IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION (L) NO. 12546 OF 2022

Crystal Pride Developers
A Partnership Firm registered under the Indian Partnership Act, 1932 and having its office at 403-A, Dalamal Chambers, 29 New Marine Lines, Mumbai – 400 020
PAN No.: AAGFCT5051R

… Petitioner

Versus

1. The Assistant Commissioner of Income Tax
Circle - 22(1), Mumbai R. No.322,
3rd floor, Piramal Chamber, Lal Baug,
Parel, Mumbai – 400 012.

2. The National Faceless Assessment Centre,
E Ramp. Jawaharlal Nehru Stadium,
Delhi 110 003.

3. The Union of India,
Through the Secretary, Department of Revenue
Ministry of Revenue Ministry of Finance North Block,
New Delhi – 110 001.

… Respondents

Mr. Rahul Hakani a/w Mr. Akash Singh, for the Petitioner.

Mr. Akhileshwar Sharma, for the Respondents-State.

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

JUDGMENT RESERVED ON : 4 DECEMBER 2024

JUDGMENT PRONOUNCED ON : 27 FEBRUARY 2025

JUDGMENT (Per Advait M. Sethna, J.):

1. Rule, made returnable forthwith. Respondents waive service. Heard finally with the consent of the parties.

A. Issue Before The Court:-

2. The pivotal issue for consideration is whether the assessment order dated 29 March 2022 ("***impugned order***" for short) read with the notice under Section 148 of the Income Tax Act, 1961 ("***IT Act***" for short) dated 27 March 2021 ("***impugned notice***" for short), reopening the assessment of the petitioner under Section 147 read with Section 144B of the IT Act for the Assessment Year 2014-2015 ("***A.Y. 2014-15***" for short), are illegal, without jurisdiction, non-est as urged by the petitioner.

3. The substantive prayers in the petition read thus:-

> "(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, calling for the records of the Petitioner's case and after going into the legality and propriety thereof, to quash and set aside the said (i) Notice dated 27th March, 2021 u/s 148 for A.Y. 2014-15 (Exh. A) and (ii) Assessment Order u/s 147 r.w. 143(3) dated 29th March, 2022 being (Exh. "B") and after examining the legality and validity thereof to quash and set aside the same;
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> (b) This Hon'ble Court be pleased to issue a Writ of Mandamus or a Writ in the nature of Mandamus or any other appropriate Writ, order or direction, directing the Respondents, its servants, subordinates, agents and successors in office;
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> (i) To forthwith withdraw and/or cancel and/or quash the (i) Notice dated 27th March, 2021 u/s 148 for A.Y. 2014-15 (Exh. A) and (ii) Assessment Order u/s 147 r.w. 143(3) dated 29th March, 2022 being (Exh. "B");

(ii) To forthwith forbear from taking any steps whatsoever pursuant to or in implementation of the (i) Notice dated 27th March, 2021 u/s 148 for A.Y. 2014-15 (Exh. A) and (ii) Assessment order u/s 147 r.w. 143(3) dated 29th March, 2022 being (Exh. "B")."

B. Factual Matrix:-

4. The petitioner is a registered partnership firm engaged in the business of real estate development, having partners in the name of Mr. Mukesh Doshi and Mrs. Harsha Doshi carrying on business of builders and developers of immovable property. During the assessment year in question, i.e., A.Y. 2014-15. The assessee was carrying on construction of residential project in Oshiwara with other two co-owners. By a supplementary partnership deed dated 1 April 2010, it was mutually agreed between the partners that no partner shall be charged interest on withdrawal by any other partner.

5. The original return of income for the relevant assessment year being A.Y. 2014-15 was filed on 27 November 2014, declaring loss of Rs. 5,53,822/-. The return was duly acknowledged by the respondent. The petitioner also furnished copy of its audited accounts along with the tax audit report filed under section 144B of IT Act, both dated 1 September 2014. The Assessing officer respondent no. 1 issued a notice to the petitioner dated 10 May 2016 under section 142 (1) of the IT Act seeking details/documents qua the return of the petitioner. The petitioner filed its reply dated 24 May 2016 to such notice, furnishing the information as sought by respondent no. 1.

6. Thereafter, Respondent no.1 proceeded to issue a final show cause notice dated 13 December 2016 under section 142(1) of the IT Act, *inter alia* stating that the petitioner had taken loans of Rs. 105,77,68,368/- (Rs. 105.77 crores approx.) and given loan of Rs. 75,64,24,189/- (Rs. 75.64 approx.) calling upon the petitioner to show cause as to why the interest of Rs. 9,07,70,902/- (Rs 9.07 crores approx.) on Rs. 75.64 crores at 12% should not be charged and added to the total income of the petitioner. In response to the said notice dated 13 December 2016, the petitioner filed a letter dated 19 December 2016. The petitioner clarified that the sum of Rs. 75.64 crores (Supra) was the debit balance of one of his partners, Mr. Mukesh Doshi. It was further submitted that payment was made to partner from interest free loans received by the petitioners. The petitioner also set out the details of loan confirmation of all parties from whom the interest free loan were received by the petitioner. Detailed document/account in support of such material was also enclosed by the petitioner to the said letter dated 19 December 2016. This was followed by another letter of the petitioner where the petitioner clarified that out of loans of Rs. 105.77 crores (Supra), unsecured interest free loans were to the extent of Rs. 89.60 crores and secured interest-bearing loans of Rs. 16,17,68,368 (Rs.16.17 crores approx.) It was also pointed out that there were no fresh withdrawals by the partners during the year instead capital was introduced by the partner of the firm during the said A.Y. 2014-15. The petitioner clarified that drawings by one of the partners Mr. Mukesh Doshi is out of interest-free funds available with the petitioner and not the interest-bearing funds.

