Item No.4.

IN THE HIGH COURT OF JUDICATURE AT CALCUTTA

CIVIL APPELLATE JURISDICTION

APPELLATE SIDE

HEARD ON: 24.11.2022

DELIVERED ON:24.11.2022

CORAM:

THE HON'BLE MR. JUSTICE T. S. SIVAGNANAM

AND

THE HON'BLE MR. JUSTICE HIRANMAY BHATTACHARYYA

M.A.T No.1757 of 2022
with
I.A. No.CAN 1 of 2022

Girdhar Gopal Dalmia.
Vs.
Union of India & ors.

Appearance:-

Mr. Ranjeet Kumar Murarka, Sr. Adv.,
Mr. Vivek Murarka,
Mr. Dibanath Dey ... for the appellant.

Ms. Smita Das De ... for respondents.

JUDGMENT

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

1. Heard Mr. Murarka, learned senior counsel appearing for the appellant and Ms. Smita Das De, learned senior standing counsel for the respondents.

2. This intra Court appeal is filed by the writ petitioner challenges the order dated 29th September, 2022 passed in W.P.A. No.22194 of 2022. In the said writ petition, the appellant had challenged an order passed under Section 148A(d) of the Income Tax Act, 1961 (for short, "the Act") dated 25th August, 2022 on various grounds. The learned Single Bench dismissed the writ petition on the ground that it is open to the appellant to raise all contentions in the reopening proceedings, which are to follow under Section 148 of the Act. The correctness of the order passed in the writ petition has been challenged before us.

3. After elaborately hearing the learned Advocates for the parties and carefully considering the materials placed on record, we note that this is a second round of litigation. Earlier, the appellant had filed a writ petition challenging an order passed under Section 148A(d) of the Act dated 29th March, 2022 in W.P.A. 7034 of 2022, which was dismissed by an order dated 26th April, 2022 roughly on the same grounds as in the present impugned order before us. The appellant being aggrieved by such order had preferred an intra Court appeal in MAT 727 of 2022. The said appeal was disposed of by the judgment and order dated 21st June, 2022. The operative portion of the judgment reads as follows:-

"4. We have elaborately heard Mr. Soumen Bhattacharya, learned standing counsel for the respondent, on the above submission. Firstly, Clause (b) of Section 148A of the Act provides for an opportunity of being heard to the assessee within such time as may be specified in the notice that has to be issued by the Assessing Officer and the period shall be not less than 7 days and but not exceeding 30 days from the date on which such notice was issued together with a power to grant further time on an application made by the assessee. Therefore, the statute gives discretion to the Assessing Officer to fix the notice period and such time limit has to be fixed bearing in mind the principles of natural justice that the assessee should be afforded reasonable and adequate opportunity. The show cause notice issued under Section 148A (b) of the Act was received online by the assessee on 17th March, 2022. The impugned order has been passed on 29th March,

2022 and according to the Assessing Officer, the assessee has not produced any document to substantiate his claim. To be noted that 17th March, 2022 was declared as a State holiday on account of Holi festival and 18th March, 2022 (Friday) was also declared as holiday and 19th March, 2022 and 20th March, 2022 being Saturday and Sunday, the next working day is 21st March, 2022. Therefore, the period of notice issued to the assessee cannot be stated to be affording a reasonable and adequate opportunity to the appellant / assessee.

4. The learned standing counsel would submit that the assessee has submitted his reply which has also been referred to by the Assessing Officer in his order under Section 148A(b) of the Act. As rightly pointed by the learned senior Advocate for the appellant that nowhere in the reply given by the assessee, there is any elaborate discussion about Section 148, 148A of the Act and probably there occurred a factual mistake at the hands of the Assessing Officer. The assessee had enclosed certain documents along with the reply and had made submissions on merit and on our reading, we find that no elaborate discussion about Section 148 or 148A *of the Act. Be that as it may, the opportunity of hearing to be provided should be reasonable and not illusory. If the appellant had received the show cause notice on 17th March, 2022 online, then for calculating the period of 7 days, namely 17th March, 2022 has to be excluded. If that is so, the period of 7 clear days does not stand fulfilled in the case on hand. Apart from that, 18th March, 2022, 19th March, 2022 and 20th March, 2022 are to be excluded since they are all holidays on account of Holi festival. Further, we state that the State of West Bengal had declared 17th March, 2022 also as a holiday though for the Central Government, no such holiday was declared and an identical issue was considered by us in the case* ***M/s. R. N. Fashion (supra).***

5. Considering all these factors, we are of the view that the assessee should be granted an opportunity by the Assessing Officer in terms of Clause (b) of Section 148A of the Act, which provides for an opportunity of being heard to the assessee. For such reason, we are inclined to remand the matter back to the Assessing Officer for fresh consideration. The notice issued *under Section 148 of the Act dated 29th March, 2022 shall not be enforced and a fresh action can be initiated in accordance with law after complying with the following direction.*

6. The appellant shall submit a fresh reply within two weeks from the date of receipt of the server copy of this judgment and order and upload the reply online and the appellant is at liberty to also refer to the order dated 29th March, 2022 under Section 148A (b) of the Act and also give his reply. On receipt of the said reply, the authorised representative of the appellant shall be given an opportunity of personal hearing through video conferencing and the documents that the assesee may produce shall also be considered and fresh order under Clause (d) of Section 148A of the Act be passed in accordance with with law.

7. The appellant has requested for copies of certain documents. The Assessing Officer before affording an opportunity of hearing shall take note of the said representation and take a decision on merits and in accordance with law and thereafter proceed further in terms of the directions.

