

Dixit

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

NOTICE OF MOTION NO.891 OF 2016
IN
MVAT APPEAL (LODGING) NO.10 OF 2016
IN
VAT SECOND APPEAL NO.119 OF 2013

ALONG WITH

NOTICE OF MOTION NO.910 OF 2016
IN
MVAT APPEAL (LODGING) NO.9 OF 2016
IN
VAT SECOND APPEAL NO.120 OF 2013

The Additional Commissioner of Sales Tax,
VAT-III, M.S., Mumbai-10

.... Applicant

In the matter between

The Additional Commissioner of Sales Tax,
VAT-III, M.S., Mumbai-10

.... Appellant

V/s.

Kayani Bakery, Pune

.... Respondent

ALONG WITH

NOTICE OF MOTION NO.1007 OF 2016
IN
MVAT APPEAL (LODGING) NO.8 OF 2016
IN
VAT APPEAL NO.9 OF 2007

The Additional Commissioner of Sales Tax,
VAT-III, M.S., Mumbai-10

.... Applicant

In the matter between

The Additional Commissioner of Sales Tax,
VAT-III, M.S., Mumbai-10

.... Appellant

V/s.

Phonographic Performance Ltd.,
Andheri (West), Mumbai.

.... Respondent

Mr. V.A. Sonpal, Special Counsel, for the Applicant in all the Notices of Motion.

Mr. P.V. Surte, a/w. Mr. Subhash Surte, for the Respondent in Notices of Motion Nos.891 of 2016 and 910 of 2016.

Mr. B.M. Chatterjee, Sr. Advocate, a/w. Ms. Shilpa Goel, i/by Mr. Subhash Surte, for the Respondent in Notice of Motion No.1007 of 2016.

**CORAM : S.C. DHARMADHIKARI &
DR. SHALINI PHANSALKAR-JOSHI, J.J.**

RESERVED ON : 12TH JULY, 2016.

PRONOUNCED ON : 19TH JULY, 2016.

JUDGMENT : [Per Dr. Shalini Phansalkar-Joshi, J.]

1. These three Notices of Motion are preferred by the Revenue seeking condonation of delay in preferring appeals under Section 27 of the Maharashtra Value Added Tax Act, 2002, against the Judgment and Order of the First Bench of Maharashtra Sales Tax Tribunal, Mumbai. As they raise the common questions of law and facts, they are being decided by this common order.

2. The first and second Notices of Motion, being Notice of Motion Nos.891 of 2016 and 910 of 2016, are directed against the order dated 27th March 2014 passed by the First Bench of the Maharashtra Sales Tax Tribunal, Mumbai in VAT Second Appeal Nos.119 and 120 of 2013 and the delay in preferring Appeals against those orders is of 548 days. The third Notice of Motion No.1007 of 2016 is directed against the order dated 19th June 2009, also passed by the First Bench of the Maharashtra Sales Tax

Tribunal, Mumbai. It is in VAT Appeal No.9 of 2007 and the delay in this case is of about 2288 days.

3. In the first two Notices of Motion, the cause for the delay is given in a general and omnibus way as stating that, *"the delay is due to various factum, especially, related to procedural mandate in Government functioning, which were not in the control of the Applicant-Appellant"*; whereas, in the third Notice of Motion, the delay is attributed to *"filing of the Special Leave Petition in the Supreme Court"*, which came to be disposed of on 7th February 2011, and, thereafter, to *"the various internal correspondence of the Revenue Department with its superior authorities, for seeking permission to file the Appeal"*.

4. Learned counsel for the Respondents herein have strongly resisted these Notices of Motion on two counts; firstly, by challenging maintainability of the Notices of Motion on the ground that Section 5 of the Limitation Act, 1963, is not applicable to the proceedings under the Maharashtra Value Added Tax Act, 2002. To advance this submission, the reliance is placed on the Judgment of this Court in *Additional Commissioner of Sales Tax, VAT-III, Mumbai Vs. Jonson and Jonson Ltd. & Anr.*¹

1 (2015) 79 VST 478 (Bom)

5. The second ground, on which the Notices of Motion for condonation of delay are opposed, is the failure of the Applicant-Appellant to make out sufficient cause for condonation of such long duration of about two years in the first two Notices of Motion and more than six to seven years in preferring the third Notice of Motion. It is submitted that absolutely no satisfactory, much less, cogent or reasonable grounds are made out for condonation of delay in first two Notices of Motion, except for making a bald and general statement that the delay is on account of “various factors” and in the third Notice of Motion, attributing the same to the alleged internal correspondence.

