

Item No.17.

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

HEARD ON: 16.11.2022

DELIVERED ON:16.11.2022

CORAM:

**THE HON'BLE MR. JUSTICE T. S. SIVAGNANAM
AND
THE HON'BLE MR. JUSTICE HIRANMAY BHATTACHARYYA**

**M.A.T No.1737 of 2022
I.A. No.CAN 1 of 2022**

**Magadh Sugar & Energy Limited & Anr.
Vs.
Assessment Unit, Income Tax Department, National Faceless
Assessment Centre & anr.**

Appearance:-

**Mr. Asim Chaudhury,
Mr. Soham Sen**

..... for the appellants.

Mr. Smarajit Roy Chowdhury

..... for the respondent no.1.

JUDGMENT

(Judgment of the Court was delivered by T.S. SIVAGNANAM, J.)

1. This intra Court appeal by the writ petitioners is directed against the order dated 28th September, 2022 passed in W.P.A. No.21656 of 2022. The said writ petition was filed challenging an assessment order passed under Section 143(3) read with Section 144B of the Income Tax Act, 1961 (for short, "the Act") dated 8th September, 2022. The challenge to the assessment order was primarily on the ground of violation principles of natural justice inasmuch as the assessing officer has failed to issue notice as required to be issued under Section 144B (1)(xii) (b) of the Act. The learned Single Bench was of the view that as against the assessment order, an effective alternate remedy by way of an appeal is provided for and therefore, was not inclined to interfere with the assessment order.

2. The moot question would be as to whether existence of an alternate remedy under the relevant statute will be a total bar for the exercise of jurisdiction under Article 226 of the Constitution of India. This issue had been elaborately dealt with in several decisions of the Hon'ble Supreme Court and the oft quoted decisions is in the case of **Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai & Ors.** reported at (1998) 8 SCC

1. In a recent decision of the Hon'ble Supreme Court in **M/s. Radha Krishan Industries Vs. State of Himachal Pradesh & Ors.**

(**Civil Appeal No.1155 of 2021**), the Hon'ble Supreme Court has culled out all the decisions on the issue pertaining to whether existence of an alternate remedy will always pushed a jurisdiction of the writ Court under Article 226 of the Constitution and culled out the legal principles in paragraph 27 of the judgment, which reads as follows:-

“27.- The principles of law which emerge are that :

- (i) The power under Article 226 of the Constitution to issue writs can be exercised not only for the enforcement of fundamental rights, but for any other purpose as well;*
- (ii) The High Court has the discretion not to entertain a writ petition. One of the restrictions placed on the power of the High Court is where an effective alternate remedy is available to the aggrieved person;*
- (iii) Exceptions to the rule of alternate remedy arise where (a) the writ petition has been filed for the enforcement of a fundamental right protected by Part III of the Constitution; (b) there has been a violation of the principles of natural justice; (c) the order or proceedings are wholly without jurisdiction; or (d) the vires of a legislation is challenged;*
- (iv) An alternate remedy by itself does not divest the High Court of its powers under Article 226 of the Constitution in an appropriate case though ordinarily, a writ petition should not be entertained when an efficacious alternate remedy is provided by law;*
- (v) When a right is created by a statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy before invoking the*

discretionary remedy under Article 226 of the Constitution. This rule of exhaustion of statutory remedies is a rule of policy, convenience and discretion; and

- (vi) In cases where there are disputed questions of fact, the High Court may decide to decline jurisdiction in a writ petition. However, if the High Court is objectively of the view that the nature of the controversy requires the exercise of its writ jurisdiction, such a view would not readily be interfered with.”*

3. In terms of the above decision, this Court has discretion to entertain or not to entertain a writ petition and one of the exceptions to the rule of alternate remedy is in cases where there has been violation of principles of natural justice.

4. Thus, we are required to see as to whether there has been violation of principles of natural justice in this case on hand. The assessing officer had issued a notice to the assessee dated 10th March, 2022 under Section 142(1) of the Act. In the annexure to the said notice, the assessee was called upon to furnish certain information, which is to the following effect: “It is seen that you have claimed agriculture income for deduction in this regard please submit details of receipts and expenditure in respect of agricultural activities”. The appellants had promptly complied with the information called for in the said notice and a reply dated 10th March, 2022 was

submitted furnishing all the details relevant to the information sought for. Thereafter, this was received by the assessing officer on 15th March, 2022.

