

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 03/08/2016

C O R A M

The Honourable **Mr.Justice S.Manikumar**
and
The Honourable **Mr.Justice D.Krishnakumar**

Tax Case Appeal Nos.522, 523, 507, 508 and 509 of 2016
and
C.M.P.Nos.10444, 10445, 10118 and 10119 of 2016

Inderchand D. Kochar	... Appellant in T.C.A.No.522/2016
Smt.Anita Kochar	... Appellant in T.C.A.No.523/2016
Ramesh Kumar Kochar	... Appellant in T.C.A.No.507/2016
Smt.Sarala Kanwar	... Appellant in T.C.A.No.508/2016
Suresh Kumar Kochar	... Appellant in T.C.A.No.509/2016

Vs

The Assistant Commissioner of Income Tax Central Circle - II(2) Chennai	... Respondent in all TCAs
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Prayer: Tax Case Appeals filed under Section 260A of Income Tax Act, 1961 against the orders of the Income Tax Appellate Tribunal, Madras 'C' Bench dated 23/09/2015 in ITA Nos.1976/Mds/2014, 1978/Mds/2014, 1974/Mds/2014, 1975/Mds/2014 and 1977/Mds/2014.

For appellant : Mr.S.Sridhar
in all the TCAs

For respondent : Mr.T.R.Senthilkumar,
Senior Standing Counsel for IT

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COMMON JUDGMENT

(Judgment of the Court was made by S.Manikumar,J)

Instant Appeals, have been filed against the orders of the Income Tax Appellate Tribunal, 'C' Bench, Madras, dated 23/09/2015. Common substantial question of law raised in all appeals by the appellant is that :

"whether the Appellate Tribunal is correct in law in not admitting the appeal without properly considering the reasons shown for the said belated filing of the appeal before them, proving perversity in their findings even though the belated filing of the appeal before them was in consequence to the change of auditor and further due to the time taken in pursuing the alternate remedy available under the statute while overlooking the decision of this Hon'ble Court reported in 153 ITR 596?"

2. Facts deduced from the material record are that assessment orders were passed on 26.12.2009 against the appellants, for the Assessment Year 2006-2007. Assesseees are different. Being aggrieved by the same, separate appeals before the Commissioner of Income Tax (Appeals)-II, Chennai, have been filed. After considering the contentions of the parties, the Commissioner of Income Tax (Appeals)-II, vide order dated 03.10.2011 dismissed the appeals. Thereafter, the appellants seemed to have presented

individual rectification petitions, under Section 154 of the Income Tax Act, 1961. Contending *inter alia* that subsequently, the appellants were advised by their new counsel to file regular appeals before the Income Tax Appellate Tribunal, Chennai under Section 253 of the Income Tax Act, appeals have been filed, before the Tribunal with a delay of 962 days in filing appeals.

3. Appellants have admitted that the time limit to file appeal before the Tribunal is 60 days from the date of receipt of the order of the appellate authority, namely Commissioner of Income Tax (Appeals). But, according to them, due to the wrong advice given by the erstwhile Chartered Accountants of the appellants, rectification petitions under Section 154 of the Act were filed before the First Appellate Authority. They were bonafidely pursuing the alternative remedy, which resulted in the delay of 962 days, in filing the appeals, before the Tribunal, and for the abovesaid reasons prayed the Tribunal, to condone the delay.

4. While adverting to the above submissions and taking note of the period of limitation of 60 days, provided, in Income Tax Act, 1961 for filing an appeal under section 253 of the Act, the Tribunal, at paragraph No.3 of the order dated 23.09.2015, in each of the appeals, ordered as hereunder:

"3. The delay cannot be condoned simply because the assessee's case is hard and calls for sympathy or merely out of benevolence to the party seeking relief. **In granting the indulgence and condoning the delay it must be proved beyond the shadow of doubt that the assessee was diligent and was not guilty of negligence whatsoever. The sufficient cause within the contemplation of the limitation provision must be a cause which is beyond the control of the party invoking the aid of the provisions.** The Supreme Court in the case of *Ramial v. Rewa Coalfield Ltd.*, AIR 1962 SC 361 has held that the cause for the delay in filing the appeal which by due care and attention could have been avoided cannot be a sufficient **cause within the meaning of the limitation provision. Where no negligence, nor inaction, or want of bona fides can be imputed to the assessee a liberal construction of the provisions** has to be made in order to advance substantial justice. Seekers of justice must come with clean hands. **In our opinion, the delay was due to negligence and inaction on the part of the assessees. The assessees would have avoided the delay by the exercise of due care and attention and there exists no sufficient and good reason for the delay of 962 days in filing these appeals.** Accordingly, all the appeals are dismissed as unadmitted."

Thus the appeals preferred by the Tribunal under Section 253 of the Act, have been dismissed.

5. Inviting attention of this court to a decision of this court in ***Commissioner of Income Tax vs. K.S.P.Shanmugavel Nadar & Ors.*** reported in ***(1985) 153 ITR 0596***, Mr.S.Sridhar, learned counsel for the appellants, submitted that when the assesseees have duly prosecuted their rectification petitions, filed under Section 154 of the Income Tax Act, 1961, their bona fide action, would not attract laches, and therefore, the appeals filed before the Tribunal, ought not to have been rejected on the grounds of laches, negligence or lack of bona fides. According to him, the assesseees had only acted on the advice given by their Chartered Accountants.

6. It is also his submission that the assesseees have filed rectification petitions under Section 154 of the Income Tax Act, 1961, before the Commissioner of Income Tax (Appeals)-II, within 60 days from the date of receipt of the order of the Commissioner of Income Tax (Appeals), and that they were awaiting, notice on the above said applications. He also submitted that as per the procedure followed, rectification petitions filed under Section 154 of the Income Tax Act, 1961 would be tagged along with the order passed by the Commissioner of Income Tax (Appeals). As the miscellaneous petitions filed by the appellants, were not taken on record, a reminder was sent on 28.05.2014 to the Commissioner of Income Tax (Appeals). Thus in the above said process, delay in filing the appeals, before the Tribunal, under Section 253 of the Act,

occurred. Contending inter alia, that there was bonafide/and it is not negligence, on the part of the assesseees, he submitted that the Tribunal has not properly adverted to the above reasons and thus prayed to set aside the order of the Tribunal impugned in the instant Tax Appeals.

7. Per contra, Mr.T.R.Senthilkumar, learned Senior Standing counsel for Income Tax department, submitted that rectification petitions stated to have been filed by the appellants, were not pursued, diligently with due care, by the appellant, and thus there is lack of bona fide and negligence. He also submitted that the affidavit filed in support of the delay excuse petitions filed before the Tribunal in each case, is bereft of details, both on sufficiency of the cause and bonafides, due care and attention, negligence. He also added that the well considered orders of the Tribunal, impugned before us, do not require any interference.

8. Heard the learned counsel for the parties and perused the materials on record.

9. On 03.10.2011, the Commissioner of Income Tax (Appeals), Chennai has passed orders in the appeals filed by the assesseees. As per Section 253 of the Income Tax Act, 1961, appeals have to be filed before the Tribunal, within 60 days from the date of receipt of a

copy of the order of Commissioner of Income Tax (Appeals). Perusal of the orders impugned before us, shows that petitions under Section 154 of the Act, for rectification, have been filed on 18.07.2012 or 19.07.2012 respectively, as the case may be, after a lapse of eight months.

10. Further perusal of the rectification Petitions shows that except one, all other applications have been filed in the Office of the Deputy Commissioner of Income Tax, Central Circle III, Chennai - 34, who is not the appellate authority. Indisputably, Commissioner of Income Tax (Appeals), Range II, Chennai, is the competent authority, to entertain, any application filed under Section 154 of the Act. Details of the rectification Petitions filed, the authority, before whom, such petitions, have been filed are detailed hereunder:

