(2015) 06 BOM CK 0275

In the Bombay High Court

Case No : Central Excise Appeal No. 57 of 2014

Rajesh H. Arora and Others APPELLANT

Vs

Union of India and Others RESPONDENT

Date of Decision : 09-06-2015

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35B, 35C, 35G, 35L
Income Tax Act, 1922 — Section 31, 33, 33(4), 66

Citation : (2015) 323 ELT 278

Hon'ble Judges : S.C. Dharmadhikari, J;G.S. Kulkarni, J

Bench : Division Bench

Advocate : Prakash V. Dhopatkar, for the Appellant; A.S. Rao and Suchitra Kamble, Advocates for the Respondent

Judgement

1. These appeals of the assessee challenge the order passed by the Customs Excise and Service Tax Appellate Tribunal, West Zonal Bench, Mumbai dated 15th April 2013.

2. Mr. Dhopatkar learned counsel appearing on behalf of the assessee in support of these appeals submits that the appeals raise a substantial question of law in as much as the tribunal had no power to dismiss a statutory appeal of the assessee for want of prosecution. He therefore, submits that the tribunal was obliged to hear the appeal on merits irrespective of the failure of the appellant-assessee to comply with the conditions imposed while granting stay of recovery of taxes during the pendency of the appeal. In other words, he submits that though the appellant did not comply with the condition and the appeal was dismissed by virtue of the self-operative order passed at the stage of grant of stay, still the tribunal should have heard the appeal on merits. That is a right vested in the assessee. In support of these submissions, reliance is placed on a recent judgment of the Hon''ble Supreme Court of India in the case of BALAJI STEEL RE-ROLLING MILLS VS.COMMISSIONER OF C.EXCISE AND CUSTOMS in Civil Appeal No. 10265 of 2014 decided on 14th November 2014 which is

reported in Balaji Steel Re-Rolling Mills Vs. C.C.E. and Customs, (2014) 272 CTR 205 : (2014) 310 ELT 209 : (2015) 1 RCR(Civil) 436 .

3. On the other hand, Mr.A.S. Rao learned counsel appearing on behalf of the revenue would submit that the facts and circumstances in the present case are gross. They would reveal deliberate inaction and utter negligence on the part of the assessee. The assessee was not prevented from exercising the right of appeal conferred by the statute. The assessee does not dispute that the assessee invoked the power of the Appellate Authority to grant waiver of the condition of pre-deposit of taxes and stay of recovery of taxes pending disposal of the appeal. The assessee does not dispute that the Authority could have imposed conditions while granting such a stay. In the instant case, it imposed a very reasonable condition and thus granted stay of the recovery pending appeal. The appellant-assessee did not comply with that condition and therefore his appeal was dismissed. The assessee then applied for restoration and during the course of such proceedings, he argued before the tribunal that the appeal cannot be dismissed for non-prosecution. The appeal was dismissed for non-compliance with the conditions imposed while granting stay as well as non-prosecution. In these circumstances, the judgment of the Hon''ble Supreme Court of India cited supra cannot be of any assistance.

4. After having perused the paper book, we are of the view that the appeal deserves to be admitted on the following substantial question of law :-

1. "Whether the Tribunal was justified in law in passing its order dated 14.10.2013 decline the appeals on merits for the reason the action stated in para 3 of its''s order? "

5. By consent this Appeal is disposed off finally by this order. The basic facts and which are undisputed are that the appellant before us is a Director of a company registered under the Indian Companies Act, 1956. The company was engaged in the manufacture of processed manmade fabrics and which was subjected to a excise duty under the Central Excise Act, 1944 and Central Excise Tariff Act, 1985. The assessee''s product was thus made liable to payment of duty under these Acts. The appellants had cleared the goods without payment of excise duty. There was a seizure at the premises of the company. A panchanama was drawn. The period of 1.1.2000 to 28.2.2000 was the relevant one. The seizure revealed that the central excise duty had been evaded and to the tune of Rs. 15,54,000/-. That is how the department/revenue issued show cause notice dated 20 July 2000 by which the duty and interest was demanded. The appellant was called to show cause as to why penalty should not be imposed. A reply was given to the show cause notice and thereafter the adjudicating authority passed an order dated 28 February 2011. The demand came to be confirmed. The Director was aggrieved by the same so also the company and they preferred appeals before the Commissioner (Appeals) in March 2011. The appeals were decided on 14 October 2011.

