(2014) 12 CAL CK 0022

In the Calcutta High Court

Case No : W.Ps. 6802(W) and 10412 (W) of 2014

Satish Kumar Sharma and Others APPELLANT

Vs

Union of India and Others RESPONDENT

Date of Decision : 12-12-2014

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35, 35(H)(1), 35G, 35G(2)(a), 35H
Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13
Constitution of India, 1950 — Article 226, 32
Limitation Act, 1963 — Section 10, 11, 12, 13, 14

Citation : (2014) 12 CAL CK 0022

Hon'ble Judges : Harish Tandon, J

Bench : Single Bench

Advocate : Arijit Chakraborty, Advocates for the Appellant; P.K. Ray and K.K. Maiti, Advocates for the Respondent

Judgement

Harish Tandon, J.—The issues involved in both the writ-petitions are intrinsically connected though emerged from different set of facts and, therefore, a common judgment is delivered to avoid prolixity of repetitions.

2. The common point which evolves in both the appeals are whether the appellate authority under the Central Excise Act, 1944 (hereinafter referred to as the said Act) is empowered to condone the delay beyond the maximum period provided in the statute and the writ petition is maintainable challenging an order-in-original which merged with the order of appellate authority upon rejection of application for condonation of delay.

3. Before proceeding to deal with the aforesaid point, it would be apposite to quote Section 35 of the Central Excise Act, 1944 which runs as follows:--

"SECTION 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."

4. Sub-section (1) thereof clearly provides that any person aggrieved by the decision or the order passed by the Central Excise Officer may appeal to the Commissioner of Central Excise (Appeals) within 60 days from the date of the communication of the said order. The proviso inserted thereto gives discretion to the said appellate authority to condone the delay beyond the normal period of limitation upto further period of 30 days. The maximum period, which could be ascertained from the aforesaid provision, is 90 days from the date of communication of this order.

5. In both the writ-petitions the petitioners filed appeals before the appellate authority beyond 90 days from the date of communication of this order and seeks condonation of delay stating different facts and in those matters, the appellate authority dismissed the appeal having barred by limitation meaning thereby the appeal was not decided on merit.

6. The petitioner of WP 6802 (W) of 2014 approached this Court under Article 226 of the Constitution of India immediately after the dismissal of the appeal by the appellate authority whereas the petitioner of WP 10412 (W) of 2014 exhausted further remedy by preferring an appeal before the Customs Excise & Service Tax Appellate Tribunal (CESTAT) who affirmed the order of the appellate authority and a writ-petition came to be filed before this Court.

7. The learned counsels for the respective petitioners in both the writ-petitions uniformly submit that the power of the High Court under Article 226 of the Constitution of India is not circumscribed by the law of limitation though the authorities under the law are bound to obey and adhere to the limitation provided in the statute. In this regard, it is submitted that though there is no illegality and/or infirmity in the order passed by the appellate authority or the CESTAT as admittedly the appeal was filed beyond the statutory period, but the persons should not be condemned unheard on merit and the meritorious matters should be thrown out at the threshold on the ground of limitation. It is again argued that if an appeal is not decided on merit but have been rejected on a technical plea like limitation, the principle of the merger of the original order into the appellate order is not attracted.

8. To assimilate the arguments advanced and the judgments cited by the petitioners, the dispute centres around as to whether the High Court in exercise of the power under Article 226 of the Constitution of India should forebear from interfering with the order of the competent authority when the statute provides the remedy by way of an appeal and the appeal having been filed beyond the

prescribed period and the authority is denuded of power to condone the delay beyond the maximum period provided therein, have been dismissed.

9. Several decisions of different High Courts are cited in support of the aforesaid contentions upholding the sovereignty of the power of the judicial review conferred by the Constitution upon the High Court with the rider that it should be so exercised in exceptional cases. This Court feels that the judgment cited at the Bar should be looked into and the ratio could be beneficially applied in favour of the petitioners.

10. The respondents have refuted the aforesaid contentions of the petitioners by saying that once the statute provides the maximum limit to exercise discretion by the statutory authority, the statutory authority does not retain power to condone the delay beyond the maximum period. It is strongly submitted that the Act provides a further appeal before the High Court who is essentially a Court of Appeal and further enjoins the constitutional power to be exercised in an appropriate case.

11. Let me summarize the propositions of law as laid down in several judgments delivered by different High Court as well as the Supreme Court where an identical point was raised.

