IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P.(C) No. 5389 of 2022

M/s. Kirit Kumar K Thaker … ***Petitioner***

Mr. Ramesh Chandra Jena,
Advocate for the petitioner

-versus-

Commissioner (Appeals) Central Excise, Customs & Service Tax & others … ***Opposite Parties***

Mr. Radheshyam Chimanka,
Senior Standing Counsel
(GST, Central Excise & Customs)
for opposite parties

CORAM:
JUSTICE JASWANT SINGH
JUSTICE M.S. RAMAN

ORDER

Order No. **07.04.2022**

02. *1.* This matter is taken up by virtual/physical mode.

2. Questioning the legality of Order dated 27.01.2022 passed by the Commissioner (Appeals), Bhubaneswar (opposite party No.1) in Appeal No. 08/ST/BBSR-GST/2022 rejecting the appeal preferred by the petitioner, provider of taxable service, directed against the Order-in-Original No. JC/BBSR/ST-14/2018, dated 25.01.2018 whereby demand to the tune of Rs.1,33,17,160/- + Education Cess of Rs.2,66,342/- + Secondary & Higher Education cess of Rs.1,33,169/- aggregating Rs.1,37,16,671/- has been raised in exercise of powers under Section 73 of Chapter-V of the Finance Act, 1994 (for brevity hereinafter referred to as "the Act") read with Sections 91 and 95 of the Finance (No.2)

Act, 2004 and Sections 136 and 140 of the Finance Act, 2007 along with interest under Section 75 of the Act, the petitioner has knocked the doors of this Court invoking provisions of Article 226 of the Constitution of India.

3. The petitioner, M/s. Kirit Kumar K Thaker, a service provider, whose business activity alleged to have fallen within the ambit of "CARGO HANDLING SERVICE" under Section 65(23) read with Section 65(105(zr) of the Act, is said not to have discharged service tax liability for the Financial Years 2011-12, 2012-13, 2013-14 and 2014-15, which fact could be unearthed by conducting inspection at the premises of the petitioner-noticee by the officials of the Central Preventive Unit of Central Excise, Customs & Service Tax, Bhubaneswar-I Commissionerate, Bhubaneswar. Perusal of the Order-in-Original reveals that with effect from 01.07.2012 the service provided by the petitioner has been brought under negative list as defined under section 65B. It is further revealed that in respect of financial year 2011-12, the Assessing Authority has treated the figures of "vehicle rent" disclosed in the Profit & Loss Account as "SUPPLY OF TANGIBLE GOODS SERVICE" as per Section 65(105)(zzzzj) of the Act and the same would be comprehended in the Head "Service" as defined under Section 65B of the Act with effect from 01.07.2012.

4. Disputing the classification as settled by the Adjudicating Authority, appeal was preferred by the petitioner under

Section 85 of before the Commissioner (Appeals), Bhubaneswar (for convenience referred to as "Appellate Authority") which was registered as 08/ST/BBSR-GST/2022. The Appellate Authority rejected the appeal on two counts:

i. There has been non-compliance of mandatory requirement under Section 83 of the Act read with Section 35F of the Central Excise Act, 1944;

ii. The appeal is time barred under the provisions of Section 85 of the Act as the Appellate Authority is not conferred with power to condone the delay in filing the appeal beyond one month after the expiry of normal period specified under sub-section (3A) of Section 85.

5. The petitioner has laid much stress on the financial hardship as a cause for non-fulfillment of requirement of pre-deposit in terms of Section 83 of the Act read with Section 35F of the Central Excise Act, 1944. Relying on the decision of Hon'ble Supreme Court in the case of *Kissan Gramodyog Sansthan Vrs. Commissioner of Central Excise, 2015 (319) ELT 370 (SC) = (2015) 10 SCC 629* whereby the Appellate Authority-Tribunal was directed to restore appeal for hearing on merits by accepting amount of pre-deposit, Mr. Ramesh Chandra Jena, Advocate for the petitioner has urged that the Appellate Authority be directed to restore the appeal in terms of aforesaid ruling.

5.1. So far as delay is concerned, the petitioner has attributed to complexities in law. The petitioner has laid emphasis on the manpower supply service *vis-à-vis* cargo handling service. The petitioner, being a contractor for supply of daily wage labourers, could not comprehend nuances of legal provisions. Therefore, the delay of around 1430 days ought to have been ignored and/or condoned by the Appellate Authority. Instead of being pedantic in his approach, he should have been pragmatic and condoning the delay in filing the appeal, he should have addressed the issue of classification of service and granted appropriate relief to the petitioner-assessee.

6. Mr. Radheshyam Chimanka, Senior Standing Counsel supported the reasons ascribed by the Appellate Authority in rejecting the appeal and submitted that plea of hardship would not be relevant factor for waiving the conditions for entertainment of appeal. This apart, inordinate delay without sufficient cause as envisaged under Section 85 of the Act being shown by the appellant-assessee, there is little scope for this Court to intervene in the matter in exercise of extraordinary jurisdiction under Article 226 of the Constitution of India, more so when statute interdicts the discretionary power of the Appellate Authority.

7. This Court proposes to examine both the angles emanating from the rival contentions and submissions.

8. As regards the first issue, the exposition of law with regard to applicable statutory provision on the date of entertainment of appeal has been propounded by this Court in the case of *Indian Oil Corporation Vrs. Odisha Sales Tax Tribunal, Cuttack, 2009 (Supp.1) OLR 928 = 109 (2010) CLT 355*. This Court succinctly laid down as follows:

> *"22. In view of the above, law can be summarised that if a condition of pre-deposit is imposed, a party while filing the appeal is bound to meet the requirement of the pre-deposit condition. However, it will depend upon the language of statutory provisions and particularly the words used therein as to whether the memo of appeal can be presented/filed or instituted without meeting the pre-deposit condition. In case 'entertaining' the appeal is not permissible, the appeal can be filed, but may not be heard on merit unless the pre-deposit condition is met. The pre-deposit condition is imposed to regulate the procedure of appeal. Therefore, in such an eventuality, where there is no prohibition for filing the memorandum of appeal without meeting the pre-deposit condition, the appeal can be heard only after meeting it."*

8.1. As is revealed from the order of the Appellate Authority, it is admitted fact that the petitioner has not deposited amount of Tax after specified rule as statutorily required to do under Section 83 of the Act read with Section 35F of the Central Excise Act.

