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SooperKanoon Citation : sooperkanoon.com/351621

Court : Mumbai

Decided On : Apr-20-2004

Reported in : 2004(6)BomCR400; 2004(3)MhLj385

Judge : V.C. Daga and ;J.P. Devadhar, JJ.

Acts : Code of Civil Procedure (CPC) - Sections 11; [Constitution of India](#) - Article 226

Appeal No. : Writ Petition No. 348 of 1992

Appellant : Gambar Plastics and anr.

Respondent : Union of India (Uoi) and anr.

Advocate for Def. : S.M. Shah and ;S.V. Bharucha, Advs.

Advocate for Pet/Ap. : Darian Shroff and ;Sonali Kunekar, Advs., i/b., Haresh Mehta and Co.

Disposition : Petition dismissed

Judgement :

V.C. Daga, J.

1. The dispute in the petition relates to tariff classification as to whether the product 'Split Profile' can be classified as sheets/sheeting of PVC and charged to

duty under erstwhile T.I. 15A (2) and under Heading No. 3920.12 of the Schedule to Central Excise Tariff Act, 1986 ('the CET Act, 1986' for short) as contended by the Revenue or, as other articles of plastic under erstwhile tariff Item No. 15A(2) and Heading No. 3926.90 as such exempted under Notification No. 53/88 dated 1st March, 1988 as contended by the petitioners.

The Facts :

2. The petitioner No. 1 is a partnership firm ('the firm' for short), inter alia, engaged in the business of manufacturing PVC Pipes, tubes and profiles of different shapes including subject product 'Split Profile'. The petitioner-firm is duly registered as a small scale industry with the Directorate of Small Scale Industries of the State. The petitioner-firm since inception of its manufacturing activities i.e. from the year 1980 had started filing declarations under Notification No. 111/78 to seek exemption under Notification No. 53/88 dated 1st March, 1988 from the payment of excise duty. Such declarations, for the assessment years 1980-81 till 1989-90, were filed and approved by the Range Officer after due verification thereof.

3. The petitioners have been declaring its product as 'Split Profile' classified as other articles of plastic under erstwhile Tariff Entry 15A(2) and claiming exemption under Notification No. 53/88CE dated 1st March, 1988 since the said product was fully exempted. An exemption was also sought under Notification No. 111/78 issued under Rule 174A from Licensing Control so as to claim exemption from payment of excise duty. It was granted in favour of the petitioners, with the result, they were allotted Exemption Code numbers by the Excise Department, which the petitioners continued to hold during the years 1984-88.

4. It appears that the officers of the Central Excise Department visited factory premises of the petitioner-firm and raised an objection regarding tariff classification of 'Split Profile' and detained 123 rolls of their product and, prima facie; found that the subject goods were 'sheeting' leviable to duty under erstwhile T.I. No. 15A(2) and sub-heading No. 3920.12 of the CET Act 1986. In the result, a show cause Notice dated 2nd April, 1990 was issued on that basis demanding duty for the period 1984-85 to 1989-90.

5. The aforesaid notice was replied by the petitioners. The Collector (J), Central Excise, Bombay-III, vide his order dated 30th August, 1991, after hearing the parties to the show cause notice was pleased to confirm the demand under the provisions of the Central Excise and Salt Act, 1944 and imposed penalty under the provisions of the Central Excise Rules, 1944 with further direction to confiscate 123 PVC sheets with further order to allow redemption thereof on payment of redemption fine of Rs. 1 lakh.

6. Being aggrieved by the aforesaid order, the petitioners invoked writ jurisdiction of this Court under Articles 226 and 227 of the [Constitution of India](#). This Court while granting 'rule' on 4th March, 1992, was pleased to grant interim order in terms of prayer Clause (c) to the petition subject to the conditions that the petitioners shall file an appeal within two weeks and apply for interim stay of the order with further direction to the petitioners to furnish security as may be directed by the Central Excise and Gold (Control) Appellate Tribunal ('CEGAT' for short). It was further observed that subject to the compliance of the interim order of the CEGAT; the interim order granted by this Court was to come to end to that extent.

7. In pursuance of the condition put by this Court while granting rule, the petitioners preferred two appeals before the CEGAT, New Delhi along with applications for stay and to dispense with the pre-deposit of duty and penalty including redemption fine imposed by respondent No. 2. It appears that by a common order dated 1st May, 1992, respondent No. 3 disposed of both applications moved in both appeals and dispensed with the necessity of pre-deposit of duty and penalty and redemption fine subject to the petitioners depositing Rs. 4 lakh in cash.

