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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.3049 OF 2011
IN
INCOME TAX APPEAL (LODGING) NO.845 OF 2005

The Commissioner of Income Tax-18, Mumbai ....Appellant
V/s.
Kamal Kumar Johari, Mumbai ....Respondent

Mr.Vimal Gupta for the Appellant.

Mr.J.D. Mistri, Senior Counsel with Mr.K. Gopal and Mr.Jitendra Singh for the Respondent.

CORAM : S.J. VAZIFDAR AND
M.S. SANKLECHA, JJ.
DATE : 9TH JULY, 2012.

ORAL JUDGMENT (PER S.J. VAZIFDAR, J.) :-

1. This is the appellant's notice of motion to condone the delay of 2046 days in taking out the notice of motion and for an order restoring the appeal dismissed by virtue of an order dated 14.2.2006.

2. The appeal was filed on 1.7.2005. The Prothonotary & Senior Master by an order dated 14.2.2006 passed the usual directions for removal of office objections on the memo of appeal and to have the appeal numbered and registered on or before 7.3.2006, failing which the appeal was to stand rejected under Rule 986 of the High Court Rules (Original Side). The appellant having failed to

remove the office objections, the appeal automatically stood dismissed on 8.3.2006.

The office copy of the appeal however, indicates that all the objections were permitted to be removed and were removed on 28.4.2006. The file bears the confirmation of the Income Tax Inspector stating that all the objections had been removed on 28.4.2006.

3. The office ought not to have permitted the objections to have been removed as by 28.4.2006, the appeal stood dismissed. Parties must first obtain an order extending the time to remove the office objections. It however, appears that the office and the Income Tax Inspector were either unaware or had lost sight of the fact that the objections could not have been removed after 8.3.2006. The stamp endorsing the rejection is also placed on the same page. The removal of the objections however does not appear to have been clandestine or mala-fide. It is possible that the rejection stamp was placed subsequently as a result whereof the clerk was unaware of the dismissal of the appeal when the Income Tax Inspector attended the office to remove the objections.

4. It is possible that being under the impression that the appeal had been filed and the objections had been removed, the appellant's officers carried the impression that the appeal would be

placed on board for admission in normal course. Indeed, there are appeals pending at the stage of admission for many years.

5. Mr.Mistri, strongly opposed this application, stating that there was no valid explanation for the inordinate delay. There is no doubt some confusion about what is stated in paragraph 2 of the affidavit in support filed by the Income Tax Officer. It is stated that the objections were not removed in time and as a result thereof, the appeal stood dismissed under Rule 986. The affiant obviously did not notice or was not informed that the objections had been removed albeit after the due date. Mr.Mistri stated that paragraph 2 contains a false statement to the effect that the Income Tax Department was not informed of the order dated 14.2.2006 by the Central Government advocate attached to the Ministry of Law and Justice. He submitted that the fact that the Income Tax Inspector had removed the office objections belied the statement. The statement is indeed incorrect. We hesitate however to hold it to be a false statement as the possibility of a communication gap cannot be ruled out.

6. Subsequently the records pertaining to the appeal were transferred to the Income Tax Department from the Ministry of Law and Justice.

7. The appellant had on 10.9.2008 engaged an advocate to represent the department in the appeal. This would indicate that the

appellant was not aware of the appeal having been dismissed. Apparently the advocate also did not inform the appellant about the same. The advocate is no longer on the panel of the Income Tax Department.

The matter pertains to a composite order. The present advocate became aware of this position when he attended to another matter.

8. The nature of the negligence does not warrant a dismissal of the appeal for it is possible in view of what is stated above that the appellant who had taken steps to prosecute the appeal, legitimately expected the appeal to come up for admission on account of the objections having been removed albeit belatedly and had even appointed an advocate to prosecute the appeal.

9. Although it is not decisive on the issue whether the delay ought to be condoned or not, it is pertinent to note that the matter involves a demand of an extremely large amount and in which there are serious allegations. Whether they are well founded or not is another matter.

