

(2015) 03 GUJ CK 0068
In the Gujarat High Court

Case No : Special Civil Application Nos. 18542 and 13530 of 2014

Panoli Intermediate (India) Pvt. Ltd.

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 13-03-2015

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35
Civil Procedure Code, 1908 (CPC) — Section 115
Constitution of India, 1950 — Article 141, 226, 227

Citation : AIR 2015 Guj 97 : (2015) 326 ELT 532 : (2015) 2 GLR 1395 : (2015) 51 GST 720 : (2015) 3 RCR(Civil) 938

Hon'ble Judges : Jayant M. Patel, J;S.H. Vora, J;K.J. Thaker, J

Bench : Full Bench

Advocate : Paresh M. Dave and Dhaval Shah, for the Appellant; Darshan M. Parikh, Advocates for the Respondent

Judgement

Jayant M. Patel, J.—The Division Bench of this Court has formulated the following questions and has referred the matter to the Larger Bench:

"(1) Whether the period of limitation provided of 60 days, for filing an appeal under Section 35 of the Central Excise Act, 1944, could be extended only up to 30 days as provided by the proviso or the delay beyond the period of 90 days could also be condoned in filing an appeal?

(2) Where a statutory remedy or appeal is provided under Section 35 of the Central Excise Act, 1944 and the delay cannot be condoned under Section 35 beyond the period of 90 days, then whether Writ Petition under Article 226 of the Constitution of India would lie for the purpose of condoning the delay in filing the appeal?

(3) When if the statutory remedy or appeal under Section 35 is barred by the law of limitation whether in a Writ Petition under Article 226 of the Constitution of India, the order passed by the original adjudicating authority could be challenged on merits?

As such, the background of the matters are that the petitioner of SCA No. 18542/14 had preferred appeal before the Customs, Central Excise and Service Tax Appellate Tribunal (Ahmedabad), against the order passed by the Commissioner of Central Excise (Appeals), which arose from the order passed by the adjudicating authority being Order in Original. In the said appeal there was delay of 118 days in preferring appeal and therefore, the Tribunal dismissed the appeal on the ground of delay since as per the Tribunal, there was no power to condone the delay beyond 30 days. Under the circumstances, the said petition. When the appeal came up for hearing before the Division Bench of this Court, the Division Bench noticed that since as per the provisions of section 35 of the Central Excise Act, 1944 (hereinafter referred to as the "Act") the delay cannot be condoned beyond the period of 90 days, i.e., 60 days being the prescribed period and further discretion to condone the delay in 30 days. But the learned counsel for the petitioner placed reliance upon the another decision of the Division Bench of this Court in the case of Amitara Industries Ltd. v. Union of India, decided on 30.01.2013 passed in SCA No. 6069/11 and contended that as per the view taken in the said decision, the delay can be condoned beyond the period of 90 days provided there is a good case on merits and the learned counsel for the petitioner also relied upon other decisions of this Court including the decision in the case of D.R. Industries Ltd. and Another Vs. Union of India (UOI) and Others, (2008) 127 ECC 61 : (2008) 153 ECR 61 : (2008) 229 ELT 24 : (2008) 3 GLH 662 . The Division Bench hearing SCA No. 18542/14 found that the matter is required to be referred to the Larger Bench for decision. Hence, the aforesaid questions were formulated and the matter has been referred to the Larger Bench.

2. It may be recorded that when SCA No. 13530/14 came up before the another Division Bench of this Court, it was brought to the notice of the said bench that the question involved in the petition for the period of limitation has been referred to the Larger Bench in SCA No. 18542/14. Under the circumstances, the said SCA No. 13530/14 has been listed before the larger bench simultaneously.

3. We have heard Mr. Paresh Dave with Mr. Dhaval Shah, learned counsel appearing for the petitioners in both the matters and Mr. Darshan Parikh appearing in SCA No. 13530/14 for the respondents.

4. Mr. Dave, learned counsel appearing for the petitioners, at the outset submitted that the reference could be said as incompetent since there were no divergent views of the two Division Benches of this Court. He submitted that the Division Bench of this Court, which referred the matter to the Larger Bench was guided by the impression that the decision of this Court in the case of Amitara Industries Ltd. (supra) and D.R. Industries Ltd. (supra) were in conflict and therefore, the referral bench found it proper to refer the matter to the Larger Bench which is on a nonexistent premise. He also submitted that the judgment of the earlier Division Bench in the case of DR. Industries Ltd.(supra) as well as Amitara Industries Ltd. (supra) were binding to the subsequent Division Bench of

the Court which referred the matter to the larger bench and in his submission even if the referral Bench was of the view that the matter deserves to be referred to the Larger Bench, it was required for the referral bench to record the reasons for disagreement and thereafter only the matter could be referred to the Larger Bench. He submitted that in the order dated 06.01.2015 passed by the referral bench of this Court in SCA No. 18542/14, there are no reasons recorded for disagreement nor any reasons are recorded for referring the matter to the larger bench and therefore, he submitted that there was no valid reason for the referral bench to refer the matter to the larger bench and hence, the reference can be said as incompetent to the larger bench.

5. Whereas, Mr. Parikh, learned counsel appearing for the respondents in SCA No. 13530/14 supported the order and submitted that when the questions are formulated and referred to the Larger Bench, the Larger Bench may examine the questions and express the view and the reference may not be termed as incompetent.

