(2014) 07 BOM CK 0353

In the Bombay High Court

Case No : Writ Petition No. 2031 of 2012

Lalit Pukhraj Deshlahara APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 15-07-2014

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2015) 321 ELT 218

Hon'ble Judges : S.C. Dharmadhikari, J;B.P. Colabawalla, J

Bench : Division Bench

Advocate : K.R. Choudhary i/by Ashok Shetty, R.V. Shetty and Rita Joshi, Advocate for the Appellant; S.S. Pakale and Suchitra Kamble, Advocate for the Respondent;

Judgement

1. This Writ Petition under Article 226 of the Constitution of India is gross abuse of the writ jurisdiction of this Court. The Petitioner claims to be manufacturer of domestic appliances, namely, mixer, grinder and parts thereof under the brand name "Cellonex" falling under Chapter sub-heading 8509.00 of the Schedule to the Central Excise Tariff Act, 1985.

2. It is the case of the Petitioner that there was partnership firm and which was engaged in manufacturing of these goods. The manufacturing activities were commenced from 7-4-1987. The requisite formalities to have the trademark registered were complied with and later on the grievance is that the Petitioner became owner of this brand. The Petitioner filed the requisite declarations and sought exemption from payment of duty on the said mixers and grinders manufactured by him under SSI Exemption Notification No. 16/97-C.E., dated 1-4-1997. It is the case of the Petitioner that the visit was paid by the officers of the Headquarters (Preventive) of the Central Excise Commissionerate at Mumbai and the inquiries were made. Upon the inquiries being made, the statements of employees were recorded. There was seizure effected. Later on the show cause notice came to be issued alleging that the Petitioner claims to be manufacturing

the grinders, mixers and parts thereof, but the brand name belongs to a distinct entity. Therefore, contravention of the relevant provisions of the Central Excise Act, 1944 and Rules was alleged. The reply was given to the show cause notice after which the personal hearing was granted. The order came to be passed on 14-2-2000 demanding the duty of central excise and levying the penalty.

3. Aggrieved and dissatisfied with this order an Appeal was preferred and the Petitioner does not dispute that this Appeal came to be dismissed for non-compliance with the condition of pre-deposit. The Tribunal thus held that unless and until the conditions as imposed by it are complied with it cannot hear the Appeal on merits.

4. Being aggrieved and dissatisfied with such an order of the Tribunal the first Writ Petition was filed and which is bearing No. 1097/2003. That challenged the orders dated 28-4-2001 and 16-8-2001. This Court by an order dated 21-4-2003 directed the Petitioner to deposit a sum of Rs. 13,10,581/- towards the duty liability and within eight weeks from the date of the said order. The Petitioner complains that there were several difficulties and this order could not be complied with. Therefore, the Writ Petition was dismissed on 30-6-2003 for noncompliance with this Court''s order.

5. Then the Petitioner claims to have addressed several letters personally as also through his Advocate and for consideration of his case sympathetically. The Petitioner filed another Writ Petition being Writ Petition No. 1723/2011. That Writ Petition came to be dismissed in default on 11-10-2011. The Notice of Motion No. 588/2011 was preferred seeking restoration of the Writ Petition and setting aside the earlier order. That Notice of Motion was, according to the Petitioner, granted and the Writ Petition was restored. However, on the own showing of the Petitioner, the said Writ Petition came to be dismissed on 2-2-2012 holding that there are no changed circumstances. The original order dated 30-6-2003 having not been complied with this Court held that it cannot assist the Petitioner in writ jurisdiction.

6. After this Writ Petition was dismissed the Petitioner claims to have paid or deposited the duty amount of Rs. 13,10,581/-. After the amount was deposited and the Petitioner sought restoration of his appeal by making an application before the Tribunal, the Tribunal did not pass any order as is now admitted, but this restoration application was withdrawn by the Petitioner. The Petitioner then claims that there is an order at Annexure-X to the petition and in which, according to the Petitioner, the Tribunal records this withdrawal of the application for restoration of the Appeal. That order is dated 15-5-2012.