12. One of the direct judgment on this point can be conveniently traced from the judgment rendered by the Supreme Court in Singh Enterprises Vs. Commissioner of Central Excise, Jamshedpur and Others, wherein a writ-petition came to be filed before the High Court against the rejection of an appeal on the ground of limitation. An argument was advanced therein that the High Court in exercise of power conferred under Article 226 of the Constitution can condone the delay even when the Commissioner (Appeals) have no power to condone it beyond the prescribed period. The Supreme Court held that if the limitation is provided in the statute and the power to condone the delay is also vested on the statutory authority though circumscribed by the maximum period, even the High Court should not direct the condonation as it would render the specific provision otiose in these words:--

"8. The Commissioner of Central Excise (Appeals) as also the Tribunal creatures of Statute are vested with jurisdiction to condone the delay beyond the permissible period provided under the Statute. The period upto which the prayer for condonation can be accepted is statutorily provided. It was submitted that the logic of Section 5 of the Indian Limitation Act, 1963 (in short the ''Limitation Act'') can be availed for condonation of delay. The first provision to Section 35 makes the position clear that the appeal has to be preferred within three months from the date of communication to him of the decision or order. However, if the Commissioner is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of 60 days, he can allow it to be presented within a further period of 30 days. It other words, this clearly shows that the appeal ha to be filed within 60 days but in terms of the proviso further 30 days time can be granted by the appellate authority to entertain the appeal. The proviso to sub-section (1) of Section 35 makes the position crystal clear that the appellate authority has no power to allow the appeal to be presented beyond the period of 30 days. The language used makes the position clear that the legislature intended the appellate authority to entertain the appeal by condoning delay only upto 30 days after the expiry of 60 days which is the normal period for preferring appeal. Therefore, there is complete exclusion of Section 5 of the Limitation Act. The Commissioner and the High Court were therefore justified in holding that there was no power to condone the delay after the expiry of 30 days period.

(10) Sufficient cause is an expression which is found in various statutes. It essentially means as adequate or enough. There cannot be any straitjacket formula for accepting or rejecting the explanation furnished for delay caused in taking steps. In the instant case, the explanation offered for the abnormal delay of nearly 20 months is that the appellant concern was practically closed after 1998 and it was only opened for some short period. From the application for condonation of delay, it appears that the appellant has categorically accepted that on receipt or order the same was immediately handed over to the consultant for filing an appeal. If that is so, the plea that because of lack of experience in business there was delay does not stand to be reason. I.T.C.''s case (Supra) was rendered taking note of the peculiar period of limitation, this Court can direct condonation. That would render a specific provision providing for limitation rather otiose. In any event, the causes shown for condonation have no acceptable value. In that view of the matter, the appeal deserves to be dismissed which we direct. There will be no order as to costs."

13. However, the Gujarat High Court in the case of D.R. Industries Ltd. and Another Vs. Union of India (UOI) and Others, held that the High Court in exercise of the power under Article 226 of the Constitution of India in an extraordinary case may order for condonation of delay beyond the maximum period prescribed under the said Act but not in mechanical or routine manner. What has been held by the Division Bench of Gujarat High Court in the above noted decision that though the adjudicating authority does not enjoin any power to condone the delay beyond 90 days from the date of communication of the order but if any extraordinary circumstances occasioning the delay is proved and gross injustice is shown to have been done, the High Court in an appropriate case can invoke the power under Article 226 of the Constitution of India in these words:--

"19. As regards the contention that there may be extraordinary cases where assessees 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 extra-ordinary 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 assessees 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 assessees can invoke the powers of this Court under article 226 of the Constitution but, of course, not as a matter of right."

(Emphasis Supplied)

14. It is necessary to observe that the judgment rendered by the Supreme Court in case of Singh Enterprises (Supra) was not cited before the Division Bench of the High Court.

