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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.2485 OF 2024

1] Shandilya Properties LLP]
having its office at Plot No.10A]
Shandilya Villa, Khan Abdul Guffar]
Khan Road, Worli, Mumbai-400 018].....Petitioner

Versus

1] Income-tax Officer – 22(3)(1)]
Room No.307, Piramal Chambers,]
Lalbaug, Mumbai – 400012]
]]
2] Pr. Commissioner of Income-tax-20]
Room No.418, Piramal Chambers,]
Lalbaug, Mumbai – 400012.]
]]
3] National Faceless Assessment Centre]
Income-tax Department]
New Delhi]
]]
4] Union of India]
through Ministry of Finance,]
North Block,]
New Delhi – 110 001.]...Respondents

**Mr. J D Mistri, Senior Advocate, a/w Mr. B V Jhaveri and Ms
Bhargavi Raval for the Petitioner.**
Mr Akhileshwar Sharma, for the Respondents.

CORAM M.S. Sonak &
 Jitendra Jain, JJ.
Reserved on : 14 January 2025
Pronounced on : 15 January 2025

JUDGMENT : (*Per M. S. Sonak, J.*)

1. Heard learned counsel for the parties.
2. The Petitioner seeks the following substantive reliefs in terms of prayer clauses (a) to (c):-

(a) that this Hon'ble Court may be pleased to issue a writ of certiorari or a writ in the nature of certiorari or any other appropriate writ, order or direction under Article 226 of the Constitution of India calling for the records of the case leading to the issue of the Show cause Notice dated 21st February, 2024 (Ex. 'F') and the assessment order u/s. 143(3) r.w.s.144B of the Act, dated 21st March, 2024 along with the Notice of Demand u/s. 156 of the Act dated 21st March, 2024 (Ex. 'J') and after going through the same and examining the question of legality thereof to quash, cancel and set aside the impugned assessment order u/s. 143(3) r.w.s. 144B of the Act, dated 21st March, 2024 along with the Notice of Demand u/s. 156 of the Act dated 21st March, 2024 (Ex. 'J');

(b) that this Hon'ble Court may be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction under Article 226 of the Constitution of India ordering and directing the Respondent No.1 to withdraw and cancel the impugned Show cause Notice dated 21st February, 2024 (Ex. 'F') and the assessment order u/s. 143(3) r.w.s.144B of the Act, dated 21st March, 2024 along with the Notice of Demand u/s 156 of the Act dated 21st March, 2024 (Ex. 'J');

(c) that this Hon'ble Court may be pleased to issue a writ of prohibition or a writ in the nature of prohibition or any other appropriate writ, order or direction under Article 226 of the Constitution of India ordering and directing the Respondent No.3, not to proceed with or in pursuance of or in furtherance of the impugned assessment order u/s. 143(3) r.w.s.144B of the Act, dated 21st March, 2024 along with the Notice of Demand u/s. 156 of the Act dated 21st March, 2024 (Ex. 'J').

3. The main relief concerns the quashing of the assessment order dated 21 March 2024, issued under Section 143(3) read with Section 144B of the Income Tax Act, 1961 (the “IT Act”). The show cause notice dated 21 February 2024 has merged with this assessment order, and the demand notice is a consequence of it.

4. As against the impugned assessment order, the Petitioner has a remedy of a statutory appeal. Still, in paragraphs 19 and 20 of the Petition, the Petitioner has made the following statements:-

“19. The Petitioner says and submits that it has no other alternate, adequate or efficacious remedy against the said illegal assessment order u/s. 143(3) r.w.s.144B of the Act, dated 21st March, 2024 along with the Notice of Demand u/s. 156 of the Act dated 21st March, 2024 (Ex. J’).

20. The Petitioner says that there is no forum but this Hon’ble Court before which it can seek relief from the said illegal assessment order u/s. 143(3) r.w.s.144B of the Act, dated 21st March 2024 along with the Notice of Demand u/s. 156 of the Act dated 21st March, 2024 (Ex. J’). The Petitioner says that the remedy given by the writs, orders or directions prayed for in this Petition will be complete.”

5. Mr. Mistri, the learned Senior Advocate for the Petitioner, submitted that the alternate remedy, in the peculiar facts of the present case, is not efficacious. Therefore, the Petitioner should not be relegated to avail of such alternate remedy. Mr. Mistri submitted that the impugned assessment order seeks to bring to tax the income already declared and accepted in the assessment for the Assessment Year 2023-24. He submitted that any attempt to assess and tax income already assessed and taxed in the Assessment Year 2023-24 is an exercise without jurisdiction. In such circumstances, he submitted that the bar of alternate remedy cannot apply.

6. Mr. Mistri submitted that there is ample material on record which establishes that the Petitioner has been following the Project Completion Method of Accounting for the last several years. He submitted that for the Assessment Years 2015-16, 2018-19 and 2023-24, specific queries were raised about why the Petitioner was not adopting the Percentage of Completion Method. After considering the Petitioner's response, the assessments were completed for the said years by accepting the Petitioner's Project Completion Method of Accounting. He submitted that such assessments have attained finality.

