

HIGH COURT OF CHHATTISGARH, BILASPUR**WA No. 322 of 2017**

Judgment Reserved On : 17/05/2018

Judgment Delivered On : 15/11/2018

- M/s Shri Sai Rolling Mill A Partnership Firm Registered Under The Indian Partnership Act, Office Works At 171, Light Industrial Area, Bhilai, District Durg Chhattisgarh Represented Through Its Partner, Suresh Kumar Agrawal, S/o Late Shri Ramchandra Agrawal, Aged About 43 Years, R/o New Khursipar, Bhilai, District Durg, Chhattisgarh , Chhattisgarh

---- Appellant**Versus**

1. The Commissioner, Custom Central Excise And Service Tax Central Excise Building, Tikrapara, Raipur, District Raipur Chhattisgarh, Chhattisgarh
2. The Commissioner, Appeals, Custom Central Excise And Service Tax, Central Excise Building, Tikrapara, Raipur, District Raipur, Chhattisgarh, District : Raipur, Chhattisgarh
3. The Assistant Commissioner, Central Excise, Division- II, Bhilai, 3rd Floor, Central Revenue Building, Hudco, Bhilai, District Durg, Chhattisgarh, District : Durg, Chhattisgarh

---- Respondent

For Appellant : Shri Kishore Bhaduri with Ms. Shriya Mishra and Ms. Juhi Jaiswal, Advocate.
 For Respondents : Shri Vinay Pandey, Advocate.

Hon'ble Shri Prashant Kumar Mishra &
Hon'ble Shri Ram Prasanna Sharma, JJ

C A V JUDGMENT

The following judgment of the Court was delivered by **Prashant Kumar Mishra, J.**

1. The appellant would call in question the order passed by the learned Single Judge dismissing the appellant's writ petition and affirming the order passed by the Customs, Excise and Service Tax Appellate Tribunal (for short 'the Tribunal') on 1.7.2016 holding that the appellant's appeal before the Commissioner (Appeals) was rightly rejected on 16.12.2015 as being barred by limitation, as the same was preferred after condonable period of delay beyond which the appellate authority has no power to condone the delay.
2. Facts of the case, briefly stated, are that the appellant purchased debris of old go-down tin shed situated at industrial area, Bhilai from one M/s Jagriti Ispat by a sale deed dated 23.4.2007. The appellant was issued small industries registration certificate by the District Trade and Industry Centre, Durg on 11.2.2008 and was also issued a certificate for exemption from payment of stamp duty. On 19.5.2010, the respondent served a notice on the appellant for deposit of Rs.22,19,135/- along with interest on the ground that the premises having factory of M/s Gyan Industry was purchased by M/s Jagriti Industries and thereafter by the appellant, therefore, the appellant being successor of the industry is liable to pay dues recoverable from M/s Gyan Industries, as contemplated under Section 11 of the Central Excise Act, 1944 (for short 'the Act'). Thereafter, another communication was served on the appellant on 24.8.2010 (Annexure-P/8 in WP) again directing him to make payment of the subject amount. On 1.1.2013, the appellant informed the Superintendent, Central Excise, Bhilai that he is not successor industry of M/s Gyan

Industries, therefore, he is not liable to pay dues recoverable from M/s Gyan Industries. By another communication dated 5.2.2013 (Annexure-P/10), the appellant informed the Assistant Commissioner, Central Excise Division, Bhilai-II that he has not purchased any land, plant and machinery from M/s Gyan Industries, therefore, dues may be recovered from M/s Gyan Industries or for that matter from M/s Jagriti Rolling Mills and not from the appellant.

3. The appellant thereafter moved WP(T) No.182/2014, which came to be dismissed on 13.1.2015 with liberty to prefer appeal under Section 35 of the Act. The appellant thereafter preferred WP(T) No.16/2016 which was again withdrawn with liberty to file an appeal. Thereafter, the appellant preferred an appeal before the Commissioner (Appeals) which has dismissed the appeal as barred by limitation and the Tribunal has also dismissed the appeal refusing to interfere with the order passed by the Commissioner (Appeals).
4. It is argued that the appellant has never been heard by the adjudicating authority before fastening the liability of payment of dues against M/s Gyan Industries. The authorities of the Central Excise Department has assumed that the appellant is the successor industry of M/s Gyan Industries, without affording opportunity of hearing, therefore, if the appeal is not entertained on the ground of limitation nor the writ petition is heard for the reason that the appellant has remedy of preferring an appeal, the appellant would be left with no remedy in law, which is not only arbitrary but is opposed to the principles of natural justice. Referring to the Full Bench judgment of

the Gujarat High Court in the matter of **Panoli Intermediate (India) Pvt. Ltd. Vs. Union of India & Others** {AIR 2015 Guj 97 : 2015 SCC Online Guj 570}, it was argued that in cases of grave injustice writ petition is maintainable despite availability of alternative remedy of appeal under Section 35 of the Act.

