

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 02-09-2016

C O R A M

The Honourable **Mr.Justice S.Manikumar**

and

The Honourable **Mr.Justice D.Krishnakumar**

Tax Case Appeal No.630 of 2016

S.P.Balasubrahmanyam

... Appellant

Vs

Assistant Commissioner of Income Tax

Media Circle I

No.112, Uttamar Gandhi Salai

Chennai - 600 034

... Respondent

Prayer: Tax Case Appeal filed under Section 260A of the Income Tax Act, 1961 against the orders of the Income Tax Appellate Tribunal, Madras 'C' Bench dated 11-12-2015 made in MA No.96/Mds/2015 in ITA No.638/Mds/2011

For appellant : Mr.J.Balachander

For respondents : Mr.M.Swaminathan
Sr. Standing Counsel

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JUDGMENT

(made by S.Manikumar,J)

Tax Case Appeal is directed against the order made in MA No.96/Mds/2015 in ITA No.638/Mds/2011 dated 11.12.2015, by which, the Tribunal, dismissed the petition filed to recall the order made in ITA No.638/Mds/2011 dated 18.07.2011, as time barred.

2. Facts leading to the appeal are that being aggrieved by the order of the Commissioner of Income Tax (Appeals) dated 04.01.2011 made in ITA No.185/09-10, Assistant Commissioner of Income Tax, Media Circle I, Chennai, the assessee has filed an appeal before the Income Tax Appellate Tribunal, 'C' Bench, Chennai. When the matter was called, there was no appearance on behalf of the appellant/assessee. Joint Commissioner of Income Tax appeared for the Revenue and argued the case.

3. After hearing the arguments and considering the materials on record, the Tribunal, vide order dated 18.07.2011 made in ITA No.638/Mds/2011 for the Assessment Year 2007-2008, disagreed with the finding of the Commissioner of Income Tax (Appeals), that the cost of acquisition in the hands of the assessee must be taken at Rs.49,82,300/-. The Tribunal further

held that the cost of acquisition must be taken at Rs.24,00,000/- as adopted by the Assessing Officer and ordered hereunder:

"7.....But, as the assessee has thereafter paid additional stamp duty and incurred other charges on the ground of underpayment of stamp duty, those amounts subsequently paid by the assessee should also be added to the amount of Rs.24.00 Lakhs to arrive at the cost of acquisition. To this extent the assessee is entitled for the relief. Therefore we direct the assessing authority to refix the acquisition cost by adding the amount of Rs.24 lakhs and the amount of additional stamp duty and expenses incurred by the assessee. But for this modification, the computation made by the assessing authority is upheld.

8. In the facts and circumstances of the case the order of the Commissioner of Income Tax (Appeals) on this point is vacated and the order of the Assessing Officer is restored, subject to the marginal relief ordered by us.

10. In result this appeal filed by the Revenue is allowed."

4. Aggrieved by the order made in ITA No.638/Mds/2011 dated 18.7.2011, assessee/appellant is stated to have filed an independent tax appeal with delay. While matter stood thus,

assessee/appellant has filed MA No.96/Mds/2015, to recall the ex-parte order contending that the same has resulted in prejudice to the assessee.

5. Averments made in MA No.96/Mds/2015 filed to recall and to set aside the ex-parte order, with a prayer to restore the same on file, are that:

"It is submitted that the petitioner/respondent came to know about the service of the notice for posting the hearing and as well as the final exparte order passed in the said appeal only very recently. The notice was served in the address where the office of the petitioner/respondent is situated. That particular notice and the final exparte order was received by the security agency staff of the petitioner/respondent/ assessee. But unfortunately the said security of the petiitoner failed to hand over the said Tribunal order either to the petitioner/respondent/assessee or to his personal secretary. The petitioner was never aware about the service of the notice and the final order. The petitioner's personal secretary was also not well and was hospitalised for cardiac problem.

It is submitted that the non representation is neither wilful nor wanton, but due to reasons set forth above.

The petitioner/respondent respectfully submits that there is no wilful or wanton non appearance before the Hon'ble ITAT. The petitioner submits that there exists sufficient cause for recalling the order in terms of ITAT Rules. The courts have held similar views on civil law also."

