

BHAVYA APPARELS PRIVATE LIMITED AND ANR.

v.

UNION OF INDIA

SEPTEMBER 18, 2007

[S.B. SINHA AND H.S. BEDI, JJ.]

Customs Act, 1962 :

s.129E—Predeposit of custom duty—Order passed by Tribunal directing predeposit of duty of Rs.3 crores as condition to hear appeal of assessee—Tribunal dismissing appeal on failure of predeposit of duty amount—High Court affirming same—Correctness of—Held: Not correct—While passing order of predeposit, Tribunal failed to consider the fact that part of goods was in custody of Revenue—Also Tribunal did not apply its mind in regard to question of undue hardship on assessee—Matter remitted to Tribunal for reconsideration.

Interpretation of statutes:

Taxing statutes—Held: To be construed strictly.

Mandatory or directory statute—Use of word 'shall'—Held: Is imperative in nature but may be interpreted as directory if context otherwise demands.

An adjudication proceeding was initiated against the appellant and assessment of Custom Duty was made. An appeal was preferred thereagainst. Tribunal dismissed appeal for failure to predeposit Rs. 3 crores. Appellant filed writ petition before High Court which was also dismissed. Hence the present appeal.

Partly allowing the appeal, the Court

HELD: 1. The Customs Act, 1962 was enacted to consolidate and amend the law relating to customs. It provides for assessing an order of custom duty. S.129E mandates pre-deposit of any duty and interest, in appeal which is preferred in respect of the goods which

A are not under the control of the custom authorities or any penalty levied under the Act. Proviso appended thereto, however, empowers the Commissioner of Appeal or the appellate tribunal to dispense with such deposit if it comes to the conclusion that the deposit of duty and interest would cause undue hardship to the appellant.

B [Para 8] [5-G; 6-B, C]

C 2. A right of appeal is not a fundamental right. It is a statutory right. As a right of appeal is a statutory right, it may also be hedged by conditions. It is, however, trite that conditions imposed may not be such which may for all intent and purport take away a vested right of appeal. [Para 9] [6-D]

Dilip S. Dahanukar v. Kotak Mahindra Co. Ltd. & Anr., (2007) 5 SCALE 452, relied on.

D 3. S.129E of the Customs Act would be attracted where the goods in question are not in the custody of the Revenue. The said provision, therefore, would be attracted only when the ingredients thereof exist. In the instant case, part of the goods is in custody of the Revenue. It was obligatory on the part of the Tribunal to take that factor into consideration in making the order of pre-deposit.

E Furthermore, while exercising its jurisdiction, the Tribunal was also required to apply its mind in regard to the question of undue hardship on the part of the appellants upon considering existence of a *prima facie* case. Merit of the case ordinarily should not otherwise be gone into unless the question on the face of it appears to be concluded.

F [Paras 10 and 11] [6-E-G]

Kishori Pujari Granite Pvt. Ltd. v. Union of India, 184 ELT 225 and *Ashoka Rubber Products v. Collector of C.Ex.*, (1989) 43 ELT 605, referred to.

G 4.1. The taxing statute must be strictly construed. However, only because the word "shall" is used, the same may not be construed to be imperative in character. [Para 17] [10-A, B]

H *Manish Maheshwari v. Asstt. Commissioner of Income Tax and Anr.*, (2007) 3 SCALE 627 and *Southern Petrochemical Industries Co. Ltd. v. Electricity Inspector and E.T.I.O. and Ors.*, (2007) 7 SCALE

392, relied on.

Mardia Chemicals Ltd. and Ors. v. Union of India and Ors., [2004] 4 SCC 311, referred to.

4.2. The word "shall" *prima facie* would be construed to be imperative in character. It may, however, be held to be directory in certain situation. While construing a statute of this nature, the context plays an important role. Interpretation of a statute would also depend upon the fact situation obtaining in the case. There are, however, certain exceptions to the said rule. Even where a statute is clearly mandatory or prohibitory, yet, in many instances, the courts will regard certain conduct beyond the prohibition of the statute through the use of various devices or principles. Most, if not all of these devices find their justification in considerations of justice. It is a well-known fact that often to enforce the law to its letter produces manifest injustice, for frequently equitable and humane considerations, and other considerations of a closely related nature, would seem to be of a sufficient calibre to excuse or justify a technical violation of the law. [Para 17] [10-C, D, G, H; 11-A]

Management, Pandiyan Roadways Corp. Ltd. v. N. Balakrishnan, (2007) 7 SCALE 758, relied on.