15. However, the Division Bench of Bombay High Court in case of The Commissioner of Central Excise Vs. Shruti Colorants Ltd., took a dissenting view in observing that the Limitation Act is not a substantive law but an piece of adjective or procedural law and applied to a matter which the legislature expressly or by way of necessary implication made it applicable, taking aid of the judgment of the Supreme Court rendered in case of Nasiruddin and Others Vs. Sita Ram Agarwal, wherein it is held that in absence of statutory provision the Court cannot usurp the inherent power to condone the delay. It would be relevant to quote paragraph 34 which runes thus:--

"34. In the case of Nasiruddin & Others (Supra), the Supreme Court had also ambiguously stated the principle that in absence of statutory provision, no inherent powers of the court exist to condone the delay. The unambiguous language of Section 35G fixes the period of limitation within a self-contained Code and does not provide for condonation of delay by the High Court. The scheme of the provision is such that it would be difficult to import or read into it the provisions of the Limitation Act, 1963, particularly, Section 5. The right to file an appeal under Section 35G is a statutory right and has to be exercised in the mode, manner and limitation specified in the special statute itself. The language of the provisions seen in conjunction with legislative intent and the objects of expeditious disposal sought to be achieved would exclude the application of Section 5 of the Limitation Act by necessary implication. Once the provisions of Section 5 are not attracted, this court inherently would have no power to condone the delay in filing the present Appeals irrespective of the extent of delay. Thus, we have no hesitation in holding that the Appeals filed under Section 35G of the Central Excise Act, 1944 beyond the prescribed period of limitation in terms of Section 35G(2)(a) would be barred by time and this Court would have no jurisdiction to condone the delay and entertain the appeal filed after the said period of limitation."

(Emphasis Supplied)

16. In case of Commissioner of Customs and Central Excise Vs. Hongo India (P) Ltd. and Another, , the question for consideration before the Supreme Court was whether the High Court can condone the delay in presentation of the reference application under unamended provision of Section 35(H)(1) of the Central Excise

Act, 1944 beyond the prescribed period by invoking the provisions of Section 5 of the Limitation Act. An argument was advanced taking support from Section 29 of the Limitation Act and it was suggested that the power to condone the delay is inbuilt power unless expressly excluded. The Court held:--

"20. Though, an argument was raised based on Section 29 of the Limitation Act, even assuming that Section 29(2) would be attracted what we have to determine is whether the provisions of this section are expressly excluded in the case of reference to High Court. 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 here in this case is Central Excise Act. The nature of the remedy provided therein are 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, 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. The scheme of the Central Excise Act, 1944 support the conclusion that the time limit prescribed under Section 35H(1) to make a reference to High Court is absolute and unextendable by court under Section 5 of the Limitation Act. It is well settled law that it is the duty of the court to respect the legislative intent and by giving liberal interpretation, limitation cannot be extended by invoking the provisions of Section 5 of the Act."

17. It was ultimately held that the Central Excise Act, 1944 is a compete Code in itself and it is a duty of the Court to respect the legislative intent and not to frustrate it.

18. Another Division Bench of the Bombay High Court in case of M/s. Raj Chemicals Vs. Union of India and Others, looked the said point from a different angle. The Bench held that once the statute have provided a period of limitation with maximum limit, the High Court should not direct the authority to act de hors the said statute in exercise of power under Article 226 of the Constitution. The relevant excerpts from the above noted judgment is quoted below:--

"8. Counsel appearing on behalf of the Petitioner submits that unlike Section 35H which provided an absolute period of limitation of 180 days, Section 35 to which the present petition relates, does provide a power to condone a delay beyond sixty days though up to an extent of thirty days. Hence, it was sought to be urged that there was no absolute bar to take recourse to the provisions of Section 5 of the Limitation Act, 1963. The submission cannot be accepted. Once the Legislature has laid down a period within which an appeal has to be filed and has prescribed the extend to which a delay beyond that period can be condones, recourse to the provisions of Section 5 of the Limitation Act, 1963 would stand "expressly excluded" within the meaning of Section 29(2) of the Limitation Act, 1963. Accepting the submission of the Petitioner would completely defeat the scheme of the Central Excise Act, 1944. In any event, the High Court in the exercise of its jurisdiction under Article 226 of the Constitution cannot issue a direction which would command the authorities constituted under the act to bypass or breach the provisions made in the statute. The Petitioner not having filed an appeal against the order of the Assistant Commissioner, dated 5 March, 2010 within limitation, this Court would not be justified in entertaining the petition and directing the Commissioner (Appeals) to condone the delay. In that view of the matter, it would not also be proper for this Court to grant the alternate prayer. For these reasons, the petition is not maintainable and is accordingly dismissed."

