

(2016) 02 BOM CK 0102

In the Bombay High Court

Case No : Notice of Motion No. 1275 of 2015 in Central Excise Appeal (L) No. 157 of 2015

The Principal Commissioner of Central Excise and Customs

APPELLANT

Vs

Omnitex Industriex (India) Limited

RESPONDENT

Date of Decision : 22-02-2016

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35-G, Section 35-G(2)(a), Section 35-G(2-A), Section 36(b)
Limitation Act, 1963 — Section 14, Section 5

Citation : (2016) 02 BOM CK 0102

Hon'ble Judges : S.C. Dharmadhikari and G.S. Patel, JJ.

Bench : Division Bench

Advocate : Pradeep S. Jetly, for the Appellant; Prakash Shah, i/b PDS Legal, for the Respondent

Final Decision : Allowed

Judgement

1. This is one of a several Notices of Motion seeking that a quite substantial delay in the filing of these Appeals be condoned. As the facts in all these cases are broadly similar, we have dealt with the present Notice of Motion as the main case for this judgment; the others will follow suit.

2. The present Appeal arises from an order dated 2nd January 2009 passed by the Customs, Excise & Service Tax Appellate Tribunal ("CESTAT"), West Zonal Bench, Ahmedabad and the CESTAT's subsequent order dated 29th May 2009 in a rectification of mistake application by the present Appellants. We are not in this Notice of Motion examining the merits of the present Appeal. We only note that the CESTAT order-in-appeal was passed in a proceeding that emanated from an Order-in-Original dated 10th January 2008 passed by the Joint Commissioner, Central Excise and Customs, Daman and a subsequent order dated 30th July 2008 passed by the Commissioner (Appeals), Central Excise & Customs, Daman.

3. Copies of the two CESTAT appellate orders were received by the present

Appellants on 28th January 2009 and 19th June 2009 respectively. The present Appellants preferred an Appeal under Section 35-G of the Central Excise Act, 1944 before the Gujarat High Court. That Appeal was lodged within 180 days, the period prescribed under Section 35-G(2)(a) of the Central Excise Act, 1944. On 28th April 2011, the Gujarat High Court admitted the Appeal. It then remained pending there till 12th January 2015, when the Gujarat High Court held that since the manufacturing unit in question was located within the Union Territory of Daman, in view of Section 36(b) of the Central Excise Act, 1944, the Gujarat High Court did not have the necessary territorial jurisdiction. The Gujarat High Court therefore dismissed the Appeal, but gave liberty to the Appellants to pursue their remedies in a court of competent jurisdiction. It is pursuant to this order that the present Appeal was lodged in this Court on 29th July 2015. The Appellant then filed the present Notice of Motion seeking that a delay computed at 2192 days be condoned.

4. We have heard Mr. Jetly for the Appellants and Mr. Shah for the Respondents. Mr. Shah has, with his usual fairness, placed before us a compilation or compendium of several authorities on the subject. Before we advert to this, it is necessary to note that Section 35-G(2-A) confers on the High Court before whom an Appeal is filed the discretion to admit an Appeal even after expiry of a period of 180 days, if it is satisfied that there is sufficient cause for not filing the Appeal within the prescribed period. This provision is in consonance with the provisions of Section 5 of the Limitation Act, 1963. However, for our purposes, Section 14 of the Limitation Act, 1963 is more apposite. In terms, this Section says that in computing the period of limitation for any Suit, the time during which the Plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a Court which, from defect of jurisdiction or similar cause, is unable to entertain it.

5. This Section and its application to various statutes, including in particular taxing statutes, have been interpreted in several authorities. A Division Bench of this Court in *Union of India v Epcos India Private Limited*, 2013 (290) E.L.T. 364 (Bom) held in the context of the Central Excise Act, 1944 that the period spent in prosecuting the Appeal bona fide before the CESTAT, later found to lack jurisdiction, was liable to be excluded under Section 14. In *Ketan V. Parekh v Special Director, Directorate of Enforcement*, 2012 (275) ELT 3 (SC), the Supreme Court, in the context of Foreign Exchange Management Act, 1999 and its corresponding Rules as also the Central Excise Act, 1944, held that in an appropriate case Section 14 can be invoked to exclude the time an Appellant has spent prosecuting diligently his remedy before an incorrect forum. This is a consistent view of various courts.¹