7. We do not see how after the Petitioner on his own approaches the Tribunal and seeks sympathy and equity by urging that the Appeal be restored to the file and heard on merits that the Petitioner now can file another Writ Petition and seeking the same reliefs from this Court. It was open for the Petitioner to seek restoration of the Appeal before the Tribunal. Having filed the restoration

application claiming that the order of pre-deposit passed in the year 2001 by the Tribunal is complied with belatedly, but not pressing the application for restoration that the Petitioner cannot approach this Court and in writ jurisdiction. The Writ Petition seeks the very relief which was the subject matter of the restoration application in the Tribunal. That having been voluntarily withdrawn we do not see how third Writ Petition is maintainable.

8. When we invited the attention of Mr. Chaudhary, counsel appearing for the Petitioner, to all these events and undisputed facts he would urge that the Court can take a sympathetic view in writ jurisdiction. He firstly relies upon the judgment of the Hon''ble Supreme Court in the case of Collector, Land Acquisition, Anantnag and Another Vs. Mst. Katiji and Others, .

9. There, the Honourable Supreme Court was concerned with a request to condone the delay in filing an appeal. The Appeal filed by the State of Jammu & Kashmir through the Collector was delayed or barred by four days. The application for condonation of delay was rejected. That is how the Honourable Supreme Court emphasized and reiterated liberal approach in condoning the delay. Here, we are not considering any application made for condonation of delay by the Petitioner. But, we are concerned with the conduct of the Petitioner in seeking equitable and sympathetic relief from this Court and thereafter, not complying with the orders and directions in that behalf. The Petitioner has been taking chances and by approaching either this Court or the Tribunal. That the Petitioner seeks to comply with the order made by the Tribunal in the year 2001 after more than 11 years, therefore, is no ground to assist him in writ jurisdiction. That is equitable, discretionary and extraordinary as well. Therefore, reliance on this judgment of the Honourable Supreme Court is clearly misplaced.

10. The second reliance is on the order passed by the Kerala High Court in Excel Rubber Products Vs. Addl. Collector of C. Ex. and Customs, , where the learned Single Judge held that an appeal filed before the Tribunal has to be heard on merits irrespective of whether the pre-deposit is made or not. We do not see how this order and in the teeth of the clear statutory provisions would assist the Petitioner. This order is, therefore, clearly distinguishable.

11. Reliance is then placed on the order of a Division Bench of this Court in Rashtra Sahi Tukdoji Cancer Hospital and Regional Cancer Centre Vs. Commissioner of Customs, , which condoned the delay in making a pre-deposit. That is in the facts and circumstances peculiar to the case of the Assessee therein which was Cancer Hospital. The Cancer Hospital could not comply with the Tribunal''s order of pre-deposit. Therefore, bearing in mind the peculiar facts and the conduct of the Appellant before this Court was not found to be blameworthy that the delay was condoned, the amount was directed to be deposited and the appeal was restored. This order once again turns upon the peculiar facts and cannot assist the Petitioner.

12. Lastly, reliance on the order passed by the Honourable Supreme Court in the

case of Kirtikumar Jawaharlal Shah Vs. Union of India (UOI), is equally misplaced. In this decision the Honourable Supreme Court passed an order in the peculiar circumstances where the direction to deposit issued by the Tribunal was partially complied with. Out of the sum of Rs. 18 lacs as condition precedent for entertaining the appeal on merits the Appellant could deposit only Rs. 6 lacs. He filed two applications for restoration and which came to be rejected. The Tribunal did not take into consideration the fact that pending the second application for restoration the Appellant paid the remaining amount of Rs. 3 lacs. It is in these peculiar circumstances that this Court''s order dismissing the Appellant''s Writ Petition was set aside. Time was granted to deposit the balance sum of Rs. 9 lacs. All this was in the peculiar circumstances and when no restoration application which was preferred before the Tribunal was withdrawn. Those restoration applications were pressed on their own merits. Having found that the Appellant did not misuse and abuse the equitable jurisdiction of the Court that this order has been passed by the Honourable Supreme Court of India. This neither lays down any general principle leave alone any rule of law that in all such matters where the conduct is blameworthy and where the equitable jurisdiction is abused that the litigants must be assisted by the court of law. In such circumstances and having found that the present Writ Petition is gross abuse of this Court''s jurisdiction, the order of pre-deposit passed in the year 2001 was complied with belatedly and the restoration application was not pressed before the Tribunal we dismiss this Writ Petition with costs quantified at Rs. 25,000/- (Rupees Twenty Five Thousand). The costs to be paid to the Respondents within four weeks from today.

