(2013) 12 KAR CK 0009

In the Karnataka High Court

Case No : STRP No. 107 of 2011

State of Karnataka — APPELLANT

Vs

M/s. Indian Hume Pipe Co. Ltd. — RESPONDENT

Date of Decision : 13-12-2013

Acts Referred:

Citation : (2014) 44 GST 61 : (2014) 78 KarLJ 259 : (2014) 69 VST 258

Hon'ble Judges : Rathnakala, J;N. Kumar, J

Bench : Division Bench

Advocate : R. Om Kumar, A.G.A, for the Appellant; R.V. Prasad and Sri K. Hema Kumar, for the Respondent

Judgement

N. Kumar, J.—The revenue has preferred this revision petition against the order passed by the Karnataka Appellate Tribunal dismissing the appeal on the ground that when the order of the original authority has merged with the order of the Appellate Authority, the original authority could not have exercised his power u/s 12A of the Karnataka Sales Tax Act to assess the escaped turnover. The Deputy Commissioner of Commercial Taxes passed the assessment order for the year 2002-03 rejecting the returns filed by the assessee. Aggrieved by the said order, the assessee preferred first appeal before the Joint Commissioner of Commercial Taxes. The appeal was dismissed confirming the order passed by the Assessing Authority. The said order became final. Subsequently, the Deputy Commissioner of Commercial Taxes noticed certain escapement of taxable turnover in the original assessment order. Therefore, he initiated proceedings u/s 12A of the Act for re-assessment. Notice was issued. The assessee entered appearance and opposed the re-assessment. After hearing him, re-assessment order was passed. The assessee preferred an appeal before the Joint Commissioner of Commercial Taxes by way of first appeal. The said appeal came to be dismissed. Aggrieved by the said order, the assessee preferred a second appeal before the Tribunal. The Tribunal passed the impugned order setting aside the orders passed by the lower authorities on the ground that the assessment order passed had merged with the appellate order and therefore, the Assessing Authority could not have exercised his jurisdiction to re-assess u/s 12A of the Act as the said order was not in existence having merged with the appellate order. Aggrieved by the said order, the present revision petition is filed.

2. The learned Government Advocate, assailing the impugned order, contended that in the instant case, the doctrine of merger has no application. The assessment order was challenged by the assessee by way of an appeal. The question whether there was any escaped turnover at the time of passing of the assessment order, was not the subject matter of the appeal. The subject mater of the appeal was whether the assessment made by the Assessing Authority is legal or valid. To that extent, the order attained finality by the doctrine of merger when the appeal came to be dismissed. Therefore, in the earlier proceedings, the escaped turnover was not the subject matter of the assessment proceedings or in appeal and therefore, the authority had the jurisdiction u/s 12A to assess the escaped turnover. The Tribunal, without properly appreciating the doctrine of merger, nor the judgment of the Apex Court which was relied upon, has set aside the orders passed by the lower authorities on the short ground which is ex-facia illegal and error apparent on the face of the record.

3. Per contra, learned counsel for the assessee submitted that when once an assessment order was the subject matter of an appeal and the Appellate Authority has decided the appeal on merits, the original order of assessment merges with the order of the Appellate Authority. There was no original order of assessment which was in existence for the assessing officer to exercise the jurisdiction u/s 12A of the Act.

4. Both the learned counsel relied on several judgments in support of their respectful contentions. Therefore, in the light of the aforesaid facts and the rival contentions, the point that arise for our consideration is as under:

(1) Whether the order of the Tribunal holding that the orders passed by the lower authorities is hit by the doctrine of merger and therefore it requires to be set aside, is correct?

5. The facts are not in dispute. The Appellate Authority passed an order rejecting the returns filed by the assessee for the year 2002-03. The assessee was aggrieved by the said order and therefore, preferred a regular first appeal. Both the authorities dismissed the appeal and confirmed the order. Therefore, the subject matter of the assessment proceedings and the subject matter of the appeal was the order of assessment passed by the Assessing Authority. The question before the Appellate Authority was whether the Assessing Authority was justified in rejecting the returns filed by the assessee and in proceeding to assess based on the material which was before him. It is only after the said order became final, the Assessing Authority noticed that some exemptions that were allowed was incorrect. Therefore, he initiated proceedings u/s 12A of the Act to revise the assessment. The question whether the exemptions claimed by the

