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W.A.No.2542 of 2024

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On	17.10.2024
Pronounced On	07.11.2024

CORAM:

THE HONOURABLE MR.JUSTICE R.SURESH KUMAR
and
THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.A.No.2542 of 2024
and
C.M.P.No.18162 of 2024

Nalin Gupta,
S/o.Late Shri Prem Gupta

... Appellant / Petitioner

Vs.

Commissioner of Customs,
Chennai-II Commissionerate,
Rajaji Salai, Customs House,
Chennai, Tamil Nadu – 600 001.

... Respondent / Respondent

Prayer: Appeal under Clause 15 of the Letters Patent, against the Order dated

08.08.2024 passed in W.P.No.20683 of 2024.

For Appellant : Mr.Sathish Sundar
for Mr.A.Ganesh

For Respondent : Mr.AR.L.Sundaresan
Additional Solicitor General
assisted by Mr.Rajnish Pathiyil
Senior Standing Counsel



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JUDGMENT

(Judgment of the Court was delivered by C.SARAVANAN, J.)

This Writ Appeal is directed against the Impugned Order dated 08.08.2024 passed by the Writ Court in W.P.No.20683 of 2024.

2. By the aforesaid Order, the Writ Court has disposed the writ petition with the following observations:-

“By consent of both sides, this Writ Petition is taken up and disposed of at the stage of admission itself.

2. Mr.Rajnish Pathiyil, learned Senior Panel Counsel, takes notice for the respondent.

3. This Writ Petition has been filed challenging the impugned Show Cause Notice No.131/2022-Gr-4 in F.No.S.Misc 131/2022-Gr-4 dated 28.09.2022 and forbearing the respondent from adjudicating the show cause notice dated 28.09.2022 being barred by limitation in terms of Section 28(9) of the Customs Act, 1962 (in short 'the Act') and proceedings are deemed to be concluded in view of second proviso of Section 28(9) of the Act.

4. The learned counsel for the petitioner submitted that the present show cause notice 28.09.2022 was issued by the respondent and the same is barred by limitation. However, he fairly submitted that the petitioner has filed a reply notice and the matter is at the stage of cross examination and is adjourned from March 2023 till date without any progress. He further submitted that the aspect of limitation was also raised before the authorities concerned, but they have decided to proceed with the adjudication, despite having no



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jurisdiction. The respondent had initiated the proceedings in respect of the impugned show cause notice only in June 2024, after the cross examination was allowed by the Tribunal in May 2023 and prior thereto, there was no communication by the respondent. There is no reason whatsoever which prevented the proper officer from determining the amount of duty or interest within the period of one year as provided under Section 28(9) of the Act. Hence, the petitioner is constrained to approach this Court to challenge the show cause notice on the aspect of limitation. Therefore, the petitioner cannot be forced to avail the alternate remedy and prayed for allowing the writ petition.

5. Learned Senior Panel Counsel appearing for the respondent would submit that the petitioner has participated in the enquiry and filed his reply. The matter is pending in the cross examination stage and it has been adjourned by the proper officer in terms of Section 28(9) of the Act. He further submitted that the respondent will complete the entire process and will pass orders.

6. This Court heard the learned counsel on either side and also perused the materials placed on record.

7. The preliminary objection of the petitioner is that the impugned order dated 28.09.2022 is non-est in law and time barred in view of Section 28(9) of the Act.

8. Considering the fact that the petitioner has filed his reply and the matter is pending at the stage of cross examination, the respondent is directed to complete the entire process and conclude the proceedings in terms of Section 28(9) of the Act.

9. With the above directions, this Writ Petition is disposed of. No costs. Consequently connected miscellaneous petitions are closed.”



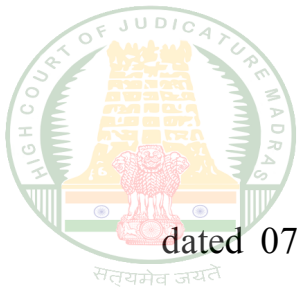
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WEB COP 3. The aforesaid Writ Petition was filed by the appellant herein for the following relief:-

“To call for the records on the file of the respondent pertaining to the impugned show cause notice viz Show Cause No.131/2022-Gr-4 in F.No.S.Misc 131/2022-Gr-4 dated 28.09.2022 forbearing the respondent from adjudicating the show cause notice dated 28.09.2022 being barred by limitation in terms of Section 28(9) of the Customs Act, 1962 and proceedings are deemed to be concluded in view of second proviso of Section 28(9) of the Customs Act, 1962 and quash the same.”

4. In this Writ Appeal, the principle ground of attack to the above mentioned Show Cause Notice dated 28.09.2022 is on the ground of limitation prescribed under Section 28(9) of the Customs Act, 1962. According to the appellant, the limitation has already expired long before on 27.09.2023 and therefore, the proceedings initiated by the Principle Commissioner of Customs, Preventive Commissionerate, Chennai-III in the Show Cause Notice dated 28.09.2022 bearing Ref.F.No.S.Misc.131/2022-Gr-4 had statutorily lapsed.

5. On the other hand, it is the contention of the respondent Customs Department that under Proviso to Section 28(9) of the Customs Act, 1962, the time period stands extended up to 27.09.2024 in view of Order/Communication



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dated 07.05.2024 of the Chief Commissioner of Customs, Chennai Customs

WEB COPY Zone, Custom House, Chennai, extending the period of limitation for passing Order in respect of Show Cause Notice F.No.S.Misc.131/2022-Gr-4 dated 28.09.2022.