5. It appears that subsequently no further notice was issued to the assessee, nor assessee was afforded an opportunity of personal hearing, nor any further information was called for from the assessee but the assessing officer straightway proceeded to complete the assessment and passed the assessment order dated 8th September, 2022.

6. Curiously enough, in the assessment order in paragraph 3, the assessing officer stated that in response to the statutory notices issued under Section 143(2) and 143(1), the assessee has furnished the requisite details along with supporting documentary evidences regarding the issue of selection, which have been duly verified. However, in paragraph 5, the assessing officer states that the assessee did not furnish any evidence as to when the land was tilted, when the crop was sown, when the crop was ready for harvest, etc. We find that no such information was called for from the assessee at any earlier point of time after the assessee submitted their reply dated 10th March, 2022 received by the assessing officer on 15th March, 2022.

7. To examine the correctness of the order passed by the assessing officer, we need to look into as to what are the statutory requirements. At this juncture, it will be relevant to take note of the statutory provision, namely, Section 144B, which deals with faceless assessment. For the purpose of the case on hand, Section 144B (1)(xii) would be relevant, which is quoted below:-

"144B(1)(xii) - the assessment unit shall, after taking into account all the relevant material available on the record, prepare, in writing, -

- (a) an income or loss determination proposal, where no variation prejudicial to assessee is proposed and send a copy of such income or loss determination proposal to the National Faceless Assessment Centre; or*
- (b) in any other case, a show cause notice stating the variations prejudicial to the interest of assessee proposed to be made to the income of the assessee and calling upon him to submit as to why the proposed variation should not be made and serve such show cause notice, on the assessee, through the National Faceless Assessment Centre;"*

8. In terms of the above provision, the assessment unit shall, after taking into account all the relevant material available on record, has two options, namely, (a) to prepare in writing an

income or loss determination proposal, where no variation prejudicial to the assessee is proposed and send a copy of such income or loss determination proposal to the National Faceless Assessment Centre (for short, "NFAC"). The second alternative is as mentioned in clause (b) is to issue a show cause notice stating variations prejudicial to the interest of the assessee proposed to be made to the income of the assessee and calling upon him to submit as to why the proposed variation should not be made and serve such show cause notice on the assessee through NFAC. Admittedly, clause (b) of Section 144B (1)(xii) has not been followed in the case on hand.

9. In **Sardar Co-op. Credit Society Ltd. Vs. Additional/Joint/Deputy/Assistant Commissioner of Income-tax** reported at [2022] 139 taxmann.com 414 (Gujarat), it was held that the obligation is on the assessing officer to serve a show cause notice calling upon him to show cause as to why the proposed variation should not be made failing which the assessee would be *non-est*. Similar view was taken in the case of **Gandhi Realty (India) (P) Ltd. Vs. Asstt./Jt./Dy./Asstt. CIT** reported at [2021] 133 taxmann.com 83. The decision in the case **Novelty Merchants (P.) Ltd. Vs. National Faceless Assessment Centre Delhi** reported at [2021] 131 taxmann.com 289 (Delhi) is

also to the same effect wherein it was held that where no prior show cause notice as well as draft assessment order have been issued before passing final assessment order there was violation of principles of natural justice as well as mandatory procedure prescribed under the Faceless Assessment Scheme and therefore, the matter was remanded to the assessing officer. The decision in *Novelty Merchants (P.) Ltd. (supra)* was prior to the amendment and after the amendment, the provision mandates that a show cause notice stating variations prejudicial to the interest of the assessee, has to be served.

10. In the absence of such a show cause notice, the assessment order has to be held in violation of principles of natural justice and in violation of the statutory provision and therefore, *non-est*.

11. In the result, the appeal is allowed along with the connected application and the order passed in the writ petition is set aside. Consequently, the writ petition is allowed and the assessment order dated 8th September, 2022 is set aside and the matter is remanded to the assessing officer for a fresh decision. The assessing officer is directed to issue a show cause notice under Section 144B(1)(xii)(b) clearly setting out the proposed variations and the assessee should be granted

reasonable time to file objections along with the documents and after receipt of the same, fresh proceedings be initiated in accordance with law.

12. In the light of the above, the penalty proceedings, which have been initiated as a consequence of the assessment order also stands set aside with liberty to proceed in accordance with law after the assessment is complete.

13. There shall be no order as to costs.

14. Urgent photostat certified copy of this order, if applied for, be furnished to the parties expeditiously upon compliance of all legal formalities.

(T.S. SIVAGNANAM, J)

I agree,

(HIRANMAY BHATTACHARYYA, J.)

NAREN/PALLAB (AR.C)