THE HONBLE THE CHIEF JUSTICE SRI KALYAN JYOTI SENGUPTA AND THE HONBLE SRI JUSTICE SANJAY KUMAR

Writ Petition No.162 of 2015; dated 20-02-2015

M/s. K.V. Narayana Reddy,Middela Village,Narsapuram Mandal,Kadapa District, Andhra Pradesh. Petitioner

The Additional Commissioner,O/o. The Commissioner of Customs,Central Excise and Service Tax,Tirupathi and others..Respondents

For the petitioner: Sri K. Raji Reddy

For Respondents 1 & 2: Sri Jalakam Satyaram

CITATIONS:

1) 2008 (221) ELT 163 (SC)

2) (2008) 7 SCC 169

Order: (per the Honble the Chief Justice Sri Kalyan Jyoti Sengupta)

This writ petition has been filed by the petitioner asking for a writ of mandamus declaring the action of the 1st respondent in levying Service Tax on the works undertaken by the petitioner as illegal, arbitrary and consequently set aside the Original Order dated __.1/2014 passed by the 1st respondent for the period 2011-2012.

Going by the petitioners own case, the order aforesaid challenged before us was unsuccessfully taken to the appellate authorities under statute successively and both these authorities refused to entertain the same as they were presented not only beyond the period of limitation prescribed therefor, but also beyond the condonable period. On identical fact and issue, we have delivered a judgment on 29.1.2015 in Writ Petition No. 1409 of 2015 between M/s. Resolute Electronics Private Limited and Union of India, wherein, we have observed in paragraphs 5 and 6 thereof as follows:

5. We think that the petitioner keeping eyes open allowed the period for preferring the appeal as well as that of for condonation of delay allowed to expire and thereafter he approached. In other words, the petitioner had fitter away its own remedy. Therefore alleged situation of remediless is its own creation. According to us, the provision of Section

35(1) of the Act is absolutely rigid and cannot be extended either directly or indirectly by the Court of law. We set out the provision of Section 35(1) of the Act hereunder:

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), 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.

6. It is clear that it is specific mandate that even Section 5 of the Limitation Act, 1963 by virtue of Section 29(2) thereof, will not be applicable beyond 90 days. We are further of the view that once this period is allowed to expire intentionally or unintentionally, then remedy is absolutely barred and no Court of law can entertain the matter. However, the petitioner availed alternative remedy unsuccessfully, so we are not considering this aspect in great detail.

The aforesaid conclusion of ours is in consonance with the judgment of the Honble Supreme Court in Singh Enterprises vs. Commissioner of Central Excise, Jamshedpur, though we did not have the occasion to see the same. Para-8 of the said judgment is relevant for our purpose, which reads as follows:

The Commissioner of Central Excise (Appeals) as also the Tribunal being 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 proviso 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. In other words, this clearly shows that the appeal has 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.

Now, a copy of our judgment was supplied to the learned counsel for the appellant, who after considering the same submits citing a decision of the Supreme Court in the case of Consolidated Engineering Enterprises vs. Principal Secretary, Irrigation Department and Others, that attempt to prefer appeal unsuccessfully before the appellate authority, does not preclude the petitioner from maintaining the writ as at present his client is remediless.

We are of the view that the aforesaid judgment of the Supreme Court cited by the learned counsel is miles away from the point involved herein. In the case reported before the Supreme Court, the question was whether time taken for prosecuting the proceedings bona fide under Section 14 of the Limitation Act should be applicable or not.

Here, the issue is after availing the remedy unsuccessfully before another Court whether we can accept the challenge to the self same order, which has reached its finality under writ jurisdiction or not. According to us, it is not legally permissible, if it is done the writ court will unsettle alegally settled position. We think that when appellate authority has already decided the matter against the petitioner, the writ Court is debarred from doing so as the same binds the writ Court applying the principle of res judicata, particularly, when the appellate authorities orders are not challenged in the writ jurisdiction. Thus, we reject the contention of the learned counsel for the writ petitioner.

The writ petition is not maintainable. Accordingly, we dismiss the same.

Consequently, pending miscellaneous applications shall also stand closed. No order as to costs.

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K.J. SENGUPTA, CJ

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SANJAY KUMAR, J

20th February, 2015