8.2. Section 83 of Chapter-V of the Finance Act, 1994 stands as follows:

"83. Application of certain provisions of Act 1 of 1944.—

The provisions of the following sections of the Central Excise Act, 1944, as in force from time to time, shall apply, so far as may be, in relation to service tax as they apply in relation to a duty of excise:

sub-section (2A) of Section 5A, sub-section (2) of Section 9A, 9AA, 9B, 9C, 9D, 9E, 11B, 11BB, 11C, 12, 12A, 12B, 12C, 12D, 12E, 14, 14AA, 15, 15A, 15B, 31, 32, 32A to 32P, 33A, 34A, 35EE, ***35F,*** *35FF, to 35O (both inclusive), 35Q, 35R, 36, 36A, 36B, 37A, 37B, 37C, 37D, 38A and 40."*

8.3. Aforesaid provision contained in Section 83 of the Act requires *inter alia* compliance of provisions of Section 35F of the Central Excise Act, 1944 in relation to service tax.

8.4. Section 35F of the Central Excise Act, 1944 has been amended by way of substitution *vide* the Finance (No. 2) Act, 2014 (No. 25 of 2014), published in Gazette of India, Extraordinary No.29, dated 06.08.2014, upon receipt of assent of the President of India on 6th of August, 2014. For convenience, position prior to amendment and post amendment is given hereunder:

Pre-amendment position of Section 35F [prior to 06.08.2014]	*Post amendment position of Section 35F [after 06.08.2014]*
35F.Deposit, pending appeal of duty demanded or penalty	*35F. Deposit of certain percentage of duty demanded or penalty*

levied.— *Where in any appeal under this Chapter, the decision or order appealed against relates to any duty demanded in respect of goods which are not under the control of Central Excise authorities or any penalty levied under this Act, the person desirous of appealing against such decision or order shall, pending the appeal, deposit with adjudicating authority the duty demanded or the penalty levied:* *Provided that where in any particular case, the Commissioner (Appeals) or the Appellate Tribunal is of opinion that the deposit of duty demanded or penalty levied would cause undue hardship to such person, the*	*imposed before filing appeal.—* *The Tribunal or the Commissioner (Appeals), as the case may be, shall not entertain any appeal.—* *(i) under sub-section (1) of Section 35, unless the appellant has deposited seven and a half per cent of the duty, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of a decision or an order passed by an officer of Central Excise lower in rank than the Principal Commissioner of Central Excise or Commissioner of Central Excise;* *(ii) against the decision or order referred to in clause (a) of sub-section (1) of Section 35B, unless the*

Commissioner (Appeals) or, as the case may be, the Appellate Tribunal, may dispense with such deposit subject to such conditions as he or it may deem fit to impose so as to safeguard the interests of revenue: *Provided further that where an application is filed before the Commissioner (Appeals) for dispensing with the deposit of duty demanded or penalty levied under the first proviso, the Commissioner (Appeals) shall, where it is possible to do so, decides such application within thirty days from the date of its filing.* *Explanation:—* *For the purposes of this section duty demanded shall*	*appellant has deposited seven and a half per cent of the duty, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of the decision or order appealed against;* *(iii) against the decision or order referred to in clause (b) of sub-section (1) of Section 35B, unless the appellant has deposited ten per cent of the duty, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of the decision or order appealed against;* *Provided that the amount required to be deposited under this section shall not exceed rupees ten crores;* *Provided further that*

include,— *(i) amount determined under Section 11D;* *(ii) amount of erroneous CENVAT credit taken;* *(iii) amount payable under Rule 57CC of Central Excise Rules, 1944;* *(iv) amount payable under Rule 6 of CENVAT Credit Rules, 2001 or CENVAT Credit Rules, 2002 or CENVAT Credit Rules, 2004;* *(v) interest payable under the provisions of this Act or the rules made thereunder.*	*the provisions of this section shall not apply to the stay applications and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act 2014.* *Explanation.—* *For the purposes of this section "duty demanded" shall include,—* *(i) amount determined under Section 11D;* *(ii) amount of erroneous CENVAT credit taken;* *(iii) amount payable under Rule 6 of the CENVAT Credit Rules, 2001 or the CENVAT Credit Rules, 2002 or the CENVAT Credit Rules, 2004.*

8.5. Intention of amendment can be culled out from bare reading of the provisions as they stood prior to amendment and post-amendment in juxtaposition. Under the provisions prior to amendment an appellant was required to deposit the duty/tax demanded or the penalty levied with the Appellate Authority or the Tribunal; and the application for waiving the deposit also could be preferred. Weighing balance, considering the undue hardship on the part of the assessee-appellant on the one hand and safeguard of the interests of the revenue on the other, the amount of deposit could be waived by the Tribunal or the Appellate Authority by exercising judicial discretion. However such discretion has been curtailed after amendment of Section 35F with effect from 06.08.2014. Substituted Section 35F of the Central Excise Act, 1944 as a matter of rule provided that, 7.5% or 10%, as the case may be, of the tax/duty demanded or penalty levied shall have to be deposited pending the appeal subject to deposit of maximum amount of Rs.10,00,00,000/-. Thus, by virtue of the substituted Section 35F of the Act, 1944, invariably 92.5% or 90% of tax demanded or duty levied is waived during the pendency of the appeal.