<i>Sl.No</i>	<i>Appellant Name</i>	<i>ITA Number</i>	<i>Date of filing of Misc. Appln.</i>	<i>Forum</i>
1	Inderchand D Kochar	215/09-10	19.07.2012	Commissioner of Income-Tax
2	Anita Kochar	214/09-10	18.07.2012	Dy. Commr. of Income Tax
3	Ramesh Kumar Kochar	210/09-10	18.07.2012	Dy. Commr. of Income Tax
4	Sarla Kanwar	213/09-10	18.07.2012	Dy. Commr. of Income Tax
5	Suresh Kumar Kochar	211/09-10	18.07.2012	Dy. Commr. of Income Tax

Thus except in Serial No.1, all the other petitions, have been filed under Section 154 of the Act, have been before the authority, not competent to entertain, and mandated to exercise the powers under

Section 154 by the Income Tax Act, 1961.

11. Material on record further discloses that after filing the rectification Petitions in 2012, after nearly two years, in 2014, the appellants/assesseees have sent a letter dated 28.05.2014 to the Commissioner of Income Tax (Appeals), Range-II, enclosing a copy of the miscellaneous application filed with Tapal Section before the Deputy Commissioner of Income Tax on 18.07.2012 and 19.07.2012 respectively, admitted the fact, that instead of filing in the office of the Commissioner of Income Tax (Appeals), Range II, who had disposed of the appeals, they have submitted the rectification petitions, to an authority, not competent, to entertain the applications. Details of the letters, are extracted hereunder:

Sl. No.	Appellant/Assessee Name	ITA Number	Contents of the Letter
1	Anita Kochar	214/09-10	I am enclosing with a copy of miscellaneous application which was filed with TAPAL SECTION before Deputy Commissioner of Income Tax on 18.07.2012 instead of Commissioner of Income Tax Appeals Range-II. I therefore request you to take on record my application and dispose of in accordance with law.
2	Ramesh Kumar Kochar	210/09-10	-do-
3	Sarla Kanwar	213/09-10	-do-
4	Suresh Kumar Kochar	211/09-10	-do-

Though Mr.S.Sridhar, learned counsel for the appellants strongly relied on the decisions of ***Commissioner of Income Tax vs. K.S.P.Shanmugavel Nadar & Ors.*** reported in ***(1985) 153 ITR 0596***, and ***Sachindra Nath Mondal & Anr. vs. Shakuntola***

Malhotra & Ors. decided on 14.03.2016, and contended that availing a wrong remedy, and diligently pursuing the same, would not hold the appellants guilty of laches and that therefore, this court, in the interest of justice, can condone the delay, even by imposing cost, this court is not inclined to accept the said contentions, for the reason that there is absolutely, no material on record to substantiate due diligence and proper care exercised by the appellants. They have not taken prompt steps to rectify their mistake. Steps have been taken nearly after a delay of two years.

12. In prosecuting a remedy before the wrong forum, we are of the considered view that the appellant must show that he was pursuing the same remedy, in a bona fide manner, and with due diligence.

13. Due diligence and caution, are the essential requirements. Due diligence cannot be measured by any absolute standard and 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.

14. As tabulated in paragraph 10, only one appellant viz. Mr. Inderchand D. Kochar, has filed the Miscellaneous petition, dated 19.12.2012, under Section 154 of the Income Tax Act, 1961, before

the Commissioner of Income Tax Act, who had disposed of the appeal in I.T.A.No.210 of 2010. All other Miscellaneous petitions have been filed before the Deputy Commissioner of Income Tax, who is not the competent authority to entertain any application under Section 154 of the Income Tax Act, 1961. When Miscellaneous petitions have been filed, in a wrong forum, it is our considered view that it is the duty of the appellant to pursue the same and seek for adjudication, by the competent authority.

15. Absolutely, there are no materials to indicate, as to what steps the appellants had taken between the date of filing of the miscellaneous petitions, i.e. 18.07.2012 or 19.07.2012, and the date on which the supporting affidavits for condonation, have been filed, except, sending a reminder on 28.05.2014. The appellants have not stated the date, as to when, the change of brief was given and also the date as to when opinion was given by the learned counsel to prefer appeals, before the Tribunal. No details are given in the affidavit filed by the assessee, as to why, they have not, prosecuted the applications filed under Section 154 of the Income Tax Act, 1961, for nearly two years.

