Kishore Jagjivandas Tanna vs Joint Director Of Income Tax (Inv.) on 24 January, 2020

Bench: S. Abdul Nazeer, Sanjiv Khanna

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 625 OF 2020
(ARISING OUT OF SPECIAL LEAVE PETITION (CIVIL) NO. 6639 OF 2019

KISHORE JAGJIVANDAS TANNA ..... APPELLAN

VERSUS

JOINT DIRECTOR OF INCOME TAX
(INV.) & ANR. ..... RESPONDENTS

O R D E R

Leave granted.

2. Despite opportunities, the respondents have not filed reply.

Learned Senior Counsel for the respondents' states that they do not wish to file a response and the appeal may be decided.

3. On 25.08.1987, Kishore Jagjivandas Tanna-the appellant before us and a resident of Bombay (now Mumbai) had checked into a hotel in New Delhi at about 3:30 p.m. On the same day, search and seizure operations under Section 132 of the Income Tax Act, 1961 ("the Act", for short) were carried out in the hotel room and cash of Rs. 5,00,000/- was found in a polythene bag. When confronted, the appellant on oath had claimed having collected this amount from a trader in New Delhi. Amount of Rs. 4,99,900/-

was seized.

4. On 22.12.1987 an order under Section 132(5) of the Act, as was then applicable, was passed by the First Income Tax Officer A-II Ward, Bombay (now Mumbai) holding, inter alia, that there were contradictions and fabrications in the appellant's version and stand on the source of Rs. 5,00,000/- and therefore the amount seized would be retained till the assessment for the Assessment Year 1988-1989 was finalised, as the estimated tax liability and penalty for concealment could exceed the seized amount.

5. The appellant had thereupon challenged the order passed under Section 132(5) of the Act in Writ Petition No. 721 of 1988 before the High Court of Judicature at Bombay. The writ was partly allowed vide the judgment dated 25.03.2008 with the order under challenge being set aside as it was passed without following the principles of natural justice. Liberty was granted to the authorities to pass a fresh order after issuing a show-cause notice under Rule 112-A of the Income Tax Rules, 1962 ("the Rules", for short) alongwith the copy of statements relied upon. Further, on failure to issue notice under Rule 112-A of the Rules within 12 weeks, the seized amount would be refunded with 6% simple interest from the date of the seizure till the date of return.

6. Consequent to the aforesaid liberty and directions, the Deputy Commissioner of Income-Tax 1(2), Mumbai had issued notice under Rule 112-A and thereafter passed an order under Section 132(5) dated 18.09.2008. By letter dated 19.09.2008, the Deputy Commissioner of Income-Tax 1(2), Mumbai informed the appellant that the seized cash need not be retained in the case. Curiously, this letter had also stated:

> "....The same cash shall be released after obtaining approval of CIT-1, Mumbai. However, the seized cash is not lying presently in the custody of CIT-1, Mumbai.
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> 2. The same fact have been brought to your notice vide the above mentioned letter under reference. You are once again requested to give any information available with you regarding such seized cash so that this office will be able to expedite the matter." By another letter dated 24.10.2008, Deputy Commissioner of Income-Tax 1(2), Mumbai wrote to the appellant stating:
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> "....you are once again requested to furnish any information which may be useful in locating present whereabouts of seized cash such as the names of various officers involved in search action and assessment proceedings etc. You are once again requested to give any information available with you regarding such seized cash so that this office will be able to expedite the matter." The appellant has rightly responded and argued before us that it was for the authorities and not the appellant to verify and ascertain which authority had retained the cash. The burden was not on the appellant as he would have no information regarding the whereabouts of the seized cash. Accordingly, the appellant had written a letter dated 04.05.2009 requesting the respondents to refund the cash.

7. On 02.12.2009, the Assessment Order for the Assessment Year 1987-88 under Section 143(3) read with Section 147 of the Act was passed determining the total income at Rs. 97,950/-. The seized cash of Rs. 4,99,900/- was not accounted and given credit in the assessment order. The appellant had thereupon moved an application under Section 154 of the Act objecting that the assessing authority had not given credit of Rs. 5,00,000/- (sic. Rs.4,99,900/-) as tax paid. Reference was also made to the letter dated 19.09.2009 by which the appellant was informed that cash seized as per the order under Section 132(5) was not required to be retained and had to be refunded. The assessment order possibly had not accounted for the seized cash as the order under Section 132(5) of the Act had directed for refund of Rs. 4,99,900/-.

8. It is the case of the appellant, which we have to observe has not been disputed and denied by the respondents, that the assessing officer had thereupon required the appellant to furnish the indemnity bond which was furnished on or about 22.09.2010, thereby indemnifying the respondents against any loss caused by the grant of refund of Rs. 4,99,900/- plus interest. The appellant had certified that he had not obtained the seized cash, and neither would he claim nor obtain the aforesaid refund in any other manner. It is an undisputed position that the respondents did not refund Rs. 4,99,900/-.