6. In order to appreciate the contention, we may record that the referral order of the Division Bench dated 06.01.2015 in SCA No. 18542/14 reads as under:

"1. A short question arises for consideration in this appeal is as to whether the delay in filing the appeal under Section 35 of the Central Excise Act, 1944 would be condoned beyond a period of 90 days. The law provides that appeal can be filed before the Commissioner (Appeals) within a period of 60 days from the date of communication to him of such decision or order of the Central Excise Officer. The first proviso to Section 35 lays down that if the Commissioner (Appeals) is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of 60 days, he can allow the appeal to present within a further period of 30 days, which means 60 days+30 days=90 days. Section 35 does not provide condonation of delay or confer any powers for condonation of delay to the Commissioner (Appeals) beyond a period of 90 days. Therefore, the appeal, without delay, could be presented within a period of 90 days and not beyond it.

2. Mr. Dhaval Shah, learned counsel for the petitioner has placed reliance on the decision of the Division Bench of this Court in the case of Amitara Industries Limited v. Union of India, decided on 30.01.2013 passed in Special Civil Application No. 6069 of 2011, wherein the view taken by the Division Bench is that the delay can be condoned beyond a period of 90 days provided that the petitioner has a very good case on merits. The other decisions relied on by the learned counsel for the petitioner are to the same effect. In the case of Lathia Industrial Supplies Co. Private Limited v. The Commissioner (Appeal-I) and another, decided on 20.03.2013 in Special Civil Application No. 16182 of 2012, as well as in the case of Ravi Pharmaceuticals Private Limited v. Union of India and others in Special Civil Application No. 14936 of 2012 with Special Civil Application No. 14937 of 2012 to Special Civil Application No. 14938 of 2012, decided on 14.03.2013, and in the case of Nelly Garments Private Limited v. Union of India

and others, decided on 18.12.2014 in Special Civil Application No. 14778 of 2014.

3. Apart from the aforesaid decisions, there is another decision in the case of D.R. Industries Ltd. and Another Vs. Union of India (UOI) and Others, (2008) 127 ECC 61 : (2008) 153 ECR 61 : (2008) 229 ELT 24 : (2008) 3 GLH 662 , wherein the same was considered in para 18, and raises another question in para 19 that if there is delay beyond 90 days, only such delay can be condoned in a Writ Petition under Article 226 of the Constitution of India.

4. Therefore, we are of the opinion that the matter is required to be referred to a Larger Bench for decision. We formulate the following questions for decision by the Larger Bench of this Court:

(1) Whether the period of limitation provided of 60 days, for filing an appeal under Section 35 of the Central Excise Act, 1944, could be extended only up to 30 days as provided by the proviso or the delay beyond the period of 90 days could also be condoned in filing an appeal?

(2) Where a statutory remedy or appeal is provided under Section 35 of the Central Excise Act, 1944 and the delay cannot be condoned under Section 35 beyond the period of 90 days, then whether Writ Petition under Article 226 of the Constitution of India would lie for the purpose of condoning the delay in filing the appeal?

(3) When if the statutory remedy or appeal under Section 35 is barred by the law of limitation whether in a Writ Petition under Article 226 of the Constitution of India, the order passed by the original adjudicating authority could be challenged on merits?

5. We refer the aforesaid three questions for decision of the Larger Bench of this Court. We make it clear that it shall be open to the Larger Bench to reframe the questions or add further questions, which may be decided by the Larger Bench. We also refer the entire case to the Larger Bench of this Court.

6. Let the record be placed before Hon"ble The Acting Chief Justice on Administrative side for constitution of a Larger Bench."

7. It is true that as per the above referred order, no specific reasons are recorded by the Division Bench for disagreement with the view taken by the other Division Bench of this Court in the case of D.R. Industries Ltd. (supra) as well as Amitara Industries Ltd. (supra) and the views taken in the other matters referred to by the Division Bench in para 2 of the aforesaid order. However, if the tenor of the order is considered, it does appear that the referral bench, in the aforesaid order, did consider the statutory provisions of section 35 of the Act, wherein the period of filing the appeal has been prescribed of 60 days and the power for condoning the delay is provided for 30 days and the referral bench found that section 35 of the Act does not provide for condonation of delay or confer any power to condone the delay to the Commissioner beyond the period of 30 days. But it was confronted that the other decisions of this Court in the case of Amitara Industries

Ltd. (supra) and D.R. Industries Ltd. (supra) and other decisions which have been referred to in the referral order, hence the referral Bench formulated the opinion that the matter is required to be referred to the Larger Bench. Therefore, taking the base of the statutory provision, it can be said that dissent to that extent was expressed not directly but indirectly or the tenor of the order could be said as a dissent with the earlier view in the case of Amitara Industries Ltd. (supra) and D.R. Industries (supra) by taking the base of statutory provisions of section 35 of the Act. Apart from the above, it cannot be said that the questions which are referred to by the Division Bench to the larger Bench are not of the general importance. Under these circumstances, we find it appropriate to answer the question instead observing the reference incompetent.

8. At this stage, we may make useful reference to the observations made by another Larger bench of this Court (Coram : Jayant Patel (one of us), Akil Kureshi and R.M. Chhaya, J.J.) in the case of Jayendrasinh Bhupatsinh Dima Vs. State of Gujarat and Others, AIR 2012 Guj 124 : (2012) 1 GLR 124 wherein also, the preliminary contention was raised that the reference to the Larger Bench by the learned Single Judge was uncalled for. This Court in the said decision, by relying on the earlier decision of the Larger Bench of this Court, observed from paras 4 to 8 as under:

"4. The first preliminary contention was raised by the learned Counsel for the respondent No. 5 that the learned Single Judge, as per the law of precedents, was bound by the view taken by the Division Bench of this Court on the aspects of maintainability of the appeal against the resolution of the Gram Panchayat for "motion of no confidence" and, therefore, the learned Single Judge could not have referred the matter to the Larger Bench. He submitted that, therefore, the present reference was not called for. The learned Counsel, in support of his submission, relied upon the observations of the Apex Court in the case of Pradip Chandra Parija and Others Vs. Pramod Chandra Patnaik and Others, (2002) 111 CompCas 299 : (2002) 174 CTR 580 : (2003) 90 ECC 878 : (2002) 144 ELT 7 : (2002) 254 ITR 99 : (2001) 10 JT 347 : (2001) 8 SCALE 384 : (2002) 1 SCC 1 : (2001) AIRSCW 5016 : (2001) 8 Supreme 548 .

