IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 8773 OF 2014

Afloat Textiles (India) Limited. … Petitioner

Vs

1. Union of India & Ors. ... Respondents

Mr. Prakash Shah with Mr. Jas Sanghvi i/b PDS Legal for the Petitioner.

Mr. A.S. Rao for the Respondents.

CORAM : S.C. DHARMADHIKARI &
B.P. COLABAWALLA, JJ.

MONDAY, 19TH OCTOBER, 2015

P.C. :

1. The Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench, Ahmedabad, has passed an order on 2nd April, 2009 and 11th April, 2014, refusing to hear the petitioner's appeal on merits. That is how this Writ Petition is filed.

2. Very brief facts need to be noted as the point raised in this petition is stated to be covered by the judgments to which we shall

make a reference hereinafter.

3. The petitioner is a manufacturer registered with the Central Excise and due to financial problems, it had filed an application with the Board for Industrial Finance and Reconstruction (BIFR) set up under the Sick Industrial Companies (Special Provisions) Act, 1985, to rehabilitate the petitioner-company in the year 2002. This Board was considering various schemes submitted by the company, but eventually concluded that the company is not viable. It, therefore, recommended winding up of the petitioner-company in the month of November, 2006. In January, 2007, that was treated as an application by this Court for winding up of the petitioner-company. The petitioner also states in paragraph 7 of this petition as to how it stopped all activities, including production and giving a closure notice. It is stated that after the winding up proceedings were commenced, the Commissioner, Central Excise and Customs passed an order on 1st February, 2007. That order resulted in the petitioner being visited with certain monetary liabilities.

4. In the meanwhile the petitioner-company was proceeded against

by this Court and by an order dated 22nd March, 2007, a Provisional Liquidator came to be appointed. We are not concerned with the events that took place thereafter for the simple reason that the order passed on 1st February, 2007, by the Joint Commissioner was challenged by the petitioner before the Commissioner (Appeals). It was filed on 3rd September, 2007. It is stated that the Commissioner (Appeals) proceeded to dispose of the said appeal. That was disposed of, according to the petitioner, not on merits, but on the point that it was barred by limitation.

5. Then the petitioner approached the Tribunal and the Tribunal initially found that this is not a case where the request of the petitioner-appellant to grant a relief as prayed. Rather, in the Memo of this petition the petitioner averred that the petitioner could not remain present on the date and time when the Tribunal passed the initial order on 2nd April, 2009. However, we find that, that is not the order which could be the relevant one inasmuch as in the paper-book at pages 26 and 27, we have found that a single Member of the Zonal Branch, after the appeal was placed before her, passed the following order:

> *" The appellants have complied with the stay order. Nobody is present on behalf of the appellants. However, I accordingly heard learned DR and has gone through the impugned order.*
>
> *2. It is seen that Commissioner (Appeals) has dismissed the appeal as barred by limitation on the ground that he has no powers to condone the delay beyond the condonable period prescribed in the statute. I find law is no more res-integra and stands settled by following decisions :*
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> *1. Maithan Ceramic Limited Vs. C.C.E. Jamshedpur [2002 (145) E.L.T. 394 (Tri.- LB)]*
> *2. Raja Mechanical Company Pvt. Ltd. Vs. C.C.E. [2002 (144) E.L.T. 36 (Del.)]*
> *3. Singh Enterprises Vs. C.C.E. Jamshedpur [2008 (221) E.L.T., 163 (S.C.)]*
>
> *3. In view of the above, I find no merit in the appeal and reject the same."*

6. This order was passed after the appellant is stated to have complied with a conditional order of stay. However, from page 26, it is apparent that when this order was passed on 29th May, 2009, the petitioner and its advocate was absent. Therefore, the petitioner applied for recalling of this exparte order and restoring the appeal to the file of the Tribunal for hearing on merits and in accordance with law. The reason was that the company continued in winding up. It continued to be so from the date of the initial order passed by this Court on 22nd March, 2007, till 9th May, 2013. Once the petitioner

came out of winding up, then, it realised that there were several legal proceedings which remained unattended. The petitioner company was fully concentrating on the winding up proceedings and during its subsistence and when the Provisional Liquidator was incharge, it was in doubt as to whether it could represent itself through an advocate on its own or it was the Provisional Liquidator who could take the requisite steps. That is why an application for restoration was made and what we find is that on this application, the Tribunal on 11th April, 2014, found that a restoration application was earlier filed on 11th August, 2003 (possibly an error of date in the Tribunal order) seeking recall of an order dated 29th May, 2009, but that was dismissed. Secondly, the Tribunal found that the appeal was dismissed by the Bench on finding that the First Appellate Authority has no power to condone the delay beyond the period within which the assessee has to file an appeal before the Appellate Authority under section 35 of the Central Excise Act, 1944. The Tribunal found that whether liquidation or otherwise, the ratio of the judgment of the Hon'ble Supreme Court in the case of *M/s. Singh Enterprises vs. Commissioner of Central Excise, Jamshedpur* reported in *2008 (221) Excise Law Times, 163,* *SC*, will apply in this case. The First Appellate Authority in the impugned order clearly recorded that in the presence of the security guard of the respondent, the order of the Joint Commissioner was pasted on the gate of the factory. The appeal was filed almost after six months. Therefore, once again the Member (Judicial) did not find any reasons for adjourning the matter. He dismissed the application for restoration filed by the petitioner-appellant. Though the application sought restoration of the appeal, this application was dismissed and equally the appeal with some additional reasons.

