

Mr Mohammad Abdul Hakim vs Commissioner Appeal Customs And ... on 26 July, 2024

Author: Yashwant Varma

Bench: Yashwant Varma

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IN THE HIGH COURT OF DELHI AT NEW DELHI
W.P.(C) 497/2024 & CM APPL. 2203/2024
MR MOHAMMAD ABDUL HAKIM

Through:

versus

COMMISSIONER APPEAL CUSTOMS AND CENTRAL
EXCISE NEW DELHI & ANR.Respondents

Through:

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE RAVINDER DUDEJA

ORDER

% 26.07.2024

1. This writ petition has been filed seeking to invoke our jurisdiction conferred by Article 226 of the Constitution and to waive the pre-deposit condition stipulated under Section 129E of the Customs Act, 1962 ["Act"].

2. From the facts on the record and which appear to be undisputed, we note that the petitioner was intending to depart India for Riyadh via Muscat on 26 October 2019 when he was apprehended by the security personnel at the Indira Gandhi International Airport and taken to the Customs Preventive Room. Upon inspection of the luggage which was being carried, two trolley bags were inspected and it was found that the same were filled with Agarwood chips. Upon following the procedure as prescribed under the Act, the petitioner This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 02/08/2024 at 23:03:48 was placed under notice in terms of Section 102 and a personal and baggage search undertaken.

3. The respondents assert that the concerned Wild Life Inspector was called upon to verify the character of the wooden logs which were sought to be exported and who opined that the same

appeared to be Agarwood (Aquilaria Chips). The articles were thereafter confiscated in terms of Section 113 of the Act, and provisionally valued at INR 1,26,00,000/-.

4. On 27 April 2020, the respondent also issued a Show Cause Notice under Section 124 of the Act. Aggrieved by the final order of confiscation that came to be passed on 24 July 2023, the petitioner is stated to have preferred an appeal. It is, however, his contention that since he is only a labourer, he does not have the means to comply with the conditions as placed by Section 129E of the Act.

5. It is not disputed before us that Agarwood is placed in the category of restricted goods and its export is subject to an appropriate license being obtained, even if it be wood which has been sourced or has its origin outside forest areas .

6. This becomes apparent from a reading of the relevant extracts of the notification dated 29 November 2021 which is extracted herein below:

"To be Published in Gazette of India Extraordinary Part - II, Section - 3, Sub - Section (ii) Government of India Ministry of Commerce & Industry Department of Commerce Directorate General of Foreign Trade UdyogBhawan, New Delhi Notification No. 45 /201502020 New Delhi, Dated: 29th November,2021 Subject: Amendment in Export Policy of Agar Oil and Agarwood This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 02/08/2024 at 23:03:48 Chips and Powder obtained from artificially propagated source and insertion of policy conditions -regarding S.O. (E) In exercise of powers conferred by Section 3 read with Section 5 of the Foreign Trade (Development & Regulation) Act, 1992 (No. 22 of 1992), as amended, read with Para 1.02 and 2.01 of the Foreign Trade Policy. 2015-20, the Central Government hereby makes following amendment in the Chapter 12 and Chapter 33 of Schedule -2 of ITC (HS) Export Policy, 2018 related to Agarwood:

Chapter -12 S.No. ITC HS Description Existing Revised Policy Condition Codes Policy Policy 86A 12119080 AGARWOOD Free Restricted The annual quota for (Aquilaria export of Agarwood Malaccensis) (INCLUDING (Aquilaria Malccensis) CHIPS AND Chips and Powder Powder) obtained from artificially propagated source (cultivated origin outside forest areas) has been fixed as under:

Agarwood Chips and Powder -25000 Kg per annum.

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7. Undisputedly, the petitioner did not hold an export license for the articles in question. Although there is some material placed on the record and on the basis of which it was sought to be contended that the Agarwood chips had been obtained from identifiable sources, however, an attempt was evidently made to export the same without complying with the conditions which stands imposed in terms of the Notification dated 29 November 2021.

8. We bear in mind that the power to waive the condition of pre- deposit as constructed in terms of Section 129E of the Act is one which this Court reserves to be wielded in "rare and deserving cases".

