IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 29.10.2018

CORAM :

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

C.M.A. No.2538 of 2018

M/s.Shiyam Foundations,
A Proprietary Concern,
New No.30/Old No.19,
Dr.Ambedkar Road,
Kodambakkam,
Chennai-600 024 ... Appellant

-vs-

The Commissioner of Service Tax,
1775, Jawaharlal Nehru Inner Ring Road,
Anna Nagar Western Extension,
Chennai-600 101 ... Respondent

Civil Miscellaneous Appeal filed under Section 35G of Central Excise Act, 1944 against the Final Order of the Customs Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai, dated 15.02.2017, in Final Order No.40238 of 2017.

For Appellant : Mr.S.Muthu Venkataraman

For Respondent : Mrs.R.Hemalatha,
Sr.Standing Counsel

JUDGMENT

(Order of the Judgement was passed by T.S.SIVAGNANAM,J.)

This appeal, filed by the assessee under Section 35G of the Central Excise Act, 1944, made applicable to the proceedings under the Finance Act, is directed against the order passed by the Customs, Excise and Service Tax Appellate Tribunal, Chennai, in final order No.40238 dated 15.2.2017.

2.The appeal has been filed raising the following substantial Questions of Law:

> "1.Whether the order of the Tribunal is arbitrary and illegal inasmuch as it proceeds on a complete misconception of law and facts, thus liable to be set aside?
>
> 2.Whether an appeal can be dismissed on demise of the proprietor of the firm, and the demand be confirmed on the legal representatives of the proprietor?
>
> 3.Whether an ex-parte order can be passed without hearing the matter on merits?"

3.The Tribunal, by the impugned order, dismissed the appeal filed by the assessee on the ground that the appellant has not complied with the condition imposed by it, vide order dated 21.09.2016, directing pre-deposit of a sum of Rs.10 lakhs.

4.To be noted that as against the order in original dated 04.03.2014, the appellant filed appeal before the Tribunal during 2014 and moved an application for stay of the demand of service tax of Rs.71,05,715/- and interest under Section 75 of the Finance Act, 1994 and equally penalty under Section 78 of the Act.

5.The said application appears to have been pending before the Tribunal for close to two years and it was heard on 21.09.2016, on which date, the Tribunal passed a conditional order of stay directing the appellant to deposit a sum of Rs.10 lakhs within a period of eight weeks. The appellant was directed to report compliance before the Tribunal on 25.11.2016. However, the Proprietor of the appellant Thiru S.Sundarraman passed away on 29.08.2016, i.e. after he had filed the appeal before the Tribunal, but well before the said petition was heard.

6.It appears that the legal heir, who is presently the assessee in this appeal, viz., his spouse, did not have knowledge of the proceedings and consequently, the demise of the Proprietor of the appellant was not placed before the Tribunal. Further, the record shows that none appeared for the appellant when the Tribunal passed the interim order on 21.09.2016. Equally, when the appeal was dismissed for non-compliance of the conditional order, vide the impugned order, there was no appearance on behalf of the appellant. Thus, we are of the considered view that the peculiar facts and circumstances of the case warrant an order, which would grant some relief to the appellant. This is more so because of the decision of the Hon'ble Supreme Court in the case of Commissioner of Service Tax vs. Bhayana Builders (P) Ltd. [2018(10) G.S.T.L.118(S.C.)]. Further, the learned counsel for the appellant, by placing reliance on the decision of the Hon'ble Supreme Court in the case of Shabina Abraham vs. Collector of Central Excise and Customs [2015(322) E.L.T.372(S.C.)] submits that the demand gets abated on the demise of the appellant. The learned counsel for the appellant also places reliance on the decision of the Hon'ble Supreme Court in the case of Balaji Steel Re-rolling Mill vs. the Commissioner of Central Excise and Customs [2014 (36) STR 1201 (SC)], wherein, the Tribunal was directed to take up the appeal and decide the same on merits. The appellant also places reliance on the Circular issued by the CBEC in Circular No.108/02/2009-ST, dated 29.01.2009 and submits that in cases where ownership of the land has been transferred and construction service continued thereafter to each land owner vide separate construction agreements, such activity is not chargeable to service tax.

7.As observed by us in the preceding paragraphs, the peculiar facts and circumstances of this case has convinced us to interfere with the order passed by the Tribunal and we go one step further to grant some relief to the legal heir of the deceased Proprietor of the appellant to canvass all the points before the Tribunal with a direction to the Tribunal to take decision on the merits of the matter. Furthermore, we are convinced that the appellant should be given a fair opportunity to contest the matter and for which purpose, we direct that the appeal be taken up and decided on merits without insisting upon any pre-deposit. We make it clear that this order has been passed taking note of the peculiar facts and circumstances of the case and not to be treated as a precedent.

8.For the above reasons, the appeal is allowed and the impugned order is set aside and the matter is remanded to the Tribunal to decide the matter on merits and in accordance with law, without insisting upon pre-deposit. The assessee is at liberty to canvass all the points which were canvassed before us and contest the matter on merits. Consequently, the Substantial Questions of Law are left open. No costs.

9.Mrs.R.Hemalatha, the learned Senior Standing Counsel appearing for the Respondent sought to distinguish the decision in the case of Bhayana Builders (P) Ltd. as well as the decision in the case of Shabina Abraham, stating that in those cases, the assessee did not participate in the adjudication of the show cause notice; whereas in the instant case, the Proprietor of the appellant, who was then alive, had participated in the adjudication process. However, we opine that the appeal should be heard on merits and liberty should be given to the assessee to canvass all points. We extend the same liberty to the Revenue to raise all the contentions before the Tribunal.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

msk
To

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

2.The Commissioner of Service Tax,
1775, Jawaharlal Nehru Inner Ring Road,
Anna Nagar Western Extension,
Chennai-600 101.

C.M.A. No.2538 of 2018

rsv[co]
srg 26/11/2018