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

WRIT PETITION (L) NO. 1614 OF 2015

Avan Nelum Gidwani	**}**	**Petitioner**
versus		
Union of India and Ors.	**}**	**Respondents**

Mr. Haresh Jagtiani-Senior Advocate with Mr.Siddhesh Bhole and Ms. Rushika Rajadhyaksha for the Petitioner.

Mr. A. R. Malhotra with Mr. Suresh Kumar for the Respondents.

CORAM :- S. C. DHARMADHIKARI &
G. S. KULKARNI, JJ.

DATED :- JULY 6, 2015

P.C. :-

By this Writ Petition under Article 226 of the Constitution of India, the Petitioner is challenging an order of assessment dated 28th March, 2014 and order of penalty dated 16th September, 2014.

2) At the outset, it must be stated that undisputedly an Appeal has been filed by the Petitioner challenging both, the order of assessment and the order of penalty. These Appeals are pending. In the present Writ Petition, this fact is acknowledged, inasmuch as it has been stated in clearest terms in the memo of the Petition (at page 23) that the two orders were communicated and copies thereof were received by the Petitioner. After receipt of the assessment order and the demand

notice, the Petitioner filed an Appeal before Respondent No. 4 on 28th April, 2014. The Petitioner also filed a Petition under section 220 of the Income Tax Act, 1961 dated 2nd May, 2014 before Respondent No. 2 for stay of the demand of Rs.6,31,87,619/-.

3) During the pendency of these proceedings, the Petitioner was served with a show cause notice dated 9th April, 2014 and which alleged that the Petitioner should pay the penalty for non compliance with the assessment order. The Petitioner pointed out that an Appeal against the substantive assessment order has been filed and is pending. Yet, according to the Petitioner, an ex-parte order of penalty was passed on 16th September, 2014 and section 271(1)(c) of the Income Tax Act, 1961 was invoked to impose the penalty of Rs.3,38,76,246/- on the Petitioner for allegedly furnishing inaccurate particulars in the Income Tax Returns. At page 23 of the paper book and prior pages, it has been stated that even the penalty order has been challenged in Appeal. That Appeal is pending. Thus, the Petitioner's grievance is that in the applications which were filed for interim protection/stay, there is a conditional order passed by the authorities. The Appeals are kept pending. Now, even the prosecution has been launched and the Petitioner threatens that criminal prosecution may be concluded even before the substantive Appeals are decided.

4) Mr. Jagtiani-learned Senior Counsel appearing for the Petitioner submits that everything of the above nature is founded on a document styled as Base Note. This document was never supplied to the Petitioner. The contents of this document are relied upon as secondary evidence, even though it has not been established that the original is in existence and lost and that the contents of the original are known to either parties. Once there is a grave and serious doubt about the existence of the document, then, the principle, which has been applied, can have no application. This is a grave prejudice and even if the Appeal has to proceed, it will proceed in the absence of this document. The foundation of the assessment order is this Note and in that regard, our attention is invited to several paragraphs in the assessment order.

5) In support of the above submission, reliance is placed upon an order passed by this Court in **Writ Petition No. 1204 of 2014**, decided on 18th June, 2015 in the matter of *M/s. Zodiac Developers Pvt. Ltd. vs. Principal Commissioner of Income Tax-8, Mumbai* and a Judgment of the Hon'ble Supreme Court of India, rendered in **Civil Appeal No. 2312 of 2007**, which has been decided on 16th April, 2014, in the matter of *Commissioner of Wealth Tax, Rajkot vs. Estate of Late HMM Vikramsinhji of Gondal*. Finally, reliance is placed upon a

Judgment of the Hon'ble Supreme Court of India in the case of *Commissioner of Income Tax vs. Bhupen Champak Lal Dalal and Anr.* reported in **2001 ALL MR (Cri.) 1208**, wherein, the Hon'ble Supreme Court of India, in exercise of powers available under section 482 of the Criminal Procedure Code, sustained an interim order passed by this Court staying the criminal prosecution during the pendency of the proceedings before the authorities under the Act.

