# Time Limit To Refer Statement Of Case By CESTAT To High Court, Under Section 130A (4) Of The Customs Act, Is Directory: Bombay High Court

**2022 LiveLaw (Bom) 437**

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**
ORDINARY ORIGINAL CIVIL JURISDICTION
***K.R. SHRIRAM; J., A.S. DOCTOR; J.***
WRIT PETITION (L) NO. 26651 OF 2022; 20th OCTOBER 2022

**Asit C. Mehta Financial Services Limited**
*versus*
**Customs Excise and Service Tax Appellate Tribunal (CESTAT)**

*Mr. Abhishek Adke a/w Ms. Vibha Joshi for Petitioners.*

*Ms. Shehnaz V. Bharucha a/w Mr. Ram Ochani for Respondent No.2. Mr. Sriram Sridharan, Amicus Curiae present.*

## J U D G M E N T

**K.R. SHRIRAM, J.**

**1.** This petition seeks dismissal and quashing of the case directed to be filed by Respondent No.1 in Customs Application No. 28 of 2001 that was filed by Respondent No.2 and for return of Bank Guarantee of Rs.26,86,000/- given by petitioner in favour of Prothonotary and Senior Master of this court.

**2.** According to petitioner, as submitted by Mr. Adke, pursuant to the directions passed by the Hon'ble Apex Court, petitioner had furnished a Bank Guarantee of Rs.26,86,000/- in favour of Prothonotary and Senior Master, Bombay High Court. Against furnishing of the said Bank Guarantee, Respondent Nos. 2 and 3 refunded an amount of Rs.50,72,000/- that petitioner had deposited during the course of investigation. By an order dated 10th January 2006, in Customs Application No. 28 of 2001 (the said application) this court raised certain substantial questions of law and directed Respondent No.1, i.e., The Customs Excise And Service Tax Appellate Tribunal (CESTAT) to send the statement of case to the Bombay High Court as expeditiously as possible. Respondent No.1 has not sent the statement of the case till date. Petitioners have been dutifully renewing the Bank Guarantee since 2002 and till date incurred about Rs.10 Lakhs to keep the Bank Guarantee alive. Section 130(A)(4) of the the Customs Act, 1962 (the Customs Act) provides time limit of 120 days to submit the statement of facts and since it has not been submitted the court should hold that it is now time barred and also dismiss the said application for want of prosecution.

**3.** Ms. Bharucha submitted copies of letter dated 27th May 2014 and 11th December 2021 to the Registrar of CESTAT to buttress her submissions. Ms. Bharucha stated that as late as 18th October 2022 Respondent No.2 has addressed letter to Respondent No.1 (CESTAT) to submit the statement of facts.

**4.** Ms. Bharucha submitted that Respondent No.2 has been pursuing the matter with Respondent No.1 (CESTAT) and even provided the papers in 3 out of 8 matters, one of which was that of petitioner. Therefore, the court should not hold Respondent No.2 does not wish to prosecute the matter.

**5.** By an order dated 17th October 2022 court appointed Mr.Sriram Sridharan as Amicus Curiae. Mr. Sriram Sridharan has tendered brief synopsis and some judgments for the benefit of the court. We have considered the synopsis and the provisions of law referred thereto as well as the judgments referred therein. We must express our

appreciation for the distinguished assistance by Mr. Sriram Sridharan, learned Amicus Curiae. The endeavour put forth by Mr. Sridharan has been of immense value in rendering this judgment.

**6.** Section 130(A)(4) of the Customs Act reads as under:

"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".

**7.** We have considered the affidavit of one Kirit D. Chauhan, Assistant Commissioner of Customs (Preventive) affirmed on 29th September 2021, copy whereof is annexed to the petition, as well as the communication that Ms. Bharucha tendered and we can come to a conclusion that Respondent No.2 had not abandoned the said Application. It appears that in three out of eight references, one of which is that of petitioner herein, papers have been submitted to CESTAT. Moreover, Mr.Adke states that even petitioner has also directly given a copy to CESTAT to Respondent No.2.

**8.** The time limit of 120 days prescribed in Section 130(A)(4) ofthe Customs Act, in our view, should be construed as being directory only and not imperative. The CESTAT (Respondent No.1) is a judicial body and over its actions Respondent No.2 has no control. In those circumstances, to construe the time limit for the submission of the case as mandatory might be to deprive Respondent No.2 of its right to have a question of law considered by the High Court which the Customs Act intends to be so considered. A party should not be deprived of a statutory right for no fault of its own, but for the fault of a public body over which it has no control. We find support for this view in Raja Benoy Kumar Sahas Roy vs. Commissioner of Income Tax[1] where the court was considering Section 66(1) of the Income Tax Act, 1922, which was parimateria to Section 130(A)(4) of the Customs Act and the court held as under :

