IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 30.10.2018

CORAM :

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM

AND

THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

Civil Miscellaneous Appeal Nos.1665 & 1948 of 2016
& 2505 & 2506 of 2018
& CMP.Nos.12688 & 14163 of 2016 & 19128 of 2018

M/s.Raja Metals Corporation,
rep.by its Partner Mr.S.Ponsekar
...Appellant in CMA.No.1665 of 2016 /2505/2018

Shri S.Ponsekar ...Appellant in both CMA.Nos.1948/2016 & 2506/2018

M/s.Raja Metals Corporation
(now defunct) ...Appellant in CMA.No.2505 of 2018

Vs

1.The Special Director, Enforcement Directorate, Government of India, Lok Nayak Bhavan, Khan Market, New Delhi-110003. ...R1 in both CMA. Nos.1665 & 1948 of 2016 & sole respondent in both CMA.Nos.2505 & 2506 of 2018

2.The Appellate Tribunal for Foreign Exchange, 15th Floor, Hindustan Times House, K.G.Marg, New Delhi-110001 ...R2 in both CMA. Nos.1665 & 1948/2016

APPEALS under Section 35 of the Foreign Exchange Management Act, 1999 respectively against (i) Order-in-Appeal Nos.169 and 170/2010 dated 20.11.2014 and (ii) Appeal Nos.FPA-FE/169/CHN/2010 and FPA-FE/170/CHN/2010/4472 dated 14.9.2018 passed by the Appellate Tribunal for Foreign Exchange, New Delhi.

For Appellants : Mr.R.Sathish Sundar
For Respondent-1:Mr.Rajnish Pathiyil, Standing Counsel

COMMON JUDGMENT
(Judgment was delivered by T.S.SIVAGNANAM,J)

Mr.Rajnish Pathiyil, learned Standing Counsel accepts notice for the first respondent. Heard both. By consent of the learned counsel on either side, the above appeals are taken up for joint disposal and CMA.No.1665 of 2016 is taken as a lead case.

2. CMA.Nos.1665 and 1946 of 2016 have been filed by the firm and the partner of the firm challenging the common order passed by the Appellate Tribunal for Foreign Exchange, New Delhi (hereinafter called the Tribunal) in Order-in-Appeal Nos.169 and 170/2010 dated 20.11.2014. The said common order was passed on the applications filed by the firm and the partner of the firm seeking to stay and waiver of pre-deposit in their challenge to the adjudication orders dated 28.5.2010 passed by the Special Director, Enforcement Directorate.

3. CMA.No.1665 of 2016 was filed before this Court on 05.8.2016 questioning the correctness of the order dated 20.11.2014. Records disclose that a Division Bench of this Court in CMP.No.12314 of 2016 in CMA.SR.No. 5224 of 2015, by order dated 04.8.2016, condoned the delay of 471 days in representing an appeal, however, subject to a condition and the appellant therein complied with the conditional order passed by the Division Bench vide order dated 04.8.2016, by which, he was directed to pay a sum of Rs.500/- to the Tamil Nadu Advocates Clerks' Association. Thereafter, the appeal was numbered as CMA.No.1948 of 2016 and both the appeals namely CMA.Nos. 1665 and 1948 of 2016 have been pending. In the meantime, the main appeals before the Tribunal were dismissed for non prosecution by a common order dated 14.9.2018, which is challenged in CMA.Nos.2505 and 2506 of 2018.

4. The appeals have been filed raising the following substantial questions of law :

> "CMA.Nos.1665 and 1948 of 2016 :
>
> Whether the second respondent Tribunal is correct in holding that no case for waiver is made out, while ignoring two factors namely prima facie case in favour of the appellant and the pleading relating to financial hardship

being undue in as much as the appellants had placed materials (in the form of income tax returns) to show their inability to come up with the amounts for pre-deposit of penalty?

CMA.Nos.2505 and 2506 of 2018 :

1. Is the Tribunal correct in dismissing the appeals for non prosecution in absence of any power to do so either under the provisions of the Foreign Exchange Management Act, 1999 or under the Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000 ?

2. Is the Tribunal justified in rejecting the appeals for non prosecution especially when it was apprised of the fact that statutory appeals in terms of Section 35 of the Foreign Exchange Management Act, 1999, in CMA.Nos.1948 and 1665 of 2016 are pending before this Court along with connected stay applications and no final orders have been passed in the same ? And

3. Has the Tribunal, as a last Fact Finding Body, overlooked the cause of substantial justice and acted on what could be termed as technicalities in dismissing the appeals for non prosecution under the impugned order, as it is submitted that cause of substantial justice should not suffer on account of procedure and technicalities, which are merely handmade of justice dispensation and not justice in its substantial terms in themselves ?"

5. The challenge to the conditional order dated 20.11.2014 passed by the Tribunal is on the ground that the appellant firm as well as the partner are undergoing severe financial hardship. The learned counsel appearing for the appellants has placed reliance on the income tax returns for the last three years. He submits that directing the appellants to make a pre-deposit of 30% of the penalty and furnish bank guarantee for the remaining amount is a onerous condition, that they would be unable to comply with the same and that the appellants may be granted an opportunity to contest the appeals on merits before the Tribunal.

6. Per contra, the learned Senior Standing Counsel for the Revenue sought to sustain the common order passed by the Tribunal dated 20.11.2014 by contending that there is no error in the exercise of discretion by the Tribunal, that the Tribunal, after taking into consideration various orders passed by various Courts on similar issues, passed the conditional order and that no substantial question of law arises for consideration in these appeals so as to be entertained.

