

sbw

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
CROSS OBJECTION NO.14 OF 2010
ARISING IN
INCOME TAX APPEAL (L)NO.1589 OF 2010

Cipla Limited

..Petitioner

Versus

The Assistant Commissioner
of Income Tax & Anr.

..Respondents

.....

Mr. Nitesh Joshi a/w Netaji Gawade i/b. Sanjay Udeshi & Co. for the
petitioner.

Mr. Ashok Kotangle a/w Ms. Padma Diwakar for the respondents.

.....

**CORAM: M. S. SANKLECHA &
A. K. MENON, JJ.**

RESERVED ON : 2nd AUGUST, 2016

PRONOUNCED ON : 9th AUGUST, 2016

JUDGMENT (PER A.K. MENON, J.)

1. The short point that arises in the present Cross Objection pertains to its maintainability in view of the fact that the Income Tax Appeal bearing Lodging No.1589 of 2010 was rejected vide order dated 9th November, 2010 for non-removal of office objections. The learned

counsel for the applicants/petitioners in the Cross Objection submits that the Cross Objection maintainable notwithstanding the rejection of the appeal in view of the fact that the applicant had notice of the hearing of appeal and it is pursuant to said notice that the Cross Objection came to be filed and within time prescribed by law. It is an admitted position that the applicant did not file its own Income Tax Appeal within the time prescribed by law.

2. In order to help focus on the issue to be decided, it will be necessary to make note of a few dates:

- (i) The impugned Order of the Income Tax Appellate Tribunal in respect of the assessment year 1999-2000 and 2000-2001 was passed on 17th February, 2010. The present Cross Objection pertains to A.Y. 2000-2001;
- (ii) Being aggrieved by the order of the Tribunal, the Revenue filed its appeal before this Court on 30th June, 2010 being Income Tax Appeal (Lodging) No.1589 of 2010.
- (iii) The Department's appeal came to be served on the applicant-assessee on 10th August, 2010.
- (iv) The appeal appeared on board on 23rd August, 2010, apparently it was listed under the caption of "Covered Matter".

3. Both Revenue and the applicant were represented. The order of the Court reads as follows:-

“PC : By Consent. Stand over to 30/08/2010.”

4. On 30th October, 2010 both parties were represented and by consent the matter came to be adjourned to 13th September, 2010. On 13th September, 2010 by consent, the matter was adjourned to 29th September, 2010 to be placed along with Cross Objection (Lodging) No.24 of 2010. On 29th September, 2010 by consent it was once again adjourned to 4th October, 2010. On 4th October, 2010 it appears that the Court noticed that objections in the Appeal as well as the Cross Objection were still not removed. As a result, the Appeal and Cross Objection came to be adjourned, by consent, by four weeks only for removal of office objections failing which the matters were to stand dismissed without further reference to the Court.

5. It transpires that the objections in the Appeal were not removed. As a result, on 9th November, 2010 the Assistant Prothonotary Appeal Cell recorded as follows:-

“Dismissed on 9/11/2010 pursuant to an order dated 4/10/2010 passed by the Hon'ble Division Bench consisting

of Hon'ble Shri Justice V. C. Daga & Hon'ble Shri Justice R. M. Savant for non compliance of the order within prescribe time."

6. In the meantime, the present Cross Objection came to be numbered after a 'filing' Order on 9th November, 2010. The Cross Objection has since remained pending. The Cross Objection came up for hearing and on 5th July, 2016 at the request of learned counsel for the applicant it came to adjourned to 12th July, 2016 and thereafter for a few dates by consent of parties. On 26th July, 2016 the matter was heard for some time when we questioned the maintainability of the Cross Objection on an objection was raised by the Revenue.

7. Mr. Kotangle, the learned counsel appearing for the Revenue pointed out that the Income Tax Appeal (L)No.1589 of 2010 had already been rejected. We, therefore, queried counsel for the Applicant as to how the Cross Objection is maintainable in view of the fact that Order 41 Rule 22 clearly provides that the Cross Objection can be entertained during the pendency of an appeal and even if an original appeal is withdrawn or is dismissed for default, the Cross Objection will nevertheless be heard and determined after notice to the other party. At this, Mr. Joshi, the learned

counsel for the assessee submitted that the Cross Objection, in the present set of facts, is clearly maintainable since the assessee had notice of the hearing of the appeal on 23rd August, 2010 when the matter was adjourned by consent of parties and accordingly the Cross Objection came to be lodged on 9th September, 2010.

