

**COLLECTOR OF CUSTOMS & EXCISE, COCHIN & ORS. A**

v.

**A. S. BAVA**

July 27, 1967

[J. C. SHAH AND S. M. SIKRI, JJ.] B

*Central Excise and Salt Act (1 of 1944), ss. 12 and 35—Unfettered right of appeal—Provision of s. 129, Sea Customs Act, 1878 extended to appeals under Excise Act—Obligation to deposit amount of duty pending appeal—If provision in s. 129 one in regard to procedure relating to appeals—Validity of extension.*

Under s. 35 of the Central Excise and Salt Act, 1944 (Excise Act) a person aggrieved by any decision or order under the Act and rules has an unfettered right of appeal. Under s. 12 of the Act, the Central Government may apply to appeals under the Excise Act the provisions of the Sea Customs Act, 1878 (Customs Act) dealing with the procedure relating to appeals. In exercise of this power, the provisions of s. 129 of the Customs Act were made applicable to appeals under the Excise Act. The section requires an appellant to deposit, pending the appeal, the duty or penalty imposed, and empowers the appellate authority, in his discretion, to dispense with such deposit pending the appeal in any particular case. C D

The respondent filed an appeal against the duty imposed on him under the Excise Act and prayed for dispensation of the deposit. The Collector, who was the appellate authority, rejected the prayer and, when no deposit was made within the time fixed, dismissed the appeal. The respondent filed a writ petition in the High Court which was allowed, and the Collector was directed to hear the appeal on merits. E

The Collector appealed to this Court.

**HELD:** Since s. 35 of the Excise Act gave a right of appeal and s. 129 of the Customs Act whittled down that substantive right, s. 129 could not be regarded as "procedure relating to appeals" within s. 12 of the Excise Act. The High Court was therefore right in holding that the application of s. 129 of the Customs Act to appeals under the Excise Act was in excess of the powers conferred under s. 12 of the Excise Act. The facts that an alternative remedy was available to the respondent under the Excise Act, and that he invoked the dispensing power of the appellate authority under s. 129 of the Customs Act, did not bar the jurisdiction of the High Court to entertain the writ petition, especially when the jurisdiction of the Collector to insist upon the deposit of duty pending appeal was itself questioned. [84B-D; 86F-G] F G

*Hoosein Kasam Dada (India) Ltd. v. The State of Madhya Pradesh*, [1953] S.C.R. 987. 4 S.T.C. 114, followed.

**CIVIL APPELLATE JURISDICTION:** Civil Appeals Nos. 2007 and 2008 of 1966. H

Appeals by special leave from the judgment and order dated September 28, 1965 of the Kerala High Court in O.P. Nos. 219 and 223 of 1964.

- A** *D. R. Prem, R. N. Sachthey and S. P. Nayar*, for the appellants (in both the appeals).

*S. T. Desai and R. Gopalakrishnan*, for the respondent (in both the appeals).

The Judgment of the Court was delivered by

- B** **Sikri, J.**—These appeals, by special leave, are directed against the judgment of the High Court of Kerala allowing two petitions filed by the respondent, M/s. A. S. Bava, under art. 226 of the Constitution. The High Court, by this judgment, quashed two orders dated February 4, 1964, and directed the Collector of Customs, & Central Excise, Cochin, to hear the appeals preferred by M/s. A. S. Bava.

- C** The relevant facts are as follows: M/s. A. S. Bava, hereinafter referred to as the petitioner, is a firm of dealers in Tobacco. By two orders of adjudication dated March 31, 1963, the Assistant Collector of Customs demanded the payment of duty under Rule 40 of the Central Excise and Salt Rules, 1944. The petitioner filed appeals against these orders on or about July 4, 1963, to the Collector of Customs & Central Excise. The petitioner made a representation on October 3, 1963, requesting that it may not be required to deposit the duty demanded pending appeal. The Collector, by letter dated January 9, 1964, rejected the representation and requested the petitioner to deposit the duty within 15 days of the receipt of the letter. On the petitioner failing to deposit the amount, the appeals were dismissed on December 4, 1964. Thereupon, as already stated, the petitioner filed two petitions under art. 226 and the petitions having been allowed, and the appellant having obtained special leave, the appeals are now before us. The High Court allowed the petitions on the ground that the notification No. 68/63 dated May 4, 1963, issued under s. 12 of the Excise and Salt Act, 1944, hereinafter referred to as the Excise Act, declaring that s. 129 of the Customs Act, 1962, relating to matters specified therein shall be applicable in regard to like matters in respect of the duties imposed by s. 3 of the Excise Act was in excess of the powers conferred under s. 12 of the Excise Act. The High Court also rejected the argument of the Collector of Customs and Central Excise that the petitioner having invoked s. 129 of the Customs Act, 1962, in the appeals preferred by it by praying for the dispensation of deposit, was precluded from proceeding under art. 226 of the Constitution.

- H** The learned counsel for the appellants has raised three points before us:

(1) The petitions under art. 226 were not maintainable as the petitioner did not avail himself of the remedy of revision provided by s. 36 of the Excise Act.

(2) The petitioner having availed of the remedy under s. 129 A of the Customs Act was debarred from challenging the impugned notification, dated May 4, 1963.

(3) The impugned notification applying s. 129 of the Customs Act was good.