6. As per Section 28(9) of the Customs Act, 1962, the proper officer has to determine the amount of duty or interest under Sub-Section (8) to Section 28 of the Customs Act, 1962,

- (a) within six months from the date of notice in respect of cases falling under clause (a) of sub-section (1);
- (b) within one year from the date of notice in respect of cases falling under sub-section (4).

7. The Show Cause Notice F.No.S.Misc.131/2022-Gr-4 dated 28.09.2022 relates to the period under Section 28(4) of the Customs Act, 1962. As per the first proviso to Section 28(9) of the Customs Act, 1962 where the proper officer fails to so determine the amount of duty or interest under Sub-Section (8) to Section 28 of the Customs Act, 1962 within the specified period therein, any officer senior in rank to the proper officer may, having regard to the circumstances of the case under which the proper officer was prevented from determining the amount of duty or interest under sub-section (8), extend the



period specified

WEB COPY i. in clause (a) to a further period of of six months and

ii. the period specified in clause (b) to a further period of one year.

8. Section 28(9) of the Customs Act, 1962 reads as under:-

“28. Recovery of [duties not levied or not paid or short-levied or short-paid] or erroneously.-

(1)

(2)

(9) The proper officer shall determine the amount of duty or interest under sub-section (8),-

(a) within six months from the date of notice in respect of cases falling under clause (a) of sub-section (1);

(b) within one year from the date of notice in respect of cases falling under sub-section (4):

Provided that where the proper officer fails to so determine within the specified period, any officer senior in rank to the proper officer may, having regard to the circumstances under which the proper officer was prevented from determining the amount of duty or interest under sub-section (8), extend the period specified in clause (a) to a further period of six months and the period specified in clause (b) to a further period of one year.

9. As per the second proviso to Section 28(9) of the Customs Act, 1962,



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where the proper Officer fails to determine within such extended period, such

proceeding shall be deemed to have concluded as if no notice had been issued.

Second proviso to Section 28(9) of the Customs Act, 1962 reads as under:-

“Provided further that where the proper officer fails to determine within such extended period, such proceeding shall be deemed to have concluded as if no notice had been issued.”

10. Further, under Sub-Section (9-A) to Section 28 of the Customs Act, 1962, where the proper officer is unable to determine the amount of duty or interest under sub-section (8) to Section 28 of the Customs Act, 1962, the law mandates that the proper Officer shall inform the person concerned the reason for non-determination of the amount of duty or interest under sub-section (8) and in such case, the time specified in sub-section (9) shall apply not from the date of notice, but from the date when such reason ceases to exist under the following circumstances:-

- (a) an appeal in a similar matter of the same person or any other person is pending before the Appellate Tribunal or the High Court or the Supreme Court; or
- (b) an interim order of stay has been issued by the Appellate Tribunal or the High Court or the Supreme Court; or
- (c) the Board has, in a similar matter, issued specific direction or order to keep such matter pending; or
- (d) the Settlement Commission has admitted an application made by the person concerned.



WEB COPY 11. Sub-Section (9-A) to Section 28 of the Customs Act, 1962 reads as

under:-

“(9-A) Notwithstanding anything contained in sub-section (9), where the proper officer is unable to determine the amount of duty or interest under sub-section (8) for the reason that-

- (a) an appeal in a similar matter of the same person or any other person is pending before the Appellate Tribunal or the High Court or the Supreme Court.
- (b) An interim order of stay has been issued by the Appellate Tribunal or the High Court or the High Court or the Supreme Court; or
- (c) the Board has, in a similar matter, issued specific direction or order to keep such matter pending; or
- (d) the Settlement Commission has admitted an application made by the person concerned,

the proper officer shall inform the person concerned the reason for non-determination of the amount of duty or interest under sub-section (8) and in such case, the time specified in sub-section (9) shall apply not from the date of notice, but from the date when such reason ceases to exist.”

12. We had certain doubts as to why there was a delay in taking up the case for final disposal within the limitation period prescribed under Section 28(9) of the Customs Act, 1962 by the authority?



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WEB COPY 13. We also felt that there could be a deliberate attempt on the part of the respondent Customs Department to let go of the liability of the appellant pursuant to the Show Cause Notice dated 28.09.2022 in view of the delay in determining the amount of duty and interest. Therefore, on 20.08.2024 we called upon the respondent Customs Department to file an affidavit explaining the reasons for not passing the order within the stipulated time under Section 28(9) of the Customs Act, 1962.

14. On **30.09.2024**, we had also directed the respondent Customs Department to produce the files regarding disciplinary action initiated against the erring officer, who led to the delay in passing order in the above mentioned Show Cause Notice dated 28.09.2022.

15. An affidavit dated 17.10.2024 was filed by Mr.H.Rajasekar, the Assistant Commissioner (Legal) attached to the Office of the Commissioner of Customs, Chennai-II (Import) Commissionerate, Custom House, Chennai – 1.

