

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

WRIT PETITION NO. 1830 OF 2013

M/s. Flemingo (Duty Free Shop)	}	
Pvt. Ltd., a company registered	}	
under the Companies Act, 1956	}	
and having its registered office at	}	
D/73/I, TTC Ind. Area, MIDC –	}	
Turbhe, Navi Mumbai 400 075,	}	
through its Manager Operation	}	
Seaport - Mr. Ajay Thoria	}	Petitioner

VERSUS

1. The Commissioner of Customs	}	
(Appeal) Mumbai Zone - I	}	
New Customs House, Ballard	}	
Estate, Mumbai – 400 001	}	
	}	
2. The Commissioner of Customs	}	
Preventive General, New Customs	}	
House, Ballard Estate, New	}	
Customs House, Mumbai–400 001	}	
	}	
3. The Deputy Commissioner of	}	
Customs, Preventive General	}	
New Customs House, Ballard	}	
Estate, New Customs House,	}	
Mumbai – 400 001	}	Respondents

WITH

WRIT PETITION (CIVIL) NO. 3419 OF 2014

Sandvik Asia Private Limited	}	
a company registered under the	}	
Companies Act, 1956, having its	}	
registered office at Mumbai Pune	}	
Road, Dapodi, Pune – 411 012	}	Petitioner

VERSUS

- | | | |
|--|---|--------------------|
| 1. The Union of India | } | |
| through the Secretary, Ministry | } | |
| of Finance, Department of | } | |
| Revenue, North Block, | } | |
| Delhi – 110 001 | } | |
| | } | |
| 2. The Joint Secretary to the | } | |
| Government of India, Ministry | } | |
| of Finance (Department of | } | |
| Revenue), having its office at 14, | } | |
| Hudco Vishala Building, 'B' wing, | } | |
| 6 th floor, Bhikaji Cama Place, | } | |
| New Delhi 110 066 | } | |
| | } | |
| 3. The Commissioner of Central | } | |
| Excise (Appeals), Pune, having his | } | |
| office at ICE House, Opp. Wadia | } | |
| College, Pune – 1 | } | |
| | } | |
| 4. The Commissioner of Central | } | |
| Excise, Pune-I, having his office at | } | |
| ICE House, Opp. Wadia College, | } | |
| Pune – 1 | } | |
| | } | |
| 5. The Additional Commissioner | } | |
| (BRU) of Central Excise, | } | |
| Pune-I, having his office at | } | |
| ICE House, Opp. Wadia College, | } | |
| Pune – 1 | } | |
| | } | Respondents |

Mr. Venkatesh Dhond-Senior Advocate with Mr. Akshay Kolse Patil i/b. M/s. Crawford Bayley and Co. for the Petitioner in WP/1830/2013.

Mr. Prakash Shah i/b. M/s. PDS Legal for the Petitioner in WP/3419/2014.

Mr. Pradeep Jetly for the Respondents in WP/1830/2013.

Mr. Pradeep S. Jetly for Respondent Nos. 1 and 2 in WP/3419/2014.

Mr. A. S. Rao, i/b. Mr. S. D. Bhosale for Respondent Nos. 3 to 5. in WP/3419/2014.

**CORAM :- S.C.DHARMADHIKARI &
A.A.SAYED, JJ.**

Reserved on :- December 8, 2014

Pronounced on :- December 24, 2014

JUDGMENT :- (Per S.C.Dharmadhikari, J.)

Rule. Respondents waive service. By consent of the parties, Rule is made returnable forthwith. Heard finally.

2) This Writ Petition (WP/1830/2013) under Article 226 of the Constitution of India challenges the order passed by the Commissioner of Customs (Appeals)/ Respondent No. 1 dated 27th December, 2012. In other words, the essential prayer in this Writ Petition is to issue a writ of certiorari or any other appropriate writ, order or direction in the nature thereof calling records pertaining to the impugned order and after due scrutiny thereof, the same be quashed and set aside.

3) It is the case of the Petitioner that it is a private limited company registered and incorporated under Indian Companies Act, 1956. It is engaged inter alia in the business of operation of duty free shops at airports and seaports in India. The Petitioner is running duty free shops pursuant to contracts and it is their case that presently 35 duty free shops at various airports and seaports are owned and operated by them. They are employing about 312 employees.

4) The case of the Petitioner is that it was granted licence by the Jurisdictional Commissioner of Customs to operate such shops and that has been renewed from time to time. The Petitioner submits that in pursuance of an approval from the Customs Department, the duty free shop/warehouse is declared as bonded store. The Petitioner has been earning valuable foreign exchange for the Country. It submits that it is strictly adhering to the terms and conditions of the licence. It relies on a licence styled as private bonded licence issued in its favour by the Mumbai Customs. The licence was granted from 20th March, 2006 to 25th July, 2006. The Petitioner has been carrying on business and without any interruption. A dispute arose under a letter of demand dated 1st April, 2011, after which, the Department stopped operations of the Petitioner and did not issue the licence. The dispute was brought before this Court by way of Writ Petition being Writ Petition No. 1705 of 2011 and when it was being contested, the third Respondent issued the licence to the Petitioner subject to an undertaking. The Petitioner is abiding by that undertaking and regularly paying the charges. The payment has been made on Merchant Over Time basis (MOT) and after referring to the nature of these charges, what the Petitioner is relying are letters and communications in relation to, firstly payment of these charges and secondly about change in working hours. The Petitioner is relying upon certain clarifications which have been issued from time to

time. The Petitioner is relying upon certain correspondence and primarily relating to the demand of MOT fees for the preventive officer posted from Mumbai Port. Thus, the demand notice, according to the Petitioner, was issued without considering their earlier replies. The demand in the sum of Rs.13,50,001/- was raised and a time frame was stipulated within which the Petitioner was called upon to pay the money. After referring to a personal hearing and confirmation of the demand, levy of interest and penalty, the Petitioner referred to certain legal proceedings, particularly a Writ Petition filed in this High Court's Bench at Goa. Then, the Petitioner relies upon the correspondence relating to a renewal of its licence. The Petitioner makes reference to certain payments and which have been made. The Petitioner refers to another round of litigation, namely Writ Petition No. 1705 of 2011 before this Court and the order passed thereon. This order reads as under:

“In these proceedings under Article 226 of the Constitution, the Petitioner has challenged a demand notice dated 1 April 2011 issued by the First Respondent for the recovery of Merchant Overtime Charges. The demand notice has now merged with an order of assessment which has been passed on 27 June 2011. The order of the Assessing Officer dated 27 June 2011 is subject to an Appeal before the Commissioner (Appeals). In the event, that an application for condonation of delay is made before the Appellate Authority, inter alia, on the ground that the Petitioner was bonafide pursuing proceedings before this Court, such an application shall be considered duly and sympathetically.

2. The Petitioner has also sought a direction for the renewal of a licence which has since been renewed. Hence, the relief

sought in that respect stands worked out. As regards the claim for refund of cost recovery charges, it would be open to the Petitioner to pursue the claim in accordance with law with the authorities.

3. We accordingly dispose of the Petition leaving it open to the Petitioner to pursue the remedies available in law. There shall be no order as to costs.”

5) The Petitioner, on 12th December, 2011, preferred an Appeal under section 128(1) of the Customs Act, 1962 before the Commissioner of Customs (Appeals)/Respondent No. 1. Along with the same, it filed two applications, one seeking condonation of delay and the other for stay of the recovery of the amount pursuant to the order dated 27th June, 2011. A personal hearing was given to the Petitioner on the application filed seeking condonation of delay.

6) We are not as much concerned with the development pertaining to recovery and payment of certain sums as set out in para 20 of the Petition. We are only concerned with the legality and validity of the order dated 27th December, 2012, by which, the application made by the Petitioner seeking condonation of delay has been dismissed.

7) It is this order, which is challenged in this Writ Petition on several grounds. Mr. Dhond learned Senior Counsel appearing on behalf of the Petitioner submits that the impugned order is contrary to law. He submits that the Petitioner applied for condonation of delay in filing of the statutory Appeal. The Petitioner submitted that the said

application be considered sympathetically and reasonably, because the delay in filing the same has been occasioned on account of the Petitioner being advised to file a Writ Petition under Article 226 of the Constitution of India in this Court to challenge the order in original dated 27th June, 2011. Mr. Dhond submits that it is only when this Court passed the order that the Writ Petition cannot be entertained, as there is an alternate equally efficacious remedy of a statutory Appeal that the Petitioner became aware of the legal provision and the time limit within which the said Appeal has to be filed. The Petitioner submits that the Appeal has to be filed within a period of 60 days from the communication of the order in original. That period expired on 27th August, 2011. However, the Writ Petition was filed on 30th August, 2011. That Writ Petition was pending till 30th November, 2011, on which date, the above reproduced order came to be passed. A certified copy of the order passed by the Division Bench of this Court became available on 11th December, 2011, after which, the Appeal came to be lodged/filed on 12th December, 2011.

8) Mr. Dhond has taken us through a copy of the application for condonation of delay, on which the impugned order is passed. He submits that the same is at page 181 of the paper book. That is on the affidavit of the Manager, Operation, Seaport of the Petitioner company.

