

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

NOTICE OF MOTION NO. 338 OF 2019
IN
NOTICE OF MOTION NO. 565 OF 2018
IN
CENTRAL EXCISE APPEAL (L) NO. 134 OF 2016

The Commissioner of Service Tax,
Mumbai – VII .. Applicant

In the matter between
The Commissioner of Service Tax,
Mumbai – VII .. Appellant

v/s.
M/s. Reliance Telecom Ltd. .. Respondent

Ms. P.S. Cardozo a/w Ms. Maya Majumdar for the applicant
Ms. Ginita Bodani I/b Economic Law Practice for the respondent

**CORAM : A.S. OKA &
M.S. SANKLECHA, J.J.**

DATED : 16th APRIL, 2019

P.C.

1. Heard the learned Counsel appearing for the applicant. We have carefully perused the affidavit-in-support of this Notice of Motion. Apart from the default on the part of the applicant, the manner in which Arpitha S., Assistant Commissioner of Division-IV, CGST and Central Excise, Belapur Commissionerate has put the blame on advocate representing the Department is shocking.

2. The Central Excise Appeal was lodged on 12th April, 2016. It appears that on 25th August, 2016, the appeal was listed before the learned Prothonotary and Senior Master. He passed a conditional order granting time of two weeks to remove office objections from the date of disposal of the Notice of Motion for delay condonation. He directed that on the failure to remove office objections within stipulated time, the appeal will stand rejected in exercise of powers under Rule 986 of the High Court Original Side Rules. The delay in preferring Appeal was condoned on 17th April, 2017. The conditional order became operative as the objections in Appeal were not removed. Notice of Motion No.565 of 2018 was taken out by the applicant which was lodged on 19th June, 2018 for restoration of the appeal. There was a delay of 619 days in filing the Notice of Motion. Under the order dated 4th October, 2018 on the request made by the learned Counsel appearing for the applicant, this Court permitted the applicant to withdraw Notice of Motion No.565 of 2018 with liberty to file a fresh motion on the same cause of action. Accordingly, the present Notice of Motion was lodged on 18th February, 2019. The affidavit-in-support of the Notice of Motion is affirmed on 8th February, 2019. Thus, the applicant took more than 4 months to file a fresh notice of motion. We have carefully perused the affidavit-in-support filed by the Ms. Arpitha

S. It is mentioned in paragraph 3 that on 15th March, 2017, the panel advocate who filed the appeal continued to be on the panel.

3. In paragraph 4 of the affidavit-in-support, it is mentioned that the entire staff was entrusted with the GST work and shifting of files to the new Commissionerate. The appeal was shown disposed of on 2nd May, 2017 as the objections in the appeal were not removed within a period of two weeks from the date on which the delay in filing the appeal was condoned. In paragraph 5, it is mentioned that on 19th July, 2017, the file was received by the CGST, Belapur Commissionerate and in August, 2017 the Officers of the Commissionerate noticed that the appeal has been dismissed. Instead of writing a letter to the advocate on record, a letter was addressed by the Commissionerate on 2nd August, 2018 to the Senior Panel Counsel to suggest the name of a junior Counsel. The affidavit further records that the Senior Panel Counsel directed them to get in touch with the junior Counsel who had filed his appearance. In paragraph 5, it is stated that a second letter dated 16th August, 2017 was written to the said junior Counsel informing him about the dismissal of the appeal. There is a specific allegation made in paragraph 5 that the said junior Counsel refused to do anything in the matter as he had not received his fees and agreed to

give his 'no objection' in the matter. We have perused the letter dated 16th August, 2017 addressed by the Deputy Commissioner of CGST, Belapur said to the junior Counsel. The letter refers to the fact that by a letter dated 3rd August, 2017, the said junior Counsel demanded advance of Rs.4,000/- for meeting the out of pocket expenses for preparing / filing of notice of motion/ removing of objections. The letter records that the draft notice of motion / chamber order for restoration has not been forwarded to the Department. Even according to the Department, the said junior Counsel was engaged in August, 2017, who addressed a letter dated 3rd August, 2017 demanding advance. Paragraph 7 of the letter dated 16th August, 2017 records that the demand of Rs.4,000/- was not justified as out of pocket expenses are sanctioned only at the time of filing of the appeal. Therefore, a request was made to the junior Counsel to take steps for restoration of the appeal. The said letter mentions that the matter involves substantial revenue due to the Government of India. Immediately on receipt of the letter dated 16th August, 2017, the junior Counsel forwarded e-mail dated 17th August, 2017 to the Deputy Commissioner. The e-mail mentions following factual aspects :-

(a) In spite of repeated telephonic requests, no Officer was deputed for clearing office objections and / or for making necessary payments,

for which the bill was issued;

(b) Fees have not been provided to him;

(c) Restoration involves filing of a full fledged application which will entail expenses and only after such application is filed and allowed, the objections can be removed;

(d) In case, the Deputy Commissioner wishes to have the appeal restored, necessary expenses as mentioned in the bill will have to be paid as till date the junior Counsel had not received any amount;

(e) The Counsel is not expected or required to pay any expenses of the department;

(f) The junior Counsel informed the Deputy Commissioner that what is mentioned in the e-mail does not appeal to the Deputy Commissioner, the junior Counsel had no objection if the matter was assigned to the another advocate.

