

IN THE HIGH COURT OF JUDICATURE AT PATNA

Miscellaneous Appeal No.356 of 2002

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Md.Sayeed, son of Abdul Rauf, R/o Behind Madhuban Market, Main Road,
Ranchi, Jharkhand

.... Appellant/s

Versus

Deputy Commissioner of Income Tax, Central Circle-1, Central Revenue Building,
Patna- 800 001

.... Respondent/s

with

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Md.Sayeed, son of Abdul Rauf, R/o Behind Madhuban Market, Main Road,
Ranchi, Jharkhand

.... Appellant/s

Versus

Deputy Commissioner of Income Tax, Central Circle-1, Central Revenue Building,
Patna- 800 001

.... Respondent/s

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Appearance :

(In MA No. 356 of 2002)

For the Appellant/s : Mr. Dr.Krishna Nandan Singh, Sr. Advocate
Mr. Kamal Deo Sharma, Advocate
Mr. Sriram Krishna, Advocate
For the Respondent/s : Mrs. Archana Sinha, Sr SC, IT
Mr. Alok Kumar
Ms. Shalini Bihari

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CORAM: HONOURABLE MR. JUSTICE RAMESH KUMAR DATTA

and

HONOURABLE MR. JUSTICE SUDHIR SINGH

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE RAMESH KUMAR DATTA)

Date: 02-03-2016

Heard learned counsel for the appellant in both the
appeals and learned counsel for the respondent-Revenue.

The appeals were admitted and as many as six

substantial questions of law were framed at the time of admission in the decision of this Court. The third substantial question is in the following terms:

“Whether the learned Tribunal was correct in law in entertaining the appeal without considering the issue of limitation and without condoning the alleged delay?

In our view if the aforesaid question is answered in the negative then there would be no occasion to proceed with hearing the other substantial questions of law.

For the assessment year 1995-96 in relation to the assessee-appellant, the Deputy Commissioner of Income Tax, Special Range-III, Patna passed the order dated 31.3.1998 under Section 143(3) of the Income Tax Act, 1961. Aggrieved by the same the assessee filed an appeal being ITA No. 128/P/A-II/98-99 before the Commissioner of Income Tax (Appeal)-II, Patna which was allowed in part by order dated 8.2.2001. The assessee being aggrieved by the fact that the CIT (Appeal) having accepted the contention of the assessee on three aspects yet wrongly remitted the matter to the assessing authority on two of them and accordingly filed an appeal before the Income Tax Appellate Tribunal. The revenue also appealed against the order dated 8.2.2001 of the CIT

(Appeal) challenging the findings of the CIT (Appeal) on the three aspects. Both the appeals were heard together by the Income Tax Appellate Tribunal, Patna Bench, Patna being ITA No. 154(Pat)/2001 and ITA No. 267(Pat.)/2001 which by order dated 25.02.2002 allowed the appeal of the Revenue and dismissed the appeal of the assessee.

So far as the memo of appeal filed by the Revenue before the ITAT is concerned, admittedly it was filed with a delay of 12 days. From the records produced before us, it is not in dispute that an application for condonation of delay was also filed on behalf of the Department. From the copy of the notice issued to the assessee in the Revenue's appeal, it is evident that the factum of delay was mentioned in the said notice. However, the admitted position is that no specific order condoning the delay in filing the appeal by the Revenue was passed.

In the aforesaid conspectus of facts, learned counsel for the appellant submits that since the appeal of the Revenue was beyond the period of limitation prescribed by the Income Tax Act and delay had not been condoned by the Tribunal, hence the final order passed by the Tribunal itself is without jurisdiction as in the absence of such condonation of delay, no appeal on behalf of the Revenue could be said to be pending before the Tribunal.

In support of the aforesaid stand learned counsel relies upon a decision of the Supreme Court in the case of Noharlal Verma Vs. District Cooperative Central Bank Limited, Jagdalpur: (2008) 14 SCC 445 relying upon paras 32 and 33 thereof which are in the following terms:-

“32. Now, limitation goes to the root of the matter. If a suit, appeal or application is barred by limitation, a court or an adjudicating authority has no jurisdiction, power or authority to entertain such suit, appeal or application and to decide it on merits.

33. Sub-section (1) of Section 3 of the Limitation Act, 1963 reads as under:

“3. Bar of limitation.-(1) Subject to the provisions contained in Sections 4 to 24 (inclusive), every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed although limitation has not been set up as a defence.”

Bare reading of the aforesaid provision leaves no room for doubt that if a suit is instituted, appeal is preferred or application is made after the prescribed period, it has to be dismissed even though no such plea has been raised or defence has been set up. In other words, even in absence of such plea by the defendant, respondent or opponent, the court or authority must dismiss such suit, appeal or application, if it is satisfied

that the suit, appeal or application is barred by limitation.”

Learned counsel also relies upon a decision of the Supreme Court in the case of State of West Bengal & ors. Vs. Somdeb Bandyopadhyay & Ors.: AIR 2009 SC 1989, the relevant part of para-6 of which is quoted below:-

“6. It is to be noticed that even without condoning the delay and entertaining the writ appeal the High Court has passed series of interim orders. Such a course is impermissible as the appeal was non-est in the eye of law without it being entertained. Admittedly, the delay in preferring the writ appeal was not condoned at the time when the interim orders were passed.....”