"Before dealing with the reference on the merits, it is necessary to dispose of a preliminary point. Section 66(1) of the Income-tax Act provides that the Commissioner or the assessee may, by an application made within a certain time, require the Appellate Tribunal to refer to the High Court any question of law arising out of its order and further provides that "the Appellate Tribunal shall, within ninety days of the receipt of such application, draw up a statement of the case and refer it to the High Court". In the present case the reference was not made within ninety days from the receipt of the application. As this was happening in too many cases, it appeared to this Court that the statutory direction contained in Section 66(1) of the Act was being disregarded by the Tribunal and, accordingly, it was directed by an administrative order that references made after the expiry of the period prescribed by the Act should be accepted only provisionally, subject to all just exceptions that might be taken at the hearing on the ground of limitation. The order was directed to be incorporated in the paper book of every case in which the question was involved so that the matter might be judicially examined. The present case is the first in which the matter has come up for consideration and we have heard the learned counsel for the Commissioner of Income-tax and the assessee. Both contended that the provision contained in Section 66(1) as to the time within which the reference was to be made was not mandatory, but only directory and, therefore, although a reference might be made after the expiry of the period prescribed, the validity of the reference would not thereby be affected. We are of opinion that that contention is correct. The act which the statute enjoins to be done within a particular period is an act to be done by the Tribunal and it is a settled principle of construction that when the effect of construing such provisions as mandatory would be to affect the right of individuals, they ought not to be so construed: Canadian Pacific Rail Co. v. Parke [1899] A.C. 535. The principle was stated by the Privy Council more

[1] (1953) 24 ITR 70 (Calcutta)

elaborately in Montreal Street Rail Co. v. Normandin [1917] A.C. 170which is the leading case on the subject. As stated there, the principle is that where the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of that duty would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the Legislature, such provisions should be construed as being directory only and not imperative. It is true that the act which the Privy Council was considering was an act of a different kind, but it appears to us that the principle laid down is none the less applicable here, because the object of the Legislature is to provide that questions of law arising out of the order of the Tribunal shall be further considered by the High Court, if either of the parties so desires and it is in furtherance of that object that a duty has been laid on the Tribunal to place such questions before the High Court. The Tribunal is a judicial body and over its actings the parties have no control. In those circumstances, to construe the time-limit for the submission of the case as mandatory might in a case be to deprive a party of his right to have a question of law considered by the High Court which the Act intends to be so considered and in view of that possibility, the provision should be construed as only directory so that a party may not be deprived of a statutory right for no fault of his own, but for the fault of a public body over which he has no control. Apart from the true construction of section 66(1), it is also settled law that a party cannot be made to suffer prejudice by any default or negligence on the part of the court. It appears to us further that no question of limitation affecting the rights of the parties can really arise in circumstances like the present, because the basis of all rules of limitation is that a party, being required or being at liberty to do a certain thing within a certain time, fails to do it within the time limited, whereas, in the present case, the default or negligence is of a third party. We accordingly hold that Section 66(1), in so far as it provides that a reference shall be made by the Tribunal within ninety days from the date of the application, is only directory and we hold further that for that reason as also the other reasons we have given, the present reference is valid, although made after the expiry of ninety days."

(Emphasis Supplied)

This was later confirmed by the Hon'ble Apex Court on merits in 1957 32 ITR 466 (SC).

**9.** In Commissioner of Income Tax vs. Duncan Brothers & Company Ltd.[2] where again Section 66(1) of the Income Tax Act, 1922 was being considered, Division Bench of the Calcutta High Court held as under:

"I may add, though it is hardly necessary, that a question of limitation is always a question between the parties and not a question between the parties or one of them and the Court. What the party who has won before the Tribunal is entitled to insist on is that his opponent, if he seeks to have the question re-opened and examined by the High Court, must make his application for a reference within the time limited by section 66 (1) and that if he fails to apply within such time, an application made later must not be entertained. After the expiry of the period of limitation for making an application for a reference, the finality of the decision of the Tribunal would become absolute. But the party who has won before the Tribunal cannot properly plead limitation against, his opponent for some default which not he, but the Tribunal has committed and therefore section 66 (1), in my view, cannot be construed as laying down that the observance of the time-limit for making a reference is also mandatory and that a default in that regard shall make the reference incompetent, although the consequence may be to make a party suffer for the fault of the Tribunal."

(Emphasis Supplied)

**10.** Therefore, Respondent No.1 has no excuse for not filing the statement of case at least with regard to the three files made available, one of which is of petitioner herein.

[2] 1955 28 ITR 427 (Cal)

**11.** Respondent No.1 (CESTAT through its Registrar) is therefore, directed once again to submit the statement of case. This shall be submitted within six weeks of receiving a copy of this order. Ms. Bharucha states that Respondent No.2 will ensure that this is strictly followed up with CESTAT (Respondent No.1) and Respondent No.2 shall, within two weeks of this order being uploaded, give all details to Respondent No.1.

**12.** This would leave the second prayer of Mr. Adke, i.e., return of Bank Guarantee. In Paragraph No. 6 of the petition read with Ground No.4, petitioner has been candid to state that petitioner has been in severe liquidity crisis and there has been tremendous turmoil of the business of petitioner. With this background, it is not possible for us to direct return of the Bank Guarantee.

**13.** After receiving the statement of facts from CESTAT, if the Customs Application at reference No. 28 of 2001 is not disposed within one year, petitioner may apply again to court for return of the Bank Guarantee and substituting it with some satisfactory security. The court will consider the application on merits at that time.

**14.** Petition disposed. No order as to costs.