



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 13.08.2021

CORAM:

THE HON'BLE MR. JUSTICE S.M.SUBRAMANIAM

WP No.746 of 2012
and M.P.No.1 of 2012

M/s.JP Jai Land & Building Promoters P Ltd.
36, Ram Nagar South, 8th Cross St.,
Madipakkam,
Chennai - 600 091.

.. Petitioner

Vs

1. The Commissioner of Income Tax - I,
Income Tax Department,
121, Nungambakkam High Road,
Chennai - 600 034.
2. The Assistant Commissioner of Income Tax
Company Circle II(3)
Income Tax Department,
121, Nungambakkam High Road,
Chennai - 600 034.
3. M/s.Sundaram and Srinivasan,
Chartered Accountants,
No.23, C.P.Ramaswamy Street,
Alwarpet, Chennai - 600 018.

.. Respondents

PRAYER: This Writ Petition is filed under Article 226 of the Constitution of India, praying for issuance of Writ of Certiorarified Mandamus, calling for the records of the Petitioner Company on the file of the 2nd respondent to quash the impugned order dated 16.12.2011 issued in PAN:AABCJ7618K/ACIT, CO.CIRCLE II(3) for appointing Special Audit u/s 142 (2A) of the income tax Act, 1961 pending assessment proceedings relating to the Assessment Year 2009-10 and consequently direct the 2nd respondent to complete the scrutiny assessment u/s 143(3) of the Income tax Act, 1961 for the Assessment Year 2009-10 based on the regular audit report filed.

For Petitioner : Mr.Kaushik.M
for Mr.S.Sridhar
For Respondents 1 & 2 : Mrs.Hema Muralikrishnan
Senior Standing Counsel
R3 : No Appearance



O R D E R

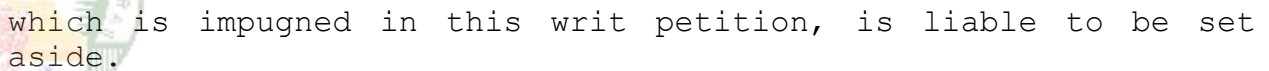
The writ on hand is filed questioning the legal validity of the order dated 16.12.2011 passed by the 2nd respondent for appointing Special Audit under section 142(2A) of the Income Tax Act, 1961 pending assessment proceedings relating to the Assessment Year 2009-10 and consequently, direct the 2nd respondent to complete the scrutiny assessment under Section 143 (3) of the Income Tax Act, 1961 for the Assessment Year 2009-10 based on the regular audit report filed by the petitioner.

2. The petitioner company was established under the Companies Act, 1956. They are assessed to Income Tax on the file of the 2nd respondent and the return of Income Tax was filed for the Assessment Year 2007-08 on 14.11.2007, declaring 'Nil' income after conduct of Statutory Audit and tax Audit of books of accounts.

3. The petitioner company, for the Assessment Year 2008-09 filed their return of income disclosing taxable total income at Rs.65,99,372/- after subjecting their accounts to the statutorily prescribed audit as well as tax audit. The return of Income was taken for scrutinising the assessment under Section 143(3) of the Act dated 02.12.2010 at a taxable total income of Rs.1,43,61,890/-, after making certain disallowances including the disallowances on the application of Section 40 (a) (ia) of the Act.

4. The fact regarding the filing of return of income, scrutinising the assessment and certain disallowances made, are not in dispute between the parties. The issue raised importantly on behalf of the petitioner is that the order impugned dated 16.12.2011, was issued in violation of the principles of natural justice, in view of the fact that the 1st proceedings dated 09.12.2011, passed by the 2nd respondent cannot be construed as a show cause notice in compliance with the provisions of Section 142 (2A) of the Act.

5. The learned counsel for the petitioner reiterated that perusal of the order dated 09.12.2011 would reveal that the authority competent have decided the issues, even before hearing the petitioner on the dispute and therefore, the said order dated 09.12.2011, cannot be considered as a show cause notice, as required under the provisions of the Act. When the initiation itself is improper, the final order dated 16.12.2011 cannot be sustained by the respondents. When the procedures contemplated at the first instance had been violated and even before receiving any objections or defence from the petitioner/assessee, for appointing an Auditor by invoking Section 142(2A) of the Income Tax Act, then the final order



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8. It is contended that the Hon'ble Supreme Court had elaborately considered the principles that pre-decisional hearing is a right conferred under the Act to an assessee and such a valuable right cannot be taken away and must be provided in its real spirit. Though there is no specific provision under the Income Tax Act to provide such pre-decisional hearing, the Hon'ble Supreme Court has interpreted the provision by holding that the post-decisional hearing is no substitute for pre-decisional hearing. Even from the language of the said provision, it is clear that the opportunity of being heard is only in respect of the material gathered on the basis of the audit report submitted under sub-section (2A) and not on the validity of the original order directing the special audit. It is well-settled that the principle audi alteram partem can be excluded only when a statute contemplates a post-decisional hearing amounting to a full review of the original order on merits, which was not the position in the instant case.