It is extracted hereunder:-

“1. I submit that I am working as Assistant Commissioner (Legal) and I am swearing this Affidavit on behalf of the Respondent. I am conversant and well acquainted with the facts



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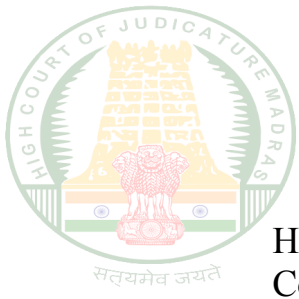
of the case based on the records made available in this office from the concerned section. This Hon'ble Court on **30.09.2024** had directed the Respondent to produce the files with regard to the disciplinary action initiated against the erring officials who had kept the file without filing an appeal from 16.06.2023 till 29.04.2024 and to also file a supporting affidavit in this regard and therefore in compliance of the same, the present Affidavit is being filed. For immediate reference, the relevant portion of the daily order dated 30.09.2024 in W.A.No.2542 of 2023 is extracted hereunder:

“2. For continuation of arguments and to produce the necessary files dealing with the steps taken towards initiating disciplinary action against the erring officials who kept the file without filing an appeal from 16.06.2023 till 29.04.2024 without any plausible reason and to file a supporting affidavit to that effect, learned Additional Solicitor General seeks time till 16.10.2024.”

2. I submit that the above direction was intimated to the Respondent vide letter dated 30.09.2024 by the Standing Counsel for the Department. In this regard, pursuant to the file noting of the Chief Commissioner dated 19.06.2024 which is also extracted hereunder, disciplinary action against the erring officers were initiated:

“This is outright lapse and dereliction of duty of officers of Preventive Commissionerate & Import Commissionerate which is detrimental to the interests of Revenue. For this inaction of officers adversely affecting Revenue, appropriate Departmental proceedings should be instituted. The Pr. Commissioner Preventive & Commissioner Import must, within 2 weeks refer the names of these officers responsible along with relevant papers to Pr. Commissioner of Customs, General for inquiry and consequent Departmental action against the concerned officers immediately.”

3. I submit that pursuant to the above noting of the Chief Commissioner, explanation from the erring officers had been called for and the officers had also submitted their explanations.



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Having found that the explanations were not satisfactory, the Competent Authority has issued charge memorandums dated 15.10.2024 to the two erring officers, i.e., Mr.Vinoth Kumar R, Examiner and Mr.Napolean G, Examiner under Rule 16 of the CCS (CCA) Rules, 1965 for misconduct and the same would be proceeded with in accordance with law and as per the CCS (CCA) Rules, 1965.

4. I submit that in this regard the Charge Memo as well as the Statement of Imputation of Misconduct in support of the Articles of Charge is also submitted before the Hon'ble Court in the form of a Typed Set.”

16. The respondent Customs Department had also enclosed copies of the Charge Memorandums issued on 15.10.2024 to the following two persons:-

Sl. No.	Date	Charge Memo No.	Name of the Examiner
1.	15.10.2024	GEN/VIG/MISC/726/2024-CIU	Nepolean G
2.	15.10.2024	GEN/VIG/MISC/726/2024-CIU	Vinoth Kumar R

17. At this stage, we do not want to make any observation on the disciplinary proceedings initiated against these two persons. The case of the appellant is that limitation for passing order had expired on 27.09.2023 itself under Section 28(9) of the Customs Act, 1962.

18. In support of his contention, the learned counsel for the appellant has relied on the following decisions rendered by the Hon'ble Supreme Court,

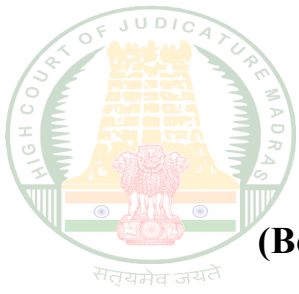


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Bombay High Court, Gujarat High Court as well as this Court:-

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- i. **Institute of Chartered Accountants of India Vs. L.K.Ratna and others, (1986) 4 SCC 537.**
- ii. **Union of India and others Vs. E.G.Nambudiri, (1991) 3 SCC 38.**
- iii. **Neelima Misra Vs. Harinder Kaur Paintal and others, (1990) 2 SCC 746.**
- iv. **Yoginath D.Bagde Vs. State of Maharashtra and another, (1999) 7 SCC 739.**
- v. **Sahara India (Firm), Lucknow Vs. Commissioner of Income Tax, Central-I and another, (2008) 14 SCC 151.**
- vi. **Steel Authority of India Vs. Collector of Customs, Bombay, (2001) 9 SCC 198.**
- vii. **State of Punjab and others Vs. Shreyans Industries Limited and others, (2016) 4 SCC 769.**
- viii. **Maneklal Chunilal & Sons Limited Vs. The Commissioner of Income Tax (Central) Bombay, 1953 SCC OnLine Bom 38.**
- ix. **Flexoplast Abrasives (India) Limited Vs. Union of India and others, 1980 (6) E.L.T. 513 (Bom.).**
- x. **Wipro Products Limited Vs. Union of India, 1981 (8) E.L.T. 531**



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(Bom.).

xi. **Karnavati Club Limited. Vs. Union of India, 2010 (20) S.T.R. 169**

(Guj.).

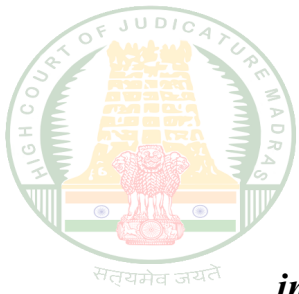
xii. **C.Solomon Selvaraj Vs. Principal Commissioner of Customs, Chennai in W.P.No.1738 of 2021 dated 13.10.2023.**

19. From the case of '**C.Solomon Selvaraj** (cited supra) of this Court, the learned counsel for the appellant has referred to Paragraphs 53 to 59. They are reproduced below:-

“53. On the other hand, in respect of cases filing under Section 28(9)(4) of the Customs Act, 1962, the proper officer has to determine the amount of duty or interest under Sub-Section (8) of the Customs Act, 1962, within a period of one year from the date of the notice.

