IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 11.4.2018	Delivered on 25.04.2018

CORAM:

THE HONOURABLE MR.JUSTICE K.K.SASIDHARAN
AND
THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

W.A.No.463 OF 2017

M/s.Home Finders Housing Ltd.,
rep. By its Chairman & Managing Director,
K.S.Ramalingam,
Block No.10, Homefinders Estate,
75/2, Thiruallur Salai, Ramapuram,
Chennai 89 ... Appellant/Petitioner

versus

Income Tax Officer,
Corporate Ward 2(3),
Room No.504, Wanaparthy Block,
5th Floor,
121 MG Road, Nungambakkam,
Chennai 34 ... Respondent/Respondent

Appeal filed against the order passed by this Court dated 7.4.2017 passed in W.P.No.1019 of 2017.

W.P.No.1019 of 2017:
Writ Petition filed under Article 226 of the constitution of India praying for issuance of a Writ of Certiorari to Calling for the records of the Respondent contained in its Assessment Order dated 30.12.2016 in PAN.AAACH1651B passed under section 143(3) of the Income Tax Act 1961 for the assessment year 2012-13 and to quash the same

For appellant : Mr.Suhrith Parthasarathy

For Respondents : Mrs.Hema Muralikrishnan

J U D G M E N T
K.K.SASIDHARAN, J.

Introductory:-
Whether the assessment order passed by the Income Tax Officer under Section 143(3) of Income Tax Act, invoking Section 147 of the Income Tax Act, (hereinafter referred to as “the I.T.

Act”) after issuing notice under Section 148 of the Act is bad in law and is void ab initio on account of the failure to follow the judgment of the Hon'ble Supreme Court in GKN Driveshafts (India) Ltd. vs. Income Tax Officer, (2002) 125 Taxman 963 (SC) to the effect that on receipt of objection given by the assessee, to the notice under Section 148, the Assessing Officer is bound to dispose of the objections by passing a speaking order, is the core issue raised in this intra court appeal for our adjudication.

Conspectus of facts:-

2. The appellant is a real estate promoter. The appellant filed its return of income for the assessment year 2012-13. It was a nil income return. The assessment order for the assessment year 2012-13 was passed on 23 March 2015.

3. The Assessing Officer was of the view that the income chargeable to tax has escaped assessment for the assessment year 2012-13. The Assessing Officer therefore decided to invoke Section 147 of the I.T. Act and issued notice dated 16 October 2015 under Section 148 of the I.T. Act to the assessee. The Assessing Officer pursuant to the request made by the appellant, furnished reasons for invoking Section 147 of the I.T. Act. The appellant on receipt of reasons, submitted objections. The Assessing Officer without giving disposal to the objections, proceeded to hear the matter and ultimately passed the assessment order on 30 December 2016.

4. The appellant challenged the assessment order before the writ court in W.P.No.1019 of 2017 on the ground that by not passing a specific order after receiving objections and before the Assessment order, the Assessing Officer violated the law declared by the Hon'ble Supreme Court in GKN Driveshafts (India) Ltd. vs. Income Tax Officer, (2002) 125 Taxman 963 (SC) and resultantly, the order is bad.

5. The learned single Judge having found that the Assessing Officer failed to follow the procedure indicated by the Supreme Court in GKN Driveshafts (India) Ltd. (supra), set aside the order and directed the respondent to consider the matter afresh, after giving disposal to the objections. The learned Judge overruled the objections raised by the appellant on the ground of limitation. The order dated 7 July 2017 in W.P.No.1079 of 2017 is the subject matter of this intra court appeal.

Summary of submissions:-

6. (a) The learned counsel for the appellant contended that the law laid down by the Supreme Court in GKN Driveshafts (India) Ltd. contain the mandatory procedure to be followed by the Assessing Officer while invoking Section 147 of the I.T. Act. Since the Supreme Court judgment is the law of the land,

violation of it would result in quashing the assessment order. The learned counsel contended that the violation of a mandatory procedure cannot be cured by remitting the matter. According to the learned counsel, since the Assessment Order was passed just one day prior to the expiry of the period of limitation, it would not be possible to pass a fresh assessment order after the disposal of the objections. The learned counsel placed reliance on Sona Builders v. Union of India (2001 (10) SCC 280) and an unreported decision of a learned Single Judge of this Court in Mrs.Jayanthi Natarajan vs. Assistant Commissioner of Income Tax (Order dated 14 September 2017 in W.P.No.1905 of 2017) in support of his contention that failure to follow the essential procedure would result in declaring the assessment order void and non-est.