5. We may record that the learned Single Judge, before opining to refer the issue to the Larger Bench in the order dated 11.8.2011 passed by him in the present proceedings vide paragraphs 22, 23, 24 and 25 has observed, thus:"

22. As could be observed from the decisions of this Court in cases touching upon the provisions of Sections 242, 249 and 259 of the Panchayat Act on question of challenge to passing of "no confidence motion" it becomes evident that no bench was specifically invited to examine the issue on framing searching question, but the benches have expressed opinion that appeal would be available under Section 242 of the Panchayat Act for challenging resolution of no confidence. It is also required to be noted that the observations made in other earlier judgments were not cited before the Court. The Apex Court has in case of State of U.P. and Another Vs. Synthetics and Chemicals Ltd. and Another, (1993) 41 ECC 326 :

(1991) 3 JT 268 : (1993) 2 SCALE 65 : (1991) 2 SCALE 110 : (1991) 4 SCC 139 : (1991) 3 SCR 64 : (1992) 87 STC 289 : (1991) 2 UJ 396 observed as under:

"In Jaisri Sahu Vs. Rajdewan Dubey and Others, AIR 1962 SC 83 : (1962) 2 SCR 558 this Court while pointing out the procedure to be followed when conflicting decisions are placed before a bench extracted a passage from Halsbury's Laws of England incorporating one of the exception when the decision of an appellate court is not binding. 41. (sic) Does this principle extend and apply to a conclusion of law, which neither raised nor preceded by any consideration. In other words can such conclusion be considered as declaration of law? Here again the English courts and jurists have carved out an exception to the rule of precedents. It has been explained as rule of sub silentio "A decision passes sub silentio, in technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the court or present to it mind (Salmond on Jurisprudence 12th Edn p. 153). In Lancaster Motor Company (London) Ltd. v. Bremith Ltd. the Court did not feel bound by earlier decision as it was rendered "without any argument, without reference to the crucial words of the rule and without any citation of authority." It was approved by this Court in Municipal Corporation of Delhi Vs. Gurnam Kaur, AIR 1989 SC 38 : (1988) 4 JT 11 : (1988) 2 SCALE 1155 : (1989) 1 SCC 101 : (1988) 2 SCR 929 Supp : (1988) 2 UJ 713 . The bench held that "precedents sub silentio and without arguments are of no moment". The courts thus have taken recourse to this principle for relieving from injustice perpetrated by unjust precedents. A decision which is not express and is not founded on reason nor it proceeds on consideration of issue cannot be deemed to be a law declared to have binding effect as is contemplated by Article 141. Uniformity and consistency are core of judicial discipline. But that which escapes in the judgment without any occasion is not ratio decidendi. In B. Shama Rao Vs. The Union Territory of Pondicherry, AIR 1967 SC 1480 : (1967) 2 SCR 650 : (1967) 20 STC 215 it was observed that "it is trite to say that a decision is binding not because of its conclusions but in regard to its ratio and the principles laid down therein." Any declaration or conclusion arrived without application of mind cannot be deemed to be declaration of law or authority of a general nature binding as precedent. Restraint in dissenting or overruling is for sake of stability and uniformity but rigidity beyond reasonable limits is inimical to the growth of law."

23. The another decision of the Apex Court also needs to be cited on the point as in case of Sundarjas Kanyalal Bhathija and others Vs. The Collector, Thane, Maharashtra and others, AIR 1991 SC 1893 : AIR 1990 SC 261 : (1990) 68 CompCas 20 : (1989) 25 ECR 129 : (1990) 183 ITR 130 : (1989) 3 JT 57 : (1989) 2 SCALE 7 : (1989) 3 SCC 396 : (1989) 3 SCR 405 : (1989) 2 UJ 485 the Apex Court has observed as under:

"21. Chief Justice Pathak in recent decision stressed the need for clear and consistent enunciation of legal principle in the decisions of a court. Speaking for

the Constitution Bench Union of India (UOI) and Another Vs. Raghubir Singh (Dead) by Lrs. Etc., AIR 1989 SC 1933 : (1989) 66 CompCas 466 : (1989) 178 ITR 548 : (1989) 2 JT 427 : (1989) 1 SCALE 1337 : (1989) 2 SCC 754 : (1989) 3 SCR 316 : (1989) 74 STC 313 learned Chief Justice said : The doctrine of binding precedent has the merit of promoting a certainty and consistency in judicial decisions, and enables an organic development of law, besides providing assurance to the individual as to the consequence of transaction forming part of his daily affairs. And, therefore the need for a clear and consistent enunciation of legal principle in the decision of a court.

22. Cardozo propounded a similar thought with more emphasis: I am not to mar the symmetry of the legal structure by the introduction of inconsistencies and irrelevances and artificial exceptions unless for some sufficient reasons, which will commonly be some consideration of history or custom or policy or justice. Lacking such a reason, I must be logical just as I must be impartial, upon like grounds. It will not do to decide the same question one way between one set of litigants and the opposite way between another.

In our system of judicial review which is part of our constitutional scheme, we hold it to be the duty of Judges of superior courts and tribunals to make the laws more predictable. The question of law directly arising in the case should not be dealt with apologetic approaches. The law must be made more effective as a guide to behaviour. It must be determined with reasons which carry convictions within the courts, profession and public. Otherwise, the lawyers would be a predicament and would not know how to advise their clients. Subordinate courts would find themselves in an embarrassing position to choose between the conflicting opinions. The general public would be in dilemma to obey or not to obey such law and it ultimate falls into disrepute.