8.6. The Hon'ble Supreme Court in the case of *Tecnimont Pvt. Ltd. Vrs. State of Punjab, 2019 SCC OnLine SC 1228* examined the issue that even though *Mohammed Kunhi, (1969) 2 SCR 65 = AIR 1969 SC 430 = (1969) 71 ITR 815 (SC)* laid down that an express grant of statutory power carries with it, by necessary implication, the authority to use all reasonable means to make grant effective, can such incidental or implied power be drawn and invoked to grant relief against requirement of pre-deposit when the statute in clear mandate says— no appeal be entertained unless 25% of the amount in question is deposited? Would not any such exercise make the mandate of the provision of pre-deposit nugatory and meaningless? The Hon'ble Court held as follows:

"In any case the principle laid down in Matajog Dubey Vrs. H.C. Bhari Dobey, 1955 (2) SCR 925 states with clarity that so long as there is no express inhibition, the implied power can extend to doing all such acts or employing such means as are reasonably necessary for such execution. The reliance on the principle laid down in Mohammed Kunhi, (1969) 2 SCR 65 cannot go to the extent, as concluded by the High Court, of enabling the Appellate Authority to override the limitation prescribed by the statute and go against the requirement of pre-deposit."

The Hon'ble Supreme Court in the said case being *Tecnimont Pvt. Ltd. Vrs. State of Punjab, 2019 SCC OnLine SC 1228* further observed as follows:

"30. As stated in P. Laxmi Devi, (2008) 4 SCC 720 and Har Devi Asnani, (2011) 14 SCC 160, in genuine cases of hardship, recourse would still be open to the concerned person. However, it would be completely a different thing to say that the Appellate Authority itself can grant such relief. As stated in Shyam Kishore, (1993) 1 SCC 22 any such exercise would make the provision itself unworkable and render the statutory intendment nugatory."

8.7. This Court in *Indian Oil Corporation Vrs. Odisha Sales Tax Tribunal, Cuttack, 2009 (Supp.1) OLR 928 = 109 (2010) CLT 355,* made the following observations with regard to right of appeal:

"7. Further, there can be no quarrel to the settled legal proposition that right of appeal may not be absolute. The Legislature can put conditions for maintaining the same. In Vijay Prakash D. Mehta & Jawahar D. Mehta Vrs. Collector of Customs (Preventive), Bombay, AIR 1988 SC 2010, the Hon'ble Apex Court held as under:

"Right of appeal is neither an absolute right nor an ingredient of natural justice, the principles of which must be followed in all judicial and quasi judicial adjudications. The right to appeal is a statutory right and it can be circumscribed by the conditions in the grant... If the statute gives a right to appeal upon certain conditions, it is upon fulfilment of these conditions that the right becomes vested and exercisable to the appellant... The purpose of the section is to act in terrorem to make the people comply with the provisions of law."

8. Similar view has been reiterated by the Hon'ble Apex Court in Anant Mills Co. Ltd. Vrs. State of Gujarat, AIR 1975 SC 1234; and Shyam Kishore & Ors. Vrs. Municipal Corportation of Delhi & Anr., AIR 1992 SC 2279; Gujarat Agro Industries Co. Ltd. Vrs. Municipal Corporation of the City of Ahmedabad & Ors., AIR 1999 SC 1818. In Shyam Kishore (supra) the Hon'ble Supreme Court placed reliance upon its earlier Judgment in Nandlal Vrs. State of Haryana, AIR 1980 SC 2097, wherein it has been held that "right of appeal is a creature of statute and there is no reason why the

Legislature, while granting the right, cannot impose conditions for the exercise of such right so long as the conditions are not so onerous as amount to unreasonable restrictions rendering the right almost illusory", the Court cannot interfere.

9. *In Bengal Immunity Company Vrs. State of Bihar, AIR 1955 SC 661, the Hon'ble Supreme Court has observed that if there is any hardship, it is for the Parliament to amend the law, but the Court cannot be called upon to discard the cardinal rule of interpretation for mitigating a hardship. If the language of an Act is sufficiently clear, the Court has to give effect to it, however, inequitable or unjust the result may be. As is said, 'dura lex sed lex' which means 'the law is hard but it is the law'. Even if the statutory provision causes hardship to some people, it is not for the Court to amend the law. A legal enactment must be interpreted in its plain and literal sense as that is the first principle of interpretation.*

10. *In Martin Burn Ltd. Vrs. The Corporation of Calcutta, AIR 1966 SC 529, the Hon'ble Supreme Court while dealing with the same issue observed as under:*

    "A result flowing from a statutory provision is never an evil. A Court has no power to ignore that provision to relieve what it considers a distress resulting from its operation. A statute must of course be given effect to whether a Court likes the result or not."

11. *Similar view has been reiterated by the Hon'ble Supreme Court in The Commissioner of Income-tax, West Bengal-I, Calcutta Vrs. M/s. Vegetables Products Ltd., AIR 1973 SC 927.*

12. *It is the settled legal position that taxing statute must be construed strictly. (vide Manish Maheshwari Vrs. Assistant Commissioner of Income-tax & ors., AIR 2007 SC 1696; Southern Petrochemical Industries Co. Ltd. Vrs. Electricity Inspector & ETIO & ors., AIR 2007 SC 1984; and Bhavya Apparels (P) Ltd. & anr. Vrs. Union of India & anr., (2007) 10 SCC 129.*

13. *In view of the above, it becomes evident that the appeal is a statutory right, which can be created only by the Legislature and it does not lie by acquiescence/consent of the parties or even the writ Court is not competent to create the appellate forum if not provided under the statute. If Legislature in its wisdom has imposed certain conditions, like pre-deposit for the purpose of filing or hearing of the appeal, the Courts are supposed to give strict adherence to the statutory provisions. The purpose of imposing the pre-deposit condition is that right of appeal may not be abused by any recalcitrant party and there may not be any difficulty in enforcing the order appealed against if ultimately it is dismissed. There must be speedy recovery of the amount of tax due to the authority."*

8.8. Reference also may be had to recent Judgment being *ECGC Limited Vrs. Mukul Shriram EPC JV, 2022 SCC OnLine SC 184* wherein the following observation has been made:

"32. The Division Bench of the Madras High Court in Dream Castle v. Union of India, W.P. No. 13431 of 2015 etc. decided on 18.04.2016 dealing with amended Section 35 of the Central Excise Act by Finance Act No. 2 of 2014 held that when the unamended condition gave only a chance or hope for an assessee to get a total waiver at the discretion of the Appellate Authority, the same cannot be equated to a vested right

or stated to be retrospective, unless it is definitely shown that the amended condition is more onerous than the unamended condition. It was held as under:

"54. Therefore, it is well settled that the right of appeal is a creature of statute and the legislature is well within its competence to impose conditions for the exercise of such a right subject only to the restriction that the conditions so imposed are not so onerous as to amount to unreasonable restrictions rendering the right almost illusory.