After setting out the preliminary facts, Mr. Dhond submits that in paras 5 to 7 the attention of the Appellate Authority was specifically invited to the order passed by this Court and how the Writ Petition was filed on a legal advice. Mr. Dhond submits that the conduct of the Petitioner through out was bonafide. Once the Writ Petition was disposed of and the reason for the delay has been extensively set out, then, it was incumbent upon the Appellate Authority to have considered the cause shown. The Appellate Authority failed to apply its mind and to some vital factors. The first and foremost was that the Petitioners filed the Writ Petition on 30th August, 2011. Since that Writ Petition was pending from 30th August, 2011 to 30th November, 2011 in this Court, the period or time, during which this Writ Petition was pending, ought to have been excluded by applying section 14(2) of the Limitation Act, 1963 or principle analogous thereto. Mr. Dhond submits that the reasons assigned in the impugned order are untenable in law because all that the Appellate Authority holds is that there is a 108 day's delay in filing of the Appeal. The Appellate Authority has no power and by virtue of the proviso to sub-section (1) of section 128 of the Customs Act, 1962 to allow presentation of the Appeal beyond a total period of 90 days. If the delay is of 108 days, then, the Appellate Authority has no jurisdiction to condone it. Mr. Dhond submits that the Appellate Authority has not dismissed the statutory Appeal only by such findings

and conclusions. The Appellate Authority has gone ahead and blamed the Petitioner for not adducing any evidence indicating that they were prevented by sufficient cause from presenting the Appeal within the period of 60 days or within a further period of 30 days. Mr. Dhond submits that it is only the inapplicability of section 5 of the Limitation Act beyond the period of 90 days, which resulted in dismissal of the Petitioner's Appeal.

9) However, the Appellate Authority failed to apply its mind to the specific averment and assertion in the Miscellaneous Application for condonation of delay, wherein, the Petitioner invoked section 14(2) of the Limitation Act, 1963. There is absolutely no reference to this ground in para No. 9 of the Miscellaneous Application. Therefore, the impugned order is vitiated by an error of law apparent on the face of the record.

10) Mr. Dhond submits that if benefit of section 14(2) of the Limitation Act had been granted, then, there was no delay or minimal delay in filing of the statutory Appeal. That could have been condoned. Mr. Dhond submits that this was therefore not a case which could have been decided only with reference to section 5 of the Limitation Act, 1963. Section 5 provides for extension of prescribed period in certain cases. Mr. Dhond has invited our attention to the definition of the term

“period of limitation” appearing in section 2 clause (j) and the term “prescribed period” which is also defined in this clause. Mr. Dhond submits that section 14 operates in a different field and that is pertaining to exclusion of time of proceeding bonafide in Court without jurisdiction. This exclusion has to be taken into account in computing the period of limitation.

11) Mr. Dhond submits that his argument is premised on the fact that sub-section (2) of section 14 does not apply to an Appeal, yet, the principle therein has been applied in several cases by the Hon'ble Supreme Court and other High Courts. Further, the order dated 30th November, 2011 on the Petitioner's Writ Petition specifically directs the Appellate Authority to consider, whether the time spent in legal proceedings in the High Court can be excluded. Mr. Dhond then relies upon section 29 of the Limitation Act, 1963 and submits that the Appellate Authority, under section 128 of the Customs Act, 1962, is a Court for the purpose of applicability of section 14 and 29 of the Limitation Act, 1963.

12) Alternatively and without prejudice, he submits that even if the Appellate Authority is not a Court within the meaning of sub-section (2), yet, the Petitioner was prosecuting with the due diligence other civil proceedings. That was a proceeding under Article 226 of the

Constitution of India in this Court, which can be styled as a civil proceeding. Therefore, the Appellate Authority, in this case, need not be a Court, particularly because section 14 of the Limitation Act, 1963 is an embodiment of general principle of equity and fairness. Hence, principles analogous to section 14 of the Limitation Act, 1963 applies to the present case. Further, he submits that if section 14 is contrasted with sections 5 and 12 of the Limitation Act, 1963, then, it would be evident that section 14 confers a right and there is no discretion in the matter of exclusion of time as envisaged by section 14(2). Whereas, in section 5, there is an element of discretion. For all these reasons, he submits that the impugned order be quashed and set aside and the Writ Petition be allowed.

13) Mr. Dhond has placed reliance upon the following decisions in support of his contentions:

1. Mukri Gopalan vs. Cheppilat Aboobacker – **(1995) 5 SCC 5.**
2. Rethinasamy vs. Komalavalli and Another – **AIR 1983 (MAD) 45.**
3. P. Sarathy vs. State Bank of India – **(2000) 5 SCC 355.**
4. The Commissioner of Sales Tax, U. P. vs. M/s. Madan Lal Das and Sons, Bareilly – **(1976) 4 SCC 464.**
5. Union of India vs. Epcos India Pvt. Ltd. - **(2013) 290 ELT 364.**
6. Rajkumar Shivhare vs. Union of India – **(2011) 273 ELT 75.**
7. A. E. Industries vs. Union of India and Ors. - **(1988) 35 ELT 620 (Bom.).**
8. Steel Authority of India vs. Collector of Excise – **(2001) 10 SCC 601.**

9. Wamanrao Deshmukh vs. Dinkarrao Deshmukh – (1998) 7 SCC 447.
10. ITC vs. Collector of Central Excise – (1997) 11 SCC 660.
11. U. P. Rajya Vidyut Parishad Karmachari Sangh vs. State of U. P. and Others – (1999) SCC (L&S) 1081.
12. Coal India Limited vs. Ujjal Transport Agency and Another – (2011) 1 SCC 117.
13. Uppalla Subbaiah vs. Chitralla Narsimloo – AIR 1956 HYD 161.
14. Azam Jung vs. Mohd. Abdul Razzack – AIR 1957 HYD 4.
15. Firm Bansi Dhar Baldeo Pershad and Another vs. Firm Alopi Pershad and Sons Ltd. - AIR 1963 P&H 556.
16. Munshi vs. Punna Ram – (1975) 2 ILR P&H 608.
17. S. A. L. Narayan Row and Anr. vs. Ishwarlal Bhagwan Das and Another – AIR 1965 SC 1818.
18. State of West Bengal vs. Satyanarayan Rice Mill – AIR 1985 CAL 391.

14) On the other hand, Mr. Jetly appearing on behalf of the Respondents submits that there is no merit in the Writ Petition and it deserves to be dismissed. Mr. Jetly has taken us through the admitted dates and events. He submits that the point is fully covered by a decision of a Division Bench of this Court in the case of *Navinon Limited vs. Union of India*, reported in **2006(205) ELT 71**. Mr. Jetly submits that above dates and which have been disclosed in the list of dates and events evidence that the order-in-original was passed on 27th June, 2011. The Petitioner made payment of Rs.78,806/- for July, 2011, on 26th July, 2011, under protest. The Petitioner did not take any steps till 30th August, 2011. Thus, period of limitation under the legal provision, namely section 128(1) of the Customs Act, 1962 expired after 60 days

from the date of communication of the order under challenge. Thus, that period expired on 27th August, 2011. The time does not stop running merely because a Writ Petition was filed in this Court under Article 226 of the Constitution of India. In fact, on the date of filing of the Writ Petition itself the Appeal was barred by time. The Petitioner did not file the Appeal even after the expiry of 60 days, but approached this Court in its Writ Jurisdiction. The proviso to sub-section (1) of section 128 of the Customs Act, 1962 does not extend the period of limitation, but only enables the Commissioner (Appeals) to condone the delay in filing of an Appeal before him by further period of 30 days. In other words, the proviso contemplates that if the Appellant was prevented by sufficient cause from presenting the Appeal within a period of 60 days, then, it can be presented within a further period of 30 days. Even that period expired, admittedly on 27th September, 2011. Mr. Jetly submits that mere pendency of a Writ Petition in this Court does not halt or stop the running of time. The time starts running from the date of communication of the order and it is only in exceptional circumstances that the time stops running. If the Petitioner does not avail of the statutory remedy within time and the Commissioner (Appeals) having no further power to condone the delay, then, no assistance can be derived from section 5 of the Limitation Act, 1963 or section 14 of the said Act. The provisions in the limitation Act do not

enable the Petitioner to get over section 128 of the Customs Act, 1962. Once this is the admitted factual and legal position, then, the order under challenge cannot be said to be either perverse or vitiated by any error of law apparent on the face of the record. The impugned order has been passed by the commissioner (Appeals) strictly within the parameters determined by law. Hence, the Writ Petition is devoid of merits and must be dismissed.

15) With the assistance of the learned Counsel appearing for the parties, we have perused the Writ Petition and the relevant Annexures thereto. We have perused carefully the impugned order. We have also perused the decisions brought to our notice.

16) In the light of the admitted factual position, the only question that requires determination is, whether the Commissioner (Appeals), in dismissing the appeal as barred by limitation, has exercised jurisdiction and power vested in law, erroneously or failed to exercise it, as complained by the Petitioner.

17) A careful perusal of the dates and events would denote that the Petitioner does not contend that this Court, while entertaining the Writ Petition, had granted any interim or ad-interim relief staying the operation, implementation or execution of the order passed by the

Respondent No. 3 on 27th June, 2011. In other words, the operation and effect of the order-in-original was never stayed.

18) In the above circumstances, the time stipulated by sub-section (1) of section 128 of the Customs Act, 1962 never stopped, but was allowed to run its course. In fact the Petitioner allowed the period of 60 days to expire and then filed the Writ Petition being Writ Petition No. 1705 of 2011 in this Court. Even that Writ Petition, on the own saying of the Petitioner, was not filed within the period of 60 days but thereafter.

19) Section 128 of the Customs Act, 1962 reads as under:

“128. Appeals to Commissioner (Appeals).

(1) Any person aggrieved by any decision or order passed under this Act by an officer of customs lower in rank than a Commissioner of Customs may appeal to the Commissioner (Appeals) within sixty days from the date of communication to him of such decision or order:

Provided that the Commissioner (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of sixty days, allow it to be presented within a further period of thirty days.

