

* IN THE HIGH COURT OF DELHI AT NEW DELHI
+ CEAC No.6/2007 & CM No.8908/2008
COMMISSIONER OF CENTRAL EXCISE Appellant
Through: Mr.Mukesh Anand, Adv.

versus

\$ M/S. KANDHARI RADIO & ORS. Respondent
^ Through: Mr. Naveen Mullick,
Adv.

Date of Hearing : April 16, 2009

% Date of Decision : April 22, 2009

CORAM:

* HON'BLE MR. JUSTICE VIKRAMAJIT SEN
HON'BLE MR. JUSTICE RAJIV SHAKDHER
1. Whether reporters of local papers may be
allowed to see the Judgment? No
2. To be referred to the Reporter or not? Yes
3. Whether the Judgment should be reported
in the Digest? Yes

VIKRAMAJIT SEN, J.

1. CM No.8908/2008 has been filed for the restoration of the Appeal which was dismissed for non-prosecution on 25.3.2008. Learned counsel for the Respondent very fairly submitted that the Appeal may be restored. In view of the averments made in the Application it is allowed and the Appeal is restored to its original number.

2. This Appeal has been filed under Section 36G of the Central Excise Act, 1944 ('Act' for short) against the Final Order of the Customs Excise and Service Tax Appellate Tribunal passed on 2.12.2005.

3. Learned counsel for the Respondent has raised an objection at the very threshold to the effect that the Appeal is liable to be dismissed, having been filed after the expiry of the period set-down in Section 35G. In support of his submission that the Appeal must automatically, inevitably and inexorably be dismissed, learned counsel for the Respondent has relied on *Commissioner of Customs, Central Excise, Noida –vs- Punjab Fibres Ltd., Noida*, (2008) 3 SCC 73 and *Commissioner of Customs and Central Excise –vs- Hongo India (P) Ltd.*, MANU/SC/0471/2009.

4. Section 35G which stands repealed with effect from 28.12.2005 by the National Tax Tribunal Act, 2005 bestowed the right to file an appeal to the High Court, and reads as follows:-

35G. Appeal to High Court.—(1) An appeal shall lie to the High Court from every order passed in appeal by the Appellate tribunal on or after the 1st day of July, 2003 (not being an order relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for the purposes of assessment), if the High Court is satisfied that the case involves a substantial question of law.

(2) The Commissioner of Central Excise or the other party aggrieved by any order passed by the Appellate Tribunal may file an appeal to the High Court and such appeal under this sub-section shall be—

(a) filed within one hundred and eighty days from the date on which the order appealed against is received by the Commissioner of Central Excise or the other party;

- (b) accompanied by a fee of two hundred rupees where such appeal is filed by the other party;
 - (c) in the form of a memorandum of appeal precisely stating therein the substantial question of law involved.
3. Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.
4. The appeal shall be heard only on the question so formulated, and the respondents shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:
- Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law not formulated by it, if it is satisfied that the case involves such question.
- (5) The High Court shall decide the question of law so formulated and deliver such judgment thereon containing the grounds on which such decision is founded and may award such cost as it deems fit.
- (6) The High Court may determine any issue which—
- (a) has not been determined by the Appellate Tribunal; or
 - (b) has been wrongly determined by the Appellate Tribunal, by reason of a decision on such question of law as is referred to in sub-section(1).
- (7) When an appeal has been filed before the High Court, it shall be heard by a bench of not less than two Judges of the High Court, and shall be decided in accordance with the opinion of such Judges or of the majority, if any, of such Judges.
- (8) Where there is no such majority, the Judges shall state the point of law upon which they differ and the case shall,

then, be heard upon that point only by one or more of the other Judges of the High Court and such point shall be decided according to the opinion of the majority of the Judges who have heard the case including those who first heard it.

(9) Save as otherwise provided in this Act, the provisions of the Code of Civil Procedure, 1908 (5 of 1908), relating to appeals to the High Court shall, as far as may be, apply in the case of appeals under this section. (emphasis supplied)

5. Section 35H which was similarly repealed as in the case of Section 35G dealt with applications to the High Court and was in these words:-

35H. **Application to High Court.**—(1) The Commissioner of Central Excise or the other party may, within one hundred and eight days of the date upon which he is served with notice of an order under section 35C passed before the 1st day of July, 2003 (not being an order relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment), by application in the prescribed form, accompanied, where the application is made by the other party, by a fee of two hundred rupees, apply to the High Court to direct the Appellate Tribunal to refer to the High Court any question of law arising from such order of the Tribunal.

(2) The Commissioner of Central Excise or the other party applying to the High Court under sub-section (1) shall clearly state the question of law which he seeks to be referred to the High Court and shall also specify the

paragraph in the order of the Appellate Tribunal relevant to the question sought to be referred.

(3) On receipt of notice that an application has been made under sub-section(1), the person against whom such application has been made, may, notwithstanding that he may not have filed such application, file, within forty-five days of the receipt of the notice, a memorandum of cross-objections verified in the prescribed manner against any part of the order in relation to which an application for reference has been made and such memorandum shall be disposed of by the High Court as if it were an application presented within the time specified in sub-section(1).

