

CASE NO.:  
Appeal (civil) 7602 of 1999

PETITIONER:  
COMMISSIONER OF CUSTOMS,

Vs.

RESPONDENT:  
M/s.Punjab Stainless Steel Industries

DATE OF JUDGMENT: 31/07/2001

BENCH:  
S.P. Bharucha, Y.K. Sabharwal & Brijesh Kumar

JUDGMENT:

Y.K.SABHARWAL, J.

The respondent, in discharge of its export obligation under quantity based advance licence, filed shipping bills for export of stainless steel utensils. One of the conditions of licence was that the utensils shall be made of AISI-202 quality stainless steel by using the raw material "non-magnetic stainless steel sheets/coils AISI-202 - indigenous" under proper declaration. The allegations against the respondent was that the goods exported under the export obligation were misdeclared inasmuch as the respondent had used the material of inferior grade to the one required in the manufacture of utensils. The Commissioner of Customs came to the conclusion that the charge against the respondent had been proved. The Commissioner for his conclusion relied upon the report of the Chemical Examiner. The demand of the respondent for retesting of samples was declined but in order to obviate any unfair treatment to the respondent, the Commissioner gave option to the respondent to cross-examine the Chemical Examiner who had tested the samples. The respondent, however, did not avail that option and declined to cross examine the Chemical Examiner. Regarding the objection of the respondent that copies of shipping bills were not supplied, the Commissioner observed that so long as report of the test conducted on the samples drawn from the respective consignments establishing that the grade of material used in the utensils exported under these consignments was substandard, was supplied to the respondent, it was immaterial whether copy of the shipping bills was supplied or not. After detailed examination of the record, the Commissioner held that the charge of mis-statement and suppressing the correct quality and grade of the input under claim of duty exemption entitlement under quantity based advance licence and DEEC Book in violation of the standard input-output and value addition norms mentioned therein stood established in respect of 67 out of 88 consignments. The Commissioner of Customs by order dated 3rd November, 1997 held that the goods amounting to Rs.6,74,43,408/- are liable to confiscation under Section 113(n) and (j) of the Customs Act, 1962 (for short, 'the Act'). Further, the bank guarantee of Rs.10,00,000/- was ordered to be appropriated against the liability of confiscation as the goods had already been exported. The respondent was also denied the benefit of the amount of Rs.4,68,78,932/- under DEEC Scheme and duty drawback in respect of these consignments directing that if these concessions have already availed by the respondent, the same shall be reversed. Further, a penalty of Rs.25,00,000/- was imposed on the respondent under Section 114 of the Act read with Section 11 of the Foreign Trade (Development and Regulation) Act, 1962.

The order of the Commissioner was challenged by the respondent by preferring appeal before the Customs, Excise and Gold (Control) Appellate Tribunal. The Tribunal by the impugned order has set aside the order of the Commissioner of Customs. Under these circumstances, appeal under Section 130E of the Act has been filed by the Commissioner of Customs.

Shri Mohta, learned senior counsel appearing for the respondent has raised objection about the maintainability of the appeal contending that since the present case does not involve determination of any question having a relation to the rate of duty of customs or to the value of the goods for the assessment and, therefore, appeal under Section 130E of the Act is not competent. Learned counsel contends that if the appellant was aggrieved by the order of the Tribunal, it ought to have taken recourse to the remedy of reference as provided in Section 130 of the Act and further if aggrieved from the order made on reference, it could approach this Court by filing a petition under Article 136 for grant of leave. Learned Attorney General, without going into the question of maintainability, submits that the present appeal may be treated as a special leave petition and in support places reliance upon Commissioner of Central Excise & Customs v. Venus Castings (P) Ltd. [(2000) 4 SCC 206] where rejecting the similar objection about the maintainability of the appeals under the Central Excise Act, the appeals were directed to be converted into special leave petitions and dealt with on merits. In the circumstances of this case and also considering that this matter has been pending in this Court for nearly two years, we convert this appeal into special leave petition, grant leave and proceed to decide the appeal on merits.

The order of the Commissioner of Customs has been set aside by the Tribunal holding that there was violation of principles of natural justice on account of two reasons, namely, (1) Rejection of the request of the respondent for retesting the samples on the ground that there is no such provision in the Act and (2) Non-supply of the copy of the shipping bills.

Regarding the first reason, noticing the contention urged on behalf of the Revenue that there is no provision which permits retesting of samples, the Tribunal states that there is also no provision under the Customs Act which prohibits retesting of the samples, and accordingly holding that the denial of opportunity to retest the sample was violative of principles of natural justice. No specific provision has been brought to our notice which permits retesting of samples, but, for the present case, without going into that aspect, we would assume that there was no bar in granting opportunity to retest the samples. At the same time, however, it has to be borne in mind that the purpose of retesting the samples was to demolish the report of the Chemical Examiner on consideration whereof the charge of mis-statement and suppression regarding quality and grade of the input had been established against the respondent. In this regard, the Tribunal failed to notice the main aspect of the case that option was granted to the respondent to cross-examine the Chemical Examiner who after taking the samples had given the report. The respondent had, thus, ample opportunity to demolish his report. The respondent did not avail that opportunity. It stands established that the adjudicating officer had given an offer to the respondent to cross-examine the Chemical Examiner. The respondent did not dispute that such an offer was made. The only objection of the respondent was that such an offer was made suo moto and the respondent had not asked for it. The objection was frivolous and misconceived. Therefore, we fail to understand, how the respondent having failed to avail the opportunity to cross-examine the Chemical Examiner could urge that there was violation of principles of natural justice by non-grant of request of the respondent for retesting of the samples. Unfortunately, in the order of the Tribunal there is not even a whisper about the offer given to the respondent to cross-examine the Chemical Examiner. Thus, the first reason given by the Tribunal for coming to the conclusion that there has been violation of the principles of natural justice is not sustainable.

The second reason given by the Tribunal is also unsustainable as the

non-supply of copy of the shipping bills containing the examination report was of no consequence as admittedly the report of the test conducted on the samples drawn on the respective consignments establishing that the inferior material has been used had been supplied to the respondent. Under these circumstances the reasoning of the Commissioner of Customs could not be faulted. Therefore, the conclusion of the Tribunal that the order passed by the Commissioner of Customs was in violation of principles of natural justice is unsustainable.

The Tribunal also held that the demand in respect of consignments was time barred as the test report was received by the revenue 6 months before issue of show cause notice. In view of the finding that the charge of mis-statement and suppressing the correct quality has been established against the respondent, the demand cannot be held to be time barred. The conclusion of the Tribunal that the extended period of limitation is not available to the appellant is clearly erroneous. The reliance by the Tribunal on the order of Tribunal in the case of S.D. Kemexc Industries v. Collector of Central Excise, Calcutta [1995 (75) ELT 377] was also misplaced as in that case, the misdeclaration and suppression had not been established and, therefore, it was held that the demand was time barred. Clearly, therefore, the said decision had no applicability to the facts and circumstances of the present case.

For the aforesaid reasons we set aside the order of the Tribunal and restore the order of the Commissioner of Customs. The appeal is accordingly allowed with costs.

[S.P. Bharucha]

[Y.K. Sabharwal]

[Brijesh Kumar]

July 31, 2001