
(1985) 12 CAL CK 0008
In the Calcutta High Court
Case No : F.M.A. No. 148 of 1973

Basanta Ram Kedarnath

APPELLANT

Vs

Income Tax Officer

RESPONDENT

Date of Decision : 09-12-1985

Acts Referred:

Constitution of India, 1950 — Article 226
Income Tax Act, 1961 — Section 147

Citation : (1986) 56 CTR 344 : (1987) 165 ITR 777

Hon'ble Judges : Mukul Gopal Mukherjee, J; Dipak Kumar Sen, J

Bench : Division Bench

Judgement

Dipak Kumar Sen, J.—Basanta Ram Kedarnath, the appellant, is a partnership registered under the Indian Partnership Act. Kedarnath Jayaswal, Badri Prosad Shah and Dwarika Prosad Shah at the material time were the partners of the appellant (firm) each having 1/3rd share therein.

2. In the assessment year 1962-63, the accounting year ending on December 31, 1961, the appellant was assessed to Income Tax u/s 143(3) of the Income Tax Act, 1961. The order of assessment was made on March 18, 1967, when the Income Tax Officer computed the total income of the appellant at Rs. 30,580 which was allocated to the partners of the appellant according to their respective shares.

3. An appeal against the said order of assessment dated March 18, 1967, was made before the Appellate Assistant Commissioner of Income Tax which was allowed in part. A further appeal preferred by the appellant before the Income Tax Appellate Tribunal was pending at the material time. The Inspecting Assistant Commissioner had also levied a penalty of Rs. 31,000 on the appellant on the ground of concealment of income. A separate appeal preferred against the said order of penalty was also pending at the material time.

4. The Income Tax Officer, "G" Ward, Hundi Circle, Calcutta, recorded on December 15, 1970, as follows :

"While completing the original assessment, interest of Rs. 9,000 paid to Shri J.P. Jaiswal on loans was not disallowed. Subsequently it has been found that the loans alleged to have been advanced by Sri Jaiswal were not genuine and hence interest on the said loans was disallowed in later years and the same was confirmed in appeal.

I have, therefore, reasons to believe that for this failure and/or part omission on the part of the assessee to disclose fully and truly all material facts necessary for his assessment, the total income was under assessed"

5. On January 2, 1971, the appellant received a notice u/s 148 of the Income Tax Act issued by the said Income Tax Officer, "G" Ward, Hundi Circle, Calcutta. It was stated in the said notice which was dated December 26, 1970, that the said Income Tax Officer had reasons to believe that the appellant's income chargeable to tax for the said assessment year had escaped assessment within the meaning of Section 147 of the Income Tax Act, 1961, and that it is proposed to reassess the income of the assessee for the said assessment year. The appellant was called upon to furnish a fresh return in the prescribed form of its income within 30 days from the date of the service of the notice.

6. By his letter dated January 15, 1971, the appellant requested the Income Tax Officer concerned to cancel or rescind or withdraw the said notice dated December 26, 1970, contending that there was no material before the latter on which he could have reasons to believe that the income of the appellant had escaped assessment. It was further stated that the appellant had produced all materials before the Income Tax Officer for the purpose of assessment and that the latter after taking into consideration the same completed the assessment and that there was no omission or failure on the part of the appellant to disclose fully and truly any material fact for the purpose of assessment. The competence, jurisdiction and authority of the Income Tax Officer to reopen the said assessment was also challenged.

7. On March 3, 1971, the appellant moved an application under Article 226 of the Constitution when a rule nisi was issued calling upon the respondents, namely, the Income Tax Officer, "G" Ward, Hundi Circle, Calcutta, the Commissioner of Income Tax, West Bengal-I, and the Union of India to show cause why appropriate writs or directions should not be issued commanding the respondents to act according to law ; to cancel, withdraw or rescind the said notice dated December 26, 1980 ; to forbear from giving any effect or taking any steps pursuant thereto for setting aside or quashing the same.

8. It was alleged in the petition that at the original assessment for the assessment year 1962-63, the appellant had disclosed fully and truly all material facts necessary for making the said assessment and as such there was no omission or failure on the part of the appellant to disclose materials necessary for assessment for the relevant assessment year. It was alleged further that at the original assessment, the representative of the appellant as also one of its

partners, namely, Kedarnath Jayaswal, had appeared before the Income Tax Officer concerned and produced books of accounts, balance-sheet, detailed statement of accounts and also the complete list of loans obtained by the appellant from different parties. Details of the creditors with their addresses and Income Tax file numbers and other evidence were also produced. The Income Tax Officer, it was alleged, after taking into consideration the aforesaid, completed the said assessment u/s 143(3) of the Income Tax Act, 1961.