9. This is evident from the enunciation of the legal position in Mohammed Akmam Uddin Ahmed & Ors. Vs. Commissioner Appeals Customs and Central Excise & Ors. [2023 SCC OnLine Del 2450], which is extracted hereinbelow:

"25. Both parties have cited judgments in support of their diametrically opposite contentions, while the petitioners have relied on decisions of this Court in support of their plea that the mandatory pre-deposit of 7.5% of the penalty in dispute can be waived in certain circumstances. The respondents have argued that no waiver can be permitted under the provision of Section 129-E of the Act.

26. The petitioners placed reliance on judgments of Coordinate Benches of this Court in Pioneer Corpn. case [Pioneer Corpn. v. Union of India, 2016 SCC OnLine Del 6758 : (2016) 340 ELT 63] , Narender Yadav case [Narender Yadav v. Commr. of Customs, 2019 SCC OnLine Del 12415] and Shubh Impex case [Shubh Impex v. Union of India, 2018 SCC OnLine Del 8793] to canvas the argument that the court has in special circumstances, waived the payment of mandatory pre-deposit amount as envisaged

in Section 129-E of the Act.

27. A Coordinate Bench of this Court in Pioneer Corpn. case [Pioneer Corpn. v. Union of India, 2016 SCC OnLine Del 6758 :

(2016) 340 ELT 63] , where the court, while discussing the amendment made to Section 35-F of the Central Excise Act, 1944 (hereinafter referred to as "the CE Act") (which section is pari materia to Section 129-E of the Act and also requires a pre-deposit in the case of an appeal), held that prior to the amendment of This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 02/08/2024 at 23:03:48 Section 35-F of the CE Act, a discretion was available to the Central Excise and Service Tax Appellate Tribunal (hereinafter referred to as "Cestat") to consider financial hardship and accordingly determine the pre-deposit amount post the amendment, a direction of waiver of the pre-deposit would be contrary to the express legislative intent of the amendment. However, it further held that the jurisdiction of the High Court under Article 226 cannot be taken away and that such power should be used only in rare and deserving cases where a clear justification is made out for such interference as follows:

"9. ... A direction, therefore, to the Cestat that it should waive the pre-deposit would be contrary to the express legislative intent expressed in the amended Section 35-F with effect from 6-8-2014. While, the jurisdiction of the High Court under Article 226 of the Constitution to grant relief notwithstanding the amended Section 35-F cannot possibly be taken away, the court is of the view that the said power should be used in rare and deserving cases where a clear justification is made out of such interference. Having heard the submissions of Mr Datta and having perused the adjudication order, the court is not persuaded to exercise its powers under Article 226 to direct that there should be a complete waiver of the pre-deposit as far as the petitioner's appeal before the Cestat is concerned".

(emphasis supplied)

28. The Coordinate Benches of this Court in Narender Yadav case [Narender Yadav v. Commr. of Customs, 2019 SCC OnLine Del 12415] and Shubh Impex case [Shubh Impex v. Union of India, 2018 SCC OnLine Del 8793] , both of which, while dealing with the amended provision of Section 129-E of the Act, have permitted waiver of the mandatory pre-deposit as is envisaged in the said provision but, in exceptional circumstances.

29. In Narender Yadav case [Narender Yadav v. Commr. of Customs, 2019 SCC OnLine Del 12415] , a Coordinate Bench of this Court, while recording that the petitioner was a salaried employee drawing Rs 14,500 per month (i.e. Rs 1,74,000 per annum) and that the order-in-original did not give any reasons for the penalty imposed on the petitioner, directed that the requirement of

pre-deposit under Section 129-E of the Act be waived. The relevant extract is below:

"... The petitioner's grievance is that as H-card holder, imposition of over Rs 3.8 crores penalty in the overall circumstances of the case, given that the order-in-original did not record any specific adverse finding against him, is unwarranted. The petitioner, therefore, seeks a direction that the requirement of pre-deposit as a condition for the hearing and disposal of the appeal -- before the Commissioner (Appeal), should be dispensed with.

