IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 2366 OF 2019

M/s. Subray Catal Chem Pvt. Ltd. .. Petitioner
VS.
Union of India and ors. .. Respondents.

Mr. A.K. Prabhakar a/w. Mr.Jay Lathiyara I/b KPS Legal for the Petitioner.
Mr. Sham Walve with Mr. J.B. Mishra for the Respondents.

CORAM: M.S. SANKLECHA, J.
AND M.S.SONAK, J.
DATE : 14 JUNE 2019.

PC

1] Heard learned counsel for the parties.

2] The challenge in this petition is to the following orders:

"(i) Order-in-Original dated 03.08.2015 passed by the Assistant Commissioner of Central Excise - (Respondent No.3);
(ii) Order-in-Appeal dated 20.04.2017 passed by Commissioner of Central Excise (Appeals) - Respondent No.2;
(iii) Final Order dated 06.10.2017 made by the Customs, Excise & Service Tax Appellate Tribunal, Mumbai (Tribunal)."

3] After the order-in-original dated 3rd August 2015 was made by Assistant Commissioner of Central Excise under the provisions of the Central Goods and Service Tax Act, 2017 (formerly, Central Excise Act, 1944), the petitioner instituted appeal before the Commissioner of Central Excise (Appeals). However, this appeal was instituted beyond period of 90 days, i.e., beyond the period of maximum extendable period by the

Appellate Authority. Accordingly, the Appellate Authority by order dated 20th April 2017 dismissed the same as time barred. This dismissal was upheld by the Tribunal by its order dated 6th October 2017.

4] Insofar as the orders dated 20th April 2017 and 6th October 2017 are concerned, there is absolutely no case made out to interfere with the same, particularly, since the Apex Court in case of ***Singh Enterprises vs. Commissioner of Central Excise, Jamshedpur – 2008 (221) E.L.T. 163 (SC),*** has clearly ruled that the Appellate Authority has no power to condone the delay beyond 90 days. In fact, this is also the view taken by the Full Bench of the Gujarat High Court in ***Panoli Intermediate (India) Pvt. Ltd. vs. Union of India – 2015 (326) E.L.T. 532 (Guj)*** and the Full Bench of the Hyderabad High Court in ***Electronic Corporation of India Limited Vs. Union of India & anr. - 2018 -TIOL-484-HC-AP-CX-LB.***

5] The two Full Benches have in fact held that even in a petition under Article 226/227 of the Constitution of India, High Court, should not condone the delay beyond period of 90 days in instituting the appeal before the Appellate Authority. Accordingly, there is absolutely no merit in the challenge as to the orders dated 20th April 2017 and 6th October 2017.

6] Mr. Prabhakar, learned counsel for the petitioner, however presses the challenge to the order-in-original dated 3rd August

2015 by relying upon the aforesaid Full Bench decisions.

7] In *Panoli Intermediate (India) Pvt. Ltd. (surpa)* the Full Bench of the Gujarat High Court was dealing with a reference. At paragraph 31, the Full Bench, has answered the questions which arose in the reference, in the following terms.

> *"31. We may now proceed to answer the question*
> *(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.***"
>
> *(emphasis supplied)*

8] In *Electronic Corporation of India Limited (supra),* again, the Full Bench of the High Court of Andhra Pradesh / Telangana, in a similar matter, has answered the reference, holding that a writ petition would lie against an order-in-original against which an appeal was filed and dismissed as time barred or no appeal had been preferred as it would have been time barred, provided sufficient grounds are made out warranting exercise of the power of judicial review under Article 226 of the Constitution of India. In this regard, it was also not necessary for the writ petitioner to assail the orders, if any, dismissing his appeal as time barred, be it by Appellate Authority or Tribunal in the event he chose to invoke such appellate remedy. On the scope of judicial review in such matters, the Full Bench has in fact followed the ruling of the Full Bench of the Gujarat High court in *Panoli Intermediate (India) Pvt. Ltd. (supra).*

9] Mr. Prabhakar submits that the Assistant commissioner of Central Excise failed to appreciate that the petitioner has reversed the proportionate Cenvat Credit attributable to inputs used in the exempted goods along with interests of 25% penalty before the issue of Show Cause Notice and had thus complied with the provisions of Rule 6 (1) of the Cenvat Credit Rules, 2004. He submits that once this credit was reversed on proportionate basis, it was as if the petitioner had never availed

Cenvat Credit on the inputs and consequently, the issue of any further payment did not arise. Mr. Prabhakar submits that in any case, since the petitioner had reversed the Cenvat Credit along with applicable interests even before the issuance of show cause notice, the imposition of penalty upon the petitioner was clearly in excess of jurisdiction. Mr. Prabhakar submits that these grounds warrant interference with the order -in-original dated 28th January 2016 made by the Assistant Commissioner of Central Excise.

10] Mr. Sham Walve, learned counsel for the respondents, contests the contention of Mr. Prabhakar and further points out that, in any case, this not a contention which goes to the root of jurisdiction. He pointed out that there was not even any complaint about violation of principles of natural justice. In such situation, Mr. Walve submits that this petition deserves dismissal.

11] According to us, the contention as raised, cannot be regarded as a contention within the scope of judicial review explained by the Full Bench of the Gujarat High Court in *Panoli Intermediate (India) Pvt. Ltd. (supra).* At the highest, as the ground raised, may have warranted some examination the exercise of appellate jurisdiction, but not in exercise of powers of judicial review. In this case, the petitioner, delayed the institution of appeal and therefore, cannot expect that the this Court converts itself into an appeal court whilst exercising powers of judicial review under Article 226 of the Constitution of India. The contention as raised would require re-evaluation and re-appreciation of factual position. Such an exercise cannot be undertaken in the exercise of limited jurisdiction of judicial review.

12] Besides, we find that the order-in-original was made on 3rd August 2015 by the Assistant Commissioner of Central Excise. Even the final order was made by the Tribunal on 6th October 2017. This petition was however, instituted only on 29th September 2018. There is absolutely no explanation for inordinate delay in the institution of the petition. The averment in the petition is that there is no delay or laches in instituting this petition. Therefore, the petitioner, far from acknowledging the delay and explaining the same, does not even admit that there is any delay or laches. This is an additional ground for dismissing this petition.

13] Accordingly, for all the aforesaid reasons, we dismiss this petition.

14] In the facts and circumstances of the present case, there shall be no order as to costs.

(M.S.SONAK, J.) **(M.S.SANKLECHA, J.)**