9. It was alleged that in the facts and circumstances, the Income Tax Officer acted illegally and wrongly assumed jurisdiction u/s 147 of the Income Tax Act, 1961, although the condition precedent for the assumption of such jurisdiction had not been satisfied.

10. It was alleged further that there was absolutely no material before the Income Tax Officer on which he could have reason to believe that the petitioner's income for the said assessment year had escaped assessment. It was alleged that the Income Tax Officer had started a fishing investigation and proceeded on a mere change of opinion on materials already disclosed.

11. Manotosh Sarcar, the then Income Tax Officer, "G" Ward, Hundi Circle, Calcutta, at the relevant time, affirmed an affidavit on August 4, 1971, which was filed in opposition to the writ petition and the rule issued thereon. It was alleged in the said affidavit, inter alia, that the original assessment of the assessee for the assessment year 1962-63 had been completed by the Income Tax Officer on the basis of the materials disclosed by the appellant at that time and that in the books of account of the appellant, a number of purported hundi loans including one in the name of one Jagannath Prasad Jaiswal were shown as genuine loans advanced to the appellant. When the genuineness of the said loans was being investigated, the appellant made a disclosure petition u/s 271(4A) of the Act disclosing that the said hundi loans except the one in the name of Jagannath Prasad Jaiswal were fictitious and they represented the concealed income of the appellant. The said loan in the name of Jagannath Prasad Jaiswal, son of Badri Prasad, a partner of the appellant (firm), had been shown since 1958 in the books of account of the appellant.

12. In the original assessment, the Income Tax Officer had allowed deduction of interest on the said loan to the extent of Rs. 9,000 which was credited to the account of the said Jagannath Prasad Jaiswal.

13. Subsequently, in the course of assessment proceedings for the assessment year 1963-64, the genuineness of the said hundi loan in the name of Jagannath Prasad Jaiswal was investigated by the Income Tax Officer, when it was found that the said loan was a bogus loan and the interest alleged to have been paid was also bogus. The said loan and the interest were both concealed income of the appellant. The said interest was not allowed to be deducted for the assessment year 1963-64 and was added back to the income of the appellant. The said assessment has since been confirmed by the Appellate Assistant

Commissioner.

14. It is alleged that on the aforesaid materials, the Income Tax Officer came to the conclusion that the interest of Rs. 9,000 alleged to have been paid on the said bogus loan in the assessment years in question also represented the income of the appellant and that such income had been suppressed by the appellant. In the premises, the Income Tax Officer had prima facie reasons to believe and bona fide believed that the appellant had failed to disclose fully and truly all material facts necessary for the assessment of his income in the said assessment year 1962-63 as a result whereof the appellant's income chargeable to tax escaped assessment or was under assessed for the relevant assessment year.

15. The said notice u/s 148 of the Income Tax Act, 1961, was accordingly issued to the appellant after obtaining the necessary approval from the Commissioner of Income Tax, West Bengal-I, Calcutta.

16. The other allegations in the petition were denied and the contentions were disputed.

17. An affidavit affirmed on September 19, 1972, by Badri Prosad Shah, a partner of the appellant (firm), was filed in reply to the aforesaid affidavit of Manotosh Sarcar.

18. It was alleged in this affidavit that Jagannath Prasad Jaiswal had been regularly assessed to Income Tax by the Income Tax Officer, "F" Ward, Howrah. His Income Tax file number was set out. A loan of Rs. 75,000, it was alleged, was obtained from Jagannath Prasad Jaiswal on June 2, 1958, and the appellant paid interest on such loan at the rate of 12%. Both the assessments of the appellant and the said Jagannath Prasad Jaiswal up to the assessment year 1962-63 were completed on the basis that this loan was genuine. Manotosh Sarcar, the succeeding Income Tax Officer, changed his opinion in respect of the said loan and purported to assume jurisdiction under Sections 147 and 148 of the Income Tax Act, 1961, on a mere change of opinion.

19. It was alleged that the Income Tax Officer had issued similar notices u/s 148 of the Act in respect of earlier assessment years 1957-58 to 1960-61 which have been challenged and quashed in this court on May 9, 1972.

20. The said application was disposed of by a judgment and order dated February 28, 1973. The learned judge in the first court discharged the rule nisi and dismissed the application. It was held by the learned judge that the finding in the subsequent year, i.e., 1963-64, by the appropriate authority that one of the items of loans was a bogus transaction constituted sufficient material for believing that the same transaction which had been the subject-matter of the previous assessment and which had been accepted was also bogus. The same also constituted sufficient material for the prima facie belief that the assessee had failed to disclose fully and truly all material facts at the original assessment.

21. The present appeal is from the said judgment and order dated February 28,

1973.