8. In this respect, perusal of the record indicates that the Cross Objection is dated 9th September, 2010 the same was lodged on 9th September, 2010 itself under Lodging No.25 of 2010. It was thereafter taken on “file” by the registry on 9th November, 2010 pursuant to the order dated 4th October, 2010 granting four weeks time to remove office objections. Thus, it is the case of the applicant that in view of the fact that it had notice of the hearing it was entitled to file the Cross Objection which must now be dealt with in accordance with law. In the course of his submissions, we pointed out to Mr. Joshi the decision of the Supreme Court in ***Mahadev Govind Gharge and others v/s. Special Land Acquisition Officer, Upper Krishna Project, Kamkhandi, Karnataka (2011) 6 SCC 321***. The observations of the Supreme Court in the said order and specially in paragraph 60 reads as follows:–

“Having analytically examined the provisions of Order 41 Rule 22, we may now state the principles for its application

as follows:

(a) The respondent in an appeal is entitled to receive a notice of hearing of the appeal as contemplated under Order 41 Rule 22 of the Code.

(b) The limitation of one month for filing the cross-objection as provided under Order 41 Rule 22 of the Code shall commence from the date of service of notice on him or his pleader of the day fixed for hearing the appeal.

(c) Where a respondent in the appeal is a caveator or otherwise puts in appearance himself and argues the appeal on merits including for the purposes of interim order and the appeal is ordered to be heard finally on a date fixed subsequently or otherwise, in presence of the said respondent/caveator, it shall be deemed to be service of notice within the meaning of Order 41 Rule 22. In other words the limitation of one month shall start from that date."

9. Thereafter, we granted the time to the parties to consider the effect of rejection of appeals for want of removal of office objections and pendency of the Cross Objections and the resultant disability that the Cross Objector may face on account of the main appeal being rejected. Mr. Joshi, the learned counsel for the applicant submitted, with the help of various judicial pronouncements that the Cross Objection was still maintainable notwithstanding the disposal of the appeal as aforesaid. In

this behalf, Mr. Joshi relied upon a decision of the Supreme Court in the case of ***Sushil Kumar Sabharwal v/s. Gurpreet Singh and others (2002) 5 SCC 377*** and submitted that in that case the Supreme Court set aside the exparte decree on the ground of non-service of summons and held that the defendant's knowledge about pendency of a suit does not amount to knowledge of the date of hearing. In the present case. Mr.Joshi contended that the applicant had knowledge of the date of hearing and therefore the Cross Objection was maintainable.

10. Mr. Joshi then referred to the decision of Patna High Court in the matter of ***Mowar Sheobaksh Singh v/s. Mowar Thakur Dayal Singh A.I.R. 1919 Patna 219(1)*** where in a First Appeal it was held that Cross Objections could be heard and disposed of despite the fact that the appeal itself had been dismissed upon failure of the appellant to provide security resulting in dismissal of the Appeal for default. Referring to the judgment of ***Madhya Pradesh High Court in Sonibai w/o Pratapji Rajput and another v/s. Bhavarsingh s/o Gangaram Rajput AIR 1963 MP 161*** Mr.Joshi submitted that the Appeal came to be dismissed for default under Order 41 Rule 22 for failure to pay paper book charges despite which the Cross Objection was heard and

determined. Mr. Joshi then invited our attention to the judgment of Madras High Court in the case of *P. K. Bhimasena Rao v/s. C.Venugopal Mudali & two others* 48 ILR 631 and submitted that in that case although the Appellant had to furnish security of costs and defaulted in doing so, resulting in the dismissal of the appeal for default, the Cross Objection was allowed to be proceeded with. Mr. Joshi laid emphasis on the judgment of Srinivasa Ayyangar, J. who observed that sub-clause(4) Rule 22 of Order 41 would entail that prior to the amendment of the Code of Civil Procedure there was an expression of judicial opinion that such Cross Objections could not be heard if the appeal itself was not pending. However with the introduction of clause(4) of Rule 22 of Order 41 there was no bar in hearing the Cross Objection. Accordingly, Mr. Joshi submitted that the present Cross Objection could be heard and disposed of notwithstanding the fact that the appeal itself had been rejected.