24. Thus it is of utmost important to settle the position of law qua purvey and purport of sub-section (2) of Sections 56, 70 and 84 and the legislative intent in enacting and the jurisdiction powers and purvey of the district appellate committee working under Section 242 and State Authority working under Sections 249 and 259 of the Panchayat Act in respect of resolution passed by Panchayats against it's Sarpanch, Up-Sarpanch, President and Vice-Presidents under Sections 56, 70 and 84 of the Panchayat Act. There are observations and directions both by learned Single Judges and Division Benches in respect of Sections 242, 249 and 259, hence the matter is in fact requires to be referred to a larger bench under Rule 5 of the Gujarat High Court Rules 1993 which reads as under:

"Rule 5: (1) A Single Judge may refer any matter before him or question arising in such matter to a Division Bench of two Judges or a Larger Bench.

(2) A Division Bench of two Judges may refer any matter before it or any question arising therein or any question referred to it under sub-rule (1) above to a Larger Bench.

25. On the question as to whether a Single Judge of this Court can directly refer the matter to Larger Bench or it has to be referred only to the Division Bench, the Full Bench of this Court has in case of Rama Fertilizers Pvt. Ltd. Vs. State of Gujarat, (2001) CriLJ 185 : (2001) 21 GLH 698 held as under:

"4.1 It will be seen from the provisions of Rule 5 of the Gujarat High Court Rules, 1993 that a Single Judge may refer any matter before him or question arising in such matter to a Division Bench of two or more Judges or a Larger Bench. The rule does not require any reason for being recorded for the purpose and it is sufficient if in the opinion of learned Single Judge the requires to be considered by a Division Bench of two Judges or Larger Bench. Therefore even if no reason is recorded for referring the matter there can arise no question of a Larger Bench not being able to consider the matter, because, the process of assignment of work to Benches is purely an internal matter of the High Court governed by these Rules and a matter, which could have been considered by a learned Single Judge, can always be referred for a decision to a Larger Bench."

6. The aforesaid as such clearly go to show that after considering the provisions of Rule 5, the learned Single Judge found that important questions have arisen in the present matter and, therefore, he has opined to refer the matter to the Larger Bench. But we find that the matter does not end there for considering the contention of respondent No. 5 on the aspects of maintainability and the reason being that the opinion of the learned Single Judge to refer the matter to the Larger Bench by raising the questions remained as the opinion when the matters were placed before the Hon''ble the Acting Chief Justice on administrative side for placement of the matter to the Larger Bench. The Hon''ble Acting Chief Justice having considered the order passed by the learned Single Judge, has found it proper to place the matter before the Larger Bench. Therefore, if the Hon''ble Acting Chief Justice on administrative side has taken decision for placement of the matter before the Larger Bench, whether the learned Single Judge could refer the matter to the Division Bench or Larger Bench would lose its significance since ultimately the Hon''ble Chief Justice or the Hon''ble Acting Chief Justice is the Master of Roster and the power on administrative side cannot be controlled by the contention raised on behalf of the respondent No. 5 as canvassed.

7. Apart from the above, we also find that the important questions of law have arisen in the present matter as observed by the learned Single Judge on the aspects of maintainability of the appeal or revision against the "motion of no confidence". At this stage, we may refer to certain observations of the Larger Bench in the case of Nandlal Bavanjibhai Posiya and Others Vs. Director of Agriculture Marketing and Rural Finance and Another, AIR 2002 Guj 348 : (2002) 22 GLH 659 : (2002) 2 GLR 1132 , wherein more or less similar contention was raised, which has been dealt with by the Larger Bench at paragraph 5 as under:--

"At the out set, we consider it appropriate to record that as on the question raised before the learned Single Judge the earlier Single Bench decision of this

Court in Narmadaben V. Parmar (1998 AIHC 1318 (Guj)) (supra) was relied on, in which reliance was placed on Division Bench decision of this Court in Chimanbhai R. Patel and etc. Vs. Anand Municipality, Anand and Others, AIR 1983 Guj 136 : (1983) 1 GLR 67 which was binding precedent on her, an order of reference to a Bench larger than of two Judges was not required, unless the learned Single Judge would have expressed a dissenting opinion on the question of law involved in the case. None the less, since both the Letters Patent Appeals and Special Civil Applications raising a question of law of general importance have been placed before us we proceed to decide the same on merits."

8. In the decision of the Apex Court in the case of Pradip Chandra Parija and Others Vs. Pramod Chandra Patnaik and Others, (2002) 111 CompCas 299 : (2002) 174 CTR 580 : (2003) 90 ECC 878 : (2002) 144 ELT 7 : (2002) 254 ITR 99 : (2001) 10 JT 347 : (2001) 8 SCALE 384 : (2002) 1 SCC 1 : (2001) AIRSCW 5016 : (2001) 8 Supreme 548 when the matters were placed before the Larger Bench, the Bench who heard the reference found that two Judges" Bench could not have referred the matter to the Constitutional Bench and, therefore, did not examine the aspect about the importance of the questions to be decided by them. Therefore, they referred the matter back holding that the matter could not have been referred to the Constitutional Bench by two Judges of the Apex Court and consequently directed the placement of the matter before three Judges of the Apex Court. Such are not the fact situation in the present case. In the facts and circumstances of the case for the reasons recorded by us hereinabove we are inclined to adopt the same course as was undertaken by the earlier Full Bench (Larger Bench> of this Court in the case of Nandlal Bavanjibhai Posiya and Others Vs. Director of Agriculture Marketing and Rural Finance and Another, AIR 2002 Guj 348 : (2002) 22 GLH 659 : (2002) 2 GLR 1132 , since we find that as the Special Civil Application raising questions of law of general importance, has been placed before us we proceed to decide the same on merits. Under these circumstances, the preliminary contention raised by respondent No. 5 fails."

