M/S J.K. Synthetics Ltd vs Collector Of Central Excise on 28 August, 1996

Equivalent citations: JT 1996 (7), 674 1996 SCALE (6)299, AIR 1996 SUPREME COURT 3527, 1996 (6) SCC 92, 1996 AIR SCW 3682, (1996) 7 JT 674 (SC), (1997) 142 CURTAXREP 521, (1996) 86 ELT 472, (1997) 57 ECC 49, (1996) 66 ECR 417, (1997) 141 TAXATION 533

Author: S.P Bharucha

Bench: S.P Bharucha, K.S. Paripoornan

PETITIONER:
M/S J.K. SYNTHETICS LTD.

Vs.

RESPONDENT:
COLLECTOR OF CENTRAL EXCISE

DATE OF JUDGMENT: 28/08/1996

BENCH:
BHARUCHA S.P. (J)
BENCH:
BHARUCHA S.P. (J)
PARIPOORNAN, K.S.(J)

CITATION:
JT 1996 (7) 674 1996 SCALE (6)299

ACT:

HEADNOTE:

JUDGMENT:

O R D E R The appellant had filed a refund claim which was rejected by the Assistant Collector of Central Excise. The appellant filed an appeal before the Collector (Customs) and the appeal was allowed. The respondent, the Collector of Central Excise, filed an appeal thereagainst before the Customs, Excise and Gold (Control) Appellate Tribunal (CEGAT). The appeal was on board for hearing on 31st August, 1987. When the appeal reached hearing, the appellant (before us) was not

represented. CEGAT heard the departmental representative in support of the appeal and decided it ex- parte against the appellant on merits. At about 11.30 A.M. on the same day CEGAT was told that the counsel for the appellant had been held up and would soon reach CEGAT. The informant was told that the appeal had already been heard and disposed of. The bench having risen, the counsel for the appellant met the Vice President of CEGAT in his chambers and, explaining why he had been held up, requested that the ex-parte order on the appeal be recalled and the appeal be heard on merits. The counsel was told, very rightly, to put his request in writing. An application in this behalf was filed. When the application was heard, learned counsel for the appellant stated what had delayed him, relied upon Rule 41 of the CEGAT (Procedure) Rules, 1982, and prayed for recall of the order dismissing the appeal on merits. The learned departmental representative representating the respondent, "while submitting that he would have no objection to the order being recalled, stated that the Tribunal, in view of Rules 20 and 21 of CEGAT (Procedure)Rules, 1982, had no power to recall or set aside such an order passed on merits in absence of the respondents". CEGAT considered the provisions of Rules 20 and 21 and of Rule 41. It observed that it could be seen from Rules 20 and 21 that whereas the proviso to Rule 20 provided for restoration of an appeal dismissed in default on sufficient cause being shown, there was no such provision with respect to an appeal heard ex-parte in the absence of the respondent to it under Rule 21. CEGAT noted the nature and true character of the order which it passed. It noted the decision of this Court in Commissioner of Income-Tax, Madras vs. S.Chenniappa Mudaliar, 74 ITR 41. It found that where a respondent had not availed of the opportunity to put forward his case, CEGAT was not absolved of its responsibility to decide. It held:

> Therefore, even if respondent was not present when the appeal was called for hearing, would not absolve the Tribunal from deciding the appeal on merits on the basis of material on record. That in fact the Tribunal did. The decision taken by the Tribunal in the absence of the respondent is not an ex-parte decision or decree as understood under the Code of Civil procedure or in a Civil Court and if it is a decision on merits, we can review or set aside the same.
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> Recalling the order passed on merit would in fact amount in setting aside or reviewing an order decided on merit. In doing so, the Tribunal would be exercising a power which is not vested in it by law. We do not think that in such a situation Rule 41 of CEGAT (Procedure) Rules, 1982 could be pressed into aid by the appellants in support of their request for recalling the order."
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> This is the Judgment and order of CEGAT under challenge. Learned counsel for the appellant submitted that Rule 41 was wide enough to take within its sweep the recall of an order passed be the merits of an appeal if such order was necessary to secure the ends or justice. Mr. Joseph Vellappally, learned counsel for the respondent, fairly, did not disagree.
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> Our attention was invited to the judgment of this Court in Income Tax Officer. Cannore vs. M.K. Mohammed Kunhi, 71 ITR 815, where the question related to the powers of the income Tax Appellate Tribunal under Section 254 of the Income Tax

