

OD-6

APO/62/2022  
IA No.GA/1/2022

IN THE HIGH COURT AT CALCUTTA  
Civil Appellate Jurisdiction  
ORIGINAL SIDE

LAKSHMAN PRASAD AGARWAL

-Versus-

UNION OF INDIA AND ANR.

Appearance:

*Mr. Pranit Bag, Adv.*  
*Mr. Anujit Mookherji, Adv.*  
*...for the appellant.*

*Mr. Om Narayan Rai, Adv.*  
*...for the respondent.*

BEFORE:

The Hon'ble JUSTICE T.S. SIVAGNANAM

-And-

The Hon'ble JUSTICE BIVAS PATTANAYAK

Date : 5<sup>th</sup> July, 2022.

The Court : We have heard Mr. Pranit Bag, learned counsel assisted by Mr. Anujit Mookherji, learned advocate for the appellant/assessee and Mr. Om Narayan Rai, learned Advocate for the respondent/revenue.

This intra-Court appeal filed by the writ petitioner is directed against the order dated 20<sup>th</sup> May, 2022 in WPO No.2006 of 2022. The said writ petition was filed challenging the notice

issued under Section 148 of the Income Tax Act, 1961 (the 'Act' for brevity) dated 26<sup>th</sup> March, 2021 and the consequential order of assessment dated 31<sup>st</sup> March, 2022 passed under Section 143(3) read with Section 147 of the Act. The learned writ Court had dismissed the writ petition on the ground that the conduct of the appellant would show that he has waived his right to object to the reopening proceedings though reasons for reopening was sought for and furnished to the assessee as early as on 26<sup>th</sup> October, 2021 and the objections to the said reasons for reopening was submitted only on 11<sup>th</sup> February, 2022, a few weeks before the assessment would get time barred. Furthermore, the learned writ Court was of the view that the assessee had sent replies to the two notices issued under Section 142(1) of the Act which also would go to show that there has been waiver on the part of the assessee. The learned Advocate appearing for the assessee reiterated the contentions which were raised in the writ petition and submitted that they had relied upon the decision of the Hon'ble Supreme Court in *GKN Driveshafts (India) Ltd. vs. Income Tax Officer & Ors.* reported in (2003) 259 ITR 19 (SC); *Income Tax Officer, Ward No.16(2) vs. M/s. Techspan India Pvt. Ltd. & Anr.* reported in (2018) 6 SCC 685 and *Fast Finance (P). Ltd. vs. Assistant Commissioner of Income Tax* reported in (2022) 136 taxmann.com 304 (Mad.) and all the decisions would squarely apply to the facts of the case. However,

the learned Single Bench had failed to follow those decisions and dismissed the writ petition.

Mr. Om Narayan Rai, learned Advocate appearing for the respondent/revenue submitted that the conduct of the assessee assumes importance in the instant case and from the relevant dates, it would be clear that the assessee has been dragging on the matter, coupled with the fact that the assessee responded to the notice issued under Section 142(1) of the Act would clearly show that there has been waiver on the part of the assessee to object to the reasons for reopening.

We have elaborately heard the learned Advocates appearing for the parties and carefully perused the materials on record. For the purpose of applying the doctrine of waiver it needs to be established that the conduct of the parties should be so clear and unequivocal that despite having full knowledge of its rights under a particular statute or a rule, the person concerned does not seek to enforce such a right. Unless and until the conduct of the party is so clear and unequivocal, the presumption cannot be drawn that the party has waived a right which is available to him under law. The Income Tax Act, as it then stood, does not provide for a procedure or an opportunity to the assessee to object to the reasons for reopening and this procedure was put in place pursuant to the decision of the Hon'ble Supreme Court in *GKN Driveshafts (India) Ltd. (supra)*. The underlying principle being that the

assessee should have an opportunity to know as to on what basis an assessment which was completed under Section 143(3) of the Act is sought to be reopened. Therefore, Hon'ble Supreme Court held that the assessee is entitled to seek for the reasons for reopening and, if sought for, reasons have to be furnished to the assessee and the assessee is entitled to submit its objection to the reasons for reopening and the objections have to be disposed of by a reasoned order. Since this procedure has been adopted pursuant to the decision of the Hon'ble Supreme Court, the assessee does not have any statutory appellate remedy over such an order passed by the assessing officer disposing of his objection and consequently the only remedy available is to file a writ petition under Article 226 of the Constitution of India. Therefore, the procedure which has been directed to be followed in *GKN Driveshafts (India) Ltd. (supra)* requires to be scrupulously adopted in all cases or else there would be gross violation of principles of natural justice. To examine as to whether such principle can be applied to the case on hand, we refer to certain dates and events.

