

IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

WRIT PETITION NO. 13066 OF 2015

IN THE MATTER OF:

Application under Article 102 of the Constitution
of the People's Republic of Bangladesh.

And

IN THE MATTER OF:

M/S Rahman Poly Hanger and Accessories
Industries Ltd.

.... Petitioner

-Vs-

Customs Excise and VAT Appellate Tribunal,
Dhaka and another

....Respondents.

Mr. Md. Taufiqul Islam, Advocate

..... For the petitioner.

Ms. Nasima K. Hakim, Deputy Attorney General
with Ms. Tahmina Polly, Mr. Elin Imon Saha and
Mr. Ziaul Hakim, Assistant Attorney General

..... For the respondents-government.

Heard On: 07.05.2023

Judgment on: 15.05.2023.

Present:

Mr. Justice Md. Iqbal Kabir

and

Mr. Justice S.M. Maniruzzaman

S.M. Maniruzzaman, J:

In this *Rule Nisi*, issued under Article 102 of the Constitution of the People's Republic of Bangladesh, the respondents have been called upon to show cause as to why order dated 09.07.2015 passed by the respondent No. 1 communicated vide Nothi No. CEVT/Case(Cus)-180/2015/67 dated

27.07.2015 dismissed the Appeal No. in CEVT/Case (Cus)-180/2015 for not complying with the provision of Section 194 of the Customs Act, 1969 (Annexure-E) should not be declared to have been passed without lawful authority and is of no legal effect and to show cause as to why the respondent No. 1 shall not be directed to admit the appeal without requiring deposit as per 2nd proviso of Section 194(1) of the Customs Act, 1969 (in short, the Act) on the ground of hardship of the petitioner and/or such other or further order or orders passed as to this Court may seem fit and proper.

Facts, relevant for disposal of the Rule, in short, are that the petitioner is a private limited company incorporated under the Companies Act, 1994 and is engaged in the business of manufacturing and supplying garments accessories by obtaining necessary certificates from the concerned Customs Authority as well as the Government authority. The petitioner is a 100% export oriented ready-made garments industry and obtained Bond License from the respondent No. 2, Commissioner, Customs Bond Commissionerate, Segunbagicha, Dhaka.

Subsequently, a preventive team of the respondent No. 2 completed inquiry/audit of the petitioner's Bonded Ware House and found that the petitioner did not use the raw materials under U.P. No. 05/2013 dated 28.01.2013 and value of the said raw materials US\$ 24,829.56. The petitioner, however, showed the value of the said raw materials US\$ 21,829.56. As per the said audit, the petitioner could not use the raw materials for manufacturing finished product. Accordingly, it is liable to pay customs duty and taxes amounting to Tk. 5,21,308.20. The said team

submitted a report to the respondent No. 1 for taking necessary steps. Pursuant to the said inquiry report, the respondent No. 1 started a Auniom Case bearing No. 04/14 dated 15.01.2014 and issued a show cause notice upon the petitioner on 13.03.2014 asking as to why the penalty should not be imposed under the Table Clause 14, 50, 51(A), 59 and 62 of Section 156(1) of the Act, 1969. Pursuant to the said proceeding the concerned Commissioner of Customs finally adjudicated the matter by his order dated 04.02.2015 imposing penalty to the tune of Taka 45,00,000/- and also directing the petitioner to pay Tk. 5,21,308.20 as customs duty and taxes at total of Tk. 5,21,308.20.

Being aggrieved thereby the petitioner preferred customs appeal before the respondent No. 1 Customs, Excise and VAT, Appellate Tribunal (in short, the Tribunal) under Section 196A of the Customs Act, 1969, being Customs Appeal No. CEVT/Case(Cus)-180/2015 at the very same day the petitioner filed an application under Second Proviso of Section 194(1) of the Customs Act, 1969 for granting exemption to deposit the statutory demanded duty due to hardship. But the tribunal without considering the petitioner application hardship dismissed the appeal by the impugned order dated 07.09.2015.

Being aggrieved thereby, the petitioner moved this application before this Court and obtained the present Rule.

Mr. Md. Taufiqul Islam, learned Advocate for the petitioner submits that the petitioner in the application for hardship has clearly stated about its financial hardship for which they are not in position to deposit the amount

as precondition to file the appeal but the Tribunal without considering the said application of the petitioner has most illegally passed the impugned order directing to deposit 25% cash and 25% bank guarantee of the demanded money and as such, the impugned order is liable to be declared to have been passed without lawful authority and is of no legal effect.

Mr. Islam next submits that the Tribunal without exercising the power conferred by the 2nd proviso of Section 194 of the Act, 1969 directing the petitioner to deposit statutory amount of duty under the law and as such, the impugned order is liable to be declared to have been passed without lawful authority and is of no legal effect.

