In the High Court of Judicature at Madras

Dated : 22.6.2018

Coram :

The Honourable Mr.Justice T.S.SIVAGNANAM

Writ Petition No.15176 of 2018 &
WMP.Nos.18024 & 18025 of 2018

M/s.Swathy Industry, rep.
by its Managing Partner
Mr.M.Krishnakumar ...Petitioner

Vs

1.The Commissioner of Central Excise,
No.1, Foulk's Road, Anaimedu,
Salem-1.

2.The Customs, Excise and Service Tax
Appellate Tribunal, South Zonal Bench,
Haddows Road, Chennai-6. ...Respondents

PETITION under Article 226 of The Constitution of India praying for the issuance of a Writ of Certiorari to call for the records of the first respondent C.No.V/34/15/209/2007-CX-Adjn. dated 27.2.2009 [Sl.No.3/2009 (Commissioner) dated 27.2.2009] and quash the same.

For Petitioner : Mr.R.L.Ramani, SC for Ms.D.Naveena

For Respondents : Mrs.Hema Muralikrishnan, SSC

ORDER

Heard Mr.R.L.Ramani, learned Senior Counsel appearing on behalf of the petitioner and Mrs.Hema Muralikrishnan, learned Senior Standing Counsel accepting notice for the respondents.

2. The petitioner has filed this writ petition challenging the Order-in-Original dated 27.2.2009 passed by the first respondent.

3. Firstly, a writ petition challenging the Order-in-Original cannot be maintained, as an appeal remedy was available to the petitioner.

4. The learned Senior Counsel appearing on behalf of the

petitioner would submit that the petitioner had availed an appeal remedy and sought for interim order before the Customs, Excise and Service Tax Appellate Tribunal. The Tribunal passed an interim order dated 01.2.2010 directing the petitioner to pay a sum of Rs.1 Crore. The petitioner filed an application on 23.3.2010 before the Tribunal for modification of the order dated 01.2.2010. However, the Tribunal rejected the application for modification by order dated 07.6.2010.

5. What is to be noted is that in the order dated 01.2.2010, not only the aspect regarding the financial hardship of the petitioner was considered, but also the merits of the Order-in-Original dated 27.2.2009 was considered. Since the petitioner failed to comply with the order passed by the Tribunal dated 01.2.2010, both the application for modification and the appeal stood dismissed by order dated 07.6.2010 on account of non compliance of the statutory requirement under Section 35F of the Central Excise Act, 1944.

6. However, the petitioner put to challenge the order passed by the Tribunal dated 07.6.2010 in Final Order No.619/2010 & Mis.Order No.311/ 2010 by filing C.M.A.No.61 of 2015 on the file of this Court raising the following substantial questions of law :

> "1. Whether the first respondent Tribunal is right in directing the appellant to pre-deposit a sum of Rs.1 Crore without considering the case of the appellant on merits ? And
>
> 2. Whether the first respondent Tribunal is right in rejecting the appellant's application for waiver of pre-deposit without considering 'undue hardship', which is a relevant factor while exercising powers under Section 35F of the Central Excise Act ?"

7. Thus, the petitioner not only canvassed the correctness of the order passed by the Tribunal in Stay Order No.70-75/2010 dated 01.2.2010 in the application for modification, but also the final order dated 07.6.2010 rejecting the petitioner's appeal and the application for modification. The Hon'ble Division Bench of this Court, by judgment dated 13.2.2015, dismissed CMA. No.61 of 2015. In doing so, the Hon'ble Division Bench of this Court not only rejected the appeal on the ground that there are no substantial questions of law involved, but approved the findings rendered by the Tribunal with regard to the merits of the case as well as the conditional order to pay Rs.1 Crore.

8. As against the judgment of the Hon'ble Division Bench in CMA.No.61 of 2015 dated 13.2.2015, the petitioner filed an appeal before the Hon'ble Supreme Court by filing S.L.P.(C).

No.27970 of 2015, which was dismissed by order dated 12.10.2015. Even thereafter, the petitioner filed a review petition before the Hon'ble Supreme Court in R.P.(C).No.152 of 2016, which was also dismissed by order dated 18.2.2016. Not satisfied with that, the petitioner moved a curative petition in Curative Petition (C) No.492 of 2016, which was ultimately dismissed by order dated 12.1.2017. After all these events, now the petitioner is before this Court challenging the Order-in-Original dated 27.2.2009.

9. The facts stated above clearly disclose that the order dated 07.6.2010 passed by the Tribunal, dismissing the appeal as well as the application for modification filed by the petitioner, stood confirmed both by the Hon'ble Division Bench of this Court as well as the Hon'ble Supreme Court. Therefore, at this distance of time, this Court cannot entertain a challenge to the Order-in-Original dated 27.2.2009.

10. The learned Senior Counsel appearing on behalf of the petitioner refers to the decision of the Hon'ble Full Bench of the High Court of Hyderabad for the States of Telangana and Andhra Pradesh in the case of Electronics Corporation of India Ltd. Vs. Union of India [reported in 2018-TIOL-484-HC-AP-CX-LB].

11. Even in the said case, the Hon'ble Full Bench held that the High Court, under Article 226 of The Constitution of India, would exercise its discretion judicially on the facts of the individual case and would examine as to whether the challenge made by such writ petitioner should be entertained and what would weigh with the Court is as to whether gross injustice would result from non consideration of the challenge sought to be laid against the Order-in-Original.

12. In the instant case, this Court is not inclined to exercise its discretion for more than one reason. Firstly, the matter involves a commercial transaction and it is not as if the petitioner was not aware of their rights. A cursory reading of the Order-in-Original dated 27.2.2009, which runs to more than 55 pages, shows that extensive search and seizure operations were conducted in the place of business of the petitioner as well as the residential premises of the partners, statements were recorded, documents were seized and after analyzing the facts, an order came to be passed. There is also a finding to the effect that the petitioner created bogus records. The petitioner went before the Tribunal alleging that they were not granted an opportunity to cross examine a particular person. This aspect was specifically considered by the Tribunal and rejected by order dated 01.2.2010. Thus, on facts, this Court is of the view that the petitioner has not made out any case for exercise of discretion in their favour to maintain such a

belated challenge to the Order-in-Original. Such a challenge is not maintainable in the light of the factual position set out above.

13. For all the above reasons, the writ petition is dismissed. No costs. Consequently, the connected WMPs are also dismissed.

Sd/-
Assistant Registrar(CCC)

//True copy//

Sub Assistant Registrar

RS

To

1.The Commissioner of Central Excise,
No.1, Foulk's Road, Anaimedu,
Salem-1.

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

+1cc to Mr.Naveena .D, Advocate SR.No.39536
+1cc to Mr.Hema MuraliKrishnan, Advocate SR.No.39668

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VBA(CO)
GN(03/07/2018)