

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 18TH DAY OF MARCH, 2015

BEFORE

THE HON'BLE MR.JUSTICE ARAVIND KUMAR

WRIT PETITION NO. 57483/2014 (T-RES)

BETWEEN:

BMS MINES & METALS PVT. LTD.,
NO.93, 1ST FLOOR, SPR COMPLEX,
TANK BUND ROAD
BELLARY
REP. BY MANAGING DIRECTOR
JASRAJ JAIN.

... PETITIONER

(BY SRI AIYER V.L.V ADVOCATE)

AND:

JOINT COMMISSIONER OF
COMMERCIAL TAXES (APPEALS-3)
DVO-III, ABOVE SHANTHI NAGAR
BUS TERMINUS, KH ROAD,
BENGALURU-560 027.

..RESPONDENT

(BY SRI T.K. VEDAMURTHY, HCGP)

WRIT PETITION IS FILED UNDER ARTICLE 226 AND 227 OF THE CONSTITUTION OF INDIA, PRAYING TO ORDER THAT THE IMPUGNED ORDER ON LIMITATION CAS ORDER NO.222166907 APP PASSED IN APPEAL NO. VAT-AP: 789/13-14 (TAX PERIOD:MARCH-06) DATED 9.7.2014 BY R-1 VIDE ANNEXURE-H IS SET ASIDE.

THIS PETITION COMING ON FOR PRELIMINARY HEARING THIS DAY, THE COURT MADE THE FOLLOWING:

ORDER

Heard Sri V.L.V.Aiyer, learned Advocate appearing for petitioner and Sri T.K. Vedamurthy, learned HCGP appearing for respondents.

2. Petitioner is calling in question order passed by first respondent dated 09.07.2014 (Annexure - H) dismissing the appeal on the ground that there is delay of 180 days in filing the appeal.

3. It is the contention of Sri Aiyer, learned Advocate appearing for petitioner that petitioner was prosecuting its claim before this Court in W.P.Nos.21328-329/2013 challenging the order of assessment and said writ petition came to be dismissed by this Court by order dated 01.07.2013 on the ground that petitioner is having alternate remedy of filing an appeal and being aggrieved by said order of dismissal of writ petition, petitioner had pursued its claim before the Division Bench in W.A.Nos.4600/2013 & 6508/2013 and said

writ appeals having also been dismissed by order dated 12.12.2013 (Annexure-A), appeal in question came to be presented before the first appellate authority i.e., respondent on 26.02.2014 and by the time said appeal came to be filed, there was delay of 180 days and as such application under Section 62(3) of the Karnataka Value Added Tax Act, 2003 (for short 'the Act') came to be filed and first appellate authority having entertained the appeal by granting an interim order of stay, ought not to have dismissed the appeal on the ground of same being barred by limitation. He would also contend that when petitioner was prosecuting its bonafide claim before this Court, petitioner would be entitled for protection under Section 14 of the Limitation Act, 1963. Hence, he prays for allowing this writ petition.

4. Per contra, Sri Vedamurthy, learned HCGP would support the impugned order and contends that Act expressly provides for filing of an appeal within 30 days and empowers the appellate authority to condone the

delay up to 180 days and any appeal which is filed beyond 210 days cannot be entertained as there is clear embargo under Sub-Section (3) of Section 62 of the Act to entertain such appeal beyond the prescribed period. Hence, he prays for dismissal of this writ petition.

5. Having heard the learned Advocates appearing for parties and on perusal of case papers, it would indicate that it is an undisputed fact that petitioner after having suffered an order of dismissal in W.P.Nos.21328-329/2013 pursued its grievance before Division Bench in W.A.Nos.4600/2013 & 6508/2013. Said Writ Appeals were not entertained on the ground that petitioner was having alternate remedy of approaching the appellate authority. Hence, writ appeals came to be dismissed by confirming the view taken by the learned Single Judge, who had declined to entertain the writ petition on the ground that petitioner was having alternative remedy of filing an appeal by challenging the Assessment order. It is only after dismissal of the writ appeals on

12.12.2013, petitioner filed an appeal before respondent questioning re-assessment order and penalty order dated 26.02.2013. It is also not in dispute that by the time said appeal came to be presented, there was delay of 287 days in preferring said appeal. As such, application came to be filed seeking condonation of delay. Appellate authority held that Act empowers the appellate authority to condone the delay of 180 days only and not beyond said period and as such, it has declined to entertain the appeal and dismissed the same on the ground that it is barred by limitation.

