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IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

K.M. JOSEPH; HRISHIKESH ROY, JJ.

CIVIL APPEAL NO(S).1566 OF 2022; 28th February, 2022

CHANDRA SEKHAR JHA VERSUS UNION OF INDIA & ANR.

Customs Act, 1962; Section 129E - Under the new regime, the amount to be deposited to maintain the appeal has been reduced from 100% to 7.5% - The discretion which was made available to the appellate body to scale down the pre-deposit has been taken away - 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 129E as substituted would not apply. (Para 8)

Legislation - Substitution of a provision results in repeal of the earlier provision and its replacement by the new provision. (Para 9)

Summary - High Court which upheld the order passed by CESTAT finding that the appellant has not made pre-deposit - Dismissed - Rejected the contention of appellant that in view of the fact that the act relates to the year 2013, he must be governed by Section 129E prior to the substitution - When the appellant is not being called upon to pay the full amount but is only asked to pay the amount which is fixed under the substituted provision, we do not find any merit in the contention of the appellant.

For Appellant(s) Mr. Galib Kabir, Adv. Mr. Sandeep Singh, AOR

ORDER

K.M. JOSEPH, J.

1. By the impugned order, the High Court has rejected the appeal carried by the appellant against the order passed by the Tribunal under Section 129E of the Customs Act, 1962 (hereinafter referred to as the 'Act'). This is for the reason that the appellant has not complied with the requirement under Section 129E of the Act, as regards, the pre-deposit of the amount in terms of the said provision.

2. The appellant while traveling in a train was intercepted. The case against him appears to be that he was carrying Gold smuggled into India from Bangladesh, and was accompanied with another person also. On conclusion of the proceedings, the Commissioner of Customs (Preventive) West Bengal, Kolkata passed a common order, wherein the appellant came to be visited with penalty in a sum of Rs.75 lakhs. It appears that the other person was also asked to pay penalty. They preferred appeals before the Customs, Excise and Service Tax Appellate Tribunal, Kolkata in the year 2017. The Tribunal finding that the appellant has not made pre-deposit dismissed the appeal. It is this order which was put in issue before the High Court and the High Court has upheld the order.

3. We heard Mr. Galib Kabir, learned counsel for the appellant. Learned counsel for the appellant would point out that demand for pre-deposit is not warranted in law. His

argument is premised on the fact that the appellant is entitled to have this case dealt with, under the provision of 129E of the Act, which was in the statute book prior to the present avatar, substituting it by Act 25 of 2014.

4. Section 129E of the Customs Act, 1962, as it stood before substitution by Act 25 of 2014, reads as follows:-

“129E. Deposit, pending appeal, of duty and interest, demanded or penalty levied.- Where in any appeal under this Chapter, the decision or order appealed against relates to any duty any interest demanded in respect of goods which are not under the control of the customs authorities or any penalty levied of goods which are not under the control of the customs authorities or any penalty levied under this Act, the person desirous of appealing against such decision or order shall, pending levied under this Act, the person desirous of appealing against such decision or order shall, pending the appeal, deposit with the proper officer duty and interest demanded or the penalty levied:

Provided that where in any particular case, the Commissioner (Appeals) or the Appellate Tribunal is of the opinion that the deposit of duty and interest demanded or penalty levied would cause under hardship to such person, the Commissioner (Appeals) or, as the case may be, the Appellate Tribunal may dispense with such deposit subject to such conditions as he or it may deem fit to impose so as to safeguard the interests of revenue:

Provided further that where an application is filed before the Commissioner (Appeals) for dispensing with the deposit of duty and interest demanded or penalty levied under the first proviso, the Commissioner (Appeals) shall, where it is possible to do so, decide such application within thirty days from the date of its filing.”

It is thereafter that the present version was inserted with effect from dated 06.08.2014, which reads as follow:-

“129-E. Deposit of certain percentage of duty demanded or penalty imposed before filing appeal.—The Tribunal or the Commissioner (Appeals), as the case may be, shall not entertain any appeal,—

(i) under sub-section (1) of Section 128, unless the appellant has deposited seven and a half per cent of the duty, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of a decision or an order passed by an officer of customs lower in rank than the Principal Commissioner of Customs or Commissioner of Customs;

(ii) against the decision or order referred to in clause (a) of sub-section (1) of Section 129-A, unless the appellant has deposited seven and a half per cent of the duty, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of the decision or order appealed against;

(iii) against the decision or order referred to in clause (b) of sub-section (1) of Section 129-A, unless the appellant has deposited ten per cent of the duty, in case

where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of the decision or order appealed against:

Provided that the amount required to be deposited under this section shall not exceed Rupees Ten crores:

Provided further that the provisions of this section shall not apply to the stay applications and appeals pending before any appellate authority prior to the commencement of the Finance (No. 2) Act, 2014.]”

