IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

Writ Petition NO. 5447 OF 2016

Vikas Shankar Joshi ...Petitioner

Versus

Additional Commissioner Of Central Excise,
Customs And Service Tax Raigad Commissionerate ...Respondent

Mr.Ganesh Gole, for the Petitioner.

Mr.M.Dwivedi with Mr.Sham V. Walve, for the Respondent

CORAM : S.V. GANGAPURWALA & G.S. KULKARNI, JJ.

DATED : 19th June,2017

PER COURT :

1. The appeal filed by the petitioner is dismissed on the ground of delay. Learned Counsel for the petitioner submits that the petitioner was not given opportunity of hearing.

2. The petitioner had filed appeal under Section 35 of the Central Excise Act. The limitation period prescribed is 60 days and the petitioner had filed an appeal on lapse of 44 days after the prescribed period of limitation. According to the learned Counsel, the petitioner has good case on merit, this Court can also consider the cause for condonation of delay. The right of the petitioner may not be negated on technical ground. According to the learned Counsel, the respondent be directed to give information in the form of the documents to which Respondent No.1 has relied. The impugned order be quashed and set aside.

3. The learned Counsel for the revenue submits that the Appellate Authority does not have power to condone the delay of more than 30 days and the order has been rightly passed.

4. The learned Counsel for the Revenue relies on the judgment of the Apex Court in the case "***Singh Enterprises Vs. Commissioner of C.Ex.Jamshedpur"*** reported in "***2008(221) E.L.T. 163 (SC)"***. So also as in the case of "***M/s. Flemingo (Duty Free Shop) Pvt. Ltd. and Another Vs. The Commissioner of Customs***

(Appeal) Mumbai Zone - I and Others*"** *reported in "2015 (315) E.L.T. 321 (Bom)***"*

5. We have considered the submissions. The Apex Court in the case of ***Singh Enterprises,*** referred to supra has observed as under:-

> "8. The Commissioner of Central Excise (Appeals) as also the Tribunal being creatures of Statute are vested with jurisdiction to condone the delay beyond the permissible period provided under the Statute. The period upto which the prayer for condonation can be accepted is statutorily provided. It was submitted that the logic of Section 5 of the Indian Limitation Act,1963 (in short the 'Limitation Act') can be availed for condonation of delay. The first proviso to Section 35 makes the position clear that the appeal has to be preferred within three months from the date of communication to him of the decision or order. However, if the Commissioner is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of 60 days, he can allow it to be presented within a further period of 30 days. In other words, this clearly shows that the appeal has to be filed within

> 60 days but in terms of the proviso further 30 days time can be granted by the appellate authority to entertain the appeal. The proviso to sub-section (1) of Section 35 makes the position crystal clear that the appellate authority has no power to allow the appeal to be presented beyond the period of 30 days. The language used makes the position clear that the legislature intended the appellate authority to entertain the appeal by condoning delay only upto 30 days after the expiry of 60 days which is the normal period for preferring appeal. Therefore, there is complete exclusion of Section 5 of the Limitation Act. The Commissioner and the High Court were therefore justified in holding that there was no power to condone the delay after the expiry of 30 days period."

6. The Apex court has categorically and specifically observed that there is complete exclusion of Section 5 of the Limitation Act and the Commissioner does not have power to condone the delay after the expiry of 30 days.

7. The Commissioner as such did not have jurisdiction to condone the delay of 30 days. We do not see any error in the said

order being passed. The Commissioner could not have considered the case on merits on account of delay, as such this Court has not considered the matter on merits.

8. In view of the above, the Writ Petition is dismissed. No costs.

(G.S.KULKARNI, J.) *(S.V. GANGAPURWALA, J.)*