11. On behalf of the Revenue Mr. Kotangle submitted that under provisions of Order 41 Rule 22 the Cross Objection could be dealt with and disposed of provided the appeal was pending. In the present case he submitted, the appeal had been disposed of by a self-operative order

passed on **4th October, 2010** and therefore, there is no question of the cross objection being heard. In addition to this, Mr. Kotangle sought to differentiate the judgments cited by Mr. Joshi and pointed out that in the case of Mowar Sheobaksh Singh (supra) the appeal was dismissed for default on account of failure of the appellant to provide security. The appeal in fact had been admitted and was registered on the file of the Court. Unlike the present case where the appeal was rejected on its lodging number itself. In the case of Sonibai w/o Pratapji Rajput (supra) also the appeal was admitted and pending in Court. It came to be dismissed only on account of the appellants failure to pay the paper book charges and as a result, the Cross Objection continued to remain on the file and was directed to be heard. In the case of P. K. Bhimasena Rao (supra) also the appeal was part of the record of the Court that the appellants defaulted in furnishing the security for costs and as a result the appeal came to be dismissed for default and the Cross Objection was allowed to proceed. According to Mr. Kotangle these cases cited as precedents are of no assistance to the applicant since in the present case the appeal itself came to be rejected without being registered in the file of this Court. He similarly sought to distinguish the facts situation in the present case from those in Sushil Kumar Sabharwal (supra).

12. In rejoinder Mr. Joshi submitted that the case of Mahadev Govind Gharge (*supra*) in fact supports the applicants, in that case the Caveat had been filed by the appellant, the appeal in question was admitted on 12th September, 2001 and the same was fixed for early hearing on 25th January, 2002, Cross Objections were filed on 19th November, 2002. The appeal came to be dismissed on 22th October, 2003. Relying on the observations of the said judgment, Mr. Joshi pointed out that under Rule 22(1) of Order 41 limitation for filing an appeal commences from date of service of notice of the date fixed for hearing of the appeal. According to Mr. Joshi the expression “date fixed for hearing” does not mean the date fixed for 'final' hearing of the appeal after the admission of appeal but should be read as date fixed for hearing of the appeal including the preliminary hearing of the appeal for admission.

13. According to Mr. Joshi notice given to the applicant in the instant matter was of a hearing on 23rd August, 2010 on which date the applicant appeared. The matter came to be adjourned to 30th August, 2010 and thereafter to 13th September, 2010 and further dates mentioned in paragraph 3 of this order. In the meantime, the Cross Objection came to be filed on 9th September. According to Mr. Joshi the period of one month

is to commence from the date of service of the notice of hearing which was initially served on 10th August, 2010 when the department served a copy of the appeal on the assessee putting them to notice that the matter would be taken up on 23rd August, 2010. On this basis, Mr. Joshi submitted that the Cross Objection was indeed in time.

14. Having heard the counsel at length on this limited aspect of maintainability of the Cross Objection, it will be useful to reproduce Order 41 Rule 22 for ease of reference:–

“Upon hearing, respondent may object to decree as if he had preferred separate appeal. – (1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree [but may also state that the finding against him on the Court below in respect of any issue ought to have been in his favour; and may also take any cross-objection] to the decree which he could have taken by way of appeal, provided he has filed such objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow.

[Explanation. – A respondent aggrieved by a finding of the Court in the judgment on which the decree appealed against is based may, under this rule, file cross-

objection in respect of the decree in so far as it is based on that finding, notwithstanding that by reason of the decision of the Court on any other finding which is sufficient for the decision of the suit, the decree, is, wholly or in part, in favour of that respondent]

(2) Form of objection and provisions applicable thereto. – *Such cross-objection shall be in the form of a memorandum, and the provisions of rule 1, so far as they relate to the form and contents of the memorandum of appeal, shall apply thereto.*

*[***]*

(4) *Where, in any case in which any respondent has under this rule filed a memorandum of objection, the original appeal is withdrawn or is dismissed for default, the objection so filed may nevertheless be heard and determined after such notice to the other parties as the Court thinks fit.*

(5) *The provisions relating to pauper appeals shall, so far as they can be made applicable, apply to an objection under this rule."*

15. Ordinarily on a plain reading of the aforesaid provision, it is clear that a respondent who has not filed an appeal is entitled to file a Cross Objection on issues that he could have taken by way of appeal, provided that, such Cross Objection is filed before the appeal Court within one month of the date of service upon him or his pleader of notice of the date

fixed for hearing the appeal or even such time that the Court may grant.