6. Adverting to the same, the Tribunal vide order in MA No.96/Mds/2015 in ITA No.638/Mds/2011 dated 11.12.2015, for the Assessment Year 2007-2008, passed orders, dismissing the petition, as hereunder:

"3. The Id. AR submitted that the order of the Tribunal was passed on 18.7.2011 and date of receipt of the order is to be considered. If we consider the date of order, the assessee has to file the M.A. within four years from the date of order of the Tribunal. In our opinion, the contention of the Id. AR is misconceived as per the decision of the Special Bench of the Tribunal in the case of Arvindbhai H. Shah v. ACIT (91 ITD 101)(Ahd.). The time limit of four years to make rectification u/s.254(2) applies both to suo motu action of the Tribunal as well as to action taken by the parties on request. Being so, the MA is not maintainable, which is filed beyond time limit. Accordingly, this MA is dismissed."

7. Assailing the correctness of the order made in MA

No.96/Mds/2015 in ITA No.638/Mds/2011, instant tax appeal is filed, on the following substantial question of law:

"Whether on the facts and circumstances of the case the Hon'ble Income Tax Appellate Tribunal was right in law in rejecting the Miscellaneous Petition/Application filed under Order 25 of the Income Tax Tribunal Rules, 1963 read with under Section 254(2) of the Income Tax Act, 1961 for recall of the exparte order passed in ITA No.638/mds/2011 dated 18th July 2011 as barred by limitation taking into consideration the time taken for actual service of the Exparte order."

8. Inviting the attention of this court to Section 254 of the Income Tax Act, 1961, r/w Rule 25 of the Income Tax Appellate Tribunal Rules, 1963, Mr.J.Balachander, learned counsel for the appellant, submitted that whenever an ex-parte order is passed by the Tribunal, application to set aside the same, and to restore the appeal on file is filed, only under the above provisions, at any time within four years from the date of the order, with a view to rectify any mistake, apparent on the face of record, amend any order passed by it under sub section (1) of Section 254 of the Act, and that the Tribunal shall make such amendment when the mistake is brought to its notice by the assessee or the Assessing officer.

9. Placing reliance on the decision of the Hon'ble Apex Court

in ***Madan lal vs State of UP and others*** reported in **1975 (2) SCC 779** and in the case of ***India House vs Kishan Lal vani*** reported in **2003 (9) SCC 393**, Mr.J.Balachander, learned counsel for the appellant contended that the Tribunal, has erred in not properly considering the principles of law laid down in the aforesaid judgments with regard to the time taken for service of the order on the assessee. According to him, the Tribunal has erred in not excluding the time taken for the actual service of the order passed in the appeal in ITA No.638/mds/2011 dated 18.7.2011, and computed the period of limitation of four years from the date of passing of the ex-parte order i.e. 18.7.2011. For the above said reasons, he prayed to set aside the order of the Tribunal.

10. Contention that such petition for recalling an exparte order, is filed under section 254(2) read with Rule 25 of the Income Tax Appellate Tribunal Rules, 1963 to set aside the exparte order, and consequently for restoration of the appeal, is not disputed by Mr.M.Swaminathan, learned standing counsel for the respondent. But placing reliance on the decision of this court in ***Vyline Glass Works Ltd vs. Assistant Commissioner of Wealth Tax*** reported in **(2015) 373 ITR 355 Mad**, learned

standing counsel for Income Tax department submitted that, even if the Tribunal wants to recall the order, is invoking Section 254(2) of the Income Tax Act, 1961 and reasons have to be recorded, it cannot blindly recall the order, on the application for rectification.

11. He further submitted that this court further held that power to rectify can be exercised, only in a case, if there is a mistake apparent on the face of record. Placing reliance on the decision of the Bombay High Court in ***Bharat Petroleum Corporation Ltd vs. Income Tax Appellate Tribunal and others*** reported in **(2013) 359 ITR 371 Bom,** Mr.M.Swaminathan, learned Standing Counsel for the Revenue submitted that even if an application for rectification is filed under Section 254(2) of the Act, 1961, the Tribunal can rectify its order, only within four years from the date of the order, which is sought to be rectified and in the case on hand, the very application for recalling the order filed under Section 254(2) of the Act has been filed beyond four years. For the above said reasons, he submitted that the order of the Tribunal dated 11.12.2015 made in MA No.96/mds/2015 in ITA No.638/mds/2011 does not call for any interference, and prayed for dismissal of the Tax Appeal.

