

IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

PRESENT:

Mr. Justice Justice Borhanuddin
Mr. Justice Md. Ashfaquul Islam
Mr. Justice Md. Abu Zafor Siddique

CIVIL APPEAL NOS. 170-171 OF 2009

(From the judgments and orders dated 25.01.2001 passed by the High Court Division in Writ Petition Nos. 72 and 73 of 1998)

Commissioner of Customs Excise and VAT, Customs, Excise and VAT Collectorate, Chittagong and others Appellants
(In both the appeals)

-Versus-

Abul Khair Steel Mills Ltd. Respondents
(In both the appeals)

For the Appellants : Mr. Somarendra Nath Biswas, DAG
(In both the appeals) instructed by Mr. Haridas Paul,
Advocate-on-record

For the Respondent : Not represented
(In both the appeals)

Date of Hearing and Judgment : 16.08.2023

J U D G M E N T

Md. Ashfaquul Islam, J: Both the civil appeals by leave are directed against the judgments and orders dated 25.01.2001 passed by the High Court Division in Writ Petition Nos. 72 and 73 of 2009 making the Rules absolute and thereby directing the writ-respondents-appellants to entertain the appeal of the writ-petitioner-respondent for exemption from depositing 50% of the demanded amount on the ground of hardship to make such deposit.

The short fact is that the writ-respondents, Commissioner of Customs and others, made the demands of VAT for the period between May, 1995 to June 1996 claiming an amount of Tk. 11,45,217/- and Tk. 10,94,898/- respectively. The writ-petitioner-respondents company being aggrieved by such demand filed an appeal before the Tribunal comprising Commissioner of Customs which was duly received by the Commissioner of Customs under Section 42 of the VAT Act together with an application on 3.12.1997 seeking exemption of payment of statutory deposit of 50% of the amount demanded on the ground of hardship. But the Tribunal by its order dated 18.12.1997 without considering the hardship dismissed the appeal by directing the writ-petitioner company to deposit 50% of the demanded amount.

Hence, the writ petitioner company filed Writ Petition Nos.72 and 73 of 1998 and obtained rule Nisi. A Division Bench of the High Court Division after hearing the parties made both the rules absolute.

Being aggrieved and dissatisfied with the aforesaid decisions writ respondents filed two separate civil

petitions for leave to appeal and obtained leave giving rise to these appeals.

Mr. Somarendra Nath Biswas, the learned Deputy Attorney General for the Appellants submits that the High Court Division palpably erred in making both the rules absolute by directing the writ-respondents-appellants to consider the appeal by exempting the writ-petitioner-respondent from making the deposit of the 50% of the demanded amount as contemplated by section 42(2)(Kha) of the VAT Act, 1991, as such the impugned judgment and order is liable to be set aside.

He further submits that the provision of question of hardship from depositing at the time of filing of the appeals, at one point of time was to be found in the VAT Act, 1991 in the manner as in the Custom Act, 1969. But subsequently that was omitted by the legislature. On this score as he submits the High Court Division had misdirected itself directing the Tribunal to allow the writ-petitioner for exemption from depositing 50% of the demanded amount as legal requirements for filing the appeal. In support of his contention the learned Deputy Attorney General placed two decisions of this Division.

Firstly, Sunshine Cables and Rubber Works Ltd vs. National Hoard of Revenue 18 BLC AD 268 and secondly, Alfa Tobacco Manufacturing Company Ltd vs. Customs, Excise 18 MLR AD 356.

None appears for the respondents.

We have heard the learned Deputy Attorney General for the appellants and considered his submissions. We have also perused the impugned Judgment and order of the High Court Division, the order of the Tribunal and other materials on record carefully.

The leave was granted to examine whether the High Court Division was justified in directing the Tribunal to accept the appeal of the writ petitioner without depositing 50% of the demanded amount as legal requirements for filing the same under Section 42(2)(kha) of the VAT Act, 1991.

The law on the issue is well settled by this Division which is no longer a res-integra. It has been crystallized vividly in the above quoted two decisions of this division.

In the case of Sunshine Cables 18 BLC AD 268 as referred to above this Division observed:

"It has been noticed that second proviso to section 194(1) of the Customs Act, 1969 has identical provisions like the second proviso to the original provisions of section 42(2) of the VAT Act which empowers the Appellate Tribunal in any particular case at the time of filing of the appeal to dispense with the deposit, either unconditionally or conditionally, of the demanded VAT or the penalty imposed considering the undue hardship to the appellant. However, by the Finance Act, 1995 [Act 12 of 1995], section 42(1) was amended and by the Finance Act, 1996 (Act No. 18 of 1996) Section 42(2) was amended and subsequently, at different times the deposit of the percentage of demanded VAT or penalty was amended by the Finance Acts. For our present purpose, by notice dated 02.03.2006 (Annexure-C) under section 55 of the VAT Act, 1991 the petitioners were asked to show cause within 15 days as to why the alleged evasion of VAT amounting to Tk. 12,41,425.00 should not be recovered from them failing which necessary

action in accordance with law would be taken for recovery of the alleged evasion of VAT/penalty. The petitioners preferred appeal before the Appellate Tribunal without deposit of 25% of the demanded VAT or penalty imposed upon them to the Government Treasury or a VAT Officer empowered by the Government.

