

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
ORDINARY ORIGINAL CIVIL JURISDICTION  
WRIT PETITION NO. 1311 OF 2005

M/s. Narendra Polyplast ... Petitioner  
V/s.  
Pranab Kumar Das,  
Income-tax Officer, 24(3)(2),  
Mumbai and ors. ... Respondents

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Mr. Subhash Shetty a/w. Mr. Atul Jasani for the Petitioner.  
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CORAM : NITIN JAMDAR &  
N.R. BORKAR, JJ.

DATE: 13 JUNE 2022.

**ORAL JUDGMENT** (PER NITIN JAMDAR, J.)

1. By this Petition, the Petitioner has challenged the order passed by Respondent No.1 dated 29 March 2005 under Section 142(2A) of the Income Tax Act, 1961 ('the Act').

2. The Petitioner is a Partnership Firm engaged in the business of manufacturing, dealing and exporting polypropylene sheetings and bags. The Petitioner filed its return of income for the assessment year 2002-03, and an intimation under Section 143 (1)(a) of the Act was issued on 27 March 2003, accepting the returned income. The Petitioner's case was taken up for consideration by issuing a notice

dated 28 October 2003. The Petitioner responded to the questionnaire and submitted the necessary books of accounts. Respondent No.1 issued further notice on 17 February 2005, for which the Petitioner sought time and filed an interim reply. On 29 March 2005, Respondent No.1 issued a notice under Section 142(2A) of the Act directing it to get its accounts for the assessment year 2002-03 audited through a Special Auditor - Respondent No.3. Being aggrieved by this order, the Petitioner filed the present Petition.

3. In this Petition, the notice was issued on 5 May 2005, and the interim relief in terms of prayer clause (c) was granted, i.e., restraining from proceeding further with the compulsory audit of the Petitioner's accounts pursuant to the impugned order. Thereafter, Rule was issued by order dated 12 July 2005, and the interim order was continued.

4. The main grievance of the Petitioner, which is also recorded in the order while issuing Rule, is that the order passed under Section 142(2A) of the Act was passed without giving an opportunity of hearing to the Petitioner. In the Petition, the Petitioner has made the specific assertion that no opportunity of hearing was given to the Petitioner before directing the Petitioner by the impugned order to get its accounts audited by Respondent No.3

- Auditor. The reply is filed by the Respondents- Revenue wherein, as regards this assertion, it is stated that there is no requirement of law to give any hearing while invoking the provisions of Section 142(2A) of the Act as it is a subjective satisfaction of the Assessing Officer and the Commissioner of Income Tax. In the reply, the stand taken by the Respondent – Revenue is that the principles of natural justice do not apply to Section 142(2A).

5. Section 142(2A) of the Act has been amended with effect from 1 June 2007, and a proviso has been inserted in this Section. The said Proviso states that the Assessing Officer shall not direct the assessee to get the accounts so audited unless he has been given a reasonable opportunity of being heard. However, it is not that the requirement of hearing the assessee prior to issuance of the order under Section 142(2A) of the Act is mandated only after the Proviso was inserted. The Proviso has made clear what was already an existing legal position. The Supreme Court in the case of *Rajesh Kumar and others vs. Deputy Commissioner of Income-Tax and ors.*<sup>1</sup> while dealing with the position and orders passed prior to 1 June 2007 has observed that the requirement of hearing has to be read into the Section 142(2A) of the Act. The decision in the case of *Rajesh Kumar* was rendered by bench of two learned judges of the Supreme Court on 1 November 2006. When a similar case came up before another Bench of the two learned judges of the Supreme

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1 (2006)287 ITR 91 (SC)

Court, the matter was referred to a larger bench by order dated 14 December 2006. The referring order stated that the case of *Rajesh Kumar* was in respect of assessments under Section 158BC (block assessment), and the question was whether the observations made in the case of *Rajesh Kumar* would apply in every case where the Assessing Officer issues a direction under Section 142(2A) of the Act. The Reference was considered by the bench of three judges of the Supreme Court in the case of *Sahara India (Firm) vs. Commissioner of Income Tax and anr.*<sup>2</sup>. The Bench in the case of *Sahara India* confirmed the law laid down in the case of *Rajesh Kumar*. It was held that the assessee has to be given the opportunity of being heard before passing the order under Section 142(2A) of the Act. The Supreme Court thus held that if no show cause notice is given to the Assessee before passing orders under Section 142(2A) of the Act, the orders were vitiated by failure to observe the principles of natural justice.

6. As held by the Supreme Court in the case of *Rajesh Kumar*, on account of the special audit, the assessee has to undergo the process of further accounting despite the fact that a qualified auditor has audited accounts in terms of section 44AB of the Act, who is a professional person and in case of misconduct liable to be proceeded against. The assessee has to pay the fees of the special auditor. During the audit of the accounts, again by the special auditor, the

<sup>2</sup> (2008) 300 ITR 403 (SC)

Assessee has to answer a large number of questions. The Supreme Court held that by virtue of an order under section 142(2A) of the Act, the assessee suffers civil consequences, and the order passed would be prejudicial to him; therefore, the principles of natural justice were held to be implicit. Also, if the assessee was put to notice, it can be shown that the accounts do not require special auditors.

7. In the present case, as stated earlier, it is an admitted position that no hearing was given, and in the light of the law laid down by the Supreme Court as above, the Petitioner is entitled to succeed.

8. Accordingly, Writ Petition is allowed. Rule is made absolute in terms of prayer clause (a). No costs.

**(N.R. BORKAR, J.)**

**(NITIN JAMDAR, J.)**