*****

59. Therefore, if one condition that was already available in the statute for the exercise of a right of appeal, is merely replaced by another condition, the same cannot be said to be retrospective, unless it is definitely shown that the amended condition is more onerous than the unamended condition. When the unamended condition gave only a chance or hope for an assessee to get a total waiver at the discretion of the Appellate Authority, the same cannot be equated to a vested right. A mere chance of convincing the Appellate Authority to exercise the discretion for the grant of a total waiver is no vested right. The amendment, in our considered view, did not take away a right vested, but merely made a chance divested. What has now gone, is not the right, but the chance or hope. Therefore, the first contention of the learned Senior counsel for the petitioner is liable to be rejected."

33. *There is another line of judgments taking a view that right of appeal is a creation of statute and the legislature is competent to determine the conditions on*

> *which an appeal would lie. These are not the cases of amending or repeal of a statute, therefore, such judgments are not applicable to the questions arising in the present application."*

8.9. This Court, in *Jindal Stainless Ltd. Vrs. State of Odisha,* reported in *(2012) 54 VST 1 (Ori)* delved into the question as to whether the condition precedent for pre-deposit of tax or interest or both in dispute in addition to payment of admitted tax for entertaining an appeal as provided under Section 77(4) of the Odisha Value Added Tax Act, 2004 read with proviso to Rule 87 of the OVAT Rules, 2005 was unreasonable, oppressive, violative and ultra vires of Article 14 of the Constitution of India and answered as follows:

> *"25. Therefore, it becomes crystal clear that appeal is a statutory remedy and the same is maintainable provided that the Statute enacted by a competent Legislature provides for it. Further, there can be no quarrel that the right of appeal cannot be absolute and the Legislature can put conditions for maintaining the same.*
>
> *26. For the reasons stated above, the decisions relied upon by the petitioner are of no help to the petitioner as those decisions are rendered in respect of particular facts of that case.*
>
> *27. In view of the above, we are of the considered view that the provisions of Section 77(4) of the OVAT Act requiring deposit of 20% of the tax or interest or both in dispute as a precondition for entertaining an appeal against the order enumerated under Section 77(1) of the OVAT Act does not make the right of appeal*

> *illusory and such a condition is within the legislative power of the State Legislature and cannot be held to be unreasonable and violative of Article 14 of the Constitution."*

8.10. The Hon'ble Jharkhand High Court at Ranchi has analysed the position in *Satya Nand Jha Vrs. Union of India, 2016 SCC OnLine Jhar 2323 = (2017) 2 AIR Jhar R 619 = (2016) 4 JBCJ 392 (HC)* in the following lines:

> *"17. By virtue of substituted Section 35F of the Central Excise Act, 1944 the following objects are going to be achieved:—*
>
> *(a) There shall be safeguard of the revenue;*
>
> *(b) Multifariousness of petitions in one or other forum relating to waiver of deposits will completely come to an end;*
>
> *(c) It reduces the discretion of Commissioner (Appeals) or the Tribunal;*
>
> *(d) It balances "undue hardship" and "safeguard of the revenue";*
>
> *(e) It is beneficial to the assessee-appellants as the Statute itself waives 92.5% or 90% of the duty demanded or penalty levied, as the case may be, whereas under the unamended Section 35F, the whole amount was to be deposited and as an exception, application for waiver of deposit was to be preferred;*
>
> *(f) Conditional right to prefer an appeal abolishes unnecessary and frivolous appeals. "Chance taking" assessees-appellants will not file appeals,*

due to this condition of depositing 7.5% or 10% of the duty demanded or penalty imposed;

(g) Cap of Rs.10 Crores (1st proviso to Section 35F) makes the provision of new Section 35F more balanced;

(h) Change in the provision of unamended Section 35F and the newly substituted Section 35F is mere procedural;

(i) By virtue of substituted Section 35F the collection of revenue in case appeals are being preferred, will be in a systematic manner;

Thus, the classification has reasonable nexus with the aforesaid object, sought to be achieved by the Act. No legislation relating to tax can be declared to be illegal, much less unconstitutional, on the ground of being harsh, on the anvil of Article 14 of the Constitution of India otherwise, every tax payer will feel every legislation relating to taxation to be a harsh one. The broader classification is to be seen and not the micro classification."

Against such lucid analysis of amended provisions in Section 35F *vis-à-vis* provisions as they stood prior to amendment being challenged before the Hon'ble Supreme Court in *S.L.P.(C) No. 31297 of 2016 [Satya Nand Jha Vrs. Union of India],* the same came to be dismissed *vide* Order dated 07.11.2016.

8.11. The position as of now stands can be summarized as: prior to 06.08.2014, the pre-deposit of percentage of duty confirmed or penalty imposed for filing appeal before the

Commissioner (Appeals) or the CESTAT was not mandatory and decision in this regard was to be taken by the Commissioner (Appeals) and/or the CESTAT on the merit of the case. The Appellate Authority was vested with discretion to decide the amount of pre-deposit required to be made by the appellant after taking into consideration the merits of the case and/or considering financial hardship caused to the assessee. This apart, safeguard the interest of revenue was also one of factors. The Appellate Authority was even competent to order for partial pre-deposit or to waive the pre-deposit altogether. However, with effect from 06.08.2014, such discretion of the Commissioner (Appeals) and/or CESTAT has been dispensed with. If the prescribed pre-deposit is not made by the time of entertainment of the appeal, the appeal is liable for rejection.