9. After having waited for some time, the appellant had sent written communication dated 05.07.2017 which was received by the office of Deputy Commissioner of Income Tax 1(2)(1) on 17.07.2017 whereby he had sought refund of the seized amount of Rs.4,99,900/- alongwith the interest. A computation sheet was also enclosed.

10. The Principal Commissioner of Income Tax-1, Mumbai, realising the fault and liability to pay, had then written the letter dated 11.10.2017 to the Director General of Income Tax (Investigations), New Delhi inter alia stating that the seized cash had not been transferred to the concerned commissioner in Mumbai and therefore the same should be transferred as the appellant was pressing hard for the refund. The respondents have not placed on record further correspondence and steps taken to ensure refund. This letter dated 11.10.2017 admits and acknowledges liability to refund the amount.

11. Left with no option, the appellant in July, 2018 had filed Writ Petition No. 2079/2018 before the Bombay High Court which has been dismissed vide the impugned judgment dated 17.09.2018 primarily on two grounds. First, the appellant should have filed an execution petition under Rule 647 of Chapter XXXIII of the Bombay High Court (Original Side) Rules,1980 which stipulates that an order made under this Chapter shall be executed, as if it were a decree made in exercise of the Ordinary Original Civil Jurisdiction of the High Court. Second, writ jurisdiction is not meant to confer benefit and enable litigants who sleep over their rights “to derive an advantage for themselves”. The appellant should have been prudent enough to “know as to how monies, allegedly retained illegally, have to be recovered promptly and expeditiously”. The appellant had failed to ‘take’ refund despite the favourable order made by the High Court more than a decade back that is, on 25.03.2008, and therefore does not deserve any relief under the Court’s discretionary and equitable jurisdiction. The writ jurisdiction is not meant to escape the bar prescribed in the Limitation Act, 1963.

12. Having considered the aforesaid factual matrix, we do not think that the reasoning in the impugned judgment can be sustained. The first reason is fallacious as Writ Petition No. 721 of 1988 was partly allowed with a direction to the assessing officer to pass a fresh order under Section 132(5) of the Act after following the procedure and Rule 112-A of the Rules. Direction for refund was applicable if no notice would be issued within the time stipulated. In any case, the learned judges had the option to treat the writ petition as an execution application or could have given liberty to the appellant to file an execution application which as per the law of limitation can be filed within 12 years. This aspect has been completely over-looked and not been given due consideration.

13. The second reason is also without merit, as we would elucidate.

Remedies by way of writ under Article 226 of the Constitution of India are extraordinary remedies exercised under the plenary jurisdiction conferred by the Constitution on the superior courts. The Constitution does not prescribe any limitation period for invoking writ jurisdiction, as by very nature this atypical extraordinary jurisdiction is discretionary and equitable, which puts it on a different footing from ordinary civil proceedings. This astir flexibility is required to ward off unfairness and clear the way to render equitable justice, which might not be achievable on strict application of the law on limitation. This would be true in matters with unusual circumstances, as writ jurisdiction offers a designed and venerate remedy against violations and for protecting and enforcing fundamental rights and also statutory rights under Article 226 of the Constitution. Long back Aristotle had acknowledged that "the nature of the equitable" is "a correction of law where it is defective owing to its universality". This is the reason why all things are not determined by law, as for some things it is impossible to lay down a uniform law and therefore, a decree of flexibility is needed. (See the dissenting opinion of Justice Breyer of the Supreme Court of the United States in Paula Petrella v. Metro-Goldwyn Mayer, Inc., et al.) Referring to the exercise of writ jurisdiction in Tilokchand and Motichand and Others v. H.B. Munshi and Another,1 Hidayatullah C.J. had held that there is no lower and upper time limit for entertaining the writ petition, and "each case must be considered on its own facts. Where there is appearance of avoidable delay and this delay affects the merits of the claim, this Court will consider it and in a proper case hold the party disentitled to invoke the extraordinary jurisdiction with 11969 2 SCR 824 utmost expedition". In other words, writ petitions should be filed within a reasonable period which period has to be considered with reference to the facts of a particular case. Therefore, as courts of equity, we have evolved a principle of practice, and not as a rule of law, not to enquire into belated and stale claims, notwithstanding that no period of limitation is prescribed either by the Constitution or by the Limitation Act. These principles enable the writ court to administer justice on the principles of equity, justice and good conscious.

14. Delay could reflect acquiescence and acceptance. In U.P. v.

Arvind Kumar Srivastava2, reference was made to U.P. Jal Nigam v. Jaswant Singh3 which had referred to a passage of Halsbury's Laws of England (para 911, pg. 395) to observe:

> "12. ... 'In determining whether there has been such delay as to amount to laches, the chief points to be considered are:
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> (i) acquiescence on the claimant's part; and
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> (ii) any change of position that has occurred on the defendant's part.

