

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :: 21-11-2019

CORAM

THE HON'BLE DR.JUSTICE VINEET KOTHARI

AND

THE HON'BLE MR.JUSTICE C.SARAVANAN

C.M.A.Nos.3074, 3091, 3092, 3093 & 3094 OF 2017

Shailesh Jariwala ... Appellant in C.M.A.No.3074/2017

Bilal Salim Saiyed ... Appellant in C.M.A.No.3091/2017

Ismail Yunus Chakkiwala ... Appellant in C.M.A.No.3092/2017

Salim Abdullah Chakkiwala ... Appellant in C.M.A.No.3093/2017

Shri Anil Kumar ... Appellant in C.M.A.No.3094/2017

-vs-

Commissioner of Customs (Seaport-Export),
Customs House, No.60, Rajaji Salai,
Chennai-600 001.

.... Respondent in all Appeals

C.M.A.No.3074 of 2017 is filed under Section 130 of the Customs Act,1962, against the Miscellaneous Order No.40163 of 2017, dated 18.04.2017, in Application No.C/ROA/41072/2016 in C/41456/2013 on the file of Customs, Excise and Service Tax Appellate Tribunal, South Regional Bench, Chennai-6.

C.M.A.No.3091 of 2017 is filed under Section 130 of the Customs Act,1962, against the Miscellaneous Order No.40161 of 2017, dated 18.04.2017, in Application No.C/ROA/41070/2016 in C/41454/2013 on the file of Customs, Excise and Service Tax Appellate Tribunal, South Regional Bench, Chennai-6.

C.M.A.No.3092 of 2017 is filed under Section 130 of the Customs Act,1962, against the Miscellaneous Order No.40162 of 2017, dated 18.04.2017, in Application No.C/ROA/41071/2016 in C/41455/2013 on the file of Customs, Excise and Service Tax Appellate Tribunal, South Regional Bench, Chennai-6.

C.M.A.No.3093 of 2017 is filed under Section 130 of the Customs Act,1962, against the Miscellaneous Order No.40164 of 2017, dated 18.04.2017, in Application No.C/ROA/41073/2016 in C/41457/2013 on the file of Customs, Excise and Service Tax Appellate Tribunal, South Regional Bench, Chennai-6.

C.M.A.No.3094 of 2017 is filed under Section 130 of the Customs Act, 1962, against the Miscellaneous Order No.40165 of 2017, dated 18.04.2017, in Application No.C/ROA/41074/2016 in C/41458/2013 on the file of Customs, Excise and Service Tax Appellate Tribunal, South Regional Bench, Chennai-6.

For Appellants : Mr.Karthik Sundaram
For Respondent : Mr.K.Mahesh

COMMON JUDGMENT
(By Dr.Vineet Kothari,J.)

The only grievance raised in the present appeals is that the learned Customs, Excise and Service Tax Appellate Tribunal (CESTAT), Chennai, could not have dismissed the appeals for want of prosecution, contrary to the decision of the Hon'ble Supreme Court in the case of Balaji Steel Re-rolling Mills v. Commissioner of Central Excise & Customs, 2014 (310) E.L.T.209 (SC).

2. The Hon'ble Supreme Court, in the said judgment of Balaji Steel Re-rolling Mills, clearly laid down as under :

'11) From a perusal of the aforesaid provisions, we find that the Act enjoins upon the Tribunal to pass order on the appeal confirming, modifying or annulling the decision or order appealed against or 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 up for hearing.

12) A similar question came up for consideration before this Court in The Commissioner of Income-Tax, Madras vs. S. Chenniappa Mudaliar, Madurai 1969 (1) SCC 591 wherein this Court considered the provisions of Section 33 of the Income-tax Act, 1922 and Rule 24 of the Appellate Tribunal Rules, 1946 which gave power to the Tribunal to dismiss the appeal for want of prosecution. For ready reference, Section 33(4) of the Income Tax Act, 1922 and Rule 24 of the Appellate Tribunal Rules, 1946 are reproduced below:-

Section 33(4) of the Income Tax Act, 1922

"33(4). The Appellate Tribunal may, after giving both parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, and shall communicate any such orders to the assessee and to the Commissioner."

Rule 24 of the Appellate Tribunal Rules, 1946

"24. Where on the day fixed for hearing or any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Tribunal may dismiss the appeal for default or may hear it ex parte."