12. Before advertng to the above contentions, let us have a cursory look at the provisions referred to by the learned counsel for the appellant.

13. Section 254 of the Income Tax Act, 1961 deals with the orders passed by the Tribunal and it reads as under:

Orders of Appellate Tribunal.

254. (1) *The Appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit.*

(1A) [***]

(2) *The Appellate Tribunal may, at any time within six months from the end of the month in which the order was passed, **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 amendment if the mistake is brought to its notice by the assessee or the Assessing Officer:*

Provided *that an amendment which has the effect of enhancing an assessment or reducing a refund or otherwise increasing the liability of the assessee, shall not be made under this sub-section unless the Appellate Tribunal has given notice to the assessee of its intention to do so and has*

allowed the assessee a reasonable opportunity of being heard:

Provided further that any application filed by the assessee in this sub-section on or after the 1st day of October, 1998, shall be accompanied by a fee of fifty rupees.

(2A) In every appeal, the Appellate Tribunal, where it is possible, may hear and decide such appeal within a period of four years from the end of the financial year in which such appeal is filed under sub-section (1) or sub-section (2) of [section 253](#):

Provided that the Appellate Tribunal may, after considering the merits of the application made by the assessee, pass an order of stay in any proceedings relating to an appeal filed under sub-section (1) of [section 253](#), for a period not exceeding one hundred and eighty days from the date of such order and the Appellate Tribunal shall dispose of the appeal within the said period of stay specified in that order:

Provided further that where such appeal is not so disposed of within the said period of stay as specified in the order of stay, the Appellate Tribunal may, on an application made in this behalf by the assessee and on being satisfied that the delay in disposing of the appeal is not attributable to the assessee, extend the period of stay, or pass an order of stay for a further period

or periods as it thinks fit; so, however, that the aggregate of the period originally allowed and the period or periods so extended or allowed shall not, in any case, exceed three hundred and sixty-five days and the Appellate Tribunal shall dispose of the appeal within the period or periods of stay so extended or allowed:

Provided also *that if such appeal is not so disposed of within the period allowed under the first proviso or the period or periods extended or allowed under the second proviso, which shall not, in any case, exceed three hundred and sixty-five days, the order of stay shall stand vacated after the expiry of such period or periods, even if the delay in disposing of the appeal is not attributable to the assessee.*

(2B) The cost of any appeal to the Appellate Tribunal shall be at the discretion of that Tribunal.

(3) The Appellate Tribunal shall send a copy of any orders passed under this section to the assessee and to the Principal Commissioner or Commissioner.

(4) Save as provided in [section 256](#) or [section 260A](#), orders passed by the Appellate Tribunal on appeal shall be final.

14. Rule 24 of the Income Tax Appellate Tribunal Rules, 1963 deals with hearing of appeal exparte for default by the

appellant.

Hearing of appeal ex parte for default by the appellant.

24. *Where, on the day fixed for hearing or on any other date to which the hearing may be adjourned, the appellant does not appear in person or through an authorised representative when the appeal is called on for hearing, the Tribunal may dispose of the appeal on merits after hearing the respondent :*

Provided *that where an appeal has been disposed of as provided above and the appellant appears afterwards and satisfies the Tribunal that there was sufficient cause for his non-appearance, when the appeal was called on for hearing, the Tribunal shall make an order setting aside the exparte order and restoring the appeal.]*

15. Rule 25 of the said rules deals with hearing of the appeal exparte for default by the respondent. They read as under:

Hearing of appeal exparte for default by the respondent.

25. *Where, on the day fixed for hearing or any other day to which the hearing may be adjourned, the appellant appears and the respondent does not appear in person or through an authorised representative when the appeal is called on for*

hearing, the Tribunal may dispose of the appeal on merits after hearing the appellant :]

Provided that where an appeal has been disposed of as provided above and the respondent appears afterwards and satisfies the Tribunal that there was sufficient cause for his non-appearance when the appeal was called on for hearing, the Tribunal shall make an order setting aside the *ex parte* order and restore the appeal.