7. Further to the above the respondent no. 1 issued a demand notice dated 29 June 2016 under section 156 of the IT Act to the petitioner for the A.Y. 2014-15 by which the petitioner's income was assessed as NIL. The respondent no. 1 proceeded to then issue an impugned notice dated 27 March 2021 under section 148 of IT Act for A.Y. 2014-15. It appears that the said notice was issued beyond period of 4 years from the relevant assessment year being A.Y. 2014-15. In response to such notice under section 148 of IT Act the petitioner filed its return of income dated 26 April 2021.

8. The respondent no. 1 then issued a notice to the petitioner dated 9 December 2021 under section 143(2) read with 147 of the IT Act for the A.Y. 2014-15 recording reasons for reopening of the assessment, calling upon the petitioner to respond to such notice by 24 December 2021, according to which the income escaping tax was stated to be Rs.7,64,17,217 (Rs. 7.67 approx.).

9. The respondent no. 2, thereafter issued a notice under section 142(1) of the IT Act dated 24 December 2021, calling upon the petitioner to submit accounts and documents on or before 30 December 2021. As the petitioner was unable to adhere to the above timeline of 30 December 2021 to submit the documents as per notice dated 24 December 2021 (Supra) the petitioner addressed a letter dated 12 January 2022 to the respondent no. 1 requesting for a copy of the recorded reasons. Pursuant to such response the respondent no. 2 issued notice dated 2 February 2022 under section 142(1) of the IT Act supplying copy of the recorded

reasons inter-alia suggesting that interest debited to work-in-process (WIP) of Rs. 1,19,91,000/-, had also escaped assessment.

10. The petitioner filed detailed objection to such reopening of the petitioner's assessment for the A.Y. 2014-15 by the respondents by a letter dated 18 February 2022, annexing several documents, partnership deed, supplementary partnership deed, audited reports, audited balance sheets, notice issued by the respondents. Pursuant thereto, the respondent no. 2 without passing separate order disposing such objection by the petitioner on reopening of the assessment of the petitioner for the A.Y. 2014-15, issued a draft assessment order dated 24 March 2022 under section 147 read with 144B of the IT Act confirming that the income of Rs. 7.64 crores (Supra) had escaped assessment and liable to be brought to tax as income from other sources.

11. The petitioner filed its objections to the draft assessment order dated 28 March 2022, along with the explanation, requesting the respondents for a personal hearing to be given before passing the final assessment order.

C. Rival Contentions:-

The case of the Petitioner :

12. Mr. Hakani learned counsel for the petitioner would assail the impugned notice dated 27 March 2021 issued under Section 148 of the IT Act read with the impugned assessment order dated 29 March 2022 premised on the following substantial grounds; (a) Notice issued by the respondent no. 1 under

Section 148 of the IT Act is bad in law as it is beyond the mandatory period of four years as provided under first proviso to Section 147 of the IT Act for the reason that there was no failure on the part of the petitioner to truly and fully disclose the material facts; (b) Reopening of the petitioner for the A.Y. 2014-15 in the facts of the present case tantamounts to change of opinion of the assessing officer, which is legally impermissible to reopen the assessment; (c) Reopening of assessment for the A.Y. 2014-15 in the present case is based on an internal audit which is contrary to law. Moreover, the objections to reopening by the petitioner are neither disposed off by a separate order nor done so in the same impugned assessment order dated 29 March 2022.

13. Mr. Hakani would next submit that the reopening of the petitioner's assessment for A.Y. 2014-15 is illegal and without jurisdiction inasmuch as it is hit by the first proviso to Section 147 of the IT Act, being reopened after the stipulated period of four years from the relevant A.Y. 2014-15. Further such reopening of the petitioner's assessment by notice dated 27 March 2021 was based on internal audit without disposing the petitioner's objection raised by a letter dated 18 February 2022. Thus, according to Mr. Hakani, the fact that the objections to reopening of the petitioner were not disposed of separately, nor in the impugned assessment order, would run contrary to the decision of the Supreme Court in the case of ***GKN Driveshafts (India) Ltd v. Income Tax Officer .***[1]