7. Mr. Mistri submitted that, given the above position, it was not open to the Assessing Officer to assess the Petitioner on the Percentage of Completion Method for the assessment year to which this Petition relates. He submitted that such an exercise is contrary to the statute and several decisions, including but not restricted to **(1) Commissioner of Income-tax – 15 Vs Aditya Builders¹** **(2) Commissioner of Income-tax Vs Bilahari Investment (P) Ltd.²** and **(3) Principal Commissioner of Income Tax-8 Vs M/s. Quest Investment Advisors Pvt. Ltd.³**

8. Mr. Mistri submitted that since the impugned assessment order and the demands based upon the same are without jurisdiction, contrary to statute and in defiance of binding judicial precedents, this Court should not relegate the Petitioner to avail of the alternate remedy of appeal. He submitted that the Appellate Authority may insist upon a pre-

¹ [2017] 79 taxmann.com 394 (Bombay)

² [2008] 168 Taxman 95 (SC)

³ Income Tax Appeal No.280 of 2016 decided on 28 June 2018

deposit by relying on certain CBDT circulars. He submits that since the amounts sought to be now taxed are already assessed and even the tax thereon is paid, such a condition would be onerous, thereby rendering the remedy much less efficacious.

9. For all the above reasons, Mr. Mistry submitted that we should issue Rule in this Petition and grant interim relief.

10. Mr. Sharma, the learned counsel for the Respondents, contested Mr. Mistri's contentions. He referred to the Affidavit filed on behalf of the Respondents and submitted that there was no case to depart from the usual practice of exhaustion of alternate remedies.

11. The rival contentions now fall for our determination.

12. Admittedly, as against the impugned order, the Petitioner has an alternate remedy under the IT Act of instituting an Appeal before the Commissioner (Appeals).

13. The IT Act does not make any provision for pre-deposit. If the Appellate Authority occasionally insists on some deposit for the grant of interim reliefs, that by itself does not render the appellate remedy any less efficacious. Besides, it is always open to the Petitioner to make out a case for a grant of interim relief without any condition for deposit.

14. The contentions raised by Mr. Mistri can as well be raised before the Appellate Authority. In fact, it is only appropriate for such contentions to be raised and considered by the Appellate Authority. Otherwise, practically in every matter, based on the Petitioner's assessment that he has an

open and shut case, the Petitioner will insist on bypassing the statutory /ordinary remedies and invoking the extraordinary remedy under Articles 226 and 227 of the Constitution. This court, then, is routinely called upon to exercise appellate jurisdiction in such matters.

15. Besides, in this case, we do not appreciate the pleadings in paragraphs 19 and 20 of the Petition transcribed by us above, where the Petitioner boldly states that it has no alternate or efficacious remedy or that there is no forum but this Court to redress the Petitioner's grievances. At best, the Petitioner should have acknowledged that it has an alternate remedy and attempted to bring its case within the well-settled exceptions by proper pleadings. However, a bald statement that the Petitioner has no other alternate, adequate or efficacious remedy or that there is no forum but this Court to redress the Petitioner's grievances is improper. All kinds of arguments are raised based on such pleadings, taking the opposite party by surprise.

16. The remedy of appeal in this case is also adequate, apart from being alternate and efficacious. All the reliefs the Petitioner seeks can also be availed by resorting to the alternate remedy. The contentions raised by Mr. Mistri will no doubt require investigation. However, the statutory remedies cannot be so lightly bypassed by simply portraying the case as being open and shut and then alleging that the entire exercise is wholly without jurisdiction.

17. As it is, the pressure on the docket of this Court is extreme. Though this is certainly not a ground for not entertaining Petitions where a case to entertain the same is

made out, we still think that the alternate statutory remedies cannot be allowed to be lightly bypassed by merely contending that there are some serious errors in the orders and then attempting to assert that every such error raises some jurisdictional issue.

18. In *Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai and others*⁴, the Hon'ble Supreme Court has held that alternative statutory remedies are not a constitutional bar to the High Court's jurisdiction but a self-imposed restriction. Further, the alternative remedy would not operate as a bar in at least three contingencies: (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is a violation of principles of natural justice; or (iii) where the order or the proceedings are wholly without jurisdiction, or the vires of an Act is challenged.

19. None of the parameters set out in *Whirlpool Corporation* (supra), are made out in this matter. The arguments raised may, at the first blush, appear formidable. But that is not the same as holding that the impugned assessment order is wholly without jurisdiction. There is no challenge to the constitutional validity of any provision. No arguments were advanced about any breach of principles of natural justice or fair play. All the arguments were on the merits or rather the de-merits of the assessment order, and based upon the same, it was contended that the impugned order is contrary to statutory provisions or binding precedents.

20. Here, the three contingencies do not apply. Therefore, there is no reason to bypass the alternative statutory remedies

⁴ (1998) 8 SCC 1

by simply contending that the impugned order is without jurisdiction. There is a distinction between a wrong order and an order without jurisdiction. At least in this case, we are not satisfied that the impugned order falls in the category of “wholly without jurisdiction”.