The assessment was completed under Section 143(3) on 10<sup>th</sup> December, 2019. On 26<sup>th</sup> March, 2021 notice under Section 148 of the Act was issued proposing to reopen the assessment. The assessee sought for the reasons for reopening by representation dated 9<sup>th</sup> October, 2021 and, soon thereafter, on 26<sup>th</sup> October, 2021

the reasons were furnished to the assessee. It is no doubt true that the assessee did not immediately submit his objection and we are conscious of the fact that no time limit has been prescribed for submitting the objection in the decision of the Hon'ble Supreme Court in *GKN Driveshafts (India) Ltd. (supra)*. But, nevertheless, the objection needs to be submitted within a reasonable time. The assessing officer issued notice under Section 142(1) of the Act on 6<sup>th</sup> December, 2021 for which a reply was sent by the assessee through their authorised representative on 13<sup>th</sup> December, 2021. A second notice under Section 142(1) of the Act was issued on 14<sup>th</sup> December, 2021 for which a reply was sent on 22<sup>nd</sup> December, 2021. It is thereafter another representation was given by the assessee on 14<sup>th</sup> January, 2022 in which the assessee sought for statement of a person which has been recorded by the department which appears to be the basis of the reopening proceedings. Therefore, the assessee made a specific request to give a copy of the statement recorded from Sri Rajal Ashar which was recorded on oath on 7<sup>th</sup> July, 2017 to enable them to understand the contents and give a befitting reply to the same. Admittedly, the replies given by the assessee on 14<sup>th</sup> December, 2021, 22<sup>nd</sup> December, 2021 and 14<sup>th</sup> January, 2021 were not acted upon and no response was received by the assessee from the assessing officer. It is thereafter objections were filed by the assessee on 11<sup>th</sup> February, 2022 to the reasons for reopening. The assessing

officer ignored such objection and completed the assessment on 31<sup>st</sup> March, 2022. The facts of the case would clearly show that the tenor of the various letters sent by the assessee to the assessing office as well as the objections raised by assessee well before 31<sup>st</sup> March, 2022 that the assessee has not waived his right to object to the reopening of the assessment. Therefore, we are of the view that the learned Single Bench ought to have interfered with the order impugned before it rather than non-suited the appellant on the ground of waiver.

The learned Advocate appearing for the appellant places reliance on the decision in *Fast Finance (P) Ltd. (supra)*. In the said case, the assessing officer passed a reassessment order under Section 143(3) read with Section 147 of the Act without passing a speaking order and thereafter completed the assessment. The Court after noting the decision in *GKN Driveshafts (India) Ltd.* had allowed the writ petition and set aside the assessment proceedings.

In the light of the above discussions, we are of the clear view that there has been clear violation of principles of natural justice and the directives issued by the Hon'ble Supreme Court in *GKN Driveshafts (India) Ltd. (supra)* have not been applied and, therefore the assessment order calls for interference. Accordingly, the writ appeal (APO/62/2022) is allowed and the order passed in the writ petition is set aside.

The order of assessment dated 31<sup>st</sup> March, 2022 is quashed and there will be a direction to the assessing officer to furnish the copy of the statement as sought for by the appellant/assessee by representation dated 14<sup>th</sup> January, 2022 within 15 days from the date of receipt of the server copy of the order, after which the appellant would be entitled to submit their objection on the said statement and on receipt of the objections, the assessing officer shall consider the objections raised for reopening of the assessment by the assessee by letter dated 11<sup>th</sup> February, 2022 and pass a reasoned order on merits, in accordance with law.

Consequently, the connected application for stay (IA No.GA/1/2021) also stands closed.

(T.S. SIVAGNANAM, J.)

(BIVAS PATTANAYAK, J.)