54. Ordinarily, the said Show Cause Notice bearing Reference F.No.DRI/CZU/VIII/48/ENQ-1/INT-50/2017 dated 18.06.2018 ought to have adjudicated by the proper officer on or before 17.06.2019 in terms of Section 28(9)(b) of the Customs Act, 1962.

55. Under proviso to Section 28(9) of the Customs Act, 1962 after amendment, any officer senior in rank to the “proper officer” may extend the period specified in clause (a) by a further period of six months and the period specified in clause (b) by a further period of one year having regard to the circumstances under which the “proper officer” was prevented from determining the amount of duty or interest under Sub-Section (8) to Section 28 of the Customs Act, 1962.



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56.If the proper officer fails to determine the amount or interest Sub-Section (8) to Section 28 of the Customs Act, 1962, within such extended period, the show cause proceeding issue shall be deemed to have concluded as if no notice had been issued.

57.Thus, the period specified in Section 28(9)(a) or (b) of the Customs Act, 1962 as the case may be could be extended by a senior officer in rank to the proper officer for a period of six months or one year as the case may be, if the “proper officer” was prevented from determining the amount, duty or interest within the period specified therein.

58.To decide whether the period was extended for completing the show cause for determining the duty within the limitation prescribed under Section 28(9) of the Customs Act, 1962, the originals of the files were called for and examined.

59.Facts on record indicates that the relied upon documents were sought by the petitioner vide letter dated 15.10.2018. The relied upon documents were sent to the petitioner after obtaining permission of the Commissioner-VIII along with notice dated 19.11.2018.”

20. On the other hand, it is the contention of the respondent Customs Department that although the initial period of limitation had expired on **27.09.2023**, however, by virtue of the extension granted by the Chief Commissioner of Customs, Chennai Customs Zone, Custom House, Chennai on **07.05.2024** under first proviso to Section 28(9) of the Customs Act, 1962, the time for completing the assessment was still available till **27.09.2024** and



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therefore, the Impugned Order of the learned Single Judge dismissing/disposing

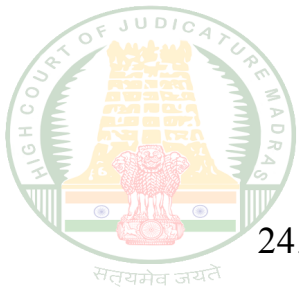
the Writ Petition, does not call for any interference.

21. The learned Additional Solicitor General of India has relied on the following decision of this Court:-

- i. **C.Solomon Selvaraj Vs. Principal Commissioner of Customs, Chennai** in **W.P.No.1738 of 2021** dated **13.10.2023**.

22. The learned Additional Solicitor General of India would submit that question for extending the limitation under the proviso to Section 28(9) of the Customs Act, 1962 will arise only after the initial period of six months or one year as the case may be had expired. It is therefore submitted that since the Chief Commissioner of Customs, Chennai Customs Zone, Custom House, Chennai has exercised the power on **07.05.2024**, the respondent Customs Department should be allowed to proceed with the Show Cause Notice dated 28.09.2022 bearing Ref.F.No.S.Misc.131/2022-Gr-4.

23. We had heard at length over a period of time. We have considered the submissions of the learned counsel for the appellant and the learned Additional Solicitor General of India for the respondent.



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24. The point for consideration is whether the proceedings initiated in the

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25. The facts on record reveal that the Show Cause Notice was issued on 28.09.2022. The said Show Cause Notice was issued under Section 28(4) of the Customs Act, 1962 read with Section 124 of the Customs Act, 1962 by the Commissioner of Customs, Chennai-II (Import) Commissionerate and answerable to the same Officer.

26. The appellant made a request on 10.04.2023 for cross-examination of the persons whose names were shown in the said Show Cause Notice dated 28.09.2022. This was even without a reply to the Show Cause Notice.

27. The request dated 10.04.2023 of the appellant was rejected by the Deputy Commissioner of Customs (Adjudication), Chennai-III vide a communication bearing FS/GEN/ADJ/COMM/370/2022-Adjn, DIN No.20230473MY000092149 dated 19.04.2023.



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28. Thus, it is evident that the request on 10.04.2023 was made almost after the expiry of a period of six months and ten days from the date of receipt of the Show Cause Notice dated 28.09.2022. This request was turned down by an Officer inferior to the Adjudicating Officer to whom the petitioner was made answerable to the said Show Cause Notice dated 28.09.2022.

29. Aggrieved by the aforesaid Order dated 19.04.2023 of the Deputy Commissioner of Customs (Adjudication), Chennai-III, strangely, an appeal was filed by the appellant vide Appeal Diary No.401592023 before the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) as if the Commissioner of Customs, Chennai-I Commissionerate had passed Order and arrayed the Commissioner of Customs, Chennai-I Commissionerate as the respondent and that the appellant was aggrieved by an Order of the Commissioner of Customs, Chennai-I Commissionerate.

30. Curiously, the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) has also entertained the appeal at the diary stage and had allowed the same vide its Order dated 26.05.2023 after hearing the appellant and the



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respondent on 04.05.2023 in the light of the decision of the Hon'ble Supreme

WEB COPY Court in **Andaman Timber Industries Vs. Commissioner of Central Excise,**

Kolkata-II, [2015 (324) E.L.T. 641 (S.C.)] and the decision of the Hon'ble

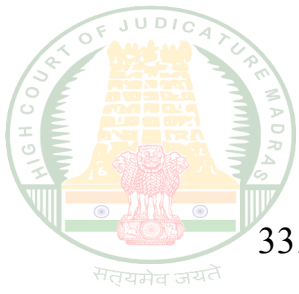
Supreme Court in **M/s.Kanungo & Co. Vs. Collector of Customs, Calcutta**

and others, [1983 (13) E.L.T. 1486 (S.C.)] and few other decisions of CESTAT

referred to the said order.