Mr. Islam then submits that the Tribunal exceeded its jurisdiction dismissing the appeal straightway without settling the issue of statutory deposition and without hearing the parties on merit. The impugned order is, therefore, not an order under the provision of Section 196B of the Act, 1969. Under the facts and circumstances of the present case, the Tribunal ought to have considered that the petitioner-company was suffering from financial hardship due to unpaid bank-loan, fire-disaster and the ongoing pandemic situation, under which it had to pray for admission of the appeal exempting the statutory deposit.

Per contra, Ms. Nasima K. Hakim, learned Deputy Attorney General appearing for respondent number 2 refers to the decision of the larger bench of this division presided over by Zubayer Rahman Chowdhury, J passed in the case of *Nila Packing and Accessories Ltd vs Customs, Excise and VAT Appellate Tribunal and another* with eleven other cases in bunch

and submits that the second proviso to Section 194 of the Act, 1969 leaves no room for doubt that the power to dispense with the deposit, either unconditional or with any condition has been left to the sole discretion of the Tribunal. In the case in hand, the Tribunal logically exercised its discretion and rightly dismissed the appeal. There is nothing to interfere with the impugned order and as such the rule is liable to be discharged.

Ms. Nasima further submits that this court has no jurisdiction to substitute its own decision for that of the Tribunal granting exemption on the application of hardship filed by the appellant. The second proviso to Section 194 of the Act confers absolute power on the Tribunal to decide the question of hardship considering each and every case on merit. In the present case, the Tribunal impliedly rejected the hardship application and consequently dismissed the appeal. Since the petitioner preferred the appeal without making the statutory deposit, the Tribunal rightly dismissed the same.

We have considered the submissions of learned Advocate and learned Deputy Attorney General and also gone through the record as well as the decisions cited hereinabove.

It appears that the petitioner preferred the appeal before the Tribunal on 27.04.2015 and on the same day filed an application for exemption from statutory deposit under the second proviso to Section 194 (1) of the Act, 1996 on the ground of hardship as taken therein. The Tribunal upon hearing the appellant directed to deposit amount the amount as per Section 194 without considering the hardship application.

However, the issue in question in the instant Rule is that whether the Tribunal without considering the hardship application can reject the appeal. The said issue has already been settled by one of the benches of this Division in a judgment dated 19-20.02.2023 passed in Writ Petition No. 697 of 2022 (one of us was party in the said judgment), wherein this Division on a threadbare discussions observed *inter alia*:

“.....

The main issue requires to be decided in this writ petition is whether the Tribunal can summarily dismiss an appeal on merit without giving any expressed decision on the application for granting exemption from the statutory deposit as mandated by Section 194 (1) of the Act, 1969.

In order to get the reply, let us go through the text of Section 194 of the Act, which reads as follows:

194. Deposit, pending appeal, of duty demanded or penalty levied-(1) Any person desirous of appealing under section 193 or section 196A against any decision or order relating to any duty demanded in respect of goods which have ceased to be under the control of customs authorities or to any penalty levied under this Act shall, at the time of filing his appeal or if he is so permitted by the appellate authority at any later stage before the consideration of the appeal, deposit with the appropriate officer fifty per cent of the duty demanded or fifty per cent of the penalty imposed, or both, as the case may be:

Provided that such person may, instead of depositing the amount of the penalty as aforesaid, deposit only fifty percent thereof and furnish a

guarantee from a scheduled bank for the due payment of the balance:

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

(2) If, upon an appeal it is decided that the whole or any portion of the aforesaid duty or penalty was not leviable, the appropriate officer shall return to the appellant such amount or portion as the case may be.

The above quoted law requires the appellant to deposit the duty demanded or penalty imposed at the time of filing the appeal, or if he is so permitted by the appellate authority, at any stage before disposal of the appeal, deposit fifty percent of the duty demanded or penalty imposed, or both as the case may be. In the case of appeal against a penalty, the first proviso to Sub-Section (1) allows the appellant to deposit fifty percent of the penalty in cash and furnish a bank guarantee for the balance while the second proviso confers power on the appellate authority to dispense with such deposit, either unconditionally or with such conditions as it may deem fit to impose.

In the present case, the Tribunal did not express any single word in the impugned order whether the application for dispensation with the statutory deposit on the ground of hardship was rejected or not. But under the facts and circumstances of the case coupled with the financial crisis during the pandemic, the

Tribunal could have permitted the appellant to deposit the demanded amount at any specific date before disposal of the appeal.

