REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 10265 OF 2014
(Arising out of Special Leave Petition (C) NO. 8738 OF 2014)

Balaji Steel Re-Rolling Mills .... Appellant(s)

Versus

Commissioner of Central Excise and Customs .... Respondent(s)

J U D G M E N T

R.K. Agrawal, J.

1) Leave granted

2) The sole question of law which arises for consideration in the present appeal is as to whether the Customs, Excise and Service Tax Appellate Tribunal (in short 'the Tribunal') has the power to dismiss the appeal for want of prosecution or not.

3) The appellant is a partnership firm engaged in the manufacture and sale of Hot Re-rolled products. The Commissioner of Central Excise and Customs, Aurangabad, vide order dated 20.07.1999, re-fixed the annual capacity of production and duty liability of the appellant. Being aggrieved, the appellant moved the Tribunal. The Tribunal, vide order dated 18.01.2002, remanded the matter back to the Commissioner of Central Excise and Customs with a direction to determine the capacity of production in accordance with law after hearing the appellant. The Commissioner of Central

Excise and Customs, Aurangabad, once again affirmed the order dated 20.07.1999. The appellant filed an appeal before the Tribunal against the order dated 14.05.2004 passed by the Commissioner of the Central Excise & Customs, Aurangabad which was placed for hearing on 22.08.2012. On the very said date, the appellant as also his counsel were not present. The Tribunal, therefore, dismissed the appeal for want of prosecution. The restoration application was also dismissed. The appellant preferred an appeal before the High Court of Bombay, Bench at Aurangabad being Central Excise Appeal No. 14 of 2013. The High Court, by order dated 18.01.2014, dismissed the appeal on the ground that no substantial question of law arises for consideration.

4) Against the said order, the appellant has preferred this appeal by way of special leave.

5) Heard Mr. Shashibhushan P. Adgaonkar, learned counsel for the appellant and Shri K. Radhakrishnan, learned senior counsel for the respondent.

6) Learned counsel for the appellant submitted that even if the appellant was not present before the Tribunal when the appeal was taken up for hearing, it could not have been dismissed for want of prosecution as Section 35C of the Central Excise Act, 1944 (in short 'the Act') enjoins upon the Tribunal to pass orders thereon as it thinks fit, that is, confirming, modifying or annulling the decision or order appealed against or may refer the case back to the authority which passed such decision or order with such

directions as it may think fit, for a fresh adjudication or decision, as the case may be, after taking additional evidence, if necessary. Thus, there is no power vested in the Tribunal to dismiss the appeal for want of prosecution even if the appellant therein has not appeared when the appeal was taken up for hearing.

7) He further submitted that Rule 20 of the Customs, Excise and Service Tax Appellate Tribunal (Procedure) Rules, 1982 (in short 'the Rules') cannot be resorted to as the Section itself does not give power to the Tribunal to dismiss the appeal for want of prosecution.

8) Learned senior counsel for the respondent, however, submitted that under Rule 20 of the Rules, the Tribunal has been given the power to dismiss the appeal for want of prosecution if the appellant does not appear, and therefore, the order passed by the Tribunal as also by the High Court calls for no interference.

9) Section 35C(1) of the Act which deals with the powers of the Tribunal reads as under:-

> **"35C. Orders of Appellate Tribunal.—(1) The Appellate Tribunal may, after giving the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or annulling the decision or order appealed against or may refer the case back to the authority which passed such decision or order with such directions as the Appellate Tribunal may think fit, for a fresh adjudication or decision, as the case may be, after taking additional evidence, if necessary."**

10) Rule 20 of the Rules which gives a power to the Tribunal to dismiss the appeal for default in case the appellant does not

appear when the appeal is called on for hearing reads as under:-

> **"RULE 20. Action on appeal for appellant's default. — Where on the day fixed for the hearing of the appeal or on any other day to which such hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Tribunal may, in its discretion, either dismiss the appeal for default or hear and decide it on merits:**
>
> **Provided that where an appeal has been dismissed for default and the appellant appears afterwards and satisfies the Tribunal that there was sufficient cause for his non-appearance when the appeal was called on for hearing, the Tribunal shall make an order setting aside the dismissal and restore the appeal."**

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.

.....J.
(ANIL R. DAVE)

.....J.
(KURIAN JOSEPH)

.....J.
(R.K. AGRAWAL)

NEW DELHI;
NOVEMBER 14, 2014.

ITEM NO.1A COURT NO.14 SECTION III
(For judgment)

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Petition(s) for Special Leave to Appeal (C) No(s). 8738/2014

(Arising out of impugned final judgment and order dated 18/01/2014 in CEA No. 14/2013 passed by the High Court of Bombay at Aurangabad)

BALAJI STEEL RE-ROLLING MILLS Petitioner(s)

VERSUS

C.C.E.& CUSTOMS Respondent(s)

Date : 14/11/2014 **This petition was called on for pronouncement of judgment today.**

For Petitioner(s) **Mr. Shashibhushan P. Adgaonkar, Adv.**

For Respondent(s) **Mr. K. Radhakrishnan, Sr. Adv.**
Ms. Sunita Rani Singh, Adv.
For Mr. B. Krishna Prasad, AOR

Hon'ble Mr. Justice R.K. Agrawal pronounced the reportable judgment of the Bench comprising Hon'ble Mr. Justice Anil R. Dave, Hon'ble Mr. Justice Kurian Joseph and His Lordship.

Leave granted.

The appeal is allowed with a cost of Rs. 25,000/- to be payable by the Respondent in terms of the signed reportable judgment.

(R.NATARAJAN)
Court Master

(SNEH LATA SHARMA)
Court Master

(Signed reportable judgment is placed on the file)