5. The Tribunal failed to take into consideration the limitation of its jurisdiction under s.129E which emanates from the custody of the goods. As a part of the goods is in the custody of the Revenue and furthermore in view of the fact that the High Court instead of considering the question as to whether direction to deposit the amount would cause undue hardship or not has gone into the merit of the matter, the interest of justice would be subserved if the impugned judgments are set aside and the matter is remitted to the Tribunal for consideration of the matter afresh. [Para 18] [11-B, C]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4340 of 2007.

From the Judgment and Order dated 04.10.2004 of the High Court of Gujarat at Ahmedabad in S.C.A. 9569 of 2004.

A C.N. Sreekumar, Prakash R. Nayak and Harshad V. Hameed, for the Appellant.

Vikas Singh, ASG, Amrita Narayan and B.K. Prasad for the Respondents.

B The Judgment of the Court was delivered by

S.B. SINHA, J. 1. Leave granted.

C 2. Interpretation of the provisions of Section 129E of the Customs Act, 1962 (for short "the Act") is in question in this appeal which arises out of a judgment and order dated 4.10.2004 passed by a Division Bench of the High Court of Gujarat at Ahmedabad in Special Civil Application No. 9569 of 2004.

D 3. An adjudication proceeding was initiated against the appellant. Assessment of Custom Duty was made. An appeal was preferred thereagainst. The said appeal was dismissed for failure to pre-deposit a sum of Rs. 3,30,00000/- as directed by the Court of Appeal.

E 4. We may notice that in the earlier round of litigation when a statement was made before the High Court that the Tribunal may hear the appeal on merit without asking the appellant to make any pre-deposit, it was asked to make that prayer before the Tribunal. Pursuant thereto an application was filed. The Tribunal in terms of its order dated 14.01.2004 opined:

F "We accordingly order that the appellant company deposit Rs. 3 crores out of the total duty demand upon such deposit further deposit of duty and penalty imposed on the company is waived and recovery thereof stayed. We further order that the director of the company Shri R.C. Agarwal deposit Rs. 20 lakhs and the power of attorney holder of the Company Shri H.R. Agarwal deposit Rs. 10 lakhs within 12 weeks of the date of the order. Compliance on 26.4.2004. Appeal is liable to be rejected for non-compliance without further notice."

H 5. A writ application filed by the appellants questioning the

correctness of the said order has been dismissed by reason of the impugned judgment. A

6. Mr. C.N. Sreekumar, learned counsel appearing on behalf of the appellants, in support of this appeal, *inter alia* would submit:

- (i) The High Court committed a manifest error insofar as it failed to take into consideration the ingredients of Section 129E of the Act. B
- (ii) Section 129E, if construed properly, would not give rise to a conclusion that in absence of any provision made in that behalf, non-compliance of the order of pre-deposit itself would lead to automatic dismissal of the appeal. C
- (iii) A right of appeal conferred upon a suitor having been provided for in a statute, the provision for pre-deposit must receive strict interpretation. D
- (iv) Provisions for payment of court fee and power to grant stay having been conferred in the Tribunal, the impugned judgment could not have been passed particularly when Section 129E of the Act does not provide for any consequence arising out of non-compliance of the order of pre-deposit. E

7. Mr. Vikas Singh, learned Additional Solicitor General appearing on behalf of Union of India, on the other hand, would submit that interpretation of Section 129E of the Act is concluded by a decision of this Court in *Vijay Prakash D. Mehta and Anr. v. Collector of Customs (Preventive), Bombay*, [1988] 4 SCC 402. F

8. The Act was enacted to consolidate and amend the law relating to customs. It provides for assessing an order of custom duty. It also provides for seizure of goods. Penalty may also be levied by the adjudicating authorities. Chapter XV of the Act provides for appeals to the Commissioner from any decision passed by an officer of custom lower in rank than the said authority. Section 128A provides for the procedure therefor. Section 129 provides for the constitution of the appellate tribunal wherefor procedures have also been laid down. G

- A Proviso appended to Section 129A enumerates the cases in respect whereof jurisdiction of the appellate tribunal is barred. Sub-section (6) of Section 129A envisages payment of court fee. Sub-section (2A) of Section 129B specifies a period of three years during which the appeal may be disposed of. A Tribunal is also empowered to grant stay. Section
- B 129E, however, mandates pre-deposit of any duty and interest in appeal which is preferred in respect of the goods which are not under the control of the custom authorities or any penalty levied under the Act. Proviso appended thereto, however, empowers the Commissioner of Appeal or the appellate tribunal to dispense with such deposit if it comes to the
- C conclusion that the deposit of duty and interest would cause undue hardship to the appellant.

