Darshan Patil

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 5690 OF 2024

M/s Perq Fabrics Exports …Petitioner

Versus

Union of India and Ors. …Respondents

Mr Aditya Talpade, a/w Mr Pratik Karande, Ms Namasvi Bhanushali, for the Petitioner.
Mr J B Mishra, a/w Ms Sangeeta Yadav, Ashutosh Mishra, for the Respondents.

CORAM: M.S. Sonak &
Jitendra Jain, JJ.

DATED: 02 December 2024

PC:-

1. Heard learned counsel for the parties.

2. The petitioner seeks the following substantive reliefs in this petition: -

> "(a) That this Hon'ble Court may be pleased to issue a Writ of Certiorari or any other appropriate Writ, order or direction calling for the record and proceedings and thereby order/direct that the Order-In-Appeal No. MUM-CUS-JSN-EXP-131,132 & 133/2019-20 NCH dated 20.02.2020 to be set aside and thereafter remand back to the Respondent No.2 to decide the issue on its own merits.
>
> (b) That this Hon'ble Court may be pleased to issue a Writ of Certiorari or any other appropriate writ, order or direction calling for the record and proceedings in Order-In-Appeal No. MUM-CUS-JSN-EXP-131,132 & 133/2019-

> 20 NCH dated 20.02.2020 to allow the benefit of drawback claim in respect of limitation period;"

3. The petitioner, in effect, challenges the Commissioner's order dated 20 February 2020 by which the Commissioner dismissed the petitioner's appeals against impugned orders in original dated 27 February 2004, 31 August 2004 and 07 August 2008 on the ground that such appeals were time-barred and instituted even beyond the condonable period in Section 128 of the Customs Act.

4. The petitioner claimed to have obtained knowledge of the orders in their original form on 21 August 2018. Mr Mishra pointed out that this contention is incorrect because, by communication dated 26 March 2018 (page 37 of the paper book), the respondents had made demands upon the petitioner referring to the orders in original.

5. However, even if the date of knowledge is accepted as 21 August 2018, appeals were instituted only on 27 February 2019, which is beyond the initial 60 days prescribed for instituting appeals and further the condonable period of 30 days specified in the Statute.

6. Section 128 of the Customs Act, 1962, is quite clear and the same reads as follows: -

> "128. Appeals to Commissioner (Appeals)—(1) Any person aggrieved by any decision or order passed under this Act by an officer of customs lower in rank than a Principal Commissioner of Customs or Commissioner of Customs may appeal to the Commissioner (Appeals) within sixty days from the date of the communication to him of such decision or order:
>
> Provided that the Commissioner (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid

> period of sixty days, allow it to be presented within a further period of thirty days.
>
> (1A) The Commissioner (Appeals) may, if sufficient cause is shown at any stage of hearing of an appeal, grant time, from time to time, to the parties or any of them and adjourn the hearing of the appeal for reasons to be recorded in writing:
>
> Provided that no such adjournment shall be granted more than three times to a party during hearing of the appeal.
>
> (2) Every appeal under this section shall be in such form and shall be verified in such manner as may be specified by rules made in this behalf."

7. The Commissioner (Appeals) could have entertained the appeal within 60 days or, if sufficient cause was made out, within a further 30 days. However, this appeal was instituted after a delay of almost 130 days, which the Commissioner (Appeals) could not even condone, given the provisions of Section 128 of the Customs Act. Accordingly, there is no legal infirmity for the impugned order dated 20 February 2020. No case is made out to interfere with the impugned order.

8. However, learned counsel for the petitioner submitted that the petitioner had no opportunity to challenge the original orders on merits. He further submitted that this Court should exercise its extraordinary jurisdiction under Articles 226 and 227 of the Constitution of India to permit the petitioner to challenge the orders in original on merits. The petitioner did have the opportunity, but he did not avail himself of it.

9. Mr Mishra pointed out that against the impugned order dated 20 February 2020, the petitioner had instituted an appeal before the tribunal, which was dismissed by the order dated 15 December 2021. He pointed out that the tribunal's order has also not been challenged by the petitioner in this petition.

10. The contentions, very similar to those now raised, were considered and rejected by the Hon'ble Supreme Court in the case of **Assistant Commissioner (CT) LTU, Kakinada & Ors. vs. M/s Glaxo Smith Kline Consumer Health Care Limited**[1]. The Court held that when a right of liability is created under statute by creating a special mechanism for enforcing duty, ordinarily, it is a remedy provided under the statute that must be availed of. The High Court should not normally permit the Petitioner to bypass mechanisms provided under the statute.

11. The Court also added that the powers of the High Court under Article 226 are wide but are not wider than the plenary powers bestowed on the Supreme Court under Article 142 of the Constitution. What the Supreme Court cannot do by exercising powers under Article 142, the High Courts also cannot do by exercising powers under Article 226 of the Constitution. The Court has emphatically held that neither Article 142 nor Article 226 jurisdiction can be exercised when invoked to undermine or defeat the applicable statutory regime. This is precisely what the present Petitioner seeks to achieve.

12. The Hon'ble Supreme Court also held that delay cannot be condoned beyond the maximum condonable period provided under the statute. The Court held that where complete mechanism is provided under the act for challenging assessment orders, that mechanism alone must be followed. A Writ Petition is not maintainable so as to defeat the statutory

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[1] 2020 19 SCC 681

scheme. Delays beyond the aggregate period prescribed, as the maximum condonable period, cannot be condoned by exercising powers under Article 142 or 226 of the Constitution. Nor can such delay be condoned by invoking Section 5 of the Limitation Act, 1963.

13. In the case before the Hon'ble Supreme Court, the learned Counsel for the Petitioner tried to argue the matter on merits. The Hon'ble Supreme Court made it clear that a party may have an arguable case on merits, but that can have no bearing on the justification for non-filing of the appeal within the statutory period. The Hon'ble Supreme Court did not approve the High Court going into the merits of the matter or holding the writ should be entertained because the party had an arguable case, despite the statutory appeal being time-barred. The Court emphasised that when a complete appellate mechanism is provided under the statute, including a maximum period of limitation, writ jurisdiction cannot be exercised to undermine the statutory regime.

14. The ratio of the above decision squarely applies to the facts of the present case; based on these, no case is made to entertain this petition.

15. For all the above reasons, we decline to entertain this petition.

16. This petition is accordingly dismissed without any cost order.

(Jitendra Jain, J) **(M.S. Sonak, J)**

Signed by: Darshan Patil
Designation: PA To Honourable Judge
Date: 04/12/2024 10:02:15