16. Reading of both, Rules 24 and 25 of the Income Tax Appellate Tribunal Rules, 1963, does not indicate any outer time limit prescribed for filing an application either by the appellant or respondent, as the case may be, to set aside the *ex parte* order and to restore the appeal on file. Rules have been framed enabling the appellant/respondent, before the Tribunal, who has suffered an *ex parte* order, to seek for setting aside the same and for restoration of the appeal. However, it could be noticed that under the guise of recalling an *ex parte* order, petitions are being filed, indirectly challenging the correctness of the order, under Section 254 of the Act, and to rectify the original order.

17. As per Section 253 of the Act, appeal has to be filed within the prescribed time limit of 60 days, and such appeal has to be heard and disposed of within four years from the end of the

financial year in which such appeal is filed under sub section (1) or sub section (2) of Section 253 of the Income Tax Act. That being the case, miscellaneous application filed beyond the period of four years, is time barred.

18. In ***Vyline Glass Works Ltd vs. Assistant Commissioner of Wealth Tax*** reported in ***(2015) 373 ITR 355 Mad.***, a Honourable Division Bench of this court considered the following decisions:

24. In the case of ***Honda Siel Power Products Ltd., v. Commissioner of Income Tax*** reported in ***[2007] 295 ITR 466***, the Supreme Court while dealing with the scope of rectification, held as follows:

"As stated above, in this case we are concerned with the application under Section 254(2) of the 1961 Act. As stated above, the expression 'rectification of mistake from the record' occurs in Section 154. It also finds place in Section 254(2). The purpose behind the enactment of Section 254(2) is based on the fundamental principle that no party appearing before the Tribunal, be it an assessee or the Department, should suffer on account of any mistake committed by the Tribunal. This fundamental principle has nothing to do with the inherent powers of the Tribunal. In the present case, the Tribunal in its

order dated September 10, 2003 allowing the rectification application has given a finding that Samtel Color Ltd. (supra) was cited before it by the assessee but through oversight it had missed out the said judgment while dismissing the appeal filed by the assessee on the question of admissibility/allowability of the claim of the assessee for enhanced depreciation under Section 43A. One of the important reasons for giving the power of rectification to the Tribunal is to see that no prejudice is caused to either of the parties appearing before it by its decision based on a mistake apparent from the record.

'Rule of precedent' is an important aspect of legal certainty in rule of law. That principle is not obliterated by Section 254(2) of the Income-tax Act, 1961. When prejudice results from an order attributable to the Tribunal's mistake, error or omission, then it is the duty of the Tribunal to set it right. Atonement to the wronged party by the court or Tribunal for the wrong committed by it has nothing to do with the concept of inherent power to review."

26. In the case of L.D.Bhatia Hingwala (P) Ltd. v. Asst. CIT (Delhi) (FB) reported in [2011] 330 ITR 243 (Delhi) (FB), the Full Bench of the Delhi High Court, while answering the reference with regard to the power of the Tribunal to recall its order, after analysing the various decisions including the decision of the Supreme Court in the case of Honda Siel Power Products Ltd. (Supra),

held as follows:

"We have carefully perused the decisions rendered by the High Courts of Madras, Bombay, Karnataka and Rajasthan which have been commended to us by Mr. Mehta and we notice that the decision was distinguished on the factual score and none of the decisions have proceeded to say that it is not a precedent for the proposition that the Tribunal under no circumstances can recall its own order.

33. In view of our aforesaid analysis, we proceed to state our conclusions in seriatim as follows :

(A) The decision rendered in Honda Siel Power Products Ltd. [2007] 295 ITR 466 by the apex court is an authority for the proposition that the Income-tax Appellate Tribunal under certain circumstances can recall its own order and there is no absolute prohibition.

