IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 6828 OF 2024

Udaan Builders & Developers,
400, 4th Floor, Arenja Corner,
Plot No. 71, Sector – 17, Vashi,
Navi Mumbai – 400 703, Maharashtra. ...Petitioner

Versus

1. Assessment Unit,
   Income Tax Department,
   Tower No. 6, 4th Floor, I.T. Office,
   Vashi Railway Station Building,
   Navi Mumbai – 400 703.

2. Union of India,
   Through its Secretary,
   Ministry of Law and Justice,
   Department of Legal Affairs, 2nd Floor,
   Aaykar Bhavan, M. K. Road,
   New Marine Lines, Mumbai – 400 020. ...Respondents

Ms. Ritika Agarwal a/w Mr. Anuj Deshmukh i/b Acelegal for the Petitioner.
Mr. Arjun Gupta for the Revenue-Respondent.

CORAM : G. S. KULKARNI &
ADVAIT M. SETHNA, JJ.

DATE : 11 DECEMBER 2024

P.C. :

1. **Rule**. Rule made returnable forthwith. Respondents waive service. By consent of the parties, heard finally.

2. The Petitioner is a partnership firm engaged in the business of builders and developers undertaking construction of residential complexes. The Petitioner is in the process of developing a project named "Udaan Aria" situated at Karjat, District-Raigad, State of Maharashtra. The assessment year in question is 2022-2023.

3. The challenge in the Petition is to the impugned assessment order dated 28 March 2024 passed by the Assessment Unit under Section 143(3) read with 144B of the Income Tax Act, 1961 (for short "**the IT Act**").

4. It is the Petitioner's case that it follows the project completion method in maintaining its accounts. The Petitioner filed its return of income under Section 139(1) of the IT Act on 23 December 2022 for the assessment year in question, declaring 'Nil' total income. It is contended by the Petitioner that the Architect's certificate clearly shows that as on 31 March 2022 significant work had remained to be completed for the buildings in relation to the said project, hence the project was not complete.

5. Respondent No. 1-Assessment Unit, Income Tax Department, Navi Mumbai issued a notice dated 1 June 2023 to the Petitioner under Section 143(2) of the IT Act, selecting the Petitioner's return of income, for regular assessment. It was followed by notices dated 28 June 2023, 10 October 2023 and 28 February 2024, the copies of which are placed on record. The Petitioner complied with such notices by submitting its replies dated 25 October 2023 and 16 January 2024, whereunder all the necessary details were furnished to the Assessment Unit. The Petitioner also pointed out to the Assessment Unit that the Petitioner is following the project completion method of accounting, in relation to the said project, which was in progress and or partly completed.

6. On 14 March 2024, a fresh notice was issued to the Petitioner to furnish comprehensive details on the ground that the notice dated 1 June 2023 was not responded by the Petitioner. The Petitioner was called upon to show cause as to why the Petitioner had not responded to the earlier notices on the proposed variation. The Petitioner was to submit a reply to the said notice on or before 25 March 2024.

7. Again a fresh notice dated 23 March 2024 was issued to the Petitioner *inter alia* calling upon the Petitioner to furnish details which were stated to have been repeatedly called for from the Petitioner during the course of assessment and provide the confirmation either from the Petitioner's office or the parties listed in the show cause notice, as early as possible on or before 25 March 2024, failing which it was informed that the assessment will be completed by treating the entire amount of unsecured loan and advances received from the customers amounting to Rs. 31,16,61,202/- as unexplained, to be added to the total income. The details of the parties were also enclosed to the said show cause notice.

8. The Petitioner contends that it uploaded its reply on 27 March 2024, wherein the Petitioner stated that all the details of unsecured loans, advances received from the customers etc. were furnished. On the aforesaid backdrop immediately on the next day, i.e., on 28 March 2024, Respondent No. 1-Assessment Unit proceeded to pass the impugned assessment order under Section 143(3) read with 144B of the IT Act *inter alia* making the additions of Rs. 1,45,74,655/- on account of project income (difference between advance received and closing stock value) and Rs. 31,25,90,040/- comprising of unsecured loans of Rs. 3,63,45,876/-, advance from unconfirmed customers of Rs. 47,34,744/- and advances received against flats of Rs. 27,05,79,582/-. Such assessment order is assailed in the present Petition.

9. It is urged on behalf of the Petitioner that Respondent No. 1 has grossly erred and/or acted arbitrarily in making the second addition of Rs. 31,25,90,040/- as it duplicates not only the booking advance of Rs. 27,53,15,326/-, which stands considered in the first addition but also includes the sums received in the earlier years. To support such contention, it is submitted that all materials were already submitted with Respondent No. 1, as set out in paragraph no. 14 of the Petition, in a tabular form, stating year-wise amounts received based on the balance-sheets of each year.

10. The next contention as urged on behalf of the Petitioner is that the impugned order is in breach of the principles of natural justice and this effect the mandatory statutory provisions, which were required to be adhered by the Revenue in passing an order under Section 144B of the IT Act. On behalf of the Petitioner, it is also submitted that the impugned assessment order clearly shows non-application of mind, to the vital materials, which were already on record of the Assessment Unit.

