

**S.M.M. Islam Vs. Chief Commissioner of Income-tax (Administration) and Commissioner of Income-tax**

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**Court :** Kolkata

**Decided On :** Mar-21-1988

**Reported in :** [1988]171ITR612(Cal)

**Judge :** M.N. Roy and ;D.K. Basu, JJ.

**Acts :** [Limitation Act, 1963](#) - Section 5

**Appeal No. :** C.R. No. 753 of 1987

**Appellant :** S.M.M. Islam

**Respondent :** Chief Commissioner of Income-tax (Administration) and Commissioner of Income-tax

**Advocate for Def. :** None

**Advocate for Pet/Ap. :** Party in person

**Judgement :**

1. Even though the rule under consideration was made ready as regards service and has been directed to be placed on the general list for hearing, nobody appeared for the respondents.

2. Before we deal with the application on which the rule under consideration was issued, we think some relevant facts will have to be stated and we must also keep it on record that on the prayers of Md. Badruddoja Mullick, advocate, we allowed him to retire from the case and allowed the applicant, Syed Mohammed Mirhajul Islam, to appear in person.

3. The applicant, who at the material time of moving this court, whereon C.O. No. 2851(W) of 1985, was directed to be issued, claimed to be the holder of a Civil Post (Judicial) under the Union of India and it was his case, that he was a member of the Indian 'Revenue Service and was appointed directly as Income-tax Officer, Group 'A', in July, 1951, and, in fact, he joined the post at Calcutta on July 24, 1951. It has been stated by him that on the basis of the results in the All India Civil Services and Central Civil Services Examinations held in the year 1950, he was placed in serial No. 19, out of the other successful candidates and his allegation was that, without considering the seniority list duly and without considering the satisfactory services rendered by him, the authorities concerned promoted other members of the service, who were junior to him, as a result whereof he suffered financial loss and irreparable damage. He has given the other particulars of his services as rendered by him which, according to him, were satisfactory.

4. The applicant, in fact, himself issued a temporary injunction in his own case and in his own favour against the Central Board of Direct Taxes, New Delhi, restraining them by his order dated October 22, 1981, from executing an order of his transfer to Bangalore, under Section 151 of the Code of Civil Procedure on the ground that the said Board had no jurisdiction, legal or otherwise, to pass the transfer order in his case and he has alleged that such order of injunction was disobeyed by the concerned Board and, in fact, on April 23, 1982, he was transferred to Calcutta. Apart from the above, he was also claimed to have issued an order of injunction on November 25, 1981, against the Government of India, asking them to recall the order of transfer and to restore him to his position at Meerut as an Appellate Assistant Commissioner and he has claimed that the said order was not also complied with and he has further stated that his petition for a reference before the Delhi Income-tax Appellate Tribunal, as filed, was also not disposed of by that time and the same was kept pending for consideration. It was his case that he has

made several applications to the Income-tax Tribunal here at Calcutta and also for a decision on the issue, whether his orders, as mentioned hereinbefore, which he claimed to be appellate orders passed as an Appellate Assistant Commissioner, were valid in law or not. It has been stated by him that the Income-tax Appellate Tribunal here at Calcutta had no doubt disposed of two appeals which were preferred against the appellate orders as passed by him in his own case but they have not really and actually decided the issue of the legality and validity of such appellate orders, as passed by him, on giving due reasons.

5. The applicant has stated that in or about November, 1984, he apprehended that on attaining the age of 58 years, as per Rule 56(a) of the Fundamental Rules, an order of retirement in his case will be passed and in order to prevent the process of his court, meaning thereby the orders as passed by him against the purported illegal obstructions in the matter of performing his duties as an Appellate Assistant Commissioner of Income-tax, he invoked the inherent powers of the court under Section 151 of the Civil Procedure Code and again issued a temporary provisional order of injunction on November 30, 1984, which again was duly served on the Chief Commissioner of Income-tax (Administration) and also on the Commissioner of Income-tax, West Bengal, on December 1, 1984.

6. It would appear that by an order dated December 28, 1984, the said Chief Commissioner passed Order No. 578, which the applicant claimed to be in clear violation and disobedience of his order dated November 30, 1984, and he claimed that the order as made by the Chief Commissioner was without jurisdiction, since the same had not assigned any reason. In fact, by the said order, the Chief Commissioner concerned directed that one Shri K. Chowdhury, A.A.C., Range XVI, Calcutta, with effect from the afternoon of December 31, 1984, will hold charge of the applicant's office and he will perform such duties in addition to his own duties until further orders. That order was certainly passed with a view to relieve the applicant from his post who, as mentioned hereinbefore, was due to retire.' The order, as mentioned above, was admittedly served on the applicant on the afternoon of December 31, 1984, in his office.

7. Against the order in question, the applicant moved a writ application, whereupon C.O. No. 2851(W) 1985 as issued, was rejected by Umesh Chandra Banerjee J. on October 7, 1985. The said order of rejection was claimed by the applicant to be improper, as the same, according to him, was made without considering the several decisions referred to by him in his writ application and also because the learned judge failed to consider that the respondents before him did not duly consider the effect and impact of the Fundamental Rules 56(a) and Section 151 of the Code of Civil Procedure.

