

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.12726 OF 2017

Allied Transport	Petitioner
versus	
The Union of India and others	Respondents

Mr.Prakash Shah with Mr.Jas Sanghavi i/by PDS Legal for petitioner.
Mr.Pradeep S. Jetly i/by Ms.Mayur Mujumdar for respondents.

CORAM : S.C.DHARMADHIKARI AND
PRAKASH D. NAIK, JJ.

DATE : 26th March 2018

PC :

1. By this petition under Article 226 of the Constitution of India, the petitioner has challenged the orders-in-original dated 31st January 2012 and 30th December 2012 passed by third respondent. Both these orders are styled as orders-in-original.

2. The petitioner before us is a partnership firm registered under Indian Partnership Act, 1932. The respondents are the Union of India and the officers exercising powers under Finance Act, 1994 read with Central Excise Act, 1944 and the Rules framed thereunder.

3. The petitioner is engaged, inter alia, in transportation service of transporting commercial and passenger vehicles and chassis from its customers premises and deliver them at the regional sales offices and other destinations of the customers. The petitioner also engages

drivers for this purpose. The services at the relevant time and rendered by the petitioner, falls under the category of “Goods Transport Agency”. The petitioner got the service tax registration. The respondents alleged that the services rendered are classifiable under “Support Services of Business and Commerce” and not under “Goods Transport Agency” under the Finance Act, 1994.

4. A show cause notice dated 30th November 2011 for the period 10th October 2010 to March 2011 was issued to the petitioner calling upon the petitioner why service tax should not be demanded and recovered togetherwith interest and penalty. Annexure-B to the petition is a copy of this show cause notice. There is a second show cause notice dated 28th May 2012 for the period from April 2011 to March 2012. It is stated that no reply could be filed to the said show cause notice, though personal hearing was granted on various dates between 10th April 2012 to 25th June 2012 by the third respondent. The hearing was granted in relation to above referred two show cause notices. The reply could not be filed because the partner was undergoing treatment with Neuro-Psychiatrist. The treatment was between 4th June 2010 till 7th January 2015. There were two orders passed, which are now styled as ex-parte orders-in-original and of the above dates.

5. Being aggrieved and dis-satisfied with these two orders, two separate appeals were filed before the Commissioner (Appeals). The appeals were not filed in time. Hence an application for condonation of delay and for stay came to be filed. The appeals were rejected by common order dated 16th December 2014 (Exhibit-F to the petition). The appeals were rejected on the ground of limitation.

6. Aggrieved thereby, two separate appeals were filed before Customs, Excise and Service Tax Appellate Tribunal ('CESTAT' for brevity). The CESTAT came to the conclusion that there is no merit in the appeals and the appeals deserve to be dismissed. Annexure-G to the petition is the copy of order of CESTAT.

7. Then two Central Excise Appeals bearing No.214/2016 and 215/2016 were filed in this Court. They came to be withdrawn on 9th October 2017 with liberty to file this writ petition.

8. Mr.Shah appearing for the petitioner would submit that the entire service tax liability confirmed in the orders-in-original, has already been deposited. On account of genuine and bona fide reasons and particularly the illness of the partner, this Court should take lenient view of the matter. Since the orders-in-original are vitiated by breach of principles of natural justice, the petitioner should be granted an opportunity of being heard.

9. Mr.Shah would submit that there is no impediment in granting this relief because the petitioner has not held back anything and whenever the petitioner was in difficulty, the Tribunal has indeed accommodated it. In that regard, our attention is invited to the order passed by CESTAT, West Zonal Bench, at Mumbai (at page 84 of the petition). Mr.Shah would rely upon paragraph 4 of this order which would indicate that even the Tribunal was convinced that genuineness and bona fides of the reason for non-appearance/non filing of the reply. In the circumstances the delay of 796 days was condoned by the Tribunal. It allowed the appeal and it quashed the orders-in-original. Merely because in this case the Tribunal is

handicapped on account of provisions of law, in writ jurisdiction, we should take a lenient view of the matter, is the argument of Mr.Shah.

