
(1984) 05 DEL CK 0024

In the Delhi High Court

Case No : C.M.P. No. 122 of 1983 & Civil Miscellaneous Appeal No. 122 of 1983
and Income Tax Reference No. 152 of 1983

Commissioner of Income Tax

APPELLANT

Vs

Bharat Heavy Electricals Ltd.

RESPONDENT

Date of Decision : 16-05-1984

Acts Referred:

Citation : (1984) 19 TAXMAN 392

Hon'ble Judges : S.S. Chadha, J;S. Ranganathan, J

Bench : Division Bench

Judgement

S.S. Chadha, J.—This petition u/s. 151 of the CPC prays for condensation of delay in refilling the Income Tax case after it was returned by the Registrar for removing the objections stated in the note sheet attached to the case.

2. The petitioner filed a petition u/s. 256(2) of the IT Act, 1961 (hereinafter referred to as "the Act") praying for a direction to the ITAT (for short called "the Tribunal") to state a case and to refer to this court the proposed question of law for its opinion. In the petition, facts giving rise to it are narrated. A copy of the order of the ITO is purported to be enclosed as Annexure P-1. A copy of the order of the CIT (Appeals) is purported to have been enclosed as Annexure P-2. A copy of the order of the Tribunal in second appeal is purported to have been enclosed as Annexure P-3. A copy of the order of the Tribunal declining to refer the question of law is purported to have been enclosed as Annexure P-4. It is also averred that the Tribunal in its order dt. 12-4-1982 served on the petitioner on 17-5-1982 declined to refer the question of law. The petitioner was filed on 17-11-1982. A petitioner to the High Court u/sub-s. (2) of s. 256 for an order requiring the Tribunal to state a case and refer it to the High Court has to be made within six months from the date on which the petitioner is served with notice of refusal by the Tribunal to State a case. Admittedly, the petition has been filed within prescribed limitation.

3. The petition was scrutinised and examined by the registrar of the court. A Dy.

Registrar of this court is authorised to return for amendment, within a time to be specified in an order to be recorded by him on the petition, any petition not drawn up in conformity with the directions, orders or in law. The Dy. Registrar found that Annexures P-1 to P-4 purported to have been attached with petition were not in fact enclosed even though mentioned in the index of the papers filed. The Joint Magistrate by his order dt. 23-11-1982 recorded that all the documents mentioned in the index are required to be filed and the petition was directed to be returned to be refiled within a week. The counsel for the petitioner refiled the petition along with the Annexures P-1 to P-1 on 28-6-1983.

4. At the time of the motion hearing of the case, a question arose as to the applicability of Chap. VII-B of Vol. V of the High Court Rules and Orders r/w Cha. I and prima facie, it had not been substantially complied with. The counsel for the petitioner sought leave of the court to file an application for condensation of delay and the leave was granted. It is thereafter that the present application has been filed praying that this court may be placed to excess the delay that occurred accidentally in re-filing the petition. Notice of this application was given to the opposite party, the assessed.

5. The averments made in the application are that it so happened that the papers got mixed up accidentally in the old records by the old clerk who was no longer in service and were traced by the new clerk when he was scrutinising the files; and that on discovery of these papers with objections, immediate steps were taken to get the defects removed which was done without any delay and the petition was refiled with the remarks duly recorded on the objection sheet. It is stated that the delay in re-filing the petition accidental and due to bona fide reasons beyond the control of the petitioner. The application is supported by affidavit of the new clerk of the counsel for the IT department. In the reply, it is stated that the defect of non-filing of the documents mentioned in the petition was not accidental or inadvertent inasmuch as it appears from the relevant papers that the documents which duly indexed were perhaps not available or the petition was filed on the last day without them to save time. The non-filing of the documents with the petition makes it a defective petition being not a valid petition in the eye of law. It is pleaded that the applicant has not made out any case for the condensation of delay as the delay has not been satisfactorily explained.