7. So far as the second set of appeals namely CMA.Nos.2505 and 2506 of 2018 is concerned, they are directed against the common order passed by the Tribunal dated 14.9.2018, which was communicated to the appellant on 25.9.2018, in and by which, the appeals filed by the appellants were dismissed for non prosecution. The Tribunal recorded that for three years, the appellants did not appear for more than 13 hearings and opined that the appellants were not interested in pursuing the appeals.

8. The learned counsel appearing for the appellants would submit that pendency of the first set of appeals before this Court challenging the conditional order passed by the Tribunal dated 20.11.2014 was brought to the notice of the Tribunal. According to him, yet the Tribunal rejected the appeals.

9. We would be first required to decide as to whether the Tribunal erred in dismissing the appeals for non prosecution. The appeals to the Tribunal were filed under Section 19 of the Foreign Exchange Management Act, 1999 (FEMA). The procedure and the powers of the Tribunal are prescribed under Section 28 of the FEMA. In exercise of the powers conferred under Section 46 read with Sections 16(1), 17(3) and 19(2) of the FEMA, the relevant Rules were framed for regulating the procedure of adjudication called the Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000.

10. Rule 11 of the said Rules deals with procedure before the Appellate Tribunal. Sub-Rule (4) of Rule 11 of the said Rules would be relevant for the purpose of this case, which reads as follows :

> "Where on the date fixed, or any other day to which the hearing of the appeal may be adjourned, the applicant or the presenting officer fail to appear when the appeal is called on for hearing, the Appellate Tribunal may decide the appeal on the merits of the case."

11. In terms of the above Rule, if the applicant or the presenting officer fails to appear when the appeal is

called for hearing, the Appellate Tribunal may decide the appeal on the merits of the case. Thus, the said Rule does not contemplate rejection of an appeal for non prosecution in the event of non appearance of the applicant or the presenting officer.

12. Rule 41 of the Customs, Excise and Service Tax Appellate Tribunal (Procedure) Rules, 1982 [for short, the CESTAT (Procedure) Rules] also contains a similar procedure. In the said Rules, Rule 20 enables the dismissal of the appeal for default. This Rule was challenged before a Division Bench of the High Court of Gujarat in the case of Viral Laminates Private Limited Vs. Union of India [reported in (1998) 100 ELT 335]. The Division Bench held that having regard to the scheme of the Act as well as the Customs Act, 1962, there was no manner of doubt that the appeal filed before the Appellate Tribunal has got to be disposed of on merits and not for default of appearance of the appellant, that the Appellate Tribunal has to decide the issue ex parte, but dismissing the appeal for non prosecution does not seem to be legally or even on equity grounds correct. The Division Bench relied upon the decision of the Hon'ble Supreme Court in the case of J.K. Synthetics Limited Vs. CCE [reported in (1996) 86 ELT 472].

13. In the decision in the case of Balaji Steel Re-Rolling Mills Vs. CE [reported in (2014) 310 ELT 209], the Hon'ble Supreme Court pointed out that to meet the ends of justice, the Tribunal has power to restore the appeal in terms of Rule 41 of the CESTAT (Procedure) Rules 1982.

14. In the decision in the case of CIT Vs. S.Chenniappa Mudaliar [reported in (1969) 1 SCC 591], the Hon'ble Supreme Court considered the provisions of Section 33 of the Income Tax Act, 1922 and Rule 24 of the Income Tax Appellate Tribunal Rules, 1946, which gave power to the Tribunal to dismiss the appeal for want of prosecution. It was held that the Appellate Tribunal under the Income Tax Act has to dispose of the appeal on merits and cannot short circuit the same by dismissing it for default of appearance.

15. In the light of the law laid down in the aforementioned decisions, the appeals filed before the Tribunal could not have been dismissed for non prosecution. Yet, we may point out that the conduct of the appellants in not appearing for several hearings also cannot be appreciated. We have to necessarily interfere with the common order passed by the Tribunal dated 14.9.2018, which was communicated to the appellants on 25.9.2018.

16. So far as the conditional order dated 20.11.2014 passed by the Tribunal is concerned, considering the

financial position pleaded by the appellants and their case that they are unable to realize export production in spite of their diligent efforts, we are of the considered view that the appellants have made out a prima facie case. However, this observation is made only for the purpose of imposing a condition on the appellants, so that the appeals before the Tribunal can be heard and disposed of on merits.

17. Accordingly, CMA.Nos.1665 and 1948 of 2016 are disposed of by slightly modifying the common order passed by the Tribunal by directing the appellants to deposit with the first respondent namely the Special Director, Enforcement Directorate, Government of India, 50% each of the penalty amounts imposed individually and furnish a bond for the balance 50% each and keep the bond alive till the appeals are heard and disposed of on merits by the Tribunal. No costs. Consequently, the connected CMPs are closed.

18. For the reasons set out by us in the preceding paragraphs, CMA. Nos.2505 and 2506 of 2018 are allowed, the common order passed by the Tribunal dismissing the appeals for non prosecution dated 14.9.2018 are set aside and the appeals are restored to the file of the Tribunal. The appellants are granted eight weeks' time from the date of receipt of a copy of this judgment to deposit 50% each as directed above. Subject to the deposit of 50% each by the appellants within the time prescribed, the Tribunal shall fix a date for hearing of the appeals and pass orders on merits and in accordance with law. No costs. Consequently, the connected CMP is closed.

RS

Sd/-
Assistant Registrar(Co)

//True Copy//

Sub Assistant Registrar

To

1.The Special Director, Enforcement Directorate, Government of India, Lok Nayak Bhavan, Khan Market, New Delhi-110003.

2.The Registrar/The Appellate Tribunal for Foreign Exchange, 15th Floor, Hindustan Times House, K.G.Marg, New Delhi-110001

+2cc to Mr.Rajnish Pathiyil,, Advocate SR.No. 74217,74218

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ASK(18/12/2018)