10. On the other hand, Mr.Jetly appearing for respondents submits that the Tribunal's order passed earlier would not be of any assistance. It is pointed out by the respondents, according to Mr.Jetly, on affidavit in this case as to how there was a total negligence on petitioner's part. The show cause notices were issued. The show cause notices were adjudicated after personal hearing was granted and extensively. Mr.Jetly would rely upon paragraphs 5A and 5B of the affidavit-in-reply, running pages 92 and 93 of the petition paper book. It is in these circumstances it is submitted that once there was no reply to the show cause notices nor any appearance before the authorities, then, this is not a fit case for grant of any relief in this Court's extraordinary and equitable jurisdiction under Article 226 of the Constitution of India. Mr.Jetly would submit that the petition be dismissed.

11. With the assistance of both the learned advocates we have perused the petition paper book, the affidavit-in-reply and the case law relied upon. We do not think that we should enter into a wider controversy, much less decide any larger issue. Undisputedly the show cause notice styled as first show cause notice was issued. It was duly served. Two letters of 15th July 2011 and 6th September 2011 were served on the noticee, who did not make any submissions. The summons was issued on 10th October 2011 for attending the office on 17th October 2011 along with data. However, the noticee did not attend the office on 17th October 2011. Pertinently, the noticee/petitioner addressed a letter dated 31st March 2011

informing the adjudicating authority that it has paid Rs.10 lakh for the period from October 2011 to February 2011 as against service tax liability of Rs.12.15 lakh. No further details were given. The order in respect of first show cause notice was passed not immediately but even thereafter the authority waited and finding that there was no denial of the allegations in the show cause notice and no reply has been filed thereto; but an admission of the liability, then, it was not obliged to wait any further. The first show cause notice, therefore, was concluded by order dated 31st July 2012.

12. In relation to the second show cause notice as well, the adjudicating authority found that no reply to the said show cause notice was filed. A reminder was issued to the petitioner to file reply by letters dated 23rd July 2012, 28th August 2012, 17th September 2012 and 9th October 2012. No reply was filed nor any cognizance was taken of these letters, though petitioner's partner acknowledged receipt thereof. The acknowledgement is also referred and is stated to be dated 14th June 2012. Thus, the principles of natural justice were complied with. Despite ample opportunities being provided, the petitioner chose not to file a reply nor remain present at the hearing. Pertinently, it found time to remit and make payment of the sum noted above of Rs.10 lakh. Even if the authority was informed that the petitioner's partner was under treatment from 4th June 2010 till 7th January 2015, a representative could have been deputed to represent the petitioner. That representative could have been requested to file a reply to the show cause notices.

13. It is in these circumstances that the Commissioner (Appeals) found that the grievance of the petitioner has no merit. Pertinently,

before the Commissioner (Appeals), the petitioner-appellant did engage a consultant. There was a delay of 563 days in the first appeal and delay in the second appeal was of 472 days. The appellate authority found that this delay could not have been condoned by him given the clear position in law and no assistance can be derived from Section 5 of Limitation Act, 1963. It is this very view which the CESTAT confirmed in its order dated 6th July 2015.

14. We are not much on the position of law but on the enormity of the delay and the reasons for the same. We find that a discretionary and equitable relief can be granted only when a litigant is diligent and does not exhibit utter callousness or negligence. If the cause shown does not lack bona fides, then, the litigant can seek discretionary relief. Pertinently, in this case, whenever the petitioner was aggrieved and dis-satisfied by the orders-in-original, he promptly approached the appellate authorities. When he approached the authorities in the earlier cases and aggrieved by order styled as order-in-original, passed by the Commissioner of Central Excise, Pune dated 8th November 2011 and sought condonation of delay, the Tribunal granted it. However, in the present case, the Tribunal and the appellate authority could not have condoned the delay in law. Though this writ petition is filed, we find that the conduct of the petitioner is not such as would enable it to seek any discretionary and equitable relief; moreso, when we have noted that the order cannot be termed as ex-parte simply because the petitioner was not present or that no legal or factual submission could be canvassed by him or on its behalf. This is a clear case where the authorities called upon the petitioner to remain present and repeatedly. They also called upon the petitioner to produce documents and file reply to the

show cause notices. For both, filing a reply and for making oral arguments, opportunities were given but they have not been availed of. To our mind, therefore, none of these authorities acted perversely or in contravention of the principles of natural justice. Their orders, therefore, cannot be interfered in the writ jurisdiction. The writ petition is, devoid of merits and is dismissed, however, with no order as to costs.

(PRAKASH D. NAIK, J.)

(S.C.DHARMADHIKARI, J.)

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