22. The learned advocate for the appellant submitted at the hearing before us that the learned judge relied on and proceeded entirely on the basis of the affidavit of the Income Tax Officer purporting to explain and justify the reopening of the assessment. He submitted that the court should have looked into the reasons recorded contemporaneously and should not have proceeded on the basis of an affidavit which was filed post litem. At the instance of the appellant and pursuant to the directions given by us, the reasons which were recorded by the Income Tax Officer on December 15, 1970, on the basis of which jurisdiction was assumed under Sections 147 and 148 were produced and considered at the hearing of the appeal. The said recorded reasons have been noted earlier.

23. The learned advocate for the appellant submitted further that in any event, the reasons as recorded could not justify the reopening of the assessment under Sub-clause (a) of Section 147. All facts which, according to the assessee, were relevant to the said disputed loan had been disclosed in the original assessment and considered by the Income Tax Officer. After consideration of such facts, the Income Tax Officer had made the original assessment accepting the said loan. It could not be said that the appellant had failed to disclose any material fact necessary for the assessment. The learned advocate for the appellant submitted that the law on the question is settled by this court as also by the Supreme Court and cited the following decisions :

(a) The Commissioner of Income Tax, Calcutta Vs. Burlop Dealers Ltd., . In this case, the assessee disclosed a profit from a joint venture in the relevant assessment year and submitted that half of the profit had been paid to another party under an agreement for financing the joint venture. In the original assessment, only half of the profit was taxed. In the subsequent assessment year, on a similar claim of the assessee, the Income Tax Officer re-examined the transaction and came to the conclusion that the financing agreement was a device to split profit and the entire profit of the venture was taxed. The decision of the Income Tax Officer was upheld in further proceedings. In the meantime, a notice was issued u/s 34(1)(a) of the Indian Income Tax Act, 1922, for reopening the assessment for the relevant year. The assessment was reopened and the half of the profit which was stated to have escaped assessment was brought to tax. On appeal, the Tribunal held that the assessee having produced all relevant accounts and documents necessary for computing the assessment, was under no obligation to inform the officer about the truth of the transaction and directed the amount of tax to be excluded. Applications by the Revenue under Sections 66(1) and 66(2) of the Indian Income Tax Act, 1922, seeking a reference to the High Court were rejected. In the final appeal, the Supreme Court construed the expressions "omission or failure to disclose fully and truly all material facts necessary for its assessment for that year" and held as follows (at pp. 612 and 613) :

"We are of the view that u/s 34(1)(a), if the assessee has disclosed primary facts

relevant to the assessment, he is under no obligation to instruct the Income Tax Officer about the inference which the Income Tax Officer may raise from those facts. The terms of the Explanation to Section 34(1) also do not impose a more onerous obligation. Mere production of the books of account or other evidence from which material facts could with due diligence have been discovered does not necessarily amount to disclosure within the meaning of Section 34(1), but where on the evidence and the materials produced, the Income Tax Officer could have reached a conclusion other than the one which he has reached, a proceeding u/s 34(1)(a) will not lie merely on the ground that the Income Tax Officer has raised an inference which he may later regard as erroneous."

(b) Panchanan Hati Vs. Commissioner of Income Tax, . In this case, subsequent to the original assessment, it came to the knowledge of the Income Tax Officer that the persons shown in the assessee's account as creditors subsequently confessed to the Income Tax Officer that they had acted as mere name-lenders for the accounts of third parties. The Income Tax Officer proceeded on the basis that this fact had been kept concealed by the assessee at the original assessment. A reassessment was made which resulted in an addition to the assessee's income as originally assessed. The reassessment was upheld both by the Appellate Assistant Commissioner and the Tribunal. The Tribunal held that the information about the confession of the alleged creditors constituted reasonable ground for the formation of a belief that the assessee at the original assessment failed to disclose fully and truly all material facts necessary for the assessment which has resulted in the escapement of his income.

On such facts, a Division Bench of this court, following the decision of the Supreme Court in The Commissioner of Income Tax, Calcutta Vs. Burlop Dealers Ltd., and a decision of the Kerala High Court in Sujir Ganesh Nayak and Co. Vs. Income Tax Officer, A Ward, Quilon, , held that it was not possible for the assessee to have disclosed the confession of the creditors which was not in existence at the material time, that no nexus or rational connection was established or shown between the subsequent information and the formation of belief of the Income Tax Officer and that the fact that the assessee could have confessed at the original assessment that the disclosed loans were not genuine would not be a material fact within the meaning of Section 147 of the Act.

