

IN THE HIGH COURT OF BOMBAY

**Notice of Motion No.743 of 2018
Customs Appeal (I) No.52 of 2018**

**THE COMMISSIONER OF CUSTOMS (IMPORT-I)
MUMBAI**

Vs

FUGRO SURVEY (MIDDLE EAST) LTD

Akil Kureshi & Sarang V Kotwal, JJ

Dated: April 11, 2019

Appellant Rep by: Mr Pradeep S. Jetly

**Respondent Rep by: Ms Khooshnum R. Daviervalva a/w Mr. Yazdi P. Jijina
i/b Mulla & Craigie Blunt & Caroe**

Cus - The present appeal is filed after a considerable period from such date of disposal of Department's appeal by Supreme Court - This Notice of Motion is strongly opposed by Respondent - Affidavit Reply is filed - The main contention of Respondent is that the Department was aware about the disposal of appeal by Supreme Court - Firstly, the Department was present before the Supreme Court when the order was passed - Secondly, it was also brought to the notice of Department by Respondent - There is no explanation for delay in filing the appeal - Respondent contended that the Department has repeatedly been lethargic in filing the appeals - Having thus heard the parties and having perused the documents on record, we may recall, the Department had initially approached the Supreme Court by filing Appeal under bona fide belief that such appeal against the Judgment of CESTAT was competent before the Supreme Court - The Supreme Court, however, expressed a different view, dismissing the appeal of Department - While doing so, liberty was kept open for Department to file appeal before the High Court - It is true that even after this order was passed by Supreme Court, the Department has taken considerable time in filing Appeal before the High Court - However, according to Department, the order of Supreme Court was not received - The Respondent did not dispute this aspect but contended that the factum of order of Supreme Court was conveyed to the Department by Respondent - Even going by this assertion, it happened in February 2017 - The Department has also cited reasons for explaining delay - The issue has a possibility of recurring effect - In totality of facts and circumstances of the case, therefore, the delay is condoned on the condition of payment of costs of Rs.20,000/- to the Respondent which shall be paid by the Department latest by 31/05/2019: HC

Notice of Motion disposed of

JUDGEMENT

1. This Notice of Motion is taken out by the Customs Department seeking condonation of delay of 1096 days in filing the Customs Appeal. The record would suggest that initially to challenge the Judgment of CESTAT, the Department had filed Appeal before the Supreme Court. Such Appeal was disposed of by an order dated 31/07/2015 holding that the Appeal would be maintainable before the High Court. The Appeal was therefore dismissed by the Supreme Court on such ground, giving liberty to the Department to approach the High Court.

2. The present Appeal is filed after a considerable period from such date of disposal of the Department's Appeal by the Supreme Court. In order to explain such delay, in the Affidavit in support of Notice of Motion, following averments are made :

"6. I say that the Honourable Supreme Court was pleased to dismiss Civil Appeal No.517 of 2006 [D24110 of 2005] by its Order dated 31-07-2015. The Honourable Supreme Court observed that the Appeal ought to be filed before this Honourable Court under Section 130 of the said Act and it was not maintainable before the Honourable Supreme Court. I most respectfully submit that the period lost during the pendency of the above Appeal before the Honourable Supreme Court is liable to be excluded in computing the period of limitation under Section 14 (2) of the Limitation Act, 1963. I respectfully submit that the Appellant bonafide pursued the statutory remedy and the defect or other cause like nature occurring in Section 14 of the Limitation Act, 1963 may be interpreted liberally to bring in its scope any circumstances, legal or factual which inhibits entertainment or consideration by this Honourable Court.

7. I say that a search of office records reveals the department did not receive an ordinary/certified copy of Order dated 31-07-2015 passed by the Honourable Supreme Court dismissing Civil Appeal NO.517 of 2006 [D24110 of 2005]. I say that assuming that the date of receipt of the Certified Copy of the Order is 31-07-2015 [which is the date of passing of the Order], then the above Appeal ought to have been filed on 18-8-2015. I say that the delay of 1096 days in filing this Appeal has been computed by taking 153 days of 2015, 366 days of 2016, 365 days of 2017 and 212 days of 2018 [1116 less 20 = 1096].

8. I say that inadvertently and by oversight, the department failed to realise, process and file an Appeal before this Honourable Court as per liberty granted by the Honourable Supreme Court vide its Order dated 31-07-2015 passed in Civil Appeal No.517 of 2006 [D24110 of 2005].

9. I say that it is only on receipt of a letter from the Deputy Commissioner (Legal), Vishakapatnam dated 15-12-2017, that the case file was traced. I say that the CESTAT, Vishakapatnam had disposed of an Appeal filed by the department by applying its Order in the case of Racial Survey Overseas Ltd. vs. CCE, Mumbai [2005-189-ELT-67] = **2005-TIOL-1184-CESTAT-MUM**. I say that the Deputy Commissioner (Legal), Vishakapatnam, sought

details as to whether the department had filed an appeal before this Honourable Court. I say that it was only then it was noticed that an Appeal needed to be filed before this Honourable Court.

10. I say that a search of the case records showed that the department had not received an Ordinary/Certified Copy of the Order of the Honourable Supreme Court. I say that the department overlooked to check and ascertain the status of pending matters before the Honourable Supreme Court. I say that the department was unaware of the outcome of Civil Appeal No.517 of 2006 [D24110 of 2005]. I say that the same was missed and not put up on file for further action. The delay is regretted and it is most respectfully submitted that this Honourable Court may be pleased to condone the delay and examine the issue on merits."

3. This Notice of Motion is strongly opposed by the Respondent. Affidavit Reply is filed. The main contention of the Respondent is that the Department was aware about the disposal of the Appeal by the Supreme Court. Firstly, the Department's Counsel was present before the Supreme Court when the order was passed. Secondly, it was also brought to the notice of the Department by the Respondent. There is no explanation for delay in filing the Appeal. Learned Counsel for the Respondent, in addition to taking us through the Affidavit Reply, contended that the Department has repeatedly been lethargic in filing the Appeals. She relied on the decisions of the Supreme Court and this Court to contend that a delay which is not explained, even if caused by the Government body, should not be condoned.

4. Having thus heard the learned Counsel for the parties and having perused the documents on record, we may recall, the Department had initially approached the Supreme Court by filing Appeal under bona fide belief that such Appeal against the Judgment of CESTAT was competent before the Supreme Court. The Supreme Court, however, expressed a different view, dismissing the Appeal of the Department. While doing so, liberty was kept open for the Department to file Appeal before the High Court. It is true that even after this order was passed by the Supreme Court, the Department has taken considerable time in filing Appeal before the High Court. However, according to the Department, the order of the Supreme Court was not received. The Respondent did not dispute this aspect but contended that the factum of the order of the Supreme Court was conveyed to the Department by the Respondent. Even going by this assertion, it happened in February 2017. The Department has also cited reasons for explaining delay, relevant portion of which we have reproduced on the order. We have also briefly acquainted ourselves with the controversy arising in the main Appeal. The issue has a possibility of recurring effect.

5. In totality of facts and circumstances of the case, therefore, the delay is condoned on the condition of payment of costs of Rs.20,000/- (Rupees

Twenty Thousand Only) to the Respondent which shall be paid by the Department latest by 31/05/2019.

6. Notice of Motion is disposed of accordingly.