21. Applying binding precedents is also required by comparing the facts in the present case and the facts involved in the cited decisions. It is well known that even a slight difference in the facts can make a difference. At this stage, we do not wish to make any observations on the merits of the contentions raised by Mr Mistri or on the decisions he relies upon. However, we note that the decisions in *Aditya Builders* (supra) and *Quest Investment Advisors Pvt. Ltd.* (supra) were rendered in Appeals under Section 260A of the IT Act, where the lower appellate authorities had threadbare analysed all the factual aspects involved. The scope of an appeal under Section 260 A is also peculiar and distinct from a petition seeking judicial review.

22. If the grounds in the Petition are perused, then the Petitioner has alleged that neither the provisions of Section 43CB of the Act nor ICDS III & IV apply “*to the facts of the Petitioner as the business of the Petitioner is not that of construction contract or a contract for providing services, but the Petitioner is in the business of real estate development.*” The Petitioner has also raised some grounds regards the interpretation of the terms “construction contract”. The Petitioner has raised some grounds concerning the commencement of the development of Shandilya Villa Project and how, it was not mandatory for the Petitioner to follow the Percentage of Completion Method. All these matters are best

looked into by the Appellate Authorities under the IT Act in the first instance. No case is made out to completely short-circuit the established procedures.

23. As noted earlier, at this stage, we do not wish to make any observations on the grounds urged by Mr. Mistri or the grounds raised in the Petition. However, we are satisfied that all these grounds are best raised before the Appellate Authorities under the IT Act so that they are adequately adjudicated after adverting to the record. The Petitioner cannot convert this Court into an Appellate Forum, bypassing the appellate remedies provided under the IT Act.

24. Mr Sharma, the learned counsel for the Respondents, pointed out that there is no condition regarding pre-deposit for entertaining an appeal against the impugned order. Regarding depositing some amount as a condition for obtaining interim relief, it is always open to the Petitioner to make out a case for unconditional interim relief. These are not grounds to bypass the statutory alternate remedies. No Petitioner can bypass alternate remedies only to avoid compliance with pre-deposit requirements, if any or because the Petitioner apprehends that the Appellate Authorities would make orders for deposit of a portion of a disputed tax amount. This is ordinarily not a legitimate ground for not exhausting the statutory alternate remedies.

25. In **Oberoi Constructions Ltd Vs. The Union of India and others**⁵, this Court, has, upon an exhaustive survey of the precedents on the subject of exhaustion of alternate remedies,

⁵ Writ Petition(L) No.33260 of 2023 & connected matters decided on 11-11-2024

held that filing of Writ Petitions under Articles 226 and 227 of the Constitution should not be encouraged where the Petitioners have an alternate and efficacious statutory remedy available to them. By adopting the reasoning in the said decision and the precedents referred to therein, we see no reasonable ground to depart from the usual practice of exhaustion of alternate remedies and entertain this Petition.

26. Recently, in *The State of Maharashtra and Others V/s. Greatship (India) Limited*⁶, the Hon'ble Supreme Court, after referring to its earlier precedents on the subject, held that Article 226 is not meant to short-circuit or circumvent statutory procedures. It is only where statutory remedies are *entirely ill-suited to meet the demands of extraordinary situations, for instance, where the very vires of the statute is in question or where private or public wrongs are so inextricably mixed up, and the prevention of public injury and the vindication of public justice require it that recourse may be had to Article 226 of the Constitution. But even then, the Court must have good and sufficient reason to bypass the alternative remedy provided by statute. Surely, matters involving the revenue where statutory remedies are available are not such matters.*

27. The Court, after referring to its earlier precedent in *United Bank of India V/s. Satyawati Tondon and Others*⁷ observed that “we can also take judicial notice of the fact that the vast majority of the petitions under Article 226 of the Constitution are filed solely for the purpose of obtaining

⁶ 2022 LiveLaw (SC) 784

⁷ (2010) 8 SCC 110

interim orders and thereafter prolong the proceedings by one device or the other. The practice certainly needs to be strongly discouraged”.

28. In *Greatship (India) Limited* (supra), the Hon’ble Supreme Court did not approve the decision of the High Court to entertain the Writ Petition under Article 226 of the Constitution challenging the assessment order given the statutory alternate remedies available under the Maharashtra Value Added Tax 2002 and the Central Sales Tax Act, 1956. The Court held that the assessee showed no valid reasons to bypass the statutory remedy of appeal and that the Supreme Court has consistently taken the view that when an alternate remedy is available, judicial prudence demands that the courts refrain from exercising its jurisdiction under constitutional provisions.

29. For all the above reasons, we decline to entertain this Petition. However, we leave it open to the Petitioner to avail the alternate remedy of appeal by clarifying that we have not examined the rival contentions on merits. If the Petitioner does institute an appeal, the Appellate Authority must note that the Petition was filed on 10 April 2024 and has been pending in this Court to date.

30. The Writ Petition is dismissed with liberty as aforesaid. Interim orders, if any, are vacated. There shall be no order for costs. All concerned to act on an authenticated copy of this order.

(Jitendra Jain, J)

(M.S. Sonak, J)