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1 2003 1 SCC 72

14. Mr. Hakani on certain relevant facts would submit that the petitioner received copy of the recorded reasons from the jurisdictional assessing officer vide notice dated 9 December 2021 under section 143(3) read with section 147 of the IT Act, after about nine months from the issuance of impugned notice dated 27 March 2021 under section 148 of the IT Act, requiring the petitioner to reply to such notice, on or before 24 December 2021. On such date, the petitioner received another notice under Section 142(1) of the IT Act from Respondent No. 2 without waiting for the petitioner to file its objections to the reopening of petitioner's assessment, by the respondent. The petitioner thereby once again asked for a copy of the recorded reasons vide reply dated 12 January 2022 from respondent No. 1 which was provided to the petitioner on 2 February 2022. On receipt of the same the petitioner have the earliest opportunity filed its objection on 18 February 2022. However, no notice was issued by the respondent No. 2 calling for any details and or giving hearing to the petitioner on its objections to the reopening of its assessments. The Respondent No. 2 instead, proceeded to issue the draft assessment order dated 24 March 2022. In response to the same, the petitioner filed its reply within four days i.e. 28 March 2022, submitting that the reassessment proceedings initiated under Section 147 of the IT Act were without jurisdiction, being initiated beyond the period of four years and also contrary to the decision of the Supreme Court in ***GKN Driveshafts*** (Supra). Despite such position being specifically pointed out by the petitioner to the respondents, Respondent No.2 did not pass a separate order disposing of the petitioner's objection dated 18 February 2022 filed along with relevant annexures. Such objections were never dealt with in the impugned

assessment order dated 29 March 2022, much less not even adjudicated and/or disposed of.

15. Mr. Hakani would also refer to the decision of this Court in the case of *KSS Petron Private Limited V/s The Assistant Commissioner of Income Tax Circle 10(2)*[2]. This was in support of his submission to the effect that non disposal of the objections of the petitioner by the assessing officer is a jurisdictional issue, which goes to the root of the matter as held by the Supreme Court in *GKN Driveshaft* (Supra). A failure on the part of the respondent to act in such manner vitiates the impugned order rendering it illegal.

16. Mr. Hakani would point out that the notice dated 10 May 2016 issued under Section 142(1) of the IT Act seeking various details from the petitioners was responded to by the petitioner vide letter dated 24 May 2016. Thereafter, notice dated 13 December 2016 was issued under Section 142(1) by Respondent No. 1 wherein it was specifically stated that the petitioner had taken loan of Rs. 105.77 crores and given loan of Rs. 75.64 crores. Therefore, the petitioner was asked to show cause why interest of Rs.9.07 crores on principal amount of Rs. 75.64 crores (approx) at 12% should not be chargeable to tax. In response to the said notice the petitioner filed its response dated 19 December 2016 wherein it stated that Rs. 75.64 crores (approx) was debit balance of its partner, Mr. Mukesh Doshi. It was further submitted that payment was made to the partner from interest free amount received by the petitioner. The petitioner further filed loan confirmation of the parties from whom

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2 2016 SCC Online Bom 13550

interest free loan were received by the petitioner. Thereafter, the petitioner further pointed that out of the loans of Rs.105.77 (approx) unsecured interest free loan were Rs. 89.60 crores (approx), and secured interest bearing loan were Rs. 16.17 crores. Also there were no fresh withdrawals by any of the partners during the year, capital was in fact introduced by the partner during the year and drawings by the partner Mr. Mukesh Doshi were out of interest free funds available with the petitioner and not out of the interest bearing funds. According to Mr. Hakani, this is a case where the assessment order dated 29 June 2016 was passed after considering various details filed by the petitioner as also on the basis of submission made by the petitioner during the assessment proceedings. Mr. Hakani would therefore submit that no change of opinion by the respondents was warranted in the given facts and circumstances.

17. Mr. Hakani, would next submit that in the original assessment proceedings the assessing officer vide notices under Section 142(1) of the IT Act dated 10 May 2016 and 13 December 2016 verified the figures of the partner capital accounts interest on secured and unsecured loan. The assessing officer specifically asked the petitioner to show cause as to why the interest ought not to be taxed on the partner's debit balance. The reason so recorded by the respondents would make it clear that the assessing officer passed the original assessment order only after verifying the issue of taxability of interest of the petitioner to be charged on the debit balance of its partner. Mr. Hakani would at this juncture clarify that the notice dated 13 December 2016 issued under Section 142(1) of the IT Act was titled as final show

cause notice calling upon the petitioner to show cause as to why the interest of Rs. 9.07 Crore (approx) at 12% on Rs. 75.64 Crores (approx) ought not to be charged and be added to the total income of the petitioner. The petitioner filed an elaborate response to the said show cause notice by letter dated 19 December 2016 setting out all details as required by the respondent including the loan confirmations from various parties, schedule of capital account and balance sheet to show that no interest is charged to profit and loss account and that the debit balance of partner is on account of the interest free amount received.

18. Mr. Hakani would submit that the reasons recorded in the subsequent notice dated 2 February 2022 would further demonstrate that the exercise of reopening was undertaken on the basis of an internal audit. According to him, the notice dated 27 March 2021 issued under Section 148 of the IT Act pursuant to the reopening to the petitioner's assessment under Section 147 which itself is illegal, also making the said notice being issued without authority of law.