10. Mr.Mistri submitted that on account of the appellant's negligence, the respondent ought not to be prejudiced. He submitted that in the event of the appeal being allowed, the respondent would be exposed to interest of about Rs.8.00 crores which they would

otherwise not have been liable for if the objections had been removed in time.

11. Although the argument appears attractive at first blush, it is not well founded. For the purpose of this submission, we must proceed on the basis that the appeal will be ultimately allowed. This would have been preceded by the office objections having been removed by 7.3.2006, and the appeal having been admitted shortly thereafter. Even in that event in the normal course, the appeal would not have been heard by today. Presently appeals of the year 2000 are being placed on the weekly board for final hearing. Thus in any event, if we are to proceed on the basis that the appellant succeeds, the respondent would have been exposed to the liability to pay interest, in any event.

12. There is of course the possibility of the appeal having been finally heard at the stage of admission and decided in the appellant's favour and the respondent then having paid the tax dues thereby protecting itself against further interest. In the facts of this case, we see no justification to reject the application on a speculation to this effect.

13. Mr.Mistri submitted that had the appeal been admitted in the year 2006, the respondent would have had the option of depositing the disputed amount under protest to protect himself

against any liability for interest and penalty. The appellant's negligence has deprived him of this opportunity.

14. This argument too at first blush appears attractive. It is however, at least in the facts of this case not well founded. The respondent has not stated on affidavit that had the appeal been admitted in the year 2006, he would have deposited the claim albeit without prejudice to his rights and contentions to safeguard himself against any liability towards interest and penalty. We are not inclined to reject the appeal merely on a hypothetical argument. This is not a mere technicality. The demand was of about Rs.8.00 crores. Had the respondent stated this on affidavit the appellant would have had an opportunity of meeting the case. The respondent would then have had to prove that he would have been ready and willing to make the deposit. Had the demand been a smaller amount, it may have made a difference. It would be unfair to dismiss the application on the basis of a submission which the appellant has not had an opportunity of contesting.

15. There is another facet to this argument even if necessary facts had been pleaded and established. We have on the one hand the respondent's predicament of being exposed to interest and penalty on account of the delay. On the other hand, is the consequence of a dismissal of the appeal resulting in a possible loss

to the revenue in a matter where some of the allegations especially relating to the alleged hawala transactions are serious. The scales in this case must tip in the appellant's favour for if the respondent loses, the prejudice would not be as severe upon him as it would be to the revenue if the appeal is dismissed due to the alleged negligence of some of its officers.

16. Mr.Mistri relied upon the judgment of the Supreme Court in the case of *Office of the Chief Post Master General & Ors. v. Living Media India Limited & Anr. In Civil Appeal No.2474-2475 of 2012 dated 24.2.2012*.

The Supreme Court held in paragraph 13 as under :-

> "13. In our view, it is the right time to inform all the government bodies, their agencies and instrumentalities that unless they have reasonable and acceptable explanation for the delay and there was bonafide effort, there is no need to accept the usual explanation that the file was kept pending for several months/years due to considerable degree of procedural red-tape in the process. The government departments are under a special obligation to ensure that they perform their duties with diligence and commitment. Condonation of delay is an exception and should not be used as an anticipated benefit for government departments. The law shelters everyone under the same light and should not be swirled for the benefit of a few. Considering the fact that there was no proper explanation offered by the Department for the delay except mentioning of various dates, according to us, the Department has miserably failed to give any acceptable and cogent reasons sufficient to condone such a huge delay. Accordingly, the appeals are liable to be dismissed on the ground of delay."

For the reasons stated above, we are of the opinion that there is a reasonable explanation for the delay in this case.

17. In the circumstances, the notice of motion is made absolute in terms of prayers (A) and (B) subject to the appellant paying the costs fixed at Rs.10,000/- to the respondent on or before 31.8.2012. Failure to pay the cost shall result in the dismissal of the appeal without further reference to Court.

(M.S. SANKLECHA, J.) **(S.J. VAZIFDAR, J.)**