31. Clearly, the order that was passed by the Deputy Commissioner of Customs (Adjudication), Chennai-III on 19.04.2023 bearing FS/GEN/ADJ/COMM/370/2022-Adjn, DIN No.20230473MY000092149 was itself without jurisdiction even though the request dated 10.04.2023 of the appellant was addressed to the Principle Commissioner of Customs, Preventive Commissionerate, Chennai-III.

32. That apart, even if a wrong Order was passed by the the Deputy Commissioner of Customs (Adjudication), Chennai –III, the appellate remedy if any for the appellant, would have been only before the Appellate Commissioner under Section 128 of the Customs Act, 1962 and not before CESTAT under Section 129-A of the Customs Act, 1962.



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33. As per Section 128 of the Customs Act, 1962, any person aggrieved

by any decision or Order passed under the Act by an Officer of customs who is lower in rank than a Principal Commissioner of Customs or Commissioner of Customs, may appeal to the Commissioner (Appeals) within sixty days from the date of the communication to him of such decision or Order. Thus, the Order dated 19.04.2023 of the Deputy Commissioner of Customs (Adjudication), Chennai-III bearing FS/GEN/ADJ/COMM/370/2022-Adjn, DIN No.20230473MY000092149 was passed without jurisdiction. As a sequitur, Order dated 04.05.2023 allowing the request of the appellant by CESTAT in Appeal Diary No.401592023 was also without jurisdiction.

34. As per Section 129-A (1) of the Customs Act, 1962, any person aggrieved by an Order of the following authorities may file an appeal before CESTAT, namely:-

- (a) an order passed by the Commissioner (Appeals) under section 128-A;
- (b) an order passed by the Board or the Appellate Principal Commissioner of Customs or Commissioner of Customs under section 128, as it stood immediately before the appointed day;
- (c) an order passed by the Board or the Principal Commissioner of Customs or Commissioner of Customs under section 128, as it stood immediately before the appointed day;
- (d) an order passed by the Board or the Principal



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Commissioner of Customs or Commissioner of Customs, either before or after the appointed day, under section 130, as it stood immediately before that day.

35. There is also an embargo on certain appeal to be filed before CESTAT under first proviso to Section 129-A (1) of the Customs Act, 1962. The first proviso reads as follows:-

“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) any goods loaded in a conveyance for importation into India, but which are not unloaded at their place of destination in India, or so much of the quantity of such goods as has not been unloaded at any such destination if goods unloaded at such destination are short of the quantity required to be unloaded at that destination;
- (c) payment of drawback as provided in Chapter X, and the rules made thereunder.

36. Further, as per the second proviso to Section 129-A (1) of the Customs Act, 1962, CESTAT may in its discretion refuse to admit an appeal in respect of an Order referred to in Clause (b), (c) or (d) of Section 129-A (1) of the Customs Act, 1962 where

- i. the value of the goods confiscated without option having been given to the owner of the goods to pay a fine in lieu of confiscation under section 125; or
- ii. in any disputed case, other than a case where the determination of any question having a relation to the



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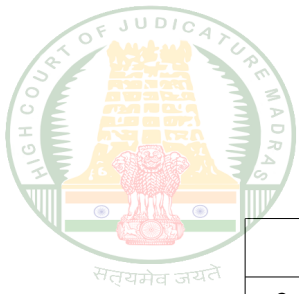


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- rate of duty of customs or to the value of goods for purposes of assessment is in issue or is one of the points in issue, the difference in duty involved or the duty involved; or
- iii. the amount of fine or penalty determined by such order.

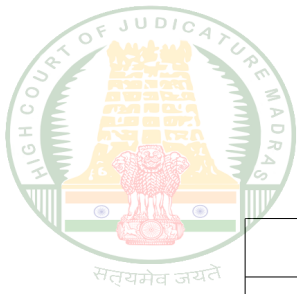
37. For the sake of clarity, Section 128 and Section 129-A (1) of the Customs Act, 1962 are reproduced below:-

Section 128	Section 129-A (1)
<p>128. Appeals to Commissioner (Appeals).-</p> <p>(1) Any person aggrieved by any decision or order passed under this Act by an officer of customs lower in rank than a Principal Commissioner of Customs or Commissioner of Customs may appeal to the Commissioner (Appeals) within sixty days from the date of the communication to him of such decision or order:</p> <p>Provided that the Commissioner (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of sixty days, allow it to be presented within a further period of thirty days.</p> <p>(1-A) The Commissioner (Appeals) may, if sufficient cause is shown at any stage of hearing</p>	<p>129-A (1) Appeals to the Appellate Tribunal.-</p> <p>(1) Any person aggrieved by any of the following orders may appeal to the Appellate Tribunal against such order-</p> <p>(a) a decision or order passed by the Principal Commissioner of Customs or Commissioner of Customs as an adjudicating authority;</p> <p>(b) an order passed by the Commissioner (Appeals) under section 128-A;</p> <p>(c) an order passed by the Board or the Appellate Principal Commissioner of Customs or Commissioner of Customs under section 128, as it stood immediately before the appointed day;</p>



