HONOURABLE SRI JUSTICE V. RAMASUBRAMANIAN

AND

HONOURABLE SRI JUSTICE P. KESHAVA RAO

WRIT PETITION No.45868 OF 2018

ORDER: *(per V. Ramasubramanian, J)*

Challenging the order passed by the Income Tax Appellate Tribunal, dismissing the appeal for non-prosecution, the Assessee has come up with the above Writ Petition.

2. Heard Sri K. Ramakanth Reddy, learned counsel for the petitioner. Sri B. Narasimha Sarma, learned Senior Standing Counsel takes notice for the respondents.

3. It appears that on the very first day when the appeal was posted for hearing, viz., 03.12.2018, it was dismissed for non-prosecution. Therefore challenging the said order, the petitioner has come up with the above writ petition. Sri B. Narasimha Sarma, learned Senior Standing Counsel contended that if the order impugned in the writ petition is an order on merits, the petitioner has to file only a regular appeal under Section 260A of the Income Tax Act, 1961 (for short 'Act, 1961'). It is further contended by the learned senior standing counsel that if the impugned order is construed as an order of dismissal for default, then the appropriate course of action open to the petitioner is to file an application in terms of the proviso to Rule 24 of the Income Tax (Appellate Tribunal) Rules, 1963 (for short 'Rules, 1963'). A writ

petition, according to the learned senior standing counsel, is not maintainable.

4. We have carefully considered the above submissions.

5. It is seen from the impugned order that the same was passed for non-prosecution. The appeal was dismissed on the very first date of hearing for non-prosecution. But a passing observation was also made as though nothing has been brought on record to rebut the findings of the Commissioner of Income Tax (Appeals).

6. But, the passing reference made as indicated above, cannot be treated as the dismissal of an appeal on merits. Therefore, the petitioner cannot be asked to file an appeal under Section 260A of the Act, 1961. In any case for this Court it does not make a difference because an appeal under Section 260A of the Act, 1961 also comes up only before the Division Bench.

7. The provisions of proviso to Rule 24 of the Rules, 1963 cannot also be invoked in this case. In fact, the substantial provision, viz., Section 254 (1) of the Act, 1961 mandates the Appellate Tribunal to pass orders on an appeal after giving both the parties to the appeal an opportunity of bearing heard. The impugned order does not disclose that the same was passed on merits after giving both the parties the opportunity of being heard. Sub-section (2) of Section 254 of the Act, 1961 enabling the Tribunal to rectify any mistake or to amend any order,

is not an answer to the failure to comply with sub-section (1) of Section 254 of the Act, 1961.

8. In fact, if the substantial provision contained in the statute mandates the disposal of an appeal on merits, the Rules cannot empower a mere dismissal for non-prosecution, without going into the merits of the dispute.

9. Therefore, cases of this type do not fall either under Section 254 (2) of the Act, 1961 or under the proviso to Rule 24 of the Rules, 1963. Hence, the Writ Petition has to be held to be maintainable.

10. Once the maintainability of the writ petition is held in favour of the petitioner, then the next question to be decided is as to whether the impugned order could be sustained.

11. It is seen from the impugned order that the appeal has been dismissed for non-prosecution on the very first date. Though we cannot say that the Tribunal did not have the power to do so, this is not the way to answer substantial issues.

12. Therefore, the Writ Petition is allowed, the impugned order is set aside and the matter is remanded to the Tribunal for fresh disposal on merits. No order as to costs.

As a sequel thereto, Miscellaneous Petitions, if any, pending in the writ petition shall stand closed.

V. RAMASUBRAMANIAN, J

P. KESHAVA RAO, J

JANUARY 03, 2019
Vhb/Mgr