8. With the aforesaid direction, the appeal and the connected application are disposed of.

9. No costs.

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

4. The direction issued above to the assessing officer has clearly set out as to what he is required to do. Pursuant to the liberty granted, the appellant had submitted a detailed reply to the show cause notice dated 17th March, 2022 issued under Section 148A(b) of the Act by reply dated 4th July, 2022.

5. Among other things, the appellant had specifically pointed out that the PAN number mentioned in the notice does not belong to him and it appears that the notice was issued to the appellant on a wrong identity. Furthermore, the allegations that loan transactions were done, were totally denied and the appellant had also relied upon various decisions rendered by the High Courts to justify their stand that reopening could not have been resorted to. The said reply was received by the assesssing officer on 6th July, 2022.

6. Thus, in terms of the direction issued earlier by the Division Bench, it was the assessing officer, who was to conduct an enquiry and then proceed to pass an order. Unfortunately, the assessing officer, Mr. Mintu Roy, Circle – 43, Kolkata has abdicated his powers as an assessing officer. We say so because he has verbatim extracted several portions of the earlier order dated 29th March, 2022 in his order dated 25th August, 2022. The assessing officer could not have done so for more than one reasons. Firstly, the earlier order dated 29th March, 2022 could not have been referred to as the same has been set aside by the Division Bench. Understanding this basic legal concept is lacking in the assessing officer. The second aspect is that by passing a non-speaking order dated 25th August, 2022, the assessing officer has violated the directions issued by the Division Bench and has indirectly interfered with the administration of justice thereby exposing himself to proceedings under the Contempt of Courts Act, 1971.

7. If the assessing office fails to obey the directions issued by the Court, stringent action should be taken and it is not clear as to whether the Principal Commissioner of Income Tax is

aware that in his field formations, such officers are functioning. These are all sufficient grounds to quash the order dated 25th August, 2022. But, however, this being a second round of litigation, we are constrained to go a step further to consider as to whether there was any justification for reopening the assessment. Reopening of the assessment is alleged to have been based upon an information given by the Deputy Director of Income Tax (Inv.) Unit-2(4), Kolkata dated 21st January, 2022. In paragraph 4 of the said report, it has been stated as follows:-

> *"Finance Broker:-Jai Bhagwan Sanwaria*
>
> *26. Name: GIRDHAR GOPAL DALMIA/DALMIA LAMINATORS LTD*

- *Potential lender or borrower status: Borrower*
- *Borrower Annexure reference: GG Dalmia*
- *Possible financial transactions deducted and decorde3d from hard copies obtained from DDIT (please refer Annexure in excel version for futher details)*
- *Potential cash borrowed from various lenders – Rs.7.45 crore.*
- *Probable names grouped uner the group name*
- *Dalmia*
- *GG Dalmia*
- *GG Dalmia A/c*
- *G.G Dalmia*

- *G.G. Dalmia*
- *DALMIA TEA*
- *GH agarwal (Anushree)*
- *GH agarwal A/c G.G. Dalmia*
- *Dalmia Laminator"*

8. From the above information, it is not clear as to how reopening of the assessment could have been resorted to. The report is as vague as possible as it states that possible financial transactions could be deduced and decoded from hard copies obtained from DDIT. Further, it says there is potential cash borrowed from various lenders and the probable names of the group have been mentioned and set out without any particulars. Assuming that material was available as annexures to the said report of the DDIT, such documents should have been made known to the assessee so as to enable them to give an effective reply.

9. As could be seen from the communication dated 21st January, 2022 referred above, in more than one place the authority has used the word "potential" and also the word "probable". The Hon'ble Supreme Court in ***Lucknow Development Authority Versus M.K. Gupta A.I.R. 1994 SC 787*** considered the meaning of the word "potential". It was pointed out that the word "potential" has been defined in the Oxford Dictionary as "capable of coming into

being, possibility. In Black's Law Dictionary, it is defined as "extending any possibility but not in Act". It was further pointed out that the said word would mean to be naturally and probably expected to come into existence at some future time, though not now existing. "Possibility" has been defined in "WHARTON" to mean expectation, an uncertain thing which may or may not happen. Under the provisions of the Income Tax Act, tax is levied on the actual income of the previous year and the facts must be taken as they existed during the previous year. It is relevant to take note of the decision of the Hon'ble Supreme Court in ***Sir Kikabhai Prenchand Versus Commissioner of Income Tax (Central) Bombay, (1953) 24 ITR 506 (SC) page 506*** wherein it was held that the State has no power to tax the potential future advantage and all it can tax is income, profits and gains made in the relevant accounting year. This decision if applied to the facts and circumstances of the case on hand, the only conclusion that can be arrived at is to hold that the reopening of the assessment was bad as it was based on certain alleged "potential" cash borrowings and certain alleged "possible" financial transactions. That apart, the assessing officer did not independently apply its mind to the information furnished by the DDIT which he is required to do while exercising the power to reopen an assessment.

10. Despite direction issued earlier, only copies of two statements have been given. The appellant has submitted his reply taking note of the veracity of the allegations in those documents, which were supplied. Therefore, the reopening proceedings could not have been done based on assumptions and presumptions as could be seen from the above material.

11. Therefore, we are of the considered view that the entire reopening proceedings commencing from issuance of the notice under Section 148A(b) and culminating in the order under Section 148A(d) of the Act dated 25th August, 2022 is a clear abuse of the process of law.

12. For the above reasons, the appeal along with the connected application are allowed and the order passed in the writ petition is set aside and consequently, the entire reopening proceedings commencing from issuance of the notice under Section 148A(b) and culminating in the order under Section 148A(d) of the Act dated 25th August, 2022 are quashed.

13. Registry is directed to communicate a copy of this judgment and order to the Principal Commissioner of Income Tax, West Bengal and Sikkim to take note of the observations we have made above in respect of the concerned assessing officer.

14. There shall be no order as to costs.

15. 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)