6. Thereafter the appellant approached the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench, Mumbai. The appellant does not dispute that the tribunal entertained the application for stay before it and passed a conditional order thereon. The appellant was made aware of the fact that non-compliance with the conditions imposed would visit him with a dismissal of the appeal without adjudication on merits. The condition to deposit the money as also other conditions imposed at the stage of stay by the tribunal were never questioned by the assessee. Since the assessee did not comply with the conditions, the appeal was dismissed for non-prosecution. The appellant-assessee applied for restoration of the appeal and by making an application to the tribunal. The tribunal found on such an application that the appellant has not revealed complete and proper facts. The tribunal found that despite such non-compliance by the appellant-assessee of these conditions, the appeals were taken up for adjudication on 16 May 2012. Thus the appeals bearing No. E/213/12-MUM and E/214/12/12-MUM were taken up for adjudication but since the appellant remained absent despite notice, the tribunal dismissed the appeal for non-prosecution. Thus, the stay application as also the appeal was dismissed accordingly by the tribunal. Thereafter, the tribunal was approached by the appellant-assessee by filing Misc.Application which reads as under :

"BEFORE THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, WESTERN ZONAL BENCH, JAI CENTRE,P.D.D''MELLO ROAD, POONA STREET, MASJID (EAST) MUMBAI-400 009

MISCELLANEOUS APPLICATION NO. OF 2013 MISCELLANEOUS APPLICATION FOR RESTORATION OF APPEAL ARISING OUT OF CESTAT ORDER NOS/1120.1121/12/ FB/C-11//504/12/FB/C-11 DATED 16.5.2012.

Rajesh Arora Director M/s. Raviraj Processors Pvt.Ltd Badlapur District Thane..

Applicant

vs

Commissioner of Central Excise Thane-1..

Respondent

MAY IT PLEASE YOUR HONOURS:

1. The applicant respectfully draws the Hon''ble Members'' kind attention that the above appeal listed on 16.5.2012 wherein stay Petition and Appeals are dismissed for non-prosecution.

2. The Applicant submits that their manufacturing unit is closed and they are facing in severe financial hardship. The impugned order was supplied by jurisdictional Supt.of Central Excise to the Applicant. It is to be noted that in earlier proceedings, the Hon''ble Tribunal after seeing their law abiding attitude permitted them to rent out their property and deposit entire rent with Department till Rs. 15,00,000/-is paid. The Applicant submits that they are in a

position to engage an Advocate or legal Consultant. The order of Hon''ble Tribunal is attached herewith.

3. The Applicant respectfully submits that the dismissal order has been passed not on merits but for non appearance in the hearing proceedings. As per Rule 20 of the CESTAT (PROCEDURE) RULES 1982 the Hon''ble Bench of the Tribunal has inherent power to restore the appeal. The Applicant submits that they would like to place reliance on the judgment of Hon''ble Gujarat High Court in the matter of Viral Laminates Pvt. Ltd. Vs. Union of India, (1998) 79 ECR 533 : (1998) 100 ELT 335 : (1998) 3 GLR 1944 .

4. In view of the above, the Applicant prays before the Hon''ble Bench for restoration of the aforesaid appeal.

5. The Applicant desires personal hearing before disposal of this application.

S/d (Signature of the Applicant)

VERIFICATION I, Rajesh Arora the Applicant do hereby declare that what is stated herein above is true and correct to the best of my information and belief.