16. Sub-rule (2) of Rule 22 provides the form of the Cross Objection, Sub-rule (3) was limited with effect from 1st July, 2002, sub-rule (4) provides that even if the original appeal is withdrawn or dismissed for default the Cross Objection may nevertheless be heard. This sub-rule is of some significance in deciding the issue of maintainability before us. We may also make reference to the Bombay High Court (Original Side) Rules which under Chapter LII provides for filing of appeals of Cross Objections. In this behalf, Rule 907 and 908 are relevant and the same is reproduced below:-

“R. 907. When cross-objection under Order XLI, Rule 22 of C.P.Code may be treated as a cross appeal. – In case an appeal for any reason fails to come to a hearing on the merits, any cross-objection filed under Order XLI, rule 22, of the Code of Civil Procedure may be treated as a cross-appeal on the application of the respondent by whom the same was filed on such terms as the Court may think fit.

R. 908. Time for filing cross-objections under Order XLI, Rule 26 of C.P. Code. – Cross-objections under Order XLI, rule 26 of the Code of Civil Procedure shall be filed within thirty days from the date on which the findings are recorded or within such further time as the Appellate Court may allow.”

17. Rule 907 provides that if for any reason the appeal fails to come to a hearing on merits, any Cross Objection filed may be treated as a cross appeal and the application of the respondent by whom the same was filed on such terms of the Court may deem fit. Clause 908 provides for the time for filing the Cross Objection under Order 41 Rule 26. We are not presently concerned with the application of the said rules as it relates to findings and evidence being on record as contemplated under Rule 26. On interpretation of Rule 907 therefore it would appear that if an appeal does not come to a hearing on merits, a Cross Objection may be treated as a cross appeal and may be heard as such. Applying this rule to the instant case, one has to consider whether the applicant would get benefit of Rule 907 from the facts narrated herein above.

18. It is evident that the appeal in question was never registered on the file of this Court. In our view, the submission of Mr. Joshi that notice of filing of the appeal and service of notice of the hearing on 23rd August, 2010 should be construed as notice of hearing of the appeal as contemplated in Rule 22 cannot be accepted. Under Rule 4 the original appeal is required to be “withdrawn” or dismissed “for default” in order to enable the respondent to maintain its memorandum of Cross Objection.

19. In the present case, the appeal was not dismissed “for default” or “withdrawn” but it came to be rejected, not on merits, but for failure to remove Office Objections. This view may appear harsh considering that non removal of objections may seem a formality. However this non-removal of objections cannot be trivialised. Compliance with office objections is a necessary process and part of the justice administration system and reflecting on parties conduct of the case. Non-removal of objections despite repeated adjournments as in the instant case or even generally, within the time specified signifies inability or a conscious decision on the part of a litigant to not pursue the case. Once a case is rejected for non compliance with objections and more particularly after time was extended by the Court to remove objections within the time

specified, the appellant loses his remedy of appeal. It is not then open for the Cross objector to insist, as of right, that the Cross objection must be heard notwithstanding rejection of the appeal. We therefore highlight the distinction between “rejection” of a case under the rules and “dismissal for default” which is indicative of a default compliance of an Order of the Court.