5. Learned counsel for the respondents would oppose the submission on the ground that once writ petition has been dismissed and the appellant has availed the remedy of appeal, the present writ petition has rightly been dismissed in view of the law laid down by the Supreme Court in the matter of **Singh Enterprises Vs. Commissioner of Central Excise, Jamshedpur and Others** {(2008) 3 SCC 70}.
6. Facts of the case, as stated infra, are not in dispute. Insofar as the appellant's earlier effort to assail the demand in the writ proceeding and submission of appeal before the Commissioner (Appeals) after the period of limitation, it has been held by the Supreme Court in the matter of **Singh Enterprises** (Supra) that if the appeal before the Commissioner of Central Excise (Appeals) as also to the Tribunal was presented after 60 days, the said authority can allow it to be presented within a further period of 30 days but the appellate authority has no power to allow the appeal to be presented beyond the period of 30 days.
7. In a Full Bench decision rendered by the Gujrat High Court in the matter of **Panoli Intermediate (India) Pvt. Ltd.** (Supra), the following

questions were referred to be answered by the Larger Bench:-

“(1) Whether the period of limitation provided of 60 days, for filing an appeal under Section 35 of the Central Excise Act, 1944, could be extended only upto 30 days as provided by the proviso or the delay beyond the period of 90 days could also be condoned in filing an appeal?

(2) Where a statutory remedy or appeal is provided under Section 35 of the Central Excise Act, 1944 and the delay cannot be condoned under Section 35 beyond the period of 90 days, then whether Writ Petition under Article 226 of the Constitution of India would lie for the purpose of condoning the delay in filing the appeal?

(3) When if the statutory remedy or appeal under Section 35 is barred by the law of limitation whether in a Writ Petition under Article 226 of the Constitution of India, the order passed by the original adjudicating authority could be challenged on merits?”

8. The Full Bench, after considering various decisions on the subject including **Singh Enterprises** (Supra), observed in para-29 that the contention of learned counsel for the Revenue that the decision of the High Court taking the view that it had no power to condone the delay after the expiry of the period of 30 days should mean that the High Court will have no jurisdiction under Article 226 in a case where the period of 30 days is over cannot be countenanced for the simple reason that whether the High Court should exercise the power to condone the delay after expiry of the period of 30 days while exercising the power under Article 226 of the Constitution is one thing, but whether the jurisdiction of the High Court under Article 226 of the Constitution is affected by the statutory provision of section 35 of the Act is another thing, with further observation that the High Court would normally go by the statutory provision and jurisdiction under Article

226 of the Constitution can be invoked where the High Court finds that there is extraordinary case satisfactorily demonstrated before it of grave injustice or non interference by the High Court would result into gross injustice. The Full Bench eventually answered the reference in the following terms in para-31:-

“31. We may now proceed to answering the question
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(1) Question No.1 is answered in negative by observing that the limitation provided under Section 35 of the Act cannot be condoned in filing the appeal beyond the period of 30 days as provided by the proviso nor the appeal can be filed beyond the period of 90 days.

(2) The second question is answered in negative to the extent that the petition under Article 226 of the Constitution would not lie for the purpose of condonation of delay in filing the appeal.

(3) On the third question, the answer is in affirmative, but with the clarification that – A) The petition under Article 226 of the Constitution can be preferred for challenging the order passed by the original adjudicating authority in following circumstances that – A.1) The authority has passed the order without jurisdiction and by assuming jurisdiction which there exist none, or A.2) Has exercised the power in excess of the jurisdiction and by overstepping or crossing the limits of jurisdiction, or A.3) Has acted in flagrant disregard to law or rules or procedure or acted in violation of principles of natural justice where no procedure is specified.

B) Resultantly, there is failure of justice or it has resulted into gross injustice.

We may also sum up by saying that the power is there even in aforesaid circumstances, but the exercise is discretionary which will be governed solely by the dictates of the judicial conscience enriched by judicial experience and practical wisdom of the judge.”

9. In the matter of **Commissioner of Income Tax and Others Vs.**

Chhabil Dass Agarwal {(2014) 1 SCC 603}, the Supreme Court held that the Income Tax Act provides complete machinery for the assessment/reassessment of tax and the assessee could not be permitted to abandon that machinery and to invoke the jurisdiction of the High Court under Article 226 of the Constitution, however, remedy under the statute must be effective and not a mere formality with no substantial relief. It was also observed in para-11 that it is within the discretion of the High Court to grant relief under Article 226 despite the existence of an alternative remedy and that the Court in extraordinary circumstances may exercise power if it comes to the conclusion that there has been a breach of the principles of natural justice or the procedure required for decision has not been adopted.

10. It is thus settled that the High Court can exercise extraordinary writ jurisdiction under Article 226 of the Constitution of India if the petitioner has been subjected to gross injustice and the order adverse to him has been passed in flagrant violation of principles of natural justice and that procedure adopted was either unfair or dehors the provisions of law.

11. In the case at hand, the Revenue has unilaterally assumed that the appellant is successor industry of M/s Gyan Industry without affording any opportunity of hearing to the appellant. The sale deed in favour of the appellant describes the property purchased by it to be debris of old go-down tin shed situated at industrial area, Bhilai. It nowhere recites that the appellant has either purchased the whole industry or plant and machinery owned by M/s Gyan Industry. Before issuing the

demand notice, the appellant was not called upon to satisfy the department that he is not successor company of the M/s Gyan Industry. By issuance of demand notice for deposit of Rs.22,19,135/-, the appellant has been condemned unheard.