Verified today the 28th day of FEB 2013.

S/d (Signature of the Applicant)

7. The appellant-assessee invoked the inherent powers of the tribunal to restore the appeal. However, on such an application the tribunal observed that the appellant has neither complied with the conditions imposed while granting stay nor has he appeared and argued the appeal on earlier occasions. In such circumstances, this is not a fit case for exercise of the discretionary powers and proceed on these lines. It has dismissed the restoration application by the impugned order.

8. We find that the Hon''ble Supreme Court of India was dealing with the situation where the appellant-assessee before it a partnership firm was subjected to certain proceedings under the Central Excise Act, 1944. However, when the order was passed on 20 July 1999 refixing the annual capacity of production and duty liability, the appellant before the Hon''ble Supreme Court aggrieved by it approached the tribunal. The tribunal passed an order dated 18th January 2002 remanding the case back to the Commissioner of Central Excise and Customs with a direction to determine the capacity of production in accordance with law. The Commissioner once again passed the same order as was passed earlier and which was challenged by the appellant before the tribunal. The appeal before the tribunal was pending and was placed for hearing on 22nd August 2012. On this date, the appellants as also his counsel were not present. The tribunal therefore, dismissed the appeals and the restoration application was also dismissed. Against such an order of the tribunal the appellant before the Hon''ble Supreme Court of India approached the Aurangabad Bench of this Court by filing Central Excise Appeal No. 14 of 2013. That came to be dismissed by holding that there is

no substantial question of law raised therein. It is in these circumstances that the Hon''ble Supreme Court analysed the tribunal''s powers conferred by section 35C of the Central Excise Act, 1944.

Section 35C of the Central Excise Act, 1944 reads as under :

"The Appellate Tribunal may, after giving the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or annulling the decision or order appealed against or may refer the case back to the authority which passed such decision or order with such directions as the Appellate Tribunal may think fit, for a fresh adjudication or decision, as the case may be, after taking additional evidence, if necessary. The Appellate Tribunal may, if sufficient cause is shown, (1A) at any stage of hearing 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 :

Provided that no such adjournment shall be granted more than three times to a party during hearing of the appeal. The Appellate Tribunal may, at (2) any time within [six months from the date of the order, with a view to rectifying any mistake apparent from the record, amend any order passed by it under subsection (1) and shall make such amendments if the mistake is brought to its notice by the [Commissioner of Central Excise or the other party to the appeal :

Provided that an amendment which has the effect of enhancing an assessment or reducing a refund or otherwise increasing the liability of the other party, shall not be made under this subsection, unless the Appellate Tribunal has given notice to him of its intention to do so and has allowed him a reasonable opportunity of being heard. (2A) The Appellate Tribunal shall, where it is possible to do so, hear and decide every appeal within a period of three years from the date on which such appeal is filed :

Provided that where an order of stay is made in any proceeding relating to an appeal filed under sub-section (1) of section 35B, the Appellate Tribunal shall dispose of the appeal within a period of one hundred and eighty days from the date of such order :

Provided further that if such appeal is not disposed of within the period specified in the first proviso, the stay order shall, on the expiry of that period, stand vacated.

The Appellate Tribunal shall send a (3) copy of every order passed under this section to the Commissioner of Central Excise and the other party to the appeal.

Save as provided in section 35G or (4) section 35L, orders passed by the Appellate Tribunal on appeal shall be final. "

9. Upon perusal of the said provision, together with its sub-sections, the Hon''ble Supreme Court of India held that the tribunal does not have any power to dismiss the appeal for default or for want of prosecution in case the appellant is

not present when the appeal is taken up for hearing. The Hon''ble Supreme Court of India in paragraph nos. 11, 12 and 13 of its judgment held as under :

11. "From a perusal of the aforesaid provisions, we find that the Act enjoins upon the Tribunal to pass order on the appeal confirming, modifying or annulling the decision or order appealed against or may remand the matter. It does not give any power to the tribunal to dismiss the appeal for default or for want of prosecution in case the appellant is not present when the appeal is taken up for hearing.