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expected to determine the issues in advance. If at all some grounds are traceable for appointment of an auditor for certain aspects, the assessing officer shall provisionally form an opinion for appointment of an auditor to conduct a special audit and said provisional decision has to be communicated to the assessee, by way of a show cause notice, seeking his explanation / objection, on such decisions taken provisionally.

10. This Court is of an opinion that show cause notices are issued by the competent authority only on the basis of the provisional decisions taken. Such provisional decision is necessarily to be taken in view of the fact that, in the absence of any such decision on certain grounds, the assessee would not be in a position to submit their objections. Therefore, a provisional decision containing certain reasons are also required for a show cause notice for fulfilling the requirement of a show cause notice. Such decision undoubtedly, will throw light on the issues as well as the grounds taken by the competent authority for initiation of any further proceedings.

11. Presuming if no such provisional decision is taken, while issuing the show cause notice, the consequences would be that the assessee may not be in a position to submit their objections. Then again the assessee has to approach the authority to know what is the allegation against which he should submit an objection? This exactly is the problem where the show cause notices are issued without any reasoning or provisional decision. It is in normal practice that, if a show cause notice is issued without any reason then writ petitions are filed by stating that the assessee is unable to submit objections as they are not aware of the ground on which such show cause notice stood issued and writ petitions are filed to quash such notices, which do not contain any reasons or provisional decision. Equally, if any provisional decisions are communicated then also writ petitions are filed by taking a ground that the authority has already pre-determined the issue and issued show cause notice and on that ground also it has to be quashed. How to balance, is the question to be considered?

12. Provisional decision means, an authority based on the materials available on record has to form an opinion, whether any further action is required in any matter or not. If such an opinion is formed rightly or wrongly, as he may not be sure of such reasons, since such opinion is unilateral in nature and it becomes necessary for such authority to provide an opportunity to the aggrieved party to submit their objections and on receipt of such objections, such an authority may take a final decision, whether his opinion initially formed, is right or wrong.

13. This being the purpose for such show cause notices are



issued, mere forming an opinion for initiation of certain action by the competent authority cannot be construed, as the issues were already pre-determined by the authority. Even in such case, it is to be understood that one cannot assess the mind of the competent authority at that juncture. However, when an order or show cause notice is issued containing certain reasons, even if the assessee forms an opinion that the authority has pre-determined the issue then also, he gets an opportunity to rebut the same by submitting his objections. However, there is a difference between a final decision arrived and forming the opinion for the purpose of issuing a show cause notice.

14. The learned Senior standing counsel appearing on behalf of the respondents contended that the proceedings dated 09.12.2011 is a show cause notice, though it has not been specifically stated as 'show cause notice'. In order to substantiate the said contention, the learned Senior standing counsel relied on the objections filed by the petitioner on 15.12.2011 referring the proceedings dated 09.12.2011, which is a show cause notice. Thereafter, considering the objections, the competent authority passed an order disposing of the objections on 16.12.2011 and the petitioner/assessee submitted further representation on 23.12.2011 and said objections were also disposed of by the 2nd respondent on 26.12.2011, which is impugned in this writ petition.

15. Thus the proceedings initially issued was acted upon by the petitioner/assessee only as a show cause notice and objections were submitted and after affording an opportunity, final decision is taken and in this case, the approval from the Commissioner of Income Tax was obtained on 15.12.2011.

16. In this regard, the learned counsel for the petitioner/assessee raised an objection that on 09.12.2011 itself such an approval would have been obtained from the Commissioner of Income Tax. Contrarily, the approval was obtained on 15.12.2011 and thereafter, the objections were disposed of on 16.12.2011.

17. In this regard, it is to be considered that Section 142 (2A) of the Income Tax Act contemplates that if at any stage of the proceedings before the Assessing officer, having regard to the nature and complexity of the accounts, volume of the accounts, doubts about the correctness of the accounts, multiplicity of transactions in the accounts or specialised nature of business activity of the assessee and the interests of the revenue is of the opinion that it is necessary so to do, he may with the previous approval of the Principal Commissioner or Chief Commissioner, direct the assessee to get the accounts audited by an accountant, as defined.