12. In the matter of **The Central Inland Water Transport Corporation Ltd. Vs. Their Workmen** {(1975) 4 SCC 348}, the assessee claimed immunity from payment of bonus on the ground that it was not successor in interest of the previous company. The Tribunal held that it is liable to pay bonus and not entitled to such immunity. Before the Supreme Court, decision of the Tribunal was under challenge. It was held by the Supreme Court that an establishment may not be newly set up; it may be an existing establishment of which merely the ownership has changed, but the new owner may not necessarily be the successor in interest of the old in respect of the business carried on in the establishment. The two concepts are entirely different. One may acquire the ownership of an establishment without taking over the business as a going concern and becoming a successor in interest of the transferor would depend on consideration of several relevant factors and the decision would depend on the evaluation of all these relevant factors, none of them being treated as of overriding or conclusive significance. The Tribunal seems to have missed some material aspects, viz., the entire undertaking including the dockyard was closed, notice of closure of the company was put after the scheme was approved by the High Court, there was no business which was being carried on as a going concern, the corporation as to

take only such of the existing workers of the company as is possible, after taking over by the corporation it did not start operating until June 5, 1967, the business activity was diversified, workers not taken over were to be paid legitimate compensation. The Tribunal did not take into consideration these important and relevant aspects. The Tribunal's finding, therefore, cannot stand, as it was not relevant and failed to take into account these relevant factors.

13. In the matter of **Rana Girders Limited Vs. Union of India and Others** {(2013) 10 SCC 746}, the Supreme Court has held in paras-20 & 21 that as far as liability of the successor in interest is concerned, the liability to pay the Government dues even without a binding statutory charge can be fastened on that person who had purchased the entire unit as an ongoing concern and not a person who had purchased land and building or the machinery of the erstwhile concern. It is only in those cases where the buyer had purchased the entire unit i.e. the entire business itself, that he would be responsible to discharge the liability of Central Excise as well. Otherwise, the subsequent purchaser cannot be fastened with the liability relating to the dues of the Government unless there is a specific provision in the statute imposing a first charge in respect of government dues on subsequent transferees/purchasers. The Supreme Court thereafter held in para-23 thus:-

“23. We may notice that in the first instance it was mentioned not only in the public notice but there is a specific clause inserted in the sale deed/agreement as well, to the effect that the properties in question are being sold free from all encumbrances. At the

same time, there is also a stipulation that “all the statutory liabilities arising out of the land shall be borne by the purchaser in the sale deed” and “all the statutory liabilities arising out of the said properties shall be borne by the vendee and the vendor shall not be held responsible in the agreement of sale”. As per the High Court, these statutory liabilities would include excise dues. We find that the High Court has missed the true intent and purport of this clause. The expressions in the sale deed as well as in the agreement for purchase of plant and machinery talk of statutory liabilities “arising out of the land” or statutory liabilities “arising out of the said properties” (i.e. the machinery). Thus, it is only that statutory liability which arises out of the land and building or out of plant and machinery which is to be discharged by the purchaser. Excise dues are not the statutory liabilities which arise out of the land and building or the plant and machinery. Statutory liabilities arising out of the land and building could be in the form of the property tax or other types of cess relating to property, etc. Likewise, statutory liability arising out of the plant and machinery could be the sales tax, etc. payable on the said machinery. As far as dues of the Central Excise are concerned, they were not related to the said plant and machinery or the land and building and thus did not arise out of those properties. Dues of the Excise Department became payable on the manufacturing of excisable items by the erstwhile owner, therefore, these statutory dues are in respect of those items produced and not the plant and machinery which was used for the purposes of manufacture. This fine distinction is not taken note of at all by the High Court.”

14. On analysis of the judgments rendered by the Supreme Court in the matters of **The Central Inland Water Transport Corporation Ltd.** and **Rana Girders Limited** (Supra), it would vividly explain that the term “successor in interest” is not merely a term but it has definite connotations depending upon the nature of provisions defining the said term and the liability of a person who is successor in interest to pay the Government or other dues within statutory scheme. The issue needs to be adjudicated by the authority before issuance of demand

notice. However, the appellant having not been heard, there is flagrant violation of principles of natural justice and the appellant cannot be left without any remedy in law merely because he has purchased some debris of old go-down tin shed situated at industrial area, Bhilai where at some prior point of time an industry was operational.

15. Consequently, on the basis of above discussion, we have no hesitation in allowing the Writ Appeal and remitting the matter back to the adjudicating authority, who has issued the demand notice with a direction to provide opportunity of hearing to the appellant and pass reasoned order as to whether the appellant is the successor industry of M/s Gyan Industry and thereafter pass final order in accordance with law. The demand notices are therefore quashed and the matter is remitted back to the concerned authority, who has issued the subject demand notice.

16. The Appeal is accordingly allowed.

**Sd/-
Judge**
(Prashant Kumar Mishra)

**Sd/-
Judge**
(Ram Prasanna Sharma)