6. Section 256 provides for a reference to the High Court at the instance of the assessed or the Commissioner. The assessed or the Commissioner who desires to have a case stated and referred to the High Court may apply to the Tribunal u/ sub-s. (1) in the prescribed form. Rules 36 to 47 of the ITAT Rules, 1963 deal with the applications for reference u/s. 256(1). Rule 36 provides that an application for reference u/sub-s. (1) of s. 256 shall be in triplicate and shall be accompanied by a list of documents (particulars of which shall be stated) which in the opinion of the applicant should form part of the case, and a translation, in English of any such documents, where necessary. The contents of and the

procedure to be followed on a petition u/s. 256(2) of the Act to be made to the High Court is not provided in those rules. The contents of the petition and the procedure is regulated by special rules made by different High Courts for the purpose.

7. Rules and Orders have been made by the Punjab High Court which are applicable to the High Court of Delhi. Relevant rules are contained in Chap VII-B r/w Chap. I of the High Court Rules and Orders, Vol. V. Rule 1 of Chap. VII-B reads as under :

"Every application u/s 66(2) of the Indian Income Tax Act as subsequently amended, hereinafter referred to as "the Act" for an order by the High Court requiring the Income Tax Appellate Tribunal to state and refer the case to the High Court shall contain a brief statement of facts and the point or points of law on which a reference, is desired. Such application shall be supported by an affidavit by the assessed ,or some other person acquainted with the facts and shall be accompanied by a copy of the said application and such documents and copies of such of the orders of the Income Tax Officer and the Income Tax Appellate Tribunal as may be necessary for understanding the point or points of law on which a reference is desired.

The application shall also be accompanied by a certificate from the Income Tax Appellate Tribunal to the effect that the Appellate Tribunal to the effect that the assessed has not withdrawn his application for reference u/s 66(1) before the said Tribunal"

The Rule, Therefore, provides that the petition shall be accompanied by copies of such documents and copies of such of the orders of the ITO and the Tribunal as may be necessary for understanding the point or points of law on which a reference is desired. A reference lies only in respect of an order of a Tribunal u/s. 254. A reference lies only on a question of law arising out of the order of the Tribunal. In the absence of a copy of the order of the Tribunal. In the absence of a copy of order of Tribunal as also the earlier orders of the CIT (Appeals) and the ITO it would not be possible to understand the point of law on which a reference is desired.

8. The procedure for the presentation and reception of appeals, petitions and applications for view and revision is laid down in Chapter I of Vol. V of High Court Rules and Orders. It inter alia, provides that every petition shall be in the English language and shall be typed in double space on each side of the paper and that in case any document is required to be filed, in duplicate, the duplicate copy shall be the first carbon copy. Rules 6 to 9 give the power to the Deputy Registrar to return for amendment, within a time to be specified in an order to be recorded in the petition, any petition not drawn up in conformity with the laid down directions. As a petition u/s. 256(2) has to be accompanied by copies of such orders of the ITO and the Tribunal as may be necessary for undertaking the point or points of law on which the reference is desired, then the Dy. Registrar is

authorised to return for amendment if the petition would not be drawn in conformity with the directions. The power is further conferred to specify a time within which the petition should be filed. This exactly what has been done by the Joint Registrar in this case.

9. The counsel for the revenue has raised a contention that the rules regarding applications and references contained in Chapter VII-B were made by the Punjab High Court u/cl. 27 of the Letters Patent to regulate proceedings of application and reference u/ss. 66(2) and 66(3) of the Indian IT Act, 1922 as amended by IT (Amendment) Act 7 of 37 and 40-K of 1940. No rules have been made for petitions u/s. 256(2) of the Act. By s. 297(1) of the Act, the IT Act, 1922 has been repealed. Sub-s. (2) of s. 297 contains the savings but, says the counsel, it does not have the rules made by the High Court u/cl. 27 of Letters Patent. Clause (k) of sub-s. (2) of s. 297 says that notwithstanding the repeal of Indian IT Act, 1922 any rule issued under any provisions of the repealed Act, shall, insofar as it is not inconsistent with the corresponding provisions of the Act, be deemed to have been entered into, made, granted, given or issued under the corresponding provision aforesaid and shall continue in force accordingly. The savings is in respect of a rule issued under any provisions of the repealed Act and not those made by the High Court u/cl. 27 of the Letters Patent. Technically, the counsel may be right. For this reason, we would suggest to the High Court of Delhi to frame the necessary rules.

