CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO.I

Customs Miscellaneous Application No.70059 of 2024
(on behalf of Respondent)
in
Customs Appeal No.70117 of 2019

(Arising out of Order-in-Appeal No.15-CUS/APPL/LKO/2019 dated 21.01.2019 passed by Commissioner (Appeals) Customs, GST & Central Excise, Lucknow)

Commissioner of Customs (Prev.),
Lucknow **.....Appellant**
(3/194, Vishal Khand-3, Gomti Nagar, Lucknow)

VERSUS

Shri Mohd. Imran, **....Respondent**
(385/54, Fazil Nagar, Lucknow-226003)

APPEARANCE:

Shri Manish Raj, Authorized Representative for the Revenue
Shri Nishant Mishra, Advocate for the Assessee

CORAM: HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

MISCELLANEOUS ORDER NO.- 70205/2024
FINAL ORDER NO.- 70438/2024

DATE OF HEARING : 10 July, 2024
DATE OF DECISION : 10 July, 2024

SANJIV SRIVASTAVA:

This appeal has been filed by the Revenue against the Order-in-Appeal No.15-CUS/APPL/LKO/2019 dated 21.01.2019 passed by Commissioner (Appeals) Customs, GST & Central Excise, Lucknow. By the impugned order learned Commissioner (Appeals) has partly allowed the appeal filed by the Appellant to the extent of converted absolute confiscation of the seized gold by the Original Authority but an option for redemption on payment of fine of Rs.7,50,000/- and also set aside penalty imposed under Section 114AA.

2.1 Revenue filed this appeal before the Tribunal which was dismissed by Final Order No.71214/2019 dated 28.06.2019 on the ground of amount involved being less than that permitted to the Revenue for filing an appeal before the Tribunal.

2.2 Rectification Application filed by Revenue was also dismissed vide Miscellaneous Order No.70343/2019 dated 07.11.2019.

2.3 Revenue carried the matter to jurisdictional High Court Lucknow Bench and Hon'ble High Court vide Order dated 29.03.2023 remanded the matter back to the Tribunal observing as follows:-

> *"This appeal was admitted by this Court on 31.07.2020 and the following substantial questions of law were framed in terms of Section 130 of the Act, 1962:-*
>
> *"A. Whether in the facts and circumstances of the matter the Tribunal was right in dismissing the appeal under litigation policy when undisputedly the redemption fine and penalty alone was not the subject matter of dispute.*
>
> *B. Whether the Tribunal was correct in presuming the monetary limit below which appeal shall not be filed as Rs.20,00,000/- on the basis of instructions dated 11/7/2018."*
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> *The contention raised by Sri Dipak Seth, learned counsel for the appellant is that CESTAT has dismissed the appeal of the appellant bearing No.70117 of 2019 which was directed against the final order dated 28.06.2019 passed by the Commissioner (Appeals) only on the ground that as per the instructions dated 11.07.2018 issued by CBEC in exercise of powers conferred under Section 35R of the Central Excise Act, 1944, monetary limit has been fixed, below which the appeal shall not be filed in the tribunal and by the said instructions, the monetary limit has been enhanced to Rs.20 Lakh. The said instructions are to apply to all pending cases and in the case at hand, as per the CESTAT, redemption fine of Rs.7.5 Lakh stands imposed by the Commissioner (Appeals) and penalty amount is to the extent of Rs.2.50 Lakh. Therefore, the appeal of the*

revenue was dismissed. The contention of Sri Dipak Seth, appellant's counsel is that the instructions dated 11.07.2018 were issued under the Excise Act and not under the Customs Act. The same were not applicable to the case at hand, a fact which has been omitted from consideration by CESTAT.

On being confronted, learned counsel for the respondent could not satisfy us that the legal and factual position was otherwise. The contention of Sri Dipak Seth is that, in fact, the notification which is applicable so far as the litigation policy/ monetary limit is concerned is dated 17.12.2015 which is annexed as Annexure no.8 and in which the monetary limit for appeals before CESTAT is Rs.10 Lakh. He also says that apart from the redemption amount and penalty, the gold which has been seized, its value had also to be taken into consideration in this regard which exceeded the monetary limit of Rs.10 Lakh. This fact is disputed by learned counsel for the respondent who says that gold is not available for redemption. As the CESTAT has not considered any other issue but the instructions dated 11.07.2018 which apparently was not applicable as it was not issued under the Customs Act. Therefore, the substantial questions of law framed at 'A' & 'B the answered in favour of the revenue/ appellant and it is held that the tribunal has erred in rejecting the appeal on the aforesaid ground relying upon the said instructions.

The appeal of the appellant shall now stands restored before the CESTAT which shall be considered afresh! While doing so, it is open for the CESTAT to consider the monetary limit and litigation policy as applicable to proceedings under the Customs Act and all other pleas which may be raised by the respondent or the appellant therein."