(b) The learned Standing Counsel for the Revenue contended that the failure to follow the procedure is only an irregularity, which would not vitiate the ultimate order. According to the learned counsel, the Assessing Officer was having time till 31 March 2017 for passing the fresh assessment order. Therefore, even after remand, there is a period of three months for passing a fresh order by the Assessing Officer. The learned counsel contended that the decision in Mrs.Jayanthi Natarajan was passed by taking a contra view notwithstanding the production of the order impugned in this appeal before the learned Judge. It was contended that the order taking a view contrary to the view already taken by a Coordinate Bench is per incurium.

Discussion:-

7. The Assessing Officer invoked Section 147 of the I.T. Act as he has reason to believe that the income chargeable to tax has escaped assessment for the assessment year 2012-13. Therefore, notice under Section 148 of the I.T. Act was issued.

8. The Income Tax Officer on receipt of request from the appellant, furnished reasons for invoking Section 147 of the I.T. Act.

9. There is no statutory requirement to deal with the objections given by the assessee after receiving reasons for initiating proceedings under Section 147 of the I.T. Act. However, there is a judgment of the Hon'ble Supreme Court in GKN Driveshafts (India) Ltd. mandating such disposal of objections before passing the assessment order.

10. The Supreme Court in GKN Driveshafts (India) Ltd. made it clear that on receipt of reasons, the noticee is entitled to file objections to issuance of notice and the Assessing Officer

is bound to dispose of the same by a speaking order. The judgment is very clear that before proceeding with the assessment proceedings, the Assessing Officer has to pass a speaking order. Therefore, the Assessing Officer is bound to pass an order and thereafter only further proceedings could be taken for passing the assessment order. It would not suffice by giving reasons to the objections in the assessment order, in view of the judgment in GKN Driveshafts (India) Ltd.

11. The Assessing Officer in the subject case without giving disposal to the objections given by the appellant, continued with the proceedings and passed a fresh assessment order.

12. The appellant has given objections on 26 March 2016. Thereafter, the Assessing Officer issued notice of enquiry to the appellant. The appellant at no point of time cited the attention of the Assessing Officer that he has to pass a speaking order, giving disposal to the objections, before passing the assessment order. Even in the letter dated 28 November 2016, the appellant though resisted the fresh assessment proceedings, nowhere pointed out the procedure indicated in GKN Driveshafts (India) Ltd., presumably to take advantage of the irregularity committed by the Assessing Officer by not following the law laid down by the Supreme Court.

13. The right given to an assessee to ascertain the views of the Assessing Officer taking into account the objections can be waived by the assessee expressly or by implication. The appellant knowing fully well that there was no disposal to the objections, submitted to the jurisdiction of the Assessing Officer. It was only when the assessment order was passed, the appellant has come up with a contention that the mandatory procedure was not complied with by the Assessing Officer.

14. The learned Single Judge in the order dated 7 April 2017, indicated that the Assessing Officer has committed a procedural irregularity and therefore remitted the matter to the Assessing Officer.

15. The appellant has raised two contentions in this appeal.

(a) The assessment order passed in violation of the law laid down by the Supreme Court is void and it cannot be ratified by remitting the matter to the Assessing Officer;

(b) The assessment order was passed just one day prior to the period of limitation and therefore, it would not be possible to pass a fresh order after giving disposal to the objections.

16. It is not in dispute that there is no statutory requirement to pass an order taking into account the statement of objections filed by the assessee after receiving the reasons for invoking Section 147 of the I.T. Act. The Hon'ble Supreme Court in GKN Driveshafts (India) Ltd., has given a procedural safeguard to the assessee to avoid unnecessary harassment by directing the Assessing Officer to pass a speaking order taking into account the objections for reopening the assessment under Section 147 of the I.T. Act.

17. The forming of opinion to proceed further by disposal of the objections need not be a detailed consideration of all the facts and law applicable. It must show application of mind to the objections raised by the noticee. In case the objections are such that it would require a detailed examination of facts and application of legal provisions, taking into account the assessment order sought to be reopened, the string of violations, suppression of material particulars and transactions which would require considerable time and would be in the nature of a detailed adjudicatory process, the Assessing Officer can dispose of the objections, by giving his tentative reasons for overruling the objections.

18. The disposal of objections is in the value of a procedural requirement to appraise the assessee of the actual grounds which made the Assessing Officer to arrive at a prima facie satisfaction that there was escape of assessment warranting reopening the assessment proceedings. The disposal of such objection must be before the date of hearing and passing a fresh order of assessment. In case, on a consideration of the objections submitted by the assessee, the Assessing Officer is of the view that there is no ground made out to proceed, he can pass an order to wind up the proceedings. It is only when a decision was taken to overrule the objections, and to proceed further with the reassessment process, the Assessing Officer is obliged to give disposal to the statement of objections submitted by the assessee.

19. The core question is as to whether non compliance of a procedural provision would ipso facto make the assessment order bad in law and non-est. The further question is whether it would be permissible to comply with the procedural requirement later and pass a fresh order on merits.