7. Mr. Prakash Shah appearing for the petitioner would submit that the facts and circumstances in this case are identical to those mentioned in the judgment of the Hon'ble Supreme Court in the case of *Balaji Steel Re-Rolling Mills vs. Commissioner of Central Excise & Customs* reported in *2014 (3) Excise Law Times, 209*. It is submitted by him that this judgment and order was followed by this Court in the case of this very petitioner in Writ Petition No.8492 of 2014 decided on 30th July, 2015.

8. On the other hand, Mr. Rao appearing on behalf of the Revenue

would submit that on 29th May, 2009, and equally on 11th April, 2014, the Tribunal dismissed the appeal on merits. Once there is a dismissal of the appeal on merits, then, the judgment of the Hon'ble Supreme Court will not apply. The judgment following it and rendered in the petitioner's case will also be, therefore, distinguishable on facts. Hence, the petition be dismissed.

9. After hearing both sides, we find that the Joint Commissioner's order which was challenged is dated 1st April, 2007. That was challenged before the Commissioner (Appeals) Central Excise and Customs, Vapi. Before the Commissioner, the argument was that the appeal is not barred by limitation as the petitioner had no knowledge of the order of the Joint Commissioner. It was in winding up inasmuch as the BIFR had recommended in the month of November, 2006 / January 2007, that the petitioner be wound up. This recommendation / reference of the BIFR was treated as a suo moto petition for winding up by this Court and that is how the proceedings commenced and this Court eventually passed the order of winding up. It is during this time that it is stated that all the operations and

activities at the factory came to a standstill. There was closure notice and the factory was closed. It is, therefore, impossible for the petitioner to have been aware of an order stated to be pasted on its factory gate. Once all operations were closed and the factory was not operating, then, the appeal filed before the Commissioner (Appeals) could not be said to be barred by limitation. It is this argument which was rejected by the Commissioner (Appeals) by his order passed on 31st July, 2008.

10. Against such an order, the petitioner approached the CESTAT at its West Zonal Bench at Ahmedabad and filed an appeal. That was given a number E/198/2009. Even this appeal was placed after compliance with the conditional stay order on 29th May, 2009. However, the petitioner and the advocate was absent. None represented the petitioner. The single Member (Judicial) of the Tribunal did not dispose of the appeal on the ground that the petitioner and the advocate were absent. Thus it was not a dismissal of the appeal for default of appearance but on merits. Once it was rejected in their absence by the Tribunal and that the application for restoration

was filed. We do not know how that first application for restoration was dealt with but what one finds is that on 1st April, 21014, on the second restoration application dated 9th May, 2013, the Tribunal passed the following order :

> *"3. Heard Learned DR.*
>
> *4. First and foremost it is noticed that the appellant had filed similar application for Restoration of Appeal on 11.8.2003 against the order dated 29.5.2009; which was dismissed. Secondly, I find that the appeal was dismissed by this Bench on a finding that the First Appellate Authority has no power to condone the delay beyond the period within which the assessee has to file appeal before him as provisions of Section 35 of the Central Excise Act, 1944. In my view, whether liquidation or otherwise, the ratio of the judgment of the Apex Court in the case of M/s. Singh Enterprises, will apply in this case. The First Appellate Authority in the impugned order clearly recorded that in the presence of the security guard of the company, the impugned order was pasted on the gate of the factory, and the appeal was filed almost after 6 months.*
>
> *5. In view of the foregoing I do not find any reasons in adjourning the matter and hence dismiss the application filed by the appellant for the Restoration of Appeal."*

11. Once the Tribunal has confirmed the dismissal of the appeal earlier by additional grounds, then, we are of the opinion that in the facts and circumstances peculiar to this case, the larger and wider controversy need not be gone into. It could be that there is some

distinguishing factor from the judgments relied upon by Mr. Shah. Yet, what these judgments essentially project is a disposal of the appeal on merits and in accordance with law, but after complying with the principles of natural justice. Therefore, once the earlier dismissal of the appeal on merits was exparte, then, the Tribunal could have, by some conditions being imposed, recalled the order and gave a chance to the appellant-petitioner to argue the appeal on its merits. We find that the above perfunctory manner of disposal of the appeal on two occasions and in the absence of the petitioner and its advocates does not sub-serve the larger interest of justice. It is, therefore, in the peculiar facts and circumstances of this case that we set aside the orders dated 29th May, 2009 and 11th April, 2014 and direct that the appeal of the petitioner be restored to the file of the Tribunal for being disposed of afresh on merits and in accordance with law, uninfluenced by any earlier findings and conclusions. This order is passed because the petitioner was under winding up from 22nd March, 2007, till the said order was set aside and recalled by this Court. In such circumstances, the petitioner deserves an opportunity to satisfy the Tribunal about the correctness of the view of the Commissioner

(Appeals). Therefore, when we set aside such orders of the Tribunal, we should not be taken to be laying down any precedent for being applicable in future cases.

12. In the light of the above discussion, the Writ Petition succeeds. It succeeds in the above terms. However, while we give a opportunity to the petitioner to satisfy the Tribunal on the merits of its appeal, we impose condition of payment of costs quantified at Rs.25,000/-. The costs will be condition precedent and to be paid to the respondent within four weeks from today.

B.P. COLABAWALLA, J. ***S.C. DHARMADHIKARI, J.***