There is no force in the first point. First, the point was not taken in the High Court. Secondly, it is settled that the existence of a remedy by way of revision does not bar the jurisdiction of the High Court to entertain a petition under art. 226. Moreover, the petitioner had alleged that the Collector had no jurisdiction to demand the deposit or duty pending the appeals as the notification dated May 4, 1963, was bad insofar as it applied s. 129 of the Customs Act. In these circumstances it was not necessary for the petitioner to have filed revisions. B C

There is equally no force in the second point. If the petitioner had not applied for dispensation of the deposit of the duty, the appellants would have contended that the petitions under art. 226 were not maintainable. Moreover, as already stated, the petitions raised a question of jurisdiction. D

To appreciate the third point, it is necessary to extract the relevant statutory provisions. Section 12 of the Excise Act authorises the Central Government to apply provisions of the Sea Customs Act, 1878, now replaced by the Customs Act, 1962, in the following terms:

"12. The Central Government may, by notification in the Official Gazette, declare that any of the provisions of the Sea Customs Act, 1878, relating to the levy of an exemption from customs duties, drawback of duty, warehousing, offences and penalties, confiscation, and procedure relating to offences and appeals shall, with such modifications and alterations as it may consider necessary or desirable to adapt them to the circumstances, be applicable in regard to like matters in respect of the duties imposed by section 3". E F

The relevant part of the impugned notification dated May 4, 1963, reads as follows:

"In exercise of the powers conferred by Sec. 12 of the Central Excise & Salt Act, 1944 (1 of 1944) ..... the Central Government declares that the provisions of..... Section 129 of the Customs Act, 1962, relating to matters specified herein shall be applicable in regard to like matters in respect of the duties imposed by Sec. 3 of the first mentioned Act.....". G H

Section 129 of the Customs Act reads thus:

"129. (1) Where the decision or order appealed against relates to any duty demanded in respect of goods

**A** which are not under the control of customs authorities or any penalty levied under this Act, any person desirous of appealing against such decision or order shall, pending the appeal, deposit with the proper officer the duty demanded or the penalty levied:

**B** Provided that where in any particular case the appellate authority is of opinion that the deposit of duty demanded or penalty levied will cause undue hardship to the appellant, it may in its discretion dispense with such deposit, either unconditionally or subject to such conditions as it may deem fit.

**C** (2) If upon any such appeal it is decided that the whole or any portion of such duty or penalty was not leviable, the proper officer shall return to the appellant such amount of duty or penalty as was not leviable."

**D** It will be noticed that s. 129 requires an appellant to deposit the duty or penalty levied pending an appeal. In other words, before an appeal can be heard the appellant must deposit the duty or penalty levied. But under s. 35 of the Excise Act, a person aggrieved by any decision or order has an unfettered right to appeal. The question that arises in these appeals is whether the provisions of s. 129 of the Customs Act can be said to be provisions relating to 'procedure ..... relating to appeals' within s. 12 of the Excise Act.

**E** As we have already said, the appeals are filed under s. 35 of the Excise Act. Section 129 of the Customs Act debars the hearing of them unless the duty or penalty is paid. This, it seems to us, is not procedure relating to appeals. This Court in *Hoosein Kasam Dada (India) Ltd., v. The State of Madhya Pradesh*<sup>(1)</sup> had to consider a similar provision in s. 22 of the Central Provinces and Berar Sales Tax Act, 1947. Section 22(1), as originally enacted, read thus:

**F** "22. (1) Any dealer aggrieved by an order under this Act may, in the prescribed manner, appeal to the prescribed authority against the order:

**G** Provided that no appeal against an order of assessment, with or without penalty, shall be entertained by the said authority unless it is satisfied that such amount of tax or penalty or both as the appellant may admit to be due from him, has been paid."

**H**

(1) [1953] 8 C.R. 987; 4 S.T.C. 114.

It was amended thus: A

“22. (1) Any dealer aggrieved by an order under this Act may, in the prescribed manner, appeal to the prescribed authority against the order:

Provided that no appeal against an order or assessment, with or without penalty shall be admitted by the said authority unless such appeal is accompanied by a satisfactory proof of the payment of the tax, with penalty, if any, in respect of which the appeal has been preferred. B

S. R. Das, J., as he then was, repelled the argument of the learned Advocate that ‘the requirement as to the deposit of the amount of the assessed tax does not affect the right of appeal itself, which still remains intact, but only introduces a new matter of procedure’, and observed: C

“There can be no doubt that the new requirement ‘touches’ the substantive right of appeal vested in the appellant. Nor can it be overlooked that such a requirement is calculated to interfere with or fetter, if not to impair or imperil, the substantive right. The right that the amended section gives is certainly less than the right which was available before. A provision which is calculated to deprive the appellant of the unfettered right of appeal cannot be regarded as a mere alteration in procedure. Indeed the new requirement cannot be said merely to regulate the exercise of the appellant’s pre-existing right but in truth whittles down the right itself and cannot be regarded as a mere rule of procedure.” D

These observations are fully applicable in the present case. E  
Section 35 of the Excise Act gave a right of appeal, but s. 129 of the Customs Act whittles down the substantive right of appeal and accordingly it cannot be regarded as “procedure relating to appeals” within s. 12 of the Excise Act. F

The appeals accordingly fail and are dismissed with costs. G  
One hearing fee.

V.P.S.

*Appeals dismissed.*