6. According to learned counsel for the Respondents, therefore, this belated wisdom dawn on the Revenue, of challenging the impugned orders of the Tribunal, is required to be dealt with strictly, especially, in the case of Revenue matters, where such causes are taken up after the long period of years together. It is submitted that the delay in Revenue matters adversely affects the steady inflow of revenues and the financial stability of the State. Therefore, when the object is to ensure speedy and final determination of fiscal matters within a reasonable certain time schedule, allowing such Notices of Motion for condonation of delay to unearth the

cause, which is set at rest long back, is acting against the spirit of the Revenue matters and, therefore, this Court should be slow in entertaining such Notices of Motion.

7. In view of the submissions advanced before us by learned counsel for the Revenue Mr. V.A. Sonpal and learned counsel for the Respondents Mr. P.V. Surte, the first question that necessarily falls for our consideration is about the maintainability of these Notices of Motion or applications for condonation of delay in preferring the Appeals, as learned counsel for the Respondents has strenuously contested the same by relying upon the decision of this Court in *Jonson and Jonson Ltd. (Supra)*. According to learned counsel for the Respondents, the application of the provisions of the Limitation Act to the proceedings in the Sales Tax matters is very much restricted. In the absence of any express provision providing for applicability of Section 5 of the Limitation Act to these proceedings, even the power of this Court to condone the delay in filing of the Appeal is not available.

8. In order to appreciate this submission, it would be necessary, first, to refer to the provisions of Maharashtra Value Added Tax Act, 2002. These Notices of Motion are filed in order to prefer an Appeal under

Section 27 of the said Act. The said Section provides that, *“the Appeal shall lie to the High Court from every order passed by the Tribunal, including a Judgment, by way of advance ruling, if the High Court is satisfied that the case involves a substantial question of law.”*

9. Sub-section 2(a) to Section 27 provides that such appeal has to be filed within the period of one hundred and twenty days from the date on which the order appealed against is received by the party.

10. Sub-section (9) of Section 27 of the said Act lays down that, *“save as otherwise provided in this Act, the provisions of the Code of Civil Procedure, 1908, relating to Appeals to the High Court, shall, as far as may be, apply in the case of Appeals under this Section.”*

11. Section 80 of the MVAT Act provides that, *“in computing the period of limitation laid down under Sections 25, 26 and 27, the provisions of Sections 4 and 12 of the Limitation Act, 1963, shall, so far as may be, apply.”*

12. Section 81 is of relevance, which clearly lays down the extension of period of limitation in certain cases. Sub-clause (1) of Section 81 reads as follows :-

"An appellate authority may admit an appeal under Section 26 after the period of limitation laid down in the said section, if the appellant satisfies the appellate authority that he had sufficient cause for not preferring the appeal within such period."

13. Thus, the provisions of this Section are clear to the effect that the Appellate Authority under Section 26 of the Act, namely, the Tribunal, is having the power of extending the period of limitation, if the Appellant makes out a sufficient cause for the same. Needless to state that, when the Appellate Authority, like the Tribunal, which is not a Court, is having such power of extension of period by condoning the delay in preferring the Appeal, the High Court, which is having the plenary and inherent powers, can hardly be said to be bereft of such power for condonation of delay. Once the Code of Civil Procedure, 1908 in so far as relating to Appeals applies to the subject Appeals, then, it is rightly conceded that this Court can condone the delay in filing Second Appeals. The provisions in so far as maintainability of the Second Appeals in this Court applies to the MVAT Appeals in this Court. Therefore, Order XLI Rule 3A of CPC would apply conferring power in this Court to condone the delay in filing MVAT Appeals beyond the prescribed period.