9. A right of appeal is not a fundamental right. It is a statutory right. As a right of appeal is a statutory right, it may also be hedged by conditions. It is, however, trite that conditions imposed may not be such
- D which may for all intent and purport take away a vested right of appeal. [See *Dilip S. Dahanukar v. Kotak Mahindra Co. Ltd. & Anr.*, (2007) 5 SCALE 452.]

10. We, however, having regard to the facts and circumstances of this case are of the opinion that the larger question, viz., interpretation of
- E Section 129E of the Act need not be gone into.

- Section 129E of the Act would be attracted where the goods in question are not in the custody of the Revenue. The said provision, therefore, would be attracted only when the ingredients thereof exist.

- F The learned Additional Solicitor General very fairly submits that a part of the goods is in custody of the respondents. If that be so, in our opinion, it was obligatory on the part of the Tribunal to take that factor into consideration in making the order of pre-deposit. Furthermore, while
- G exercising its jurisdiction, the Tribunal was also required to apply its mind in regard to the question of undue hardship on the part of the appellants upon considering existence of a *prima facie* case. Merit of the case ordinarily should not otherwise be gone into unless the question on the face of it appears to be concluded.

- H 11. The Tribunal while imposing the condition of pre-deposit was

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required to apply its mind in regard to the existence or otherwise of the conditions laid down in the statute. A

12. In *Vijay Prakash D. Mehta* (supra), applicability or interpretation of Section 129E of the Act came up for consideration before this Court wherein it was held: B

"9. Right to appeal is neither an absolute right nor an ingredient of natural justice the principles of which must be followed in all judicial and quasi-judicial adjudications. The right to appeal is a statutory right and it can be circumscribed by the conditions in the grant. C

11. These observations cannot be applied to the facts of this case. Here we are concerned with the right given under Section 129A of the Act as controlled by Section 129E of the Act, and that right is with a condition and thus a conditional right. The petitioner in this case has no absolute right of stay. He could obtain stay of realisation of tax levied or penalty imposed in an appeal subject to the limitations of Section 129E. The proviso gives a discretion to the authority to dispense with the obligation to deposit in case of "undue hardships". That discretion must be exercised on relevant materials, honestly, bona fide and objectively. Once that position is established it cannot be contended that there was any improper exercise of the jurisdiction by the Appellate Authority. In this case it is manifest that the order of the Tribunal was passed honestly, bona fide and having regard to the plea of 'undue hardship' as canvassed by the appellant. There was no error of jurisdiction or misdirection. D E F

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13. It is not the law that adjudication by itself following the rules of natural justice would be violative of any right-constitutional or statutory, without any right of appeal, as such, if the statute gives a right to appeal upon certain conditions, it is upon fulfilment H

A of those conditions that the right becomes vested and exercisable to the appellant. The proviso to Section 129E of the Act gives a discretion to the Tribunal in cases of undue hardships to condone the obligation to deposit or to reduce. It is a discretion vested in an obligation to act judicially and properly."

B 13. Mr. Sree Kumar, however, submits that *inter alia* having regard to the decision of the Madhya Pradesh High Court in *Kishori Pujari Granite Pvt. Ltd. v. Union of India*, [184 ELT 225] and the decision of the Kerala High Court in *Ashoka Rubber Products v. Collector of C.Ex.*, (1989) 43 ELT 605, the matter requires reconsideration. As at
C present advised, we are not inclined to do so.

14. We are satisfied that in a case of this nature, where a part of the goods which is the subject matter of the proceedings under the Act is in possession of the Revenue, proviso appended to Section 129E of the Act
D should have been invoked.

15. Justification for enacting such a provision has been considered by a Constitution Bench of this Court in *Mardia Chemicals Ltd. and Ors. v. Union of India and Ors.*, [2004] 4 SCC 311 wherein it was held:

E "56. The contention of the petitioners is that in the first place such an oppressive provision should not have been made at all. It works as a deterrent or as a disabling provision impeding access to a forum which is meant for redressal of the grievance of a borrower. It is submitted where the possession of the secured assets has
F already been taken over or the management of the secured assets of the borrower including the right to transfer the same, in that event it would not at all be necessary to burden the borrower doubly with deposit of 75% of the demand amount. In a situation where the possession of the secured assets have already been taken over
G or its management, it is highly unreasonable further to ask for 75% of the amount claimed before entertaining the grievance of the borrower.

