

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of decision: 24th March, 2015

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LPA No.702/2014

GURBACHAN SINGH

.... Appellant

Through: Ms. Sapna Chauhan, Adv. with Mr.
Nikhil Bahri, Adv.

Versus

UNION OF INDIA & ORS.

.... Respondents

Through: Mr. Vikram Jetly, Adv. for R-1 to 3
along with Mr. Rajiv Saxena, Asstt.
Director, Enforcement Directorate.

AND

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W.P.(C) No.8210/2003

GURBACHAN SINGH

.... Petitioner

Through: Ms. Sapna Chauhan, Adv. with Mr.
Nikhil Bahri, Adv.

Versus

UNION OF INDIA & ORS.

.... Respondents

Through: Mr. Vikram Jetly, Adv. for R-1 to 3
along with Mr. Rajiv Saxena, Asstt.
Director, Enforcement Directorate.

CORAM:-

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J

1. This intra-court appeal impugns the order dated 15th May, 2014 of the learned Single Judge of this Court of dismissal of the applications, being CM Nos.17965/2012 and 15521/2013 filed for restoration of the W.P.(C) No.8210/2003 (filed by the appellant) dismissed in default on 27th August, 2010 and for condonation of delay in applying therefor. The appeal also impugns the order dated 1st August, 2014 of the learned Single Judge of dismissal of the application filed by the appellant for review of the order dated 15th May, 2014. Though the appeal was listed from time to time but no notice thereof was issued. We heard the counsel for the appellant / writ petitioner on 22nd January, 2015. The counsel for the respondents appearing on advance notice was also heard on that date.

2. The writ petition from which this appeal arises was filed on 25th September, 2003 and came up first for consideration on 5th December, 2003 when notice thereof was issued. Vide order dated 11th March, 2004, the counsel for the appellant / writ petitioner as well as the counsel for the respondents were directed to file synopsis on the legal question entailed in the writ petition, of entitlement if any of the appellant / writ petitioner to interest, supported with authorities, within two weeks thereof. While the appellant / writ petitioner filed

the synopsis, the counsel for the respondents sought time and owing whereto the hearing could not take place. Thereafter also the counsel for the respondents sought time and the learned Single Judge on 6th August, 2004 issued 'Rule' in the writ petition; though the writ petition was still ordered to be listed on actual date for hearing in the category of '*After Notice Miscellaneous Matters*' but was again adjourned from time to time. Vide order dated 17th August, 2005, again 'Rule' was issued and the writ petition was ordered to be listed in the category of "*Regulars*" as per its turn. The writ petition thereafter came up first for hearing after little more than five years on 27th August, 2010 when none appeared for either of the parties and the writ petition was dismissed for non prosecution.

3. The appellant / writ petitioner filed CM No.17965/2012 and thereafter CM No.15521/2013 (supra) for restoration of the writ petition and for condonation of delay in applying for restoration stating, i) that after the writ petition was on 17th August, 2015 ordered to be listed in the category of "*Regulars*" on its turn, the counsel earlier engaged by the appellant / writ petitioner disengaged from the matter citing other commitments and asked the appellant / writ petitioner to engage another counsel when it gets listed for hearing; ii) that from the beginning of the year 2010, the wife of the appellant /

writ petitioner already ill, took seriously ill and the appellant / writ petitioner was running from pillar to post and further straining his financial condition; iii) that in between the appellant / writ petitioner visited the Court but learnt that the writ petition was yet to be taken up for hearing; and, iv) that however shortly prior to 1st October, 2012, when the appellant / writ petitioner enquired, he learnt of the writ petition having been dismissed for non prosecution on 27th August, 2010; and (v) that the cause of action leading to the filing of the writ petition was still alive.

4. The said applications were taken up for hearing on 15th May, 2014 when they were dismissed, observing that restoration had been sought after 26 months from the date of dismissal and that no documents of illness of the wife of the appellant / writ petitioner or of the financial resources of the appellant / writ petitioner had been annexed to the application and restoration would work to the prejudice of the respondents as they would be liable to pay interest even for the period the appellant / writ petitioner was negligent in seeking restoration of the writ petition.

5. The appellant / writ petitioner sought review of the said order by annexing the documents of illness of his wife and by pleading that the respondents were in no way prejudiced by the delay in applying for restoration.

6. However, the learned Single Judge vide order dated 1st August, 2014 dismissed the said application also, observing that no ground for review was made out.

