OD-8

APOT/59/2019
IA No.GA/1/2019 (Old No.GA/1418/2019)
IA GA/2/2020 (Old No.GA/637/2020)

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
ORIGINAL SIDE

PANKAJ V. MEHTA

-Versus-

UNION OF INDIA & ORS.

Appearance:
Mr. Ajay Gaggar, Adv.
Mr. H. Gangopadhyay, Adv.
...for the appellant.

Mr. Bhaskar Prasad Banerjee, Adv.
...for the respondent.

BEFORE:
The Hon'ble JUSTICE T.S. SIVAGNANAM
-And-
The Hon'ble JUSTICE HIRANMAY BHATTACHARYYA

Date : 12th August, 2022.

The Court : We have heard Mr. Ajay Gaggar, learned advocate for the appellant and Mr. Bhaskar Prasad Banerjee, learned standing counsel for the respondent/revenue.

There is a delay of 11 days in filing the appeal.

We are satisfied with the reasons assigned in the affidavit filed in support of the application for condone delay. For such reason, we exercise discretion and condone the delay in filing the appeal. Accordingly, the application for condonation of delay (IA No.GA/1/2019) is allowed and delay in filing the appeal is condoned.

We have heard Mr. Ajay Gaggar, learned advocate assisted by Mr. H. Gangopadhhay, Advocate for the appellant and Mr. Bhaskar Prasad Banerjee, learned standing counsel for the revenue, who was requested by us to appear in the matter. The Department shall regularise his appearance.

This intra-Court appeal is directed against the order dated 14th January, 2019 in WP No.930 of 2010. The said writ petition was filed by the appellant herein challenging an order in original passed by the Commissioner of Customs (Port), Kolkata, the second respondent herein, as confirmed by the Customs, Excise & Service Tax Appellate Tribunal, Kolkata. The appeal filed by the appellant before the tribunal was dismissed on a technical ground and not on merits by order dated 13th July, 2009. The tribunal noted that by the order passed by the Commissioner of Customs, duty and penalty were confirmed and that the appellant had not filed any application for waiver of pre-deposit of duty and penalty nor they have deposited the same. Taking note of Section 129E of the Customs Act, the tribunal held that the appellant having not deposited the duty and penalty as imposed by the original authority, nor they have filed any application for waiver before the tribunal, dismissed the appeal as not maintainable. The appellant thereafter filed miscellaneous application before the learned tribunal to restore the appeal so that the appeal can be heard on merits and along with such application, another application for stay/waiver of the pre-deposit was also filed. The tribunal took up those applications for consideration and by order dated 2nd September, 2009 held that the appeal was dismissed by the tribunal on 13th July, 2009 on the ground that the appellant had not deposited the demand of duty and penalty as per the order passed by the lower authority nor the appellant had filed any application for waiver of the pre-deposit of duty and penalty and, therefore, the application for restoration of the appeal that too without depositing the amount in dispute cannot be entertained and, accordingly, the application was dismissed. Thereafter, the appellant filed another miscellaneous application for rectification and recalling the order dated 2nd September, 2009. This application was dismissed by order dated 27th November, 2009. The appellant filed the writ petition challenging the orders of the tribunal dated 13th July, 2009, 2nd September, 2009 and 27th November, 2009 and also prayed for a direction to the learned Tribunal to admit their appeal without insisting upon the appellant to pre-deposit the duty amount. The writ petition was pending before this Court and by order dated 14th January, 2009, the writ petition was dismissed on the ground that the applications filed by the appellant subsequent to the dismissal of the appeal by the tribunal seeking for stay/waiver of the pre-deposit cannot be taken into consideration since the appeals have already been disposed of. Aggrieved by such order, the appellant/writ petitioner is before us by way of this appeal.

It is the contention of the learned standing counsel that the writ petition was not maintainable as against the order of the learned tribunal and if the appellant was aggrieved, he ought to have filed a statutory appeal before this Court which would have been heard by a Division Bench. Furthermore, it is submitted that the conduct of the appellant should be taken note of as the appellant did not pray for any stay/waiver of the pre-deposit when they preferred the appeal before the learned tribunal and, therefore, the learned tribunal was right in dismissing the appeal and the order has been rightly affirmed by the learned writ Court. It is no doubt true that as against the order passed by the learned tribunal, the appeal lies to the Division Bench of this Court except in cases where notification issues are involved. Therefore, on the said ground, the writ petition could have been dismissed. Nevertheless, we find that the writ petition was filed in the year 2010 and after nearly nine years was dismissed on 14th

January, 2019. Therefore, even assuming such an objection was raised by the revenue in the writ petition it would be too harsh to drive the assessee to an alternative remedy after a period of 9 years when the writ petition was pending before this Court. There are several decisions to the said effect that if the writ petition has been entertained and pending before Court for a considerable period of time, it would not augur well to relegate the writ applicant to avail alternative remedy after a long lapse of time as in the case on hand which is nearly nine years. In any event, the order passed by the writ Court is now being tested by us in the Division Bench and, therefore, the technical objection raised by the revenue would not strictly apply to the case on hand.

On going through the order passed by the learned Tribunal which was impugned in the writ petition, we find a more liberal approach could have been taken by the learned tribunal. It is no doubt true at the first instance, the appellant did not file application for stay/waiver of the pre-deposit. Subsequently, when they filed an application for restoration of the appeal, the appellant had filed an application for stay/waiver of the pre-deposit and such application could have been considered by the tribunal or at least when the application for rectification/restoration was filed, the tribunal could have adopted a more lenient approach. In any event, the tribunal having guided by its own procedure, would have hesitated to exercise its power of rectification after having dismissed the appeal. However, no such shackles can be put on a writ Court exercising jurisdiction under Article 226 of the Constitution and we are entitled to exercise discretion considering the facts and circumstances of the case. The case on hand, in our opinion, is a peculiar case and we are of the firm view that the appellant should not be denied the right of appeal solely on the technical ground i.e. non-filing of application for waiver of pre-deposit.

Thus, for the above reason, we are inclined to interfere with the orders passed by the learned Tribunal. In the result, the appeal (APOT/59/2019) is allowed and the order passed in the writ petition is set aside and the orders passed by the learned Tribunal dated 13th July, 2009, 2nd September, 2009 and 27th November, 2009 are set aside and the appeal is restored to the file of the learned tribunal. The appellant is directed to file a fresh application for stay/waiver of the pre-deposit which shall be taken on the file of the learned tribunal without reference to limitation and such application be considered on merits and in accordance with law and, if deem appropriate by the learned tribunal, appeal itself can be heard on merits and a decision be taken in accordance with law. The appellant is directed to file such application before the tribunal within three weeks from the date of receipt of a server copy of this order.

Consequently, the connected application for stay (IA No.GA/2/2020) also stands disposed of.

(T.S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)

S.Das/As.