(1-A) The Commissioner (Appeals) may, if sufficient cause is shown, at any stage of hearing of an appeal, grant time, from time to time, to the parties or any of them and adjourn the hearing of the appeal for reasons to be recorded in writing:

Provided that no such adjournment shall be granted more than three times to a party during hearing of the appeal.

(2) Every appeal under this section, shall be in such form and shall be verified in such manner as may be specified by rules made in this behalf.”

20) A bare perusal thereof would indicate that the Appeal before the Commissioner (Appeals) ought to be filed within a period of 60 days from the date of communication of the decision or order passed by an officer lower in rank to the Commissioner of Customs. That Appeal must be filed within 60 days. This period was substituted by the Finance Act, 2001 (14 of 2001) for the words “within three months”. By the Finance Act, 2001, the proviso to sub-section (1) of section 128 of the Customs Act, 1962 was substituted. The Commissioner was empowered to allow presentation of the Appeal within a further period of 30 days on recording his satisfaction that the Appellant was prevented by sufficient cause from presenting the Appeal within the aforesaid period of 60 days. Thus, the period of limitation is prescribed by sub-section (1) of section 128 of the Customs Act, 1962. The proviso merely enables the Commissioner (Appeals) to allow presentation of such Appeal within a further period of 30 days. The proviso does not mean that the Appeal can be presented after 60 days. If it is presented beyond the period of 60 days but within the further period of 30 days as stipulated by the proviso, then, the Appellant has to satisfy the Commissioner (Appeals) [Appellate Authority] that there was sufficient cause which prevented him from presenting the Appeal within the period of 60 days. We do not find in the present case that the Appeal was presented within 60 days. It was not even presented

thereafter within 30 days. The Petitioner/Appellant waited till 12th December, 2011 to present the Appeal. If the Petitioner waited for the outcome of a Writ Petition in this Court and in the meanwhile allowed the time to run, then, it has to blame itself.

21) The Petitioner cannot fault the order of the Commissioner (Appeals) refusing to condone delay of 108 days. The Commissioner (Appeals) held, in our view, that she had no power to condone the delay beyond 90 days. The order of rejection of the Appeal as time barred, therefore, cannot be questioned on the ground of failure to exercise the jurisdiction vested in the Commissioner (Appeals) by law. The Commissioner acted within her powers and the impugned order therefore cannot be termed as contrary to law. In our view, this much is enough to dispose of this Writ Petition, but as Mr. Dhond, the learned Counsel appearing for the Petitioner, raised an alternate contention, we deem it fit to deal with it.

22) The contention is that in the application seeking condonation of delay, the Petitioner had specifically urged that though the Appeal is filed on 12th December, 2011 by taking recourse to section 14(2) of the Limitation Act, 1963, the time, during which the Petitioner was bonafide prosecuting another civil proceeding, namely under Article 226 of the Constitution of India, be excluded. In other words,

the time spent from 30th August, 2011 till 30th November, 2011 in prosecuting the Writ Petition should be excluded while computing the total period of 90 days prescribed in section 128(1) of the Customs Act, 1962, as reproduced above.

23) With regard to this contention of Mr. Dhond, it would be worthwhile reproducing the three sections of the Limitation Act i.e. section 5, section 14 and section 29, which read as under:

“5. Extension of prescribed period in certain cases. -

Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908, may be admitted after the prescribed period, if the appellant or the applicant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application within such period.

Explanation – The fact that the appellant or the applicant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period may be sufficient cause within the meaning of this section.

14. Exclusion of time of proceeding *bona fide* in Court without jurisdiction.

(1) In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a Court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(2) In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a Court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(3) Notwithstanding anything contained in rule 2 of Order XXIII of the Code of Civil Procedure, 1908, the provisions of

sub-section (1) shall apply in relation to a fresh suit instituted on permission granted by the Court under rule 1 of that Order, where such permission is granted on the ground that the first suit must fail by reason of a defect in the jurisdiction of the Court or other cause of a like nature.

Explanation – For the purpose of this section, -

(a) in excluding the time during which a former civil proceeding was pending, the day on which that proceeding was instituted and the day on which it ended shall both be counted;

(b) a plaintiff or an applicant resisting an appeal shall be deemed to be prosecuting a proceeding;

(c) misjoinder of parties or of causes of action shall be deemed to be a cause of a like nature with defect of jurisdiction.

29. Savings - (1) Nothing in this Act shall affect section 25 of the Indian Contract Act, 1872.

(2) Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of section 3 apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in sections 4 to 24 (inclusive) shall apply only insofar as, and to the extent to which, they are not expressly excluded by such special or local law.

(3) Save as otherwise provided in any law for the time being in force with respect to marriage and divorce, nothing in this Act shall apply to any suit or other proceeding under any such law.

(4) Section 25 and 26 and the definition of “easement” in section 2 shall not apply to cases arising in the territories to which the Indian Easements Act, 1882, may for the time being extend.”

24) A bare perusal of the three sections would reveal that the “period of limitation” means the period of limitation prescribed for a Suit, Appeal or Application by the Schedule and “prescribed period” means the period of limitation computed in accordance with the provision of the Limitation Act, 1963. Sub-section (1) of section 3 of the Limitation Act, 1963 states that subject to the provisions contained

in sections 4 to 24 (inclusive), every Suit instituted, Appeal preferred, and Application made after the prescribed period shall be dismissed, although limitation has not been set up as a defence. Section 5 of the Limitation Act, 1963 only extends the prescribed period of limitation for filing of an Appeal or Application, other than the one under Order XXI of the Code of Civil Procedure, 1908 and such proceeding can be admitted after the prescribed period, if the Appellant or the Applicant satisfies the Court that he/she had sufficient cause for not preferring the Appeal or making the Application within such period. Thus, the prescribed period of limitation by law such as section 128(1) of the Customs Act, 1962 is extended in certain cases.

25) By section 29 and particularly sub-section (2) thereof, it is evident that if any special or local law prescribes, for any Suit, Appeal or Application, a period of limitation different from the period prescribed by the Schedule to the Limitation Act, 1963, the mandatory stipulation in section 3 of the said Act shall apply as if such period was prescribed by the Schedule of the said Act. Then, for determining period of limitation prescribed for the legal proceeding by any special or local law, provisions contained in sections 4 to 24 (inclusive) shall apply only insofar as and to the extent to which they are not expressly excluded by such special or local law. Upon a similar controversy as to

whether sub-section (2) of section 29 should be interpreted and construed to mean that section 5 is applicable absolutely, but subject to such limitations or restrictions as are to be found in the special or local law was considered by us recently in the case of *The Additional Commissioner of Sales Tax vs. M/s. Jonson and Jonson Ltd.* passed in **Notice of Motion No. 1101 of 2014 in Sales Tax Application (L) No.8 of 2014** and connected matter. In this decision, we referred to several Hon'ble Supreme Court decisions and decisions of this Court and held as under:

“10 At the relevant time, the Bombay Sales Tax Act, 1959 had a provision and which enabled the forwarding of a statement of case to this Court. That is to seek an opinion or answer on any question of law arising out of the order and passed by the authorities named in section 61. Section 61 of the Act reads as under:

S.61 Statement of case to the High Court. (1) Within ninety days from the date of the communication of the order of the Tribunal, passed in appeal being an order which affects the liability of any person to pay tax or penalty or interest or to forfeiture or any sum or which affects the recovery from any person of any amount under section 39, that person, the Additional Commissioner of Sales Tax having jurisdiction over the whole of the State or the Commissioner, may by application in writing (accompanied, where the application is made by that person, by a fee of one hundred rupees) require the Tribunal to refer to the High Court any question of law arising out of such order; and where the Tribunal agrees, the Tribunal shall, as soon as may be after the receipt of such application, draw up a statement of the case and refer it to the High Court:

Provided that, if in the exercise of its power under this sub-section the Tribunal refuses to state the case which it has been required to do, on the ground that no question of law arises, that person, the Additional Commissioner of Sales Tax having jurisdiction over the whole of the State, or as the case may be, the Commissioner, may, within ninety days of such refusal, either withdraw his application (and if he does so any fee paid shall be refunded), or apply to the High Court against such refusal.

Provided further that, the Tribunal may refuse to refer the

case of the High Court, if the person or, as the case may be, the Commissioner fails to submit the paper book and other documents required by the Tribunal, within a period of three months from the date of order of the Tribunal served on that person or, as the case may be, the Commissioner.

(2) If upon receipt of an application under sub-section (1), the High Court is not satisfied as to the correctness of the decision of the Tribunal, it may require the Tribunal to state the case and refer it; and accordingly, on receipt of any such requisition the Tribunal shall state the case and refer it to the High Court.

(3) If the High Court is not satisfied that the statement in the case referred under this section are sufficient to enable it to determine the question raised thereby, it may refer the case back to the Tribunal to make such additions thereto or alterations therein, as the High Court may direct in that behalf.

(4) The High Court, upon the hearing of any such case, shall decide the question of law raised thereby, and shall deliver its judgment thereon containing the grounds on which such decision is founded, and shall send to the Tribunal a copy of such judgment under the seal of the Court and the signature of the Registrar, and the Tribunal shall dispose of the case accordingly.

Explanation. - For the purpose of this sub-section, certified copy of the judgment of the High Court, submitted by the Commissioner to the Tribunal, shall be deemed to be the copy of the judgment of the High Court delivered to the Tribunal under the seal of the court and the signature of the Registrar.

(5) Where a reference is made to the High Court under this section, the costs including the disposal of the fee referred to in sub-section (1), shall be in the discretion of the Court.

(6) The payment of the amount of the tax, penalty, interest or sum forfeited if any, due in accordance with the order of the Tribunal in respect of which an application has been made under sub-section (1) shall not be stayed pending the disposal of such application or any reference made in consequence thereof; but if such amount is reduced as the result of such reference, the excess tax, penalty, interest or sum forfeited paid shall be refunded in accordance with the provisions of section 43."

