THE HIGH COURT OF MADHYA PRADESH : JABALPUR

(DIVISION BENCH)

CEA No. 40/2018

M/s Quality Agencies ……..Appellant

Versus

The Commissioner, Customs & Central Excise ……...Respondent

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CORAM: **Hon'ble Shri Justice Ajay Kumar Mittal, Chief Justice**
Hon'ble Shri Justice Vijay Kumar Shukla, Judge

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Present: For the Appellant : Shri Reji Mathai, Advocate
For the Respondent : Shri Gajendra Singh Thakur, Advocate

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Whether approved for reporting: **Yes**

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Law Laid Down:

- On conjoint reading of sub-rule (1) of Rule 17 of Order XLI of the Code of Civil Procedure, 1908 and the Explanation appended thereto, it is clear that the aforesaid provision enables the Appellate Court to adjourn the case to some future date but it does not empower the Appellate Court to adjudicate the appeal on merits, or it can pass such other order as it thinks proper in the circumstances of the case. There is nothing in the Rule 17, which provides that when the appellant does not appear and the respondent appears, the appeal shall be disposed of *ex parte*.
- The intent of the Legislature in enacting the provision under Rule 17 is that the appeal should not be dismissed on merits in the absence of the appellant but it may be dismissed in default so that the appellant may avail of the remedy provided under Rule 19. Similar, opportunity is given to the respondent in terms of Rule 21 to move an application for rehearing of the appeal by showing sufficient cause for non-appearance if the appeal was heard in his absence and *ex parte* decree passed.

  The Supreme Court judgment in ***Harbans Pershad Jaiswal (Dead) by LRS vs. Urmila Devi Jaiswal (Dead) by LRS, (2014) 5 SCC 723*** – *relied.*

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Significant paragraphs: 6 & 7

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ORDER (Oral)
[21.11.2019]

Per: Ajay Kumar Mittal, Chief Justice:

The present appeal under Section 35-G of the Central Excise Act, 1944 (for short "the Act") has been filed by the appellant challenging the order dated 31.10.2017 (Annexure A-1) passed by the Customs, Excise & Service Tax Appellate Tribunal, New Delhi in Central Excise Appeal No.E/52633/2016-Ex(SM) whereby the appeal preferred by the appellant against an order dated 03.05.2016 passed by the Commissioner (Appeals), Central Excise, Bhopal has been dismissed.

2. The appellant has claimed the following questions of law:-

> "(i) Whether the learned Appellate Tribunal, while passing the impugned order has appreciated the merits of the case or not? It is now, a well settled position of law that while considering the case for final hearing, the Appellate Tribunal must appreciate and consider the merits and the value of the cause involved in the matter and in the instant case the Appellate Tribunal has miserably failed to follow the dictum as it ought to have followed.
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> (ii) Whether the Appellate Tribunal is justified in disposing off the petition of the appellant without appreciating the facts of the case and without hearing them or their advocate. It is well settled position of law that an effective hearing is a pre-condition before passing an adverse order in any appeal.
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> (iii) Whether the Appellate Tribunal is justified in upholding the penalty after giving a finding that the penalty imposed by the lower authority is under a wrong provision of Rules whereas it should have been altogether under the different Rule that too without putting the appellant under notice.
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> (iv) Whether the Appellate Tribunal is justified in imposing a hefty penalty for venial breaches contra to the Hon'ble Supreme Court's

> dictum in Hindustan Steel vs. State of Orissa 1978(2) ELT J159 (SC) without establishing fraud, collusion or any willful misstatement or suppression of facts or contravention of any provisions of the Act with the intent to evade payment of duty and whether the appellate Tribunal is justified in imposing a penalty under Rule 26 of the Central Excise Rules, 2002 on the appellant that was neither proposed in the show cause notice nor invoked by the lower authorities."

However, during the course of argument it emerged that the appellant has claimed the substantial questions of law on merits of the controversy whereas the argument was raised that in the absence of the appellant or its counsel, the Tribunal erred in adjudicating the appeal on merits. On these premises, the only substantial question which would arise for consideration at this stage in the appeal is:-

> "Whether in the facts and circumstances of the case, the Tribunal was justified in adjudicating the appeal on merits in the absence of the counsel or the appellant before it?"

3. Briefly stated, the facts of the case are that the appellant, a registered dealer of excisable goods and issuing invoices under Rule 11 of the Central Excise Rules, 2002, disputed the correctness of an order dated 26.02.2014 issued by the Assistant Commissioner (CCE&ST), Bhopal imposing penalty under Section 11 AC of the Act before the Commissioner (Appeals), which was dismissed vide order dated 03.05.2016 (Annexure A-XI) on merits. As against the order passed in appeal, the appellant moved the Customs, Excise & Service Tax Appellate Tribunal, New Delhi (in short "the Appellate Tribunal") by filing an appeal under Section 35-C of the Act. The Appellate Tribunal vide order dated 31.10.2017 has dismissed the appeal. In this manner, the present appeal has been filed by the appellant.

