

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 7972 OF 2013

M/s Jagati Publications Ltd.

..Petitioner

Vs.

The President,
Income Tax Appellate Tribunal
Through Registrar and Ors.

..Respondents

....
Mr. J.D. Mistri, Sr. Advocate a/w Mr. Atul K. Jasani, Advocate for
Petitioner.

Mr. A.J. Rana, Sr. Advocate a/w Mr. M.S. Bharadwaj and Mr. P.S.
Jetley, for Respondent No.1.

Mr. Girish Dave, Advocate a/w Mr. Suresh Kumar, for
Respondent Nos.2 and 3.

**CORAM : M.S. SANKLECHA AND
S.C. GUPTE, JJ**

DATED : 10th NOVEMBER 2014

ORAL ORDER: (Per M.S. SANKLECHA, J.)

Heard.

2 Rule.

3 This petition under Article 226 of the Constitution of
India challenges the order dated 05th March 2013 passed under
Section 255(3) of the Income Tax Act, 1961 (hereinafter
referred to as 'Act'). By the impugned order, the President of
Income Tax Appellate Tribunal ("Tribunal") has constituted a
special bench by making the following endorsement on the
order sheet placed before him.

"I constitute a special bench consisting of the following members.

- | | | |
|---|----------------|------|
| 1 | R.S.Sayad | A.M. |
| 2 | P.M. Jagtap | A.M. |
| 3 | M.V. Vasudevan | J.M. |

To hear and decide the entire appeal.

Sd/-5.3.13".

4 The bare facts necessary for consideration at this stage are as follows :-

The petitioner had filed its Return of Income for the assessment year 2008-2009 declaring a loss of Rs.19.91 crores. The Assessing Officer passed an assessment order under Section 143(3) of the Act determining the petitioner's income at Rs.272.65 crores. Being aggrieved, the petitioner carried the matter in appeal to the CIT(A). This appeal was dismissed by the CIT(A). Thereafter the petitioner filed a second appeal to the Tribunal. On 25 January 2012, a Division Bench of the Tribunal granted stay of the demand on the petitioner making a payment of Rs.12 crores. The appeal before the Tribunal was being adjourned from time to time. During the pendency of the appeal before the Division Bench of the Tribunal, the Central

Board of Direct Taxes (CBDT) by letter dated 15th November 2012 addressed to the President of the Tribunal sought the constitution of special bench of three or more members under Section. 255(3) of the Act for hearing the petitioner's appeal pending before the Division Bench of the Tribunal, in the interest of the revenue. The President of the Tribunal thereafter forwarded the above communication dated 15 November 2012 of the CBDT to the Vice President of the Tribunal at Hyderabad. On 27th November 2012, the Vice President of the Tribunal addressed a letter to the members of the Division Bench seized of the petitioner's appeal pointing out as under :-

“The special counsel, who was to be engaged by the Revenue in this matter, explained the facts in brief in support of Revenue's request for constitution of Special Bench in the case of M/s Jagathi Publications Pvt. Ltd. Bearing in mind the political sensitivity in this matter and also the tax implication, apart from the complexity of the issues, as stated in the letter dated 15th November 2012, I am of the view that you need to go through the file along with Shri. Saktijit Dey, Judicial Member and report to me as to whether it a fit case for constituting a Special Bench. After examining the file, if both of you are of the view that it requires hearing on this preliminary issue, the same may be posted on any convenient date and then the views of the Bench may be forwarded to the Hon'ble president to enable him to consider as to whether it is a fit case for constituting Special Bench in exercise of the powers vested under section 255(3) of the Income

Tax Act, 1961. This may be treated as urgent.”

Consequent to the above communication, the Division Bench of Tribunal, seized of the petitioner's appeal, heard the parties on the issue of constituting a Special Bench of the Tribunal to hear the petitioner's appeal.

5. The Tribunal by its order dated 19th December 2012 held that there was no need to constitute a Special Bench in view of complication of facts and law, (most appeals before the Tribunal involve complex issues), or on the ground on the ground that it has large revenue impact or that it would have an effect on proceeding before CBI. However, in view of political sensitivity, as a politician was involved, it concluded that the appeal may be heard before an appropriate bench outside the then State of Andhra Pradesh and so recommended to the President of the Tribunal. It must be pointed out that after having rejected the above contentions raised on behalf of the revenue in paragraph 18 of its order dated 19th December 2012, the Tribunal observed “In the circumstances any decision of the tribunal on the issues involved in the appeal one way or other may have wide spread ramification in similar matters

across the country” and finally the Tribunal recommended that the President of the Tribunal may constitute an appropriate bench outside the state of Andhra Pradesh.

6. Thereafter the Vice President of the Tribunal at Hyderabad addressed a communication dated 9th January 2013 to the President of the Tribunal informing him that he has gone through the decision of the Division Bench and on considering the complexity of issues involved, he is of the prima facie view that the appeal deserves to be referred to a Special Bench. Thereafter on 27th February 2013, the Assistant Registrar of the Tribunal put up an order sheet before the President along with all papers including the original appeal file relevant for the purpose of constitution of Special Bench under Section 255(3) of the Act. The President on the above basis made the endorsement reproduced herein above and constituted a Special Bench to hear the petitioner's appeal at Hyderabad by members who were not stationed in Hyderabad. This was in terms contrary to the suggestion in the order dated 19 December 2012, of the Division Bench at Hyderabad.