(Emphasis supplied)

9. Before we further proceed to examine the question referred to Larger Bench, we find it proper to consider and examine the statutory provisions and also the relevant case law on the point.

10. Section 35 of the Act reads as under:

"35. Appeals to [Commissioner (Appeals)].-- (1) Any person aggrieved by any decision or order passed under this Act by a Central Excise Officer lower in rank than a [Commissioner of Central Excise] may appeal to the [Commissioner of Central Excise (Appeals)] [hereafter in this Chapter referred to as 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 the prescribed form and shall be verified in the prescribed manner."

11. The aforesaid provision shows that any person aggrieved by the decision or the order of the Central Excise Officer may appeal to the Commissioner of Central Excise (Appeals) within a period of 60 days and it is further provided that the Commissioner (Appeals) if is satisfied that the appellant was prevented by sufficient cause, he may allow the appeal to be presented within further period of 30 days.

12. In the case of D.R. Industries Ltd. (supra), the Division Bench of this Court had an occasion to examine the scope and ambit of section 35 of the Act and it was observed at paragraphs 16 to 18, as under:

"16. Similarly, whether a person is aggrieved by an order of the Commissioner of Central Excise as the original authority or by an order of the Commissioner (Appeals) as the appellate authority, the period of limitation for approaching the Appellate Tribunal is the same, whether the aggrieved party is an assessee or the revenue. Thus, there is no discrimination in the matter of the length of period for which the delay can be condoned by the Appellate Tribunal, whether the appellant is an assessee or the revenue.

17. In view of the above discussion, it is not necessary to refer to or deal with the decisions cited by the learned Assistant Solicitor General for the proposition that there is a presumption about constitutionality of a statute nor is it necessary to refer to or deal with the decisions cited by the learned counsel for the petitioners as regards the burden of justifying differentiation or discrimination.

18. We, therefore, do not find any merit in any of the contentions raised on behalf of the petitioners for challenging the constitutional validity of the proviso to sub-section (1) of Section 35 of the Central Excise Act. 1944 in so far as the Parliament has provided for the limitation period of 60 days for filing an appeal before the Commissioner (Appeals) and in so far as the power to condone the delay conferred on the Commissioner (Appeals) is only for a period of 30 days after expiry of the limitation period of 60 days."

(Emphasis supplied)

However, the Division Bench, while considering the extraordinary cases where an assessee may not be in a position to challenge the order of the adjudicating

authority, explaining the delay and the gross injustice done by the adjudicating authority, it was observed by the Division Bench at paragraph 19, as under:

"19. As regards the contention that there may be extraordinary cases where assessee may not be in a position to challenge the order of the adjudicating authority before the Commissioner (Appeals) within a period of 90 days from the date of communication of the order, we are of the view that in such extraordinary cases where an assessee can show extra ordinary circumstances explaining the delay and also gross injustice done by the adjudicating authority, the assessee may invoke the writ jurisdiction of this Court. Hence, in cases where the assessee have suffered gross injustice and they could not file appeals before the Commissioner (Appeals) within a period of 90 days from the date of communication of the order in original on account of circumstances beyond their control, such assessee can invoke the powers of this Court under Article 226 of the Constitution but, of course, not as a matter of right."

(Emphasis supplied)

13 The aforesaid shows that the Division Bench of this Court in the case of D.R. Industries Ltd. (supra) did not find any substance in the challenge to the constitutional validity of the provisions of section 35 of the Act and further expressed the view that the power to condone delay by the Commissioner (Appeals) is for a period of 30 days after the expiry of the limitation period of 60 days, but while further considering the extraordinary cases where gross injustice has been done by the adjudicating authority but the assessee could not prefer appeal within the outer limit of 90 days, it was observed that the assessee can invoke the power of this Court under Article 226 of the Constitution, but of course not as of right. Thereafter, the Division Bench in the said case permitted the petitioner therein to file the petition under Article 226 of the Constitution.

14. In the case of Amitara Industries Ltd. (supra), the another Division Bench of this Court observed at paragraph 12, as under:

"12.....Thus the total length of delay being very small and with extremely good ground on merit to sustain, we are of the opinion that non interference at this stage would cause gross injustice to the petitioner. Therefore, we need to step in by invoking extraordinary jurisdiction."

15. In the said case, the Division Bench of this Court had relied upon the earlier decision of this Court in the case of D.R. Industries Ltd. (supra). Therefore, as such, there is considerable force in the contention of the learned counsel appearing for the petitioner that the decision in case of Amitara Industries Ltd. (supra) is not in conflict with the view taken by the earlier decision of this Court in case of D.R. Industries Ltd. (supra) nor it can be said that this Court in the case of Amitara Industries Ltd. (supra) had taken the view that the delay can be condoned beyond the period of 30 days (beyond the period of 90 days from the period of order under challenge). It can rather be said that the Court found it appropriate case being exceptional case of gross injustice on account of statutory

provision of maximum limit of 90 days in preferring appeal and therefore, found it proper to exercise the power under Article 226 of the Constitution.

16. Similarly, in the other decision of this Court in the case of Lathia Industrial Supplies Co. Ltd. v. Commissioner of Appeals and Anr., in SCA No. 16182/12 decided on 20.03.2013, the Division Bench of this, Court made the observation at para 5, as under:

"5.....the Court finds that non-consideration of the issues would result into gross injustice."

Thereafter, the Court proceeded to exercise the power under Article 226 of the Constitution.

17. In the case of Ravi Pharmaceuticals P. Ltd. v. Union of India in SCA No. 14936/12, the Division Bench of this Court at paragraph 6 of the said decision dated 14.03.2013, had observed as under:

"6.....It is a case where, if the petition is not entertained, great injustice would cause to the petitioner."