(c) Income Tax Officer and Others Vs. Madnani Engineering Works Ltd., Calcutta, . In this case, interest paid by the assessee to the creditors who were shown to have lent money to the assessee on hundis were allowed to be deducted as expenditure in the original assessment. Subsequently, the Income Tax Officer sought to reopen the assessment on the ground that the purported transaction covered by the hundi loans were bogus, no interest had been paid by the assessee to the creditors and that such interest was wrongly allowed to be deducted. The notice of reopening was challenged in a proceeding under Article 226 of the Constitution. The Income Tax Officer in his affidavit stated that in the course of assessment of the assessee for a subsequent year, it was discovered

that hundi loans shown in the assessee's books were fictitious and the credits against the names of the creditors were not genuine. It was contended that the assessee failed to disclose fully and truly all material facts, by reason whereof, a part of the income has escaped assessment. The application failed in the first court. On appeal, a Division Bench of this court allowed the appeal. On further appeal to the Supreme Court, it was held following the earlier decision of the Supreme Court in *The Commissioner of Income Tax, Calcutta Vs. Burlop Dealers Ltd.*, , that the respondent had produced at the initial assessment the original hundis as also the entries in his books of account in support of his case. It was for the Income Tax Officer to investigate and determine whether the documents produced were genuine or not. The assessee could not be said to have failed to make a true and full disclosure of material facts by not confessing before the Income Tax Officer that the hundis and the entries in the books of account produced were bogus.

24. The learned advocate for the Revenue contended, on the other hand, that the investigation made by the Income Tax Officer following the disclosure petition in the subsequent assessment year resulted in the finding that the alleged loan purported to have been obtained from the creditor, Jagannath Prasad Jaiswal, was bogus and this was confirmed by the Appellate Assistant Commissioner on an appeal. The aforesaid constituted sufficient material on which he could come to hold the belief that the assessee in the relevant assessment year had not disclosed material facts fully and truly which resulted in under-assessment. In support of his contentions, the learned advocate for the Revenue cited a decision of a learned judge of this court in *Biswanath Pasari Vs. Income Tax Officer, "B" Ward and Others*, . In this case, an assessment was sought to be reopened on the ground that material facts had not been disclosed by the assessee truly and fully which has resulted in an under-assessment. It was observed by the learned judge as follows (at pp. 427 and 428):

"Simply because a transaction is held fictitious in a subsequent assessment proceeding, similar transaction in an earlier assessment year cannot be ipso facto held fictitious...it should also be noted that mere disclosure of certain alleged facts will not ipso facto absolve the responsibility of the assessee..... If the assessee relies on certain transactions which in reality did not exist but were fictitious and imaginary, then it must be held that the assessee had not disclosed primary and material facts fully and truly."

25. On the facts of the case, the reopening was upheld.

26. He also cited *Commissioner of Income Tax Vs. Nathuram Gokulka*, . In this case, a Division Bench of this court held that where there were contradictions between the statements made at the time of the original assessments and the statements made in the subsequent disclosure petition, the contradiction itself could be considered to be sufficient material on which a reasonable person could form a tentative belief that at the time of the original assessment, true materials and facts have not been disclosed and on that basis reassessment could be

validly initiated.

27. It appears to us that the dispute in this appeal is concluded by the decisions of the Supreme Court and this court cited by the learned advocate for the assessee. The decision of the learned judge in Biswanath Pasari Vs. Income Tax Officer, "B" Ward and Others, , really turned on the facts of that case. The earlier decision of a Division Bench of this court in Panchanan Hati Vs. Commissioner of Income Tax, was not cited before the learned judge in Biswanath Pasari Vs. Income Tax Officer, "B" Ward and Others, .

28. The decision in Commissioner of Income Tax Vs. Nathuram Gokulka, has no application to the facts of this case. The disclosure petition in that case was made after the original assessment was made and the disclosure petition and the statements of the assessee in the original assessment contradicted each other. In the case before us, the disclosure was made before the original assessment was made and there was no contradiction between the two.

29. Law appears to be settled that in order to bring a case within the ambit of Section 147, it is for the Revenue to establish that the assessee has failed to disclose a fact or material correctly or truly which has resulted in under-assessment of the income of the assessee. As long as the material facts with contemporaneous records and documents are placed before the Income Tax Officer at the time of the original assessment, the assessee can be said to have done his duty.

30. Thereafter, it is for the Income Tax Officer to investigate and then to accept or reject the case of the assessee. It is not for the assessee to invite a rejection from the Income Tax Officer by confessing that his return, as filed, is not true or correct or that he has concealed material facts or has made untrue statements.

31. For the reasons stated above, we allow the appeal and set aside the judgment and order dated February 28, 1973, under appeal. The rule nisi is made absolute. The impugned notice dated December 20, 1970, is quashed. Let appropriate writs issue.

32. There will be no order as to costs.

33. The learned advocate for the Revenue, at the conclusion of the judgment, orally prayed that a certificate be issued to the effect that this is a fit case for appeal to the Supreme Court. We are unable to allow the prayer inasmuch as, in our view, the law stands well-settled and no substantial question of law arises from this judgment.

Mukul Gopal Mukharjee, J.

34. I agree.