IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CENTRAL EXCISE APPEAL NO. 3 OF 2018

Craft World .. Appellant

v/s.

The Joint Commissioner of Service
Tax & Anr. ..Respondents

Mr. Rakesh Kumar Singh for the appellant
Mr. M. Dwivedi a/w Mr. J.B. Mishra for the respondents

CORAM : M.S. SANKLECHA &
RIYAZ I. CHAGLA, J.J.

DATED : 22nd OCTOBER, 2018.

P.C.

1. This appeal under Section 83 of the Finance Act, 1994 r/w Section 35G of the Central Excise Act, 1944 (the Act) challenges the orders 8th March, 2013 and 27th January, 2015 passed by the Customs, Excise and Service Tax Appellate Tribunal (the Tribunal).

2. The appellant urges the following substantial questions of law for our consideration :-

(i) Whether in the facts and circumstances of the case and in law, the Tribunal was correct in dismissing an appeal for non prosecution by impugned Ex-parte order dated 27.1.2015 as

well as order dated 8.3.2013 signed on 11.3.2013 contrary to Rule 20 of the Customs, Excise and Service Tax Appellate Tribunal (Procedure) Rules, 1982 read with Section 35C of CEA, 1944?

(ii) Whether in the facts and circumstances of the case and in law, the Tribunal was justified in dismissing the appeal when issue is settled by Hon'ble Apex Court in the case of Balaji Steel Re-rolling Mills Vs. Commissioner of C. Ex. & Customs, 2014 (310) ELT 209 (S.C.) and judgment of this Hon'ble Court in the case of Super Label Mfg. CO. Vs. Union of India, 2015 (324) E.L.T. 290 (Bom.)?

(iii) Whether in the facts and circumstances of the case and in law, the Tribunal was correct who did not consider the genuine cause for non prosecution and dismissed an appeal by order dated 27.1.2015?

3. The impugned order dated 8^{th} March, 2013 of the Tribunal dismissed the petitioner's appeal filed under Section 35B of the Act as none appeared in support of the appeal. This after sending three notices of the hearing and the Registry also directing the appellants to file a condonation of delay application along with the prescribed fees. The appeal was dismissed by the impugned order dated 8^{th} March, 2013 in terms of Rule 11 of the Customs, Excise and Service Tax Appellate

Tribunal (Procedure) Rules, 1982 (Rules).

4. Thereafter, the petitioner filed an application for restoration of the appeal dismissed on 8th March, 2013 along with the application for condonation of delay in filing the appeal with Commissioner (Appeals). This restoration application was dismissed by the impugned order dated 27th January, 2015 by recording that none appears in support of the petitioner's application for recall of an order which has already been dismissed for non-removal of objections. It also records that the application for restoration was filed after about a year without any application of condonation of delay. It records that the application for condonation of delay is not in respect of delay in filing the restoration application. Thus, dismissed the application.

5. So far as an appeal against order dated 27th January, 2015 rejecting the application for restoration of a dismissed appeal is not maintainable under Section 35G of the Act. This as it is not an order passed in appeal by the Tribunal but an order passed on an application after the order has been already passed in appeal. The non maintainability of an appeal from an order on recall / restoration stands concluded by the decisions of this Court in ***Union of India Vs. Jain***

Irrigation System Ltd. 2015(322) E.L.T. 662 and ***Chem Amit Vs. Assistant Commissioner of Income-Tax, 2005 (272) ITR 397.*** Thus, the remedy if any against the impugned order dated 27th January, 2015 is not an appeal under Section 35G of the Act. Therefore, in this appeal we are not concerned with the challenge to the order dated 27th January, 2015 of the Tribunal.

6. In the above view, we are concerned only with the order dated 8th March, 2013 passed by the Tribunal dismissing the appeal for non-removal of office objections in filing an appeal and also for not appearing inspite the notices being sent to the appellant.

7. So far as question nos. (i) and (ii) are concerned, it is the case of the appellant as appearing from the questions, that the Tribunal could not have dismissed the appeal for non-appearance and non-compliance with the objections raised by the Registry without having considered the issue on merits. In support, as mentioned in the questions, decisions of various Court are also relied upon. The aforesaid decisions being relied upon were rendered in the context of Rule 20 of the Rules, which requires the Tribunal to hear the parties on the date fixed for hearing of the appeal so as to decide the appeal on merits. In fact, even

if the party / parties do not appear at the time of the hearing, Rule 20 of the Rules requires the Tribunal to decide the issue on merits. This is not the requirement while dismissing an appeal for non-compliance with the Rule 11(2) of the CESTAT (Procedural) Rules. Thus, we see no reason to entertain the appeal on the aforesaid two questions of law as proposed by the appellant.

8. So far as question (iii) is concerned, it is contended by the appellant that it was his Advocate / Chartered Accountant who did not appear at the time of the hearing though briefed. In the above view, it is submitted that the appellant should not be penalized for the fault of his advocate. In support, reliance was placed upon the decision of the Supreme Court in ***Rafiq and Anr. Vs. Munshilal and Anr. AIR 1981 SC 1400***. The question as proposed in respect of the order dated 27th January, 2015 i.e. rejecting the restoration application, thus outside the scope of the appeal. Thus, not entertained.

9. In any case, the decision of the Apex Court in Rafiq (supra) will not apply to the facts of the present case in view of the fact that there is no evidence produced before the Tribunal that the Chartered Accountant / Advocate who was briefed did not appear on the date

when the hearing was fixed by the Tribunal. Before us the parties places reliance upon the bill dated 6th June, 2015 issued by the Chartered Accountant in support of his contention that the Chartered Accountant was briefed and he did not appear on the date fixed by the Tribunal for hearing of the appeal. However, the perusal of the above bill indicates that the charges were for filing of condonation of delay application and application for restoration of the dismissed appeal. It does not indicate any charges in bill for preparing the appeal or appearing at the Tribunal for the hearing of the appeal. In these circumstances, question (iii) does not give rise to any substantial question of law. Thus, not entertained.

10. Accordingly, the appeal is dismissed.

(RIYAZ I. CHAGLA, J.) **(M.S. SANKLECHA, J.)**