14. As to the authority relied upon by learned counsel for the Respondents, that of *Jonson and Jonson Ltd. (Supra)*, the issue involved therein was totally different. It related to the provisions of Bombay Sales Tax Act, 1959 and pertains to the delay in preferring a Reference thereunder. In the said case, having regard to the entire scheme of Sections 59 and 60 of Bombay Sales Tax Act, 1959, it was held that, "*the Legislature did not intend to confer any power in the High Court to condone the delay by taking recourse to Section 5 of the Limitation Act. As the Section makes it clear that the Court has to abide by the limit of 90 days and if the application is filed beyond that period, the Court has no powers to condone the delay by taking recourse to Section 5 of the Limitation Act.*"

15. It was observed that, "*the authorities constituted under the Sales Tax Act for deciding the tax dues are not courts, but Tribunals and unless there is an express power conferred by the Act to condone the delay or exclude any period of limitation, the Tribunal would not be clothed with the power to condone the delay.*"

16. In so far as the power of the Tribunal referring the matter to the High Court beyond the period prescribed by Section 61 is concerned, it was held that, "*there was no power in the Tribunal to extend that period and*

consequently, as there is no power in the Tribunal, there is also no power in the High Court to condone the delay, which the Tribunal itself could not have condoned.”

17. Thus, it is clear that these observations are made in the context of and pertaining to the 'Reference', which the Tribunal has to make within a particular time period and Tribunal, not being a court, had no authority or powers to extend such period of limitation. In consequence, the High Court was also held to be not having such power to entertain the Reference beyond the period of limitation, prescribed by Section 61 of the Bombay Sales Tax Act, 1959.

18. As against it, in the instant case, we are concerned with the “Appeal” and not the “Reference”. As stated above, Section 81 of the MVAT Act confers powers even on the Appellate Authority like the Tribunal, which is not a Court, to extend the period of limitation, if sufficient cause is made out. Hence, needless to state that the High Court cannot be considered as bereft of such powers. Therefore, so far as the question of maintainability of these applications / Notices of Motion for condonation of delay are concerned, we have to hold that they are very much maintainable.

19. However, the mere fact that the Notices of Motion are maintainable, does not mean that they have to be allowed. After all, this Court also has to consider whether 'sufficient cause', which is the essential condition or one may call a *sine qua non*, for allowing such applications for condonation of delay is made out by the Applicant-Appellant or not.

20. For the Court to exercise its discretionary power under Section 5 of the Limitation Act, on facts, the Applicant-Appellant has to plead and make out a sufficient cause for condonation of delay. In this respect, however, we are constrained to observe that the Applicant-Appellant has miserably failed to make out such sufficient cause in all the three applications.

21. At the cost of repetition, it has to be stated that a very general and vague averment is made in the first two Notices of Motions as to the cause for delay in preferring the Appeals. In Para No.4 of the applications / first two Notices of Motion, it is stated as follows :-

“4. I say that the delay in filing the present Appeal is not deliberate or intentional but due to various factors, especially related to procedural mandate in Government functioning, which were not in control of the Appellant.”

22. Thus, absolutely no cause is given, as such, for condonation of delay and that of about 548 days in preferring the Appeals, except for attributing the same to the specious plea of “various factors”. Which were those factors is not at all stated or illustrated. Merely stating that, *“those factors relate to procedural mandates in Government functioning, which was not in control of the Appellant”*, cannot be sufficient, even accepting that, in litigations to which the Government is a party, there are some aspects, which perhaps cannot be ignored and those factors and aspects are required to be stated.