Considering the aforesaid provisions, this Court held as under:-

"7. The scheme of the provisions of the Act relating to the Appellate Tribunal apparently is that it has to dispose of an appeal by making such orders as it thinks fit on the merits. It follows from the language of Section 33(4) and in particular the use of the word "thereon" that the Tribunal has to go into the correctness or otherwise of the points decided by the departmental authorities in the light of the submissions made by the appellant. This can only be done by giving a decision on the merits on questions of fact and law and not by merely disposing of the appeal on the ground that the party concerned has failed to appear. As observed in *Hukumchand Mills Ltd. v. CIT*, the word "thereon" in Section 33(4) restricts the jurisdiction of the Tribunal to the subject-matter of the appeal and the words "pass such orders as the Tribunal thinks fit" include all the powers (except possibly the power of enhancement) which are conferred upon the Appellate Assistant Commissioner by Section 31 of the Act. The provisions contained in Section 66 about making a reference on questions of law to the High Court will be rendered nugatory if any such power is attributed to the Appellate Tribunal by which it can dismiss an appeal, which has otherwise been properly filed, for default without making any order thereon in accordance with Section 33(4). The position becomes quite simple when it is remembered that the assessee or the CIT, if aggrieved by the orders of the Appellate Tribunal, can have resort only to the provisions of Section 66. So far as the questions of fact are concerned the decision of the Tribunal is final and reference can be sought to the High Court only on questions of law. The High Court exercises purely advisory jurisdiction and has no appellate or revisional powers. The advisory jurisdiction can be exercised on a proper reference being made and that cannot be done unless the Tribunal itself has passed proper order under Section 33(4). It follows from all this that the Appellate Tribunal is bound to

give a proper decision on questions of fact as well as law which can only be done if the appeal is disposed of on the merits and not dismissed owing to the absence of the appellant. It was laid down as far back as the year 1953 by S.R. Das, J. (as he then was) in CIT, v. Mtt. Ar. S. Ar. Arunachalam Chettiar that the jurisdiction of the Tribunal and of the High Court is conditional on there being an order by the Appellate Tribunal which may be said to be one under Section 33(4) and a question of law arising out of such an order. The Special Bench, in the present case, while examining this aspect quite appositely referred to the observations of Venkatarama Aiyar, J. in CIT v. Scindia Steam Navigation Co. Ltd. indicating the necessity of the disposal of the appeal on the merits by the Appellate Tribunal. This is how the learned judge had put the matter in the form of interrogation:

"How can it be said that the Tribunal should seek for advice on a question which it was not called upon to consider and in respect of which it had no opportunity of deciding whether the decision of the Court should be sought."

Thus looking at the substantive provisions of the Act there is no escape from the conclusion that under Section 33(4) the Appellate Tribunal has to dispose of the appeal on the merits and cannot short-circuit the same by dismissing it for default of appearance."

13) Applying the principles laid down in the aforesaid case to the facts of the present case, as the two provisions are similar, we are of the considered opinion 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. The High Court also erred in law in upholding the order of the Tribunal.

14) We, therefore, set aside the order dated 18.01.2014 passed by the High Court of Judicature of Bombay, Bench at Aurangabad and also the order dated 22.08.2012 passed by the Tribunal and direct the Tribunal to decide the appeal on merits.

15) Accordingly, the appeal is allowed with a cost of Rs. 25,000/- to be payable by the Respondent.'

3. The learned CESTAT, at the first instance, dismissing the appeals for want of prosecution on 03.10.2016, made the following order :

'None present for these appellants. On 26.9.2016, an order was passed directing the appellants to cause appearance today.

2. In view of further default to comply to the above order, seeking adjournment, the stay granted earlier on 22.1.2014 was vacated on 26.9.2016.

3. Appellants conduct clearly shows that the applications were filed to abuse the process of law. Accordingly, all the appeals are dismissed for default.'