12. A similar question came up for consideration before this Court in Commissioner of Income Tax, Madras Vs. S. Chenniappa Mudaliar, AIR 1969 SC 1068 : (1969) 74 ITR 41 : (1969) 1 SCC 591 : (1969) 3 SCR 818 wherein this Court considered the provisions of Section 33 of the Income-tax Act, 1922 and Rule 24 of the Appellate Tribunal Rules, 1946 which gave power to the Tribunal to dismiss the appeal for want of prosecution. For ready reference, Section 33(4) of the Income Tax Act, 1922 and Rule 24 of the Appellate Tribunal Rules, 1946 are reproduced below:-

"Section 33(4) of the Income Tax Act, 1922 "33(4). The Appellate Tribunal may, after giving both parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, and shall communicate any such orders to the assessee and to the Commissioner."

Rule 24 of the Appellate Tribunal Rules, 1946 "24. Where on the day fixed for hearing or any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Tribunal may dismiss the appeal for default or may hear it ex parte."

Considering the aforesaid provisions, this Court held as under:-"7. The scheme of the provisions of the Act relating to the Appellate Tribunal apparently is that it has to dispose of an appeal by making such orders as it thinks fit on the merits. It follows from the language of Section 33(4) and in particular the use of the word "thereon" that the Tribunal has to go into the correctness or otherwise of the points decided by the departmental authorities in the light of the submissions made by the appellant. This can only be done by giving a decision on the merits on questions of fact and law and not by merely disposing of the appeal on the ground that the party concerned has failed to appear. As observed in Hukumchand Mills Ltd. v. CIT, the word "thereon" in Section 33(4) restricts the jurisdiction of the Tribunal to the subject-matter of the appeal and the words "pass such orders as the Tribunal thinks fit" include all the powers (except possibly the power of enhancement) which are conferred upon the Appellate Assistant Commissioner by Section 31 of the Act. The provisions contained in Section 66 about making a reference on questions of law to the High Court will be rendered nugatory if any such power is attributed to the Appellate Tribunal by which it can dismiss an appeal, which has otherwise been properly filed, for default without making any order thereon in accordance with Section 33(4). The position becomes quite simple when it is remembered that the assessee or the CIT, if aggrieved by the orders of the Appellate Tribunal, can have resort only to the provisions of Section 66. So far as the questions of fact are concerned the decision of the Tribunal is final and reference can be sought to the High Court only on questions of law. The High Court exercises purely advisory jurisdiction and has no appellate or revisional powers. The advisory jurisdiction can be exercised on a proper reference being made and that cannot be done unless the Tribunal itself has passed proper order under Section 33(4). It follows from all this that the Appellate Tribunal is bound to give a proper decision on questions of fact as well as law which can only be done if the appeal is disposed of on the merits and not dismissed owing to the absence of the appellant. It was laid down as far back as the year 1953 by S.R. Das, J. (as he then was) in CIT, v. Mtt. Ar. S. Ar. Arunachalam Chettiar that the jurisdiction of the Tribunal and of the High Court is conditional on there being an order by the Appellate Tribunal which may be said to be one under Section 33(4) and a question of law arising out of such an order. The Special Bench, in the present case, while examining this aspect quite appositely referred to the observations of Venkatarama Aiyar, J. in CIT v. Scindia Steam Navigation Co. Ltd. indicating the necessity of the disposal of the appeal on the merits by the Appellate Tribunal. This is how the learned judge had put the matter in the form of interrogation:

"How can it be said that the Tribunal should seek for advice on a question which it was not called upon to consider and in respect of which it had no opportunity of deciding whether the decision of the Court should be sought."