19. The Gujarat High Court in case of Texcellence Overseas Vs. Union of India, though noticed the judgment of the Supreme Court rendered in Singh Enterprises, accepted and adopted the view rendered in case of D.R. Industries (supra) and upheld the power of the High Court under Article 226 of the Constitution in condoning the delay beyond the maximum period prescribed under the Act in an extraordinary cases in following words:--

"11. In the instant case, as the petitioner has approached this Court urging to invoke extraordinary jurisdiction relying on the decision of D.R. Industries Ltd. v. Union of India (supra), recognizing that this Court has extraordinary powers in appropriate case to interfere even while upholding the contention that there is statutory limitation to which delay can be condoned by the authorities. We ourselves have earlier in case of Senior Superintendent of Post Office - V- Union of India (supra) recognized that if an aggrieved person knocks the door of High Court seeking redressal under writ jurisdiction for valid reasons, to obviate extraordinary hardship and injustice such challenge can be entertained even beyond the period of limitation.

13. At the cost of reiteration, we note that we are conscious of the fact that such powers are required to be exercised very sparingly and in event, of extraordinary circumstances in an appropriate case where otherwise we would fail in our duty that such powers are needed to be invoked. We are therefore, of the opinion that order impugned and appellate forums dated 7.1.2011 and 18.1.2009 though not be interfered with and yet the impugned order of order-in-original dated 23.2.2009 requires to be quashed and set aside."

(Emphasis Supplied)

20. The Karnataka High Court in case of Phoenix Plasts Company Vs. Commr. of

C. Ex., held that the judgment in Texellence (Supra) is not a precedent in view of the judgment rendered by the Supreme Court in case of Singh Enterprises and the Hongo India Private Limited by reiterating the ratio laid down in D.R. Industries Limited and relying thereupon, the Bench of Punjab and Haryana High Court in case of JCB India Ltd. Vs. Union of India, , upheld the authority and power of High Court under Article 226 of the Constitution of India in condoning the delay beyond prescribed period.

21. There appears to be divergent views of the different High Courts and the Supreme Court in the above noted decisions whether the High Court can condone the delay beyond the prescribed period in exercise of power under Article 226 of the Constitution of India. Indisputably the Central Excise Act which is a complete Code in itself have conferred power on the authorities to condone the delay upto a certain limit. The right of appeal is a statutory right within the period of limitation and losses such status once limitation intervenes. The law of limitation is an adjective or procedural law and has been designed with avowed object and purposes. The authorities, who are the creature of a statute, are bound to act strictly in terms thereof and cannot travel beyond it. It is settled proposition of law that the Court cannot direct the statutory authority to act in violation of the statute or de hors to it in exercise of the power of judicial review; The right of an appeal being the statutory right can be circumscribed by putting a limitation provided it does not violate the constitutional mandate.

22. There is another important angle which cannot be overlooked as it relates to the power of judicial review conferred upon the High Court by virtue of Article 226 of the Constitution. The said power not only can be exercised for issuance of the prerogative writs but also an order or direction to enforce any fundamental rights and for any other purpose. The power of the High Court under Article 226 of the Constitution is wider in scope and is long enough to reach injustice wherever it is found. The Court as a senitial on the qui vive is to mete out injustice in the given facts. The founding fathers placed no limitation or fetters on the power of the High Court under Article 226 of the Constitution except self-imposed restrictions. In a recent judgment rendered by the Supreme Court in case of Commissioner of Income Tax and Others Vs. Chhabil Dass Agarwal, , it is held that power under Article 226 is not an absolute bar when an efficacious alternative remedy is available. The High Court in an appropriate case have imposed self-restrictions in not exercising the discretionary power when an efficacious alternative remedy is available. In an exceptional cases which warrants the interference under Article 226 of the Constitution, the High Court may invoke the extraordinary jurisdiction in these words:

"11. Before discussing the fact proposition, we would notice the principle of law as laid down by this Court. It is settled law that non-entertainment of petitions under writ jurisdiction by the High Court when an efficacious alternative remedy is available is a rule of self-imposed limitation. It is essentially a rule of policy, convenience and discretion rather than a rule of law. Undoubtedly, it is within the discretion of the High Court to grant relief under Article 226 despite the existence of an alternative remedy. However, the High Court must not interfere if there is an adequate efficacious alternative remedy available to the petitioner and he has approached the High Court without availing the same unless he has made out an exceptional case warranting such interference or there exist sufficient grounds to invoke the extraordinary jurisdiction under Article 226. (See State of U.P. v. Mohd. Nooh, Titaghur Paper Mills Co. Ltd. v. State of Orissa, Harbanslal Sahnia v. Indian Oil Corpn. Ltd. and State of H.P. v. Gujarat Ambuja Cement Ltd.)

