IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 26.02.2015

CORAM

THE HONOURABLE MR. JUSTICE R.SUDHAKAR
AND
THE HONOURABLE MR. JUSTICE R.KARUPPIAH

C.M.A. NO. 300 OF 2015
AND
M.P. NO. 1 OF 2015

M/s. V.Sathyamoorthy & Co.
40 D, Surya Garden
Trichy Road, Namakkal 637 001
rep. By its Managing Partner
Mr. S.Anandavadivel .. Appellant

- Vs -

1. The Customs, Excise &
Service Tax Appellate Tribunal
(Southern Region)
Shastri Bhavan, Annexe Building
1st Floor, Haddows Road
Chennai 600 006.

2. The Commissioner of Service Tax
No.692, Anna Salai
M.H.U. Complex, Nandanam
Chennai 600 035. .. Respondent

Appeal filed under Section 35-G of the Central Excise Act against the order dated 31.12.2014 passed by the Customs, Excise & Service Tax Appellate Tribunal, Chennai, made in Misc. Order No.42491/2014 in Application No.ST/S/41303/2014 in Appeal No.ST/41067/2014-DB.

For Appellant : Mr. P.S.Raman, SC for
Mr. G.K.Muthukumar

For Respondents : Mr. V.Sundareswaran for R-2

JUDGMENT

(DELIVERED BY R.SUDHAKAR, J.)

Aggrieved against the order passed by the Tribunal ordering pre-deposit without affording an opportunity of hearing, the appellant/assessee is before this Court by filing the present appeal.

2. The case relates to the adjudication order passed by the jurisdictional Commissioner demanding service tax on the appellant alleging that the services rendered by the appellant to the Tamil Nadu Slum Clearance Board would attract service tax liability on the premise that construction of residential complex service is a taxable service.

3. Heard Mr.P.S.Raman, learned senior counsel appearing for the appellant and Mr.Sundareswaran, learned standing counsel appearing for the 2nd respondent.

4. Mr. P.S.Raman, learned senior counsel placed reliance upon the following orders to impress upon the Court that there is no element of service tax liability and, prima facie, it is a case of no service tax liability and, therefore, the order of the Tribunal directing pre-deposit is liable to be set aside :-

> "i) S.Kadirvel - Vs - Commissioner of Central Excise & Service Tax (2013 (30 STR 414 (Tri. - Chennai);
>
> ii) Khurana Engineering Ltd. - Vs - Commissioner of Central Excise (2011 (21) STR 115 (Tri. - Ahmd); and
>
> iii) Nitesh Estates Ltd. - Vs - Commissioner of Central Excise, Bangalore (2012 (26) STR 587 (Tr. - Bang)."

5. It is fairly submitted by the learned senior counsel for the appellant that due to the callous approach of the appellant in the adjudication proceedings, the appellant suffered the order. Nevertheless, the appellant filed an appeal to the Tribunal along with an application for waiver of pre-deposit, which petition came to be disposed of by the Tribunal on 31.12.14. The primary reason that weighed with the Tribunal to order pre-deposit is that the appellant was non-cooperative and due to the ineffective participation of the appellant even in the adjudication proceedings, causing prejudice to the interest of justice, the authority based on the materials available on record passed the ex-parte order.

6. Learned senior counsel appearing for the appellant brought to the notice of the Court the reason for non-appearance of the appellant before the Tribunal. The explanation given by the appellant shows that they filed application seeking for waiver of

pre-deposit on 20.5.14 and the matter came to be listed for the first time on 10.9.14. However, vide letter dated 8.9.14 itself, the appellant had given a request for adjournment, but the Tribunal, without recording the said request, has stated that there was no appearance and, therefore, adjourned the appeal to 31.12.14. In the meantime, the appellant/assessee had engaged the services of Mr.S.Venkatachalam, Advocate of Chennai, who submitted a letter on 29.12.14, which, for better clarity, is extracted hereunder :-

> "To
> The Asst. Registrar
> Customs, Excise and Service Tax Appellate Tribunal
> Shastri Bhavan Annexe 1st Floor
> No.26, Haddows Road
> Chennai 600 006.
> Sir,
> Sub : Request for adjournment – in the matter of V.Sathyamoorthy & Co. - Reg.
> Ref : Stay Application No.ST/Stay/41303/2014 in Appeal No.ST/41067/2014-DB.
> ----------
> The stay petition is posted for hearing on 31.12.2014 before the Hon'ble Tribunal.
> It is submitted that as I am going to Sabarimalai on pilgrimage and leaving Chennai on 30.12.2014 I am not in a position to attend the hearing fixed on 31.12.2014. Hence kindly adjourn the hearing fixed on 31.12.2014 by 4 weeks.
> Inconvenience caused regretted."