11 A bare perusal thereof would indicate that the Application to forward a question or referring it for opinion and answer by this Court in the first instance can be made by a written Application to the Tribunal. If the Tribunal agrees with the Applicant then, it shall draw up this statement of case and refer it to the High Court. However, that power of the Tribunal can be invoked within 90 days from the date of communication of the order passed by the Tribunal in Appeal and which affects the liability of any person to pay tax or penalty or interest or to forfeiture of any sum or which affects the recovery from any person of any amount under section 39 of the Bombay Sales Tax

Act, 1959. That person can invoke the jurisdiction of the Tribunal or equally the Additional Commissioner of Sales Tax having jurisdiction over the whole State or the Commissioner of Sales Tax can as well approach the Tribunal in terms of the first part of section 61 of the Bombay Sales Tax Act, 1959.

12 The second part of section 61 and with which we are really concerned is the first proviso to section 61(1) of the Bombay Sales Tax Act, 1959. In that proviso it is provided that if the Tribunal in exercise of its powers under sub-section (1) refuses to state the case which it has been required to do, on the ground that no question of law arises, the person who has invoked the Tribunal's jurisdiction under section 61 may within 90 days of such refusal, either withdraw his Application or apply to the High Court against such refusal. Thereafter, there are further sub-sections and which enable this Court to exercise its jurisdiction and answer the question or decide it in terms of the other sub sections.

13 The argument before us is that though sub section (1) of section 61 in its first part contains a stipulation that the person can approach the Tribunal within 90 days from the date of the communication and seek the Tribunal's assistance in forwarding for opinion, a question of law, arising out of the Appellate order passed by it, but that will not mandate invocation of this Court's jurisdiction or powers within 90 days from the refusal by the Tribunal. The argument really is that within 90 days of refusal by the Tribunal, the Applicant or the person can either withdraw his Application or apply to the High Court against that refusal. That can very well be done after 90 days. If that is done after 90 days this Court is not precluded or prevented from condoning the delay and by taking recourse to section 5 of the Limitation Act, 1963.

.....

15 It is not possible for us to agree with Mr. Sonpal that the period of 90 days provided in the proviso for approaching this Court against the refusal of the Tribunal to refer any question of law is not a rule or provision of limitation. In **Commissioner of Sales Tax, Maharashtra State, Mumbai vs. N.H. Polymers**, both sides proceeded on the agreed basis that 90 days is a period provided for both sub section (1) substantively and the proviso. This period or stipulation of time or provision of limitation binds the parties. The question was whether if the Application filed under the proviso to section 61(1) is filed beyond 90 days, can this Court take recourse to section 5 of the Limitation Act, 1963.

16 It is in dealing with that limited controversy that this Court referred to the rival contentions and then in para 9 answered the same. Para 9 of this judgment reads as under:

“9. On behalf of the respondents, it is submitted that the Act has been repealed with effect from April 1, 2005 on introduction of Value Added Tax Act, 2002. The Act, it is submitted, is a special law providing for a period of limitation different from the period prescribed under the Limitation Act, 1963 and, therefore considering section 29(2) of the Limitation Act, only those provisions would be applicable which are specifically made applicable. Since the special law prescribes the period of limitation, the Sales Tax Act would be governed by the specific provisions of the Act of 1959. Section 5 of the Limitation Act would not be applicable, considering the provisions of sections 59 and 60 of the Act of 1959, which exclude expressly or by necessary implication, the application of the provisions of the Limitation Act except sections 4 and 12. Section 59 of the Act provides that in computing the period of limitation, only the provisions of sections 4 and 12 of the Limitation Act in so far as they relate to proceedings under the provisions of sections 55, 57 and 61 will apply. A literal reading of section 59 can only lead to the conclusion, that all proceedings under Section 61, including under sub-section (1) or under its proviso, only the provisions of sections 4 and 12 of the Limitation Act would apply. Therefore, in such proceedings, the application of section 5 of the Limitation Act is expressly excluded. Section 60 of the Act of 1959 confers power for extension of period of limitation only on an appellate authority while admitting an appeal under Section 55. Considering the language of section 60 and the object behind enacting it, an inference can be drawn that Section 60 was enacted to exclude the application of Section 5 of the Limitation Act. By necessary implication, therefore, it will also impliedly exclude the application of section 5 of the Limitation Act to an application for reference under the Act submitted either to the Tribunal or the court under the proviso to section 61. Considering the specific provisions of the special law, the ratio of the Supreme Court judgment in the case of [Union of India v. Popular Construction Co. \(2001\) 8 SCC 470](#) and the decision in the case of [Commissioner of Sales Tax, U.P. v. Parson Tools and Plants \(1975\) 35 STC 413 \(SC\)](#) is squarely applicable.”

17 The Division Bench held that in computing the period laid down in sections 55, 57 and 61, the provisions of section 4 and 12 of the Limitation Act, 1963 shall, so far as may be applied. Therefore, though section 5 of the Limitation Act, 1963 has not been expressly excluded, yet in computing the period under section 61 only sections 4 and 12 of the Limitation Act as far as applicable be applied. Considering the language of section 29 (2) of the Limitation Act, only section 4 and 12 being made expressly

applicable, the inference is that other provisions of the Limitation Act are excluded. It is this understanding of the legal provisions by the Division Bench which has been assailed before us by Mr. Sonpal.

.....

26 It is thereafter section 61 appears in the statute book. A reading of sections 59 and 60 of the Bombay Sales Tax Act, 1959 together enabled the Division Bench in **Commissioner of Sales Tax, Maharashtra State, Mumbai vs. N.H. Polymers** to come to a conclusion that the legislature did not intend to confer any power in this Court to condone the delay by taking recourse to section 5 of the Limitation Act, 1963. In other words both Tribunal and this Court have to abide by the limit of 90 days and if the Application is filed beyond that period the Court has no powers to condone the delay by taking recourse to section 5 of the Limitation Act, 1963.

27 As recently as in August, 2014 a three Judge Bench of the Hon'ble Supreme Court had an occasion to consider the applicability of section 5 of the Limitation Act, 1963 to the Revision Application which was filed before the Madhya Pradesh High Court under Madhya Pradesh Madhyastham Adhikaran Adhiniyam (29 of 1983). The judgment of the Hon'ble Supreme Court in **State of M.P. and Anr. vs. Anshuman Shukla** is reported in **AIR 2014 SC 3403**, there the question arose as to whether two judge Bench decision of the Hon'ble Supreme Court was correct in laying down the law that the revisional powers cannot be exercised beyond the statutory limit or the limitation prescribed by law. In other words, the delay in filing a Revision Petition invoking section 19 of this Act cannot be condoned after the period specified therein and by taking recourse to section 5 of the Limitation Act, 1963. The observations, conclusions and findings of the Hon'ble Supreme Court are instructive. In para 19 of this judgment the Supreme Court framed the question no.1 and in answering the same referred to not only the Madhya Pradesh Act but the Limitation Act, 1963 and held that it is a general legislation on the law of limitation. It expressly referred to section 5 and 29 thereof in paras 25 and 26. Thereafter, the judgments brought to its notice by parties have been referred in paras 27, 28 and 29. Some of the judgments that the Hon'ble Supreme Court referred are also cited in the Division Bench order in **Commissioner of Sales Tax, Maharashtra State, Mumbai vs. N.H. Polymers**.

28 Therefore, it may be as Mr.Sonpal contented there should be an express exclusion of section 5 of the Limitation Act, 1963, so as to disable the Court from condoning the delay in filing any

Application. He urges that there is no such express exclusion. The Division Bench erroneously read the word “only” in section 59 of the Bombay Sales Tax Act, 1959. However, as the Hon’ble Supreme Court has clarified it is not just the aspect of express exclusion but the nature of the proceedings which are relevant. The Hon’ble Supreme Court has therefore, examined the matter and with the reference to all the previous judgments. In the event, an Application lies to a Court then, the nature of the enquiry should be as held by the Hon’ble Supreme Court. In the earlier paragraphs which we have reproduced above, the Division Bench of this Court has referred to other decisions and rendered by the Hon’ble Supreme Court in Commissioner of Sales Tax, Uttar Pradesh, Lucknow vs. Parsaon Tools And Plants, Kanpur reported in (1975) (VOL.35) STC 413 and Shrimati Ujjambai vs. State of Uttar Pradesh & Another reported in (1963) 1 SCR 778. Eventually the legislative intent to expressly exclude the applicability of section 5 of the Limitation Act, 1963, which is relevant. In the present case, the conclusion of the Division Bench is based on a conjoint reading of the above referred provisions of the Bombay Sales Act, 1959. The conjoint reading reveals the legislative intent. It is not that the party or person approaching the same Tribunal, which has rendered the appellate decision or order and seeking its intervention to refer any question of law for opinion and answer of this Court, is decisive leave alone conclusive. The Tribunal as the provision itself indicates has to agree, that its Appellate order raises a question of law and which requires it to refer it to the High Court. Then alone the Tribunal can draw the statement of case and refer the question to the High Court. A party or a person has not been conferred with an absolute right and to seek a reference. Equally, upon the refusal of the Tribunal to state a case and on the ground that no question of law arises there is a discretion and a person may approach the High Court against such refusal but that has to be done within 90 days. Sub section 2 of section 61 enables the High Court to record a satisfaction with regard to the correctness of the decision of the Tribunal and after it receives an Application under sub section (1), therefore, only upon compliance of sub-section 1 that the High Court can deal with the Application and then find out for the purpose of recording its satisfaction as to whether the Tribunal’s decision not to refer any question and stated to be of law for opinion of this Court is correct or not.

