IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

WRIT PETITION NO.1025 OF 2022

Modern Living Solutions Private Ltd. Thr. Director Kirit Joshi, MIDC Industrial Area, Nagpur
-vs-
Income Tax Officer Ward 1(3), MECL Bldg. Seminary Hills, Nagpur and ors.

Office notes, Office Memoranda of Coram, appearances, Court's orders or directions and Registrar's orders.	Court's or Judge's Orders.

Shri Abhay N. Agrawal, Advocate for petitioner.
Shri Anand Parchure, Advocate for respondent Nos.1 to 3.
Shri C. J. Dhumane, Advocate for respondent No.4. .

CORAM : A. S. CHANDURKAR AND M. W. CHANDWANI JJ.
ARGUMENTS WERE HEARD ON : APRIL 20, 2023
ORDER IS PRONOUNCED ON : JUNE 09, 2023

P. C.

1. The challenge raised in this writ petition filed under Article 226 of the Constitution of India is to the notices dated 31/03/2021 issued under Section 148 of the Income Tax Act, 1961 (for short, the Act of 1961) by which the respondent No.1 has sought to re-open the assessment of the petitioner for the year 2017-2018. A challenge is also raised to the communication dated 19/12/2021 issued by the respondent No.2 turning down the objection raised by the petitioner to the re-opening of the said process.

2. At the outset Shri A. Parchure, learned counsel for the respondent Nos.1 to 3 has raised a preliminary objection to the maintainability of the writ petition on the ground that an alternate statutory remedy is available to the petitioner by way of an appeal under the Act of 1961 for challenging the order of assessment when passed. It is submitted by relying upon the affidavit in reply that since such statutory remedy is available to the petitioner, there is no reason to entertain the writ petition in exercise of extra ordinary jurisdiction. All grounds that are sought to be raised in the

present writ petition can be permitted to be raised in such statutory proceedings. There is no exceptional case made out to invoke writ jurisdiction.

3. Shri A. N. Agrawal, learned counsel for the petitioner on the other hand submitted that since the petitioner had challenged the jurisdiction of the respondent No.1 in seeking to re-open the assessment proceedings under Section 148 of the Act of 1961, such challenge could be entertained in exercise of jurisdiction under Article 226 of the Constitution of India. Since the petitioner was challenging the initiation of the proceedings itself by urging that the statutory requirements provided under Section 148 of the Act of 1961 were absent and hence there was no jurisdiction to initiate such proceedings, it was permissible to raise such jurisdictional issue in the present proceedings. The writ petition was maintainable and the challenge raised could be adjudicated on merits.

4. We have heard the learned counsel for the parties on the preliminary objection raised to the maintainability of the writ petition. The learned counsel have relied upon various decisions in support of their respective contentions. Suffice it to mention that the distinction between maintainability of the writ petition under Article 226 of the Constitution of India and the aspect of its entertainability has been considered in a recent decision of the Hounourable Supreme Court in Civil Appeal No.5393 of 2010 *(M/s Godrej Sara Lee Ltd. vs. The Excise and Taxation Officer-Cum-Assessing Authority and ors.)* decided on 01/02/2023. It has been held therein that an objection to maintainability of a writ petition would go to the root of the matter as the Court would be incapable of receiving the lis for adjudication. The question of entertainability is however within the realm of discretion of the Court since writ remedy is discretionary in nature. It has been further held that when a jurisdictional issue is raised in

a writ petition challenging the competence of exercise of statutory power in question, the same being a pure question of law, it can be considered in exercise of writ jurisdiction. Thereafter the aspect of grant of discretionary relief could be considered while entertaining the writ petition.

5. We find that in the present writ petition the petitioner has raised a challenge to the initiation of proceedings and exercise of power under Section 148 of the Act of 1961 by urging that the statutory requirements prescribed by Section 148 have not been satisfied. In other words, it is submitted that since there is no existence of any reason to believe, re-opening of the proceedings by the respondent No.1 is without jurisdiction. Since the jurisdiction of the respondent No.1 of initiating the proceedings itself is under challenge, the writ petition would be maintainable. In the light of the challenge as raised it cannot be said that the writ petition is not maintainable. The further question as regards the entitlement to any relief would be a matter to be considered on merits while entertaining such jurisdictional challenge is an aspect to be considered on merits. It is therefore held that the writ petition as filed is maintainable and the same is liable to be entertained on merits.

6. The preliminary objection to maintainability of the writ petition is thus turned down. Since challenge as raised in the writ petition is required to be considered further, we have not referred to the various decisions relied upon by the learned counsel for the parties on merits since the same would be considered when the writ petition is heard on the challenge as raised. The writ petition shall accordingly be heard for admission. Place the same for admission accordingly.

(M. W. Chandwani, J.) **(A. S. Chandurkar, J.)**

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