19. Mr. Hakani in support of the above would place reliance on the decision of the Supreme Court in ***Commissioner of Income-Tax v. Kelvinator of India Ltd*** [3] to contend that where the assessing officer adopted one possible view then he cannot adopt a completely different view on the same material before him as that would tantamount to change of opinion, in violation of the scheme/ framework of the IT Act.

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3 [2010] 320 ITR 561 (SC)

20. Mr. Hakani in support of his submissions to assail the impugned order would submit that the addition of Rs. 7.64 crores (approx) under section 56(2)(v) of the IT Act is patently erroneous as section 56(2)(v) can have no application to the facts of the case. He would further submit that when the petitioner has not received any interest income, notional interest income cannot be foisted on such assessee. Further, as the loan given to Mr. Mukesh Doshi was out of interest free funds, no addition of notional interest can be made in the hands of the petitioner. The supplementary partnership deed prohibits charging and payment of interest to partners. Furthermore, the Income Tax Department cannot sit on the armchair of the businessman and decide whether interest is to be charged or not contrary to the partnership deed. Also, according to Mr Hakani the decision of the respondents on reopening of the assessement for earlier assessment years will have no application to the present proceedings. He would state that in any event, there is an appeal filed by the petitioner in regard to reopening of the earlier assessment for the A.Y. 2013-2024 for which all such details are available with the respondent no.2.

<u>Submissions of the Respondents:-</u>

21. On the contrary, Mr. Akhileshwar Sharma, the learned counsel for the respondents would place reliance on an affidavit in reply dated 30 November 2022 filed by one Jaibhim T. Narnaware, Assistant Commissioner of Income Tax, which is on record. Taking recourse thereto, Mr. Sharma would raise a preliminary objection to the maintainability of the petition. He would submit that the respondents have an alternate, efficacious statutory remedy against the impugned assessment order dated

29 March 2022, by challenging it before the Commissioner Appeals under the IT Act. He would submit that instead of resorting to such statutory alternate remedy, the petitioner jumped the gun and rushed to this Court by filing a writ petition, which is therefore not maintainable which is the settled law of the land.

22. In the above context, Mr. Sharma would rely on a decision in the case ***Commissioner of Income Tax and Others v. Chhabil Dass Agarwal***[4] and ***Assistant Collector, Central Excise v. Dunlop India Pvt Ltd***[5], to submit that the IT Act provides for a remedy in form of appeal under section 246A and revision under section 264 of the IT Act. In view thereof, no writ shall lie. In the alternative, on merits he would submit that merely stating that the debit balance is out of the petitioner's interest free funds without providing any supporting evidence in this regard, to does not tantamount to full and true disclosure under the provisions of section 148 of the IT Act. Mr. Sharma would further contend that the Supreme Court and various High Courts have justified the reopening of the assessment in such facts and circumstances. Consequently, the window of reopening of assessment will remain open for assessing officer on those points where the assessing officer neither accepts nor rejects such claim.

23. Mr. Sharma would then place reliance on the decision of the Gujarat High Court in the case of ***Gujarat Power Corporation Ltd v. Assistant Commissioner of Income Tax***[6] to infer that no opinion was formed by the assessing officer, it will be

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4. (2013) 357 ITR 357

5. 1985 (19) ELT 22

6. 2012 SCC OnLine Guj 4293

far-fetched to assume that a change in that opinion was being effected. Further, he would submit that the safest and surest guide to ascertaining whether any such opinion was formed at the original assessment is to look to the assessment order itself. Mere silence on a particular issue or absence of discussion in the original order on that issue, does not imply that the assessment officer adjudicated upon the same one way or the other. Therefore, Mr. Sharma would submit the averment made by the petitioner that the reopening is based on change of opinion is based on surmises and conjectures and is hence untenable.

24. According to Mr. Sharma, the submission of the petitioner that the satisfaction recorded by respondent no. 2 is mechanical and without application of mind is neither correct nor acceptable. This is so because the respondent no. 2 while approving the proposal of reopening submitted by jurisdictional assessing officer thoroughly considered all aspects and thereafter, the approval under section 151 of the IT Act was provided by respondent no. 2, to issue notice under section 148 of the IT Act.

25. Mr. Sharma would next submit that in the instant case, the assessee was supplied the copy of reasons recorded for reopening on 9 December 2021 and the assessee filed its objection on 18 February 2022, i.e., after a lapse of about two months. Even if the objection filed by the assessee was considered and disposed of by way of speaking order, the department would have been in no position to complete the assessment proceedings within time limit, i.e., 31 March 2022 as the finalization of assessment proceedings is a time consuming process.

26. According to Mr. Sharma, the delay in filing objection against the reopening proceedings is attributable to the petitioner in this case and due to this delay the assessing officer was not in the position to dispose of the objection separately leading to non-finalizing of the said assessment proceedings which were getting barred on 31 March 2022. Thus, to save limitation the petitioner has approached this Court to circumvent statutory remedy of appeal under the IT Act.

27. Mr. Sharma would urge that the issue raised by the audit constitutes information which the assessing officer can legitimately rely upon to examine the aspect of income escaping tax assessment. Once the assessing officer is satisfied based upon the information received by audit that income chargeable tax has escaped assessment, the action of the assessing officer is to reinitiate reassessment is free from doubt. Mr. Sharma would submit that the issue raised by the audit was not disclosed by the petitioner in its return of income and also not disclosed during the course of original assessment proceedings. In vie thereof, such reopening was just legal and proper in the given facts.

