

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

CUSTOM APPEAL NO. 109 OF 2015

M/s. Allied Fibers Ltd.

..Appellants

Versus

1 Commissioner of Customs
(Import)2 Customs, Excise & Service Tax Appellate
Tribunal

..Respondents

Mr. Kiran Doiphode I/by V.M. Doiphode & Co. for the Appellants.

Ms. S.I. Shah I/by S.I. Shah & Co. for Respondents/

**CORAM: ANOOP V. MOHTA AND
SMT.ANUJA PRABHUDESSAI, JJ.****DATE : July 10, 2017****ORAL JUDGMENT (Per Anoop V. Mohta, J.):**

1 This is an Appeal under Section 130 of the Customs Act,
1962.

2 Admit, on the following questions of law:

(a) Whether the Hon'ble Tribunal erred in holding
that ROM Application filed within the period of six
months from the date of receipt of the order was

beyond the time limit prescribed under the law?

(c) Whether the time limit of 6 months stipulated in Section 129B(2) will apply only in a case where the Tribunal suo moto rectifying the mistake crept in an order, which is apparent from the record?

3 Heard forthwith finally by consent of the parties.

4 The Appellant has challenged impugned order dated 15.07.2017 passed by Customs, Excise & Service Tax Appellate Tribunal, West Zonal Bench at Mumbai. (for short, “the Tribunal”|)

5 The relevant facts are as under :

Between October 1994 to September 1995, the Appellant has imported 8 consignments of capital goods. On 24.03.1998, a Show Cause Notice was issued to the Appellant demanding customs duty under Section 59 of the Customs Act, 1962 (The Act). On 27.3.1999, the Commissioner of Customs (Import) Mumbai dropped all the proposal against the Appellant in the notice. On 30.7.2004, on appeal, Tribunal (CESTAT), Mumbai, set aside the adjudication order

and remanded the matter, to the original authority for de novo adjudication. On 30.11.2006, the learned Commissioner of Customs Mumbai confirmed the demand of customs duty, confiscated the goods and imposed penalty on the Appellant. On 21.8.2014, Appellant preferred Appeal before the Tribunal which was dismissed. On 8.1.2015, Appellant did not receive the order passed by the Tribunal for considerable time of conclusion of hearing, therefore, Appellant requested Registrar of the Tribunal for handing over the order if any to bearer of the request letter. On 9.1.2015, the Registrar of the CESTAT handed over the order passed by the Tribunal to the representative of the Appellant. On 6.7.2015 the Appellant filed an Application for Rectification of Mistakes as provided under section 129B of the Act. On 15.7.2015, the Misc. Application was dismissed on the ground that the same was filed beyond the time limit prescribed under the law.

6 Section 129B(2) reads as under:

“129-B. Orders of Appellate Tribunal. -

(1)

(2) The Appellate Tribunal may, at any time within six

months from the date of the order, with a view to rectifying any mistake apparent from the record, amend any order passed by it under sub-section (1) and shall make such amendments if the mistake is brought to its notice by the Principal Commissioner of Customs or Commissioner of Customs or the other party to the appeal:

Provided that an amendment which has the effect of enhancing the assessment or reducing a refund or otherwise increasing the liability of the other party shall not be made under this sub-section, unless the Appellate Tribunal has given notice to him of its intention to do so and has allowed him a reasonable opportunity of being heard.

7 Admittedly, the Appellant received the copy of order dated 9.1.2015. The Application for rectification was filed by the Appellant on 9.6.2015. The Tribunal, therefore, in view of the stated provision and the judgment so referred in the order, rejected the Application. That resulted into rejection of the Appeal on merit itself.

8 The provision so reproduced above itself provides that the

Tribunal suo-moto need to rectify the mistake, if any, within six months from the date of the order. In this case, there was no such suo motu action initiated by the Tribunal. The Applicant/Appellant, however, after receipt of the impugned order, taken out the Application so recorded above. The Tribunal, therefore, was required to consider and decide the merits of the matter within six months from the date of receipt of such Application. This is for simple reason that the Appellant and/or the party would not be in a position to apply for rectification unless and until the actual order is seen and/or verified. There is nothing on record to show that the Appellant has received the copy of order on a particular date immediately after passing of the order. On the contrary, the Tribunal issued the copy of order on 9.1.2015, on the request/Application filed/made by the Appellant for the same. The statement is made that this Application for copy was moved as the Respondent/Department raised the demand on 8.1.2015. The Department's submission, that the plain reading of section itself is sufficient to reject the Application for rectification so filed by the Appellant beyond six months from the date of order, is unacceptable.

