IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 5573 OF 2015

Mr. Xavier Thomas ... Petitioner

Vs

1. Union of India & Ors. ... Respondents

Mr. Vijay S. Gharat with Mr. Sandeep Mahadik for the Petitioner.

Mr. Pradeep S. Jetly and Mr. Jitendra B. Mishra for the Respondent.

CORAM : S.C. DHARMADHIKARI &
G.S. KULKARNI, JJ.

THURSDAY, 30TH JULY, 2015

P.C. :

1. The petitioner has filed this Writ Petition seeking a direction to the Tribunal to entertain a statutory appeal although it is held to be barred by limitation and the Tribunal's power to condone the delay in filing it and presenting it is restricted and circumscribed by the statute itself.

2. The attempt is to ask this Court to do something indirectly which it cannot do directly.

3. The facts which are required to be stated and for the purpose of the Tribunal's conclusion to be upheld are that the petitioner carries on business in the name and style of M/s. Technocrats Engineering Company. He filed returns for the year 2004-08 and paid a sum of Rs.19,59,606/- and further sums towards service tax.

4. It is his claim that he was diligent and honestly paying the taxes and meeting the demands as raised but with regard to a certain work awarded to him, the petitioner paid the taxes but realised that the second respondent has imposed a service tax liability. The petitioner purports to dispute this demand and has raised several contentions with which we are not concerned.

5. The records indicate that a notice styled as show-cause-cum-demand dated 20th October, 2011 was served and it was adjudicated. The order of adjudication was passed by the authority namely, the Additional Commissioner, Central Excise, Customs and Service Tax on 31st August, 2012. That order dated 31st August, 2012 was

impugned before the Appellate Authority. The Tribunal was of the opinion that the appeal was not presented in time. If the appeal had been presented beyond the period prescribed by law, the Commissioner (Appeals) was helpless and he could not have exercised the power to condone the delay beyond the specified limit. The Tribunal found that the delay, therefore, could not have been condoned beyond this period. The Tribunal noted the admitted dates and which are undisputed. The petitioner received the adjudication order on 7th September, 2012. However, he filed the appeal before the Commissioner (Appeals) on 11th March, 2013. At the relevant time, the provisions of section 85(3) of the Finance Act, 1994, required the appeal to be filed within two months from the date of receipt of the order and if filed later than this period, the Commissioner had power to condone a delay of thirty days only and that too on showing sufficient cause. The provision that was brought in by amendment later stipulates the period as six months. Such was not the provision earlier and the appeal had to be brought within the period noted by the Tribunal. That is also, therefore, an undisputed position meaning thereby the earlier stipulation of two months and one month (thirty days) in all three months was prevailing when the Commissioner passed the order impugned before the Tribunal and equally when the Tribunal passed the order. Therefore, the appeal had to be presented in terms of section 85(3A), within a period of two months from the date of receipt of a decision or order of the Adjudicating Authority and the Appellate Authority could have entertained the appeal if the presentation was within a further period of one month and the delay was satisfactorily explained.

6. If the admitted facts and as noted in the Tribunal's order are borne in mind, then, the Tribunal's conclusion cannot be said to be perverse or vitiated by any error of law apparent on the face of the record. The Tribunal concluded that the law laid down by the Hon'ble Supreme Court in the case of *Singh Enterprises vs. Commissioner of Central Excise, Jamshedpur 2008 (221) ELT 163* concludes the issue against the petitioner and in favour of the Revenue. One of us (S.C. Dharmadhikari, J.) had an occasion to consider a similar question in the case of *Flemingo (Duty Free Shop) Private Limited vs. Commissioner of Customs (Appeals), Mumbai-I 2015 (315) Excise*

Law Times, 321. The Division Bench following the law laid down by the Hon'ble Supreme Court took the same view.

7. In the circumstances, we cannot agree with Mr. Gharat that the Tribunal's order should be interfered with by us in our extraordinary, equitable and discretionary jurisdiction under Article 226 of the Constitution of India. We cannot put a premium on the negligent act of the petitioner-appellant of not approaching the Appellate Authority in time by exercising our plenary powers. Our powers under Article 226 of the Constitution of India do not enable us to override any statutory provision nor we can pass an order contrary to law.

8. In the circumstances, there is no merit in the Writ Petition and it is dismissed. No costs.

G.S. KULKARNI, J. ***S.C. DHARMADHIKARI , J.***