7. Considering the fact that the writ petition was dismissed in default on the very first date when it was listed in the category of “*Regular*” matters for hearing and after five years from the previous date, we were on 22nd January, 2015 of the view that the order of the learned Single Judge dismissing the application for restoration of the writ petition was harsh and liable to be set aside. It cannot be lost sight of that litigants, as also their lawyers, cannot be penalized for not appearing when the matter ordered to be posted in the category of ‘Regulars’ with no specific date, suddenly after five years comes up for hearing. However when we indicated the same to the counsels, the counsel for the appellant / writ petitioner contended that the appellant / writ petitioner is very old and the issue entailed in the writ petition would not entail a long hearing and we should hear the writ petition itself. We as such, with the

consent of the counsels, proceeded to hear the writ petition itself, from the documents thereof on the appeal file.

8. The appellant / writ petitioner filed the writ petition pleading:

- (i) that on 24th April, 1993, an amount of Rs.9.90 lacs was seized from his custody by the police authorities at police station Rajouri Garden, New Delhi by invoking the provisions of Section 102 of the Cr.P.C. and the petitioner was arrested in a case under Sections 353/186/332 of IPC;
- (ii) that the appellant / writ petitioner moved an application before the Metropolitan Magistrate (M.M.) for release of the amount so seized from him;
- (iii) that the M.M. vide order dated 24th September, 1993 granted custody of the seized amount to the respondent No.2 Enforcement Directorate for the purpose of investigations from the Foreign Exchange Regulation Act, 1973 (FERA) angle and on the condition that it shall be returned back to the appellant / writ petitioner if within a period of one year, it was found that the appellant / writ petitioner had not violated any provision of FERA;

the respondent No.5 Income Tax department was also permitted to assess the said amount subject to investigations by the Enforcement Directorate;

- (iv) that the Enforcement Directorate vide its letter dated 8th April, 1994 to the Commissioner of Income Tax (CIT) informed that no case under FERA in respect of seized amount was made out and asked the CIT to depute some officer to take over the seized amounts for investigation from income tax angle;
- (v) that though the Income Tax department did not take over the seized currency but the Enforcement Directorate continued to retain the money in their custody without any legal mandate;
- (vi) that the Income Tax department also vide order dated 27th March, 2000 held that no income tax demand was outstanding against the appellant / writ petitioner and his family members and issued No Objection Certificate dated 28th March, 2000 certifying that no income tax demand was pending against the appellant / writ petitioner;

(vii) that the appellant / writ petitioner again approached the M.M. for release of the said amount and vide order dated 1st November, 2000, the Enforcement Directorate was directed to refund Rs.8,40,000/- out of the total amount of Rs.9,90,000/- as the sum of Rs.1,50,000/- belonged to the co-accused of the appellant / writ petitioner;

(viii) that the said amount of Rs.8,40,000/- was refunded to the appellant / writ petitioner by the Enforcement Directorate finally on 9th January, 2003.

The writ petition was filed claiming interest at the rate of 18% per annum on the said sum of Rs.8,40,000/- for the period from 24th April, 1993 till 9th January, 2003.

9. The Enforcement Directorate in its reply to the writ petition pleaded:

(a) that under the scheme of FERA there was no provision for payment of interest upon the amounts lying in the custody of the department; and,

(b) that the amount was not even seized by the Enforcement Directorate but was seized by the respondent No.6 police and the custody of the Enforcement Directorate of the said amount was in pursuance to the orders of the M.M. and thus the said retention could not be termed as illegal.

10. The Commissioner of Income Tax Department impleaded as respondent No.5 to the petition also filed a short affidavit in response to the writ petition, only stating that no relief had been claimed in the petition against the respondent No.5 as per the averments in the petition and that, at no point of time the seized money was taken over by the Income Tax Department and hence the question of the Income Tax Department being liable for payment of any interest on the said amount to the appellant / writ petitioner does not arise.

11. On the basis of the arguments addressed before us on 22nd January, 2015, we had asked the counsel for the respondents to take instructions whether there was any possibility of compensating the appellant / writ petitioner. The counsel for the appellant / writ petitioner had also shown willingness to accept a lesser amount, provided it was paid immediately. In the circumstances, we also directed the personal presence of the concerned officer on 10th February, 2015.

12. On 10th February, 2015, the Assistant Director, Enforcement appeared before us and stated that there is no possibility of any settlement. In the circumstances, we heard the counsels further on the merits of the writ petition and reserved judgment and also called for the writ file.

