

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.6021 OF 2009

COMMISSIONER OF CUSTOMS AND CENTRAL EXCISE, GOA ...Appellant(s)

*Versus*

M/S ADANI EXPORTS LTD. THROUGH ITS MANAGER ...Respondent(s)

WITH

CIVIL APPEAL NO.6072-6073 OF 2009

**ORDER**

Civil Appeal No.6021/2009 arise out of the final judgment of the High Court of Bombay dated 9.12.2003 in a Reference Application under Customs Act no. 2 of 2003 and Civil Appeal Nos. 6072-6073 of 2009 arise out of judgment dated 21.2.2007 passed by the Customs, Excise & Service Tax Appellate Tribunal, West Zonal Bench, Ahmedabad in Customs Appeals Nos. 680 and 681 of 2003. It is not necessary to give the full factual details of the Civil Appeals. To indicate the background of these appeals, we may state the most basic facts, of Civil Appeal No.6021 of 2009, relevant for this order.

A show cause notice under Section 28(1) of the Customs Act was issued to the respondent-Company proposing to recover some duty

which was not paid by the respondent in connection with certain transactions of import of Low Ash Metallurgical Coke claiming the benefit of certain advance licences allegedly purchased by the respondent Company. The licences, it appears, were originally granted in favour of some other entity and were transferred on more than one occasion. After the import was completed at some stage, the appellants opined the licences were not valid licences at the point of time of the imports made by the respondents. Therefore, the notice under Section 28(1).

Admittedly the show cause notice under Section 28(1) was issued by the appellants beyond a period of six months reckoned from the relevant date. However, that period of six months was required to be substituted with a period of 5 years in certain contingencies under the proviso to Section 28(1)<sup>1</sup> as it stood at the point of time relevant to the

<sup>1</sup> **Section 28. Notice for payment of duties, interest, etc.**-(1) When any duty has not been levied or has been short-levied or erroneously refunded, or when any interest payable has not been paid, part paid or erroneously refunded, the proper officer may,-

- (a) in the case of any import made by any individual for his personal use or by Government or by any educational, research or charitable institution or hospital, within one year;
- (b) in any other case, within six months,

from the relevant date, serve notice on the person chargeable with the duty or interest which has not been levied or charged or which has been so short-levied or part paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:

Provided that where any duty has not been levied or has been short-levied or the interest has not been charged or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts by the importer or the exporter or the agent or employee of the importer or exporter, the provisions of this sub-section shall have effect as if for the words "one year" and "six months", the words "five years" were substituted..

facts of the case.

The Customs, Excise and Gold Appellate Tribunal (CEGAT) before which eventually the dispute landed up opined that the Department (appellants before us) was not justified in invoking the extended period of limitation.

Aggrieved by the same, the appellants sought a reference under Section 130A of the Customs Act (which stood subsequently repealed by Act 49 of 2005). Section 130A read at that point of time as follows:-

“130A. Application to High Court. – (1) The Commissioner of Customs or the other party may, within one hundred and eighty days of the date upon which he is served with notice of an order under 129B passed before the 1st day of July, 2003 (not being an order relating, among other things, to the determination of any question having a relation to the rate of duty of customs or to the value of goods for purposes of assessment), by application in the prescribed form, accompanied, where the application is made by the other party, by a fee of two hundred rupees, apply to the High Court to direct the Appellate Tribunal to refer to the High Court any question of law arising from such order of the Tribunal.

Provided further that where the amount of duty which has not been levied or has been short-levied or erroneously refunded or the interest payable has not been paid, part paid or erroneously refunded is one crore rupees or less, a notice under this sub-section shall be served by the Commissioner of Customs or with his prior approval by any officer subordinate to him:

Provided also that where the amount of duty which has not been levied or has been short-levied or erroneously refunded or the interest payable thereon has not been paid, part paid or erroneously refunded is more than one crore rupees, no notice under this sub-section shall be served except with the prior approval of the Chief Commissioner of Customs.

Explanation.- Where the service of the notice is stayed by an order of a court, the period of such stay shall be excluded in computing the aforesaid period of one year or six months or five years, as the case may be.

(2) The Commissioner of Customs or the other party applying to the High Court under sub-section (1) shall clearly state the question of law which he seeks to be referred to the High Court and shall also specify the paragraph in the order of the Appellate Tribunal relevant to the question sought to be referred.