16. In the supporting affidavit to the petitions filed for condoning the delay of 962 days, in filing the appeals, before the Tribunal, the assessee has not given the dates, as to when they

had handed over the papers to the erstwhile Chartered Accountants for action. The statement of the assesseees that due to misunderstanding with the erstwhile Chartered Accountant, the appellants were constrained to appoint a counsel, in the month of June 2014, and on review of all the Income Tax matters, the fact of non-filing of appeals against the appellate orders, was noticed and thus, the appeals were filed on 11.07.2014 before the Commissioner of Income Tax (Appeals), is not supported with any material document. Mere averments, do not stand the test of proof.

17. Though, Mr.S.Sridhar, learned counsel for the assesseees/appellants submitted that it is the duty of the office of the Commissioner of Income Tax (Appeals) to have sent the notices for hearing of the rectification petitions, filed by the appellants/assesseees and thus the assesseees were waiting, for a considerable period, and thus attributed the cause for delay, this court is not inclined to accept the same, for the reason that as observed earlier that rectification petitions have been filed before an incompetent appellate authority. Even taking for granted that they were filed in the office of the Deputy Commissioner of Income Tax, we are of the considered view that it is for the appellants/assesseees to have processed the same. Blaming an authority is always easy. Conduct of the appellants substantiates lethargy and lack of bonafides. On the facts and circumstances of

the case, we are also of the considered view, that the appellants, have not pursued the remedy, promptly, with diligence and due care, when they filed such applications. Inaction, is apparent on the face of record. In the light of the above, it cannot be contended that the appellants were wrongly pursuing a remedy, with diligence, care and caution and hence the delay in filing the appeals before the Tribunal should be condoned.

18. 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 the 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.”

23. It is also worthwhile to extract paragraph Nos.14 to 17 of the judgment in ***Tamilnadu Mercantile Bank's case***.

“14. We are unable to agree with the reasoning of the learned Judge that no litigant ordinarily stands to benefit by instituting a proceeding beyond time. It is common knowledge that by delaying a matter, evidence relating to the matter in dispute may disappear and very often the party concerned may think that preserving the relevant records would be unnecessary in view of the fact that there was no further proceeding. If a litigant chooses to approach the Court long after the time prescribed under the relevant provisions of the law, he cannot say that no prejudice would be caused to the other side by the delay being condoned. The other side would have in all probability destroyed the records thinking that the records would not be relevant as there was no further proceeding in the matter. Hence to view a matter of condonation of delay with a presupposition that no prejudice will be caused by the condonation of delay to the respondent in that application will be fallacious. In our view, each case has to be decided on the facts and circumstances of the case. Length of the delay is a relevant matter to be taken into account while considering whether the delay should be condoned or not. It is not open to any litigant to fix his own period of limitation for instituting proceedings for which law has prescribed period of limitation.

17.... Once it is held that a party has lost his right to have the matter considered on merits because of his own inaction for a long time, it cannot be presumed to be non-deliberate delay, and in such circumstances of the

case, he cannot be heard to plead that substantial justice deserved to be preferred as against technical considerations. We are of the view that the question of limitation is not merely a technical consideration. Rules of limitation are based on principles of sound public policy and principles of equity. It is a litigant liable to have a Damocles' sword hanging over his head indefinitely for a period to be determined at the whims and fancies of the opponent?"

19. In the light of our discussion, and principles of law laid down by the Hon'ble Supreme Court in ***H.Dohil Constructions Company Private Limited V. Nahar Exports Limited and Another***, reported in **2015 (1) Supreme Court Cases 680**, we are not inclined to entertain the appeals. Substantial question of law raised by the appellants, is answered against the appellants/assesseees and in favour of the respondent.

In the result, all the tax case appeals are dismissed. Consequently, the connected civil miscellaneous petitions are closed. However, there shall be no order as to cost.

(S.M.K.,J) (D.K.K.,J)
03.08.2016

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Index : Yes
website : Yes

S.MANIKUMAR,J

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D.KRISHNAKUMAR,J

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