8. It appears from the record that the petitioners moved this Court, in this writ petition, one Civil Application bearing No. 2934 of 1992 and obtained directions from this Court against CEGAT; wherein this Court directed the CEGAT to hear the appeals on merits by accepting bank guarantee of Rs. 5 lakh by way of pre-deposit instead of cash deposit in the sum of Rs. 4 lakh. Petitioners, thereafter, furnished bank guarantee of Rs. 5 lakh, that is how stay became operative with respect to the recovery of duty and penalty and redemption fine during the

pendency of appeals.

9. It appears that when the appeals were taken up for final hearing on 20th June, 1997, the same were dismissed in default by the CEGAT vide final order No. 336-337/97-C; since nobody was present before the CEGAT on behalf of the appellants/petitioners herein.

10. It further appears from the record that the petitioners (appellants before the CEGAT) moved two separate applications in respective appeals for restoration of appeals. The said applications came to be registered as ROA/491/97-CE/2123 and 2127/97-C. It further appears that during the course of hearing, learned counsel appearing for the petitioners/appellants before the CEGAT, on being asked; could not show that the bank guarantees furnished were renewed and alive on the date of hearing so as to establish compliance of the terms of the interim order, with the result, the CEGAT refused to restore the appeals, which were dismissed in default for want of appearance on 20th June, 1997 when the appeals were called out for final hearing. In the result, both applications moved for restoration of appeals were rejected by the CEGAT.

11. Being aggrieved by the above orders, petitioners chose to file separate writ petition before this Court being Writ Petition No. 3602 of 1998 to challenge both the orders of the CEGAT; one dated 20th June, 1997, whereby appeals were dismissed in default and another dated 3rd April, 1998, refusing to grant restoration of the appeals.

12. The above writ petition was heard by the Division Bench of this Court and on 20th July, 1998. The said petition came to be dismissed by a reasoned order on the same date finding that the petitioners did not keep the bank guarantee renewed or alive; which was furnished by way of pre-deposit before the CEGAT. The Division Bench as such found no fault with the order passed by the CEGAT, whereby applications seeking restoration of appeals were dismissed. The said order rejecting writ petition was accepted by the petitioners, with the result, it became final and conclusive for want of any further challenge. In nutshell, both orders, one passed by the CEGAT dismissing both appeals; wherein the order dated 30th August, 1991 passed by the Collector (J), Bombay-III was a subject

matter of challenge, and the other; order passed by the Division Bench of this Court rejecting writ petition became final and conclusive.

13. Now this writ petition has come up for final hearing. The present petition challenges the very same order dated 30th August, 1991 passed by the Collector (J), Bombay-III which was the subject matter of challenge before the CEGAT in appeals.

Submissions and Consideration:

14. Mr. Shroff, learned counsel for the petitioners, in his usual persuasive style, vehemently forcefully contended that since there was no adjudication on the validity of the impugned order-in-original passed by the Collector of Excise, it is open for the petitioners to canvass its illegality in the present petition notwithstanding dismissal of appeals and writ petition arising therefrom.

15. Mr. Shah, learned counsel appearing for the Revenue opposed this petition contending that the challenge to the order-in-original is not available to the petitioners in view of subsequent events which took place during the pendency of this petition as referred to hereinabove in extenso.

16. In our view, Mr. Shah is right. Challenge to the impugned order dated 30th August, 1991, as on date, does not survive in view of the fact that both appeals preferred by the petitioners against the said order dated 30th August, 1991 passed by the Collector of Central Excise (J), Bombay-III in Appeal Nos. 336 and 337/97-C were dismissed by the CEGAT, may be for want of prosecution. Prayer for restoration thereof also came to be rejected. The writ petition challenging refusal to restore those appeals also came to be dismissed by a reasoned order which has become final and conclusive.

17. In the aforesaid backdrop even though, the appeals filed by the petitioners were dismissed for want of prosecution and restoration thereof was refused and no orders on merits of the legality of the impugned order were passed, even then those orders would be the orders passed by the CEGAT in appeals, as such challenge to the order-in-original is not available in this petition.

18. In the case of Mela Ram and Sons v. Commissioner of Income-tax, Punjab, : [1956]29ITR607(SC) ; the appeal was dismissed as barred by limitation as such it was urged that the appeal presented beyond time was no appeal and the order passed was not one passed in appeal. The Apex Court ruled that the appeal presented beyond time is an appeal and the order dismissing it as time barred is one passed in appeal and held that the order of the Assistant Commissioner holding that there was no sufficient reason for excusing delay under Section 30(2) of the Income-tax Act and rejecting the appeal as time-barred is an order passed under Section 31 and appeal lies from that order to the Appellate Tribunal. According to the said judgment, it made no difference whether the order of dismissal was made before or after the appeal was admitted. The Apex Court while taking this view relied upon decision of this Court in K.K. Porbunderwalla v. Commissioner of Income-tax : [1952]21ITR63(Bom) wherein Hon'ble Shri Chagla, C.J. (as he then was) observed :

'..... although the Appellate Assistant Commissioner did not hear the appeal on merits and held that the appeal was barred by limitation his order under Section 31 and the effect of that order was to confirm the assessment which had been made by the Income-tax Officer.'