Act, 1961. Reliance was placed upon Sutherland's Statutory Construction, Third Edition, Domat's Civil Law, Volume I, and Maxwell on Interpretation of Statutes, 11th Edn., to hold that it was a firmly established rule that an express grant of statutory power carried with it, by necessary implication, the authority to use all reasonable means to make such grant effective. The powers which had been conferred upon the Tax Appellate Tribunal were of the widest possible amplitude and carried with them, by necessary implication, all powers and duties incidental and necessary to make the exercise of those powers fully effective. Having regard to its powers under Section 254, it was held that the Tax Appellate Tribunal had impliedly been granted the power of doing all such acts and employing such means as were essential and necessary to its ends. The statutory power carried with it the duty in proper cases to make such order for staying proceedings as would prevent the appeal, if successful, from being rendered nugatory.

In Grindlays Bank Ltd. vs. Central Government Industrial Tribunal & Ors., 1981 (2) SCR 341, the same principles were applied in relation to the Industrial Tribunal constituted under the provisions of the Industrial Disputes Act. It was held that where a party was prevented from appearing at a hearing due to sufficient cause and was faced with an ex-parte award, it was as if the party was visited with an award without notice of the proceedings. Where an Industrial Tribunal proceeded to make an award without notice to a party, the award was nothing but a nullity. In such circumstances, the Industrial Tribunal had not only the power but also the duty to set aside the ex- parte award and to direct the matter to be heard afresh. The rule in question Rule 22 of the Industrial Disputes (Central) Rules, 1957) provided that without sufficient cause being shown. if any party to proceedings before the Industrial Tribunal failed to attend or be represented, the Industrial Tribunal would proceed as if the party had duly attended or had been represented. If, therefore, there was no sufficient cause for the absence of a party, the Industrial Tribunal had the jurisdiction to proceed ex- parte. But if sufficient cause was shown which prevented a party from appearing, the Industrial Tribunal had the power to set aside the ex-parte award. the power to proceed ex- parte carried with it the power to enquire whether or not there was sufficient cause for the absence of a party at the hearing.

Rule 20 of the CEGAT (Procedure) Rules deals with cases where the appellant has defaulted. Rule 21 empowers CEGAT to hear appeals ex-parte. The fact that Rule 21 does not expressly state that an order on an appeal heard and disposed of ex-parte can be set aside on sufficient cause for the absence or the respondent being shown does not mean that CEGAT has on power to do so. Rule 41 gives CEGAT wide powers to make such orders or give such directions as might be necessary cr expedient to give effect or in relation to its order or to prevent abuse of its process or, most importantly, to secure the ends of justice.

If, in a given case, it is established that the respondent was unable to appear before it for no fault of his own, the ends of justice would clearly require that the ex-parte

order against him should be set aside. Not to do go on the ground of lack of power would be manifest injustice. Quite apart from the inherent power that every tribunal and court constituted to do justice has in this respect, CEGAT is clothed with express power under Rule 41 to make such order as is necessary to secure the ends of justice. CEGAT has. therefore, the power to set aside an order passed ex- parte against the respondent before it if it is found that the respondent had, for sufficient cause, been unable to appear.

It is for CEGAT consider in every such case whether the respondent who applies for recall of the ex-parte order against him had sufficient cause for remaining absent when it was passed and, if it is established to the satisfaction of CEGAT that there was sufficient cause, CEGAT must set aside the ex-parte order, restore the appeal to its file and hear it afresh on merits.

On the facts of the present case, we think it proper to allow the appellants' application to CEGAT for setting aside the ex-parte order against it ourselves.

The appeal is allowed. The order under appeal is set aside. The application of the appellant for recalling the order dated 31st August, 1987, passed by CEGAT ex-parte against it is allowed. The appeal (No.590/84C) before CEGAT is restored to its file and shall be heard and disposed of on merits.

There shall be no order as to costs.