2.4 Review Petition filed against the said order has been dismissed by order dated 22.05.2023.

3.1 Respondent to the revenue appeal has filed this Miscellaneous Application for bringing on record all the decisions including those of the High Court. After placing on record the decisions of tribunal and High Court following prayer is made:-

> ***"A****- Misc. Application be allowed and if this Hon'ble Court deems appropriate then the same be decided in light of the observation passed by the Hon'ble High Court for ascertainment of threshold limit of the litigation policy keeping in view the facts and circumstances in the matter at hand;*
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> ***B-*** *To dismiss the appeal of the Revenue as per the new monetary limit vide instruction F. No.390/Misc./30/2023-JC dated 02.11.2023;*
>
> ***C-*** *To dismiss the appeal of the Revenue for the same is not maintainable being the matter of goods imported as baggage under Section 129-A, proviso (a), therefore this Hon'ble High Court lacks jurisdiction to entertain the present appeal."*

4.1 I have heard Shri Nishant Mishra learned Advocate appearing for the Respondent Assessee and Shri Manish Raj learned departmental Authorized Representative appearing for the Revenue.

5.1 I have considered the impugned order alongwith submissions made in the appeal and during the course of arguments.

5.2 Facts are not in dispute as per appeal filed by the Revenue following is relevant facts stated which is sufficient for deciding the case:-

> "Briefly stated about the facts of the case that the Appellant landed at Lucknow airport on 10 July 2017 from Abu Dhabi by Flight No.9W-511. The appellant had concealed gold weighing 1235 gram in the frame pipe of his stroll which was detected in scanning by X-Ray machine. The said gold was not declared in the disembarkation slip in terms of section 77 of the Customs

Act, 1962 (the said Act). The impugned gold appeared liable to confiscation under Section 111 of the said Act.

2. Accordingly, a show cause notice was issued and the adjudicating authority ordered absolute confiscation of the impugned gold under Section 111 of the said Act. The two trolley bags were also confiscated under Section 119 of the said Act. Penalty of two lakh fifty thousand rupees was imposed on the appellant under Section 112(b) of the said Act. Further, penalty of Rs.25,000/- was also imposed under section 114AA of the said Act."

5.3 From the above stated facts in the appeal it is clear that the issue involved in the present case is in respect of seizure of gold from the personal baggage of a passenger. Sub Section 1 to Section 129A of the Customs Act, 1962 reads as follows:

"Section 129A. Appeals to the Appellate Tribunal. -

(1) Any person aggrieved by any of the following orders may appeal to the Appellate Tribunal against such order -

(a) ……;

(b) an order passed by the Commissioner(Appeals) under section 128A;

(c) ……;

(d) ….:

Provided that no appeal shall lie to the Appellate Tribunal and the Appellate Tribunal shall not have jurisdiction to decide any appeal in respect of any order referred to in clause (b) if such order relates to, -

(a) any goods imported or exported as baggage;

(b) …..;

(c) …. ;

From the plain reading of the above provisions it is evident that the appeal in the present case before tribunal is not maintainable as tribunal has not been assigned any jurisdiction to entertain and consider such appeals.

5.4 In case of Sans Frontier [2023-TIOL-1728-HC-DEL-CUS] while interpreting the same provision Hon'ble Delhi High Court observed:-

> *"61. We do not agree with the said contention advanced on behalf of the Firm. It is settled law that competence of the Court to try a case goes to the very root of the jurisdiction. The inherent lack of jurisdiction makes the order passed by the Court void in law. There is also no inherent right to file an appeal and the same is granted by the statute. In the absence of any such right, the learned CESTAT being a creature of statute, did not have any jurisdiction to entertain the same. No Court or Tribunal is empowered to usurp jurisdiction, which it does not have. Any order passed by a Tribunal that does not have the jurisdiction to pass such an order, is non est. The invalidity of such orders can be set up whenever they are sought to be enforced.*
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> *62. It is well-settled that the order passed by a Court, which does not have the subject matter jurisdiction to adjudicate the issue, would be a nullity. No consent, waiver or acquiescence can confer jurisdiction upon a Court, which is otherwise barred by the statute. The order, passed by a Court having no jurisdiction, is non est and its invalidity can be set up at any stage and in any proceedings.*
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> *63. The Hon'ble Apex Court, in Harshad Chiman Lal Modi v. DLF Universal Ltd. : (2005) 7 SCC 791, held as under:*
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> *"30. We are unable to uphold the contention. The jurisdiction of a court may be classified into several categories. The important categories are (i) territorial or local jurisdiction; (ii) pecuniary jurisdiction; and (iii) jurisdiction over the subject-matter. So far as territorial and pecuniary jurisdictions are concerned, objection to such jurisdiction has to be taken at the*

> *earliest possible opportunity and in any case at or before settlement of issues. The law is well settled on the point that if such objection is not taken at the earliest, it cannot be allowed to be taken at a subsequent stage. Jurisdiction as to subject-matter, however, is totally distinct and stands on a different footing. Where a court has no jurisdiction over the subject-matter of the suit by reason of any limitation imposed by statute, charter or commission, it cannot take up the cause or matter. An order passed by a court having no jurisdiction is a nullity.*