(B) In view of the law laid down in Honda Siel Power Products Ltd. [2007] 295 ITR 466 by the apex court, the decisions rendered by this court in K. L. Bhatia [1990] 182 ITR 361 (Delhi), Deeksha Suri [1998] 232 ITR 395 (Delhi), Karan and Co. [2002] 253 ITR 131 (Delhi), J. N. Sahni [2002] 257 ITR 16 (Delhi) and Smt. Baljeet Jolly [2001] 250 ITR 113 (Delhi) which lay down the principle that the Tribunal under no circumstances can recall its order in entirety do not lay down the correct statement of law.

(C) Any other decision or authority which has

been rendered by pressing reliance on K. L. Bhatia [1990] 182 ITR 361 (Delhi) and the said line of decisions are also to be treated as not laying down the correct pro position of law that the Tribunal has no power to recall an order passed by it in exercise of power under Section 254(2) of the Act.

(D) The Tribunal, while exercising the power of rectification under Section 254(2) of the Act, can recall its order in entirety if it is satisfied that prejudice has resulted to the party which is attributable to the Tribunal's mistake, error or omission and which error is a manifest error and it has nothing to do with the doctrine or concept of inherent power of review.

(E) When the justification of an order passed by the Tribunal recalling its own order is assailed in a writ petition, it is required to be tested on the anvil of law laid down by the apex court in Honda Siel Power Products Ltd. [2007] 295 ITR 466 (SC) and Saurashtra Kutch Stock Exchange Ltd. [2008] 305 ITR 227 (SC)."

19. In ***Madanlal vs. State of UP and others*** reported in **(1975) 2 SCC 779**, the Hon'ble Apex Court held that the determination of the statutory period of limitation runs from the date of notice, actual or constructive, after the making of the order.

20. In ***India House vs Kishan Lal vani*** reported in **2003**

(9) SCC 393, the Hon'ble Apex Court held as follows:

"The period of limitation statutorily prescribed has to be strictly adhered to and cannot be relaxed or departed from for equitable considerations. At the same time full effect should also be given to those provisions which permit extension or relaxation in computing period of limitation such as those contained in Section 12 of the Limitation Act. The underlying purpose of these provisions is to enable a litigant seeking enforcement of his right to any remedy to do so effectively and harsh prescription of time-bar not unduly interfering with the exercise of statutory rights and remedies. That is why Section 12 has always been liberally interpreted. To wit, the time requisite for obtaining a copy of the impugned decree, sentence or order has been held liable to be excluded from computing the period of limitation although such copy may not necessarily be required to be filed along with appeal, application or memo of representation or review. No distinction is drawn between decrees or orders pronounced on the original side or the appellate or revisional side. No application is required to be made seeking the benefit of Section 12 of Limitation Act; it is the statutory obligation of the Court to extend the benefit where available. Although the language of sub-Section (2) of Section 12 is couched in a form mandating the time requisite for obtaining the copy being excluded from computing the period of limitation, the easier way of expressing the rule and

applying it in practice is to find out the period of limitation prescribed and then add to it the time requisite for obtaining the copy - the date of application for copy, and the date of delivery, thereof both included - and treat the result of addition as the period of limitation. The underlying principle is that such copy may or may not be required to accompany the petition in the jurisdiction sought to be invoked yet to make up one's mind for pursuing the next remedy, for obtaining legal opinion and for appropriately drafting the petition by finding out the grounds therefor the litigant must be armed with such copy. Without the authentic copy being available the remedy in the higher forum or subsequent jurisdiction may be rendered a farce. All that sub-Section (2) of Section 12 of the Limitation Act says is the time requisite for obtaining the copy being excluded from computing the period of limitation, or, in other words, as we have put it hereinabove, the time requisite for obtaining the copy being added to the prescribed period of limitation and treating the result of addition as the period prescribed. In adopting this methodology it does not make any difference whether the application for certified copy was made within the prescribed period of limitation or beyond it. Neither it is so provided in sub-section (2) of Section 12 of the Limitation Act nor in principle we find any reason or logic for taking such a view."