Learned Senior Standing Counsel for the Income Tax Department, on the other hand, submits that the application for condonation of delay having been filed by the Revenue and notice with regard to the same also having been served upon the assessee, it would be deemed that the limitation has been condoned once the final order has been passed.

It is further submitted by learned counsel for the Income Tax Department that the fault equally lay with the assessee because in view of the notice dated 2.11.2001 issued to them they

were very well aware of the pendency of the limitation petition.

In support of her stand learned counsel for the Revenue relies upon a decision of the Supreme Court in the case of Hindustan Construction Co. Ltd. & anr. Vs. Gopal Krishna Sengupta & ors: (2003) 11 SCC 210 relying upon paras 18 and 19 of the said decision which are as follows:-

“18. Taking a cue from this order the 1st respondent now files a review application before the High Court challenging the order dated 12-8-1997. On this review application the High Court passed the order dated 19-10-2000 (which is one of the impugned orders). It was not pointed out to the Court that the revision was barred by limitation and/or by delay or laches. The High Court noticed that the application filed by the 1st respondent on 9-3-1995 to examine Pritika Prabudesai was still pending and no order had been passed thereon. Thus it is clear that attention of the High Court was not drawn to the fact that subsequently on 5-9-1997 the respondent had moved another application to examine Pritika Prabudesai and that that application stood rejected on 6-11-1997. As the High Court was not aware of this fact and the High Court felt that it was absolutely necessary that the share transfer form and the share certificate be on record of the trial court, the High Court passed the following

operative order:

“6. I have heard the petitioner, but he was unable to satisfy how his prayer is maintainable at law. He wants the whole proceedings to be quashed and a de novo trial to be started against all the accused. The impugned order shows that before the learned Magistrate the petitioner conceded that there was no such provision of law, which enabled the court to hold a fresh trial against the accused. It is, therefore, not possible to grant the said prayer made by the petitioner in this petition. However, having regard to the abovementioned facts and to secure ends of justice I think that it would be proper to direct the learned Magistrate to pass an appropriate order on the application dated 9-3-1995 filed by the petitioner praying for issue of summons to Pritika S. Prabudesai. The learned Magistrate should allow the said application permitting the petitioner to lead additional evidence of Pritika S. Prabudesai or her guardian in whose custody the said share certificate is, after recording the additional evidence in terms of the application dated 9-3-1995. By giving opportunity to the accused to cross-examine the witness, the learned Magistrate

shall proceed to decide the case on merits expeditiously and in any event not later than 31.12.2000.”

19. The appellants then moved an application being Criminal Application No. 3643 of 2000 for recalling the order dated 19-10-2000. That application stood disposed of by an order dated 13-12-2000/22-12-2000 (which is also one of the impugned orders). In this order it has been observed that during the hearing of the revision application no objection had been raised as to maintainability on the ground of limitation. The Court holds that Section 362 of the Criminal Procedure Code did not permit the Court to alter or review its earlier order which was a final order. In our view this finding is absolutely correct. It must be mentioned that the Court was convinced that the 1st respondent had played a fraud upon it and therefore issued a show-cause notice to him to show cause why action should not be taken against him for having played such a fraud.”

We have considered the submissions of parties on the question of limitation and we are clearly of the view that unless the delay in filing the appeal of the Revenue had been condoned, the Tribunal had no jurisdiction, power or authority to entertain the appeal and pass any effective order on the same as no appeal could

be deemed to be pending before the Tribunal until the delay in filing the same had been condoned. This is clearly the view of the Supreme Court in Noharlal Verma's case (supra).

So far as the matter being within the knowledge of the assessee also is concerned, the same has no relevance as the limitation application having been filed by the Revenue in its appeal which was time barred, it was for the Revenue to have pressed such application which has not been done. We are not aware of any such duty imposed by law upon learned counsel for the respondent to press an application for condonation of delay filed on behalf of the appellant.

So far as the reliance upon a decision of the Supreme Court in the Hindustan Construction Company's case (supra) by learned counsel for the Revenue is concerned, it is relevant that no such proposition flows from the same nor there can be deemed condonation of limitation merely because a final order has been passed. In the said case the issue really did not relate to an order passed on a criminal revision being barred by limitation rather the issue was as to whether in a review application the said issue can be looked into which was answered in the negative holding that under Section 362 of the Code of Criminal Procedure it was not permissible for the Revenue to alter or review an order which was a final order.



In the aforesaid view of the matter, the substantial question of law No. III is answered in the negative against the Revenue and it is held that the Tribunal was not correct in entertaining the appeal without considering the issue of limitation and without condoning the alleged delay. That being the position since there was an application for condonation of delay, which has not been considered by the Tribunal and the final order has been passed allowing the appeal of the Revenue and the order of the Tribunal being couched in a manner that the appeal of the assessee cannot be separated from the appeal of the Revenue, the order dated 25.2.2001 has to be and is quashed in its entirety and the matter is remitted to the Tribunal to proceed in the matter after first considering the application for condonation of delay filed on behalf of the Revenue.

In view of our decision on the question of law on the point of limitation, there is no need to decide any other substantial question of law at this stage.

Both the appeals are, accordingly, allowed.

Let the question of limitation be considered by the Tribunal expeditiously.

(Ramesh Kumar Datta, J)

S.Pandey/-

(Sudhir Singh, J)

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