11. Two reply-affidavits on behalf of Respondent No. 1 opposing the Petition are placed on record. The first reply-affidavit is of Shri. Bhupendra Kumar Roy, Income Tax Officer-28(3)(1), Mumbai dated 2 August 2024. The second additional reply-affidavit dated 30 September 2024, also of the same officer. The primary contention as urged on behalf of the Respondents in the reply-affidavits is that the Petitioner is not entitled for the reliefs as prayed for, as the Petitioner has an alternate remedy of an appeal available under the IT Act, to assail its impugned order, wherein all such contentions can be raised. On merits, it is contended that the assessment order is justified, legal and proper. However what is significant, is that in the additional reply-affidavit, there is an admission of the Petitioner's case to the effect that two separate additions are recorded in the impugned assessment order and the amounts of income are seen duplicated, firstly, as business income to the extent of Rs. 27,53,15,326/- after deduction of the expenses resulting in a profit of Rs. 1,45,74,655/-, being added to the total income (first addition), and secondly there is another addition of unexplained loan liability which includes an amount of Rs. 27,05,79,582/-, hence, such amount being included in the amount of Rs. 27,53,15,326/-. The statement made in the additional reply-affidavit is required to be noted, which reads thus, "*A. There are two separate additions recorded in the assessment order and the amounts of income have been prima facie duplicated, first as business income to the extent of Rs. 27,53,15,326/- which after deduction of expenses, results in a profit of Rs. 1,45,74,655/- added to the total income (first addition), and secondly there is another addition of unexplained loan liability which includes an amount of Rs. 27,05,79,582/- and this amount prima facie appears to be included in the amount of Rs. 27,53,15,326/- above. Though this approach is prima facie incorrect in law, it is not always the case that the assessment order is sacrosanct. The assessment order if sacrosanct, there would be no reason to have any appellate mechanism. The additions/duplication of income form part of the merits of the case and the duplication, if any, has occurred only after properly following the decision making process. It is submitted that once there is no infirmity in the decision making process, the assessment order may be appealed and the Petitioner has an appropriate remedy in law.*

B. It is secondly submitted that the additions, being separately recorded, this is a case where the two additions are severable from one and the other, and without prejudice one of the additions may be upheld and the other discarded pursuant to the examination/analysis by the ld. CIT(A). However, this Court ought not to interfere on the merits of the case suffice it to say that if the decision making process is without blemish, this Hon'ble Court ought not to interfere on the merits of the case. The decision making process rule as laid down by our Hon'ble Constitutional Courts applies squarely to the instant case, which is that a writ petition is maintainable only if there is an error in the decision making process and is not maintainable even if the error occurs on the merits of the case. It is submitted that there is no error in the decision making process which has led to the passing of the assessment order. Nor is there any averment in the writ petition making out any such error. The error of duplication if at all an error, only pertains to the merits of the case. Thus, the faceless assessing officer has committed no constitutional infirmity while arriving at the conclusion contained in the assessment order."

12. Having made the aforesaid statements in the reply-affidavit, Mr. Gupta states that the appropriate remedy for rectification of such mistake is that the Petitioner needs to take recourse to the provisions of Section 154 of the IT Act and no relief ought to be granted to the Petitioner in the present proceedings. It is hence submitted that the Petitioner be relegated to avail the statutory remedies that may be available to the Petitioner.

13. We have heard learned counsel for the Petitioner. We have perused the record.

14. At the outset, it may be observed that it is clearly pointed out on behalf of the Respondents in the reply-affidavit that there is a gross infirmity in the assessment order in terms of what is stated in paragraph 3A. If the assessment order to such extent has infirmity or is defective, the same cannot be considered to be legal and valid, so as to bind the Petitioner.

15. This apart, we also find that the mandatory procedure as contemplated under Section 144B of the IT Act in the present case has not been followed, which can be clearly inferred from the facts set out in details, hereinabove. It also appears that a show cause notice was issued to the Petitioner on 14 March 2024 calling upon the Petitioner to furnish the detailed reply by 25 March 2024. However, the Petitioner although filed its detailed reply on 27 March 2024, on the very next day, i.e., on 28 March 2024, the assessment order came to be passed and without the Petitioner be heard. Hence, an order prejudicial to interest of the Petitioner was being passed without an opportunity of a hearing being granted. We therefore find substance in the submission as urged on behalf of the Petitioner that mandatory procedure under Section 144B of the IT Act being followed, the impugned order would be rendered illegal. Thus, there is a substance in the contention of Petitioner on both the counts, i.e., breach of natural justice and also non-application of mind on the part of Respondent No. 1 in passing the impugned assessment order. Hence, the impugned assessment order would deserve interference. Hence we do not accept the plea as urged by Mr. Gupta that the Petitioner be relegated to the alternate remedies.

16. For the aforesaid reasons, we are inclined to set aside the impugned assessment order and restore the proceedings to the Assessing Officer for fresh assessment order to be passed in accordance with law.

17. We accordingly dispose of this Petition by the following order :

ORDER

a. The impugned assessment order dated 28 March 2024 for Assessment Year 2022-2023 is hereby quashed and set aside.

b. The proceedings stand restored to Respondent No. 1 for fresh assessment order to be passed in accordance with law.

c. Such order to be passed within a period of two months from the day a copy of this order is made available.

d. All contentions of the parties in that regard are expressly kept open.

e. We also direct that henceforth the Petitioner shall be diligent in responding to all the notices, which may be issued by the Respondents and in the event such notices are not promptly responded by the Petitioner and/or the tax obligations are not appropriately complied with, an adverse inference may be drawn against the Petitioner.

18. Rule is made absolute in the aforesaid terms. No costs.

[ADVAIT M. SETHNA, J.] [G. S. KULKARNI, J.]