IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 3026 OF 2018

Sportina Payce Infrastructure Pvt. Ltd. .. Petitioner

v/s.

Union of India & Ors. .. Respondents

Mr. Vikram Nankani, Senior Counsel a/w Mr. Prithviraj Chaudhari I/b Sharon Patole for the petitioner
Mr. J.B. Mishra a/w Mr. Sham Walve for the respondents

CORAM : AKIL KURESHI &
M.S. SANKLECHA, J.J.

DATED : 20th DECEMBER, 2018.

P.C.

1. This petition under Article 226 of the Constitution of India challenges the order dated 17th September, 2018 passed by the Commissioner of CGST & CE (Appeals) i.e. respondent no.2 herein. The impugned order dated 17th September, 2018 rejected the petitioner's application for restoration of an appeal which was dismissed on 17th May, 2018. The appeal itself was filed before the respondent no.2 under Section 84 of the Finance Act, 1994 (the Act) from order in original dated 18th January, 2018.

2. The petitioner's appeal was dismissed on 17th May, 2018 for non-

deposit of the statutory amount as specified in Section 35F of the Central Excise Act, 1944 (Excise Act) r/w Section 83 of the Act.

3. The petitioner thereafter on 28th August, 2018 met the requirement of pre-deposit provided under Section 35F of the Excise Act r/w Section 83 of the Act and made the mandatory pre-deposit of Rs.7.5% of service tax demand. Thereafter, by an application dated 28th April, 2018, the petitioner made an application for the order dated 17th May, 2017 being recalled and appeal being restored to be decided on merits.

4. However, by the impugned dated 17th September, 2018 the respondent no.2 rejected the petitioner's application on the ground that he has no power to restore an appeal which has been dismissed. This in the absence of any statutory provision to recall the order. Section 35F of the Central Excise Act *inter alia* provides that the appeal will not to be entertained till the statutory amount as required under the Act has been deposited by the appellant.

5. We are of the view that there is no bar under Section 84 of the Act in filing an appeal without the pre-deposit being made. This if seen

in the context of Section 107(6) of the Central Goods and Services Act, 2017 which prohibits filing of appeal in the absence of statutory deposit. Even Section 35F of the Excise Act only prohibits appellate authority from entertaining the appeal. Section 84 of the Act r/w Section 35F of the Excise Act does not prohibit filing of the appeal without necessary deposit. It only prohibits the appellate authority from entertaining the appeal on merits. Therefore, where an appeal is dismissed for non-deposit and such deposit if made within a reasonable time of dismissal then, the appellate authority should exercise its inherent power to recall the order of dismissal and hear the petitioner's application on merits. This is a procedural review and not a review on merits of the case. Therefore, even in the absence of such power of recall being provided in the statute, every quasi judcial authority has inherent powers to exercise this power of recall in its inherent jurisdiction in the interest of justice. This has been so held by the Supreme Court in ***Grindlays Bank Vs. Central Govt. Industrial Tribunal, 1980 (supp) SCC 420***. Therefore, in the facts of this case, the respondent no.2 should have recalled his order dated 17th May, 2018 by allowing the petitioner's application dated 28th August, 2018.

6. In above view, the impugned order dated 17th September, 2018

and the order dated 17th May, 2018 are both quashed and set aside. The appeal of the petitioner is restored to the file of respondent no.2 – Commissioner (Appeals). This to enable disposal of the petitioner's appeal on merits, in accordance with law.

7. Petition is disposed of in above terms. No order as to costs.

(M.S. SANKLECHA, J.) **(AKIL KURESHI, J.)**