29 The nature of the power must therefore be borne in mind. There is no comparison of this power with that of an Appellate power and to approach the Appellate Authority against an erroneous or incorrect decision is held to be a right conferred by the statute. More often then not we have seen a provision such

as “an Appeal shall lie” which would indicate that an Appellate power is created by the statute and that also confers a right in the aggrieved party to approach the Appellate Authority or Tribunal. It is a remedy to correct an erroneous, incorrect and illegal order and at the first available opportunity and within the statutory frame work, that the Appellate Authority has been conferred further power to condone the delay in filing of an Appeal. It is in such circumstances, that section 60 uses the words and of great significance, namely, the Appellate Authority may admit the Appeal under section 55 after the period of limitation laid down in the said section if the Appellant satisfies the Appellate Authority that he has sufficient cause for not preferring the Appeal within such period. In comparison in section 59, the legislature clarifies that for computation of the period laid down under sections 55, 57 and 61, the provisions of sections 4 and 12 of the Limitation Act, 1963, shall so far as may be apply. Reading these two provisions together reveals the legislative intent. For the purposes of computation of the period of limitation laid down by sections 55, 57 and 61 which are powers of Appeal, Revision and of referring of a statement of case to the High Court, the provisions of sections 4 and 12 of the Limitation Act, 1963 can be applied but that also so far as may be.

32 A perusal thereof would reveal that save and except any Application under any of the provisions of Order XXI of CPC any Appeal or Application is capable of being admitted after the prescribed period, if the Appellant or the Applicant satisfies the Court that he had sufficient cause for not preferring the Appeal or making the Application within such period. It is this provision which is expressly included in section 60 of the Bombay Sales Tax Act, 1959. It has been made applicable to the exercise of the Appellate power under that Act. Sections 4 and 12 of the Limitation Act, 1963 only enable an Applicant to institute or prefer or make any suit, appeal or application after reopening of the Court and in the event, it is closed on the expiry of the last day of filing the proceedings, section 12 only enables exclusion of time. These are therefore provisions enabling computation of the period of limitation by excluding from it certain days. The date on which the judgment is pronounced and the time requisite for obtaining the copy thereof and lastly Application being made for leave to Appeal from a decree for order, the time requisite for obtaining the copy of the judgment shall also be excluded. Such a provision is distinct from section 5 of the Limitation Act, 1963 and that enables extension of prescribed period in certain cases. Mr. Sonpal does not dispute that the ambit and scope of these provisions namely section 4, 12 and section 5 is distinct and

different. His contention is that the word “only” is not appearing in section 59 therefore, the Division Bench Judgment is erroneous.

33 We are unable to agree with Mr. Sonpal because it is not the word “only” referred by the Division Bench but a conjoint and combined reading of the legal provisions referred by us which enables even us to hold that application of section 5 of the Limitation Act, 1963 is excluded. The exclusion can be culled out from a combined reading of the legal provisions and that is not contrary to the Supreme Court judgment even in the case of *State of Madhya Pradesh & Anr. vs. Anshuman Shukla* (supra). In this regard paras 29 and 30 of the Judgment in *State of Madhya Pradesh & Anr. vs. Anshuman Shukla* (supra) can be usefully referred. They read as under:

“29. Further, in the case of *Hukumdev Narain Yadav v. Lalit Narain Mishra* (1974) 2 SCC 133: (AIR 1974 SC 480), a three judge Bench of this court, while examining whether the Limitation Act would be applicable to the provisions of Representation of People Act, observed as under:

“17.but what we have to see is whether the scheme of the special law, that is in this case the Act, and the nature of the remedy provided therein are such that the Legislature intended it to be a complete Code by itself which alone should govern the several matters provided by it. If on an examination of the relevant provisions it is clear that the provisions of the Limitation Act are necessarily excluded, then the benefits conferred therein cannot be called in aid to supplement the provisions of the Act. In our view, even in a case where the special law does not exclude the provisions of Sections 4 to 24 of the Limitation Act by an express reference, it would nonetheless be open to the Court to examine whether and to what extent the nature of those provisions or the nature of the subject-matter and scheme of the special law exclude their operation.”

30. According to *Hukumdev Narain Yadav* (AIR 1974 SC 480) (supra), even if there exists no express exclusion in the special law, the court reserves the right to examine the provisions of the special law, and arrived at a conclusion as to whether the legislative intent was to exclude the operation of the Limitation Act.”

34 The legislative intent to exclude the applicability of section 5 of the Limitation Act, 1963 has to be found out with reference to the nature of the power which is invoked and which is requested to be exercised, whether a party or person has absolute right to invoke it and equally whether the Court can exercise it and all this has to be examined with reference to the provisions

of the special law. It is not that an express exclusion must be found in the section which is being construed or interpreted namely, section 61 of the Bombay Sales Tax Act, 1959. It is possible to arrive at the conclusion and which has been arrived by the Division Bench by a combined or conjoint reading of the legal provisions as ultimately the statute must be read as a whole. Its provisions have to be read together and harmoniously so as to discern the legislative intent. If a combined reading enables us to reach the same conclusion as reached by the Division Bench then, we do not find any merit in the contentions of Mr. Sonpal.”

26) Thus, even if we assume for purpose of the present case that section 5 of the Limitation Act 1963 can be invoked and applied because of the language of the proviso to sub-section (1) of section 128 of the Customs Act, 1962, still, its application is restricted in the sense that by taking recourse to section 5 the Commissioner (Appeals) can allow presentation of the Appeal only within further period of 30 days, but not thereafter.

27) We have referred to a Judgment of the Hon'ble Supreme Court recently delivered by a three Judge Bench in the order passed by us in the case of *M/s. Jonson and Jonson* (supra). That decision of the Hon'ble Supreme Court makes detailed reference to several decisions rendered either by two Judge or three Judge Bench of the Hon'ble Supreme Court. The Hon'ble Supreme Court proceeds to hold that when applicability of section 5 of the Limitation Act is not absolute, but circumscribed or restricted, then, the statutory provision restricting or circumscribing it must be given effect to in the light of clear language of

sub-section (2) of section 29 of the Limitation Act, 1963. In other words, sections 4 to 24 (inclusive) shall apply only insofar as and to the extent to which they are not excluded by the special or local law. In our case, beyond further period of 30 days and total period of 90 days, there is no further application of section 5 of the Limitation Act, 1963. The extent to which section 5 can be applied having been enumerated and set out in section 128(1) of the Customs Act, 1963, which is a special law, then, for the further delay in filing or presenting the Appeal, applicability of section 5 of the Limitation Act, 1963 is expressly ruled out. The language of section 128(1), which is a special law, therefore cannot be ignored or brushed aside.

28) Mr. Dhond sought to take assistance of sub-section (2) of section 14 of the Limitation Act, 1963. He contends that the time spent in prosecuting this Writ Petition be excluded as the Petitioner was bonafide pursuing that civil proceeding in this Court. Since this Court found that it had no jurisdiction to entertain the Petition because of an alternate efficacious remedy of an Appeal under section 128 of the Customs Act, 1962 that the Petitioner became aware of the lack of jurisdiction of this Court. The entire period spent in prosecuting and pursuing this Writ Petition if excluded with the aid of sub-section (2) of section 14 of the Limitation Act, 1963, the statutory Appeal could have

been entertained by the Commissioner (Appeals) is the submission of Mr. Dhond.

29) We are unable to accept it and for more than one reason. We assume, for the purpose of the present Judgment and proceeding, that the Commissioner (Appeals) is “Court” within the meaning of sub-section (2) of section 14 of the Limitation Act, 1963. We further assume, for the purpose of the present Judgment and proceeding, that the time spent by the Petitioner in pursuing the Writ Petition under Article 226 of the Constitution of India is spent to pursue or prosecute another civil proceeding. We are not called upon to decide this wider controversy, simply because Mr. Dhond relies upon the order passed by the Division Bench of this Court in the Petitioner's Writ Petition. Therefore, we do not decide this controversy, though we were persuaded to so decide, by Mr. Jetly. We rely upon the peculiar facts of this case and the order passed by this Court in the Petitioner's Writ Petition and assume that the Petitioner can invoke sub-section (2) of section 14 of the Limitation Act, 1963. We presume that the ingredients thereof have been satisfied. Still, we cannot condone the delay with the aid of this section or sub-section of the Limitation Act, 1963, as that provision cannot override section 128(1) of the Customs Act, 1962. We are in agreement with Mr. Jetly that the Petitioner cannot get over the

period of limitation under sub-section (1) of section 128 of the Customs Act, 1962 with the aid of sub-section (2) of section 14 of the Limitation Act, 1963.

30) We have already held that by sub-section (2) of section 29 of the Limitation Act, 1963 and applying it to the facts of the present case, sections 4 to 24 (inclusive) of the Limitation Act, 1963 have limited application to the proceedings and particularly Appeals under section 128 of the Customs Act, 1962. The third assumption on which we proceed is that sub-section (2) of section 14 of the Limitation Act, 1963 applies to Appeals as well. We are not impressed by Mr. Dhond's placing reliance on the Judgment of the Hon'ble Supreme Court in the case of *Ketan Parekh vs. Special Director, Directorate of Enforcement and Anr.* reported in **(2011) 15 SCC 30**. We have perused this Judgment very carefully and minutely.

31) The Hon'ble Supreme Court was approached by the Appellant to challenge an order passed by this Court on the application for condonation of delay in filing the Appeal under section 35 of the Foreign Exchange Management Act, 1999. This Court dismissed the application along with the Appeal.