4. When applications were filed for recall of that order and hearing of the appeals on merits, the learned Tribunal again dismissed the said applications on 18.04.2017, distinguishing the above judgment of the Hon'ble Supreme Court in Balaji Steel Re-rolling Mills, with the following observations :

'8. We have to say that the miscellaneous orders dated 13.06.2016 as well as 29.06.2016 are just orders granting adjournment and fixing the date of next hearing. The appeals were adjourned on the request made by the ld. Counsel of the appellants. Instead of passing a docket order granting adjournment and posting the next date of hearing of the case, the Tribunal, in order to make it clear that the appeal will be positively taken on the next date, passed the above miscellaneous orders. So the ground put forward by the appellants that they received the copy of the miscellaneous orders on 05.10.2016 and therefore could not appear on 03.10.2016 is baseless and impermissible. If there was any direction in the miscellaneous order which the appellant had to comply within the next hearing date, the argument of the ld. Counsel would have some persuasive effect. The miscellaneous orders are nothing but orders of adjournments. It is the duty of the parties as well as the Counsels to take note of the next date of hearing when they seek adjournment. In the present case, especially when the Tribunal directed the appellants to get ready

with the matter, there was a strong responsibility on the part of Counsel for appellants to follow up the hearing date of the appeals. Ld. Counsel for the appellants heavily relies upon the judgment in the case of Balaji Re-rolling Mills Ltd. (supra) to contend that the Tribunal should not have dismissed the appeals for default and that Tribunal should dispose the appeals only on merits. We are in full and humble agreement with the view expressed by the Hon'ble Apex Court in the said judgment. We are fully aware of our responsibility to consider and dispose the appeals on merits. The facts of the judgment reveal that the appeal in the said case was given only a single hearing date and the Tribunal dismissed the appeal for non-prosecution. In the case before us, the facts are entirely different. The Tribunal has given several adjournments and also passed miscellaneous orders directing the appellant to get ready with the appeals. Nonetheless, tax matters require the assistance of lawyers and department representative to dispose of the matters. The issue involved being complex as also facts, as well as the implication of Revenue necessitates proper guidance from the bar and the Department to dispose the appeals on merits of the case. After filing vakalath for appearance in the matter, the Counsels appearing cannot seek repeated adjournments, thereby delaying delivery of justice. The judgment of the Hon'ble Apex Court in the case of Balaji Re-rolling Mills Ltd., (Supra) cannot be used as a shelter for non-appearance and non-prosecution. In the absence of assistance from the Counsel appearing for appellant, even after specific direction, Tribunal has dismissed the appeals for non-prosecution. We find therefore no ground to interfere in the order passed by the Tribunal, for the reason that the appellants have been given sufficient chances for arguing their case on merits.

9. In the result, all the miscellaneous applications for restoration of appeals filed by the applicants are dismissed."

5. Having perused the record and after hearing the learned counsel for the parties, we are satisfied that the learned Tribunal has erred, with great respect, in unnecessarily finding ways to distinguish the ratio and applicability of the said judgment of the Hon'ble Supreme Court in the case of Balaji Steel Re-rolling Mills (Supra), which was binding on all the lower Courts and the Tribunals without exception and, therefore, the learned Tribunal was bound to decide the appeals on merits.

6. Being the final fact finding body, a duty is cast on the learned Tribunal to decide the appeals on merits. Tribunals are not Constitutional Courts. At the same time, if repeated adjournments were sought, the learned Tribunal could impose some costs on the appellant, but the appeals could not have been dismissed for want of prosecution or without deciding the merits of the case even though ex-parte, if it becomes necessary, in terms of the aforesaid judgment of the Hon'ble Supreme Court in the case of Balaji Re-rolling Mills Ltd.

7. Therefore, we allow the present Civil Miscellaneous Appeals and set aside both the orders of the learned Tribunal, dated 03.10.2016 and 18.04.2017, and restore the five appeals on the file of learned CESTAT with a direction to the learned Tribunal to decide the appeals on merits after giving an opportunity of hearing to both the parties, subject to the condition that the appellants/assesseees shall deposit costs of Rs.10,000/- (Rupees Ten Thousands) for each appeal restored by this order with the Consumer Welfare Fund, maintained by the Central Government.

Sd/-

Assistant Registrar (CS-IV)

// True Copy//

Sub Assistant Registrar

dixit

To

1. Commissioner of Customs (Seaport-Export),
Customs House, No.60, Rajaji Salai,
Chennai-600 001.

2. Customs, Excise and Service Tax Appellate Tribunal,
South Regional Bench, Chennai-6.

+1CC to Mr.K.Magesh, Advocate, SR.No.96994.

+5CC to Mr.Karthik Sundaram, Advocate, SR.Nos.96900 to 96904.

CA(CO)

CSR: 07/01/2020

C.M.A.No.3074/2017 & BATCH