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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**
**ORDINARY ORIGINAL CIVIL JURISDICTION**
**WRIT PETITION NO.988 OF 2009**

IVP Limited and Anr. … Petitioners
Vs.
Union of India and Ors. … Respondents

Mr. Prakash Shah a/w Mr. Jas Sanghvi i/by PDS Legal for the Petitioners.

Mr. Pradeep S. Jetly for the Respondents.

**CORAM : A.S. OKA &**
**A.K. MENON, JJ.**

**DATE : 5th OCTOBER, 2017**

**ORAL JUDGMENT (Per A.S. Oka, J.)**

1 Called out for final hearing. By this Petition under Article 226 of the Constitution of India, the petitioners – Assessees have taken an exception to the order passed dated 6th March, 2009 passed by the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench (Appellate Tribunal) at Mumbai. The petitioners made an application by taking recourse to the provisions of Sub-Section (2) of Section 35C of the Central Excise Act, 1944 (for short “the said Act”). An application was made for rectification of final order dated 12th August, 2004 passed by the Appellate Tribunal. The application was made on 18th September,

2008. A prayer was made for condonation of delay. By the impugned judgment and order, the Appellate Tribunal held that there is no provision in Sub-Section (2) of Section 35C to condone the delay. The Tribunal also considered the question whether aid can be taken of Section 14 of the Limitation Act, 1963 (for short “Limitation Act'). The view taken by the Appellate Tribunal appears to be that if the legislature intended to confer power on the Appellate Tribunal to condone the delay in making an application under Sub-Section (2) of Section 35C, while amending Sub-Section (2) of Section 35C by Act No.20 of 2002, the legislature in its wisdom would have provided for a power to condone the delay. By Act No.20 of 2002, period of limitation of four years was brought down to six months.

2 The question which is canvassed by the learned counsel appearing for the petitioners is about the power of the Appellate Tribunal to invoke Section 14 of the Limitation Act. He has placed reliance on a decision of the Apex Court in the case of *M.P. Steel Corporation Vs. Commissioner of Central Excise*[1]. He submitted that the Apex Court has held that though by virtue of provisions of Section 29(2) of the Limitation Act, Section 14 per se will not apply, the principles governing Section 14 will certainly apply. He submitted that because there is no power to condone the delay in filing application

1 2015 (319) E.L.T. 373 (S.C.)

under Sub-Section (2) of Section 35C, the view that even the principles analogous to Section 14 of the Limitation Act cannot be invoked is per se illegal in the light of the law laid down by the *M.P. Steel Corporation*. He would, therefore, submit that considering the facts of the case, by applying principles under Section 14 of the Limitation Act, the application for rectification ought to have been dealt with on merits.

3 The learned counsel appearing for the respondent firstly relied upon a decision of the Division Bench of this Court in the case of *Flemingo (Duty Free Shop) P. Ltd. Vs. Commissioner of Customs (Appeals), Mumbai-I*[2]. He submitted that the Division Bench while dealing with the Appeals under Section 128 of the Customs Act, 1962 did not accept the submission that Sections 5 or 14 of the Limitation Act are applicable. He also invited our attention to another decision of the Division Bench of this Court in the case of *Principal Commissioner of Central Excise and Custom, Daman Vs. Omnitex Industries (I) Ltd.*[3]. He submitted that in the case of *M.P. Steel Corporation,* the Apex Court was dealing with provisions regarding Appeal under the Customs Act which provide for a power to condone the delay. Even in the case of *Principal Commissioner of Central Excise and Custom, Daman,* the Division Bench was dealing with a case whether there was a power to condone the delay. In the

2 2015(315) E.L.T. 321 (Bom.)
3 2016(334) E.L.T. 639 (Bom.)

present case, the intention of the legislature becomes very clear as the legislature brought down the period of limitation from four years to six months and did not provide for condonation of delay or extension of time for making an application for rectification. He submitted that the view expressed in the case of *Flemingo Pvt. Ltd.* remains unaffected by the decision of the Apex Court in the case of *M.P. Steel Corporation (Supra)* and therefore, in the present case, Section 14 cannot be invoked.

4 We have given careful consideration to the submissions. Firstly, we must make a reference to the decision of the Apex Court in the case of *M.P. Steel Corporation*. The said decision was rendered on 23rd April, 2015 and therefore, when the Division Bench of this Court dealt with the case of *Flemingo Pvt. Ltd.* and decided the same on 24th December, 2014, the Division Bench did not have benefit of the said decision of the Apex Court. The Appeal before the Apex Court arose out of the order of the Commissioner of Customs (Appeals) where the Appeal was dismissed as the same was preferred beyond period of 60 days plus 30 days provided in Section 128 of the Customs Act. The Appeal preferred against the said order was dismissed by the Central Excise and Service Tax Appellate Tribunal and therefore, an Appeal was filed by the Assessee before the Apex Court. In paragraph 4, a specific