32) After noticing the background facts and the rival contentions, particularly para 15, where the Enforcement Directorate's Counsel supported the impugned order, the Hon'ble Supreme Court then referred to relevant provisions and the case law. It then referred to another Judgment delivered by it in the case of *State of Goa vs. Western Builders* reported in **(2006) 6 SCC 239** and ultimately in paras 30, 31 and 32, the Hon'ble Supreme Court held as under:

"30. The aforesaid three judgments do support the argument of Shri. Ranjit Kumar that even though Section 5 of the Limitation Act cannot be invoked for condonation of delay in filing an appeal under the Act because that would tantamount to amendment of the legislative mandate by which the special period of limitation has been prescribed, Section 14 can be invoked in an appropriate case for exclusion of the time during which the aggrieved person may have prosecuted with due diligence remedy before a wrong forum, but on a careful scrutiny of the record of these cases, we are satisfied that Section 14 of the Limitation Act cannot be relied upon for exclusion of the period during which the writ petitions filed by the appellants remained pending before the Delhi High Court. In the applications filed by them before the Bombay High Court, the appellants had sought condonation of 1056 days' delay by stating that after receiving a copy of the order passed by the Appellate Tribunal, they had filed writ petitions before the Delhi High Court, which were disposed of on 26-7-2010 and, thereafter, they filed appeals before the Bombay High Court under Section 35 of the Act. Paragraphs 1, 2 and 3 of the applications for condonation of delay which are identical in all the cases were as under:

"1. The appellant abovenamed has preferred an appeal against the order dated 2-8-2007 (hereinafter referred to as "the impugned order") passed by Respondent 1 against the appellant abovenamed. The appellant states that the impugned order was received by the appellant on 5-10-2007. The appellant states that there is a delay of 1056 days in filing the above appeal, the reasons for which are being stated in detail hereunder and, therefore, the appellant abovenamed prays that the delay in filing the present appeal may please be condoned.

2. Reliefs sought:

(a) That this Hon'ble Court be pleased to condone the delay of 1056 days in filing the said appeal;

(b) That such further and other reliefs as the facts and circumstances may require.

3. Reasons for the delay

3.1 The appellant declares that there is delay of 1056 days in filing the appeal as prescribed in the Limitation Act, 1963.

3.2 The appellant further states that the delay occurred as the writ petition was filed before the Delhi High Court on 5-11-2007. The said writ was filed under the provisions of Articles 226 and 227 of the Constitution of India seeking issuance of a writ, order or direction in the nature of mandamus or any other writ for setting aside the impugned order dated 2-8-2007, passed by the Appellate Tribunal for Foreign Exchange under Rule 10 of the Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000 for dispensation. In the said writ proceedings the Hon'ble High Court of Delhi had passed an order on 26-7-2010. Vide the said order dated 26-7-2010, while relying on the judgment of the Hon'ble Supreme Court, it was held by the Hon'ble Delhi High Court that even an order passed by the Appellate Tribunal in an application seeking dispensation of predeposit of the penalty would be appealable under section 35 of the FEMA and that remedy under Article 226 is not available against such an order.

Further, the Hon'ble Delhi High Court also held that the present petition cannot be entertained by this Court. It is, however, open to the appellants to avail of the appropriate remedy in terms of para 45 of the above judgment of the Supreme Court.

3.3 Hence, pursuant to the said order passed by the Hon'ble Delhi High Court the appellant abovenamed prefers an appeal before this Hon'ble Bombay High Court.

3.4 Under the said circumstances the appellant most humbly prays that this Hon'ble Court may be pleased to condone the delay.

3.5 It is submitted that the delay in filing of the present appeal has not prejudiced the respondent in any manner, whatsoever, and, therefore, this Hon'ble Court be pleased to condone the said delay.

3.6 It is further submitted that the delay of 1056 days in filing the present appeal was bona fide, unintentional and inadvertent."

31. A careful reading of the above reproduced averments show that there was not even a whisper in the applications filed by the appellants that they had been prosecuting remedy before a wrong forum i.e. the Delhi High Court with due diligence and in good faith. Not only this, the prayer made in the applications was for

condonation of 1056 days' delay and not for exclusion of the time spent in prosecuting the writ petitions before the Delhi High Court. This shows that the appellants were seeking to invoke Section 5 of the Limitation Act, which, as mentioned above, cannot be pressed into service in view of the language of section 35 of the Act and interpretation of similar provisions by this Court.

32. There is another reason why the benefit of Section 14 of the Limitation Act cannot be extended to the appellants. All of them are well conversant with various statutory provisions including FEMA. One of them was declared a notified person under Section 3(2) of the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992 and several civil and criminal cases are pending against him. The very fact that they had engaged a group of eminent advocates to present their cause before the Delhi and the Bombay High Court shows that they have the assistance of legal experts and this seems to be the reason why they invoked the jurisdiction of the Delhi High Court and not of the Bombay High Court despite the fact that they are residents of Bombay and have been contesting other matters including the proceedings pending before the Special Court at Bombay. It also appears that the appellants were sure that keeping in view their past conduct, the Bombay High Court may not interfere with the order of the Appellate Tribunal. Therefore, they took a chance before the Delhi High Court and succeeded in persuading the learned Single Judge of the Court to entertain their prayer for stay of further proceedings before the Appellate tribunal. The promptness with which the learned Senior Counsel appearing for the appellant, Kartik K. Parekh made a statement before the Delhi High Court on 7-11-2007 that the writ petition may be converted into an appeal and considered on merits is a clear indication of the appellant's unwillingness to avail remedy before the High Court i.e. the Bombay High Court which had the exclusive jurisdiction to entertain an appeal under Section 35 of the Act."

33) We are unable to agree with Mr. Dhond that this Judgment would enable us to conclude that section 14 of the Limitation Act, 1963 can be invoked by the Petitioner to get over the outer limit or restriction in sub section (1) of section 128 of the Customs Act, 1962. In fact, all the Judgments that have been referred by the Hon'ble Supreme Court take the view that there was no power to condone the delay after expiry

of the prescribed period. In that regard, the Hon'ble Supreme Court has, in para 21, referred to a Judgment delivered by it in the case of *Singh Enterprises vs. Commissioner of Central Excise* reported in **(2008) 3 SCC 70**. In para 22, the Hon'ble Supreme Court referred to a three Judge Bench decision in the case of *Consolidated Engineering Enterprises vs. Irrigation Department* reported in **(2008) 7 SCC 169**. In para 23 it specifically referred to two Judgments delivered by it, first in the case of *Commissioner of Central Excise and Customs vs. Hongo India (P) Ltd.* reported in **(2009) 5 SCC 791** and second in the case of *Union of India vs. Popular Construction Company* reported in **(2001) 8 SCC 470**. None of these decisions have been held to be laying down any proposition or principle of law, which has been pressed into service by Mr. Dhond before us. In fact, there is nothing in these Judgments which would enable us to hold that the Petitioner can invoke section 14(2) of the Limitation Act, 1963, to extend the period stipulated in sub-section (1) of section 128 of the Customs Act, 1962. Therefore, the observations in para 30 of the Judgment in the case of *Ketan Parekh* (supra) cannot be seen in isolation or de hors the previous observations and conclusions therein.

34) When such is the position and emerging from these Judgments, then, we do not see how Mr. Dhond can derive any

assistance from the other Judgments cited by him. The First Judgment in the case of *Mukri Gopalan vs. Cheppilat Puthanpurayil Aboobacker* reported in **(1995) 5 SCC 5** has been expressly referred in later Judgments of the Hon'ble Supreme Court and it has not been held that the course suggested by Mr. Dhond is permissible by relying not only on the observations in *Mukri Gopalan* (supra), but in the case of *PSarthy vs. State Bank of India* reported in **(2000) 5 SCC 355**. Mr. Dhond placed strong reliance on a Judgment of a Division Bench of this Court in the case of *Union of India vs. Epcos India Pvt. Ltd.* Reported in **(2013) 290 ELT 364**. That decision was rendered in the context of a rebate claim, which was rejected by the Adjudicating Authority. That order was challenged before the Commissioner (Appeals) and he allowed the Appeal on 7th March, 2008. On 16th May, 2008, the Revenue filed an Appeal before the Customs, Excise and Service Tax Appellate Tribunal (CESTAT), but, it held on 12th August, 2008 that the Appeal is not maintainable. The papers were returned for presentation before the appropriate Forum. The Revenue filed a Revision on 22nd October, 2008. On 23rd November, 2010, the Revision Application was dismissed on the ground that it was barred by limitation. Para 3 in the Judgment of *Epcos India Pvt. Ltd.* (supra) is relevant for our purpose. It reads as under:

“3. We find merit in the contention of the petitioner that the period spent in prosecuting the proceedings bona fide before the CESTAT, which had no jurisdiction, would have to be excluded by giving the benefit of the provisions of Section 14 of the Limitation Act, 1963. The provisions of Section 14 of the Limitation Act would be attracted in view of the judgment of this Court in *Rajkumar Shivhare v. Union of India* – **2011 (273) E.L.T. 75 (Bom.)**. The period for filing a revision under Section 35EE(2) of the Central Excise Act, 1944 is three months. However, the Central Government, if the applicant was prevented by sufficient cause from presenting the application within three months may allow the application to be presented within a further period of three months. There is no dispute about the position that if the period which was spent in prosecuting the proceedings before the Tribunal, is excluded, the revision which was filed before revisional authority would be within the stipulated period under sub-section (2) of Section 35EE.”