10. If there are no specific rules, then the rules of practice and procedure of this court would be applicable to all petitions filed u/s. 256(2) of the Act in the absence of any rules to the contrary governing such petitions. This is settled position. The practice and procedure of this court would be the same in the petition u/s. 256(2) as was adopted in case of petition u/ss. 66(2) and 66(3) of 1922 Ac or similar petition under other statutory provisions. A party is entitled to apply to the High Court and the High Court may, if it is not satisfied with the correctness of the decision of the Tribunal, require the Tribunal to state the case and to refer it. The High Court has to come to the conclusion that the Tribunal has wrongly refused to state a case on the ground that no question of law arises. For that purpose the orders of the Tribunal have to be filed along with the petitions to enable the High Court to come to a conclusion whether any question of law arises or not out of such order. The earlier orders may be required for understanding the points of law on which reference is desired. The copies of those orders are thus required to be filed along with the petition even in the absence of specific rules requiring its filing.

11. A question arises whether the requirement that the petition shall be accompanied by such documents and copies of such of the orders of the ITO and the Tribunal as may be necessary for understanding the point or points or law on which reference is desired, is mandatory or directory. An absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if directory enactment be obeyed or fulfilled substantially. Section 256(2) of the Act does not lay down any

such requirement of filing the copies. The requirement is by our own rules or practice and procedure. As the object for the copies of documents to accompany the petition is to understand the points of law on which a reference is desired, then it cannot be mandatory. The petition itself contains a verbatim narration of the orders or even a gist to understand the points raised. The copies can be filed later before the High Court takes up the petition if the narration is insufficient or incomplete. The scheme and object of the provision to enable the High Court to come to a conclusion whether any question of law arises or not and this be achieved by merely filing the orders of Tribunal alone. The copies of the orders of the ITO or CIT (Appeals) may not be filed. If they same need not be filed, the provision cannot be treated as mandatory. The mere use of the word "shall" does not suggest imperative. Art. 320(3) of the Constitution says that the Public Service Commission "shall" be consulted on all disciplinary matters and it has been held by the Supreme Court in *State of U.P. Vs. Manbodhan Lal Srivastava*, that the provision was not mandatory. Another significant feature of the provision is that the consequences of the non compliance or breach of the provision has not been provided. In its absence a rigorous observance is not intended thus making the provision only directory.

12. In *Mahant Bikram Dass Chela Vs. Financial Commissioner, Revenue, Punjab, Chandigarh and Others*, , a Letters Patent appeal was presented within the period of limitation of 30 days but it was accompanied by only one set as against three sets as required by r. 3 of Chap. 2C of Vol. V of the Punjab and Haryana High Court Rules and Orders. It was held that rule was directory and not mandatory. The failure to file two and sets of documents was a mere irregularity which the High Court could condone by granting further time for formal compliance with the rules. In *NAND RAM CHHOTAY LAL Vs. COMMISSIONER OF Income Tax, U. P. and C. P.*, a question arose before the Allahabad High Court when a petition u/s. 66(2) of the 1922 Act was not supported by an affidavit though required by the High Court Rules. The affidavit was filed subsequently but not within six months. It was held that the filing of the affidavit need not be simultaneous as it is a matter of possible doubt whether it would have altered the clear requirement of the Act that the application was required to be filed within the period of six months. The Act does not mention either the filing of the affidavit in support of the petition or for filing the copies of the documents. Thus in our view, the provision is only directory. The non-filing of the documents along with the petition u/s. 256(2) would not make it an imperfect petition on no petition in the eye of law.