Rejoinder of the Petitioner:-

28. Mr. Hakani would reiterate his submissions recorded above *inter alia* asserting that the assessment proceedings were commenced without disposing the objections of the petitioner or without giving further time to petitioner to file its objections. Further, the rejoinder clarifies that the petitioner specifically asked for a copy of the recorded reasons on 12 January 2022 and the same were supplied to the petitioner on 2 February 2022, after which the petitioner filed its objections on 18

February 2022. Hence, the allegation of the respondent that petitioner did not file objections to reopening in a reasonable time is not only contrary to the given facts but also a perverse finding indicating non-application of mind, vitiating the impugned assessment order dated 29 March 2022.

D. Analysis and Conclusion:-

29. We have heard learned counsel for the parties. With their assistance we have perused the record. At the very outset, we note that the present proceedings challenge the notice dated 27 March 2021 issued under Section 148 of the IT Act by the Respondent No. 1 coupled with the impugned order issued by the Respondent No. 2 dated 29 March 2022 passed under Section 147 read with 144B of the IT Act. The issue revolves around the validity, legality of the reopening of assessment under Section 147 of the IT Act by the respondent on the premise that the income of the petitioner had escaped assessment for the A.Y. 2014-15. In this context, the relevant provision being Section 147 of the IT Act as it stood by the relevant time read thus:-

> " *Income Escaping Assessment*
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> *147. If the [Assessing] Officer [has reason to believe] that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year):*

Provided that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year:

[Provided further that nothing contained in the first proviso shall apply in a case where any income in relation to any asset (including financial interest in any entity) located outside India, chargeable to tax, has escaped assessment for any assessment year:]

[Provided [also] that the Assessing Officer may assess or reassess such income, other than the income involving matters which are the subject matters of any appeal, reference or revision, which is chargeable to tax and has escaped assessment.]

Explanation 1.-Production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the foregoing proviso.

Explanation 2.-For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely :-

(a) where no return of income has been furnished by the assessee although his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income-tax;

(b) where a return of income has been furnished by the assessee but no assessment has been made and it is noticed by the Assessing Officer that the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return;

[(ba) where the assessee has failed to furnish a report in respect of any international transaction which he was so required under section 92E;]

(c) where an assessment has been made, but-

(1) income chargeable to tax has been underassessed; or

(ii) such income has been assessed at too low a rate; or

(iii) such income has been made the subject of excessive relief under this Act; or

(iv) excessive loss or depreciation allowance or any other allowance under this Act has been computed;]

[(d) where a person is found to have any asset (including financial interest in any entity) located outside India.]

[Explanation 3.-For the purpose of assessment or reassessment under this section, the Assessing Officer may assess or reassess the income in respect of any issue, which has escaped assessment, and such issue comes to his notice subsequently in the course of the proceedings under this section, notwithstanding that the reasons for such issue have not been included in the reasons recorded under sub-section (2) of section 148.]

[Explanation 4.-For the removal of doubts, it is hereby clarified that the provisions of this section, as amended by the Finance Act, 2012, shall also be applicable for any assessment year beginning on or before the 1 day of April, 2012.]"

On a plain reading of the above provision it is discernible that the present proceedings pertain to A.Y. 2014-15. The impugned notice dated 27 March 2021 issued under Section 148 of the IT Act, would reveal that this is a case falling within the first proviso to Section 147 of the IT Act (as the period of four years from the end of the relevant assessment year expired on 1 April 2018). Thus, where an assessment is made under Section 143(3) read with Section 147 for the relevant assessment year, no action shall be taken under the

said provision after expiry of four years from the end of the relevant assessment year unless any income chargeable to tax escaped assessment for such assessment year.

30. In the context of the issues involved in the present petition, some of the undisputed facts are required to be noted. For the assessment year in question, i.e., A.Y. 2014-15 the petitioner had initially filed its return declaring loss of Rs. 5,53,822/- on 27 November 2014. In the original assessment proceeding the assessing officer vide notices dated 10 May 2016 and 13 December 2016 issued under Section 142(1), verified all details of the petitioner firms capital account, interest on secured and unsecured loans. The assessing officer issued notice u/s 142(1) dated 13/12/2016 wherein it was specifically stated that Assessee has taken loans of Rs.105.77 crores and given loans of Rs.75.64 crores and asked as to why interest of Rs 9,07,70,902/- on Rs.75.64 crores @12% should not be charged to tax. In response to said notice, the petitioner filed its letter dated 19 December, 2016 wherein it was mentioned that Rs.75,64,24,189/- was debit balance of partner Mr Mukesh Doshi