4. Notwithstanding the clear statements made in the e-mail that in paragraph nos. 5 and 6 of the affidavit in support, allegations have been made against the learned junior Counsel that he refused to do anything and he refused to file a Notice of Motion for restoration.

5. Three weeks after receiving e-mail dated 17th August, 2017, the

Department issued a letter of appointment dated 11th September, 2017 appointing another junior counsel. Paragraph 7 contains an assertion that on 9th March, 2018 an Officer was deputed to meet the junior Counsel who was appointed on 11th September, 2017. But the junior Counsel was not in Bombay. Thus, it is very clear that from 11th September, 2017, no Officer of the Department contacted the junior panel Advocate till 9th March, 2018.

6. The letter dated 20th February, 2018 annexed to the affidavit-in-support addressed by the Assistant Commissioner to another assistant Commissioner records that the appeal is still shown as disposed of on the website of the High Court. A copy of the letter dated 12th March, 2018 addressed by the Superintendent, Range-IV to the junior standing Counsel is annexed to the affidavit-in-support by which a request was made him to communicate all the Office Objections which are required to be removed to restore the appeal. The junior panel Counsel responded immediately by e-mail dated 22nd March, 2018 informing the Department that only after the Notice of Motion is filed and allowed, it is possible to remove the objections. It appears from the letter dated 17th April, 2018 annexed to the affidavit-in-support affirmed by Assistant Commissioner, CGST and Central Excise, Belapur to the

Assistant Commissioner (Legal), Belapur Commissionerate that the junior panel Advocate informed that the notice of motion delivered to him was different from the one which was forwarded by him to the Department and that as the notice of motion was different from one which was drafted, he is not going to file the same in the High Court. Surprisingly, the Assistant Commissioner, Legal addressed e-mail to the said junior Counsel wherein it was mentioned that there was a delay on the part of the panel Counsel in preparation of draft notice of motion. The said e-mail was responded by the said panel Counsel by his e-mail dated 24th May, 2018. Perhaps, the panel Counsel had an objection to the ground added by the Department as he has mentioned that being an Advocate on record, he will have “to bear the finding of Court and it will affect his prospects”.

7. There is one important aspect which needs to be noted is the correspondence exchanged between the junior Counsel engaged in August, 2017 and the Department which shows that the expectation of the Department was that the junior Counsel should take steps by filing notice of motion for restoration and for removing the office objections without a single farthing being paid to him. The junior Counsel by his e-mail dated 18th August, 2017 has set out all the correct facts. He has

stated that in case the Department is interested in getting the matter restored, necessary expenses as per the bill dated 3rd August, 2017 will have to be paid. In the e-mail dated 18th August, 2017, it is clearly mentioned that if the Department was not willing to pay the amount, he had no objection if the matter is assigned to another Advocate. On one hand the Department did not pay single farthing to the Advocate on record and on the other hand an allegation is made in the affidavit-in-support that the said advocate refused to file the notice of motion. These allegations are made behind the back of the said junior Counsel. He is not made a party to the notice of motion.

8. On the conjoint reading of paragraph nos. 6 to 9 of the affidavit in support, it is very clear that there was a delay on the part of the Officers of the Department in contacting another junior panel Advocate appointed. The said panel Advocate forwarded a notice of motion for signature. Instead of returning the notice of motion duly signed, a modified notice of motion was sent to the junior panel Counsel who raised an objection to the act of sending modified Notice of Motion. There is no explanation as to why such a modified notice of motion was sent to the advocate.

9. Firstly, there is a default on the part of the Department as objections were not removed. Secondly, the Department refused to pay even a single farthing to the junior Counsel who was engaged in August, 2017 to file a notice of motion for restoration. We fail to understand as to how the Department expects the Advocate to file a notice of motion for restoration to get the appeal restored and to remove the office objections in the appeal, without receiving single farthing from the Department even for out of pocket expenses. Considering the correspondence enclosed to the affidavit-in-support, there is a complete justification for the said advocate who refused to file the notice of motion without receiving requisite amount as mentioned in the bill submitted by him. The allegations made against the said junior Counsel engaged in August, 2017, are most unfortunate and ought not have been made. There is a delay at every stage on the part of the Department.

10. Instead of some responsible Officer of the Department coming to the Court and accepting the responsibility, the Assistant Commissioner who has filed the affidavit-in-support has tried to put the entire blame on the panel Advocate, in particular the panel Advocate who was appointed in August, 2017. The Department claims that there are

stakes involved in the appeal. Thus, there is complete negligence on the part of the department in prosecuting the appeal. The first notice of motion for restoration was withdrawn on the ground that there has been no explanation for the delay of 690 days. In the present second notice of motion not only that the delay is not explained, but false and frivolous allegations have been made against a junior Counsel appointed by the Department.

11. Therefore, no case is made out for condonation of delay and for restoration of the appeal. We must also note that ultimately the present notice of motion is not filed through the second advocate but through the third advocate.

12. Considering the conduct of the applicant which is reflected from the findings recorded above, no case is made out for restoration of appeal. The Notice of Motion is accordingly dismissed.

13. Considering the manner in which this matter is handled by the Department, we direct the Prothonotary and Senior Master to forward a copy of this order to the Central Board of Indirect Taxes and Customs so that appropriate remedial action can be taken by the Department. We

are constrained to observe that if the Department refuses to pay even out of pocket expenses to the advocate, many of such appeals are bound to be dismissed for non-prosecution.

(M.S. SANKLECHA, J.)

(A. S. OKA, J.)