submission made by the learned counsel appearing for the appellant is noted by the Apex Court that in view of Sub-Section (2) of Section 29 of the Limitation Act even Section 14 of the Limitation Act would also apply to the Tribunals set up under the special and local Acts. The argument of the respondent before the Apex Court as noted in the decision is that Section 128 of the Customs Act excluded applicability of Section 14 of the Limitation Act inasmuch as the power to condone the delay in preferring an Appeal is limited to the period of 60 days. Another contention was that Section 14 of the Limitation Act applies only to the Courts as distinguished from the Tribunals or quasi-judicial Tribunals. In paragraph 7, the Apex Court observed that the submissions made by the respondent were technically speaking correct. However, the Apex Court considered wider issue whether principles laid down under Section 14 of the Limitation Act would be attracted to the facts of this case. Thereafter, the Apex Court proceeded to consider the question whether the Limitation Act applies only to the Courts and not to the Tribunals. The Apex Court referred to its own decisions as well as the decisions of the other High Courts. The Apex Court referred to its own decision in the case of *Commissioner of Sales Tax, U.P., Lucknow v. Parson, Tools and Plants*[4] and proceeded to distinguish the same. In paragraph 31, the Apex Court observed that Limitation Act including Section 14 thereof would not apply to Appeals filed before quasi-judicial

4 (1975) 4 SCC 22

Tribunals such as Collector (Appeals) under Section 128 of the Customs Act. An argument which was canvassed before the Apex Court was that Section 128 as amended is a complete code in itself and it provides for condoning the delay of a maximum period of 60 days. The Apex Court dealt with the said argument in support of the proposition that applicability of Section 14 is excluded. In paragraph 35, Apex Court held thus :-

> "35. Merely because Parson Tools also dealt with a provision in a tax statute does not make the ratio of the said decision apply to a completely differently worded tax statute with a much shorter period of limitation – Section 128 of the Customs Act. Also, the principle of Section 14 would apply not merely in condoning delay within the outer period prescribed for condonation but would apply de hors such period for the reason pointed out in Consolidated Engineering above, being the difference between exclusion of a certain period altogether under Section 14 principles and condoning delay. **As has been pointed out in the said judgment, when a certain period is excluded by applying the principles contained in Section 14, there is no delay to be attributed to the appellant and the limitation period provided by the concerned statute continues to be the stated period and not more than the stated period. We conclude, therefore, that the principle of Section 14 which is a principle based on advancing the cause of justice would certainly apply to exclude**

> **time taken in prosecuting proceedings which are bona fide and with due diligence pursued, which ultimately end without a decision on the merits of the case**."
>
> (emphasis added)

5 In fact, the Apex Court, thereafter proceeded to discuss the issue as to which periods are to be excluded under Section 14. The Apex Court overruled its own decision in the case of *C.S.T., U.P vs Madan Lal Das and Sons*[5] which held that Section 12(2) of the Limitation Act will apply to the proceedings under the U.P. Sales Tax Act and distinguished the decision in the case of Parson Tools. The Apex Court noted the difference between the exclusion of certain period under Section 14 and the condonation of delay. Thus, the Apex Court held that though Section 14 may not in terms apply to the quasi-judicial Tribunals, the principle of Section 14 based on advancing the cause of justice would certainly apply to exclude time taken by the applicant in prosecuting proceedings which are bona fide and with due diligence.

5 As stated earlier, the decision of the Division Bench in the case of *Flemingo Pvt. Ltd.* is rendered before the decision of the Apex Court in the case of *M.P. Steel*. We have carefully perused the said decision. It is true that the submission canvassed on the basis of

5 (1976) 4 SCC 464

applicability of Section 14 was considered by this Court. In paragraph 25, the Division Bench considered Sub-Section (2) of Section 29 of the Limitation Act. In paragraphs 28 and 29, the Division Bench dealt with the argument of the applicability of Section 14(2). In paragraph 29, the Division Bench accepted the submission made on behalf of the Revenue 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. Paragraph 19 of the judgment shows that the Division Bench was dealing with amended Section 128 with which the Apex Court dealt with in the case of *M.P. Steel*. Thus, the Division Bench accepted the argument that under proviso to Sub-Section (1) of Section 128 delay can be condoned only for a maximum period of 60 days and therefore, by invoking Section 14 of the Limitation Act, the said period of 60 days cannot be further extended.

6 As observed earlier, in the case of *M.P. Steel*, the Apex Court has made a distinction between the power to condone the delay and principles incorporated in Section 14 of the Limitation Act. Section 14 of the Limitation Act provides for exclusion of time and Section 5 of the Limitation Act provides for extension of time by condoning the delay. Hence, the decision in the case of *Flemingo P. Ltd* cannot be read as

binding precedent in the light of the decision of the Apex Court in the case of *M.P. Steel*.