13. In the circumstances aforesaid, we allow the appeal by setting aside the order of the learned Single Judge of dismissal of the applications filed by the appellant / writ petitioner for restoration of the writ petition and condonation of the delay in applying for restoration and restore the writ petition to its original position. The appeal thus stands disposed of and we now proceed to adjudicate the writ petition.

14. We were during the hearing on 22nd January, 2015 swayed in favour of the appellant / writ petitioner, being of the view that the money must have been kept by the respondents in the bank only and must have earned interest thereon and the appellant / writ petitioner should be reimbursed the same. However on perusal of the writ record, we find:

- A. The appellant / writ petitioner, an Afghan national, was on 24th April, 1993 apprehended by the police while riding pillion on a motorcycle, “the driver of which had jumped the red light”; on

checking the bag of the appellant, Rs.9,90,000/- were recovered which were seized under Section 102 Cr.P.C. and deposited in the Maal Khana;

- B. An application as aforesaid was filed by the appellant / writ petitioner in the Court of the M.M.;
- C. In the meanwhile, applications were also filed by officials of Enforcement Directorate as well as Income Tax department requesting that the seized money be handed over to them as the same was suspected to be the sale proceeds of foreign exchange illegally sold or converted by the appellant / writ petitioner and that the amount was required for purpose of examining the matter;
- D. The M.M., vide order dated 24th September, 1993 supra found,
 - (i) that the police were entitled to seize the money;
 - (ii) that the police, on suspicion of the said money being sale proceeds of foreign exchange illegally sold, was bound to inform Enforcement Directorate;

(iii) that similarly the Enforcement Directorate was authorized to seize the money believed to be in violation of FERA;

(iv) that the contents of the application of the appellant / writ petitioner for release of money also *prima facie* disclosed commission of offence under Section 13 of FERA;

(v) that the Enforcement Directorate was so entitled to retain the money for the purpose of six months;

(vi) that thus the Enforcement Directorate was entitled to custody of seized money;

E. Accordingly, vide order dated 24th September, 1993, the money was directed to be given to the Enforcement Directorate subject to the undertaking to return the same to the appellant / writ petitioner, if within a period of one year the appellant / writ petitioner was not found to have violated any provision of FERA and it was further directed that if the officials of the

Income Tax department in the said time found it necessary, they were free to move the Court in that regard;

- F. It is thus clear that the Enforcement Directorate was given custody of the money under the order dated 24th September, 1993 and on the terms and conditions contained therein and which did not include any condition for payment of interest;
- G. The Enforcement Directorate, well before the period of one year i.e. on 8th April, 1994 itself cleared the appellant / writ petitioner from violation of FERA. However, they vide letter dated 8th April, 1994 asked the Income Tax department to depute some office to take over the “currency” (meaning, the cash as seized was being retained and was not deposited in any bank);
- H. The Income Tax Department filed an application in the Court aforesaid of the M.M., Tis Hazari Courts, Delhi and vide order dated 22nd September, 1994 (i.e. before expiry of one year within which the Enforcement Directorate as per order dated 24th September, 1993 was to return the money to the appellant /

writ petitioner) notice of the said application was issued to the appellant / writ petitioner as well as to the Enforcement Directorate and the Enforcement Directorate in the meanwhile directed not to handover the “currency notes” to the appellant / writ petitioner;

- I. The aforesaid application of the Income Tax Department remained pending and it is evident from the order dated 3rd April, 1997 of the Court of the M.M., Delhi that the appellant / writ petitioner till that date had not even filed reply to the said application; accordingly the interim order dated 22nd September, 1994 restraining the Enforcement Directorate from handing over the “currency notes” to the appellant / writ petitioner was extended;
- J. The Income Tax Department ultimately vide order dated 20th January, 2000 added the seized amount of Rs.9,90,000/- in the income of the appellant / writ petitioner, as the source of the same had not been explained by the appellant / writ petitioner to the satisfaction of the Assessing Officer;

- K. When the proceedings were listed before the Court of the M.M. on 29th January, 2000 *inter alia* for disposal of the application of the Income Tax Department on which vide order dated 22nd September, 1994 the Enforcement Directorate had been directed not to hand over the “currency notes” to the appellant / writ petitioner, the appellant / writ petitioner sought adjournment contending that he was intending to file an appeal against the order dated 20th January, 2000 of the Income Tax Department and the application be taken for consideration thereafter;
- L. The appellant / writ petitioner preferred an appeal to the Commissioner of Income Tax (CIT) against the order dated 20th January, 2000 of the Assessing Officer contending that the sum of Rs.9,90,000/- had been given to him by another Afgan national and he was not the owner thereof and thus the order dated 20th January, 2000 adding the same to his income was not justified; alternatively, it was contended by the appellant / writ petitioner that the addition to income could not have been made in the assessment year 1993-1994;