13. As we have noticed earlier, a petition to the High Court u/sub-s. (2) of s. 256 for an order requiring the Tribunal to state a case and refer to the High Court has to be made within six months from the date on which the petitioner in service with notice of refusal by the Tribunal to state a case. The petition is filed in this case within the period of limitation. It was not an imperfect petition without the copies of certain documents. The petition was returned for the purpose of filing the documents as mentioned in the index, namely, the copies of the order of the

ITO, the CIT (Appeals) and the two orders of the Tribunal. In our view, the representation is only a continuation of the original petition and does not affect the question of limitation in filing the petition. The plaints of suits are sometimes returned for removal of defects and representation. The consensus of judicial opinion is that the represented plaint is a continuation of the former suit, and it is not necessary for a plaintiff to fall back on s. 14 of the Limitation Act. When a plaint after removing the defect or even reducing the jurisdictional value is represented to the same court on the date on which the new suit would be barred by limitation, the courts have treated the same as a continuation of the previous suit. The defective appeals or petitions are also similarly returned for removal of defects and representation within the time specified. We can take judicial notice of the practice followed in this court that the prescribed period is never rigidly insisted upon by the registry. The opposite parties or their counsel have seldom raised an objection of non-representation within the specified period. It is only when representation is unreasonably delayed that objection is raised by the registry.

14. In *Indian Statistical Institute v. Associate Builders* AIR 1978 SC 335 a question arose about the delay in refiling. The arbitrators filed an award in the High Court. The objector on receipt of notice of the filing of the award in court filed objections for setting aside the award within the period of limitation. The objection petition was defective, in that, the necessary stamps were not affixed and the date of verification of the petition was not entered. The memorandum of objection was returned by the registry of the High Court on 12-10-1966 for rectifying the defects. The objections were refiled on 21-1-1967. An application u/s. 5 of the Limitation Act for condensation of delay was filed but rejected by the High Court. In appeal, it was held by their Lordships of the Supreme Court :

"The High Court was in error in holding that there was any delay in filing the objections for setting aside the award. The time prescribed by the Limitation Act for filing of the objections is one month from the date of the service of the notice. It is common ground that the objections were filed within the period prescribed by the Limitation Act though defectively. The delay, if any, was in representation of the objection petition after rectifying the defects. Section 5 of the Limitation Act provides for extension of the prescribed period of limitation if the petitioner satisfies the court that he had sufficient cause for not preferring the objections within that period. When there is no delay in presenting the objection petition s. 5 of the Limitation Act has no application and the delay in representation is not subject to the rigorous tests which are usually applied in executing the delay in a petition under s. 5 of the Limitation Act. The application filed before the lower court for condensation of the delay in preferring the objections and the order of the court declining to condone the delay are all due to misunderstanding of the provisions of the CPC"

15. In an earlier decision *Mahant Bikram Dass* (supra) their Lordships pointed out that the petition u/s. 5 of the Limitation Act seeking to condone the delay in

preferring an appeal is different from a petition for excusing the delay in representation. It was held :

"Section 5 of the Limitation Act is a hard task-master and judicial interpretation has encased it within narrow compass. A large measure of case law has grown around s. 5, its highlights being that one ought not easily to take away a right which has accrued to a party by lapse of time and that Therefore a litigant who is not vigilant about his rights must explain every day's delay. These and similar considerations which influence the decision of s. 5 applications are out of place in cases where the appeal itself is preferred within the period of limitation but there is an irregularity in presenting it. Thus, in the instant case there was no occasion to invoke the provisions of section 5, Limitation Act, or of Rule 4, Chapter I, of the High Court Rules. If the Division Bench were aware that Rule 3 of Chapter 2C is directory, it would have treated the appeal as having been filed within the period of limitation, rendering it in opposite to consider whether the delay caused in filing the appeal could be condoned."

16. We have considered the facts of this case. The sufficient cause should receive a very liberal construction on an application for condensation of delay in re-filing the petition. There are no mala fides or any contumacious conduct. The question is only lack of some diligence in representation after removal of defects. We see no reason why the irregularity committed by the petitioner in not filing the copies of the documents in the first instance should not be condoned by accepting the complete petition even after some delay. The rigorous tests which are usually applied in representation of the petitions. There is no need in such cases to explain each day's delay in coming to the court. The Explanation furnished in the application is truthful and frank. We, accordingly, allow the application and direct that the case be listed for admission in due course.