31. The petitioner then filed replies dated 24 May 2016 and 19 December 2016. The assessing officer thereafter passed the original assessment order dated 29 June 2016 upon duly verifying the issue of taxing the interest on the debit balance of the partner. Thereafter, the petitioner received a copy of such recorded reasons from the jurisdictional assessing officer on 9 December 2021, i.e., after 7 months, directing the petitioner to file reply by 24 December 2021. However, on 24 December 2021

itself the petitioner received a notice under Section 142(1) from Respondent No. 2 without even waiting for the petitioner to file its objection. For this reason, the petitioner once again asked the respondents to furnish a copy of such recorded reasons so as to enable it to file its objection. Such reasons were provided only on 2 February 2022 after which the petitioner promptly filed its objection, reply dated 18 February 2022. After such date no notice was issued by Respondent No. 2 calling for any further or information details from the petitioner. It was on 24 March 2022 that a draft assessment order was issued to the petitioner. In its response dated 28 March 2022 to the draft assessment order, the petitioner, inter-alia, referred to the procedure prescribed in ***GKN Driveshafts*** (Supra) being not followed. Despite this being pointed out, the respondent No. 2 neither passed a separate order disposing of the petitioner's objections filed on 18 February 2022 nor were such objections were dealt with much less decided in the impugned assessment order dated 29 March 2022.

32. A perusal of the reasons for the reopening for the petitioner's case, reveals that the assessing officer has not made out any case to the effect that the petitioner failed to disclose fully and truly all material facts necessary for assessment. The impugned order does not in any manner attribute such reasoning stipulated under proviso to Section 147 of the IT Act, to the petitioner in any manner whatsoever. In fact, the reasons for reopening of the assessment are itself based on the records provided, by the petitioner like the books of account, documents, loan

confirmation details from various parties which were furnished by the petitioner during the course of the assessment proceedings.

33. The fact of complete disclosure by the petitioner of all details necessary for assessment were duly disclosed by the petitioner in its letter dated 19 December 2016 (supra) along with all details, annexures in specific response to the final show cause notice dated 13 December 2016 issued by the respondents for the A.Y. 2014-15. It is such material which formed the basis of reopening of the assessment as is evident from the impugned assessment order dated 29 March 2022. There appears to be no fresh tangible material before the respondents to form its own/independent opinion in regard to reopening of the petitioner assessment for the A.Y. 2014-15, under Section 147 of the IT Act. This would be clearly indicative of change of opinion on part of the respondents in the facts of this case which is not permissible under the statutory scheme of Act read with the judgments in this regard, as further discussed below.

34. We may observe that the mandatory procedure postulated under Section 144B of the IT Act is also not followed by the respondents. This is in as much as the petitioner's objection dated 18 February 2022 to the reasons recorded for reopening of the assessment by the respondent dated 9 December 2021 were neither considered, dealt with, much less disposed of by the respondents. Further the reply of the petitioner to the draft assessment order dated 24 March 2022 was filed by the petitioner on 28 March 2022, mainly pointing out that the reassessment proceedings were contrary to the provisions of section 147 of the IT Act read with

the decision of the Supreme Court in ***GKN Driveshaft*** (Supra). The respondent failed to even consider these vital aspects which embrace the requirement of reasonable opportunity to be given to the petitioner, rushed to pass the impugned assessment order on 29 March 2022 i.e., just within a day after receiving a reply dated 28 March 2022 from the petitioner to the draft assessment order. No opportunity of being heard/hearing was given to the petitioner despite the variations prejudicial to the petitioner were unilaterally proposed by the respondents, nor were the objections raised by the petitioner separately disposed of by the respondents. Thus, the impugned assessment order runs contrary to the intrinsic principles of natural justice inbuilt and ingrained under Section 144B of the IT Act rendering the impugned order patently illegal. Such view on similar facts has taken by a coordinate bench of this Court to which one of us (G.S. Kulkarni, J.) was a member in the case of ***Teerth Developers and Teerth Realties v. Additional/Joint/Deputy/Assistant Commissioner of Income Tax/Income Tax Officer and Ors***[7].

35. To add to the above, in our considered view, the impugned assessment order passed *inter alia* u/s 147 of the IT Act is wholly without jurisdiction. This is as much as it runs contrary to the decision of the Supreme Court in ***GKN Driveshafts*** *(*Supra) wherein it was categorically held that on receipt of reasons from the assessing officer the assessee is entitled to file objections. The assessing officer is bound to dispose such objections by a speaking order. This would be a proper course to be adopted by the respondent when a notice is issued under section 147 of IT Act. There is abject failure on the part of respondent no. 2 to comply with such

7. 2024 SCC OnLine Bom 3621

jurisdictional requirements ingrained under section 147 of the IT Act. To make matters worse, the petitioner despite pointing this aspect out in its response/reply dated 28 March 2022 to the draft assessment order passed by respondent no. 2 dated 24 March 2022, it was glossed over by the respondents.