23. As observed by the Apex Court in the case of *G. Ramegauda Major etc. Vs. The Special Land Acquisition Officer, along with connected matter, Bangalore*², that, *“in assessing, what in a particular case can constitute 'sufficient cause', for the purpose of Section 5 of the Limitation Act, it might be unrealistic to exclude the consideration of the characteristics of the decisions taken at the Government level and the aspects which are peculiar to the functioning of the Government.”*

24. We are also aware that certain amount of latitude in cases where Government is a litigant, is not impermissible, as the State represents collective cause of the community and what ultimately suffers is public

2 AIR 1988 SC 897

interest, necessitating adoption of pragmatic approach to do substantive justice. However, in case of gross delay and inaction, it becomes difficult to put a State on high pedestal, so as to be immune to the consequences of the inaction. No separate standards to determine the cause laid by the State vis-a-vis private litigant could be laid to prove sufficient cause. Merely because applicant is a State, delay cannot be condoned without a proper explanation as Section 5 of the Limitation Act is equally applicable to the State as well.

25. In the case of *Office of the Chief Post Master General & Ors. Vs. Living Media India Ltd. & Anr.*³, the Apex Court, after taking review of its earlier decisions, was constrained to observe that,

“12. In the absence of plausible and acceptable explanation, we are posing a question why the delay is to be condoned mechanically merely because the Government or a wing of the Government is a party before us. Though we are conscious of the fact that in a matter of condonation of delay when there was no gross negligence or deliberate inaction or lack of bona fide, a liberal concession has to be adopted to advance substantial justice, we are of the view that in the facts and circumstances, the Department cannot take advantage of various earlier

3 2012 AIR SCW 1812

decisions. The claim on account of impersonal machinery and inherited bureaucratic methodology of making several notes cannot be accepted in view of the modern technologies being used and available. The law of limitation undoubtedly binds everybody including the Government.

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 bona fide 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.”

26. It has, thus, to be remembered that the Government is also a litigant before the Court like any other litigant. Hence, even to invoke these aspects of peculiar functioning of Government, a specific case is required to be made out, as to which are those aspects which, in a particular case, cause delay in preferring the Appeal.

27. In the instant case, there is absolutely no averment in the Notices of Motion or even in the submissions as to which were those peculiar or distinctive aspects of the Government functioning, which resulted in causing delay of about two years in preferring these appeals. Therefore, having regard to the tenor of the averments in the application, we have no hesitation in our mind to reject these first two Notices of Motion on failure of the Applicant-Appellants to bring their case within the four corners of 'sufficient cause', as contemplated under Section 5 of the Limitation Act.

28. Even as regards the third Notice of Motion, though the details of the various internal correspondence are given and the cause is attributed to the same and also to the fact that the Special Leave Petition was preferred in the Hon'ble Supreme Court of India against the order of the Tribunal and hence there was delay, we are not at all convinced by the same. It is pertinent to note that the impugned decision of the Tribunal is dated 19th June 2009 and the Special Leave Petition was disposed of on 7th February 2011 itself. The Appeals are, however, preferred on 3rd

February 2016 along with these Notices of Motion. Thus, even if the period consumed in prosecuting Special Leave Petition filed in the Supreme Court of India, is excluded from consideration, there is a delay of about five years. Such a delay can hardly be explained by attributing the same merely to the functioning of the Government and internal correspondence.

29. In this respect also, it is pertinent to note that the Government has given the sanction to file Writ Petition on 13th December 2011 itself. The Draft Appeal received approval thereafter from the concerned Department on 16th December 2015. No explanation at all is offered for this delay of four years and the subsequent delay of again about two months in preferring this Appeal with Notice of Motion. Such a delay cannot be condoned on the spacious plea of the characteristics of Government functioning.

30. As a matter of fact, the Government, being the largest litigant, has to be a model and ideal litigant. The sheer and gross negligence on the part of the Government in preferring such Appeals cannot be condoned in this manner, as a routine or as a right of the Government, and that too to unearth the cause which is already set at rest.

31. The delay in the third Notice of Motion is of not one or two years, but of about seven years and again being not explained satisfactorily, we are not inclined to allow this Notice of Motion. It will also set a bad precedent and may encourage the Revenue in the dilly dallying tactics.

32. As a result, all the three Notices of Motion stand dismissed. In consequence, the Appeals no more survive and the same are also disposed of accordingly.

[DR. SHALINI PHANSALKAR-JOSHI, J.] [S.C. DHARMADHIKARI, J.]