

Item no. 05

**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice T.S. Sivagnanam

And

The Hon'ble Justice Hiranmay Bhattacharyya

MAT 329 of 2022
with
IA No. CAN 1 of 2022

Bahin Samabay Krishi Unnayan Samity Ltd. & anr.
vs.
Union of India & ors.

For the Appellants : Mr. Himangshu Kr. Ray
Mr. Yashashwi Sundariya

For the Respondents : Mr. Om Narayan Rai

Heard on : 22.03.2022 & 23.03.2022

Judgment on : 23.03.2022

T.S. Sivagnanam J.:

This intra-Court appeal is directed against an order dated 07.03.2022 passed in WPA 3288 of 2022 (Bahin Samabay Krishi Unnayan Samity Ltd. & Anr. vs. Union of India & Ors.). In the said writ petition the appellants had challenged the order of assessment dated 22.09.2021 passed under Section 147 read with Section 144 of the

Income Tax Act, 1961 (in short 'the Act') and also to set aside the notice of demand issued pursuant to the order of assessment.

The learned Single Judge had dismissed the writ petition on the ground that the appellant should avail the alternative remedy provided under Section 246A of the said Act for which the appellants can file an appeal before the Commissioner of Appeal and without resorting to such remedy the appellants are not justified in approaching the Court by filing a writ petition under Article 226 of the Constitution of India. Challenging the correctness of the order impugned the appellant are before us.

We have heard at length learned counsel for the parties present.

The case of the appellants is that the assessment order impugned in the writ petition suffers from vice of lack of jurisdiction and it is patently illegal as the assessment order has been passed under Section 147 read with Section 144 of the Act, is in complete violation of Section 144B of the Act as well as the notification issued by the CBDT dated 31.03.2021. Further, it is submitted that the assessment order has been passed in violation of the procedures stipulated under Section 144B of the Act and, therefore, it is non est in law.

Learned counsel for the appellants contended that the assessment order is vitiated on account of non-service of notice or in other words, failure to follow the procedure under the Act and the Rules framed therein in the matter of service of notice. Learned counsel for

the appellants has placed reliance on a decision in the case of **Gurgaon Realtech Ltd. vs. National Faceless Assessment Centre, Delhi** reported in **[2021] 127 taxmann.com 726 (Delhi)**. Therefore the learned counsel submitted that the assessment order should be set aside and matter should be remanded back to the assessing officer to take a fresh decision after affording an opportunity of hearing to the assessee.

Learned senior standing counsel for the respondent submitted that the assessee despite having been granted sufficient opportunity did not submit the return of income which has been specifically recorded by the assessing officer in the assessment order dated 27.09.2021. Further, the learned counsel has drawn our attention to the show cause notice issued to the assessee dated 16.09.2021 wherein the assessee was informed that they were given opportunity to show cause as to why the assessment should not be completed under Section 144 of the Act. In view of the circumstances set out in the show cause notice and the assessee was also specifically informed that they have to submit their response through registered e-filing account by 23.59 hrs on 2.9.2021 and by the said time if the assessee fails to comply with the requirement under the show cause notice they were requested to submit their reply through online by 24.9.2021 positively as their case is going to be barred on 30.9.2021. Further, the assessee was informed that in case no response is received within the given time and date the assessment shall be finalized under

Section 144 of the Act. It is submitted that though the assessee replied to the show cause but did not raise such objections before the assessing officer, which are being raised now by the assessee in the writ petition. Therefore it is the submission of the learned senior standing counsel that the assessee should not be permitted to canvas this point or allege that there has been a jurisdictional error for the first time before the learned writ Court and, therefore, the learned writ Court rightly relegated the appellant to avail the alternative remedy. The learned counsel has also drawn our attention to Section 144B(8) of the said Act which states that notwithstanding anything contained in sub-section 1 or 2 of Section 144B the Principal Chief Commissioner or Principal Director General-in-Charge of National Faceless Assessment Centre may at any stage of the assessment, if considers necessary, transfer the case to the assessing officer having jurisdiction for such case with the prior approval of the Board. It is further submitted that the notification issued by the Central Government dated 22.9.2021 would be very relevant to the case in hand as the Government has stated that in addition to the exclusion of the cases in the orders dated 31.3.2021 and 6.9.2021, the cases where effective time limit for completion expires on 30.09.2021 pending before the jurisdictional assessing officer as on 11.09.2021 and/or thereafter which cannot be completed as per the procedure laid down under Section 144B of the Act due to technical/procedural constraints in the given period of limitation, shall also be excluded from the purview of Section 144B of the Act. It is