Acquiescence in this sense does not mean standing by while the violation of a right is in progress, but assent after the violation has been completed and the claimant has become aware of it. It is unjust to give the claimant a remedy where, by his conduct, he has done that which might fairly be regarded as equivalent to a waiver of it; or where by his conduct and 2(2015) 1 SCC 347 3(2006) 11

SCC 464 neglect, though not waiving the remedy, he has put the other party in a position in which it would not be reasonable to place him if the remedy were afterwards to be asserted. In such cases lapse of time and delay are most material. Upon these considerations rests the doctrine of laches.'" Laches emphasises on prejudice caused by delay and also by negligence whereby a third party could be affected or the position of parties has undergone a change or a parallel right has been created. In Maharashtra State Road Transport Corporation v. Balwant Regular Motor Service,4 this Court had referred to Lindsay Petroleum Co. v. Hurd5 in which Sir Bens Peacock had elucidated:

> "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 of limitations, the validity of that defence must be tried upon principles substantially equitable. 4AIR 1969 SC 329 5(1874) LR 5 PC 221 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 relates to the remedy."

15. In Shankara Cooperative Housing Society Ltd. v. M. Prabhakar,6 this Court had highlighted and specified the following principles which are to be applied when the writ court examines the issue of delay, laches and acquiescence:

> "54. The relevant considerations, in determining whether delay or laches should be put against a person who approaches the writ court under Article 226 of the Constitution is now well settled. They are:
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> (1) There is no inviolable rule of law that whenever there is a delay, the Court must necessarily refuse to entertain the petition; it is a rule of practice based on sound and proper exercise of discretion, and each case must be dealt with on its own facts.
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> (2) The principle on which the Court refuses relief on the ground of laches or delay is that the rights accrued to others by the delay in filing the petition should not be disturbed, unless there is a reasonable explanation for the delay, because Court should not harm innocent parties if their rights had emerged by the delay on the part of the petitioners. (3) The satisfactory way of explaining delay in making an application under Article 226 is for the petitioner to show that he had been seeking relief 6 (2011) 5 SCC 607 elsewhere in a manner provided by law.

If he runs after a remedy not provided in the statute or the statutory rules, it is not desirable for the High Court to condone the delay. It is immaterial what the petitioner chooses to believe in regard to the remedy.

(4) No hard-and-fast rule, can be laid down in this regard. Every case shall have to be decided on its own facts.

(5) That representations would not be adequate explanation to take care of the delay."

16. In the facts of the present case, the respondents do not and cannot dispute that they have to refund the seized amount. Further, considerable delay and failure to make the payment constitutes and is inseparable from the cause of action as the delay and negligence is on the part of the authorities. The appellant does not seek setting-aside or quashing of an adverse order, no third-party rights are involved and the respondents' ex- facie would not suffer due to a change of position. Prayer for compliance of a valid and legal order passed cannot be equated with prayers made in repeated representations seeking a change of position. Acquiescence is not apposite to patience as acquiescence is not just standing-by, and refers to assent on being aware of the violation or reflects conduct showing waiver. Laches is this case would require sheer negligence of the nature and type which would render it unjust and unfair to grant relief.

When, the liability to pay Rs.4,99,900/- is acknowledged and accepted, then to deny relief by directing payment in terms of the order under Section 132(5) of the Act would be unjust, unfair and inequitable. Statute mandates the respondents to make payment. To be fair to the counsel for the respondents, it was conceded that an appropriate order may be passed to do justice.

17. For the aforesaid reasons, the appeal is allowed with the direction to the respondent authorities to pay Rs. 4,99,900/- with interest as per law within a period of three months from the date on which the copy of this order is received. In case of failure to pay in time, the appellant would be at liberty to file a contempt petition against the officers concerned and also claim costs.

.....J. (S. ABDUL NAZEER) .....J. (SANJIV KHANNA) NEW DELHI;

JANUARY 24, 2020

ITEM NO.39 COURT NO.13 SECTION III

S U P R E M E C O U R T O F I N D I A

RECORD OF PROCEEDINGS

Special Leave Petition (Civil) No.6639/2019 KISHORE JAGJIVANDAS TANNA Appellant(s) VERSUS JOINT DIRECTOR OF INCOME TAX (INV.) & ANR. Respondent(s) Date : 24-01-2020 This appeal was called on for hearing today.

CORAM : HON'BLE MR. JUSTICE S. ABDUL NAZEER
HON'BLE MR. JUSTICE SANJIV KHANNA

For Appellant(s) Mr. S.C. Tiwary, Adv.
Mr. Jatin Zaveri, AOR
Mr. Neel Kamal Mishra, Adv.

For Respondent(s) Mr. K. Radhakrishnan, Sr. Adv.
Mr. Pranay Ranjan, Adv.
Ms. Priyanka Das, Adv.
Mrs. Anil Katiyar, AOR
Mr. Sumit Upadhyay, Adv.
Ms. Manjari Tiwari, Adv.

UPON hearing the counsel the Court made the following O R D E R Leave granted.

The Civil Appeal is allowed in terms of signed order. Pending application(s), if any, shall stand disposed of.

(RACHNA) (RAJINDER KAUR)
SENIOR PERSONAL ASSISTANT ASSISTANT REGISTRAR
(Signed order is placed on the file)