21. Even taking for granted that the judgments of the Apex

Court are applicable to the case on hand and that the period of limitation of four years for filing an application for recalling an order filed under Section 254(2) of the Income Tax Act, 1961, has to be computed from the date of service of the order, averments made in the said petition, filed in the year 2015, are bereft of details, as to when the order was served in the address, where the office of the appellant is situated. Order of the Tribunal in ITA No.638/mds/2011, has been passed on 18.7.2011, whereas, the appellant has filed the petition on 24.7.2015, which is beyond four years from the date of passing of the order by the Tribunal on 18.7.2011. Though Mr.J.Balachander, learned counsel for the appellant, submitted that in the normal course, service of order, on the party would take some time, and therefore the miscellaneous application filed on 24.7.2015 was just six days exceeding the four years period from the date of passing the order and therefore, the Tribunal ought to have considered the time taken for service of the impugned order and allowed the application for rectification, we are not inclined to accept the said contention, for the reason that, there are no averments in the miscellaneous petition, as to when the order was served on the appellant.

22. Due diligence and caution, are the essential

requirements. It is true that due diligence cannot be measured by any absolute standard but it depends on relative facts of a particular case. Due diligence is a measure of prudence by the litigant, who is expected to be reasonable and prudent, under the particular circumstances. In the case on hand, laches on the part of the appellant is apparent.

23. The delay and laches on the part of the petitioners is *per se* apparent. In this context, this Court deems it fit to extract few decisions dealing with delay and laches, which are as follows:

(i) In **P.S.Sadasivaswamy v. State of Tamil Nadu** reported in **AIR 1974 SC 2271**, the Apex Court held as follows;-

"..... A person aggrieved by an order of promoting a junior over his head should approach the Court at least within six months or at the most a year of such promotion. It is not that there is any period of limitation for the Courts to exercise their powers under Article 226 nor is it that there can never be a case where the Courts cannot interfere in a matter after the passage of a certain length of time. But it would be a sound and wise exercise of discretion for the Courts to refuse to exercise their extraordinary powers under Article 226 in the case of persons who do not approach it expeditiously for relief and who stand by and allow things to happen and then approach the Court to put forward stale claims and try to unsettle settled matters. The petitioner's petition should, therefore, have been

dismissed in *limine*. Entertaining such petitions is a waste of time of the Court. It clogs the work of the Court and impedes the work of the Court in considering legitimate grievances as also its normal work. We consider that the High Court was right in dismissing the appellant's petition as well as the appeal."

(ii). In **State of M.P. v. Bhailal Bhai** reported in **AIR 1964 SC 1006**, the Supreme Court held that it is not either unreasonable delay denies to the petitioner the discretionary extraordinary remedy of mandamus, certiorari or any other relief.

(iii). In **State of M.P., v. Nandlal Jaismal** reported in **1986 (4) SCC 566**, the Supreme Court, at Paragraph 24, held as follows:

"24. Now, it is well settled that the power of the High Court to issue an appropriate writ under Article 226 of the Constitution is discretionary and the High Court in the exercise of its discretion does not ordinarily assist the tardy and the indolent or the acquiescent and the lethargic. If there is inordinate delay on the part of the petitioner in filing a writ petition and such delay is not satisfactorily explained, the High Court may decline to intervene and grant relief in the exercise of its writ jurisdiction. The evolution of this rule of laches or delay is premised upon a number of factors. The High Court does not ordinarily permit a belated resort to the extraordinary remedy under the writ jurisdiction because it is likely to cause confusion and public inconvenience and bring in its train new injustices. The rights of third parties may intervene and if the writ jurisdiction is exercised on a writ petition filed after unreasonable delay, it may have the effect of inflicting not only hardship and

inconvenience but also injustice on third parties. When the writ jurisdiction of the High Court is invoked, unexplained delay coupled with the creation of third party rights in the meanwhile is an important factor which always weighs the High Court in deciding whether or not to exercise such jurisdiction. We do not think it necessary to burden this judgment with reference to various decisions of this Court where it has been emphasised time and again that where there is inordinate and unexplained delay and third party rights are created in the intervening period, the High Court would decline to interfere, even if the State action complained of is unconstitutional or illegal.Of course, this rule of laches or delay is not a rigid rule which can be cast in a strait jacket formula, for there may be cases where despite delay and creation of third party rights the High Court may still in the exercise of its discretion interfere and grant relief to the petitioner. But, such cases where the demand of justice is so compelling that the High Court would be inclined to interfere in spite of delay or creation of third party rights would by their very nature be few and far between. Ultimately it would be a matter within the discretion of the court; *ex hypothesi* every discretion must be exercised fairly and justly so as to promote justice and not to defeat it."

