(2015) 06 BOM CK 0288

In the Bombay High Court

Case No : Writ Petition No. 1319 of 2015

Super Label Mfg. Co. APPELLANT

Vs

The Union of India and Others RESPONDENT

Date of Decision : 29-06-2015

Acts Referred:
Central Excises and Salt Act, 1944 — Section 35C

Citation : (2015) 324 ELT 290 : (2015) 51 GST 763

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

Bench : Division Bench

Advocate : Swapna V. Gokhale, for the Appellant; Jitendra B. Mishra, Advocates for the Respondent

Judgement

1. This Writ Petition is filed challenging the order passed by the Customs, Excise & Service Tax Appellate Tribunal dated 29.11.2013.

2. By that order the Tribunal dismissed the application bearing No.E/ROA-96100/13. This was an application for restoration of Appeal No.E/399/10 - Mumbai which was dismissed for want of prosecution on 13.9.2010. The Tribunal''s order reads as under:-

" The applicant filed this application for Restoration of Appeal.

2. Heard both sides.

3. The appeal filed by the applicant was dismissed by this Tribunal on 13.09.2010 for non-prosecution. It was observed by the Tribunal that the matter was listed for hearing on 9.7.2010. On the said day the learned Advocate appearing on behalf of the applicant sought adjournment. Therefore, the matter was posted for hearing on 09.08.2010. On 9.8.2010 none appeared on behalf of the applicant nor any request for adjournment has been received but again, in the interest of justice, this Tribunal adjourned the matter to 13.09.2010. On 13.9.2010 also none appeared for the applicant nor any request for adjournment received. In the application for Restoration of Appeal, they have not specified any reason as

to why the applicant or their authorized representative have not appeared for the hearing. There is also no reasonable cause has been stated in the application for Restoration of Appeal. In these circumstances, the application for ROA deserves no merit hence dismissed."

The petitioner''s Counsel submits that the Tribunal has no power to dismiss the appeal for want of prosecution. The appeal arose out of an order dated 6.10.2009 passed by the Commissioner of Central Excise (Appeals), Mumbai. The petitioner approached the Tribunal because the Commissioner had dismissed the petitioner''s appeal challenging the order in original.

3. The Tribunal should have given an opportunity to the appellant/petitioner to satisfy it that though the appeal was belated, there is sufficient cause for the delay and that the petitioner deserves an adjudication of the appeal on merits. The learned Counsel relies upon the judgment of the Hon''ble Supreme Court in the case of Balaji Steel Re-Rolling Mills Vs. C.C.E. and Customs, (2014) 272 CTR 205 : (2014) 310 ELT 209 : (2015) 1 RCR(Civil) 436 ".

4. On the other hand Mr. Mishra, learned Counsel appearing on behalf of the respondents submits that the petitioner''s conduct is gross and reflects utter neglect and callousness. The petitioner''s case as pointed out from the admitted facts is that the order of adjudication/ order in original was passed on 27.11.2008. Being aggrieved by it, the Commissioner (Appeals), Central Excise was approached and who on an application for stay/dispensation of the condition of pre-deposit, passed an order on 25.8.2009. He ordered deposit of 50% of the confirmed demand and penalty. This order was not complied with by the petitioner and therefore, the appeal before the Commissioner stood dismissed for non compliance of the condition. The petitioner, thereafter, approached the Tribunal against this order dated 6.10.2009 of the Commissioner of Central Excise (Appeals) and the appeal was posted on 9.8.2010 when the petitioner''s Advocate was absent. The Tribunal as a matter of indulgence adjourned the appeal to 13.9.2010, but even on that date Advocate for the petitioner was absent and hence, the appeal was dismissed for want of prosecution. To such a situation the law laid down by the Hon''ble Supreme Court would not apply. In any event, once the condition is imposed by an Appellate Authority and that condition is not complied with then, the default or non compliance must visit the assessee with dismissal of his appeal and without adjudication on merits. In the circumstances, there is no error or infirmity in the impugned order and the petition should be dismissed.

5. After having heard both the sides and perusing the impugned order, we are of the view that the judgment of the Hon''ble Supreme Court is clear inasmuch as the Hon''ble Supreme Court referred to Section 35C of the Central Excise Act,1944. That section deals with the orders of the Appellate Tribunal. In that section, there is no power conferred upon the Tribunal, according to the Hon''ble Supreme court, of dismissing the appeal for want of prosecution. The judgment of the Hon''ble Supreme Court construed sub-section (1) of Section 35C of the

Act and holds that the larger or wider power will not include the situation where an appeal can be dismissed without adjudication on merits or for want of prosecution. A reference is also made to Rule 24 of the Appellate Tribunal Rules,1946 under the Income Tax Act,1922 and equally Rule 20 of the subject Rules. Though the rule may be giving power to the Tribunal to dismiss in its discretion an appeal for default yet, construing its wording the Hon''ble Supreme Court holds that when the Act enjoins upon the Tribunal to pass order on the appeal confirming, modifying or annulling the decision or order appealed against or it may remand the matter, then, that power under the Section does not include dismissal of appeal for default or for want of prosecution. Therefore, the wording of section was held to be crucial for the purposes of rendering the decision on the issue or question before the Supreme Court.

6. Once the above judgment applies and the Tribunal has no power to dismiss the petitioner''s appeal without adjudication on merits, then, it could have given an opportunity to the petitioner to argue its appeal and satisfy the Tribunal that the order of the Commissioner is required to be annulled or modified or the case must go back to him. That opportunity should have been granted by condoning the delay in filing the appeal or by restoration of the appeal. While condoning the delay and restoring the appeal, the Tribunal could have imposed some reasonable conditions but even that has not been done.

7. As a result of the above discussion and without deciding any wider controversy, we allow this Writ Petition. We set aside the order passed by the Tribunal on 29.11.2013 and restore the appeal of the petitioner to the file of the Tribunal for decision on merits and in accordance with law but on the condition that the appellant /Petitioner pays costs of Rs. 15,000/- (Rupees Fifteen thousand only). The costs shall be condition precedent and to be deposited with the respondents within a period of two weeks from receipt of copy of this order. If the proof of such deposit is produced before the Tribunal''s Registry, the Tribunal shall restore the petitioner''s appeal for decision in accordance with law. Non compliance with this condition will result in dismissal of this Writ Petition and confirming the order of the Tribunal. No extension of time will be granted.

8. We are of the view that though the Tribunal is obliged to hear all the appeals on merits, but revival of the appeals which have already been dismissed for want of prosecution or allowing applications for restoration thereof, does not follow as a matter of course. Every case must be dealt with on its own facts and no general rule can be laid down in that behalf. We have found that the appellant / petitioner and his Advocate have not taken care to appear before the Tribunal on two occasions, even restoration application by the petitioner is filed after nearly three years. In these circumstances, we have imposed this condition of payment of costs and which appears to be imminently reasonable. The petition is allowed in these terms.