6) After having heard Mr. Jagtiani at length and perusing the Petition and the impugned order of assessment, we are not impressed by any of his submission. We do not wish to say anything on the merits of the controversy and the grounds that are raised in the Appeals. The grounds certainly are denial of the principles of natural justice. Even if such grounds are not raised substantially, the Petitioner/Appellant has ample opportunity to make amends and incorporate specific challenges including that the order passed by the Assessing Officer is contrary to and in breach of the principles of natural justice. That, the document, on which the order is founded, is not in existence and yet relied upon. That, secondary evidence of its contents cannot be taken once the original itself is not in existence, according to the Petitioner. We have no doubt in our mind that if such grounds are raised, the Appellate Authority shall consider them and, not only on the same, but on all

other grounds permissible in law, pass orders in accordance with law. It would definitely call for the records and hear all parties on the versions that are placed before it.

7) In the teeth of the Appeals and the orders passed on the stay application, we do not think that we should entertain the Writ Petition. It is not as if the Petitioner is remedyless and once we have clarified that the order of assessment can be challenged *inter alia* on the ground that it is in utter breach and disregard to the principles of fairness, equity and justice. All the more we decline to entertain the Writ Petition.

8) In the case of *M/s. Zodiac Developers* (supra), the order passed by the Principal Commissioner of Income Tax was transferring the cases pending with the Income Tax Officer, Mumbai to the Assistant Commissioner of Income Tax, Aurangabad. The Petitioner was informed in the midst of the hearing by the Principal Commissioner that the proceedings have been transferred. Before transferring the said proceedings, the Petitioner was not informed and that once all the documents and evidence was available in Mumbai, there was no warrant for transferring the proceeding was the complaint of the Petitioner. Further, the order was non-speaking one. In the circumstances, this Court quashed and set aside the order, but clarified

that the Revenue can pass a fresh order, after following the principles of natural justice. This order can be of no assistance to the Petitioner in the present case.

9) In Civil Appeal No. 2312 of 2007, upon merits, the Hon'ble Supreme Court of India concluded that a discretionary trust is the one in which no benefit accrues to the trust. Nature of such trust is considered. We are not required to go into this aspect because on merits the order of assessment has been passed and which is challenged in Appeal. Further, despite the principles of natural justice being found to be violated, the Appellate Tribunal is inclined to go into the merits of the Appeal, it is open for the Petitioner to argue that the nature of the income is such that it cannot be brought to tax in India. Even if the ground that the principles of natural justice are violated is accepted, still, the Appellate Authority has an option and the Petitioner can either request it to remit the case back to the Assessing Officer or decide the Appeal on merits. At that stage, the assistance of the principles laid down in this decision can be taken and we have no manner of doubt that the Appellate Authority will go into the same.

10) As far as the issue of criminal prosecution is concerned, we see no reason to entertain the Petition. The Petitioner was aware of the fact that there are proceedings where the income has been assessed to

tax and an assessment order has been passed. That was adverse to the interest of the Petitioner and therefore an Appeal was filed. In the substantive Appeal, an application for stay was filed and that was also heard and decided. In the meanwhile, the penalty proceedings were initiated. Even those concluded against the Petitioner and Appeal has been filed to challenge the order in the same. Even therein, an application for stay was filed and on which, orders have been passed. In the circumstances, if the criminal prosecution is initiated, we have no doubt that all defences are available including pointing out to the competent Criminal Court that substantive proceedings are pending and it should await the outcome of the same. In the event any such application is made and the outcome thereof is adverse to the Petitioner, we have no doubt that the Petitioner can approach the competent Court and request it to pass appropriate orders. It is at that stage that reliance can be placed on the principles laid down in the case of *Bhupen Champak Lal Dalal* (supra). Presently, we are not required to go into the same.

11) As a result of the above discussion, we find that the Writ Petition cannot be entertained. It is accordingly dismissed. No costs.

12) At this stage, Mr. Jagtiani makes a request that considering the fact that the Petitioner has complied with the conditional order of

stay, the Appeal before the Commissioner of Income Tax (Appeals) be expedited.

13) Mr. Malhotra appearing for the Revenue took instructions and stated that the Appellate Authority has just taken the charge and it would endeavor to dispose of the Appeal filed by the Petitioner within a period of three months from today. The statement made by Mr.Malhotra, on instructions from the competent officials who are present in Court, is accepted as an undertaking given to the Court. We direct that the Appeal shall be disposed of within a period of three months from the date of receipt of copy of this order.

(G.S.KULKARNI, J.) **(S.C.DHARMADHIKARI, J.)**