8.12. This Court has considered the rival submissions and examined the statutory provisions. It is an undisputed position that a right to file an appeal is not an absolute right but a right bestowed by the statute. Thus, such a statutory right of appeal can be made subject to conditions. However, though the right of appeal has been made conditional by Section 35F of the Central Excise Act, 1944, as applicable to Finance Act, 1994, by virtue of Section 85 of Chapter-V of the Finance Act, 1994, it is unambiguously suggested that a party who desires to challenge the Order-in-Original in appeal shall have to deposit in terms of provisions contained in Section 35F of the Central Excise Act. The requirement to make such deposit is to be fulfilled for the purpose of "entertainment of appeal" and not "filing of the appeal". This can only be reasonable interpretation to the above provision which is inconsonance with law laid down by this Court in *Indian Oil Corporation Vrs. Odisha Sales Tax Tribunal, Cuttack, 2009 (Supp.1) OLR 928 = 109 (2010) CLT 355*; otherwise it would require adding the words "filing of" to the above provisions. Section 35F of the Central Excise Act did not bar a party from filing an appeal unless the amounts of tax and penalty demanded by the adjudicating authority are deposited. This is evident from Section 107(6) of the Central Goods and Service Tax Act/, 2017 which, *inter alia*, provides that no appeal shall be "filed" before the Appellate Authority subject to conditions stipulated therein. Thus, from the above, it is evident that whenever the Legislature desired to make a pre-condition that certain amount is required to be deposited before the Appeal is filed, it is so provided in the legislation. Thus, in terms of Section 85 of Chapter-V of the Finance Act read with Section 35F of the Central Excise Act, so long as the appeal is not disposed of/dismissed/rejected by the Appellate Authority, it is open to the party to deposit the conditional amount pending the disposal of the appeal.

8.13. Upon cumulative reading of legal position as settled in *Indian Oil Corporation Vrs. Odisha Sales Tax Tribunal, Cuttack, 2009 (Supp.1) OLR 928 = 109 (2010) CLT 355* and *Satya Nand Jha Vrs. Union of India, 2016 SCC OnLine*

Jhar 2323 = (2017) 2 AIR Jhar R 619 = (2016) 4 JBCJ 392 (HC), this Court does not see any reason to interfere with the view expressed by the Commissioner (Appeals), Bhubaneswar. For the reason that by the date of entertainment of appeal no evidence is placed on record by the petitioner-appellant to show that it had complied with the condition hedged for "entertainment of appeal", this Court hereby affirms the impugned appellate order dated 27.01.2022.

8.14. In the present appeal, the petitioner having not placed any material evidencing compliance of conditions for entertainment of appeal, this Court, therefore, confirms the Order-in-Appeal on this score.

9. Now coming to the point of limitation as being agitated by the petitioner by way of writ petition, it is only to be said that the argument is untenable in the eye of law on the touchstone of the interpretation of law by the Hon'ble Supreme Court.

9.1. It is forthcoming from the Order-in-Appeal dated 27.01.2022 that the Order-in-Original dated 25.01.2018 passed under Section 73 of the Act was served on the petitioner-assessee on 09.02.2018 and appeal being filed on 10.01.2022, there was a delay of 1430 days in presenting the appeal.

9.2. The Appellate Authority has assigned reasons to justify that he ceases to have jurisdiction to condone the delay beyond the period specified under Section 85 of the Act. The Appellate Authority has discarded the following reason assigned by the petitioner eliciting the nature of delay in presenting the appeal:

"In the instant case, the explanation offered for the abnormal delay of nearly 47 months is that the Service Tax has been paid and the case is made complicated by the Departmental Officers so that the appellant could not understand how to defend the case. From the application for condonation of delay, it appears that the appellant has categorically accepted the receipt of the order. During this 47 months the Appellant has filed other Appeals before this forum. If that is so, the plea that because of lack of experience there was delay does not stand to be reason. In any event, the causes shown for condonation have no acceptable value. Accordingly, I reject the application for condonation of delay in filing the appeal."

9.3. Section 85 of the Act stands thus:

"85. Appeals to the Commissioner of Central Excise (Appeals).—

(1) Any person aggrieved by any decision or order passed by an adjudicating authority subordinate to the Principal Commissioner of Central Excise or Commissioner of Central Excise may appeal to the Commissioner of Central Excise (Appeals).

(2) Every appeal shall be in the prescribed form and shall be verified in the prescribed manner.

(3) An appeal shall be presented within three months from the date of receipt of the decision or order of such adjudicating authority, relating to service tax, interest or penalty under this Chapter made before the date on which the Finance Bill, 2012 receives the assent of the President:

Provided that the Commissioner of Central Excise (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of three months, allow it to be presented within a further period of three months.

(3A) An appeal shall be presented within two months from the date of receipt of the decision or order of such adjudicating authority, made on and after the Finance Bill, 2012 receives the assent of the President, relating to service tax, interest or penalty under this Chapter:

Provided that the Commissioner of Central Excise (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of two months, allow it to be presented within a further period of one month.

(4) The Commissioner of Central Excise (Appeals) shall hear and determine the appeal and, subject to the provisions of this Chapter, pass such orders as he thinks fit and such orders may include an order enhancing the service tax, interest or penalty:

Provided that an order enhancing the service tax, interest or penalty shall not be made unless the person affected thereby has been given a reasonable *opportunity of showing cause against such enhancement.*

(5) Subject to the provisions of this Chapter, in hearing the appeals and making order under this section, the Commissioner of Central Excise (Appeals) shall exercise the same powers and follow the same procedure as he exercises and follows in hearing the appeals and making orders under the Central Excise Act, 1944 (1 of 1944).”