Thereafter, the Court proceeded to exercise the power under Article 226 of the Constitution.

18. In the case of Nelly Garments Pvt. Ltd. v. Union of India in SCA No. 14778/14 decided on 18.12.2014, the entire proceedings before the adjudicating authority had gone ex parte and it was further found at paragraph 6 that:--

"6..... the High Court is not devoid of its jurisdiction under Article 226 of the Constitution of India in rare exceptional cases to examine the validity and legality of the order of the adjudicating authority."

Thereafter, the powers under Article 226 of the Constitution was exercised.

19. In our view, none of the above referred decision could be said as in conflict with the views taken by the earlier Division Bench of this Court in the case of D.R. Industries (supra). Further, as per the above referred decisions of the various Division Bench of this Court, it can be said that the legal position prevailing upto now are as under:--

(1) The appeal deserves to be preferred within the prescribed time limit as per section 35 of the Act and the delay beyond the period of 30 days cannot be condoned by the appellate authority. Hence, the outer limit of preferring appeal including the period for condonation of delay could be said as 90 days.

(2) In exceptional cases, where it is a case of "gross injustice", the aggrieved person can invoke the writ jurisdiction under Article 226 of the Constitution and if the Court is satisfied that it is an exceptional case of gross injustice, the power under Article 226 can be exercised.

20. Mr. Dave, learned counsel appearing for the petitioners contended that the

view taken by the Division Bench of this Court in the case of D.R. Industries Ltd. (supra) is consistently followed by this Court in large number of its subsequent decisions since 2008 and this Court has exercised the power under Article 226 of the Constitution where it was found that gross injustice would be caused if no interference is made on the ground of limitation period including outer limit as provided under section 35 of the Act is over and he further submitted that the constitutional power of this Court under Article 226 can neither be controlled by any statutory provision nor can be prescribed in definite language. He submitted that the power under Article 226 of the Constitution of this Court can be exercised by this Court in exceptional cases as held by the Division Bench of this Court in the case of D.R. Industries Ltd. (supra), if this Court finds that gross injustice would be caused if no interference is made on account of the expiry of the statutory period of preferring appeal or for the expiry of outer limit of power with the appellate authority for condonation of delay of 30 days. He submitted that therefore, Larger Bench of this Court may not upset the view already taken by the Division Bench of this Court in the case of D.R. Industries Ltd. (supra).

21. Whereas Mr. Parikh, learned counsel appearing for the respondent in one of the matter, contended that the view taken in the case of D.R. Industries Ltd. (supra) cannot be said as fully correct because the Apex Court in the other decisions have declined to exercise the power even in writ jurisdiction on the ground that limitation period including the outer limit for condonation of delay was over. He further submitted that it has become a regular practice on the part of the assessee to prefer writ petition under Article 226 of the Constitution in practically all cases where the limitation period is over for condonation of delay and such course deserves to be discouraged. He submitted that the view taken by the Division Bench of this Court in the case of D.R. Industries Ltd. (supra) deserves to be diluted or deserves to be further explained keeping in view the subsequent decisions of the Apex Court wherein the Apex Court has declined interference to the orders of the High Court wherein the power under Article 226 of the Constitution were not exercised on account of the expiry of the period of limitation including for condonation of delay. He therefore submitted that the Larger Bench of this Court may examine the question and may answer in favour of the Revenue.

22. In order to appreciate the contentions raised by the respective sides, it would be appropriate to first consider the scope and ambit of the power under Article 226 of the Constitution. As such, the question is no more res integra when the jurisdiction of the High Court to entertain the petition for writ of certiorari under Article 226 of the Constitution or power of superintendence under Article 227 of the Constitution against the orders are to be considered. It can hardly be disputed that the power of this Court under Articles 226 and 227 of the Constitution are conferred by the Constitution and cannot be diluted or nullified by any statute or legislation. At this stage, useful reference can be made to the decision of the Apex Court in the case of Surya Dev Rai Vs. Ram Chander Rai and Others, AIR 2003 SC 3044 : (2003) 4 CTC 48 : (2003) 6 SCALE 133 : (2003) 6

SCC 675 : (2003) 2 SCR 290 Supp : (2003) WritLR 722 : (2003) AIRSCW 3872 : (2003) 6 Supreme 390 wherein the question came up for consideration before the Apex Court as to whether the amendment made in the Code of Civil Procedure under section 115 would in any manner affect the jurisdiction under Articles 226 and 227 of the Constitution. The Apex Court in the said decision, after considering various decisions, concluded at para 38 as under:

"38. Such like matters frequently arise before the High Courts. We sum up our conclusions in a nutshell, even at the risk of repetition and state the same as hereunder:

(1) Amendment by Act No. 46 of 1999 with effect from 01.07.2002 in Section 115 of Code of Civil Procedure cannot and does not affect in any manner the jurisdiction of the High Court under Articles 226 and 227 of the Constitution.

(2) Interlocutory orders, passed by the courts subordinate to the High Court, against which remedy of revision has been excluded by the CPC Amendment Act No. 46 of 1999 are nevertheless open to challenge in, and continue to be subject to, certiorari and supervisory jurisdiction of the High Court.

(3) Certiorari, under Article 226 of the Constitution, is issued for correcting gross errors of jurisdiction, i.e., when a subordinate court is found to have acted (i) without jurisdiction by assuming jurisdiction where there exists none, or (ii) in excess of its jurisdiction by overstepping or crossing the limits of jurisdiction, or (iii) acting in flagrant disregard of law or the rules of procedure or acting in violation of principles of natural justice where there is no procedure specified, and thereby occasioning failure of justice.