20. In our view, the cases cited by Mr. Joshi of Patna High Court, Madhya Pradesh High Court and Madras High Court all can be distinguished on facts inasmuch as in all those cases the appeal was filed and registered in the record of the Court and all were scheduled for hearing on merits. The appellants committed default in complying to the orders of the Court for furnishing the security for costs and paying paper book charges. These were not the cases where the appeals were not registered for non-compliance of preliminary office objections but these were appeals scheduled to proceed on merits. In this behalf, it is useful to consider the decision of the Supreme Court in Mahadev Gharge(supra) which in paragraph 60 has observed that the respondent is a Caveator or otherwise puts in appearance and argues on merits and if the appeal is heard finally on a subsequent date, such a factual occurrence shall be

deemed to be service of notice within the meaning of Order 41 Rule 22 and the period of limitation of one month would start from that date. This judgment of the Supreme Court clearly contemplates that the parties would have argued the appeal on merits and the same would be taken up for hearing on merits. The provisions of Order 41 Rule 22 enables a party to file a Cross Objection only when an appeal is filed and when the Court hears the appeal on merits. In ***Rajasthan High Court in Ramkripal v/s. Radheshyam and Others AIR 1970 Rajasthan 234***, a Division Bench of the Rajasthan High Court had occasion to consider the contention that the Cross Objection could be canvassed independent of the appeal. The Court held that a Cross Objection can be entertained only if the Court issues notice to the respondent on the appeal, after the Court assumes jurisdiction and decides to hear the appeal. We agree with this view. In the present case, in our view, the Court had not assumed jurisdiction to entertain the appeal since the appeal was rejected at the very preliminary stage. Since the applicant had filed its Cross Objections even before the appeal was heard for admission, the issue of limitation may not arise. However, filing of the Cross Objection before time in that sense does not entitle the applicant to a hearing of the Cross Objection on merits in the absence of the appeal being admitted.

21. In the instant case, there is nothing to show that the Court had assumed jurisdiction and the merits of the matter has been considered. The contention of Mr. Joshi that the matter was shown as a “covered matter” is of no consequence because it appears that the said appeal was listed was the caption of matters which were possibly “covered” by an earlier decision of this or of another court. There is nothing to indicate that the matter was actually covered by any prior decision of Court. The operative portion of the order merely reads as follows:–

“PC : By Consent. Stand over to 30/08/2010.”

22. The order of the Court therefore simply adjourns the matter by a week. Subsequently and as we have seen from the order sheets the matter came to be adjourned on 6 occasions for this very same reason i.e. by consent the same was stood over for presumably for removal of office objections. It is only on one occasion on 13th September, 2010 that the Court took cognizance of the pendency of the Cross Objections and directed that the appeal be heard along with the Cross Objections and on that date even the Cross Objections were not heard and continued to be so till the subsequent order was passed on 4th October, 2010 granting the applicant time of four weeks from 4th October, 2010 to remove the office

objections in Cross Appeal and that is how the Cross Objection came to be numbered and 'filed' on 9th November, 2010.

23. In the circumstances, we are of the opinion that the Appeal was never taken on the file of this Court and was dismissed for non-removal of office objections. There was no occasion for this Court to consider the issue arising in the appeal on merits. There has not been a hearing on merits at all before the appeal came to be rejected. The record indicates that the Cross Objections nevertheless continued to remain on file since the office objections therein were removed as directed by the Court on 4th October, 2010. In the circumstances, there will be no occasion for the Revenue to be heard on merits in the appeal. We are of the opinion that the applicant had notice of "date fixed for hearing of the appeal". Even assuming Mr. Joshi is correct in his submission, the hearing of the appeal indicates that hearing would include hearing at the stage of admission and not necessarily at the final hearing of the appeal. Since there has been no hearing of the appeal on merits, it will not be possible to accept Mr. Joshi's submission that service of the appeal memo and intimation that the appeal is likely to be listed for admission before the Court on a particular date would amount to notice

of the date fixed for hearing. We are of the considered opinion that the expression “notice of date fixed for hearing” necessarily meant the date fixed for hearing of the appeal on merits.