9.4. From the narration of facts, the instant case falls within the ambit of sub-section (3A) of Section 85 of the Act which without admitting any ambiguity hints at that an appeal can be presented within two months from the date of receipt of the Order-in-Original passed by the adjudicating authority under Section 73 relating to service tax, interest or penalty under Chapter-V of the Finance Act, 1994. Proviso thereto unequivocally lays down that in case of delay in presentation of appeal, the discretion of the Commissioner of Central Excise (Appeals) in considering application for condonation of delay is restricted. If the Commissioner (Appeals) is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of two months, he has the jurisdiction to allow it to be presented within a further period of one month.

9.5. In identical setting of provisions of statute that is contained in the statute presently under consideration, the Hon’ble Supreme Court has laid down that Section 5 of the

Limitation Act, 1963 has no application where the Legislature has prescribed stipulated outer limit restricting discretion to condone the delay. In the case of *Chattisgarh State Electricity Board Vrs. Central Electricity Regulatory Commission, [2010] 4 SCR 680 = (2010) 5 SCC 23* it has been laid down as follows:

> *"15. In Commissioner of Customs and Central Excise v. Hongo India Private Limited and another (2009) 5 SCC 791, a three-Judge Bench considered the scheme of the Central Excise Act, 1944 and held that High Court has no power to condone delay beyond the period specified in Section 35-H thereof. The argument that Section 5 of the Limitation Act can be invoked for condonation of delay was rejected by the Court and observed:*
>
> > *"30. In the earlier part of our order, we have adverted to Chapter VI-A of the Act which provides for appeals and revisions to various authorities. Though Parliament has specifically provided an additional period of 30 days in the case of appeal to the Commissioner, it is silent about the number of days if there is sufficient cause in the case of an appeal to the Appellate Tribunal. Also an additional period of 90 days in the case of revision by the Central Government has been provided. However, in the case of an appeal to the High Court under Section 35-G and reference application to the High Court under Section 35-H, Parliament has provided only 180 days and no further period for filing an appeal and making reference to the High Court is mentioned in the Act.*

32. *As pointed out earlier, the language used in Sections 35, 35- B, 35-EE, 35-G and 35-H makes the position clear that an appeal and reference to the High Court should be made within 180 days only from the date of communication of the decision or order. In other words, the language used in other provisions makes the position clear that the legislature intended the appellate authority to entertain the appeal by condoning the delay only up to 30 days after expiry of 60 days which is the preliminary limitation period for preferring an appeal. In the absence of any clause condoning the delay by showing sufficient cause after the prescribed period, there is complete exclusion of Section 5 of the Limitation Act. The High Court was, therefore, justified in holding that there was no power to condone the delay after expiry of the prescribed period of 180 days.*

35. *It was contended before us that the words "expressly excluded" would mean that there must be an express reference made in the special or local law to the specific provisions of the Limitation Act of which the operation is to be excluded. In this regard, we have to see the scheme of the special law which here in this case is the Central Excise Act. The nature of the remedy provided therein is such that the legislature intended it to be a complete code by itself which alone should govern the several matters provided by it. If, on an examination of the relevant provisions, it is clear that the provisions of the Limitation Act are necessarily excluded, then the benefits conferred therein cannot be called in aid to supplement the provisions of the Act. In our considered view, that*

even in a case where the special law does not exclude the provisions of Sections 4 to 24 of the Limitation Act by an express reference, it would nonetheless be open to the court to examine whether and to what extent, the nature of those provisions or the nature of the subject-matter and scheme of the special law exclude their operation. In other words, the applicability of the provisions of the Limitation Act, therefore, is to be judged not from the terms of the Limitation Act but by the provisions of the Central Excise Act relating to filing of reference application to the High Court."

16. In view of the above discussion, we hold that Section 5 of the Limitation Act cannot be invoked by this Court for entertaining an appeal filed against the decision or order of the Tribunal beyond the period of 120 days specified in Section 125 of the Electricity Act and its proviso. Any interpretation of Section 125 of the Electricity Act which may attract applicability of Section 5 of the Limitation Act read with Section 29(2) thereof will defeat the object of the legislation, namely, to provide special limitation for filing an appeal against the decision or order of the Tribunal and proviso to Section 125 will become nugatory."

9.6. In *Popat Bahiru Govardhane Vrs. Special Land Acquisition Officer, (2013) 10 SCC 765,* it is succinctly laid down as follows:

"16. It is a settled legal proposition that law of limitation may harshly affect a particular party but it has to be applied with all its rigour when the statute so prescribes. The Court has no power to extend the period of limitation on equitable grounds. The statutory provision may cause hardship or

inconvenience to a particular party but the Court has no choice but to enforce it giving full effect to the same. The legal maxim "dura lex sed lex" which means "the law is hard but it is the law", stands attracted in such a situation. It has consistently been held that, "inconvenience is not" a decisive factor to be considered while interpreting a statute. "A result flowing from a statutory provision is never an evil. A Court has no power to ignore that provision to relieve what it considers a distress resulting from its operation." (See : The Martin Burn Ltd. v. The Corporation of Calcutta, AIR 1966 SC 529; and Rohitas Kumar & Ors. v. Om Prakash Sharma & Ors., AIR 2013 SC 30)."

9.7. *Vide* Judgment dated 23rd August, 2021 this Court in the matters of *National Highways Authority of India (NHAI) and Another Vrs. Dillip Kumar Pati, W.P.(C) No. 37571 of 2020,* held as follows:

"11. In the present case, admittedly the last date for filing of the petitions under Section 34 of the A&C Act by the NHAI to challenge the awards in question was 29th April, 2019. In terms of Section 34(3) of the A&C Act it was not possible for any challenge to be entertained beyond the outer limit of 120 days. This position has been made explicit in a series of decisions of the Supreme Court of India including Popular Construction Company, (2001) Suppl. 3 SCR 619 and Simplex Infrastructure Ltd., (2019) 2 SCC 455. In the last mentioned decision after discussing extensively the earlier case law, the Supreme Court explained in para 18 as under:

"18 A plain reading of sub-section (3) along with the proviso to Section 34 of the 1996 Act, shows that the application for setting aside the award on the grounds mentioned in sub-section (2) of Section 34 could be made within three months and the period can only be extended for a further period of thirty days on showing sufficient cause and not thereafter. The use of the words "but not thereafter" in the proviso makes it clear that the extension cannot be beyond thirty days. Even if the benefit of Section 14 of the Limitation Act is given to the respondent, there will still be a delay of 131 days in filing the application. That is beyond the strict timelines prescribed in sub-section (3) read along with the proviso to Section 34 of the 1996 Act. The delay of 131 days cannot be condoned. To do so, as the High Court did, is to breach a clear statutory mandate."