31. In Halsbury's Laws of England, (4th Edn.), Reissue, Vol. 10, para 317, it is stated:

317. Consent and waiver.—Where, by reason of any limitation imposed by a statute, charter or commission, a court is without jurisdiction to entertain any particular claim or matter, neither the acquiescence nor the express consent of the parties can confer jurisdiction upon the court, nor can consent give a court jurisdiction if a condition which goes to the root of the jurisdiction has not been performed or fulfilled. Where the court has jurisdiction over the particular subject-matter of the claim or the particular parties and the only objection is whether, in the circumstances of the case, the court ought to exercise jurisdiction, the parties may agree to give jurisdiction in their particular case; or a defendant by entering an appearance without protest, or by taking steps in the proceedings, may waive his right to object to the court taking cognizance of the proceedings. No appearance or answer, however, can give jurisdiction to a limited court, nor can a private individual impose on a judge the jurisdiction or duty to adjudicate on a matter. A statute limiting the jurisdiction of a court may contain provisions enabling the parties to extend the jurisdiction by consent."

32. In Bahrein Petroleum Co. [(1966) 1 SCR 461 : AIR 1966 SC 634] this Court also held that neither consent nor waiver nor *acquiescence can confer jurisdiction upon a court, otherwise incompetent to try the suit. It is well settled and needs no authority that "where a court takes upon itself to exercise a jurisdiction it does not possess, its decision amounts to nothing". A decree passed by a court having no jurisdiction is non est and its invalidity can be set up whenever it is sought to be enforced as a foundation for a right, even at the stage of execution or in collateral proceedings. A decree passed by a court without jurisdiction is a coram non judice."*

64. Therefore, even if it is to be assumed that the Revenue had consented to the learned CESTAT hearing the appeal, the defect of lack of jurisdiction cannot be cured.

65. Having arrived at the conclusion that the order passed by the learned CESTAT was without jurisdiction, the Revenue, thus, was right in observing that the refund order sanctioned in favour of the Firm pursuant to the order of the learned CESTAT, was required to be reviewed.

66. The non-maintainability of the appeal before the learned CESTAT also does not mean that the party is remediless. Section 129DD(1) states as under:

"129DD. Revision by Central Government

(1) The Central Government may, on the application of any person aggrieved by any order passed under section 128A, where the order is of the nature referred to in the first proviso to sub-section (1) of section 129A, annul or modify such order: PROVIDED that the Central Government may in its discretion, refuse to admit an application in respect of an order where the amount of duty or fine or penalty, determined by such order does not exceed five thousand rupees.

Explanation : For the purposes of this sub-section, "order passed under section 128A" includes an order passed under that section before the commencement of section 40 of the Finance Act, 1984, against which an appeal has not been preferred before such commencement and could have been, if the said section *had not come into force, preferred after such commencement, to the Appellate Tribunal."*

67. It specifically provides that such orders of the Commissioner (Appeals), which are not appealable before the Appellate Tribunal, can be subject matter of revision by the Central Government. Any person aggrieved by such order can file an application with the Central Government. The Central Government has the power to annul or modify the order passed by the Commissioner (Appeals)."

5.5 I also note that the Respondent – Applicant had filed an appeal before this Tribunal which was finally adjudicated vide Final Order No.70240/2020 dated 27.02.2020. Strictly speaking as per the above provision this appeal too was not maintainable before tribunal. In the said order Bench have noted the direction of Hon'ble High Court Lucknow Bench (Order dated 08.08.2019 in Writ Petition No.21783 (M/B) of 2019) as follows:-

> *"6. We are of the considered opinion that because on related issue cross appeals are pending and the issue of confiscation and other related issues would be adjudicated by the Appellate Authority viz. CESTAT constituted for Allahabad region, it would be appropriate that the petitioner makes all prayers before the said authority. Any order passed by the writ Court in this regard is likely to reflect on the jurisdiction of CESTAT.*
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> *7. The petition is disposed of with liberty to the petitioner to file an application before Customs Excise & Service Tax Appellate Tribunal Allahabad."*

Taking note of the above direction and the fact that the Revenue appeal had been dismissed earlier for whatsoever reason Tribunal proceeded to decide the appeal. In terms of Article 226 the said direction contains in the order dated 08.08.2019 where to be followed. It also appears that no objection with regards to maintainability of this appeal before CESTAT was ever raised by the revenue before Hon'ble High Court or CESTAT. The fact that the revenue appeal was dismissed on 28.06.2019 was also not brought to the notice of Hon'ble High Court as is evident from the observations made in the order of the Hon'ble High Court.

5.6 Be that as it is, similar direction do not appear in the Order dated 29.03.2023 in the Custom Appeal No.3 of 2020 of the Hon'ble High Court. Hon'ble High Court has specifically permitted all objections to be taken against the appeal filed by revenue in the remand proceedings before CESTAT. By this Miscellaneous Application ground of maintainability of the Revenue's appeal has been raised which is justifiable ground in terms of above noted provisions of Customs Act. Accordingly I am inclined to hold that this appeal is not maintainable before CESTAT.

6. Appeal dismissed as none maintainable. Miscellaneous Application also gets disposed of.

(Dictated and pronounced in open court)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

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