5. The specific argument of the learned counsel for the appellant is that in the case of the appellant in view of the fact that the act relates to the year 2013 (namely on 28.2.2013), the appellant must be governed by Section 129E prior to the substitution. This is for the reason that the substitution of Section 129A was effected on 06.08.2014 which is after the date of the incident (28.02.2013). On the basis of the same, it is contended that under Section 129E, as it stood, prior to the substitution there was a power available with the Appellate Authority in the matter of demand of pre-deposit. He would point out that the amount for pre-deposit in his case is harsh and onerous.

6. On a conspectus of the provisions of Section 129E before and after the substitution, it becomes clear that the law giver has intended to bring about a sweeping change from the previous regime and usher in a new era, under which the amount to be deposited was scaled down and pegged at a certain percentage of the amount in dispute. In other words, while under Section 129A, as it stood prior to the substitution, the appellant was to deposit the duty and the interest demanded or the penalty levied, in the present regime, the appeal is maintainable upon the appellant depositing seven and the half percent of the amount. Under the earlier regime, in other words the entire amount which was in dispute had to be deposited. Under the earlier avatar of Section 129E, the law giver also clothed the appellate body with power as contained in the first proviso. The first proviso provided the Commissioner (Appeals) or as the case may be, Appellate Tribunal the power to dispense with such deposit, subject to conditions as he deemed fit to impose to safeguard the interest of the revenue.

7. The question whether it is undue hardship has been the subject matter of the judgment of this Court in ***Benara Valves Ltd. and others vs. Commissioner of Central Excise and another***, reported in (2006) 13 SCC 347, wherein it, inter alia, held as follow:-

“13. For a hardship to be “undue” it must be shown that the particular burden to observe or perform the requirement is out of proportion to the nature of the requirement itself, and the benefit which the applicant would derive from compliance with it.”

8. It is in sharp departure from the previous regime that the new provision has been enacted. Under the new regime, on the one hand, the amount to be deposited to maintain the appeal has been reduced from 100% to 7.5% but the discretion which was made available to the appellate body to scale down the pre-deposit has been taken away.

9. The first proviso of Section 129E of the present Section enacts a limitation on the total amount which can be demanded by way of pre-deposit. The first proviso provides that the amount required to be deposited should not exceed Rs.10 Crores. In this regard, the law giver has purported to grant relief to an appellant. The second proviso contemplates that Section 129(e) as substituted would not apply to stay applications and appeals which are pending before the Appellate Authority prior to the commencement of the Finance Act (2) of 2014. The amended provision, as we have already noticed has come into force from 06.08.2014. 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 129E as substituted would not apply. Substitution of a provision results in repeal of the earlier provision and its replacement by the new provision. [[See in this regard, a discussion in Justice G. P. Singh, Principles on Statutory Interpretation (12th Edition) page No.676.]

10. As far as the argument of the appellant that for the reason that the incident which triggered the appeal filed by the appellant took place in the year 2013, the appellant must be given the benefit of the power available under the substituted provision, it does not appeal to us. The substitution has effected a repeal and it has re-enacted the provision as it is contained in Section 129E. In fact, the acceptance of the argument would involve a dichotomy in law. On the one hand, what the appellant is called upon to pay is not the full amount as is contemplated in Section 129(E) before the substitution. The order passed by the Commissioner is dated 23.11.2015 which is after the substitution of Section 129E. The appellant filed the appeal in 2017. What the appellant is called upon to pay is the amount in terms of Section 129E after the substitution, namely, the far lesser amount in terms of the fixed percentage as provided in section 129E. The appellant, however, would wish to have the benefit of the proviso which, in fact, appropriately would apply only to a case where the appellant is maintaining the appeal and he is called upon to pay the full amount under Section 129E under the earlier avatar.

11. We would think that the legislative intention would clearly be to not to allow the appellant to avail the benefit of the discretionary power available under the proviso to the substituted provision under Section 129E. When the appellant is not being called upon to pay the full amount but is only asked to pay the amount which is fixed under the substituted provision, we do not find any merit in the contention of the appellant. However, in the interest of justice we extend the period for complying with Section 129E by a period of two months from today. Subject to the same, the appeal will stand dismissed.

There will be no order as to costs.

Pending application(s), if any, stands disposed of.