(4) If, on an application made under sub-section(1), the High Court directs the Appellate Tribunal to refer the question of law raised in the application, the Appellate Tribunal shall, within one hundred and twenty days of the receipt of such direction, draw up a statement of the case and refer it to the High Court. (emphasis supplied)

6. It must immediately be noted that the question before their Lordships in *Punjab Fibres Ltd.* was whether the High Court possessed powers to condone delay under Section 35H of the Act. We have, however, been called upon to interpret Section 35G. The High Court had dismissed the Reference opining that it had no power to condone the delay in its filing. It was further observed that the period of limitation had been prescribed as six months under the old law as well as the new Act, but since the power to condone the delay had not been prescribed in the statute, the High Court was right in rejecting the appeal. Their Lordships had

adverted to the earlier decision in ***Singh Enterprises -vs- CCE***, (2008) 3 SCC 70 which dealt with Section 35 of the Act. That provision stipulates that an Appeal must be filed within sixty days from the date of the communication of the decision; the proviso empowered the Commissioner(Appeals) to condone the delay if he was satisfied that the appellant had been prevented by sufficient cause from presenting the Appeal within the aforesaid period of sixty days, provided that the Appeal had been presented within a further period of thirty days. It had been opined that the Appeal was not maintainable if filed beyond ninety days, that is, 60 days+30 days.

7. It is Section 35H of the Act which was relevant provision even in ***Hongo India (P) Ltd.***, unlike Section 35G which is attracted in the Appeal before us. Learned counsel for the Respondent has relied on paragraph 7 of ***Hongo India (P) Ltd.*** which reads thus:-

7. Unamended Section 35G speaks about Appeal to the High Court. Sub-section 2(a) enables the aggrieved person to file an appeal to the High Court within 180 days from the date on which the order appealed against is received by the Commissioner of Central Excise or the other party. **There is no provision to condone the delay in filing appeal beyond the prescribed period of 180 days.** (emphasis supplied)

8. Mr. Mukesh Anand, learned counsel for the Appellant, has contended that these provisions are not binding on this Court in

view of the fact that, according to him, the provisions of sub-section(9) of Section 35G had not been noted.

9. It is, no doubt, true that the aforementioned sub-section(9) has not been brought to the notice of their Lordships. It is also true that since the Supreme Court was actually concerned with Section 35H, the observations on which the learned counsel for the Respondent has laid great store, are in the nature of *obiter dicta*. There are judgments of the Supreme Court on both sides of the watershed – those prescribing that even the *obiter dicta* of the Supreme Court is binding on all other courts and those proscribing the enforcement of *obiter dicta*. (see *Raval and Co. -vs- K.G. Rama Chandran*, AIR 1974 SC 818, *ADM, Jabalpur -vs- Shivkant Shukla*, AIR 1976 SC 1207, *Sreenivasa General Traders -vs- State of AP*, AIR 1983 SC 1246, *Amar Nath Om Prakash -vs- State of Punjab*, AIR 1985 SC 218, *ONGC -vs- Western Co. of North America*, AIR 1987 SC 674, *MCD -vs- Gurnam Kaur*, AIR 1989 SC 38, *Sanjay Dutt -vs- State through CBI, Bombay*, (1994) 5 SCC 402, *Director of Settlements, AP -vs- M.R. Appa Rao*, AIR 2002 SC 1598, *Nathi Devi -vs- Radha Devi Gupta*, (2005) 2 SCC 271, *State of Haryana -vs- Ranbir*, AIR 2006 SC 1796 and *Oriental Insurance Co. Ltd. -vs- Meena Varial*, (2007) 5 SCC 428).

10. It appears apparent to us that this aspect whether or not Court possesses power to condone delay in presenting an Appeal in view of sub-section 3A of Order XLI of the Code of Civil Procedure,

which is attracted by virtue of sub-section 9 of Section 35G as it stood at the relevant time requires consideration. This provision reads as follows:-

3A. Application for condonation of delay.—(1) When an appeal is presented after the expiry of the period of limitation specified therefor, it shall be accompanied by an application supported by affidavit setting forth the facts on which the appellant relies to satisfy the Court that he has sufficient cause for not preferring the appeal within such period.

(2) If the Court sees no reason to reject the application without the issue of a notice to the respondent, notice thereof shall be issued to the respondent and the matter shall be finally decided by the Court before it proceeds to deal with the appeal under rule 11 or rule 13, as the case may be.

(3) Where an application has been made under sub-rule(1), the Court shall not make an order for the stay of execution of the decree against which the appeal is proposed to be filed so long as the Court does not, after hearing under rule 11, decide to hear the appeal.

11. However, in view of the categorical and unequivocal observations with regard to the law on condonation of delay in filing appeals which permeates through the decision in ***Singh Enterprises, Punjab Fibres Ltd.*** as well as ***Hongo India (P) Ltd.***, we are constrained to dismiss the Appeal as it has been filed beyond the prescribed period of 180 days. We restrain ourselves from proceeding under sub-section(9) of Section 35G. Accordingly,

the Appeal is dismissed as being barred by the principles of prescription.

12. In the singular circumstances of the case, we grant to the Appellant a Certificate under Section 134A of the Constitution of India to appeal to the Supreme Court of India.

(VIKRAMAJIT SEN)
JUDGE

April 22, 2009
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(RAJIV SHAKDHER)
JUDGE