sas

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.1158 OF 2014

Madhukar B. Thakoor ..Petitioner.
V/s.
Income Tax Appellate Tribunal, Mumbai & Ors. ..Respondents.

Mr.Sanjiv M. Shah for the appellant.
Mrs.S.V.Bharucha for the respondents.

CORAM : S.C.DHARMADHIKARI AND A.K. MENON, JJ.

DATED : 22ND APRIL, 2015

P.C. :-

1. By this Writ Petition under Article 226 of the Constitution of India, apart from claiming the same reliefs, namely deletion and expunging of the adverse remarks and imposition of costs, the additional argument is that the Tribunal completely omitted from consideration a vital fact and material. That vital fact and material was that an application for rectification of the mistake was made invoking the Tribunal's jurisdiction under section 254(2) of the Income Tax Act, 1961 by the petitioner-assessee.

2. That application styled as Miscellaneous Application No.236/13 has been dismissed by the impugned order. In dismissing that, the Tribunal lost sight of the important fact that it was the assessee's appeal. The petitioner-assessee had filed appeal being Income Tax Appeal No.77/2009. He was aggrieved and dissatisfied with that part of the direction in the Commissioner's order dated 23rd April, 2009 which refused to grant him a relief. It was pointed by the assessee's representative by filing a personal affidavit that there was a preliminary objection raised in that appeal by the departmental representative and not by the assessee-petitioner. The Tribunal indicated to the assessee's representative that they were inclined to uphold the preliminary objection. In view thereof, the assessee's representative did not make any submission on merits. If that was the understanding on which both sides proceeded, then, the Tribunal should have corrected the mistake pointed out and allowed both sides to canvass their submissions on merits. Having not done that and refusing to correct an apparent mistake, the Tribunal has committed an error and apparent on the face of the record. It has omitted from consideration the basic and fundamental factual materials.

It has proceeded on an absolutely wrong premise is probably the reason for which Mr.Sanjiv Shah would submit that this Court must exercise its writ jurisdiction.

3. Mr.Shah's submissions are that the appellant-assessee / the petitioner before us Mr.Madhukar B.Thakoor is a senior citizen. He would suffer immensely if only the application for rectification is being directed to be re-heard by setting aside the impugned order, in the light of the obvious mistakes pointed out. Interest of justice would be served if this Court sets aside not only the impugned order dated 13th December, 2013 but the order in Appeal No.(SS)77/M/2009 and restore that appeal for being heard again by the Tribunal on merits and in accordance with law.

4. Mrs.Bharucha appearing on behalf of the respondents on notice would submit in response that attempt now being made by the petitioner-assessee is only to seek a rehearing of a disposed of appeal. That was disposed of by a common order passed by the Tribunal. There has been no objection raised to the course adopted by the Tribunal. Now, it is argued before this Court that the petitioner-assessee had no

opportunity to argue his appeal on merits. Thus, a re-hearing of a disposed off matter is sought on a flimsy ground. This Court, therefore, should not permit any such course and dismiss the writ petition.

5. We have heard both sides and perused the petition paper-book, including the annexures relevant for our purpose. At annexure-L at page 111 of the paper-book is a copy of a common order passed by the Income Tax Appellate Tribunal, Bench at Mumbai in Income Tax Appeal (SS)/60/Mum/2009, Income Tax Appeal IT(SS) No.77 & 79/Mum/2009, Income Tax Appeal No.(SS)A No.65/Mum/2009, They pertain to a block period of 1st April, 1987 to 15th September, 1997. Then, there is another appeal of one Mohan B.Thakoor which is numbered as Income Tax Appeal (SS) No.66/Mum/2009. The appellants in these appeals were distinct and we are only concerned with Madhukar B.Thakoor. As far as his appeal is concerned, the Tribunal in its common order observed that this appeal of the petitioner-assessee was directed against the order of the Commissioner of Income Tax (Appeals) dated 23rd April, 2009. According to the Tribunal, there is a solitary issue involved relating to the quantification of the exact amount of the

undisclosed income of the assessee on account of cash sale of scrap / machinery.

6. The Tribunal found that this issue is common to the case of Mr.Vasant Thakoor. That is what has been observed in para 14 and thereafter in para 15. The Tribunal was of the view that the preliminary objection was raised. The Tribunal had held that the assessee's counsel has not made any submission on the issue of quantification of undisclosed income made by the Commissioner of Income Tax (Appeals) on merits.

7. It is in this regard that the assessee's representative filed an affidavit in which he states that there is a patent error inasmuch as, the objection was not raised by the assessee's representative but the department in the present matter. Secondly, the Tribunal was not given an opportunity to make submission on the merits in the light of the department's objection and which the Tribunal was inclined to uphold. Thus, if the department's objection was to be upheld and the appeal was to be disposed of or dismissed only on that ground, then, no ground would arise to address

the issue on merits. However, the Tribunal has not decided the appeal on any preliminary ground. It appears that it has been decided it on merits, though it was inclined not to go into the same in view of the revenue's preliminary objection. Thus, a serious prejudice is caused to the petitioner-assessee by the dismissal of his appeal on merits in this manner.

8. In the above event, the Tribunal would have been well advised to have recalled its order at least in this appeal and income Tax Appeal No.77 of 2009 ought to have restored to the file for decision again on merits and in accordance with law in order to prevent any miscarriage of justice. We have found that the Tribunal has completely erred in referring to the departmental objection and has erroneously termed it as a preliminary objection of the assessee. Secondly, the Tribunal was in error in holding that there is no argument canvassed and on merits. Such an approach of the Tribunal has resulted in the petitioner-assessee being deprived of opportunity to convince the Tribunal on the merits of his appeal. In such circumstances, we see considerable substance in the grievance of Mr.Shah. While we delete the imposition of penalty so also expunge all the remarks which have been

made against the petitioner / assessee' representative, we direct that the Tribunal shall hear Income Tax Appeal No. (SS)/77/2009 once again and decide the same after giving opportunity to both sides of being heard. It shall decide the appeal on merits and in accordance with law, uninfluenced by its earlier conclusion.

9. In the light of above, we quash and set aside the Tribunal's order dated 28th March, 2013 only in so far as the above appeal is concerned. As a result, we allow the Miscellaneous Application preferred by the assessee / petitioner to the above extent. That application having been disposed of by us in the above manner and the appeal being restored as directed, the writ petition is allowed in these terms. There shall be no order as to costs.

10. We clarify that we have not expressed any opinion on the rival contentions in so far as the merits of the appeal are concerned.

(A.K.MENON, J.) **(S.C.DHARMADHIKARI, J.)**