8. Admittedly, against such order of rejection on or about October 12, 1985. F.M.A.T. No. 3814 of 1985 was presented by the applicant and on May 23, 1986, the Bench presided over by Anil Kumar Sen J. (as his Lordship then was), dismissed the said appeal and also an application, which was filed on April 25, 1986, for necessary orders. From a reference to the said order dated May 25, 1986, it would appear that the learned judges of the said Division Bench found that both the appeal and the application were misconceived and they have also found that the appellant before them, who is the applicant now, had attained the age of superannuation and, as such, he was directed to go on retirement and the concerned order could not be so lightly' interfered with and that too in the manner the applicant had suggested. On the date of the making the said order, the applicant was duly represented by his learned advocates, Sarbashree Dhruba Kumar Mookherjee and Sadek Hoosain, and there was no statement by them that they were not given a hearing before passing the order in question or the said order was passed behind their back or in their absence. We have made the above recordings because, at the time of hearing before us now, the applicant wanted to suggest that the said order was not passed after duly hearing his learned advocates. We are not in a position to accept such allegations at this stage. In fact, there is no legal evidence establishing these allegations as made by the applicant.

9. Against such determination of the Division Bench, on or about July 24, 1986, an application for review, being Review Tender No. 2225 of 1986, was presented and it was duly reported by the stamp reporter; that the said application was out of time by one day and the court fee on the same was short by Rs. 95. In view of the

report of the stamp reporter, on September 16, 1986, the said Bench as presided over by Anil Kumar Sen J. (as his Lordship then was) found that the application as filed was not in form and accordingly rejected the same. In fact, we feel that such order was duly, justifiably and authorisedly passed.

10. There was an application for restoration filed on November 12, 1986, by the applicant before us, against the said order dated September 16, 1986, and on November 19, 1986, that application was assigned for hearing before this Division Bench and on November 29, 1987, after hearing the learned advocate for the applicant, the application was directed to go out of the list.

11. Thereafter, another review application, bearing No. 3693 of 1986, was presented by the applicant on December 4, 1986, and this time, the report of the stamp reporter was that the said application was filed after 164 days' delay. The stamp reporter has also pointed out that the application for review as filed was also accompanied by an application under Section 5 of the Limitation Act for condonation of delay. It should be noted that under the practice and procedure on the appellate side, the applicant should have taken back his review application, as filed out of time, from the stamp reporter, in terms of his report and should have also presented the same along with his application under Section 5, before the appropriate Bench. This was admittedly not done. Here also we must keep it on record that even though there is no such specific order, the applicant, at the time of hearing before us, alleged that the present review application along with the necessary application under Section 5 of the Limitation Act for condonation of delay was filed pursuant to the liberty granted to him by the court. There is also no evidence appearing from the records on the basis whereof such allegations can be accepted.

12. It would also appear that on March 27, 1987, a rule (Civil Rule No. 753(M) of 1987) on the application under Section 5, as filed for condoning the delay in filing the second review application, viz., Review Tender No. 3693 of 1986, was issued and as indicated earlier, even in spite of due service, the respondents in the rule have neither appeared nor contested the rule.

13. The reasons given by the applicant for condoning the delay in filing the second review application have been given in paragraph 7 of the application. Although this application was filed through a learned advocate, the applicant, as indicated earlier, elected to appear in person at the time of hearing. The applicant has, in fact, given no cogent and acceptable explanation for the time which he consumed, in the matter of preferring the second review application after such enormous delay, but, as stated earlier, he has only taken the plea that since on November 26, 1986, this Bench was pleased to direct him to file a fresh review application with an application under Section 5 of the Limitation Act for necessary condonation of delay and, as such, he has filed the application in question, the delay should be condoned and he has also prayed that if there is delay, the same may be condoned under Section 5 of the Limitation Act, as otherwise, he will suffer irreparable loss and injury. In fact, such explanation as given now, is neither borne out by the records nor acceptable. There is no satisfactory explanation for the delay of 164 days. The order dated November 25, 1986, just records that the matter was adjourned for two weeks.

14. It should be noted that during the course of hearing, the applicant, Mr. Islam, pointed out that the earlier report on the question of limitation and insufficiency of court fees, as made by the stamp reporter, was not authorised, proper and bona fide. In fact, he wanted to contend at this stage that the delay was of one day as pointed out by the stamp reporter. His earlier application, being Review Tender No. 2225 of 1986, was made on wrong calculation, and he has also pointed out during his arguments before us that at that time he had filed the concerned review application with a court fee of Rs. 5, as he was informed so by the officer concerned, meaning thereby the Commissioner of Affidavits and furthermore, he was not informed by his learned advocates that he was required to pay Rs. 100. In any event, he has stated that since a sum of Rs. 95 has been paid subsequently, his review application should have been considered for the condonation of delay and the Bench presided over by Anil Kumar Sen J. (as his Lordship then was), was not right and justified in rejecting the concerned review application on September 16, 1986. Unfortunately for us, at this stage, we cannot reopen the reasons which are shown now for condonation of the said delay and really, in this application, we are only required to consider whether the subsequent delay in filing

the second application in Review Tender No. 3693 of 1986 should be condoned.