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The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 02/08/2024 at 23:03:48 The court has considered the submissions, and the fact that the order-in-original discloses no reason why penalty was imposed upon the petitioner -- a salaried employee drawing Rs 14,500 per month. In the circumstances, the petitioner's appeal to the Commissioner (Appeals) shall be heard on its merits without insisting upon the requirement of pre-deposit; it is accordingly directed to be waived...."

(emphasis supplied)

30. In Shubh Impex case [Shubh Impex v. Union of India, 2018 SCC OnLine Del 8793] , a direction to make a pre-deposit of Rs 1.27 crores, being 7.5% of the duty imposed, under Section 129-E of the Act was challenged by the appellant. While discussing the judgment in Pioneer Corpn. case [Pioneer Corpn. v. Union of India, 2016 SCC OnLine Del 6758 : (2016) 340 ELT 63] , a Coordinate Bench of this Court recognised the existence of the power available to the court under Article 226 of the Constitution albeit under rare and compelling circumstances. The court, thus, directed that a pre-deposit be made in the sum of Rs 5 lakhs in addition to the token pre-deposit already made by the appellant therein. The relevant extract is below:

"10. Given the aforesaid facts, while we are inclined to accept the preliminary objection of the respondents on the alternative remedy, we are also inclined to interfere and relax the condition of pre- deposit. We would direct that on the petitioner making a pre- deposit of Rs 5,00,000 in addition to Rs 3,70,008, the appeal which would be filed by the petitioner would be entertained by the first appellate authority. The pre-deposit would abide by the result of the appeal. First appeal, if preferred within 21 days, would not be rejected on the ground of limitation.

11. In Pioneer Corpn. v. Union of India [Pioneer Corpn. v. Union of India, 2016 SCC OnLine Del 6758 : (2016) 340 ELT 63] , a Division Bench of this Court has held that the High Court while exercising writ jurisdiction under Article 226 of the Constitution can exercise discretion and reduce the pre-deposit in rare and deserving case, notwithstanding the amendment made under Section 35-F of the Customs Act

(sic -- Central Excise Act). The statute has not withdrawn or taken away the said power vested in the writ court, which should be exercised in rare but compelling and deserving cases, when the cause of justice requires such reduction."

(emphasis supplied)

31. Another Coordinate Bench of this Court in *Manoj Kumar Jha v. DRI* [*Manoj Kumar Jha v. DRI*, (2019) 365 ELT 166] , allowed the appeal to be prosecuted on payment of partial pre-deposit, given the financial stringency of the appellant in the case, subject to the furnishing of bond or reasonable security. Reference can be made This is a digitally signed order.

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"3. To this Court, it appears that the petitioner is a man of limited means. It is not clear whether any prosecution has been launched against the petitioner. In these circumstances, in view of the material-on-record which suggests that the petitioner has very limited means to deposit any amounts, this Court is of the opinion that the relief is warranted. The requirement of pre-depositing of any amount directed to be waived, however, the petitioner shall furnish a bond and also provide reasonable security having regard to the list of immovable properties produced before the court. Subject to this, the requirement of pre-deposit is hereby waived. The petitioner's appeal shall be revived and now Cestat shall proceed to hear the parties on its merits after issuing adequate notice to the counsel."

(emphasis supplied)

32. The Allahabad High Court in *Ganesh Yadav* case [*Ganesh Yadav v. Union of India*, 2015 SCC OnLine All 9174] , while upholding the requirement of pre-deposit under Section 35-F of the CE Act as mandatory and dismissing the constitutional challenge, held that the High Court under Article 226 of the Constitution of India is vested with the jurisdiction in an appropriate case to dispense with the requirement of a pre-deposit. Reliance is placed on the following extract:

"8. ... The requirement of a deposit of 10% is in the case of an appeal to the Tribunal against an order of the Commissioner (Appeals). This requirement cannot be regarded or held as being arbitrary or as violative of Article 14. Above all, as the Supreme Court held in *Shyam Kishore v. MCD* [*Shyam Kishore v. MCD*, (1993) 1 SCC 22] the High Court under Article 226 of the Constitution is vested with the jurisdiction in an appropriate case to dispense with the requirement of pre-deposit and the power of the court under Article 226 is not taken away. This was also held by the Supreme Court in *Govt. of A.P. v. P. Laxmi Devi* [*Govt. of A.P. v. P. Laxmi Devi*, (2008) 4 SCC 720] in which the Supreme Court observed that recourse to the writ jurisdiction would not be ousted in an appropriate case...."