It has been further observed:

"We have already noticed that the earlier proviso to section 42(2) of the VAT Act, 1991 was similar to the second proviso to section 194(1) of the Customs Act, 1969 and that because of the subsequent amendment of the said provisions of the Act of 1991 there is no scope to exempt/relax/dispense with the mandatory requirement of deposit of 25% of the VAT demanded or penalty imposed upon the petitioners by the Tribunal as the legislature consciously repealed such provisions from the VAT Act. In view of the aforesaid provisions of law, we are of the opinion that the Tribunal shall follow the procedure of Customs Act only when an appeal

presented to it is in form i.e. with the deposit as mandatory required under section 42(2) (Kha) of the VAT Act and not at the time of filing of an appeal before the Appellate Tribunal. In coming to a conclusion the High Court Division rightly referred to an unreported decision in Writ Petition No. 6895 of 1997 (Asif Steels Limited-Vs-The Commissioner of Customs, Customs House, Chittagong and others) and also referred to the judgment and order dated 9th August, 2007 passed by this Division in Civil Petition for Leave to Appeal No. 576 of 2005 wherein it has been held that in order to get the benefit of Sub-section (4) of Section 42 of the VAT Act the appeal must be in form. In the aforesaid decision this Division observed as under:

"We are of the view that since the Tribunal has no authority or jurisdiction to relax the mandatory deposit of 50% either of the demanded VAT or the penalty the order passed by the Tribunal was of little legal consequence and, as such, the petitioner

cannot thrive upon it to get the benefit of sub-section (4) of section 42 of the Act since at the relevant time deposit of 50% either of the demanded VAT or the penalty was compulsory to maintain and hear an appeal which the petitioner did not, the legal consequence would be that the appeal would be incompetent, or in other words not in form and therefore, it does not matter whether any consequence has been provided for in the statute for such non-deposit

.....

Since the appeal itself was not in form, the question of having allowed the same pursuant to the provision of sub-section (4) of section 42 of the Act does not arise at all....."

Similar view has also been taken by this Division in the case of Alfa Tobacco 18 MLR AD 356 wherein this Division had reiterated:

"The question involved in these two leave petitions squarely came up for consideration by

this Division in Civil Petition for Leave to Appeal No. 896 of 2009 and in that case after considering the provisions of sections 37, 42 and 55 of the VAT Act, 1991 and sections 193, 194, 196, 196A, 196B, 196C of the Customs Act, 1969 this Division held that "Therefore, the intention of the legislature is very clear that in order to file an appeal under section 42 of the VAT Act the percentage of the demanded VAT and or the penalty as mentioned therein must be deposited at the time of filing the appeal and in absence of such deposit an appeal cannot be accepted. So, no illegality was committed either by the Commissioner (Appeal) in not accepting the appeal or by the Appellate Tribunal in directing the petitioner to deposit the demanded VAT as per the VAT Act and deposit the treasury chalan of such deposit by 18.04.2007" and on the above view the judgment and order passed by the High Court Division was affirmed and the leave petition was dismissed. We find no reason to take a different view from the view taken in the

said leave petition and therefore, we find no merit in the leave petitions. Accordingly, both leave petitions are dismissed.”

Further in the case of JMS Glass Industries Ltd. Vs. Customs, Excise and VAT Appellate Tribunal 64 DLR AD 43 it was also held that the provisions of Section 194 of the Custom Act, 1969 cannot be attracted or applied for the purpose of waiving/dispensing with the statutory deposit as provided in sub-section (2) of section 42 of the VAT Act, it being an independent statute.

Fortified with the decisions as discussed above it is clear that the Tribunal shall only follow the procedure of the Custom Act only when the appeal presented to it with the required deposit under the VAT Act and with all the trappings of the custom Act as far as it is applicable. After filing of the appeal, it does not contemplate prevailing procedure of the appeal. That is to say requirement before filing to be construed as it is.

That being the position, we find substance in the submissions of the learned Deputy Attorney General for the appellants. Accordingly, both the appeals are

allowed. The judgment and order of the High Court Division is set aside, however, without any order as to costs.

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