- M. The CIT, without analyzing the facts on merits, decided the appeal on technical point and deleted the addition made in the assessment year 1993-1994 but with a direction that if at all addition was to be made, the same could have been made only in the year 1994-1995 and accordingly issued notice to the appellant / writ petitioner with respect to the year 1994-1995 and remanded the matter to the Assessing Officer;
- N. The Assessing Officer re-framed the assessment under Section 143(3) of the IT Act and also recorded the statements of other persons who according to the appellant / writ petitioner had given the said money to the appellant / writ petitioner; the Assessing Officer however did not believe the case of the appellant / writ petitioner of the said money having been lent to him by others and made an estimate of the income of the appellant / writ petitioner;
- O. The appellant again approached the CIT under Section 264 of the Income Tax Act against the said estimation of income made by the Assessing Officer;

P. The CIT, vide order dated 27th March, 2000, found/observed/held: (a) that it was the case of the persons who claimed to have lent the said amount to the appellant / writ petitioner that the source of the money so lent by them to the appellant / writ petitioner was the sale proceeds of goods brought by them from Kabul and the money brought by them with themselves from Afghanistan; (b) that though importing of Indian Currency is also an offence but the Enforcement Directorate had concluded that no case of FERA violation was made out. The CIT was thus satisfied that the source of money, which the said other persons claimed to have lent to the appellant / writ petitioner, stood sufficiently established. The CIT accordingly held that the said money could not be treated as or added to, the income of the appellant / writ petitioner and set aside the order of the Assessing Officer adding the sum of Rs.9,90,000/- to the income of the appellant / writ petitioner.

Q. Accordingly, the Income Tax Department issued a 'No Objection Certificate' dated 28th March, 2000 certifying that no

income tax demand was outstanding against the appellant / writ petitioner;

R. The proceedings before the Court of M.M. on 1st November, 2002 where also the stand of the appellant / writ petitioner was that out of Rs.9,90,000/- seized, Rs.1,50,000/- belonged to his co-accused Sh. Didar Singh and of Rs.8,40,000/- seized from him, only Rs.65,000/- belonged to him and the remaining Rs.7,75,000/- belonged to Smt. Jagtar Kaur (Rs.2,25,000/-), Smt. Bhagat Kaur (Rs.3,00,000/-) and Smt. Joban Kaur (Rs.2,50,000/-). On the basis of the said plea of appellant / writ petitioner, the release of the entire sum of Rs.8,40,000/- to him was opposed by the police. The M.M. however overruled the said objection observing that since the entire amount of Rs.8,40,000/- had been seized from the possession of the appellant / writ petitioner, he was entitled to release thereof, without going into the question of ownership.

15. What transpires from the above and relevant for our purposes is:

(I) that the money in the form of 'cash' or 'currency' remained in the custody of the Enforcement Directorate, for the entire duration, under orders of the learned M.M.;

(II) that though the Enforcement Directorate had as far back as in April, 1994 disclaimed any right over the said money but was restrained from refunding the same by an order of the Court of the M.M. on an application of the Income Tax Department;

(III) that the Assessing Officer of the Income Tax Department had found money due on account of income tax from the appellant / writ petitioner but the said order was set aside vide order dated 27th March, 2000 of the CIT;

(IV) that the appellant in the income tax proceedings as well as before the Court of M.M. disclaimed ownership of the said money and took a stand that the said money had been lent to him by others and which stand was ultimately accepted by the CIT.

16. In the aforesaid facts and circumstances, neither any delay, negligence etc. can be attributed to the Enforcement Directorate or to the Income Tax department, nor can the appellant / writ petitioner as a person from whose

custody money of others was seized, and which others are not pleaded to have even demanded any interest from the appellant / writ petitioner, can be held to be entitled to any interest on account of wrongful retention of money. It is settled principle of law enshrined in the maxim *actus curiae neminem gravabit* that an act of Court shall prejudice no one.

There is thus no merit in the writ petition also which is dismissed. However, no order as to costs.

RAJIV SAHAI ENDLAW, J.

CHIEF JUSTICE

MARCH 24, 2015
'gsr/bs'