assessee and which was granted by the Assessing Authority on an earlier occasion was justified or not, was not the subject matter of the appeal filed by the assessee against the said order. After hearing the assessee, the Assessing Authority revised the assessment holding that he is not entitled to any exemptions. Aggrieved by the said order, the assessee preferred an appeal which also came to be dismissed. It is against that order, the second appeal was filed before the Tribunal. The question before the Tribunal was whether the Assessing Authority was justified in disallowing those exemptions. However, the Tribunal, without going into the merits, allowed the appeal on the ground that once an appeal has been filed against the assessment order, the Assessing Authority had no jurisdiction to initiate proceedings u/s 12A to re-assess, as the original assessment order had merged with the appellate order. In that connection, the Tribunal relied on a judgment of the Apex Court in the case of State of H.P. and Others Vs. Gujarat Ambuja Cement Ltd. and Another, . In paragraph 38 of the said judgment which is extracted in the judgment of the Tribunal, it is clearly mentioned that the respondent No. 1 - Company had questioned the correctness of the fixation of dates by filing appeals which came to be dismissed. In other words, the orders merged with the first appellate orders, so for as the date of entitlement is concerned. In other words, as two authorities have concurrently held what is the date of entitlement and as it has attained finality, the said question cannot be re-opened. The Tribunal failed to notice the words "so for as the date of entitlement is concerned". In other words, in all other aspects, the order of the lower authority had not merged with the Appellate Authority as the same was not the subject matter of appeal.

6. The learned counsel for the assessee also relied on a judgment of this Court in Mallika Metal Foundry Vs. Commissioner of Commercial Taxes in Karnataka, Bangalore, , wherein it was held as under:

In the instance case before us, the subject-matter of revisional proceedings initiated by the first revisional authority was the same as the one now involved before the second revisional authority and in this appeal. The subject-matter is the taxability of the particular goods (battery plates) under entry 73-B of the Second Schedule. The Deputy Commissioner initiated proceedings u/s 21 proposing to tax the goods under the said entry 73-B and subsequently upheld the original order of assessment holding it to be taxable u/s 5(1), on the ground that the goods were not covered by entry 73-B. The Commissioner proposed to revise this order on the same ground and roped in the goods into entry 73-B. Therefore, the subject-matter of the first revisional proceedings is the same (which was also the subject-matter considered by the assessing authority earlier), it has to be held that there was fusion or merger of the two orders thereby the original order of assessment losing its identity.

7. Therefore, it is clear from this judgment, where the subject matter of the original proceedings and the subject matter of the appeal proceedings is one and the same and the Appellate Authority pronounces on the said subject matter,

then the order of the original authority fuses or merges with the appellate order and therefore, it ceases to be in existence. Infact, in a recent judgment of the Apex Court in the case of '' Commissioner of Central Excise, Delhi Vs. Pearl Drinks Ltd., , wherein, all the judgments on the point have been considered and at paragraph 16, the three Judge Bench judgment of the Apex Court in the case of Kunhayammed and Others Vs. State of Kerala and Another, was extracted, which reads as under:

44, To sum up, our conclusions are:

xxx

(iii) The doctrine of merger is not a doctrine of universal or unlimited application. It will depend on the nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or capable of being laid shall be determinative of the applicability of merger. The superior jurisdiction should be capable of reversing, modifying or affirming the order put in issue before it. Under Article 136 of the Constitution the Supreme Court may reverse, modify or affirm the judgment, decree or order appealed against while exercising its appellate jurisdiction and not while exercising the discretionary jurisdiction disposing of petition for special leave to appeal. The doctrine of merger can therefore be applied to the former and not to the latter.

8. Therefore, it is clear, the application of doctrine of merger depends on the nature of jurisdiction exercised by the superior forum and the content or subject matter of challenge led or capable of being led, it shall be determinative of the applicability of merger. If the subject matter of the original proceedings is not the subject matter of the appellate proceedings, the doctrine of merger has no application. Then, if on that aspect the original order is to be modified or altered, the power is conferred on the original authority to do so. The said authority is at liberty to initiate proceedings for modification or alteration of the said order as the said order has not merged with the appellate order. Seen from that angle, the question whether the deductions given to the assessee in the earlier order is legal or not, was not the subject matter of appeal in an appeal preferred by the assessee on other aspects and therefore, if the Assessing Authority wants to reassess and rectify the mistake by initiating proceedings u/s 12A of the Act, it cannot be said that he has no jurisdiction to do so on the ground that the order passed by the original authority is merged with the appellate order. The Tribunal has not properly understood the concept of merger and the express words used by the Apex Court, on which reliance is placed and committed a serious error in allowing the appeal. Therefore, the orders of the Tribunal is not sustainable. Hence, we pass the following

ORDER

Revision petition is allowed. The impugned order passed by the Tribunal is hereby set aside. The matter is now remanded back to the Tribunal to consider the case on merits and in accordance with law.

Parties to bear their own costs.