6. While considering this question, we may profitably make reference to the decision of the Supreme Court in *M.P. Steel Corporation v. Commissioner of*

Central Excise , 2015 (319) E.L.T. 373 (S.C.). In that case, one of the questions was whether the Limitation Act, 1963 applied only to Courts and not to Tribunals, for the appeal in question in that case was before the tribunal. The Supreme Court noted the decision of the Supreme Court in Consolidated Engineering Enterprises v. Principal Secretary, Irrigation Department , (2008) 7 SCC 169 and in particular the five conditions that are set out in paragraph 21 of that decision for the correct invocation and application of Section 14 of the Limitation Act. These five conditions are by now well settled. Both the prior and subsequent proceedings must be civil proceedings prosecuted by same party; the prior proceeding should have been prosecuted with due diligence and in good faith; the failure of the prior proceeding must have been due to a jurisdictional defect or similar cause; both proceedings must relate to the same matter in issue; and both proceedings must be in a Court. In paragraph 7 of its decision in M.P. Steel Corporation, the Supreme Court in terms held that the period spent in pursuing a remedy before another appellate forum ought to be excluded. The Supreme Court also said that Section 14 must be liberally construed to advance the cause of justice. In paragraph 41 of its decision in M.P. Steel Corporation, the Supreme Court said that the plain language of Section 14, construed in light of its statutory purpose, lends itself to just such a liberal interpretation. The statutory object is to ensure that, subject to conditions being met, a plaintiff or applicant or appellant is put in the same position as he would have been when he first commenced the proceeding in a court of competent jurisdiction; i.e., that the time taken diligently pursuing the same remedy in a court without jurisdiction should be excluded. In such a case, all that is necessary is the absence of negligence or inaction. As long as the party bona fide pursues a legal remedy, one that later turns down to be abortive, the time taken in that jurisdictionally deficient proceeding is to be excluded. If this were not so, the results would be anomalous.

7. In the present case, there is no doubt that the Appellants were pursuing their remedy in a "Court". The only question was one of lack of territorial jurisdiction. There is also no dispute that the Appeal before the Gujarat High Court was in fact filed in time. The entire period, therefore, from the time of filing of the Appeal in the Gujarat High Court till its disposal as above by that Court must, in our view, be fairly excluded for the purposes of limitation. If that is not done, great injustice and unfairness will result. The direction of that High Court, with respect, is that the papers in each of these Appeals be returned to the respective Appellants/their Advocates for presentation to the Competent Appellate Court, which is this Court.

8. For the purposes, therefore, of computing the delay to be condoned, if any, we must take first the two dates that lie at the extremities, viz., the date of receipt of the order appealed against and the date of filing of the Appeal in the present Court. From this period, the entire period from the date of filing of the Appeal in the Gujarat High Court to the date of its disposal by that High Court is to be excluded. If the remaining period is found to be 180 days or less, then there is

no question of any application being necessary to condone the delay and the Appeal is in time. It is only if this remaining period exceeds 180 days that the Appellant will be required to file a application seeking condonation of delay and setting out the reasons or cause which in the Appellant's opinion is sufficient.

9. We find that having regard to the circumstances, there is sufficient reason to condone the delay. The explanation given in the Affidavit in Support is adequate. The time spent in prosecuting the Appeal before the Gujarat High Court is to be excluded. The Notice of Motion is allowed in terms of prayer clause (a). No costs.

1Badlu & Anr. v Shiv Charan & Ors, (1980) 4 SCC 401; Rajkumar Shivhare v Union of India, , 2011 (273) E.L.T. 75 (Bom); Flemingo (Duty Free Shop) P. Ltd. v Commissioner of Customs (Appeals) Mumbai-I, , 2015 (315) E.L.T. 321 (Bom); Steel Authority of India Ltd. v Collector of Central Excise, , 1996 (82) E.L.T. 172 (S.C.). We may note that in Flemingo, one of us (S.C. Dharmadhikari, J.) was a Member of the Bench in question.