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Section 128	Section 129-A (1)
<p>of an appeal, grant time, from time to time, to the parties or any of them and adjourn the hearing of the appeal for reasons to be recorded in writing:</p> <p>Provided that no such adjournment shall be granted more than three times to a party during hearing of the appeal.</p> <p>(2) Every appeal under this section, shall be in such form and shall be verified in such manner as may be specified by rules made in this behalf.</p>	<p>(d) an order passed by the Board or the Principal Commissioner of Customs or Commissioner of Customs, either before or after the appointed day, under section 130, as it stood immediately before that day:</p> <p>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,-</p> <p>(a) any goods imported or exported as baggage;</p> <p>(b) any goods loaded in a conveyance for importation into India, but which are not unloaded at their place of destination in India, or so much of the quantity of such goods as has not been unloaded at any such destination if goods unloaded at such destination are short of the quantity required to be unloaded at that destination;</p> <p>(c) payment of drawback as provided in Chapter X, and the rules made thereunder:</p> <p>Provided further that the Appellate Tribunal may, in its</p>



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Section 128	Section 129-A (1)
	<p>discretion, refuse to admit an appeal in respect of an order referred to in clause (b) or clause (c) or clause (d) where-</p> <p>(i) the value of the goods confiscated without option having been given to the owner of the goods to pay a fine in lieu of confiscation under section 125; or</p> <p>(ii) in any disputed case, other than a case where the determination of any question having a relation to the rate of duty of customs or to the value of goods for purposes of assessment is in issue or is one of the points in issue, the difference in duty involved or the duty involved; or</p> <p>(iii) the amount of fine or penalty determined by such order.</p>

38. If the said Order dated 19.04.2023 was passed by Principal Commissioner of Customs or the Commissioner of Customs, Chennai-I Commissionerate the so called appeal filed by the appellant in Appeal Diary No.401592023 which was allowed on 26.05.2023 vide Interim Order No.40048



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of 2023 could have been entertained by CESTAT under Section 129-A of the
WEB CUSTOMS Act, 1962.

39. Thus, Interim Order No.40048 of 2023 dated 26.05.2023 that was passed by CESTAT in Appeal Diary No.401592023 itself was a nullity and without jurisdiction. The Application in Appeal Diary No.401592023 is not permissible even under Rule 28C of CESTAT (Procedure) Rules, 1982. As such, CESTAT ought not to have been entertained such an appeal.

40. An appeal, if any, ought to have been filed against the Interim Order No.40048 of 2023 dated 26.05.2023 under Section 130 of the Customs Act, 1962 within a period of 180 days from the date of its communication. Thus, the appeal if any ought to have been filed by 30.11.2023. Ideally, a Writ Petition ought to have been filed as Order dated 26.06.2023 of CESTAT in Appeal Diary No.401592023 as it was a nullity in the eye of law and without jurisdiction.

41. Be that as it may, as against the aforesaid Order passed by CESTAT on 26.05.2023 which is said to have been communicated to the respondent on 30.05.2023, a decision was taken to file an appeal before this Court under Section 130 of the Customs Act, 1962. This is evident from a reading of letter dated 03.05.2024 of the Chief Commissioner of Customs (In-Situ), Chennai-III



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(Preventive) Commissionerate, Office of the Principal Commissioner of

WEB COPY Customs (Preventive), Chennai addressed to the Commissioner of Customs,

Chennai II Import Commissionerate, Chennai seeking for extension of time for

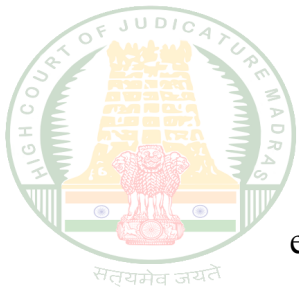
passing Order under the proviso to Section 28(9) of the Customs Act, 1962.

The said communication reads as follows:-

“3. During the course of adjudication proceedings, the noticee's request for cross-examination of the co-noticees/witnesses was denied vide this office letter dated 19.04.2023. Aggrieved by the said denial, the party went on an appeal before the Hon'ble CESTAT, and obtained an Interim Order No.40048/2023 dated 26.05.2023 wherein Hon'ble CESTAT has set aside the communication denying right to cross-examination as not sustainable and directed the adjudicating authority to allow cross-examination of any person/whose statements are sought to be relied upon or used against the petitioner before passing the adjudication order.

4. As the said order was not acceptable, Preventive Commissionerate requested Import Commissionerate to file an appeal against the Interim Order before the Hon'ble High Court within the time limit. The file was forwarded to Import Commissionerate along with this office letter dated 16.06.2023 (copy enclosed) enclosing Grounds of Appeal for filing the appeal on 16.06.2023. Vide letters dated 06.11.2023 and 04.04.2024. CCO was informed by this Commissionerate that the said file had been transferred to Import Commissionerate, under intimation to Import Commissionerate.

5. At this juncture, Import Commissionerate has returned the said file to Preventive Commissionerate on 29.04.2024, with a letter dated 29.04.2024 (copy enclosed), stating that inadvertently the file was not attended during transfer of charges and the time period for filing appeal against the Hon'ble CESTAT order dated 26.05.2023 before the Hon'ble High Court had expired; that the Adjudicating Authority may proceed with the adjudication proceedings allowing cross-



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examination of the witnesses as directed by Hon'ble CESTAT.

6. It is submitted that the Show Cause Notice in the impugned case has been issued under Section 28(4) of the Customs Act, 1962 on 28.09.2022 and the time limit for completing the adjudication as per Section 28(9)(b) of the Act *ibid*, had expired on 28.09.2023.