36. The aforesaid decision of the Supreme Court was subsequently followed by this court in the case of ***KSS Petron Pvt Ltd*** (Supra), wherein the court observed as:

> *"8. We note that once the impugned order finds the Assessment Order is without jurisdiction as the law laid down by the Apex Court in GKN Driveshafts (supra) has not been followed, then there is no reason to restore the issue to the Assessing Officer to pass a further/fresh order. If this is permitted, it would give a licence to the Assessing Officer to pass orders on reopening notice, without jurisdiction (without compliance of the law in accordance with the procedure), yet the only consequence, would be that in appeal, it would be restored to the Assessing Officer for fresh adjudication after following the due procedure. This would lead to unnecessary harassment of the Assessee by reviving stale/ old matters."*

Considering the facts in the given case, the above decision is applicable and in light of such settled legal principles we see no reason to take a different view as Mr. Sharma would want us to. The impugned order cannot be given any effect to as it is eclipsed by the observations and ratio of such judgments.

37. Further, at this juncture it is apposite to refer to a decision of the Supreme Court in ***Kelvinator of India Ltd*** (Supra), where the court was pleased to hold thus:-

> *"6. However, one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, section 147 would give arbitrary powers to the Assessing Officer to reopen assessments on the basis of "mere change of opinion", which cannot be per se reason to reopen. We must also keep in mind the conceptual difference between power to review and power to reassess. The Assessing Officer has no power to review; he has the power to reassess. Hence, after 1st April, 1989, the Assessing Officer has power to reopen, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief. Our view gets support from the changes made to section 147 of the Act, as quoted hereinabove. Under the Direct Tax Laws (Amendment) Act, 1987, Parliament not only deleted the words "reason to believe" but also inserted the word "opinion" in section 147 of the Act."*

Applying the above principles to the given facts, it is discernible that there is no fresh tangible material placed on record by the respondents to justify reopening of the assessment for A.Y. 2014-15 by a notice under section 148 dated 27 March 2021. In fact, the petitioner had disclosed all such material which was available with the assessing officer, during the course of the assessment proceedings. It appears that the assessing officer by the impugned assessment order sought to review the decision already taken during assessment which is impermissible. Also the impugned assessment order clearly brings out a change of mind/ opinion of the assessing officer in reopening the assessment of the petitioner for A.Y. 2014-15 cannot be camouflaged under 'reason to believe' which would be in the teeth of and contrary to the settled legal principles, as noted above.

38. We now advert to a judgment of a coordinate Bench of this Court to which one of us (G.S. Kulkarni, J.) was a member in the case of ***Saraswat Co-***

operative Bank Ltd v. Assistant Commissioner of Income Tax[8] , operative portion of which reads thus :-

> "*20. The reasons recorded by the Assessing Officer nowhere state that there was failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment of that assessment year. It is needless to mention that the reasons are required to be read as they were recorded by the Assessing Officer. No substitution or deletion is permissible. No additions can be made to those reasons. No inference can be allowed to be drawn based on reasons not recorded. It is for the Assessing Officer to disclose and open his mind through reasons recorded by him. He has to speak through his reasons. It is for the Assessing Officer to reach to the conclusion as to whether there was failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for the concerned assessment year. It is for the Assessing Officer to form his opinion. It is for him to put his opinion on record in black and white. The reasons recorded should be clear and unambiguous and should not suffer from any vagueness. The reasons recorded must disclose his mind. Reasons are the manifestation of mind of the Assessing Officer. The reasons recorded should be self-explanatory and should not keep the assessee guessing for the reasons. Reasons provide link between conclusion and evidence. The reasons recorded must be based on evidence. The Assessing Officer, in the event of challenge to the reasons, must be able to justify the same based on material available on record. He must disclose in the reasons as to which fact or material was not disclosed by the assessee fully and truly necessary for assessment of that assessment year, so as to establish vital link between the reasons and evidence. That vital link is the safeguard against arbitrary reopening of the concluded assessment. The reasons recorded by the Assessing Officer cannot be supplemented by filing affidavit or making oral submission, otherwise, the reasons which were lacking in the material particulars would get supplemented, by the time the matter reaches to the Court, on the strength of affidavit or oral submissions advanced.*"

In light of the above, juxtaposing it to this case, the impugned notice dated 27 March 2021, was issued beyond the four-year period from the end of the A.Y. 2014-15 which runs contrary to the mandate as set out in the proviso to section

8. 2024 SCC OnLine Bom 2772

147 of the IT Act. The assessing officer lacked the jurisdiction to reopen the assessment proceedings, which had been already been concluded under section 143(3) of the IT Act.

39. We would at this juncture refer to a recent judgment of a co-ordinate bench of this court in the case of ***Imperial Consultants and Securities Ltd. v. Deputy Commissioner of Income Tax, Circle-6(1)(2) & Ors.***[9] where we had the occasion to consider and deal with a similar issue of reopening of assessment which was examined in light of jurisdictional requirements and settled legal position. In this context the court re-visited the judgments rendered in ***Andhra Bank Ltd v. CIT***[10] ; ***Siemens Information System Ltd v. Assistant Commissioner of Income-Tax & Ors*** [11]; ***NYK Line (India) Ltd v. Deputy Commissioner of Income-Tax*** [12] ; ***Income Tax Officer, Ward No. 16(2) v. Techspan India Private Ltd & Anr***[13] ; ***GKN Sinter Metals Ltd v. ACIT***[14]. In the said case of ***Imperial Consultants*** (Supra) Justice G.S. Kulkarni speaking for the Division Bench considering of reopening of assessment beyond the period of four years, observed thus:-