18. The above provision unambiguously stipulates that having regard to the nature and complexity of the accounts, volume of the accounts, doubts about the correctness of the accounts, multiplicity of transactions in the accounts or specialised nature of business activity of the assessee and the interests of the revenue, if the assessing officer is of the opinion that it is necessary to appoint an accountant / auditor, he could do so. Therefore, only if the Assessing officer arrive at a conclusion that an appointment of auditor is required, then it is mandatory to obtain approval from the Commissioner of Income Tax.

19. In the present case, at the time of issuing proceedings dated 09.12.2011, the assessing officer had not formed an opinion however, he had some reasons to appoint an auditor in the case of the petitioner. Therefore, this Court is of an opinion that the very contention that the respondent has pre-determined the issue while issuing the order dated 09.12.2011, is doubtful. The assessing officer at the time of issuance of proceedings dated 09.12.2011 had not obtained the prior approval as at that point of time, he has not received the objections of the petitioner/assessee. Only after receiving the objections from the petitioner, on 15.12.2011, the assessing officer formed an opinion that the case of the petitioner is a fit case for appointment of an auditor by invoking Section 142(2A) of the Income Tax Act and accordingly, obtained the prior permission from the Commissioner of Income Tax and disposed of the objection in proceedings dated 16.12.2011.

20. In the order dated 16.12.2011, the assessing officer categorically considered the nature of accounts and the complexities involved in the accounts and few such complexities involved in the accounts are narrated, which reads as under:

"(a) The company is not in a position to explain properly the whole activity done by the Land agents / power of attorney holders and its accounting in the books of the company.

(b) All the entries are not properly accounted in the books of accounts.

(c) Transactions made through Bank accounts of POA holders are not commented in the Audit Report u/s 44AB.

(d) Cash payments made are not entered in the books and whether the vouchers were produced in Audit is not known. Column No.17(A) of 3CD report annexed to Return of Income shows that cash payments were made. But there is no annexure enclosed nor disallowance made in the computation memo.

(e) Cash payments made during the FY 2008-09, (AY:09-10) are per Survey Report works out to Rs.55,54,700/-. But there is no qualification of



such payment in the Audit Report. Through a letter dated 20.10.2011, the company asked to reconcile, it is unable to reconcile.

(f) Transactions in the name of Shri D. Arul Muthiah of Rs.1,29,00,000/- routed through Axis Bank Account No.258010200007070 and admitted as done for the company. However, audit report does not qualify such transactions done through intermediaries."

21. In paragraph no.3 of the said order dated 16.12.2011, the assessing officer has given reasons for the rejection of the objections filed by the writ petitioner, which reads as under:

"3. Your reply dt. 15.12.2011 is gone through. After careful consideration of the submissions the explanation is rejected for the reasons infra:

4 - The fact of using companies funds through power agents is admitted and whether Memorandum of Articles authorize such transactions and the details of ownership as on date and violation of any statutory rules should fine a mention in the auditor's report.

-amounts in admissible u/s 40 (a)(ia) and amounts inadmissible u/s 40A(3) r.w.r.6DD if I.T.Rules were not given separately even though there is comment regarding 40A(3) violations in the audit report.

-difference in cash payments as per investigation wing report based on loose papers, and copies thereof were provided to the assessee and such expenses should be correlated with books. After all entries in the books are made based on vouchers and in the instant case loose papers also.

-transactions done through Arul Muthiah whether or not authorized by memo of articles etc ought to have been commented by the Auditors."

22. In paragraph No.5, it is stated that the Commissioner of Income Tax, Chennai - 1 has nominated M/s.Sundaram & Srinivasan, CAs, No.23, C.P.Ramaswamy Street, Alwarpet, Chennai - 18 Tel.No.24988762, 24988463 as Special Auditors, for this purpose.

23. Not satisfied with the above order disposing of the objections filed by the writ petitioner, once again the petitioner submitted further objections on 23.12.2011 and the said objections were also disposed of by the 2nd respondent in proceeding dated 26.12.2011, which is impugned in the present writ petition.

24. The impugned order reveals that the assessment was given in paragraph Nos.2 and 3, and the same reads as under:



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"2. Taking into complexities of the accounts as detailed in by a show cause notice u/s.142(2A) dated 09/12/2011 and served on you on 10/12/2011, the company was directed to get accounts audited u/s.142 (2A) of the Act as approved by the Hon'ble CIT-1, Chennai vide approval in C.No.278/50/CIT-I/2011-12 dated 15/12/2011.

3. The assessee was given an opportunity to explain its case. Assessee's objections are considered before issuing a direction for special audit u/s.142(2A). Information furnished by the assessee was carefully gone through, defects noticed in the accounts were communicated to the assessee. As the law requires an opportunity u/s.142(2A) the Assessing Officer has given a reasonable opportunity of being heard. After due deliberation of facts on record an objective decision was taken in passing orders u/s.142(2A). Hence, you are required to comply with the terms of the said notice u/s.142(2A) dated 16/12/2011."