Learned Deputy Attorney General, with reference to the decision of the larger bench passed in the bunch cases of *Nila Packing and Accessories Ltd. vs Customs, Excise and VAT Appellate Tribunal and others*, submits that it is the discretion of the Tribunal to dispense with the deposit either unconditionally or subject to such conditions as it may deem fit to impose. We have no scope to disagree with the decision of the larger bench. In the cited case the larger bench relied on the case of *Pandyan Insurance Company Limited vs KJ Khambatta and others*, reported in AIR 1955 (Bombay) 241 and observed:

It is the cardinal rule of interpretation that the words used in a Statute are to be interpreted as it is, and not what they ought to be. The Legislature, in their wisdom, and in our view quiet correctly, stipulated that the discretion to allow dispensation with the deposit is vested only with the Tribunal. This is apparent from the very last sentence, which reads, "it may dispense with such deposit, either unconditionally or submit to such conditions as it may deem fit to impose." (emphasis added on the word "it") By using the word "it", the Legislatures have very clearly expressed their intention that it is the Tribunal and the Tribunal alone which is vested with the sole authority to dispense with the deposit or otherwise accept an appeal upon such conditions as it deems fit to impose with regard to such deposit. The use of the word "it", in our view,

implies that the jurisdiction or authority of this Court to interfere in matters of granting exemption on the ground of hardship has been excluded....

It appears that the petitioners in their respective writ petitions made submission before the larger bench relying on the judgment of the Appellate Division passed in *Dhaka Warehouse Ltd and another vs Assistant Collector of Customs and others* disposed of with three others cases in bunch and reported in 11 BLD (AD) 227, wherein the Appellate Division observed:

Payment of the demanded sum, a condition precedent as required under Section 194 of the Act for filing an appeal, would have surely caused a great hardship to the appellants. The appellants' prayer for exemption from depositing demanded sum rather arbitrarily rejected by the appellate authority.

In the above cited case of *Dhaka Warehouse Ltd*, the Appellate Division considering the hardship in depositing the demanded duty, directed the High Court Division to hear the writ petition filed against the order of the Tribunal dismissing the customs appeal for non-deposit due to hardship. The above case of *Dhaka Warehouse Ltd* was distinguished by the larger bench in the following manner:

...the aforesaid decision of the Apex Court is distinguishable from the present case before us for the simple reason that in the decision referred to above, no exemption was granted and the appellants' application of hardship was rejected summarily. In the present writ petitions, the

petitioners were granted exemptions, albeit of varying degrees. It is the non-deposit of the exempted amount which led to the rejection of the appeals by the Tribunal.

(Emphasis supplied)

The larger bench further observed:

When a Tribunal is set up under an Act for adjudicating the disputes between the contending sides relating to the rights and privileges conferred under the Act, unless otherwise provided by law, the jurisdiction of the Tribunal is exclusive. However, this should not be inferred as a total ouster of the Court's jurisdiction. Where the Tribunal exceeds its authority or where it fails to exercise its power in accordance with law or where it has acted malafide, in such cases, this Court can and should interfere.

(emphasis supplied)

It appears from the above quoted two passages that in the cases of larger bench, the Tribunal allowed the appellants' applications of hardship and directed them to make deposits of varying degrees, which they failed to comply with. In the present case, the Tribunal did not at all consider the appellant's application on hardship even did not pass any order disposing of the same. The present case is thus sharply distinguishable with that of the larger bench. It rather matches the case of Dhaka Warehouse Ltd. In fact, the case in hand is better, because in the case of Dhaka Warehouse Ltd. the applications were rejected, but in this no order was passed on the application for exemption.

Under the facts and circumstances of the present case, the Tribunal ought to have dispensed with the deposit either unconditionally or subject to such condition as it may deem fit to impose or to allow time to deposit the demanded amount by the appellant at any time before disposal of the appeal.....”

In the instant case the Tribunal without considering the hardship application of the petitioner and without applying its discretion properly contemplated in the second provision of Section 194 of the Act, 1969 directed to the petitioner to deposit required amount as prescribed under Section 194. The facts of the case in hand is similar in the facts of the judgment referred hereinabove and as such the judgment passed in Writ Petition No. 697 of 2023 is applicable in the present case.

In view of the discussions made in above, we find substance in the submissions of the learned advocate for the petitioner and thus we are inclined to give a chance to the petitioner-company to press its appeal on merit by depositing a certain percent of the demanded duty and taxes.

Accordingly, the Rule is made absolute, however, without any order as to costs.

The order dated 09.07.2015 passed by the respondent No. 1 communicated vide Nothi No. CEVT/Case(Cus)-180/2015/67 dated 27.07.2015 dismissed the Appeal No. in CEVT/Case (Cus)-180/2015 for not complying with the provision of Section 194 of the Customs Act, 1969 (Annexure-E) without disposing the demanded duty is hereby declared to have been passed without lawful authority and the application for hardship

is allowed in a different form. The petitioner is directed to deposit 10% of the demanded amount of duty and taxes within 30 (thirty) days from the date of receipt of the copy of this judgment and order and the Tribunal is directed to hear and dispose of the appeal in accordance with law within 6 (Six) months thereafter. In default the Customs Authority will be at liberty to realize the demanded amount in accordance with law.

Communicate a copy of this judgment to respondent number 1.

Md. Iqbal Kabir, J:

I agree.

M.A.Hossain-B.O.