24. Mr. Joshi has placed reliance on paragraphs 36, 38, 40, 41, 44, 45 and 48 of the judgment in Mahadev Gharge (*supra*) to submit that the date of hearing can be classified in two different stages one at the stage of admission and the other at the final stage and normally the date of hearing should be understood to mean the date on which the Court applies its mind to the merits of the case. The Supreme Court observed in the said judgment that in a criminal case the matter can be said to have commenced only when the Court applies its mind to frame a charge etc. and similarly under civil law it is only when the Court actually applies its mind to averments made by the parties, has to be considered as a “hearing” of the case. In paragraph 45 the Supreme Court observed that there appears to be dual purpose in the language of Order 41 Rule 22, firstly to grant a month's time (or such extended period as the Court may grant) and secondly to put the party or his pleader at notice that the appeal has been admitted and fixed for hearing and the Court will pronounce the rights and contentions of the parties on the merits of the

appeal. It is on such notice being served, the period of limitation starts running. The Court further observed that if both these purposes are achieved prior to the service of a fresh notice then, it would be futile to issue a separate notice which would result in delay in disposal of the appeals.

25. The Court observed that a law of procedure should be construed in a manner so as to eliminate both these possibilities of delay and prejudice being caused to the parties. In our view, from the above observations of the Supreme Court, it is clear that the party or his pleader must be put to notice that the appeal has been admitted (emphasis supplied) and fixed for hearing and the Court is going to pronounce the judgment upon the rights and contentions of the parties on the merits. This stage, in our view, had not been reached in the instant case because the appeal came to be rejected for non-removal of office objections as aforesaid. There has evidently been no hearing on the merits of the case at all and no prejudice was caused to the revenue since it consciously stopped pursuing the appeal. On all dates and as referred to above in the various orders only time has been extended and repeatedly, for removal of office objections and for no other reason. In the circumstances, there is no question of any

delay on the part of the applicant filing a Cross Objection. The question is whether the Cross Objection can be entertained given the fact that the appeal itself was never on the file of this Court and was never fixed for hearing. Sub-rule 4 of Rule 22 of Order 41 does not in our view assist the Applicant.

26. In our view, the answer to this would also depend upon the meaning that we give to the Rule 907 which states that if an appeal “fails” to come for hearing on merits any Cross Objection filed under Order 41 Rule 22 may be treated as a Cross appeal but on the application of the respondents. In the present case, Mr. Joshi has contended that in the event we hold against the Applicant on maintainability, the present Cross Objection may be treated as an appeal and the delay in filing the appeal be condoned. While there is nothing on record to assist us in ascertaining extent of delay, there is also no application that has been preferred before us as contemplated in Rule 904. As far as Rule 907 is concerned on proper reading of the said Rule it becomes evident that if the pending appeal which has been admitted or which is pending admission, what is intended is that if the pending appeal does not come up for hearing on merits and if the Respondent has filed Cross Objection,

the Respondent may apply to have Cross Objection heard as if the same were Cross Appeal and although the Appeal is pending.

27. The Rules do not enable the Respondent – Cross Objector to make such application if the Appeal is already rejected for non removal of office objections. Under High Court Rule 986, an appeal can be rejected by the Prothonotary and Senior Master if the Appellant does not remove office objections within 30 days of lodging an Appeal. In the present case it is the Court that has granted additional time to remove office objections failing which the appeal would stand rejected and it was accordingly rejected. Rule 907 does not give any right to the Appellant, over and above what is provided under Order 41 Rule 22 Sub-Rule (4). All that it does is to enable the cross objector to seek hearing of the Cross Objection as if the same were Cross Appeal, during pendency of the appeal and nothing more. In the circumstances having considered the various judgments relied upon by the Applicants and the submissions of the counsel we are of the view that present Cross Objection is not maintainable in view of the fact that the Appeal itself was rejected.

28. As an alternate submission, Mr. Joshi suggested that in the event the Court is against the Applicant he may be allowed to treat the Cross

Objection as an Appeal and delay in filing it may be condoned. As far as this oral request is concerned, we hold that it will be open for the Applicant to take out appropriate application after filing an appeal, seeking condonation of delay if so advised and same will be considered on its own merits. Be that as it may, we noticed that the present appeal has since been numbered as Appeal No.556 of 2011, even after its dismissal by the self operative order. The Registry informs us that as a matter of practice the Appeals which are rejected pursuant to orders of Court are also numbered for the sake of good order and maintaining the register of disposed off matters used for reporting pendency. In the circumstances we pass the following order ;

- (i) Cross objection is dismissed.
- (ii) There will be no order as to costs.

(A. K. MENON, J.)

(M. S. SANKLECHA, J.)