7. In view of the foregoing, it is requested that the Chief Commissionerate of Customs may kindly extend the time limit for Adjudication in the instant case by 1 year as per second proviso to the Section 28(9) of the Customs Act, 1962. The extension will facilitate cross-examination requested by the noticee and comprehensive examination of the case records/submissions of the importer to arrive at a judicious decision within the canons of natural justice.”

42. Thus, a reading of the above communication/request dated 03.05.2024 of the Chief Commissioner of Customs (In-Situ), Chennai-III (Preventive) Commissionerate, Office of the Principal Commissioner of Customs (Preventive), Chennai addressed to the Commissioner of Customs, Chennai II Import Commissionerate, Chennai, seeking an extension of time for passing Order under the first proviso to Section 28(9) of the Customs Act, 1962 indicates that the Office of the Principal Commissioner of Customs (Preventive), Chennai had requested the Commissioner of Customs, Chennai II Import Commissionerate, Chennai to file an appeal before this Court purportedly under Section 130 of the Customs Act, 1962 although ideally a Writ Petition ought to have been filed against Interim Order No.40048 of 2023 dated 26.05.2023, as the Order was passed without jurisdiction.

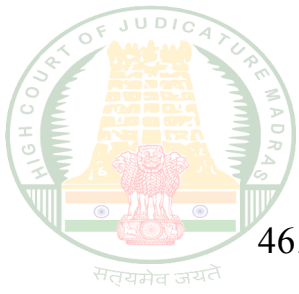


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WEB COPY 43. Thus, it is clear that the Principal Commissioner of Customs (Preventive), Chennai proposed to file an appeal against the Interim Order No.40048 of 2023 dated 26.05.2023 in Appeal Diary No.401592023 secured by the appellant by forwarding Grounds of Appeal to the Commissioner of Customs, Chennai II Commissionerate, Chennai.

44. It is strange that the Commissioner of Customs, Chennai II Import Commissionerate, Chennai, has returned the file to the Office of the Principal Commissioner of Customs (Preventive), Chennai on **29.04.2024** stating that the file was “**inadvertently**” not attended during transfer of charges and the time period for filing an appeal against CESTAT Interim Order dated 26.05.2023 in Appeal Diary No.401592023 before the High Court had expired and that the adjudicating authority may therefore proceed with the adjudication by allowing cross-examination of the witnesses as directed by CESTAT.

45. It appears that subsequently the cross-examination was also allowed on 19.06.2024 pursuant to Interim Order dated 26.05.2023 of CESTAT in Appeal Diary No.401592023.



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46. It is thereafter W.P.No.20683 of 2024 was filed on 22.07.2024 by the appellant before this Court which has culminated in the Impugned Order dated 08.08.2024 of the Writ Court.

47. A reading of Section 28(9) (a) and (b) of the Customs Act, 1962 makes it clear that at the expiry of six months or one year as the case may be, from the date of Show Cause Notice, the concerned proper officer who was to adjudicate the Show Cause Notice would have become *functus officio*. It is only thereafter, any senior officer in rank to the proper officer can extend the period by six months or one year as is stipulated in Section 28(9)(a) and (b) of the Customs Act, 1962 under proviso to it.

48. It is therefore clear that the question of granting extensions under the first proviso to Section 28(9) of the Customs Act, 1962 will arise only after the limitation for passing Order determining duty or interest, as the case may be, within the time stipulated under Section 28(9) of the Customs Act, 1962 had expired.

49. Therefore, only after the period of six months or one year, as the case may be, the senior officer could extend the period by another six months or one



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year specified in Clause (a) and Clause (b) under the first proviso to Section

WEB 28(9) of the Customs Act, 1962. The second proviso to Section 28(9) of the Customs Act, 1962, further contemplates abatement of the proceedings if after the extension period under the first proviso to Section 28(9) of the Customs Act, 1962, no Orders are passed.

50. The clarification of the Commissioner of Customs, NS-IV, Mumbai Customs Zone-II, Nhava Sheva, Raigad-400 707 in Standing Order No.12/2018 dated 25.04.2018 was issued in the wake of amendment to Section 28(9) of the Customs Act, 1962 vide Finance Act, 2018 (13 of 2018). The clarification issued therein itself is a non-application of mind as the second proviso to Section 28(9) of the Customs Act, 1962 deals with abatement of the proceedings after extension is granted. It is irrelevant.

51. The argument of the learned counsel for the appellant that the standing orders have been issued by various Commissionerates for the procedures to be adopted for processing of adjudication files is merely a guideline for ensuring that there is no lapsing of proceeding under Section 28 of the Customs Act, 1962. The Standing Orders of other Commissionerates were issued in the light of the amendment to Section 28 of the Customs Act, 1962,



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which prescribed the time limit for adjudication that where there are justifiable

ground to seek extensions as provided under second proviso (actually first proviso) to Section 28(9) of the Customs Act, 1962, adjudication files should be put up before the officer authorized to grant such extensions atleast 30 days prior to the time limit of six months or one year as the case may be.

52. In any event, the said Standing Order No.12/2018 dated 25.04.2018 of another Commissionerate cannot be said to be binding either on the respondent Customs Department or on this Court as it has no statutory force of law. At best, it is an procedure to be adopted by the ranks within whose jurisdiction it has been issued.