(iv) In **State of Maharashtra v. Digambar** reported in **AIR 1995 SC 1991**, the Supreme Court, considered a case, where compensation for the acquired land was claimed belatedly and at Paragraphs 12, 18 and 21, held as follows:

"12. How a person who alleges against the State of deprivation of his legal right, can get relief of compensation from the State invoking writ jurisdiction of

the High Court under article 226 of the Constitution even though, he is guilty of laches or undue delay is difficult to comprehend, when it is well settled by decision of this Court that no person, be he a citizen or otherwise, is entitled to obtain the equitable relief under Article 226 of the Constitution if his conduct is blameworthy because of laches, undue delay, acquiescence, waiver and the like. Moreover, how a citizen claiming discretionary relief under Article 226 of the Constitution against a State, could be relieved of his obligation to establish his unblameworthy conduct for getting such relief, where the State against which relief is sought is a welfare State, is also difficult to comprehend. Where the relief sought under Article 226 of the Constitution by a person against the welfare State is founded on its alleged illegal or wrongful executive action, the need to explain laches or undue delay on his part to obtain such relief, should, if anything, be more stringent than in other cases, for the reason that the State due to laches or undue delay on the part of the person seeking relief, may not be able to show that the executive action complained of was legal or correct for want of records pertaining to the action or for the officers who were responsible for such action not being available later on. Further, where granting of relief is claimed against the State on alleged unwarranted executive action, is bound to result in loss to the public exchequer of the State or in damage to other public interest, the High Court before granting such relief is required to satisfy itself that the delay or laches on the part of a citizen or any other person in approaching for relief under Article 226 of the Constitution on the alleged violation of his legal

right, was wholly justified in the facts and circumstances, instead of ignoring the same or leniently considering it. Thus, in our view, persons seeking relief against the State under Article 226 of the Constitution, be they citizens or otherwise, cannot get discretionary relief obtainable thereunder unless they fully satisfy the High Court that the facts and circumstances of the case clearly justified the laches or undue delay on their part in approaching the Court for grant of such discretionary relief. Therefore, where a High Court grants relief to a citizen or any other person under Article 226 of the Constitution against any person including the State without considering his blame-worthy conduct, such as laches or undue delay, acquiescence or waiver, the relief so granted becomes unsustainable even if the relief was granted in respect of alleged deprivation of his legal right by the State.

18. Laches or undue delay, the blame-worthy conduct of a person in approaching a Court of Equity in England for obtaining discretionary relief which disentitled for grant of such relief was explained succinctly by Sir Barnes Peacock, long ago, in *Lindsay Petroleum Co. v. Prosper Armstrong* (1874) 5 PC 221) thus :

"Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his

conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation, in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute or limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of Justice or injustice in taking the one course or the other, so far as it relates to the remedy."

21. Therefore, where a High Court in exercise of its power vested under Article 226 of the Constitution issues a direction, order or writ for granting relief to a person including a citizen without considering his disentitlement of such relief due to his blameworthy conduct of undue delay or laches in claiming the same, such a direction, order or writ becomes unsustainable as that not made judiciously and reasonably in exercise of its sound judicial discretion, but as that made arbitrarily."

(v). In **State of Rajasthan v. D.R.Laxmi** reported in **1996 (6) SCC 445**, the Supreme Court observed that though the order may be void, if the party does not approach the Court within a reasonable time, which is always a

question of fact and have the order invalidated or acquiesced or waived, the discretion of the Court has to be exercised in a reasonable manner.

(vi). In **Chairman, U.P. Jal Nigam and another v. Jaswant Singh** reported in **AIR 2007 SC 924**, the Supreme Court, after considering a catena of decisions on the aspect of delay, at Paragraph 13, held as follows:

"13.Therefore, whenever it appears that the claimants lost time or while away and did not rise to the occasion in time for filing the writ petitions, then in such cases, the Court should be very slow in granting the relief to the incumbent. Secondly, it has also to be taken into consideration the question of acquiescence or waiver on the part of the incumbent whether other parties are going to be prejudiced if the relief is granted."

