**Form No. J.(2)**
**Item No.6**

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

HEARD ON: 02.01.2024

DELIVERED ON: 02.01.2024

**CORAM:**
**THE HON'BLE CHIEF JUSTICE T.S. SIVAGNANAM**
**AND**

**THE HON'BLE MR. JUSTICE SUPRATIM BHATTACHARYA**

**M.A.T. 1667 of 2023**
**With**
**I.A. No. CAN 1 of 2023**

**Gee Bee Nirman Co Private Limited**
**Vs.**
**Income Tax Officer, Ward – 5(1), Kolkata & Ors.**

**Appearance:-**
**Mr. Avra Mazumder**
**Mr. Kausheyo Roy**
**Mr. Suman Bhowmick**
**Mr. Samrat Das** .........**for the appellant**

**Mr. Aryak Dutt** .........**for the respondent/Department**

**<u>JUDGMENT</u>**

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

1. This intra-Court appeal by the writ petitioner is directed against the order dated 16th August, 2023 in W.P.A. No.18683 of 2023. In the said writ petition, the appellant had challenged the assessment order dated 24th May, 2023 under Section 147 read with Section 144B of the Income Tax Act, 1961 (for brevity, "the Act") for the assessment year 2017-2018 on the

ground that the appellant had not been granted an opportunity to cross-examine one Mukesh Banka, whose statement was recorded under Section 131 of the Act.

2. The learned Single Bench after noting the observations made in paragraph 2 of the order passed by the assessing officer, has dismissed the writ petition. Aggrieved by the same, the appellant has filed the present appeal.

3. We have elaborately heard the learned advocates for the parties.

4. Admittedly, the request made by the assessee for cross-examination of Mukesh Banka was accepted by the department and summons was issued to the said person to appear online on 9th May, 2023 and the hearing was fixed at 12:15 p.m. on the same date. It is a case of the assessee that the link for attending the hearing through video conferencing was shared with the assessee much after the time, which was fixed. Consequently, the assessee could not avail the opportunity. This was brought to the notice of the assessing officer by way of a representation. The assessing officer accepted the same and fixed a fresh date for cross-examination of the said Mukesh Banka and the link was shared. On the date so fixed, the assessee appeared online, however, Mukesh Banka did not turn up citing certain health reasons.

5. Once again, the asssessee had made a request that Mukesh Banka be produced for cross-examination and thereafter, the assessee should be granted of an opportunity to put forth their case. However, the assessing officer declined to consider the said request on the ground that the assessment proceedings are getting time barred on 31st May, 2023 and proceeded to state that the statement of Mukesh Banka was recorded on

oath on 30th May, 2018 and 19th July, 2018 and they are very much clear in respect of modus operandi to provide accommodation entries.

6. Thus, the assessing officer proceeded on the basis of the statements recorded by Mukesh Banka without affording an opportunity to cross-examine the said person by the assessee. It would have been a different case had the department rejected the request for cross-examination at the first instance and the matter would have been dealt with in a different manner by the assessee. However, the request made by the assessee for cross-examination was considered and granted and merely because Mukesh Banka refused to co-operate with the department by not responding to the summons cannot prejudice the assessee and simultaneously, the assessing officer cannot proceed on the basis of the statement recorded from Mukesh Banka, which remains uncontroverted.

7. There are two ways by which the department can resolve the issue. Firstly, by issuing fresh summons to Mukesh Banka and fixing a fresh date for cross-examination or the second methodology that can be adopted is to ignore the statements recorded by Mukesh Banka by affording a fresh opportunity to the assessee by way of personal hearing through video conferencing or in person and thereafter, consider the materials placed by the assessee and proceed to take a decision in accordance with law. Therefore, by not providing an opportunity to cross-examine Mukesh Banka, the authority is precluded from relying upon the statement recorded from the said person.

8. For the above reasons, we are inclined to interfere with the order impugned in the writ petition dated 24th May, 2023.

9. Accordingly, the appeal is allowed and the application (I.A. No. CAN 1 of 2023) is disposed of. The order passed in the writ petition is set aside and consequently, the assessment order dated $24^{th}$ May, 2023 is set aside and the matter stands remanded back to the assessing officer for fresh consideration. The assessing officer is directed to issue fresh summons to Mukesh Banka and ensure his presence and permit the appellant to cross-examine the said person and thereafter, afford an opportunity to the assessee to submit additional reply and take a final decision in the matter in accordance with law. In the event, Mukesh Banka refuses to cooperate with the department by not responding to the summons, then the department cannot rely upon the statements recorded from Mukesh Banka and a fresh decision be taken by the assessing officer after affording an opportunity of fresh hearing to the appellant and take a decision based on the materials available on record except the statements of Mukesh Banka.

10. No costs.

11. 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)**
**CHIEF JUSTICE**

I agree.

**(SUPRATIM BHATTACHARYA, J.)**

Pallab/KS AR(Ct.)