IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 10.12.2018

CORAM :

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

Civil Miscellaneous Appeal No.2882 of 2018

M/s.Amudhasurabi Fruit Industries P.Ltd.
Rep by its Managing Director C.Selvam
.. Appellant/Appellant

-vs-

The Commissioner of Central Excise,
Chennai III Commissionerate,
26/1, Mahatma Gandhi Road,
Nungambakkam, Chennai - 600 034.
...Respondent/Respondent

Civil Miscellaneous Appeal filed under Section 35G of the Central Excise Act, 1944 directed against the order passed by the Central Excise and Service Tax Appellate Tribunal, dated 30.05.2018 in E/ROA.40077/2018 in Final order No.41040 of 2017 dated 20.06.2017 in Appeal No.E/1041/2005 DB Passed by the Customs, Excise and Service Tax Appellate Tribunal, Chennai. Rejectiong the application filed by the Applicant seeking restoration of their appeal against Final order No.41040 of 2017 dated 20.06.2017 in Appeal No.E/1041/2005.

For Appellant : Mr.S.Baskaran,

For Respondent : Mr.K.S.Ramasamy

JUDGMENT
[Judgement of the Court was delivered by T.S.Sivagnanam, J.]

This Civil Miscellaneous Appeal is filed under Section 35G of the Central Excise Act, 1944 directed against the order passed by the Central Excise and Service Tax Appellate Tribunal, dated 30.05.2018 rejecting the assessee's application seeking restoration of their appeal which was dismissed for non-prosecution vide order dated 20.06.2017.

2.Heard Mr.S.Baskaran, learned Counsel for the petitioner and Mr.K.S.Ramasamy, learned counsel accepts notice for the respondent.

3.The learned counsel for the respondent submitted that the appeal before this Court under Section 35G of the Central Excise Act, 1944 will not be maintainable, since it is arising out of a Miscellaneous Order. We do not accept the said contention because, even if an order has been passed in Miscellaneous Application, for example, in a case where there is a delay in filing the appeal which is dismissed, yet a Substantial Question of Law will arise. Therefore, this Court will be well justified in examining the correctness of the orders passed by the Tribunal, dated 20.06.2017 by which appeal was dismissed for non-prosecution.

4.Therefore, this appeal is entertained on the following Substantial Questions of Law:

> "(i)Whether the Tribunal was right in dismissing the appeal of the appellant for want of prosecution without deciding the case on merits in terms of the ration laid down by the Hon'ble Apex Court in the case of Balaji Steel Re-rolling Mills Vs. CEX & Customs reported in 2014 (310) ELT 209 (SC)?
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> (ii)Whether the Tribunal was right in dismissing the restoration application filed by the appellant, when the Tribunal even at the first instance cannot dismiss the appeal for want of prosecution and should have decided the case on its merits in view of the judgement rendered by the Division Bench of the Bombay High Court in the case of Afloat Textiles (India) Ltd. Vs. UOI reported in 2015 (325) ELT 719 (Bom)?
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> (iii)Whether the Tribunal was right in dismissing the appeal of the appellant for non-prosecution without considering the provisions of Section 35C of the Central Excise Act, which do not grant/provide powers to the Tribunal to dismiss any appeals for default or for want of prosecution, even in a case where the appellant nor his counsel not present during the course of hearing?"

5.Identical issue was considered by the Hon'ble Division Bench of this Court in the case of P.Ganesh, Commercial Director Vs. The Commissioner of Central Excise in CMA No.2055 of 2018 dated 19.09.2018. In the said case also the Tribunal dismissed the appeal for non-prosecution after taking note of the decisions of the Hon'ble Supreme Court. On the said issue the Court allowed the appeal filed by the assessee for better appreciation. The operative portion of the judgement is quoted herein

> "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."

6.The above issue was also dealt with by the Hon'ble Division Bench of the High Court of Bombay in the case Afloat Textiles (India) Ltd., Vs. Union of India [reported in (2015) 325 E.L.T 719 (Bom.). In the said decision, the Court took into consideration the decision of the Hon'ble Supreme Court in the case of Balaji Steel Re-rolling Mills Vs. Commissioner of Central Excise and Customs, and held as follows:

"7........

The Hon'ble Supreme Court has clarified that once there is no power in the Tribunal to dismiss an appeal for want of prosecution then, the orders of this nature cannot be sustained. The Hon'ble Supreme Court has held that the Act viz., Central Excise Act, 1944, enjoins upon the Tribunal to pass an order on the appeal confirming, modifying or annulling the decision of order appealed against or it may remand the matter. It does not give any power to the Tribunal to dismiss the appeal for default or for want of prosecution in case the appellant is not present when the appeal is taken for hearing. In the light of this clear pronouncement of law we cannot sustain the impugned order. The initial dismissal itself being contrary to law, the refusal to restore the appeal for adjudication on merits cannot be sustained.”

7.Accordingly, this appeal is allowed and Substantial Questions of Law framed for consideration are answered in favour of the assessee and the matter is restored to the Tribunal for consideration of the appeal on merits and in accordance with the law with a further direction to the assessee to appear before the Tribunal and not to seek any adjournment.

8.In the result, the appeal allowed. No costs.

Sd/-
Assistant Registrar(CS VI)

//True Copy//
Sub Assistant Registrar

mrm/ska
To
1. The Central Excise and Service Tax Appellate Tribunal, Chennai.

2. The Assistant Commissioner of Central Excise, Hosur I Division, Hosur-635 128.

3. The Commissioner of Central Excise, Chennai III Commissionerate, 26/1, Mahatma Gandhi Road, Nungambakkam, Chennai - 600 034.

+1cc to Mr.N.Viswanathan, Advocate, S.R.No.85010
+1cc to Mr.K.S.Ramasamy, Advocate, S.R.No.84887

C.M.A.No.2882 of 2018

VGI(CO)
CS/24/01/2019