24. Further in **H.Dohil Constructions Company Private Limited V. Nahar Exports Limited and Another**, reported in **2015 (1) Supreme Court Cases 680**, the Hon'ble Supreme Court, after considering a Hon'ble Division Bench judgment of this Court in **Tamilnadu Mercantile Bank Ltd., Vs. Appellate Authority**, reported in **(1990) 1 LLN 457** and decision of the Supreme Court in **Esha Bhattacharjee v. Raghunathpur Nafar Academy**, reported in **(2013) 12 SCC 649** at paragraph Nos.23 and 24, held as follows:

"23. We may also usefully refer to the recent decision of this Court in **Esha Bhattacharjee [Esha Bhattacharjee v. Raghunathpur Nafar Academy, reported in (2013) 12 SCC 649]**, where several principles were culled out to be kept in Principles (iv), (v), (viii), (ix) and (x) of para 21 can be usefully referred

to, which read as under: (SCC pp. 658-59)

“21.4(iv) No presumption can be attached to deliberate causation of delay but, gross negligence on the part of the counsel or litigant is to be taken note of.

21.5. (v) Lack of bona fides imputable to a party seeking condonation of delay is a significant and relevant fact.

21.8. (viii) There is a distinction between inordinate delay and a delay of short duration or few days, for to the former doctrine of prejudice is attracted whereas to the latter it may not be attracted. That apart, the first one warrants strict approach whereas the second calls for a liberal delineation.

21.9 (ix) The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the courts are required to weight the scale of balance of justice in respect of both parties and the said principle cannot be given a total go-by in the name of liberal approach.

21.10. (x) If the explanation offered is concocted or the grounds urged in the application are fanciful, the courts should be vigilant not to expose the other side unnecessarily to face such a litigation.

24. When we apply those principles to the case on hand, it has to be stated that the failure of the Respondents in not showing due diligence in filing of the appeals and the enormous time taken in the refiling can only be construed, in the absence of any valid explanation, as gross negligence and lacks in bonafides as displayed on the part of the Respondents. Further, when the Respondents have not come forward with

proper details as regards the date when the papers were returned for refiling, the non-furnishing of satisfactory reasons for not refiling of papers in time and the failure to pay the Court fee at the time of the filing of appeal papers on 06.09.2007, the reasons which prevented the Respondents from not paying the Court fee along with the appeal papers and the failure to furnish the details as to who was their counsel who was previously entrusted with the filing of the appeals cumulatively considered, disclose that there was total lack of bonafides in its approach. It also requires to be stated that in the case on hand, not refiling the appeal papers within the time prescribed and by allowing the delay to the extent of nearly 1727 days, definitely calls for a stringent scrutiny and cannot be accepted as having been explained without proper reasons. As has been laid down by this Court, Courts are required to weigh the scale of balance of justice in respect of both parties and the same principle cannot be given a go-by under the guise of liberal approach even if it pertains to refiling. The filing of an application for condoning the delay of 1727 days in the matter of refiling without disclosing reasons, much less satisfactory reasons only results in the Respondents not deserving any indulgence by the Court in the matter of condonation of delay. The Respondents had filed the suit for specific performance and when the trial Court found that the claim for specific performance based on the agreement was correct but exercised its discretion not to grant the relief for specific performance but grant only a payment of damages and the Respondents were really keen to get the decree for specific performance by filing the appeals, they should

have shown utmost diligence and come forward with justifiable reasons when an enormous delay of five years was involved in getting its appeals registered.”

25. In the light of the discussions and decisions, we find no merit in the appeal and consequently, the substantial question of law raised, is answered against the assessee. Accordingly, the instant Tax Case Appeal is dismissed. However, there shall be no order as to cost.

(S.M.K.,J) (D.K.K.,J)
02-09.2016

Index : Yes/No
website : Yes/No
asr

S.MANIKUMAR,J

a n d

D.KRISHNAKUMAR,J

asr

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