7. It is submitted by the learned senior counsel that though the counsel submitted the above letter pleading that he was on pilgrimage and, therefore, requested sometime, the Tribunal held that the plea for adjournment amounts to abuse of process of law and, therefore, did not deserve leniency. The Tribunal also further observed that when one adjournment has been granted, there is no necessity to grant second adjournment. The Tribunal, therefore, proceeded to consider the case on merits and ordered pre-deposit. For better clarity, the relevant portion of the order of the Tribunal is extracted hereunder :-

> "5. Record reveals that for no co-operation of the appellant, the authority was in dark to consider thesubmission of the appellant. He passed exparte order basing on the materials available on record. The manner appellant has acted before law, throws light that it had defiant attitude toward law which is patent from para-21 of the adjudication order.
> 6. Keeping in view the prima facie case suggesting balance of convenience tilting in favour of Revenue

and appreciating no undue hardship may be caused by this order to the appellant, as an interim modality, we direct the applicant to deposit Rs.4,00,00,000/= (Rupees Four Crores only) within 4 weeks from receipt of the order adjusting any amount deposited against adjudicated demand (subject to verification by Revenue) and make compliance on 24.2.2015.

7. Subject to compliance with above direction, there shall be waiver of predeposit of balance demand in question and stay of recovery during pendency of the appeal."

8. Though a plea is made by the learned senior counsel on the merits of the appeal itself, this Court, at this point of time, is not inclined to dwell on the merits, as this Court is inclined to remand the matter back to the Tribunal on the plea of waiver of pre-deposit taking into consideration the prima facie case and undue hardship as may be pleaded by the appellant before the Tribunal.

9. The Tribunal had passed the exparte order directing pre-deposit on the ground that inspite of adjournment, there is no representation for the appellant and that the appellant is adopting dilatory tactics in not appearing, which is an abuse of process of law and, therefore, no leniency should be given. However, it appears from the records that initially when the matter was to be called on 10.9.14, which is the first date of hearing, the appellant himself had submitted a request letter on 8.9.14 requesting for adjournment. Though such is the factual position, the said fact does not find a place in the order of the Tribunal. However, without any mention about the said letter, the matter was adjourned to 31.12.14. However, prior to the date of hearing, i.e., 31.12.14, the counsel engaged by the appellant had submitted a letter on 29.12.14 seeking adjournment on the ground that he is out on a pilgrimage. It is evident from the records that the counsel had entered appearance for the first time and due to personal reasons, had sought for adjournment. In the above scenario, may be, the Tribunal could have adjourned the matter to a shorter date. The finding that there was abuse of process of law on account of the counsel seeking adjournment, that too for the first time after being engaged, appears to this Court to be too harsh. It is evident from proviso to Section 35-C of the Central Excise Act, that even in respect of appeals, the Tribunal is entitled to grant adjournment not exceeding three times, to a particular party.

10. In such view of the matter, this Court is of the considered opinion that the finding of the Tribunal relating to abuse of process of law, warrants leniency and the matter deserves to be relooked into for which course the learned senior counsel for the appellant is fully agreeable and more so, accepts that a specific date be fixed

for hearing. Therefore, accepting the plea of the appellant, this Court, while setting aside the order passed by the Tribunal, remands the matter back to the Tribunal for reconsideration of the application filed for waiver of pre-deposit to be heard on 18.3.2015, which date, it is stated, that the appeal has been posted for reporting compliance of the order of the Tribunal. It is made clear that the appellant/assessee will not seek further adjournment and the discretion as to adjourning the matter is left to the Tribunal on the date of hearing, if the matter so requires.

11. In the result, this appeal is allowed by way of remand to be listed on 18.3.2015. Consequently, connected miscellaneous petition is closed. However, there shall be no order as to costs.

GLN

-s/d-
Assistant Registrar(CS-II)
Dt:5/3/2015

True Copy

Sub-Assistant Registrar

To

1. The Customs, Excise &
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Shastri Bhavan, Annexe Building
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Chennai 600 006.

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No.692, Anna Salai
M.H.U. Complex, Nandanam
Chennai 600 035.

+ 1 cc to Mr.G.K.Muthukumar Advocate SR 11021

+ 1 cc to Mr.V.Sundareswaran, Advocate SR 11025

sai(co)
prk 5/3