

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

WRIT PETITION NO.812 OF 2020

Mayur Kanjibhai Shah

... Petitioner

V/s.

The Income Tax Officer – 25(3)(1) and ors. ... Respondents

Mr.D.H.Jain with Ms.Radha Halbe, Advocate for the Appellant.
Mr.Sham Walve with Mr.Pritish Chatterji, Advocate for the Respondents.

**CORAM : UJJAL BHUYAN &
MILIND N. JADHAV, JJ.
DATE : MARCH 13, 2020**

P.C.:-

1. Heard Mr.D.H.Jain, learned counsel for the petitioner; and Mr.Sham Walve, learned standing counsel, Revenue for the respondents.

2. This petition filed under Article 226 of the Constitution of India assails the legality and validity of the order dated 30th January, 2020 passed by respondent No.1 rejecting the application of the petitioner for stay of demand as well as order dated 17th February, 2020 passed by respondent No.2, also rejecting the stay application of the petitioner and further seeks a direction to the respondents to keep in abeyance recovery of demand till disposal of the appeal by the Commissioner of Income Tax (Appeals).

3. From the materials placed on record, we find that petitioner is an assessee under the Income Tax Act, 1961

(briefly “the Act” hereinafter) within the jurisdiction of respondent No.1.

4. Petitioner is running a proprietorship concern called “M/s Evergreen Enterprises”. For the assessment year 2012-13, petitioner had earlier filed his return of income on 28th September, 2012 declaring total income of Rs.5,05,981.00, which was processed under Section 143(3) of the Act. Subsequently, it was decided to reopen the assessment under Section 147 of the Act, for which notice under Section 148 was issued. Following assessment proceedings on re-opening culminating in the assessment order dated 21st December, 2019 passed under Section 143(3) of the Act read with Section 147 of the Act, Assessing Officer held that an amount of Rs.3.25 crores was extended by the petitioner to M/s Evergreen Enterprises / Shri Nilesh Bharani which was treated as unexplained money under Section 69A of the Act and was added to the total income of the petitioner.

5. Pursuant to the order of assessment, respondent No.1 as the Assessing Officer issued notice on demand dated 21st December, 2019 to the petitioner under Section 156 of the Act calling upon him to pay an amount of Rs.2,17,76,850.00 within the period prescribed.

6. It is seen that against the order of assessment petitioner preferred appeal before the Commissioner of Income Tax (Appeals)-37, Mumbai on 21st January, 2020 bearing acknowledgment No.294193161210120.

7. Simultaneously, petitioner filed an application before respondent No.1 on 28th January, 2020 for stay of demand which was received in the office of respondent No.1 on 29th January, 2020. By the order dated 30th January, 2020, passed under Section 220(6) of the Act, respondent No.1 rejected the stay application giving liberty to the petitioner to pay 20% of the demand in which event it was stated that the balance of the outstanding dues would be kept in abeyance.

8. Petitioner preferred further application for stay before respondent No.2 on 5th February, 2020, received on 7th February, 2020. By the order dated 17th February, 2020, respondent No.2 rejected the prayer of the petitioner for complete stay of demand. However, petitioner was given liberty to pay the demand in installments as per the schedule mentioned in the said order.

9. Aggrieved, the present writ petition has been filed seeking the reliefs as indicated above.

10. Respondents have filed a common affidavit. In the affidavit respondents have justified reopening of assessment in the case of the petitioner for the assessment year 2012-13 and has contended that the assessment order upon reopening suffers from no error or infirmity. Regarding the decision of respondent No. 2 directing the petitioner to pay outstanding dues as per installments, it is stated that the same reflects due application of mind by respondent No.2 to the facts and circumstances of the case and it cannot be said

that respondent No.2 had acted arbitrarily. In paragraph No.17 of the affidavit, it is stated that summons under Section 131 of the Act was issued to Shri Nilesh Bharani, but Shri Nilesh Bharani instead had sent a copy of letter dated 14th October, 2014 addressed to the Director of the Income Tax-2, Mumbai.

11. We have heard rival submissions as well as considered the pleadings on record. Only to satisfy ourselves as to whether a *prima facie* case had been made out by the petitioner seeking stay, we have given our attention to the assessment order dated 21st December, 2019. We find that the assessment order on reopening has been made primarily on the basis of certain entries (in coded language) made in the diary recovered from the premises of Shri Nilesh Bharani in the course of search and seizure under Section 132 of the Act. The finding that the petitioner had lent/provided cash amount of Rs.3.25 crores to M/s Evergreen Enterprises/Shri Nilesh Bharani was also reached on the statement made by Shri Nilesh Bharani. From the assessment order, we do not find that Shri Nilesh Bharani was subjected to any cross-examination by the petitioner; rather in the affidavit of the respondents it is stated that Shri Nilesh Bharani has retracted his statement made. *Prima facie* on the basis of coded language diary entries and retracted uncorroborated statement of an alleged beneficiary, perhaps, the additions made by the Assessing Officer is highly questionable. In such circumstances, we feel that instead of taking a mechanical approach by directing the petitioner to pay 20% of the tax demand or providing installments, respondent Nos.1 and 2

ought to have considered the *prima facie* case, balance of convenience and financial hardship, if any, of the petitioner. From the impugned order, we do not find that respondents had alluded to the above aspects. That apart, petitioner's appeal before the Commissioner of Income Tax (Appeals) is pending for consideration. In such circumstances, we are of the view that it would be in the interest of justice if the demand raised is kept in abeyance till disposal of the appeal by the Commissioner of Income Tax (Appeals).

12. Ordered accordingly.

13. Let the appeal be decided by the Commissioner of Income-Tax (Appeals) within a period of four months from the date of receipt of an authenticated copy of the order. Till disposal of the appeal within the said period, notice of demand dated 21st December, 2019 pursuant to assessment order for the assessment year 2012-13 shall be kept in abeyance.

14. Before parting with the record, we make it clear that the discussions and observations made in this order are only in the context of considering the prayer for stay of the petitioner and that the same should not in any manner be treated as final observations or findings on merit.

15. Writ Petition is disposed of.

(MILIND N. JADHAV, J.)

(UJJAL BHUYAN, J.)

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