further submitted that the order passed by the Central Government dated 22.9.2021 is in addition to the earlier orders, more particularly, the order dated 31.3.2021 on which the appellants have placed reliance. Learned counsel has also provided a copy of the screen shot to show that on what date the transfer of the case took place. Further, Section 292B of the Act was referred to substantiate the argument that service of notice has been validly done.

After elaborately hearing the learned counsel for the parties, we are of the considered view that the appellants should be relegated to avail the alternative remedy of appeal and should not be permitted to canvas all the issues in a writ petition. We substantiate such conclusion with the following reasons.

Firstly, the question of jurisdiction, as raised by the appellants in the instant case, is not purely a question of law. It is a mixed question of fact and law and, therefore, a vigilant assessee should raise such an issue at the earliest point of time. This is shown to have not done by the assessee despite issuance of show cause notice and it has been canvassed for the first time in the writ petition. To decide such an issue, facts have to be examined. Such exercise cannot be done in a writ petition. It would be well open to the appellate authority to re-examine the facts, call for all details as to the manner and procedure adopted by the assessing officer while completing the assessment, examine the procedure for its correctness, whether it satisfies statutory requirement and then take a decision apart from the fact that the

appellate authority will also be entitled to re-appreciate the facts which the assessee may place before the appellate authority. Therefore, to state that the appellants are purely questioning the assessment order on account of jurisdictional error, is not acceptable.

The decision rendered in **Gurgaon Realtech Ltd. (supra)** is pressed in service and it is submitted by the learned counsel for the appellants that the said decision would squarely apply to the case on hand and in the said case the Court quashed the assessment order and remanded the matter back for fresh consideration despite the fact that the assessee therein had preferred an appeal before the appellate authority.

On going through the decision we find that the Revenue in the said case did not submit any argument with regard to principal ground on which the assessee questioned the assessment order stating that the assessment order could not have been passed under Section 143(3A) and 143(3B) of the Act after 1.4.2021. The only objection raised by the respondent therein was that since the assessee has already taken recourse to alternative remedy by preferring an appeal with the CIT (A) the issues raised in the writ petition should be agitated before the said forum. However, before us the learned senior standing counsel sought to justify the action of the department by referring to the order passed by the Central Government dated 22.9.2021 and also the fact that the transfer of the assessment file has taken place as also that show cause notice was given to the assessee and the assessee did not raise the

objections before the assessing officer which are now raised. Therefore, we are of the view that the decision in the **Gurgaon Realtech Ltd. (supra)** cannot be applied to the facts and circumstances of the case on hand.

Learned counsel for the appellants further placed reliance on the decision of **SHL (India) Private Limited vs. Deputy Commissioner of Income Tax & Ors.** reported in **(2021) SCC Online Bom 1312**. In our considered view it is too early for us to examine the applicability of the said decision to the case in hand as the matter requires adjudication into the facts, with regard to the correctness of the procedure adopted by the assessing officer and all other matters incidental thereto.

Therefore, we are of the considered view that the appellants should avail the alternative remedy of appeal before the Commissioner of Income Tax (Appeals).

In the light of the above, we find no ground to interfere with the order passed by the learned Single Judge. Hence, the appeal fails and is **dismissed**. Consequently, the connected application also stands dismissed. No costs.

The appellants are granted liberty to file an appeal before the appellate authority within a period of 30 days from the date of receipt of the server copy of this judgment and the appellate authority shall not reject the appeal on the ground of limitation and consider the matter on merits and in accordance with law. We make it clear that

whatever observations and findings rendered by us in this judgment are only to support our conclusion that the writ petition is not the appropriate remedy in the case on hand.

We further make it clear that the appellate authority shall consider the appeal on merits and in accordance with law without being influenced by any of the observations and findings recorded by us in this judgment.

We give full liberty to the appellants to raise all issues including the question regarding the jurisdictional issue and the procedure etc. before the appellate authority.

(T. S. Sivagnanam, J.)

(Hiranmay Bhattacharyya, J.)