25. In this background, let us now consider the judgment relied on by the petitioner. The principles regarding the pre-decisional hearing is the ruling of the Hon'ble Apex Court of the India. By applying the principles laid down in the case of Sahara India's case [cited supra], the facts in the present writ petition is to be considered. As far as the case before the Supreme Court is concerned, paragraph No.27 of the judgment records the same which reads as under:

"27. Indubitably, before passing the said orders, no show-cause notice was given to the appellants. On the contrary, it appears from the record that on 9-3-2006, the appellants were required to furnish by 20-03-2006 details/explanation in respect of queries raised vide order sheet entry dated 16-2-2006 but in the meanwhile, the impugned orders were passed on 14-3-2006 itself. It is manifestly clear that when the impugned orders were made, the Assessing Officer had no occasion to have even a glimpse of the accounts maintained by the appellants. Therefore, in the light of the legal position noted above, we have no option but to hold that the impugned orders dated 14-3-2006, are vitiated by the failure to observe the principle audi alteram partem."

26. Regarding the facts in the present case admittedly, proceedings dated 09.12.2011 is issued. But, in the said proceedings, the Assessing Officer has not mentioned as 'show cause notice'. However, the proceedings dated 09.12.2011 reveals



that the accounts of the petitioner relevant to the Financial Year 2008-09 (Assessment Year 2009-10) is to be audited by a Special Auditor to be appointed by the respondents. The nature of accounts and the complexities involved in the accounts are narrated in paragraph No.2 of the proceedings dated 09.12.2011. What is missing in the said proceeding is that in the concluding paragraph the respondent has not stated that the assessee shall submit their objection or explanations with reference to the grounds raised in paragraph No.2 of the said proceedings. That exactly is the reason why the petitioner has contended that it is not a show cause notice.

27. Though the petitioner argued before this Court that it is not a show cause notice, it was construed as a show cause notice by the petitioner themselves. The reason would be that pursuant to the proceedings dated 09.12.2011 neither an Auditor was appointed immediately nor an Auditor went to the premises of the petitioner and even the approval at that point of time from the Commissioner of Income Tax, was not obtained. But the petitioner submitted their objections on 15.12.2011 in detail and thereafter, on receipt of the objections the assessing officer obtained approval from the Commissioner of Income Tax and disposed of the objections on 16.12.2011. The assessee has once again submitted an objection on 23.12.2011 and the said objections were also disposed of on 26.12.2011. Thus, the opportunity to defend the case by way of pre-decisional hearing was provided as no final order was passed based on the proceedings dated 09.12.2011 directly. Further, the petitioner has not challenged the said order dated 09.12.2011, as if the said proceedings is a final order.

28. As considered in the aforementioned paragraphs, the reasons stated in the proceedings dated 09.12.2011 regarding the complexities involved in the accounts cannot be construed as a final decision taken by the competent authority. In the absence of recording such reasons, the assessee may not be in a position to file their objections and therefore, even while issuing the show cause notice, the provisional decision or allegations, are to be stated enabling the assessee to defend their case effectively.

29. The facts involved in the case decided by the Hon'ble Supreme Court of India i.e. Sahara India's case cannot be compared with the facts involved in the present case. In the present case, the proceedings dated 09.12.2011 was treated as a show cause notice for all purposes both by the Assessing Officer and by the Assessee/petitioner and the petitioner submitted his objections in detail on 15.12.2011 and thereafter, the approval from the Commissioner of Income Tax was obtained and the objections were disposed of on 16.12.2011. The further



objections raised on 23.12.2011, were also disposed of by the Assessing Officer on 26.12.2011. This being the admitted facts between the parties, there is no reason to disbelieve the proceedings dated 09.12.2011, though it was not aptly worded, as rightly stated by the learned Senior counsel appearing on behalf of the respondents.

30. In respect of the impugned order, the petitioner is bound to cooperate for the earlier completion of the Special Audit, enabling the authority to proceed in accordance with law.

31. Accordingly, writ petition stands dismissed. No Costs. Consequently, the connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS VI)

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Sub Assistant Registrar

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To

1. The Commissioner of Income Tax - I,
Income Tax Department,
121, Nungambakkam High Road,
Chennai - 600 034.
2. The Assistant Commissioner of Income Tax
Company Circle II(3)
Income Tax Department,
121, Nungambakkam High Road,
Chennai - 600 034.

+1CC to Ms.Hema Muralikrishnan, Advocate, Sr.No.40597

WP No.746 of 2012

GSM (CO)
K.RK. (16.09.2021)