

In the High Court of Judicature at Madras

Dated : 19.9.2018

Coram :

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
AND
THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

Civil Miscellaneous Appeal No.2055 of 2018

P.Ganesh, Commercial Director,
Hi Tech Mineral Industries Covai
P. Ltd., Salem-636304.

...Appellant

Vs

The Commissioner of Central
Excise, Salem-1.

...Respondent

APPEAL under Section 35G of the Central Excise Act, 1944
against miscellaneous order No.40116/2018 dated 12.2.2018 on the
file of the Customs, Excise and Service Tax Appellate Tribunal,
South Zonal Bench, Chennai-6.

For Appellant : Ms.D.Naveena

For Respondent : Mrs.Aparna Nandakumar, SSC

Judgment was delivered by T.S.SIVAGNANAM, J

This appeal, by the Director of a private limited company,
which is under liquidation, is directed against the order passed
by the Customs, Excise and Service Tax Appellate Tribunal, South
Zonal Bench, Chennai (for short, the Tribunal) in Miscellaneous
Order No.40116/2018 dated 12.2.2018. By the impugned order, the
application filed by the appellant for restoration of the appeal
filed by the appellant, which was dismissed for default vide
final order dated 02.8.2017, was dismissed.

2. The above appeal is admitted on the following substantial
question of law :

"Whether the impugned order of the
Tribunal is bad in law for departing from
the following principles :

(i) by virtue of Article 141 of The Constitution of India, the issue must be decided strictly in accordance with law laid down by the Supreme Court - it being the last word on the subject ? And

(ii) if, there is no decision of the Supreme Court on the issue, then the effort must be to decide the issue by any decision of the High Court of our country, if holding the field ?”

3. By the Order-in-Original dated 31.12.2012, the Adjudicating Authority confirmed the demand of central excise duty to the tune of Rs.13,11,35,087/- together with cess and other charges payable by M/s.Hi Tech Mineral Industries Covai Private Limited under Section 11A(2) of the Central Excise Act, 1944 (for brevity, the Act). The demand for payment of interest under Section 11AB of the Act was confirmed and penalty equivalent to the amount of excise duty was also levied under Section 11AC of the Act on the said company. Further, a sum of Rs.50 lakhs was imposed as penalty on the appellant, who was the Commercial Director of the said company under Rule 26 of the Central Excise Rules, 2002.

4. As against the said Order-in-Original dated 31.12.2012, the said company as well as the appellant herein filed two appeals before the Tribunal. During the relevant time, both the said company as well as the appellant herein were represented by a common counsel. The appellants before the Tribunal sought for waiver of condition of pre-deposit and the Tribunal, between 2014 and 2017, passed certain interim orders, the last of which being on 22.3.2017, in which, the Tribunal noted that the said company was wound up, that the Official Liquidator of this Court was appointed as the Provisional Liquidator in Comp.A.No.1141 of 2014 dated 23.3.2015 and that the Ex-Directors of the said company were directed to file the statement of affairs before the Official Liquidator within 21 days. Thus, the Tribunal, in the said order dated 22.3.2017, ordered notice to the Official Liquidator to inform the Tribunal as to whether he chooses to be necessary respondent in the appeals and if he chooses to do so, he may file an appropriate application.

5. When the cases came up for hearing before the Tribunal on 02.8.2017, it appears that both the Official Liquidator as well as the appellant herein were not represented by counsel. It is submitted that on account of unavoidable circumstances and due to ill-health, the appellant herein could not travel to Chennai from Coimbatore and that therefore, he could not appear. Consequently, the appeals filed by both the company as well as

the appellant herein were dismissed on account of default in not appearing before the Tribunal.

6. Before the Tribunal, the appellant before us filed an application for restoration of the appeal filed by him in terms of Rule 41 of the Customs, Excise and Service Tax Appellate Tribunal (Procedure) Rules, 1982 (for brevity, the 1982 Rules), pointing out that on account of ill-health, the appellant could not appear and that the non appearance of their counsel was entirely bona fide and unintentional. It was further pointed out that the appellant was diligently pursuing the appeal before the Tribunal and was represented for all the hearings before the Tribunal and that only on the last date i.e. 02.8.2017, the advocate could not appear. It was also pointed out that Rule 20 of the 1982 Rules, which enables the dismissal of the appeal for default, was held to be ultra vires by the decision of the Division Bench of the High Court of Gujarat in the case of Viral Laminates (P) Ltd. Vs. Union of India [reported in (1998) 100 ELT 335].

7. It was further pointed out by the appellant that the Tribunal ought to have disposed of the appeal on merits in term of Section 35C of the Act. In this regard, reliance was placed on the decision of the Hon'ble Supreme Court in the case of Balaji Steel Re-Rolling Mills Vs. CE [reported in (2014) 310 ELT 209]. It was again pointed out that to meet the ends of justice, the Tribunal has the power to restore the appeal in terms of Rule 41 of the 1982 Rules and in this regard, reliance was placed on the decision of the Hon'ble Supreme Court in the case of JK Synthetics Limited Vs. Collector [reported in (1996) 86 ELT 472], which was relied upon by the High Court of Gujarat in the case of Fairdeal Supplies Limited Vs. CC [reported in (2017) 351 ELT 220].

8. The aforementioned decisions, which were referred to in the application for restoration, were furnished in the form of a paper book before the Tribunal. However, the Tribunal, by the impugned order, held that if the appellant herein was interested in prosecuting the matter, he ought to have appeared and argued the matter and that till the dismissal of the appeal, there was no representation for either the Official Liquidator or the co-noticee (appellant herein). Thus, the Tribunal concluded that the appellant herein was not diligent to prosecute the matter and that the appeal was rightly dismissed for default holding that there was no merit in the application for restoration of the appeal.