(4) Supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping the subordinate courts within the bounds of their jurisdiction. When the subordinate Court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or the jurisdiction though available is being exercised by the Court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby, the High Court may step into exercise its supervisory jurisdiction.

(5) Be it a writ of certiorari or the exercise of supervisory jurisdiction, none is available to correct mere errors of fact or of law unless the following requirements are satisfied : (i) the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and (ii) a grave injustice or gross failure of justice has occasioned thereby.

(6) A patent error is an error which is self evident, i.e., which can be perceived or demonstrated without involving into any lengthy or complicated argument or a long drawn process of reasoning. Where two inferences are reasonably possible and the subordinate court has chosen to take one view the error cannot be called gross or patent.

(7) The power to issue a writ of certiorari and the supervisory jurisdiction are to be exercised sparingly and only in appropriate cases where the judicial conscience of the High Court dictates it to act lest a gross failure of justice or grave injustice should occasion. Care, caution and circumspection need to be exercised, when any of the above said two jurisdictions is sought to be invoked during the pendency of any suit or proceedings in a subordinate court and the error though calling for correction is yet capable of being corrected at the conclusion of the proceedings in an appeal or revision preferred there against and entertaining a petition invoking certiorari or supervisory jurisdiction of High Court would obstruct the smooth flow and/or early disposal of the suit or proceedings. The High Court may feel inclined to intervene where the error is such, as, if not corrected at that very moment, may become incapable of correction at a later stage and refusal to intervene would result in travesty of justice or where such refusal itself would result in prolonging of the lis.

(8) The High Court in exercise of certiorari or supervisory jurisdiction will not covert itself into a Court of Appeal and indulge in depreciation or evaluation of evidence or correct errors in drawing inferences or correct errors of mere formal or technical character.

(9) In practice, the parameters for exercising jurisdiction to issue a writ of certiorari and those calling for exercise of supervisory jurisdiction are almost similar and the width of jurisdiction exercised by the High Courts in India unlike English courts has almost obliterated the distinction between the two jurisdictions. While exercising jurisdiction to issue a writ of certiorari the High Court may annul or set aside the act, order or proceedings of the subordinate courts but cannot substitute its own decision in place thereof. In exercise of supervisory jurisdiction the High Court may not only give suitable directions so as to guide the subordinate court as to the manner in which it would act or proceed thereafter or afresh, the High Court may in appropriate cases itself make an order in super session or substitution of the order of the subordinate court as the court should have made in the facts and circumstances of the case.

Though we have tried to lay down broad principles and working rules, the fact remains that the parameters for exercise of jurisdiction under Articles 226 or 227 of the Constitution cannot be tied down in a strait jacket formula or rigid rules. Not less than often the High Court would be faced with dilemma. If it intervenes in pending proceedings there is bound to be delay in termination of proceedings. If it does not intervene, the error of the moment may earn immunity from correction. The facts and circumstances of a given case may make it more appropriate for the High Court to exercise self restraint and not to intervene because the error of jurisdiction though committed is yet capable of being taken care of and corrected at a later stage and the wrong done, if any, would be set right and rights and equities adjusted in appeal or revision preferred at the conclusion of the proceedings. But there may be cases where "a stitch in time would save nine". At the end, we may sum up by saying that the power is there

but the exercise is discretionary which will be governed solely by the dictates of judicial conscience enriched by judicial experience and practical wisdom of the Judge."

23. The aforesaid decision was considered by the Apex Court in the case of Mahendra Saree Emporium Vs. G.V. Srinivasa Murthy, AIR 2004 SC 4289 : (2004) 7 JT 20 : (2004) 7 SCALE 271 : (2005) 1 SCC 481 : (2004) 3 SCR 931 Supp : (2004) AIRSCW 4797 : (2004) 6 Supreme 599 , wherein while considering the aspects as to whether any legislation subordinate to the Constitution can whittle down the power under the Constitution of the Apex Court under Article 226 of the Constitution. It was held that any legislation subordinate to the Constitution cannot whittle down the jurisdiction and power conferred on the constitutional courts of the country.

24. Once again, in the case of Salem Advocate Bar Association, Tamil Nadu Vs. Union of India (UOI), AIR 2005 SC 3353 : (2005) 3 ARBLR 81 : (2005) 6 JT 486 : (2005) 6 SCC 344 : (2005) 1 SCR 929 Supp : (2005) AIRSCW 3827 : (2005) 5 Supreme 236 , the question arose before the Apex Court was as to whether amendment made under section 115 of the Code of Civil Procedure would take away the constitutional jurisdiction of the High Court or not. It was held by the Apex Court after considering the earlier decision of the Apex Court in the case of Surya Dev Rai Vs. Ram Chander Rai and Others, AIR 2003 SC 3044 : (2003) 4 CTC 48 : (2003) 6 SCALE 133 : (2003) 6 SCC 675 : (2003) 2 SCR 290 Supp : (2003) WritLR 722 : (2003) AIRSCW 3872 : (2003) 6 Supreme 390 that curtailment of revisional jurisdiction of the High Court under Section 115 of the Code of Civil Procedure does not take away and could not have taken away the constitutional jurisdiction of the High Court. But it was also further held that the power exists, untrammelled by the amendment in Section 115 and is available to be exercised subject to rules of self discipline and practice which are as well settled.