53. In this case, the appellant has not been filed a reply to the Show Cause Notice dated 28.09.2022. Only, a request was made by the appellant for cross-examining the persons named in the Show Cause Notice dated 28.09.2022 as per the decisions of the Hon'ble Supreme Court in **Andaman Timber Industries** (cited supra) and in **M/s.Kanungo & Co.** (cited supra), long after the receipt of Show Cause Notice dated 28.09.2022 on 10.04.2023.

54. As mentioned above, the request was rejected by the Deputy



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Commissioner of Customs (Adjudication), Chennai-III vide a communication

WEB COPY bearing reference FS/GEN/ADJ/COMM/370/2022-Adjn, DIN

No.20230473MY000092149 dated 19.04.2023, even though the said Officer was not concerned with the adjudication of the Show Cause Notice dated 28.09.2022. Thus, the proceedings got derailed for further illegality by the said Officer.

55. The decision taken to file an appeal before the High Court was transferred on 16.06.2023. The file was returned by the Commissioner of Customs, Chennai II Import Commissionerate, Chennai, on 29.04.2024 as the limitation for filing an appeal against CESTAT Order dated 26.05.2023 had expired.

56. Therefore, a decision appears to have been rightly taken on 29.04.2024 for getting extension. It is also strange to note that no steps was taken by the Customs Department to file appeal with an application for condonation of delay. That apart, since the Order of the Deputy Commissioner of Customs (Adjudication), Chennai-III dated 19.04.2023 bearing reference FS/GEN/ADJ/COMM/370/2022-Adjn, DIN No.20230473MY000092149 was without jurisdiction, the correct remedy that was available was to file a Writ Petition under Article 226 of the Constitution of India.

57. There are indications that the entire statutory safeguards under the



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Acts have been attempted to be prevaricated by the Officials of the Customs

Department to allow the appellant and the co-noticees go scot free in the show

cause proceedings. There appears to be large-scale complicity on the part of the

officials of the Customs Department from the senior to junior ranks to allow the

appellant and his co-noticee to get away. Mere initiation of the disciplinary

proceedings against two officials is not sufficient. The seniors, who are involved

also should be proceeded. The Deputy Commissioner of Customs

(Adjudication), Chennai-III, who passed Order dated 19.04.2023 bearing

reference FS/GEN/ADJ/COMM/370/2022-Adjn, DIN

No.20230473MY000092149 should be also explained as to why he decided to

pass the Order when he was not the proper officer to adjudicate the Show Cause

Notice. He should be proceeded and if he was acting on the instructions of his

superiors. Such superiors should be also proceeded departmentally.

58. Since the cross-examination of the witnesses was allowed and

conducted on 19.06.2024, W.P.No.20683 of 2024 filed on 22.07.2024 was

clearly without any merits and has been rightly rejected. The respondent is

directed to complete the adjudication proceedings as expeditiously as possible.

The time taken before various forums including this Court i.e., both before the

Writ Court and before us in this Writ Appeal till the date of receipt of this copy

shall stand excluded for computation of limitation under Section 28(9) of the



Customs Act, 1962.

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59. In view of the above discussion, we find no reasons to interfere with the Impugned Order dated 08.08.2024 in W.P.No.20683 of 2024 passed by the learned Single Judge of this Court.

60. While disposing the present Writ Appeal, we also make it clear that the question of entertaining an application for cross-examination of the witnesses without any reply on merits by a notice in a show cause proceeding is to be eschewed and should not to be allowed.

61. We also direct that the Principal Commissioner of Customs (Preventive), Chennai to refer the entire file to the Vigilance Department starting from the events surrounding the passing of the Order dated 19.04.2023 bearing reference FS/GEN/ADJ/COMM/370/2022-Adjn, DIN No.20230473MY000092149 by the Deputy Commissioner of Customs (Adjudication), Chennai-III and initiate a detailed probe and thereafter initiate appropriate proceedings for corruption, if any, not only against two (2) Subordinate Officers of the Customs Department against whom proceedings said to have been initiated but also against those Senior Officers of the Customs



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Department who may have shown complicity and were responsible in the delay

in the adjudication of Show Cause Notice dated 28.09.2022 by perpetrating fraud on the Customs Department. There is a large scale subterfuge and prevarication of safeguards. The above proposal shall be in addition to the disciplinary proceedings under the provisions of the Central Civil Services Rules or such other rules as may be applicable to the officers of the Customs Department against all those officers involved in the fraud.

62. The respondent shall file a status report regarding the steps taken in this direction within six months before this Court from today.

63. For the reasons stated above, we are of the view that the present writ appeal is liable to be dismissed.

64. This Writ Appeal has become infructuous in the light of communication dated 07.05.2024 of the Chief Commissioner of Customs, Chennai Customs Zone, Custom House, Chennai, extending the period of limitation under the first proviso to section 28(9) of the Customs Act, 1962.

65. In the result, this Writ Appeal is dismissed. No costs. Connected



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Civil Miscellaneous Petition is closed.

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66. List this Appeal on 9th of June 2025 for reporting compliance.

[R.S.K., J.]

[C.S.N., J.]

07.11.2024

Index : Yes/No
Internet : Yes/No
Speaking Order/Non-Speaking Order
Neutral Citation : Yes/No

arb

To

Commissioner of Customs,
Chennai-II Commissionerate,
Rajaji Salai, Customs House,
Chennai, Tamil Nadu – 600 001.



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R.SURESH KUMAR, J.
and
C.SARAVANAN, J.

arb

Pre-Delivery Judgment in W.A.No.2542 of 2024



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07.11.2024