20. The learned counsel for the appellant by placing reliance on an order passed by the learned Single Judge in Mrs.Jayanthi Natarajan (cited supra) submitted that the order being one made without complying with the mandatory procedure, is non est in law and it cannot be given life by complying with the procedure later. In short, it is the contention that non compliance of a prescribed procedure would nullify the order and

the irregularity cannot be cured later.

21. The learned counsel for the Revenue contended that the order dated 14 September 2017 in W.P.No,1905 of 2017 is bad in law. It was passed ignoring the order passed by a Coordinate Bench which is challenged in this appeal.

22. Since the learned counsel for the appellant placed heavy reliance on the view expressed in Mrs.Jayanthi Natarajan, we have perused the said order. We are in respectful disagreement with the views expressed by the learned Single Judge in W.P.No.1905 of 2017.

23. The learned Single Judge by placing reliance on the decision of the Supreme Court in Sona Builders, quashed the assessment order without remitting the matter to the Assessing Officer for compliance of the procedure regarding disposal of objection. In Sona Builders, it was the admitted case that only one week before the expiry of the period of limitation, the reassessment proceedings were taken. The Supreme Court found that the notice to the assessee was posted on 24 May 1993. Though there were five days left to pass the order, within the period of limitation, two days were Saturday and Sunday. The Supreme Court on the facts and circumstances of the case quashed the proceedings without remitting it for passing fresh orders. The learned Single Judge was therefore not correct in quoting Sona Builders for giving an indication that in case there is a procedural irregularity, it would vitiate the entire proceedings.

24. In case an order is passed without following a prescribed procedure, the entire proceedings would not be vitiated. It would still be possible for the authority to proceed further after complying with the particular procedure.

25. The enactments like the Land Acquisition Act, 1894, contain mandatory provisions like Section 5A, the non compliance of which would vitiate the declaration under Section 6 of the Act. Even after quashing the declaration for non compliance of Section 5A, the Court would permit the conduct of enquiry and pass a fresh declaration within the period of limitation.

26. We therefore make the position clear that non compliance of the procedure indicated in the GKN Driveshafts (India) Ltd., would not make the order void or non est. Such a violation in the matter of procedure is only an irregularity which could be cured by remitting the matter to the authority. The first issue is accordingly answered against the appellant.

27. The next issue relates to period of limitation.

28. In the ordinary circumstances, while remitting the

matter, it is not necessary to adjudicate the question whether the authority would be in a position to complete the assessment within the period of limitation. This is essentially a matter to be decided when there is a challenge made later to the order on the ground of limitation. The question of limitation is not a pure question of law. Since for deciding the question of limitation, it is also necessary to analyze the facts, it would not be proper and correct to decide the said question when the matter is remitted for fresh consideration.

29. In the subject case, the appellant wanted the Court to adjudicate the question regarding limitation for passing a fresh order after giving disposal to the objections. The learned Judge therefore made certain observations touching the question regarding limitation.

30. The learned counsel for the appellant contended that Clause 57.7 of the Explanatory notes to the provisions of the Finance Act, 2016, makes it clear that the amendments made by the Finance Act, 2016, to Section 153 of the Income Tax Act, 1961, would apply retrospectively. According to the learned counsel, this would mean that the time limit prescribed by Section 153(2) as amended by the Finance Act, 2016, is applicable to the case of the appellant. If this position is accepted, it is clear that only one day prior to the limitation period, Assessing Order was passed.

31. The learned Standing Counsel for the Revenue on the other hand contended that notice for reassessment under Section 148 of the I.T. Act, 1961 in respect of assessment year 2012-13 was issued on 16 October 2015 which falls in the Financial Year 2015-16 and the end of the Financial Year is 31 March 2016. According to the learned counsel, as on the date of issuance of the reassessment notice i.e. on 16 October 2015, the limitation stipulated under Section 153(2) of the I.T. Act, 1961, for passing the order was one year from the end of the financial year in which the notice was issued. In the present case, the one year period would expire only on 31 March 2017 and not on 31 December 2016 as contended by the appellant.

32. We are not expressing any opinion touching upon the question of limitation as the same would amount to pre-judging the issue. It is for the Assessing Officer to decide the said question by giving reasons.

33. We confirm the order passed by the learned Judge remitting the matter to the Assessing Officer for passing a fresh order, after giving disposal to the objections. We set aside the findings given by the learned Single Judge with regard to the issue relating to limitation.

34. For the reasons aforesaid, we allow the intra court appeal in part to the extent indicated above.

-s/d-
Assistant Registrar(CS-II)

True Copy

Sub-Assistant Registrar

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To

1.Income Tax Officer,
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+1 CC to Mr. Arun Karthik Mohan, Advocate sr 30789.
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SP(08/05/2018)