> *"Adverting to the principles of law as the aforesaid decisions lay down to the facts of the present case, we may observe that the Assessing Officer in issuing the impugned notice under Section 148 of the IT At has clearly acted without jurisdiction. This firstly for the reason that the Assessing Officer was reopening an assessment beyond the period of four years and in such context the*

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9. Writ Petition (OS) No. 1783 of 2022

10. (1997) 225 ITR 447

11. 2007 SCC OnLine Bom 1292

12. 2012 SCC OnLine Bom 195

13. (2018) 6 SCC 685

14. 55 taxmann.com 438 (Bom)

first proviso to Section 147 was strictly applicable inter alia to the effect that when the petitioner/assessee had not defaulted in fully and truly disclosing all material facts necessary for his assessment for the assessment year in question, the Assessing Officer would not have jurisdiction to reopen the concluded assessment. Secondly, the reasons as furnished to the petitioner, in no manner whatsoever make out a case on the failure on the part of the petitioner to fully and truly disclose all the materials. This apart, the reasons demonstrate that the entire basis for such reopening is on the materials which was already available with the Assessing Officer, in finalizing the petitioner's assessment under Section 143(3) of the IT Act. If this be so, the Assessing Officer was acting on a complete change of opinion on the same material and / or intending to have a review of the assessment order passed by him. This was certainly not permissible applying the settled principles of law as discussed by us hereinabove. Thus, on both the counts namely on failure of the Assessing Officer in adhering to the mandate as contained in the first proviso to Section 147, and on exceeding his jurisdiction as conferred by the said provision by forming an opinion on the same material, which was available with him in the course of assessment proceedings, was wholly an impermissible exercise of jurisdiction, to issue the impugned notice. This is writ large from the plain reading of the reasons for reopening as furnished to the petitioner. We have already observed that there was substantive correspondence between the petitioner and the Assessing Officer on all materials and subject matter of reopening and all such materials had formed part of the disclosure by the petitioner. It was, hence, clearly not permissible for the Assessing Officer to reopen the assessment on the very material on which the assessment order was passed. The law does not permit such course of action and if permitted, it would not only fall foul of the mandate of the first proviso below Section 147 but also it would amount to manifest arbitrariness and illegality resulting in drastic and unwarranted consequences being brought about to unsettle settled/concluded assessments, which the law would certainly not recognize"

Based on the above, it is pertinent to note that the entire basis for reopening of the assessment in the given case is on the materials which were already available with the assessing officer, in finalizing the petitioner's assessment under Section 143(3) the IT Act. It is thereby evident that the assessing officer acted on a complete change of opinion on the same material available with him with an intent

to review the assessment already done. This is certainly not permissible, applying the settled principles of law as discussed by us hereinabove.

40. In light of the foregoing discussion, we are unable to accept the contention urged on behalf of Mr. Sharma that the petition should not be entertained in light of availability of alternate remedy of appeal to the petitioner under the IT Act, considering that the impugned assessment order lacks jurisdiction and suffer from patent illegality. When an action is *ex facie* without jurisdiction and thus, illegal, it is not just, fair and/or legal to relegate the petitioner to such alternate remedies in a situation as this, in the peculiar facts and circumstances.

41. In the above backdrop, even on merits we are unable to concur with Mr. Sharma in connection with his submission as also recorded in the affidavit in reply of the respondents. This is case where there is no fresh tangible material on the basis of which the assessing officer decided to reopen the petitioner's assessment for the impugned A.Y. 2014-15. Mr. Sharma, fell short of justifying the violation of the procedure mandated under Section 144B, of the IT Act, which for the reasons noted (Supra) has an inbuilt requirement of compliance to the principles of natural justice. In the present case Mr. Sharma fairly does not dispute that the objections filed by the petitioner dated 18 February 2022 to the reasons recorded for reopening of assessment vide letter dated 2 February 2022 of the respondents, were neither separately disposed of nor has it been dealt with/adjudicated upon in the impugned assessment order. Further, from a perusal of the reply affidavit of the respondents it appears that the respondents have sought to justify their conduct in not following the

mandate of the statutory provisions under Sections 147 and 144B of the IT Act to save such assessment from being barred by limitation. However, such justification is legally untenable in light of the clear statutory provisions and the settled law referred to (Supra) and hence cannot be countenanced.

42. For the reasons set out above, the impugned assessment order fails to consider that the assessment cannot be reopened beyond a period of four years from the relevant assessment year A.Y. 2014-15 in terms of the first proviso to section 147 of the IT Act. Such action would stare in non compliance of jurisdictional requirements, and is therefore, non-est in law. We cannot be oblivious to the fact that the impugned notice dated 27 March 2021 issued under Section 148 for the A.Y. 2014-15 would transgress the statutory requirement of four years. Thus, the said notice is ex-facie without jurisdiction and has no legs to stand on.

43. In light of the above discussion writ petition is bound to succeed.

44. Rule made absolute in terms of prayer clauses (a) & (b). No costs.

(ADVAIT M. SETHNA, J.) (G. S. KULKARNI, J.)