25. Recently, the decision of the Apex Court in the case of Surya Dev Rai Vs. Ram Chander Rai and Others, AIR 2003 SC 3044 : (2003) 4 CTC 48 : (2003) 6 SCALE 133 : (2003) 6 SCC 675 : (2003) 2 SCR 290 Supp : (2003) WritLR 722 : (2003) AIRSCW 3872 : (2003) 6 Supreme 390 (supra) as was referred to the Larger Bench, on the point as to whether the order of the Civil Court was amenable to the writ jurisdiction under Article 226 of the Constitution or not, and the Larger Bench of the Apex Court in the case of Radhey Shyam and Others Vs. Chhabi Nath and Others(2015) 3 AD 73 : (2015) 2 RCR(Civil) 606 : (2015) 3 SCALE 88 : (2015) 5 SCC 423 : (2015) 3 SCJ 552 : (2015) 1 UPLBEC 646 , overruled the decision of the Apex Court in the case of Surya Dev Rai (supra), but only to the extent that the judicial orders of the Civil Court are not amenable to the writ jurisdiction under Article 226 of the Constitution and it was held that the jurisdiction under Article 227 of the Constitution is distinct from the jurisdiction under Article 226 of the Constitution. However, the pertinent aspect is that the earlier view taken by the Apex Court in the case of Mahendra Saree

Emporium Vs. G.V. Srinivasa Murthy, AIR 2004 SC 4289 : (2004) 7 JT 20 : (2004) 7 SCALE 271 : (2005) 1 SCC 481 : (2004) 3 SCR 931 Supp : (2004) AIRSCW 4797 : (2004) 6 Supreme 599 and Salem Advocate Bar Association (supra) that no legislation subordinate to the Constitution can whittle down the jurisdiction conferred by the Constitution has been reiterated.

26. The aforesaid discussion would go to show that no legislation including section 35 of the Act can whittle down or dilute or nullify the power of the constitutional court under Article 226 of the Constitution but the parameter for exercise of the writ of certiorari would be in a case where the Tribunal or the authority has acted without jurisdiction or in excess of jurisdiction or acted in flagrant disregard of the law or the rules of procedure or have acted in violation to the principles of natural justice and mere by, resulting into failure of justice. The certiorari jurisdiction may be exercised when the error if not corrected at the very moment may become incapable of correction at the later stage and refusal to intervene would result travesty of justice. But the jurisdiction of writ of certiorari should not be converted into the court of appeal or indulge into reappreciation of the evidence or evaluation of the evidence or correction of the errors where two views are possible. The High Court while exercising the jurisdiction of writ of certiorari may annul or set aside the act or set aside the proceeding, but cannot substitute its own decision in place thereof. The High Court while exercising the power has to apply self restraint. It was well summed up by the Apex Court in the case of Surya Dev Rai Vs. Ram Chander Rai and Others, AIR 2003 SC 3044 : (2003) 4 CTC 48 : (2003) 6 SCALE 133 : (2003) 6 SCC 675 : (2003) 2 SCR 290 Supp : (2003) WritLR 722 : (2003) AIRSCW 3872 : (2003) 6 Supreme 390 that the power is there but the exercise is discretionary which will be solely governed by the dictate of the judicial conscience, enriched by judicial experience and practical wisdom of the Judge.

27. The aforesaid discussion goes to show that it is not possible to observe that in a case where the limitation period of preferring appeal or further period of condonation of delay is over, the High Court will have no jurisdiction under Article 226 of the Constitution but the exercise of such power has to be in exceptional cases where gross injustice is satisfactorily demonstrated. Otherwise, in normal circumstances, the High Court would give appropriate weight age to the statutory provisions because the things which cannot be done directly as per the statute cannot be permitted to be done indirectly in writ jurisdiction unless a grave and strong case is made out before the High Court that non-interference to the order under challenge would result into a gross injustice to the party suffering the order.

28. In the decision of the Apex Court in the case of Singh Enterprises Vs. Commissioner of Central Excise, Jamshedpur and Others, (2008) 1 CLT 709 : (2008) 1 CTC 707 : (2008) 124 ECC 1 : (2008) 150 ECR 1 : (2008) 221 ELT 163 : (2007) 14 SCALE 610 : (2008) 3 SCC 70 : (2008) 12 VST 542 : (2008) AIRSCW 1461 : (2007) 8 Supreme 533 , which has, been relied upon by the

learned counsel Mr. Parikh, the Apex Court was considering the scope and ambit of sufficient cause found in the various statutes and thereby to consider to give the effect of the statutory provision made for limitation. In the said case, the question as to whether the provisions of section 35 of the Act affects the jurisdiction of the High Court under Article 226 of the Constitution for exercise of the constitutional power or not was not considered by the Apex Court. Therefore, the contention of the learned counsel Mr. Parikh that the decision of the High Court taking the view that it had no power to condone the delay after the expiry of the period of 30 days should mean that the High Court will have no jurisdiction under Article 226 in a case where the period of 30 days is over cannot be countenanced for the simple reason that whether the High Court should exercise the power to condone the delay after expiry of the period of 30 days while exercising the power under Article 226 of the Constitution is one thing, but whether the jurisdiction of the High Court under Article 226 of the Constitution is affected by the statutory provision of section 35 of the Act is another thing. It cannot be disputed if the High Court declines to exercise the power after the expiry of the period of 30 days if the case is not falling in the exceptional circumstance where gross injustice is not satisfactorily demonstrated before the High Court. Hence, the said decision is of no help to Mr. Parikh for canvassing his contention.

29. In none of the decisions upon which the reliance has been placed by Mr. Parikh, the question was examined as to whether the statutory provision under section 35 of the Act affects the jurisdiction of the High Court under Article 226 of the Constitution or not and therefore, we do not find that the said decisions are of any help to Mr. Parikh. At the same time, there is considerable force in the contention of Mr. Parikh that even while exercising the power under Article 226 of the Constitution, the High Court would normally go by the statutory provision. But such contention can be accepted in normal circumstances unless the High Court finds that there is extraordinary case satisfactorily demonstrated before it of grave injustice or non interference by the High Court would result into gross injustice.

30. 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.

31. All the three questions are answered accordingly. The matters now shall be placed before the appropriate Bench for further consideration in accordance with law.