15. We have indicated the facts of this case, which, in our view, is a peculiar and perhaps a singular one. However, since we are not required to say anything on the merits of the initial grievances of the applicant in the concerned civil order proceedings as mentioned hereinbefore, we are not making any consideration on the merits or otherwise of the case of the applicant or the facts of the case. We must, of course, keep it on record that the applicant strenuously contended before us that he authorisedly passed the orders of injunction as a court, in terms of or under the provisions of Section 151 of the Code of Civil Procedure, for meeting the ends of justice and for the purpose of preserving the dignity of the orders passed by such court, the authorities concerned should have obeyed the orders of injunction as passed, instead of violating them. In support of his submissions, the applicant, firstly, relied on the case of *Manohar Lal Chopra v. Rai Bahadur Rao Raja Seth Hiralal*, : AIR 1962 SC527 , where it has been laid down by the Supreme Court that it is well-settled that the provisions of the Code are not exhaustive, for the simple reason that the Legislature is incapable of contemplating all possible circumstances which may arise in future litigation and consequently for providing the procedure for them. The effect of the expression 'if it is so prescribed' in Section 94 is only this that when the rules in Order 39, Civil Procedure Code, prescribe the circumstances in which the temporary injunction can be issued, ordinarily the court is not to use its inherent powers to make the necessary orders in the interests of justice, but is merely to see whether the circumstances of the case bring it within the prescribed rule. If the provisions of Section 94 were not there in the Code, the court could still issue temporary injunctions, but it could do that in the exercise of its inherent jurisdiction. It is the incidence of the exercise of the power of the court to issue temporary injunction that the provisions of Section 94 of the Code have their effect and not in taking away the right of the court to exercise its inherent power and Section 151 itself says that nothing in the Code shall be deemed to limit or otherwise affect the inherent power of the court to make orders necessary for the ends of justice. In the face of such a clear statement, it is not possible to hold that the provisions of the Code control the inherent power by limiting it or otherwise affecting it. The inherent power has not been conferred upon the court, it is a power inherent in the court by

virtue of its duty to do justice between the parties before it. Further, when the Code itself recognises the existence of the inherent power of the court, there is no question of implying any powers outside the limits of the Code and such being the position, there being no such expression in Section 94 which expressly prohibits the issue of a temporary injunction in circumstances not covered by Order 39 or by any rules made under the Code, the courts have inherent jurisdiction to issue temporary injunction in circumstances which are not covered by the provisions of Order 39, Civil Procedure Code, if the court is of opinion that the interests of justice require the issue of such interim injunction. The applicant, on being asked by us, could not establish that any lis was pending before him as Appellate Assistant Commissioner of Income-tax, on the basis whereof such injunctions as were issued in his own case, could be issued. The effect of the submissions of the applicant, if accepted, would mean that a court will be authorised to pass an order of injunction in its own case. The applicant in this case was really and duly pursuing his own case and he really intended to act as a judge of his own case. Secondly, Mr. Islam referred to the case of *Madhu Limaye v. State of Maharashtra*, : 1978 CriLJ165 , where the point for determination was really whether the High Court can exercise its inherent power to quash an interlocutory order and amongst others, the Supreme Court has indicated the following :

- (1) That the power is not to be resorted to if there is a specific provision in the Code for the redress of the grievance of the aggrieved party;
- (2) That it should be exercised very sparingly to prevent abuse of process of any court or otherwise to secure the ends of justice ;
- (3) That it should not be exercised as against the express bar of law engrafted in any other provision of the Code, where the High Court can exercise its inherent power. On the basis of the above decision, Mr. Islam contended that this court, thus, should have made interference in the proceedings as initiated by him and should have decided on the validity and bona fides of the orders as passed and made by him, may be on his own case, for ends of justice. We are sorry that we are not in a position to accept such submission and more particularly so, since we feel that the orders as passed by the applicant were not authorised. Then and,

thirdly, Mr. Islam placed reliance on the case of CIT v. Nandlal Agarwal : [1966]59ITR758(SC) and fourthly, to the determinations in the case of Naresh Shridhar Mirajkar v. State of Maharashtra, 0044/1966 : [1966]3SCR744 . The determinations in the abovementioned two cases, in our view, cannot be applied in the facts of this case nor will they be of any assistance to the applicant.

16. We thus keep it on record that the delay in the instant case of 164 days for not filing the Review Tender No. 3693 has not been duly and satisfactorily explained and no plausible or possible ground has been made out, for which we can hold that the applicant was prevented by just and sufficient cause from preferring his second review application in time. We also find that the affirmation of the application in Review Tender No. 3693 of 1986 was neither due nor proper and the same was defective. Even though in this case we were not required to deliberate on the facts and merits of the case, we have made reference to some facts and cases as cited, as Mr. Islam placed those facts and cases at the time of hearing.

17. For the views which we have expressed, we find no merit in this application and accordingly this application is rejected. In this case, we could have passed an order for costs, but we are not doing so since there has been no appearance entered by the respondents.