7. Prima facie looking at the manner in which the entire proceeding has been conducted for the purposes of the constitution of the Special Bench of the Tribunal appears to have been unfair to the petitioner. In the petitioner's appeal which was seized of by the Division Bench of the Tribunal at Hyderabad, the CBDT chooses not to file an application to the Division Bench to refer the appeal to the President for constitution of a Larger Bench of the Tribunal but adopts a back door method of approaching the President of the Tribunal to constitute the Special Bench and that too in the interest of the Revenue. It is urged on behalf of the respondent that the President has the power in terms of Section 255(3) of the Act to constitute a Special Bench and the exercise of that power by the President cannot be questioned. Undoubtedly the President does have the power to constitute a Special Bench but at what point and how is this power to be exercised is a debatable question. Prima facie this power cannot be exercised, when a Division Bench is seized of the appeal and the Revenue has been seeking time before it. If this power can be exercised at any time then what would stop the President from exercising such power even in respect of appeals finally heard and where

orders are awaited. It is submitted by the respondent that Section 255(3) of the Act does not put any such limitation and/or condition for exercise of the power by the President. Yes but only because it is expected that such power given to the head of the Tribunal will be exercised to aid the judicial process. It is expected and/or taken as a given that the President of quasi judicial body such as the Tribunal would act with fairness. In fact, fairness is the stock in trade of authorities deciding disputes between the parties. We also find this practice of the President entertaining and acting upon letters of CBDT and the Vice President entertaining the Counsel (likely to appear for Revenue) *ex parte* in respect of an appeal already seized of by a Division Bench of the Tribunal to be wanting in propriety. This application could well have been made to the Division Bench which could then make a reference to the President for constitution of the Special Bench. In any case, even if the CBDT, who is a party to the proceedings were to approach the Vice President in respect of a pending proceeding, the same should have been done only after notice to the other side. Similarly, in case the President wanted to act upon the letter dated 15 November 2012 of the CBDT the least he could

have done was to call for a response from the other side in view of the appeal being seized of by the Division Bench. This would be the most elementary requirement in a country wedded to the Rule of Law. It was contended by Mr. Rana, learned Senior Counsel for the President of the Tribunal that a litigant cannot choose its forum and the petitioner should appear before the Special Bench and put forth its case. None can dispute the submission that a litigant cannot choose its forum and yet it is forgotten that the CBDT, i.e. the Income Tax department is a party to the litigation before the Division Bench of the Tribunal and it chooses to have an appeal shifted to a Special Bench of the Tribunal not in the interest of justice but in the interest of revenue. Thereafter, it was next submitted by Mr. Rana, learned Senior Counsel appearing for the President that the order constituting the Special Bench is an administrative order and there is no requirement for giving reasons. Thus the Court should not interfere. An administrative order which requires application of law should indicate in brief that mind has been applied to the law. An administrative order must also be passed to promote the Rule of Law and cannot be on a mere whim and fancy as it can be a cause for civil

consequences/prejudice to the parties. This is more particularly so in view of the Division Bench being seized of the appeal and the contest between the parties with regard to the constitution of the Special Bench. The President in these facts is prima facie obliged to give some reasons indicating why he is constituting the Special Bench of Tribunal. The respondents submit that the Division Bench of the Tribunal had heard the petitioner but what they failed to notice is that decision is taken by the President of the Tribunal who has considered/heard only one side i.e. the letter dated 15 November 2012 of CBDT. Moreover, the Division Bench who considered/heard both sides does not decide the issue. It is axiomatic in law that one who hears must decide. It was next submitted by Mr. Rana, that when an administrative order is passed accepting suggestions made then no separate reason is required to be given in support of the order. However, in the present fact, even if one accepts the submission of Mr. Rana one cannot lose sight of the fact that the recommendations given by the Division Bench of the Tribunal are not very clear as after holding that Special Bench is not necessary, records the constitution of an appropriate bench outside the State of Andhra Pradesh. The words appropriate

bench according to Mr.Rana is a Special Bench. Moreover, the recommendations made by the Vice President are not in consonance with the recommendations made by the Division Bench to the extent that the Vice President in his communication to the President indicates that the matter involves complex questions and therefore a Special Bench needs to be constituted, while the Division Bench has specifically negated the constitution of Special Bench on account of complexity of issues. However, all these are matters which would require consideration at the stage of final hearing. In the meantime, as the petitioner has made out a strong prima facie case, interim relief in terms of prayer clause 'E' must follow.

6) At the request of the parties the final hearing is expedited. The respondents waive service. At the request and with the consent of the parties the petition to be placed on board for directions on 08th January 2015 before the Bench to which this petition is assigned. At that time a date for final hearing could be considered by the Bench hearing such matters.

[S.C. GUPTE, J.]

[M.S. SANKLECHA, J.]