Thus looking at the substantive provisions of the Act there is no escape from the conclusion that under Section 33(4) the Appellate Tribunal has to dispose of the appeal on the merits and cannot short-circuit the same by dismissing it for default of appearance."

13. Applying the principles laid down in the aforesaid case to the facts of the present case, as the two provisions are similar, we are of the considered opinion that the Tribunal could not have dismissed the appeal filed by the appellant for want of prosecution and it ought to have decided the appeal on merits even if the appellant or its counsel was not present when the appeal was taken up for hearing. The High Court also erred in law in upholding the order of the Tribunal."

10. Mr. Dhopatkar learned counsel for the appellants would submit that the law laid down in this decision is binding on us. After carefully perusing this decision of the Hon''ble Supreme Court of India, we are of the view that the same analyses the powers of the tribunal while dealing with an appeal. The tribunal has to be specifically vested with the power to dismiss the appeal for want of prosecution. We are inclined to apply the law laid down by the Hon''ble Supreme Court of India to the present case as well. However, we find that no litigant much less placed on par with the appellant before us has the absolute right to insist on the appeal being heard even when he does not comply with the conditions imposed on him while granting him discretionary and equitable relief of interim

stay of recovery of taxes. The conditions that have been imposed by the tribunal while granting such a discretionary and equitable relief have never been questioned by the appellant and rather he has accepted the same. He therefore, cannot be permitted to wriggle out of the same and by relying on the present state of law as emerging from the judgment of the Hon''ble Supreme Court of India. We therefore, made it clear to Mr. Dhopatkar learned counsel for the appellant that we are inclined to set aside the impugned order of the tribunal and restore the appeals for decision on merits by the tribunal. However, the appellant-assessee cannot insist on non-compliance with the conditions imposed by the tribunal. Having not complied with the conditions and thereafter inviting dismissal of his appeal, the appellant-assessee cannot insist on an unconditional adjudication of his appeal on merits. That would be putting a premium on his negligent and intentional act. The order that we propose to pass, therefore does not run counter to the law laid down by the Hon''ble Supreme Court of India. The Hon''ble Supreme Court of India had not dealt with a situation where there was non-compliance with the conditions imposed by the tribunal on the appellant before it while entertaining a appeal and granting interim relief. The Hon''ble Supreme Court nowhere holds that the higher Court or Tribunal cannot pass a conditional order of restoration of a appeal dismissed for want of prosecution. The consequences of a breach of such a conditional order was also not an issue before the Hon''ble Supreme Court in the above judgment. The law laid down in the above decision cannot be stretched and applied to a situation where the conditional order is not complied with and still the appeal must be decided on merits. That was a case where the appellant and for no fault of his, was visited with a dismissal of his appeal for want of prosecution. He lost a valuable right of appeal and adjudication of the same on merits. Such is not the case before us. The appellant approached the tribunal on two occasions. Prior thereto, he approached the Commissioner (Appeals) and applied for discretionary and equitable reliefs. There was a conditional stay. He did not comply with that condition as well. Rather he did not comply with the conditions imposed by the tribunal as well. In such circumstances, we pass the following order :

ORDER

(a) On the appellant depositing with the competent authority a sum of Rs. 7,00,000/- within a period of two months from the date of receipt of copy of this order and producing a proof thereof, the tribunal shall hear the appeal filed by the appellant on merits and in accordance with law;

(b) The tribunal shall then give an opportunity to the Advocate to remain present and make submissions;

(c) If the tribunal finds that the appellant is absent despite sufficient notice, then the tribunal must act in compliance with the law laid down by the Hon''ble Supreme Court of India in the case of BALAJI STEEL RE-ROLLING MILLS supra and dispose of the appeal in accordance with law in the absence of the appellant;

(d) On the breach of clause (a) the order dismissing the appeal passed by the tribunal stands and will not be interfered with.

We make it clear that we have not expressed any opinion on the rival contentions on merits of the appeals. As far as imposing of costs is concerned, no order as to costs.