9. We have heard Ms.D.Naveena, learned counsel appearing for the appellant and Mrs.Aparna Nandhakumar, learned Senior Standing Counsel appearing for the respondent/Revenue.

10. On a perusal of the impugned order passed by the Tribunal, we find that the Tribunal had not adverted to any of the contentions raised by the appellant in the application for restoration dated 09.10.2017. In the said application, the appellant pointed out certain reasons, which, according to him, were sufficient cause for not being able to appear before the Tribunal on 02.8.2017. Apart from that, he relied upon the decisions of the Hon'ble Supreme Court and of the Gujarat High Court to state that the appeal could not have been dismissed for default and should have been decided on merits in the light of the fact that Rule 20 of the 1982 Rules has been held to be ultra vires. The appellant also pointed out that the Tribunal has sufficient power to restore the appeal in terms of Rule 41 of the 1982 Rules. None of these grounds has been dealt with by the Tribunal. Rather, the Tribunal has not even referred to the same in the impugned order.

11. In the decision in Viral Laminates (P) Ltd., the challenge was to Rule 20 of the Customs, Excise and Gold (Control) Appellate Tribunal Rules, 1982, which enables the Tribunal to dismiss the appeal for default of appearance, as being ultra vires the provisions of Section 35C(1) of the Act and Section 129B(1) of the Customs Act, 1962. The Division Bench of the Gujarat High Court 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, that dismissing the appeal for non appearance does not seem to be legally or even, on equity of grounds, correct when the Hon'ble Supreme Court in JK Synthetics Ltd., held that an appeal decided ex parte can be recalled and heard afresh if the appellant shows sufficient cause for his absence. The Gujarat High Court pointed out that Rule 20 of the relevant Rules empowers the Tribunal to restore an appeal if sufficient cause is shown for absence and that the power to dismiss an appeal for non appearance of the appellant clearly comes into conflict with Sub-Section (1) of Section 35C of the Act as well as Section 129B(1) of the Customs Act, 1962. It was further held that that part of Rule 20 of the relevant Rules, which enables the Appellate Tribunal to dismiss an appeal for default of appearance as well as the Proviso to Rule 20 of the relevant Rules, are ultra vires the provisions of Section 35C(1) of the Act as well as 129B of the Customs Act, 1962. It was also held that the Appellate Tribunal has no power to dismiss the appeal for non appearance of the appellant and that the appeal should be decided on merits.

12. In the decision in Balaji Steel Re-Rolling Mills, the question of law, which fell for consideration, was as to whether the Tribunal has the power to dismiss an appeal for want of prosecution or not. The Hon'ble Supreme Court took note of the decision in the case of CIT Vs. S.Chenniappa Mudaliar [reported in (1969) 1 SCC 591] wherein 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 an 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. Placing reliance on the said decision, the Hon'ble Supreme Court held that the provisions of Rule 20 of the 1982 Rules are similar to that of the provisions of Rule 24 of the Income Tax Appellate Tribunal Rules, 1946 and that the Tribunal could not have dismissed the appeal filed by the appellant for want of prosecution and it ought to have decided the appeal on merits even if the appellant or its counsel was not present when the appeal was taken up for hearing.

13. The aforementioned decision would clearly support the case of the appellant before us and it has to be necessarily held that the order passed by the Tribunal, which is impugned before us, is unsustainable in law. As pointed out by us earlier, the Tribunal did not even refer to the grounds raised by the appellant in the application filed for restoration of the appeal, which was accompanied by a paper book containing relevant decisions, some of which have been referred above.

14. One more aspect, which the Tribunal failed to note, is that the non appearance of the appellant was only on one hearing i.e 02.8.2017. On the previous hearings, it was reported that the said company, which was also one of the appellants, was wound up pursuant to the orders passed by the Company Court and the Official Liquidator was appointed as the Provisional Liquidator. Therefore, the appropriate procedure would have been to issue notice to the Official Liquidator because he is, in fact, an officer of the Company Court and he has to administer the estate of the said company. However, it is not clear as to whether notice was served in the office of the Official Liquidator nor there was any proof of service produced. In any event, the impugned order, being an order without jurisdiction, in the light of the decision of the Hon'ble Supreme Court in the decisions in Balaji Steel Re-Rolling Mills and S.Chenniappa Mudaliar, deserves to be set aside.

15. For the above reasons, the above civil miscellaneous appeal is allowed and the substantial question of law is answered in favour of the appellant. The impugned order dated

12.2.2018 is set aside and the matter is remanded to the Tribunal for a fresh consideration with a direction to restore the appeal filed by the appellant. No costs.

16. After further hearing the learned counsel for the parties, we are of the considered view that the dismissal of the appeal filed by the said company also requires to be restored because it is a substantial appeal and this is so required in the interests of the Revenue also. On such restoration, the Tribunal shall direct notice to be served on the Official Liquidator and give sufficient time to the Official Liquidator to enter appearance on behalf of the said company under liquidation. In the result, Final Order Nos.41388 and 41389 of 2017 in Appeal Nos.E/40812/2013 and E/40813/2013 dated 02.8.2017 are set aside and the appeals are restored to the file of the Tribunal to be heard and decided on merits.

-s/d-

Assistant Registrar (CS-IV)

True Copy

Sub-Assistant Registrar

RS

To

1.The Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai-6.

2.The Commissioner of Central Excise, Salem-1.

+1 CC to Mr.S. Durairaj, Advocate sr 64837.

CMA.No.2055 of 2018

SP(09/10/2018)

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