(emphasis supplied)

33. Respondent 2, in addition to placing reliance on Chandra Sekhar Jha case [Chandra Sekhar Jha v. Union of India, 2022 SCC OnLine SC 269] , has also relied on the judgment of a Coordinate Bench of this Court in Dish TV India Ltd. case [Dish TV India Ltd. v. Union of India, 2020 SCC OnLine Del 2580] as well as a Coordinate Bench of the Bombay High Court in Nimbus Communications Ltd. case [Nimbus Communications Ltd. v. Commr. of Service Tax, 2016 SCC OnLine Bom 6792] .

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34. A Coordinate Bench of this Court in Dish TV India Ltd. case [Dish TV India Ltd. v. Union of India, 2020 SCC OnLine Del 2580] , in a matter concerning the import of satellite/viewing cards by the petitioner company, upheld the mandatory pre-deposit in view of the amendment to the Act. The aforesaid judgment while discussing the amendment of Section 129-E of the Act noted the fact that the petitioner's annual turnover for Financial Year 2018- 2019 was more than Rs 6000 crores and that the mandatory pre- deposit would be a miniscule percent thereof, has directed the pre-deposit be made.

35. The Coordinate Bench in Dish TV India Ltd. case [Dish TV India Ltd. v. Union of India, 2020 SCC OnLine Del 2580] relied on the previous decision in Diamond Entertainment Technologies (P) Ltd. v. Commr., CGST [Diamond Entertainment Technologies (P) Ltd. v. Commr., CGST, 2019 SCC OnLine Del 12414 : (2019) 368 ELT 579] and Anjani Technoplast Ltd. v. Commr. of Customs [Anjani Technoplast Ltd. v. Commr. of Customs, 2015 SCC OnLine Del 13070 : (2015) 326 ELT 472] to hold that waiver of pre-deposit cannot be granted.

36. An analysis of the Anjani Technoplast case [Anjani Technoplast Ltd. v. Commr. of Customs, 2015 SCC OnLine Del 13070 : (2015) 326 ELT 472] shows that the issue before the Coordinate Bench was whether the amended Section 129-E of the Act would apply to all the appeals filed on and from the date of enforcement of the amended provision i.e. from 6-8-2014. The Coordinate Bench held that the wordings of the second proviso to Section 129-E of the Act were unambiguous and the amended provision would not apply to any appeals pending before the appellate authority which have been filed prior to 6-8-2014. Thus, amended provision would apply to all appeals filed on or after 6-8- 2014 as follows:

"In any event, as far as the amended Section 129-E of the Act is concerned, its wording is unambiguous. It opens with the words 'the Tribunal or the Commissioner (Appeals), as the case may be, shall not entertain any appeal ... unless the appellant deposits the percentage of the demanded duty as stipulated in clauses (i), (ii) or

(iii) thereunder'. The wording of the second proviso to the amended Section 129-E is also unambiguous. It makes it clear that the amended provision would not apply to

appeals and stay applications already 'pending' before the appellate authority 'prior to the commencement of the Finance (No. 2) Act, 2014', i.e. 6-8-

2014. In other words, it would apply to all appeals filed on or after the said date. Therefore, what is to be seen is the date of filing of the appeal. If the appeal is filed on or after 6-8-2014 then the condition stipulated in the amended Section 129-E of the Act has to be fulfilled for the appeal to be entertained."

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37. The decision of the Coordinate Bench of this Court in Diamond Entertainment case [Diamond Entertainment Technologies (P) Ltd. v. Commr., CGST, 2019 SCC OnLine Del 12414 : (2019) 368 ELT 579] , while refusing to permit the petitioner to prosecute its appeal before Cestat without complying with the conditions of the mandatory pre-deposit did not, in fact, rule out that in exercise of its inherent powers under Article 226 of the Constitution of India. It was held that the appellant may be allowed to prosecute its appeal without the payment of the pre-deposit amount. Reliance is placed on para 11 of this judgment which reads as follows:

"11. Thought it may be argued that, this writ court, in exercise of the inherent powers conferred on it by Article 226 of the Constitution of India in appropriate cases, may allow the appellant to prosecute its appeal before the Cestat, without requiring to pay the mandatory pre-deposit...."