35) A bare perusal thereof would indicate that the Revenue approached the CESTAT within the period prescribed by law for filing an Appeal. That Appeal was pending before the Appellate Authority when it passed the final order holding that it was not maintainable. When the Revenue approached the Revisional Authority within three months of the date of the Tribunal's order and sought benefit not only under section 14 of the Limitation Act, 1963, but the power of the Central Government to condone the delay in filing the Revision Application, if the same is presented within a further period of three months. There was no dispute before the Division Bench that if the period, which was spent in prosecuting the proceeding before the Tribunal, is excluded, the Revision Application, which was filed before the Revisional Authority would be within the stipulated period under section 35EE(2) of the Central Excise Act, 1944. We do not see how these observations

can assist the Petitioner before us. In the first place, the stipulation in section 35EE and particularly sub-section (2) is not identical to section 128(1) of the Customs Act, 1962. Secondly, the Revenue had filed an Appeal and which was pending before the CESTAT from 16th May, 2008 till 12th August, 2008. That Appeal was filed within time. Further, the Revision Application was also filed on 22nd October, 2008. The argument was that section 14 of the Limitation Act, 1963 would be attracted and that argument has been accepted. This decision does not lay down a principle that even after the power to condone the delay beyond a said limit is restricted and the delay cannot be condoned beyond the said limit, that with the aid of section 14 of the Limitation Act, 1963 a proceeding or Appeal, which is time barred, can be revived or restored to file, even after the specific period is over. In other words, if the proceedings are ex-facie time barred that they can be revived or restored to file by this circuitous method. We do not see how this Judgment can be assisting the Petitioner. Placing reliance upon it is identical to the emphasis on the order passed in the Petitioner's Writ Petition by this Court. For the reasons aforeindicated the reliance on these Judgments is misplaced.

36) Further, in *Rajkumar Shivhare vs. Union of India* reported in (2011) 273 ELT 75 the Division Bench found that the period spent in

prosecuting the Writ Petition to challenge an order rejecting application for dispensing with the condition of pre-deposit, together with the time spent challenging the High Court order in the Hon'ble Supreme Court can be excluded because section 14 of the Limitation Act, 1963 can be invoked. Further, if the facts in para 2 are noted, it would be apparent that there was a specific direction from the Hon'ble Supreme Court of India and in the following terms:

“In view of this Court's jurisdiction under Article 136 of the Constitution, we give liberty to the appellant, if so advised, to file an appeal before an appropriate High Court within the meaning of Explanation to section 35 of FEMA and if such an appeal is filed within a period of thirty days from today, the appellate forum will consider the question of limitation sympathetically having regard to the provision of Section 14 of the Limitation act and also having regard to the fact that the appellant was bona fide pursuing his case under Article 226 of the Constitution before the Delhi High Court and then its appeal before this Court.”

37) In the light of the wider power conferred on the Hon'ble Supreme Court by Articles 136 and 142 of the Constitution of India, the direction issued by it had to be abided by all Courts and Tribunals so also Authorities in India. Such being the scope of the direction and traceable to Articles 136 and 142 of the Constitution of India that the Division Bench in para 7 excluded the period spent by the Appellant in the above proceedings. The Division Bench in paras 7 and 8 expressly held as under:

“7. Section 29(2) of the Limitation Act, 1963 prescribes that where any special or local law prescribes for any suit, appeal or application, a period of limitation different from the time prescribed

by the Schedule, the provisions of Section 3 shall apply as if such period were the period prescribed by the Schedule and for the purposes of determining the period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in Sections 4 to 24 shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law. Now Section 35 of the FEMA provides firstly, a specific period of limitation of sixty days for filing an Appeal before the High Court Secondly, Section 35 empowers the High Court to allow the Appeal to be filed within a further period not exceeding sixty days if it is satisfied that the Appellant was prevented by a sufficient cause from filing the Appeal within the original period of sixty days. In view of this provision, section 5 of the Limitation Act, 1963 would not empower the High Court to condone the delay for a period in excess of what is stipulated by the proviso to Section 35. Section 14 of the Limitation Act, 1963, however, does not provide for an extension of the period of limitation. Section 14 deals with the exclusion of time taken in a proceeding bona fide in a Court without jurisdiction. Section 14 of the Limitation Act, 1963 does not extend the period of limitation but relates to the exclusion of a certain period while computing the period of limitation. Undoubtedly the provisions of Section 5 of the Limitation Act, 1963 would stand excluded and the power of the High Court to condone a delay occasioned beyond the period specified by the proviso to section 35 would be excluded by virtue of the specific statutory provision. But merely because the provision of Section 5 of the Limitation Act, 1963 are rendered inapplicable that would not result in an inference that the provisions of Section 14 would not apply. That is simply because Section 14 is not a provision which confers upon the Court a power to condone the delay for sufficient cause but a provision by which a certain period has to be excluded in computing the period of limitation. Hence, there is absolutely no reason or justification for the Court to infer that Section 14 of the Limitation Act, 1963 cannot be applied in relation to the proceedings before the High Court in an Appeal under Section 35 of the FEMA. Section 35 of the FEMA does not in any event expressly exclude the application of Section 14 of the Limitation Act, 1963.

8. In arriving at this conclusion, we are fortified by the judgment of a Bench of three Judges of the Supreme Court in *Consolidated Engineering Enterprises v. Principal Secretary, Irrigation Department* [2008 (7) SCC 169]. Section 34 of the Arbitration and Conciliation Act, 1996 specifies that an application for setting aside an arbitral award may not be made after three months have elapsed from the date on which the party making that application had received that arbitral award. Under the proviso, if the Court is satisfied that the applicant was prevented by sufficient cause from

making the application within the said period of three months, it may entertain the application within a further period of thirty days but not thereafter. The issue which arose before the Supreme Court was whether the Limitation Act, 1963 was inapplicable to a proceeding in Court under the Arbitration and Conciliation Act and, even if the Limitation Act, 1963 is applicable, whether the applicability of Section 14 is excluded to proceedings under Section 34(1) of the Arbitration and Conciliation Act, 1996. At this stage, it would be necessary to note that Section 43(1) of the Arbitration & Conciliation Act, 1996 specifically provides that the Limitation Act, 1963 shall apply to arbitrations as it applies to proceedings in Court. The Supreme Court held on a review of the provisions of the Act of 1996, that there is no provision in that Act which excludes the applicability of the provisions of Section 14 of the Limitation Act, 1963 to an application submitted under Section 34 of the Arbitration and Conciliation Act, 1996. On the contrary, the provision of Section 43 made the provisions of the Limitation Act, 1963 applicable to arbitration proceedings. In a Judgment delivered by Mr. Justice Panchal on behalf of His Lordship and the learned Chief Justice, it was observed that the intention of the legislature in enacting sub-section (3) of Section 34 was that an application for setting aside an award should be made within three months which period could further be extended on sufficient cause being shown by another period of thirty days, but not thereafter. Hence, Section 5 of the Limitation Act, 1963 would stand excluded. However, merely because Section 5 was excluded, that would not lead to the conclusion that Section 14 would not be applicable. Holding that Section 14 of the Limitation Act, 1963 would be applicable, the learned Judge observed thus:

“22. The policy of the section is to afford protection to a litigant against the bar of limitation when he institutes a proceeding which by reason of some technical defect cannot be decided on merits and is dismissed. While considering the provisions of Section 14 of the Limitation Act, proper approach will have to be adopted and the provisions will have to be interpreted so as to advance the cause of justice rather than abort the proceedings. It will be well to bear in mind that an element of mistake is inherent in the invocation of Section 14. In fact, the section is intended to provide relief against the bar of limitation in cases of mistaken remedy or selection of a wrong forum. On reading Section 14 of the Act it becomes clear that the legislature has enacted the said section to exempt a certain period covered by a bona fide litigious activity. Upon the words used in the section, it is not possible to sustain the interpretation that the principle underlying the said section namely, that the bar of limitation should not affect a person honestly doing his best to get his case tried on merits but failing because the court is unable to give him such a trial, would not be applicable to an

application filed under Section 34 of the Act of 1996. The principle is clearly applicable not only to a case in which a litigant brings his application in the Court, that is, a court having no jurisdiction to entertain it but also where he brings the suit or the application in the wrong court in consequence of bona fide mistake or (sic of) law or defect or procedure. Having regard to the intention of the legislature this Court is of the firm opinion that the equity underlying Section 14 should be applied to its fullest extent and time taken diligently pursuing a remedy, in a wrong court, should be excluded”

“In his concurring judgment, Mr. Justice R. V. Raveendran held that the proviso to Section 34(3) is a provision relating to the extension of the period of limitation; and since it differs from Section 5 of the Limitation Act in regard to the period of extension, the proviso to Section 34(3) would have the effect of excluding section 5 of the Limitation Act. However, Section 14 of the Limitation Act does not relate to the extension of the period of limitation but relates to the exclusion of a certain period while computing the period of limitation. Consequently, the proviso to Section 34(3) was held not to exclude the application of Section 14.”

38) We do not see how these observations can assist the Petitioner in getting over the clear legal position noted by us. As it is, Mr. Dhond's contentions are based on too many assumptions, now he wants us to hold that the Writ Petition was filed in this court on 30th August, 2011 and it was pending in this Court till 30th November, 2011 and this duration is to be excluded in computing the period of limitation of sixty plus thirty days. In other words, though the Writ Petition was not filed within 60 days but it was filed within 90 days and with the assistance of section 14(2) of the Limitation Act, 1963, the same can be entertained. However, the Appeal was filed on 12th December, 2011 and which is beyond the period of 90 days as well. The Writ Petition was not finally disposed of till 30th November, 2011 but

during its pendency the entire period under section 128(1) of the Customs Act, 1962 was over.