57. Secondly, it is submitted that, it would not be possible for a
H borrower to raise funds to make deposit of the huge amount of

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75% of the demand, once he is deprived of the possession/ management of the property namely, the secured assets. Therefore, the condition of deposit is a condition of impossibility which renders the remedy made available before the DRT as nugatory and illusory. The learned Attorney General refutes the aforesaid contention. It is further submitted that such a condition of pre-deposit has been held to be valid by this Court earlier and a reference has been made to SCC at p. 202 in Anant Mills Co.Ltd. Vs. State of Gujarat to submit that such a provision is made to regulate the exercise of the right of an appeal conferred upon a person. The purpose is that right of appeal may not be abused by any recalcitrant party and there may not be any difficulty in enforcing the order appealed against if ultimately it is dismissed and there may be speedy recovery of the amount of tax due to the corporation.

64. The condition of pre-deposit in the present case is bad rendering the remedy illusory on the grounds that (i) it is imposed while approaching the adjudicating authority of the first instance, not in appeal, (ii) there is no determination of the amount due as yet (iii) the secured assets or its management with transferable interest is already taken over and under control of the secured creditor (iv) no special reason for double security in respect of an amount yet to be determined and settled (v) 75% of the amount claimed by no means would be a meager amount (vi) it will leave the borrower in a position where it would not be possible for him to raise any funds to make deposit of 75% of the undetermined demand. Such conditions are not alone onerous and oppressive but also unreasonable and arbitrary. Therefore, in our view, sub-section (2) of Section 17 of the Act is unreasonable, arbitrary and violative of Article 14 of the Constitution."

16. The Constitution Bench, therefore, was of the opinion that such a condition would be onerous and, thus, arbitrary if a suitor is required to deposit such an amount at the initial stage and not at the appellate stage.

A 17. We are not oblivious that the taxing statute must be strictly construed. [See *Manish Maheshwari v. Asstt. Commissioner of Income Tax and Anr.*, (2007) 3 SCALE 627 and *Southern Petrochemical Industries Co. Ltd. v. Electricity Inspector and E.T.I.O. and Ors.*, (2007) 7 SCALE 392]

B We are also not oblivious of the fact that only because the word "shall" is used, the same may not be construed to be imperative in character.

In *Management, Pandiyan Roadways Corp. Ltd. v. N. Balakrishnan*, (2007) 7 SCALE 758, this Court observed:

C "12. On a plain reading of the said provision and particularly in view of the fact that the word "shall" has been used, *prima facie* it would be construed to be imperative in character. It may, however, be held to be directory in certain situation. While
D construing a statute of this nature, the context plays an important role. Interpretation of a statute would also depend upon the fact situation obtaining in the case. There are, however, certain exceptions to the said rule. The question came up for consideration before this Court in *U.P. State Electricity Board v. Shiv Mohan Singh and Anr.*, wherein it was, *inter-alia*, noticed:

E 96. Ordinarily, although the word shall is considered to be imperative in nature but it has to be interpreted as directory if the context or the intention otherwise demands. (See *Sainik Motors v. State of Rajasthan* AIR para)

F 97. It is important to note that in Crawford on Statutory Construction at p. 539, it is stated:

G 271. Miscellaneous implied exceptions from the requirements of mandatory statutes, in general. Even where a statute is clearly mandatory or prohibitory, yet, in many instances, the courts will regard certain conduct beyond the prohibition of the statute through the use of various devices or principles. Most, if not all of these devices find their justification in considerations of justice. It is a well-known fact that often to enforce the law to its letter produces manifest injustice, for frequently equitable and humane
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considerations, and other considerations of a closely related nature, A
would seem to be of a sufficient calibre to excuse or justify a
technical violation of the law."

18. In view of our findings aforementioned, the matter, in our opinion, B
requires reconsideration at the hands of the Tribunal. The Tribunal failed
to take into consideration the limitation of its jurisdiction under Section
129E which emanates from the custody of the goods and as a part of the
goods is in the custody of the Revenue and furthermore in view of the
fact that the High Court instead of considering the question as to whether C
direction to deposit the amount would cause undue hardship or not has
gone into the merit of the matter, the interest of justice would be subserved
if the impugned judgments are set aside and the matter is remitted to the
Tribunal for consideration of the matter afresh. We direct accordingly. We
would request the Tribunal to consider the desirability of disposing of the
matter as early as possible. D

19. The appeal is allowed to the aforementioned extent. No costs.

D.G.

Appeal partly allowed.