(emphasis supplied)

38. In Nimbus Communications Ltd. case [Nimbus Communications Ltd. v. Commr. of Service Tax, 2016 SCC OnLine Bom 6792] , a Coordinate Bench of the Bombay High Court has upheld the requirement of mandatory pre-deposit in the case of an appeal filed after 6-8-2014, while discussing Section 35- F of the CE Act. The issue that arose before the court was whether the law as applicable on the date of commencement of the lis or on the date of filing of the appeal would govern the dispute. The case was disposed of by consent of the parties holding that the amended provisions would not apply to those appeals and applications which were pending prior to 6-8-2014, regardless of the date of commencement of the lis.

39. The judgments in Dish TV India Ltd. case [Dish TV India Ltd. v. Union of India, 2020 SCC OnLine Del 2580] , Diamond Entertainment case [Diamond Entertainment Technologies (P) Ltd. v. Commr., CGST, 2019 SCC OnLine Del 12414 : (2019) 368 ELT 579] , Anjani Technoplast case [Anjani Technoplast Ltd. v. Commr. of Customs, 2015 SCC OnLine Del 13070 : (2015) 326 ELT 472] and Nimbus Communications Ltd. case [Nimbus Communications Ltd. v. Commr. of Service Tax, 2016 SCC OnLine Bom 6792] are distinguishable on facts as these judgments were primarily

adjudicating the following two questions of law:

(i) the issue of challenge to the constitutional validity of Section 129-E of the Act and Section 35-F of the CE Act; and

(ii) whether the law as applicable pre-amendment (on or before 6-

8-2014) in (i) above, would be applicable in the circumstances where the infringing act or the lis occurred prior to the amendment.

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40. The Supreme Court in Chandra Sekhar Jha case [Chandra Sekhar Jha v. Union of India, 2022 SCC OnLine SC 269] , put a quietus to this issue. The question that arose in this case was whether the appellant is to be governed by the provisions of the unamended Section 129-E of the Act, since the incident in question related to the year 2013. While noting that the amendment has come into force on 6-8-2014, the Supreme Court held that applications and appeals, which were pending as on 6-8-2014 before the appellate authority, would be governed by the unamended provision, however, for all appeals filed thereafter, the amended provision of the Act would apply. The relevant extract is reproduced herein below:

".... The amended provision, as we have already noticed has come into force from 6-8-2014. Therefore, in regard to stay applications and appeals which were pending before any appellate authority prior to commencement of the Finance (No. 2) Act, 2014, Section 129-E as substituted would not apply. Substitution of a provision results in repeal of the earlier provision and its replacement by the new provision."

(emphasis supplied)

41. Thus, an analysis of the conspectus of law as enunciated above gives a clear understanding that after passing of the Amendment Act on 6-8-2014, the amended Section 129-E of the Act and also Section 35-F of the CE Act shall be applicable in those cases where the appeal has been filed after 6-8-2014.

42. However, as discussed above, the Coordinate Benches of this Court have exercised and, thus, preserved the power as available under Article 226 of Constitution of India to either waive the pre-deposit condition or to grant the right to appeal subject to a part deposit or security. The power, albeit, has been exercised only in rare and exceptional cases."

10. In our considered opinion, the category of rare and deserving cases is not concerned merely with economic capacity of the person charged. The Court would also have to examine and consider the

nature of the allegation levelled and the evidence which is sought to be relied upon by the respondents to bring home the charge. The petitioner has woefully failed to proffer any explanation of having validly sourced the article in question. The articles were admittedly attempted to be exported without a valid license.

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11. Bearing the overall facts which have been placed before us, we find that the petitioner has failed to make out its case as falling in the category of "rare and exceptional cases". The writ petition is accordingly dismissed.

YASHWANT VARMA, J RAVINDER DUDEJA, J JULY 26, 2024/ssc This is a digitally signed order.

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