(3) On receipt of notice that an application has been made under sub-Section (1), the person against whom such application has been made, may, notwithstanding that he may not have filed such application, file, within forty-five days of the receipt of the notice, a memorandum of cross-objections verified in the prescribed manner against any part of the order in relation to which an application for reference has been made and such memorandum shall be disposed of by the High Court as if it were an application presented within the time specified in sub-section (1).

(4) If, on an application made under sub-Section (1), the High Court directs the Appellate Tribunal to refer the question of law raised in the application, the Appellate Tribunal shall, within one hundred and twenty days of the receipt of such direction, draw up a statement of the case and refer it to the High Court.”

By the judgment under appeal, the High Court dismissed the application. Hence the instant appeals.

The only submission made by the learned counsel for the appellants is that when such an application under Section 130A seeking a reference is made, the High Court is mandatorily obliged to call for a statement from the Tribunal before deciding the application. It is submitted that in the instant case, the High Court proceeded to decide the application even without calling for a statement of the Tribunal, therefore, the proceedings are unsustainable in law.

Confronted with the question as to what is the provision of law which mandates the High Court to necessarily call upon the Tribunal to make a statement, Mr. K. Radhakrishnan, learned senior counsel placed an order of this Court in **Commissioner Of Customs, Bangalore v. Central Manufacturing Tech. Institute** reported in 2002 (146) ELT 27. It is a short order running into 10 lines. Therefore, we extract the entire order. It reads as under:-

“1. Leave granted. The High Court rejected an application for reference of the question of law arising from the order of CEGAT and the High Court agreed with the view taken by the Tribunal and disposed of the matter stating that the question of law does not arise from the order of CEGAT. That was not the stage at which the High Court could have expressed its views on merits of the matter and the appropriate course for the High Court was to call for a statement and then decide the matter in an appropriate manner as provided under the law.

2. In that view of the matter, we set aside the order made by the High Court and remit the matter to the High Court for fresh examination. The appeal is allowed accordingly.”

We do not find anything in the text of Section 130A which implies that the High Court is mandatorily required to call for a statement from the Tribunal in every case, where a reference is made. We say so because of the language of Sub-Section 4 which opens with an ‘if’. However, learned counsel for the appellants very vehemently argued that the above extracted order enunciated the legal position regarding

the interpretation of Section 130A which is required to be followed. We find it difficult to accept the submission. However, having regard to the fact that it is a question of law, we deem it appropriate that the matters be decided by a larger Bench of appropriate strength. We, therefore, direct the Registry to place the Order before Hon'ble the Chief Justice of India for appropriate further course of action.

.....J.  
(J. CHELAMESWAR)

.....J.  
(SANJAY KISHAN KAUL)

NEW DELHI  
March 14, 2018

ITEM NO.101

COURT NO.2

SECTION IX

S U P R E M E C O U R T O F I N D I A  
R E C O R D O F P R O C E E D I N G S

Civil Appeal No(s). 6021/2009

COMMISSIONER OF CUSTOMS AND CENTRAL EXCISE, GOA

Appellant(s)

VERSUS

M/S ADANI EXPORTS LTD. THROUGH ITS MANAGER

Respondent(s)

WITH

C.A. No. 6072-6073/2009 (III)

Date : 14-03-2018 These appeals were called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE J. CHELAMESWAR  
HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

For Appellant(s)

Mr. K. Radhakrishnan, Sr. Adv.  
Mr. Arijit Prasad, Adv.  
Ms. Shirin Khajuria, Adv.  
Ms. Ayushi Gaur, Adv.  
Mr. B. Krishna Prasad, AOR

For Respondent(s)

Mr. Abhishek Anand, Adv.  
Mr. Udit Jain, Adv.  
Mr. M.P. Devanath, Adv.  
Mr. Ranjit B. Raut, Adv.  
Ms. Surbhi Kapoor, Adv.  
Mr. Vivek Sharma, Adv.  
Mr. Somnath Shukla, Adv.  
Ms. Ashwini Chandrasekaran, Adv.  
Mrs. Bina Gupta, AOR

Ms. Tara Shree, Adv.  
Mr. Ejaz Maqbool, AOR  
Mr. Kunwar Aditya Singh, Adv.

UPON hearing the counsel the Court made the following  
O R D E R

In terms of the signed order, the Court observed as follows:-

"Having regard to the fact that it is a question of law, we deem it appropriate that the matters be decided by a larger Bench of appropriate strength. We, therefore, direct the Registry to place the Order before

Hon'ble the Chief Justice of India for  
appropriate further course of action."

(DEEPAK MANSUKHANI)  
AR CUM PS

(RAJINDER KAUR)  
COURT MASTER

(Signed order is placed on the file)