7 Now, we turn to the decision in the case of *Principal Commissioner, Daman Vs. Omnitex*. In paragraph 6, the argument based on the decision in the case of *M.P. Steel Corporation* was made. Paragraphs 6 to 8 of the said decision read thus :-

> 6. While considering this question, we may profitably make reference to the decision of the Supreme Court in M.P. Steel Corporation v. Commissioner of Central Excise (2015 (319) E.L.T. 373 (S.C.).In that case, one of the questions was whether the Limitation Act, 1963 applied only to Courts and not to Tribunals, for the appeal in question in that case was before the tribunal. The Supreme Court noted the decision of the Supreme Court in Consolidated Engineering Enterprises v. Principal Secretary, Irrigation Department (2008) 7 SCC 169)and in particular the five conditions that are set out in paragraph 21 of that decision for the correct invocation and application of Section 14 of the Limitation Act. These five conditions are by now well settled. Both the prior and subsequent proceedings must be civil proceedings prosecuted by same party; the prior proceeding should have been prosecuted with due diligence and in good faith; the failure of the prior proceeding must have been due to a jurisdictional defect or similar cause; both proceedings must relate to the same matter in issue; and both proceedings must be in a Court. In paragraph 7 of its decision in M.P. Steel Corporation, the Supreme Court in terms held that the period spent in pursuing a remedy before another appellate forum ought to be excluded. The Supreme Court also said that Section 14 must be liberally construed to advance the cause of justice. In paragraph 41 of its decision in M.P. Steel Corporation, the Supreme Court said that the plain language of Section 14, construed in light of its statutory purpose, lends itself to just such a liberal interpretation. The statutory object is to ensure that, subject to conditions being met, a plaintiff or applicant or appellant is put in the same position as he would have been when he first commenced the

proceeding in a court of competent jurisdiction; i.e., that the time taken diligently pursuing the same remedy in a court without jurisdiction should be excluded. In such a case, all that is necessary is the absence of negligence or inaction. As long as the party bona fide pursues a legal remedy, one that later turns down to be abortive, the time taken in that jurisdictionally deficient proceeding is to be excluded. If this were not so, the results would be anomalous.

7. In the present case, there is no doubt that the Appellants were pursuing their remedy in a Court . The only question was one of lack of territorial jurisdiction. There is also no dispute that the Appeal before the Gujarat High Court was in fact filed in time. The entire period, therefore, from the time of filing of the Appeal in the Gujarat High Court till its disposal as above by that Court must, in our view, be fairly excluded for the purposes of limitation. If that is not done, great injustice and unfairness will result. The direction of that High Court, with respect, is that the papers in each of these Appeals be returned to the respective Appellants/ their Advocates for presentation to the Competent Appellate Court, which is this Court.

8. For the purposes, therefore, of computing the delay to be condoned, if any, we must take first the two dates that lie at the extremities, viz., the date of receipt of the order appealed against and the date of filing of the Appeal in the present Court. From this period, the entire period from the date of filing of the Appeal in the Gujarat High Court to the date of its disposal by that High Court is to be excluded. If the remaining period is found to be 180 days or less, then there is no question of any application being necessary to condone the delay and the Appeal is in time. It is only if this remaining period exceeds 180 days that the Appellant will be required to file a application seeking condonation of delay and setting out the reasons or cause which in the Appellant's opinion is sufficient."

8 Hence, the Division Bench in fact followed the law laid down in the case of *M.P. Steel Corporation* and granted benefit of Sub-Section (2) of Section 14 to the Appellant – Assessee.

9 Thus, the Apex Court in the case of *M.P. Steel* held that though a statue imposes embargo on the power of the Tribunal to condone the delay by providing that delay only upto the period of 60 days can be condoned, the time spent by the applicant in prosecuting wrong proceedings which are bona fide with due diligence can be excluded while computing the period of limitation.

10 In the circumstances, in the present case, the Appellate Tribunal ought to have considered the issue whether the petitioners can be given benefit of the principles analogous to Sub-Section (2) of Section 14. Therefore, in the facts of the case, the matter will have to be remitted to the Appellate Tribunal for reconsideration of the prayer made by the petitioners for exclusion of time under Sub-Section (2) of Section 14. However, the number of factual aspects will have to be gone into.

11 Accordingly, we pass the following order :-

ORDER

(i) The impugned order dated 6th March, 2009 is hereby quashed and set aside. Application Nos.E/MA(COD)-1992/2008 AND E/MA(ROM)-1993/2008 in Appeal

No.E/2671/1999 are restored to the file of the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench at Mumbai;

(ii) We direct the parties to appear before the Tribunal on 13th November, 2017 for fixing the schedule of hearing for considering the prayer of the petitioners for exclusion of time in accordance with Sub-Section (2) of Section 14 of the Limitation Act;

(iii) We make it very clear that whether the petitioners have made out a case for invoking principles governing Sub-Section (2) of Section 14 is left open to the decision of the Appellate Tribunal and nothing observed in this judgment and order shall be construed as expression of opinion on the merits of the case;

(iv) Rule is made partly absolute on above terms.

**(A.K. MENON, J)** **(A.S. OKA, J)**