9 The judgment so read and referred by the Tribunal while rejecting the Application are distinct and distinguishable on facts and cannot be the foundation to reject such Application so filed by the Appellant. Furthermore, referring to clause (a) of Section 37C of Central Excise Act, 1944, a judgment is delivered by the Gujarat High Court in *Vadilal Industries Ltd v. Union of India*¹. The following are the observations made in paras 14 and 15, in our view, support the case of the Appellant:

“14 ... The Section is divided into two parts. The first part grants discretion to the Tribunal to take up any order made under sub Section (1) of Section 35C of the Act for rectifying any mistake apparent from record or amending any order within six months from the date of the order. The second part of the section requires that the Tribunal shall make such amendments if the mistake is brought to its notice by either party to the appeal before it. The p[arty to the appeal can bring the fact of apparent mistake on record only after going through the order made by the Tribunal. Therefore, to read that the period of limitation has to be computed at any time within six months from the date of the order does not fit in either with legislative intent or the language employed by the provision.

15 There is another angle from which the matter can be approached. It is only the party to the appeal who finds that the order contains a mistake apparent from the record and is aggrieved by such mistake, would be in a position to move an application seeking

1 2006 (197) E.L.T. 160 (Guj.)

rectification of the order. Therefore also, unless and until a party to the appeal is in a position to go through and study the order it would not be possible, nor can it be envisaged, that a party can claim to be aggrieved by the mistake apparent from the record. Hence, even on this count the period of limitation has to be read and understood so as to mean from the date of the receipt of the order.”

We are also of the same view referring to the similar provision so reproduced above. Under Customs Act the party to the Appeal, other party, as per the second part of the section, can apply for rectification of the mistake. Therefore, it is necessary for the party to see and verify the order so passed. That can only be done after receipt of the same. Therefore, the Application for rectification filed by the appellant in view of the above background which was admittedly within six months, the rejection order passed in the present case, is unacceptable. It renders the party remedyless for their no fault. This amounts to dismissal of appeal without hearing on merits.

10 We have gone through the provisions and related provisions where it is noted that there is no power and/or remedy available and/or no provision for condonation of delay in filing such Application for rectification. In the absence of any such provision, we

are of the view that the second part of the Section need to be read in the interest of the Appellant. The Application so filed after receipt of the order serve the purpose and object of the Application for rectification. The Tribunal, suo motu, even as per proviso to Section may correct the mistake within six months. But, if other party to appeal required correction, then second part of the Section is available to the Appellant/party. In such case, the strict interpretation of appeal within six month from the date of order referring to first part of the Section is unacceptable. Any application for correction filed by the appellant, other party, before the Tribunal, is required to be filed within six months from the receipt of the copy of the order, such application may not be dismissed, as not filed, within six months from the date of order.

11 Strikingly, the Apex Court in *Vidyacharan Shukla v. Khubchand Baghel & ors.*² (Five Judges Bench) considering the terms for the purpose of determining any period of limitation referring to provisions of Limitation Act and dealing with the rights of appeal conferred under the Act, though while dealing with the

2 AIR 1964 SC 1099

Representation of the People Act, 1951 held that the Appellant is entitled to exclude the time taken by him for obtaining the copy of the order and condoned the delay in filing such appeal. The provisions of Limitation Act read with the provisions of the Act in question, therefore, is required to be read together as both are relating to procedural aspects of filing such an appeal/application. As there is no specific provision to deal with the Limitation aspect from the receipt of the order, we are of the view that a case is made out by the Appellant even to condone the delay, if any. The period of limitation may be different under two different circumstances. Therefore, the Application so filed under the same provision from the receipt of order is within limitation. Such application cannot be liable to be dismissed as sought to be contended by the Department.

12 Therefore, taking overall view of the matter, we are inclined to interfere with the order so passed by holding that the second part of the Section read to mean that the Appeal/Application may be filed within six months from the receipt of the order. It would not be treated as beyond the prescribed period of six months from the date of order.

dgm

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13 Therefore, the following order :

ORDER

- (a) The Appeal is allowed.
- (b) Order dated 15.07.2015 passed by Customs, Excise & Service Tax Appellate Tribunal, West Zonal Bench at Mumbai is quashed and set aside.
- (c) Misc. Application for correction filed by the Appellant is restored to record. The same to be disposed of on merits in accordance with law.
- (d) Accordingly, the questions of law (a) and (c) are answered.
- (e) No costs.

(ANUJA PRABHUDESSAI,J.)

(ANOOP V. MOHTA, J.)