12. The Constitution Benches of this Court in K.S. Rashid and Son v. Income Tax Investigation Commission, Sangram Singh v. Election Tribunal, Union of India v. T.R. Varma, State of U.P. v. Mohd. Nooh and K.S. Venkataraman and Co. (P) Ltd. v. State of Madras have held that though Article 226 confers very wide powers in the matter of issuing writs on the High Court, the remedy of writ is absolutely discretionary in character. If the High Court is satisfied that the aggrieved party can have an adequate or suitable relief elsewhere, it can refuse to exercise its jurisdiction. The Court, in extraordinary circumstances, may exercise the power if it comes to the conclusion that there has been a breach of the principles of natural justice or the procedure required for decision has not been adopted. [See N.T. Veluswami Thevar v. G. Raja Nainar, Municipal Council, Khurai v. Kamal Kumar, Siliguri Municipality v. Amalendu Das, S.T. Muthusami v. K. Natarajan, Rajasthan SRTC v. Krishna Kant, Kerala SEB v. Kurien E. Kalathil, A. Venkatasubbiah Naidu v. S. Chellappan, L.L. Sudhakar Reddy v. State of A.P., Shri Sant Sadguru Janardan Swami (Moingiri Maharaj) Sahakari Dugdha Utpadak Sanstha v. State of Maharashtra, Pratap Singh v. State of Haryana and GKN Driveshafts (India) Ltd. v. ITO.]

13. In Nivedita Sharma v. Cellular Operators Assn. of India, this Court has held that where hierarchy of appeals is provided by the statute, the party must exhaust the statutory remedies before resorting to writ jurisdiction for relief and observed as follows:

"12. In Thansingh Nathmal v. Supt. of Taxes this Court adverted to the rule of self-imposed restraint that the writ petition will not be entertained if an effective remedy is available to the aggrieved person and observed:

''7. ...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 the 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.''

13. In Titaghur Paper Mills Co. Ltd. v. State of Orissa this Court observed:

''11. ...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 in the following passage:

"...There are three classes of cases in which a liability may be established founded upon a 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 Newspaper Ltd. and has been reaffirmed by the Privy Council in Attorney General of Trinidad and Tobago v. Gordon Grant and Co. Ltd. and Secy. of State v. Mask and Co. 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.''

14. In Mafatlal Industries Ltd. v. Union of India B.P. Jeevan Reddy, J. (speaking for the majority of the larger Bench) observed:

''77. ...So far as the jurisdiction of the High Court under Article 226-or for that matter, the jurisdiction of this Court under Article 32-is concerned, it is obvious that the provisions of the Act cannot bar and curtail these remedies. It is, however, equally obvious that while exercising the power under Article 226/ Article 32, the Court would certainly take note of the legislative intent manifested in the provisions of the Act and would exercise their jurisdiction consistent with the provisions of the enactment.''"

(See G. Veerappa Pillai v. Raman & Raman Ltd., CCE v. Dunlop India Ltd., Ramendra Kishore Biswas v. State of Tripura, Shivgonda Anna Patil v. State of Maharashtra, C.A. Abraham v. ITO, Titaghur Paper Mills Co. Ltd. v. State of Orissa, Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath and Sons, Whirlpool Corpn. v. Registrar of Trade Marks, Tin Plate Co. of India Ltd. v. State of Bihar, Sheela Devi v. Jaspal Singh and Punjab National Bank v. O.C. Krishnan.)

14. In Union of India v. Guwahati Carbon Ltd. this Court has reiterated the aforesaid principle and observed:

"8. Before we discuss the correctness of the impugned order, we intend to remind ourselves the observations made by this Court in Munshi Ram v. Municipal Committee, Chheharta. In the said decision, this Court was pleased to observe that:

''23. ...[when] a revenue statute provides for a person aggrieved by an assessment thereunder, a particular remedy to be sought in a particular forum, in a particular way, it must be sought in that forum and in that manner, and all the other forums and modes of seeking [remedy] are excluded.''"