*12. The language of the provision is abundantly clear and does not admit of any ambiguity. There is no question of entertaining the petitions of the District Judge beyond the 120 days period. ***"*

9.8. The following observation made by the Hon'ble Supreme Court of India in the matter of *Assistant Commissioner (CT) LTU, Kakinada Vrs. Glaxo Smith Kline Consumer Health Care Ltd., 2020 SCC OnLine SC 440,* may be relevant to be referred to in the present context *qua* exercise of extraordinary jurisdiction under Article 226 of the Constitution of India:

"16. In the backdrop of these facts, the central question is: whether the High Court ought to have entertained the writ petition filed by the respondent? As regards the

power of the High Court to issue directions, orders or writs in exercise of its jurisdiction under Article 226 of the Constitution of India, the same is no more res integra. Even though the High Court can entertain a writ petition against any order or direction passed/action taken by the State under Article 226 of the Constitution, it ought not to do so as a matter of course when the aggrieved person could have availed of an effective alternative remedy in the manner prescribed by law (see Baburam Prakash Chandra Maheshwari vs. Antarim Zila Parishad now Zila Parishad, Muzaffarnagar, AIR 1969 SC 556; and also Nivedita Sharma vs. Cellular Operators Association of India & Ors. (2011) 14 SCC 337. In Thansingh Nathmal & Ors. vs. Superintendent of Taxes, Dhubri & Ors. AIR 1964 SC 1419, the Constitution Bench of this Court made it amply clear that although the power of the High Court under Article 226 of the Constitution is very wide, the Court must exercise self-imposed restraint and not entertain the writ petition, if an alternative effective remedy is available to the aggrieved person. In paragraph 7, the Court observed thus:—

'7. Against the order of the Commissioner an order for reference could have been claimed if the appellants satisfied the Commissioner or the High Court that a question of law arose out of the order. But the procedure provided by the Act to invoke the jurisdiction of the High Court was bypassed, the appellants moved the High Court challenging the competence of the Provincial Legislature to extend the concept of sale, and invoked the extraordinary jurisdiction of the High Court under Article 226 and sought to reopen the decision of the Taxing Authorities on question of

fact. The jurisdiction of the High Court under Article 226 of the Constitution is couched in wide terms and the exercise thereof is not subject to any restrictions except the territorial restrictions which are expressly provided in the Articles. But the exercise of the jurisdiction is discretionary: it is not exercised merely because it is lawful to do so. The very amplitude of the jurisdiction demands that it will ordinarily be exercised subject to certain self- imposed limitations. Resort that jurisdiction is not intended as an alternative remedy for relief which may be obtained in a suit or other mode prescribed by statute. Ordinarily the Court will not entertain a petition for a writ under Article 226, where the petitioner has an alternative remedy, which without being unduly onerous, provides an equally efficacious remedy. Again the High Court does not generally enter upon a determination of questions which demand an elaborate examination of evidence to establish the right to enforce which the writ is claimed. The High Court does not therefore act as a court of appeal against the decision of a court or tribunal, to correct errors of fact, and does not by assuming jurisdiction under Article 226 trench upon an alternative remedy provided by statute for obtaining relief. Where it is open to the aggrieved petitioner to move another tribunal, or even itself in another jurisdiction for obtaining redress in the manner provided by a statute, the High Court normally will not permit by entertaining a petition under Article 226 of the Constitution the machinery created under the statute to be bypassed, and will leave the party applying to it to seek resort to the machinery so set up.'

17. *We may usefully refer to the exposition of this Court in Titaghur Paper Mills Co. Ltd. & Anr. Vs. State of Orissa & Ors., (1983) 2 SCC 433, wherein it is observed that where a right or liability is created by a statute, which gives a special remedy for enforcing it, the remedy provided by that statute must only be availed of. In paragraph 11, the Court observed thus:—*

'11. Under the scheme of the Act, there is a hierarchy of authorities before which the petitioners can get adequate redress against the wrongful acts complained of. The petitioners have the right to prefer an appeal before the Prescribed Authority under sub-section (1) of Section 23 of the Act. If the petitioners are dissatisfied with the decision in the appeal, they can prefer a further appeal to the Tribunal under sub-section (3) of Section 23 of the Act, and then ask for a case to be stated upon a question of law for the opinion of the High Court under Section 24 of the Act. The Act provides for a complete machinery to challenge an order of assessment, and the impugned orders of assessment can only be challenged by the mode prescribed by the Act and not by a petition under Article 226 of the Constitution. It is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. This rule was stated with great clarity by Willes, J. in Wolverhampton New Waterworks Co. v. Hawkesford [(1859) 6 CBNS 336, 356] in the following passage:

There are three classes of cases in which a liability may be established founded upon statute.

... But there is a third class, viz. where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it... The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to.

The rule laid down in this passage was approved by the House of Lords in Neville v. London Express Newspapers Ltd. (1919 AC 368) and has been reaffirmed by the Privy Council in Attorney-General of Trinidad and Tobago v. Gordon Grant & Co. Ltd. (1935 AC 532) and Secretary of State v. Mask & Co. (AIR 1940 PC 105). It has also been held to be equally applicable to enforcement of rights, and has been followed by this Court throughout. The High Court was therefore justified in dismissing the writ petitions in limine.'