39) Once this view is taken, then, we need not refer to the other Judgments cited on the point of applicability of the Limitation Act to the proceedings before the Commissioner (Appeals) and the power to condone the delay by exclusion of time spent in prosecuting bonafide other legal proceedings. While it may be true that the time can be excluded and that to seek exclusion is a right conferred in the Applicant, still, we cannot be unmindful of the clear legal position and which equally emerges from the decisions of the Hon'ble Supreme Court.

40) We would be failing in our duty if we do not make a reference to a Judgment of the Hon'ble Supreme Court in the case of *Union of India vs. West Coast Paper Mills Ltd.* reported in **AIR 2004 SC 1596**. The three Judge Bench of the Hon'ble supreme Court was considering an issue as to whether the time spent by West Coast (Respondent before the Hon'ble Supreme Court) in bonafide prosecuting the proceedings before the Railway Freight Rates Tribunal and challenging the order of that Tribunal before the Hon'ble Supreme Court can be excluded. While dealing with that question, the Hon'ble Supreme Court referred to the facts till para 7 and in para 8 noted the contentions of Union of India. Para 8 of the decision reads as under:

“8. A contention that the said suits were barred by limitation was raised by the appellants herein stating that the cause of action for filing the same arose immediately after the judgment was passed by 'The Tribunal' on 18-4-1966 and, thus, in terms of Article 59 of the Limitation Act, 1963, they were required to be filed within a period of three years from the said date, as despite the fact that the Special Leave Petition was preferred thereagainst, no stay had been granted by this Court and, thus, the period, during which the matter was pending before this Court, would not be excluded in computing the period of limitation. Having regard to the plea raised by the plaintiff-respondent in the aforementioned suits as regards the applicability of sections 14 and 15 of the Limitation Act, 1963, the trial Court held that the suits had been filed within the stipulated period. The High Court in appeal also affirmed the said view.”

41) Thereafter it noted the reliance placed by Union of India on a Judgment of the Privy Council and of the Hon’ble Supreme Court in the case of *Secretary, Ministry of Works and Housing, Government of India vs. Mohinder Singh Jagdev and Ors* reported in (1996) 6 SCC 229 in para 10, which reads as under:

“10. Mr. Malhotra would further contend that in absence of an order staying the operation of the judgment, it became enforceable and, thus, the plaintiff-respondent was required to file the suit within the period of limitation specified therefor. Furthermore, the learned counsel would urge that in terms of section 46-A of the Indian Railways Act, the judgment of the Tribunal being final, the starting period of limitation for filing the suit would be three years from the said date. Strong reliance in this behalf has been placed on *Juscurn Boid and another V. Pirthichand Lal* (LR India Appeals 1918-1919 page 52), *P.K. Kutty* (supra), *Maqbul Ahmad and others V. Onkar Pratap Narain Singh and others* (AIR 1935 PC 85) and *Secretary, Ministry of Works and Housing, Govt. of India and others V/s. Mohinder Singh Jagdev and others*, [(1996) 6 SCC 229].”

42) In paras 13 to 18, this is what is held by the Hon’ble Supreme Court:

“13. It may be true that by reason of section 46-A of Indian Railways Act the judgment of the Tribunal was final but by reason thereof the jurisdiction of this Court to exercise its power under Article 136 of the Constitution of India was not and could not have been excluded.

14. Article 136 of the Constitution of India confers a special power upon this Court in terms whereof an appeal shall lie against any order passed by a Court or Tribunal. Once a Special Leave is granted and the appeal is admitted, the correctness or otherwise of the judgment of the Tribunal become wide open. In such an appeal, the Court is entitled to go into both questions of fact as well as law. In such an event the correctness of the judgment is in jeopardy.

15. Even in relation to a civil dispute, an appeal is considered to be a continuation of the suit and a decree becomes executable only when the same is finally disposed of by the Court of Appeal.

16. The starting point of limitation for filing a suit for the purpose of recovery of the excess amount of freight illegally realised would, thus, begin from the date of the order passed by this Court. It is also not in dispute that the respondent herein filed a writ petition which was not entertained on the ground stated hereinbefore. The respondents were, thus, also entitled to get the period during which the writ petition pending, excluded for computing the period of limitation. In that view of the matter, the civil suit was filed within the prescribed period of limitation.

17. The Trial Judge as also the High Court have recorded a concurrent opinion that the respondents were entitled to the benefits of sections 14 and 15 of the Limitation Act, 1963. We have no reason to take a different view.

18. It is beyond any cavil that in the event, the respondent was held to have been prosecuting its remedy bonafide before an appropriate forum, it would be entitled to get the period in question excluded from computation of the period of limitation.”

43) Thereafter, the relevant observations of the Hon’ble Supreme Court are to be found in paras 40, 41 and 42, which reads as under:

“40. In Mohinder Singh Jagdev (supra) also this Court held :

“7. The crucial question is whether the suit is barred by limitation? Section 3 of the Limitation Act, 1963 (for short, “the Act”) postulates that the limitation can be pleaded. If any

proceedings have been laid after the expiry of the period of limitation, the Court is bound to take note thereof and grant appropriate relief and has to dismiss the suit, if it is barred by limitation. In this case, the relief in the plaint, as stated earlier, is one of declaration. The declaration is clearly governed by Article 58 of the Schedule to the Act which envisages that to obtain “any other” declaration the limitation of three years begins to run from the period when the right to sue “first accrues”. The right to sue had first accrued to the respondent on 10-9-1957 when the respondent's services came to be terminated. Once limitation starts running, until its running of limitation has been stopped by an order of the competent Civil Court or any other competent authority, it cannot stop. On expiry of three years from the date of dismissal of the respondent from service, the respondent had lost his right to sue for the above declaration.”

41. Unfortunately in P.K. Kutty (supra) and Mohinder Singh Jagdev (supra) no argument was advanced as regard applicability of doctrine of merger. The ratio laid down by the Continuation benches of this Court had also not been brought to the Court's notice.

42. In the aforementioned cases, this Court failed to take into consideration that once an appeal is filed before this Court and the same is entertained, the judgment of the High Court or the Tribunal is in jeopardy. The subject-matter of the lis unless determined by the last Court, cannot be said to have attained finality. Grant of stay of operation of the judgment may not be of much relevance once this Court grants special leave and decides to hear the matter on merit.”

44) Thus, the Hon'ble Supreme Court held in the case of *Mohinder Singh* (supra) that once limitation starts running, till its running is stopped by an order of the competent Civil Court or competent Authority, it cannot stop. It overruled the earlier Judgment in the case of *P. K. Kutty Anuja Raja and Anr. vs. State of Kerala and Anr.* reported in **AIR 1996 SC 2212** only because no argument was advanced as regards the applicability of doctrine of merger. The Hon'ble Supreme Court entertained the SLP and granted leave to Appeal as also stay. The time spent in prosecuting the proceedings

before the Hon'ble Supreme Court and which is bonafide was permitted to be excluded. Pertinently, the test laid down is applicable in a case where a Appeal is filed that being a continuation of the lis, its pendency can be relied upon to claim the benefit. A Writ Petition's pendency will not stand on the same footing always. If the time has not stopped running, then, none of the principles relied upon by the Petitioner will assist it. As we have noted above, in this case, Writ Petition was pending in this Court, but neither it was entertained nor any interim relief was granted, leave alone admitting it. If the Petitioner decides not to approach the appropriate, correct or right Forum, but tries to bypass it by filing a Writ Petition and allows the time to run, then, it cannot request this Court in its discretionary and equitable jurisdiction to set right a wrong, for which it is itself responsible. In other words, the Petitioner is trying to take advantage of its own wrong committed earlier in approaching this Court, though knowing fully well that it had refused to exercise jurisdiction, because the alternate efficacious remedy of Appeal to the Commissioner of Customs was provided by law. The Petitioner did not take steps to file such an Appeal even during the pendency of the Writ Petition and allowed the time to run. In these circumstances, we cannot extend any benefit, as that would allow the Petitioner to take advantage of its own wrong. As a result of the above discussion, the Writ Petition fails. Rule is discharged. There would be

no order as to costs. In the view we have taken, we do not decide the other controversy as to whether disposal of a Writ Petition on the ground that the order on Petitioner's earlier Writ Petition No. 1705 of 2011 would mean there was a defect of jurisdiction or other cause of like nature denoting that for that reason this Court was unable to entertain it.

45) The only other contention which has been raised by Mr. Prakash Shah appearing for the Petitioner in Writ Petition No. 3419 of 2014 is that the Writ Petition is maintainable because even though the Appeal is dismissed on the ground of delay and in identical facts and circumstances as that of M/s. Fleming Pvt. Ltd. the Petitioner in Writ Petition No. 1830 of 2013, but the order-in-original not complying with the principles of natural justice that this Writ Petition be entertained irrespective of the dismissal of the Petitioner's Appeal as barred by limitation.

46) Mr. Shah sought to take assistance of the principle that this Court can exercise jurisdiction even if there is an alternate and equally efficacious remedy, because there is no prohibition in entertaining a Writ Petition under Article 226 of the Constitution of India. However, in this case, the Petitioner filed the Appeal and knowing fully well that it has an alternate remedy. It was not only alternate but equally

efficacious. The Petitioner has to blame itself for approaching the Appellate Authority belatedly. If the Appellate Authority refused to condone the delay by relying upon the statutory prescription, then, we do not find that the Petitioner can take assistance of this Court's jurisdiction under Article 226 of the Constitution of India to overcome the binding order passed by the Commissioner (Appeals), Central Excise, Pune-I. More so, when that order cannot be faulted in law. Therefore, the controversy in this case is identical to that in Writ Petition No. 1830 of 2013. For identical reasons, even this Writ Petition fails. Rule discharged. No costs.

(A.A.SAYED, J.)

(S.C.DHARMADHIKARI, J.)