6. Though Mr.Aiyer, learned Advocate appearing for petitioner would contend that petitioner was prosecuting its claim before this Court and therefore petitioner would be entitled to seek for delay being condoned, this Court is of the considered view that provisions of Limitation Act, 1963 is inapplicable to a statutory appeal filed under Section 62 of the Act. Section 62 of the Act would provide for filing of an

appeal within 30 days from the date on which order was communicated to the appellant. Sub-section (3) of Section 62 of the Act also enables the appellate authority to entertain an appeal preferred after the period of 30 days but filed within period of 180 days after 30 days subject to appellant establishing that there was sufficient cause for not preferring the appeal within 30 days period. It is not in dispute that in the instant case, when the appeal came to be filed beyond period of 210 days (30 + 180 days). As on the date of filing of the appeal, there was delay of 287 days and as such an application seeking condonation of delay came to be filed. When the appellate authority is not empowered to condone the delay beyond 180 days, appellant cannot be heard to contend that either provisions of the Limitation Act, 1963 would be applicable or first appellate authority for any reason whatsoever could have condoned the delay by entertaining the appeal on merits beyond 210 days, since it would be contrary to Section 62 (3) of the Act

and as such, this Court is of the considered view that there is no infirmity committed by the first appellate authority namely, respondent in not entertaining the appeal which had been filed beyond 210 days.

7. Section 85 of the Finance Act which is in pari materia with Section 62 of the Act was the subject matter for consideration before Division Bench of this Court in the case of **THE DIRECTOR OF MINES AND GEOLOGY VS THE COMMISSIONER OF CENTRAL EXCISE (APPEALS-II), BENGALURU** reported in **2013(31) STR 275 (Kar)** whereunder it has been held, in the absence of provisions of Limitation being applicable, Section 5 of the Limitation Act, 1963 would not be applicable to the appeals filed under the said Act nor delay can be condoned when appeal is presented beyond period of limitation. It has been held by Division Bench of this Court as under:

“6. A perusal of the aforesaid provision makes it clear that a right of

appeal is created in favour of an assessee to challenge an order passed by the Adjudicating Authority subordinate to the Commissioner of Central Excise. The appeal lies to the Commissioner of Central Excise (Appeals). The appeal shall be preferred in the prescribed form and verified in the prescribed manner. Sub-Section 3 of Section 85 provides the period of limitation within which such an appeal is to be filed. It provides three months time to prefer an appeal from the date of receipt of the decision or order of such Adjudicating Authority. A proviso to the said provision makes it clear that if the appeal is not filed within three months as prescribed under sub-Section 3 of Section 85, the Commissioner of Central Excise (Appeals) is vested with the power to condone the delay if sufficient cause is made out for the delay in preferring the appeal. However, the said delay cannot exceed three months in addition to the period of three months prescribed for preferring an appeal. Therefore, the Act provides for a period of limitation as well as the provision for condoning the delay. Therefore, when an express provision is made for a period of limitation and also for condoning the delay, the said provision override the provisions of the Limitation Act which is the general law governing the law of limitation. In those circumstances, Section 5 of the

Limitation Act, which provides for condoning the delay, is not attracted.

8. For the reasons aforesaid, I do not find any merit in this writ petition. Accordingly, writ petition stands dismissed.

However, it is made clear that insofar as prayer (c) is concerned, no opinion is expressed and petitioner would be at liberty to seek for appropriate relief before jurisdictional Magistrate and in the event of any application is filed seeking for discharge, jurisdictional Magistrate would be at liberty to consider the same on merits and pass orders thereon in accordance with law.

It is also made clear that dismissal of this writ petition would not come in the way of petitioner availing any other remedy available under law.

**Sd/-
JUDGE**

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