15. Thus, while it can be said that this Court has recognised some exceptions to the rule of alternative remedy i.e. where the statutory authority has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial procedure, or has resorted to invoke the provisions which are repealed, or when an order has been passed in total violation of the principles of natural justice, the proposition laid down in Thansingh Nathmal case, Titaghur Paper Mills case and other similar judgments that the High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance still holds the field. Therefore, when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation.

16. In the instant case, the Act provides complete machinery for the assessment/ reassessment of tax, imposition of penalty and for obtaining relief in respect of any improper orders passed by the Revenue Authorities, and the assessee could not be permitted to abandon that machinery and to invoke the jurisdiction of the High Court under Article 226 of the Constitution when he had adequate remedy open to him by an appeal to the Commissioner of Income Tax (Appeals). The remedy under the statute, however, must be effective and not a mere formality with no substantial relief. In Ram and Shyam Co. v. State of Haryana this Court has noticed that if an appeal is from "Caesar to Caesar''s wife" the existence of alternative remedy would be a mirage and an exercise in futility."

23. In view of the law laid down in the above noted decisions, the power of judicial review is a rule of discretion than of compulsion. Any attempt to undermine the power of judicial review enshrined under Article 226 of the Constitution would offend the basic structure of the Constitution.

24. The High Court, therefore, in an exceptional cases can interfere with the order of the authority provided an extraordinary circumstances warrants it. The judgment rendered in case of Singh Enterprises (supra) and Hongo India Private Limited (supra) does not lay down the proposition of law that under any conceivable circumstances, the remedy under Article 226 of the Constitution is not available. It is one thing to say that the Court cannot condone the delay beyond the maximum limit provided under the statute but it would be different when a challenge is made to an order where the statutory authority acted in defiance of the fundamental principles of judicial procedure or passed an order to a total violation of principles of natural justice.

25. This Court, therefore, holds that if an extraordinary case is made out, even if, a remedy by way of a statutory appeal is available, the Court can exercise the

power of judicial review under Article 226 of the Constitution.

26. Another point has been canvassed before this Court that once the petitioners have exhausted the statutory remedy by preferring an appeal before the Appellate Authority, the subsequent challenge to the original order under Article 226 is not permissible. As indicated above, the appeal before the Appellate Authority as well as the tribunal was dismissed solely on the ground that the Appellate Authority is not empowered to condone the delay beyond the prescribed limit, meaning thereby, no conscious decision on merit was arrived.

27. In case of Gojer Bros. (Pvt.) Ltd. Vs. Shri Ratan Lal Singh, , it is held that the plea of merger depends on the nature of the appellate or revisional order. The reliance was placed to an earlier judgment of the Supreme Court rendered in case of U.J.S. Chopra Vs. State of Bombay, wherein it is held that the judgment pronounced by the appellate or revisional authority after issuance of the notice and a full hearing in presence of both the parties would replace the judgment of the lower Court. The dismissal of an appeal upon rejecting an application for condonation of delay is not a decision on merit and, therefore, the plea of merger cannot be applied though the resultant effect is the dismissal of an appeal. However, the anomaly whether the rejection of an application for condonation of delay amounts to the disposal or dismissal of the appeal is clarified in three bench decisions of the Supreme Court delivered in case of Shyam Sundar Sarma Vs. Pannalal Jaiswal and Others, . The sheet anchor of the argument in the said decision was whether the dismissal of an appeal against the ex parte decree for default or dismissal of an application for condonation of delay would amount to a decision in the appeal so as to attract the proviso inserted to Order 9 Rule 13 of the Code putting a fetter in maintaining the application under the said provision. The Court held that dismissal of an appeal for default or when the application for condonation of delay is rejected tantamount to the decision in the appeal and doctrine of merger would get attracted in these words:

"15. We are not impressed by the argument of learned counsel for the appellant that the decision in Rani Choudhury case requires reconsideration. On going through the said decision in the light of the objects and reasons for the introduction of the Explanation to Order 9 Rule 13 and the concept of an appeal as indicated by the Privy Council and this Court in the decisions already cited, the argument that an appeal which is dismissed for default or as barred by limitation because of the dismissal of the application for condoning the delay in filing the same, should be treated on a par with the non-filing of an appeal or the withdrawal of an appeal, cannot be accepted. The argument that since there is no merger of the decree of the trial court in that of the appellate court in a case of this nature and consequently the Explanation should not be applied, cannot also be accepted in the context of what this Court has earlier stated and what we have noticed above.

