IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 14391 OF 2018

Smt. Veena S. Hosmane .. 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. Ram Ochani for the Respondents.

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

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1] Heard learned counsel for the parties.

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

"(i) Order-in-Original dated 10.03.2016 passed by Respondent No.3;
(ii) Order-in-Appeal dated 25.05.2017 passed by Respondent No.2;
(iii) Final Order dated 21.11.2017 passed by Tribunal."

3] After the order-in-original dated 10th March 2016 was made by Assistant Commissioner of Central Excise and Customs Division-II, 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 & Customs, (Appeals-III). 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 25th May 2017 dismissed the same as time barred. This dismissal was upheld by the Tribunal by its order dated 21st November 2017.

4] Insofar as the orders dated 25th May 2017 and 21st November 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 25th May 2017 and 21st November 2017.

6] Mr. Prabhakar, learned counsel for the petitioner, however presses the challenge to the order-in-original dated 10th March 2016 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."***
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> *(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 from out of three agencies which had discharged the job work for the petitioner, two agencies had already paid the requisite tax and tax in respect of the third agency was borne by the petitioner. He therefore, submits that the demand upon the petitioner to pay duty upon the finished product amounts to double taxation and consequently, such taxation was totally unjust and in excess of jurisdiction. He submits that such a ground warrants interference with the order-in-original.

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 impugned order was made on 10th March 2016. Even the final order by the Tribunal was made on 21st November 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.)**