19. The Apex Court while applying common law doctrine of merger, in the case of Kunhayammed v. State of Kerala, : [2000]245ITR360(SC) of its judgment relied upon observations of the Apex Court in the case of C.I.T. v. Amritlal Bhogilal and Co., : [1958]34ITR130(SC) ; wherein the Apex Court has observed as under:

'There can be no doubt that, if an appeal is provided against an order passed by a tribunal, the decision of the appellate authority is the operative decision in law. If the appellate authority modifies or reverses the decision of the tribunal, it is obvious that it is the appellate decision that is effective and can be enforced. In law the position would be just the same even if the appellate decision merely confirms the decision of the tribunal. As a result of the confirmation or affirmance of the decision of the tribunal by the appellate authority the original decision merges in the appellate decision and it is the appellate decision alone which subsists and is operative and capable of enforcement;'

The Apex Court further went on to observe in paras 41 and 42 at page 383 of the said judgment as under:

41. 'Once a special leave petition has been granted, the doors for exercise of appellate jurisdiction of this Court has been let open. The order impugned before the Supreme Court becomes an order appealed against. Any order passed thereafter would be an appellate order and would attract the applicability of doctrine of merger. It would not make a difference whether the order is one of reversal or of modification or of dismissal affirming the order appealed against. It would also not make any difference if the order is a speaking or non-speaking one. Whenever this Court has felt inclined to apply its mind to the merits of the order put in issue before it though it may be inclined to affirm the same, it is customary with this Court to grant leave to appeal and thereafter dismiss the appeal itself (and not merely the petition for special leave) though at times the orders granting leave to appeal and dismissing the appeal are contained in the same order and at times the orders are quite brief. Nevertheless, the order shows the exercise of appellate jurisdiction and therein the merits of the order impugned having been subjected to judicial scrutiny of this Court.

42. 'To Merge' means to sink or disappear in something else; to become absorbed or extinguished; to be combined or be swallowed up. Merger in law is defined as the absorption of a thing of lesser importance by a greater, whereby the lesser ceases to exist, but the greater is not increased; an absorption or swallowing up so as to involve a loss of identity and individuality, (see Corpus Juris Secundum, Vol. LVII, pp. 1067-68.)

20. On the aforesaid backdrop, now the question which needs to be answered is whether the order of dismissal of appeals in default will merge with the order of the CEGAT. This question no longer res integra in view of the law laid down by the Apex Court in the case of Rani Choudhary v. Suraj Jit Choudhury, : [1983]1SCR372 ; wherein the Apex Court has observed as under:

'Prior to coming into force of Explanation to Rule 13 of Order 9, Civil Procedure Code it was only where the appeal was disposed of, and the appellate decree superseded the trial Court decree by reversing, confirming or varying it that the

trial Court could not proceed to set aside its ex parte decree, for the trial Court decree was said to have merged with the appellate decree. But there was a limited area where this doctrine of merger could operate and in cases when the appeal was dismissed in default, or where it was dismissed as having abated by reason of the omission of the appellant to implead the legal representatives of a deceased respondent or where it was dismissed as barred by limitation, the trial Court decree did not merge with the appellate decree. By introduction of the Explanation the area of operation of the merger doctrine was enormously extended. Now by virtue of the Explanation the disposal of the appeal, on any ground whatever, apart from its withdrawal, considered sufficient reason for bringing the ban into operation.'

In view of the above settled legal position, one cannot say that the order-in-original passed by the Collector of Central Excise (J), Bombay-III, which is a subject matter of challenge in the instant petition, is still available for judicial scrutiny. Even otherwise, the order of CEGAT dated 20th June, 1997, whereby the appeals came to be dismissed in default, having become final, will operate as res-judicata. The reasoned order refusing to restore appeals having become final and conclusive in view of dismissal of the Writ Petition No. 3602/1998 would also operate as res-judicata. Thus, considering from any angle, the submissions advanced by Mr. Shroff, though forceful, cannot be accepted.

21. Having taken survey of the aforesaid judicial authoritative pronouncements of judgments, we do not think that the order in original passed by the Collector of Customs (J), Bombay-III is still available for challenge in this petition, especially, when the appeals challenging the said orders were met with dismissal.

22. In the result, petition is dismissed. Rule stands discharged with no order as to costs.