16. Thus, in the case on hand we find that the trial court, the appellate court and the High Court have rightly held that petition under Order 9 Rule 13 of the Code

would not lie in view of the filing of an appeal against the decree by the appellant and the dismissal of the appeal though for default, since a dismissal for default or on the ground of it being barred by limitation cannot be equated with a withdrawal of the appeal. Consequently, the decision of the High Court is affirmed and this appeal is dismissed. In the circumstances of the case we make no order as to costs."

28. The law enunciated in the above noted report can be summarized as follows:

"(i) The power of the High Court under Article 226 of the Constitution is not excluded merely because the alternative efficacious remedy is provided in the statute. It is a self-imposed restrictions and depends upon the facts of the each case and, therefore, is more a rule of discretion than of compulsion. The power of judicial review can be exercised where remedy available under the statute is not effective but mere formality with no substantial relief, where the statutory authority have acted in violation of the statutory provision or not acted in accordance therewith where the decision of the statutory authority is incomplete defiance of the fundamental principles of judicial procedure or the statutory authority have passed an order in gross violation of principles of natural justice or a fundamental rights guaranteed under the Constitution is infringed by the statutory authority.

(ii) The power under Article 226 of the Constitution can be exercised when the statutory remedy is not available because of the interdiction of the limitation prescribed in the statute in an extraordinary circumstances when an extraordinary case is made out.

(iii) The doctrine of merger would be attracted in a case when an appeal is dismissed for default or an application for condonation of delay is rejected but not when the appeal is allowed to be withdrawn."

29. On the above legal parameters, let me see whether the relief as claimed in the respective writ petitions can be granted to the petitioners therein.

30. In W.P. 10412 (w) of 2014, the petitioner assailed the order- in-original dated 23.09.2009 before the Commissioner of Central Excise (Appeals), Kolkata beyond ninety days from the date of the receipt of the said order along with an application for condonation of delay. Proviso to Section 35 of the Central Excise Act does not empower the Commissioner to condone the delay beyond the period of ninety days and thus the appeal came to be dismissed on such ground. The petitioner further assailed the said order before the Customs Excise and Service Tax Appellate Tribunal(CESTAT) and filed an application seeking waiver of pre-deposit of the duty. At the time of hearing the said application, the CESTAT found that the order of the Commissioner (Appeals) cannot be faulted with as the statute provides a maximum limit to condone the delay. The Tribunal dismissed the said appeal and the order of the tribunal is challenged in this writ petition. the petitioner prayed for setting aside the order of the tribunal with further prayer to condone the delay and transmit the matter to the Appellate Authority

for consideration on merit. Section 35 of the Act puts a restriction on the Commissioner (Appeals) to condone the delay beyond certain limits and, therefore, there is no illegality in the order of the Commissioner (Appeals) in rejecting the appeal on such ground. Equally this Court cannot find fault in the order of the tribunal in dismissing the appeal and affirming the order of the Appellate Authority. This Court, therefore, does not find that there is any uniformity and/or illegality in the order of the tribunal in rejecting the appeal because of the restrictions provided under Section 35 of the Act.

31. The writ petition is, therefore, dismissed.

32. In W.P. 6802 (w) of 2014, the petitioner has challenged both the orders i.e. the original order and the appellate order in the writ petition. The petitioner tried to impress this Court that the order in original is palpably illegal and contrary to the judicial pronouncement and, therefore, the writ petition is otherwise maintainable. Much argument is advanced to convince the Court that it is an exceptional case and the justice demands the interference and invocation of power of judicial review.

33. In view of the ratio laid down in Shyam Sundar Sarma (supra), the order of the sub-ordinate authority must be the order of the higher authority upon rejection of an application seeking condonation of delay. It is, therefore, the order of the Appellate Authority which is an existence as two orders cannot operate in the field. The Appellate Authority have rejected the application for condonation of delay which resulted into the dismissal of an appeal itself. There is no ambiguity in the order of the Appellate Authority in dismissing the appeal having time-barred, as the statute does not provide the power to condone delay beyond certain limits.

34. This Court, therefore, does not find any fault in the order of the Appellate Authority as the order-in-original has merged into it.

35. The writ petition, therefore, fails.

36. However, there shall be no order as to costs.