4. Learned counsel for the appellant submitted that the impugned order has been passed without affording any effective hearing to the appellant. The Appellate Tribunal in the impugned order observed that the penalty has been imposed by the Adjudicating Authority under Section 11AC of the Act, which has been upheld by the First Appellate Authority whereas the show cause notice seeks to impose penalty under Rule 15 of the Cenvat Credit Rules, 2004. Ultimately, the Appellate Tribunal held that the penal provision under Rule 26 of the Central Excise Rules, 2002 (for short "the 2002 Rules") gets attracted and accordingly while dismissing the appeal, inflicted the penalty under Rule 26 of the 2002 Rules. Learned counsel further argued that the first Appellate Authority also did not consider the verification reports of the lower Authorities and original/duplicate impugned invoices and therefore, grant of effective hearing to the appellant was *sine qua non* for fair adjudication of the appeal. In support of his contention, learned counsel has placed reliance upon the Supreme Court decision in ***Thakur Sukhpal Singh v. Thakur Kalyan Singh (AIR 1963 SC 146)*** to contend that while a litigant cannot just raise objections in his memorandum of appeal and leave it to the Appellate Court to give its decision on those points after going through the record and determining the correctness thereof but at the same time, it is also the duty of the Appellate Court to hear the litigant in support of the appeal.

5. The question which has emerged for consideration is: whether the Tribunal was justified in adjudicating the appeal on merits in the absence of the counsel or the appellant on the date of hearing. In this context, it would

be apt to take note of Order XLI, Rule 17 of the Code of Civil Procedure, 1908 (for short "the Code"), which reads as under:-

> "**17. Dismissal of appeal for appellant's default**. - (1) Where on the day fixed, or on any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed.
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> [*Explanation*. - Nothing in this sub-rule shall be construed as empowering the Court to dismiss the appeal on the merits.]
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> (2) **Hearing appeal *ex parte***. - Where the appellant appears and the respondent does not appear, the appeal shall be heard *ex parte*."

6. On conjoint reading of sub-rule (1) of Rule 17 and the Explanation appended thereto, it is clear that the aforesaid provision enables the Appellate Court to adjourn the case to some future date but it does not empower the Appellate Court to adjudicate the appeal on merits, or it can pass such other order as it thinks proper in the circumstances of the case. There is nothing in the Rule which provides that when the appellant does not appear and the respondent appears, the appeal shall be disposed of *ex parte*. If that were the intention of the Legislature, a clear mandate to the said effect would have been incorporated in the Rule. In fact, the intent of the Legislature in enacting this provision is that under Rule 17, the appeal should not be dismissed on merits in the absence of the appellant but it may be dismissed in default so that the appellant may avail of the remedy provided under Rule 19. At this stage, it would be expedient to refer to Rule 19 of the Order XLI of the Code for effective adjudication. The said provision is in the following terms:-

> "**19. Re-admission of appeal dismissed for default**. - Where an appeal is dismissed under rule 11, sub-rule (2) or rule 17, the appellant may apply

> to the Appellate Court for the re-admission of the appeal; and, where it is proved that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing or from depositing the sum so required, the Court shall re-admit the appeal on such terms as to costs or otherwise as it thinks fit."

Thus, the view expressed in the preceding paragraph finds support from the aforesaid provision. Inasmuch as when an appeal is dismissed under Rule 17, the appellant is entitled to apply to the Appellate Court for re-admission of the same under Rule 19 of Order XLI of the Code, where the appellant will have an opportunity to prove that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing and if the Court is satisfied, re-admission of the appeal shall be permissible.

7. On the other hand, when the matter is heard in the absence of the respondent and *ex parte* decree is passed in terms of sub-rule (2) of Rule 17, Rule 21 provides for an opportunity to the respondent to prefer a similar application for rehearing of the appeal by showing sufficient cause for his non-appearance. Rule 21 of the Order XLI of the Code, reads as under:-

> "**21. Re-hearing on application of respondent against whom ex parte decree made**. - Where an appeal is heard ex parte and judgment is pronounced against the respondent, he may apply to the Appellate Court to re-hear the appeal; and, if he satisfies the Court that the notice was not duly served or that he was prevented by suficient cause from appearing when the appeal was called on for hearing, the Court shall re-hear the appeal on such terms as to costs or otherwise as it thinks fit to impose upon him."

8. The issue involved in the present appeal has been put to rest by the Supreme Court in ***Harbans Pershad Jaiswal (Dead) by Legal Representatives vs. Urmila Devi Jaiswal (Dead) by Legal Representatives (2014) 5 SCC 723*** wherein the Court held that in terms of sub-rule (1) of

Rule 17 Order XLI of the Code, if the appellant does not appear, the appeal shall be dismissed for default without going into merits.

9. Regard being had to the aforesaid provision and the decision of the Supreme Court, in the present case, the order impugned, on the face of it, is contrary to the judgment of the Supreme Court in ***Harbans Pershad Jaiswal***'s case (supra). It is noticed that the appellant did not appear on the date of hearing despite notice. However, once the Appellate Tribunal found that the show cause notice was issued proposing to impose penalty under Rule 15 of the Cenvat Credit Rules, 2004, whereas, the penalty under Section 11AC of the Act was attracted and consequently, imposed penalty under Rule 26 of the 2002 Rules, the appellant ought to have been heard before passing the impugned order. In this view of the matter, the impugned order is not sustainable in the eye of law.

10. For the reasons stated hereinabove, the appeal deserves to be allowed. Accordingly, the substantial question, as reframed and noticed above, is answered in favour of the appellant. Consequently, the impugned order dated 31.10.2017 (Annexure A-1) is set aside and the matter is remanded to the Appellate Tribunal to decide the appeal on merits afresh after hearing the counsel for the parties in accordance with law. Needless to say, we have not expressed any opinion on the merits of the controversy. The present appeal stands ***disposed of*** in the manner indicated above.

(AJAY KUMAR MITTAL)
CHIEF JUSTICE

(VIJAY KUMAR SHUKLA)
JUDGE

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