18. In the subsequent decision in Mafatlal Industries Ltd. & Ors. vs. Union of India & Ors. (1997) 5 SCC 536, this Court went on to observe that an Act cannot bar and curtail remedy under Article 226 or 32 of the Constitution. The Court, however, added a word of caution and expounded that the constitutional Court would certainly take note of the legislative intent manifested in the provisions of the Act and would exercise its jurisdiction consistent with the provisions of the enactment. To put it differently, the fact that the High Court has wide jurisdiction under Article 226 of the Constitution, does not mean that it can disregard the substantive provisions of a statute and pass orders *which can be settled only through a mechanism prescribed by the statute.*

19. *Indubitably, the powers of the High Court under Article 226 of the Constitution are wide, but certainly not wider than the plenary powers bestowed on this Court under Article 142 of the Constitution. Article 142 is a conglomeration and repository of the entire judicial powers under the Constitution, to do complete justice to the parties. Even while exercising that power, this Court is required to bear in mind the legislative intent and not to render the statutory provision otiose. In a recent decision of a three-Judge Bench of this Court in Oil and Natural Gas Corporation Limited vs. Gujarat Energy Transmission Corporation Limited & Ors.13, the statutory appeal filed before this Court was barred by 71 days and the maximum time limit for condoning the delay in terms of Section 125 of the Electricity Act, 2003 was only 60 days. In other words, the appeal was presented beyond the condonable period of 60 days. As a result, this Court could not have condoned the delay of 71 days. Notably, while admitting the appeal, the Court had condoned the delay in filing the appeal. However, at the final hearing of the appeal, an objection regarding appeal being barred by limitation was allowed to be raised being a jurisdictional issue and while dealing with the said objection, the Court referred to the decisions in Singh Enterprises vs. Commissioner of Central Excise, Jamshedpur & Ors., (2008) 3 SCC 70; Commissioner of Customs and Central Excise vs. Hongo India Private Limited & Anr., (2009) 5 SCC 791; Chhatisgarh State Electricity Board vs. Central Electricity Regulatory Commission & Ors., (2010) 5 SCC 23; and Suryachakra Power Corporation Limited vs. Electricity Department represented by its*

Superintending Engineer, Port Blair & Ors. (2016) 16 SCC 152 and concluded that Section 5 of the Limitation Act, 1963 cannot be invoked by the Court for maintaining an appeal beyond maximum prescribed period in Section 125 of the Electricity Act.

*20. The principle underlying the dictum in this decision would apply proprio vigore to Section 31 of the 2005 Act including to the powers of the High Court under Article 226 of the Constitution. ****

21. A priori, we have no hesitation in taking the view that what this Court cannot do in exercise of its plenary powers under Article 142 of the Constitution, it is unfathomable as to how the High Court can take a different approach in the matter in reference to Article 226 of the Constitution. The principle underlying the rejection of such argument by this Court would apply on all fours to the exercise of power by the High Court under Article 226 of the Constitution."

9.9. Regard being had to the position of law, on the material available on record that the petitioner having received the Order-in-Original passed under Section 73 of the Act on 09.02.2018, filed the appeal under Section 85 of Chapter-V of Finance Act, 1994 on 10.01.2022, thereby there caused a delay beyond the period of 3 months (*i.e.,* normal period of 2 months + condonable period of 1 month with the discretion of the Appellate Authority), it is held that there is no infirmity found to warrant interference with the Order of the Appellate Authority. The explanation of the petitioner that the delay was on account of the complexities of law could not stay the operation of law of limitation.

9.10. Thus, since the statutory period specified for filing of appeal (2 months + 1 month) had expired long back in May, 2018 itself and the appeal came to be filed by the petitioner only on 10.01.2022, without substantiating the plea about inability to file appeal within the prescribed time, no indulgence could be shown to the petitioner-assessee at all.

10. Section 85 of the Finance Act, 1994 does not prohibit/bar a person from filing an appeal with the Appellate Authority in the absence of depositing amounts of tax/duty and penalty demanded by the adjudicating authority. However, in absence of compliance of mandatory requirement of Section 83 of Chapter-V of the Finance Act, 1994 read with Section 35F of the Central Excise Act, 1944 (as amended) by the time appeal is taken up for entertainment, there is no scope for the Appellate Authority to dispense with such a condition. Reliance on the decision of the Supreme Court in *Kisaan Gramodyog Sansthan Vrs. Commissioner of Central Excise, 2015 (319) ELT 370 = (2015) 10 SCC 629* by the petitioner-assessee is misplaced. In the said case, after disposal of Special Leave Petition in connection with dismissal of appeal for want of pre-deposit, the petitioner had complied with the condition by making pre-deposit and under such "peculiar facts and circumstances of the case", the Hon'ble Supreme Court of India Court directed the Tribunal to accept the "pre-deposit amount" as deposited by the appellant therein and "hear the appeal on merits". This is not the position in the case at hand. The instant petitioner has not demonstrated peculiarity in its case.

10.1. Thus, since the statutory period specified for filing of appeal (2 months + 1 month) had expired long back in May, 2018 itself and the appeal came to be filed by the petitioner only on 10.01.2022, without substantiating the plea about inability to file appeal within the prescribed time, no indulgence could be shown to the petitioner-assessee at all. The case law in cited by the petitioner is misplaced.

10.2. In the above view of the matter, the order of the Commissioner (Appeals) dated 27.01.2022 rejecting the appeal on the ground that the appeal has been filed belatedly beyond the period stipulated under Section 85 of the Act without complying with the condition stipulated for entertainment of appeal under Section 83 of Chapter-V of the Finance Act, 1994 read with Section 35F of the Central Excise Act, 1994 does not warrant indulgence in exercise of power conferred under Article 226 of the Constitution of India.

11. In fine, the present writ petition stands dismissed. No costs.

(JASWANT SINGH)
JUDGE

(M.S. RAMAN)
JUDGE

Laxmikant

April 07, 2022
Cuttack