(1973) 02 CAL CK 0017

In the Calcutta High Court

Case No : Civil Rule No. 2912 (W) of 1966

Biju Patnaik APPELLANT

Vs

Income Tax Officer RESPONDENT

Date of Decision : 07-02-1973

Acts Referred:
Income Tax Act, 1922 — Section 29, 34(1A)
Income Tax Act, 1961 — Section 142(1), 147, 148, 148(2), 151

Citation : (1974) 1 ILR (Cal) 314

Hon'ble Judges : Chittatosh Mookerjee, J

Bench : Single Bench

Advocate : D. Pal, P.K. Pal and R.N. Dulta, for the Appellant;M.N. Roy, for the Respondent

Judgement

Chittatosh Mookerjee, J.—The Petitioner in this Rule has prayed that the notice dated July 31, 1965, u/s 148 of the income tax Act, 1961, issued by the income tax Officer, Special Investigation, Calcutta, for the assessment year 1957-58 and also the notice u/s 142(1) of the Act dated September 17, 1965, for the said, assessment year be quashed and/or set aside. The Petitioner has further prayed that the Respondents be commanded to cancel and/or withdraw the said notices and they be prohibited from taking any steps whatsoever in pursuance of the said notices.

2. The Petitioner''s case is that he as a mine-owner carried on mining business in the district of Keonjhar, Orissa. He made an application to the Collector of Keonjhargarh under the Mineral Concessions Rules, 1949, for a mining lease of iron ore and manganese ore over an area of 3,900 acres within Champa Subdivision of the said district. The Government of Orissa by their order dated October 10, 1952, granted the Petitioner permission to work the mines in respect of manganese ore for a period of one year from the date of delivery of the possession of the said land. The said permission was, however, renewable from year to year until the finalization of the terms and conditions of the lease which

the Government of Orissa had agreed to. grant to the Petitioner. The Government of Orissa by another letter dated January 14, 1954, granted to the Petitioner permission to work out the iron ore in respect of 286-5 acres falling within the said area of 3,900 acres. By another letter dated August 30, 1955, the Government of Orissa granted to the Petitioner the working permission in respect of iron ore over an area of 1,006 acres in Kasia. In March 1956, B. Patnaik Mines Pvt. Ltd. was incorporated as a company under the Indian Companies Act, 1913 One of the objects of the said company was to purchase or otherwise acquire as a going concern the business and good-will of the firm of B. Patnaik Mine Owner as carried on by the Petitioner and all the assets of the said business. The Board of Directors of the said company, by a resolution dated March 23, 1956, resolved that the assets and good-will of the Petitioner would be taken over on or before March 31, 1956, on payment of a consideration of Rs. 15,00,000 payable in suitable instalments in course of ten years. The assets and liabilities of the said mining business owned by the Petitioner were, accordingly, taken over by the company from him and incorporated in its balance-sheet for the period ending March 31, 1956. A sum of Rs. 15,00,000 was credited to the Petitioner''s capital account and debited to the said company being the good-will receivable by the said company.

3. The Petitioner had submitted a return of his income for the assessment year 1956-57 and the income tax Officer had computed his total income at Rs. 1,30,816. On a revisional application his total income was reduced to Rs. 68,216. For the assessment year 1957-58, the Petitioner also submitted a return of his income and had produced the books of account including the balance-sheet and other documents relevant for the assessment. The ''Petitioner has claimed that during the course of discussion with the income tax Officer, A Ward, Cuttack, the question as to whether he, was liable to be assessed during the relevant assessment year on the capital gains arising, if any, as a result of the transfer of the entire mining business assets to the said company was also considered by the said income tax Officer. The .Petitioner has submitted that assets of the business were taken over by the company on March 31, 1956, and on the said date the tax on capital gains was not payable. The income tax Officer in his original assessment order did not include any capital gains in the income of the Petitioner and computed his total income for the said assessment year 1957-58 at Rs. 39,950 and issued demand notice u/s 29 of the Indian income tax Act, 1922, for the tax which was payable by the Petitioner.

4. The Petitioner''s income tax file had since been transferred to the income tax Officer, Special Investigation Circle. On July 31, 1965, the income tax Officer, Special Investigation, Calcutta, issued a notice u/s 148 of the income tax Act, 1961, stating that whereas he had reason to believe that the Petitioner''s income chargeable to tax for the assessment year 1957-58. had escaped assessment within the meaning of Section 147 of the income tax Act, 1961, he, therefore, proposed to re-assess his income for the said assessment year. The income tax Officer required the Petitioner to deliver to him within 30 days from the date of

service of the notice, a return in the prescribed form of his income assessable for the said assessment year. The said notice further stated that it was being issued after obtaining necessary sanction of the Commissioner of income tax, Bihar and Orissa. Thereafter, the said income tax Officer issued a notice u/s 142(1) of the Act calling upon the Petitioner to appear before him on September 29, 1965, and to comply with certain requisitions set out in the said notice. The income tax Officer asked the Petitioner to furnish particulars about the date on which he had applied to the Government of Orissa for transfer of the mining business in favour of the company or he had applied for substitution of the name of the company in his place for working the mining leases. The ''Petitioner was also asked to furnish a copy of the first return submitted by the company to the Chief Inspector of Mines, Dhanbad and also the first certificate of approval granted by the Government of Orissa in favour of the company.

5. The Petitioner through his lawyer requested the income tax Officer, Special Investigation, Cuttack, to let him know the reasons as to why his assessment for the year 1957-58 was reopened. He also asked for the certified copy of the order-sheet for the assessment year 1957-58. The income tax Officer, Special Investigation, by a letter dated October 29, 1965, informed the Petitioner the reasons as to why the assessment for the year 1957-58 was reopened. According to the said officer, there was material to show that the Petitioner had earned a sum of Rs. 15,00,000 as capital gains by transferring his mining business to a limited company during the accounting year ended on March 31, 1957, which had escaped assessment. The Petitioner had originally stated that the transfer of the business was made before March 31, 1956. From the materials which bad come to their possession, but which was not available at the time of original assessment, it appeared that the date of transfer of business under the law fell during the accounting year ended on March 31, 1957. Hence, it was necessary to re-open the assessment for 1957-58. The Petitioner was offered opportunity to inspect the materials on record for re-opening of the said assessment. The Petitioner also through his agent inspected these materials on record. Particulars of the said documents and papers have been set out in para. 23 of the writ petition. The Petitioner by letter dated November 5, 1965, confirmed that he had obtained inspection of records, but he disputed the contention that these'' materials disclosed any basis for proceeding u/s 147 of the Act. He denied that there had been any omission or failure to disclose the material facts. The Petitioner contended that conditions precedent for the assumption of jurisdiction to re-open the assessment did not exist.

6. Thereafter, the Petitioner obtained the present Rule contending that the impugned proceeding u/s 147 was invalid.

7. Mr. Pal, learned Advocate for the Petitioner, has contended before me that the present case is fully covered by the decision of the Supreme Court in Chhugamal Rajpal Vs. S.P. Chaliha and Others, and the recent Full Bench decision of this Court in Lakhmani Mewalal Das v. income tax Officer, I Ward, District VI and Ors.

(1972) Tax L.R. 815.

8. In the instant case, the impugned notice u/s 148 of the Act was issued on the basis that Section 147(a), was applicable. Therefore, to sustain the validity of the impugned proceedings the following conditions precedent must exist. The income tax Officer must have reason to believe (i) that, in fact, profits or gains had been under-assessed and (ii) that such under-assessment was due to nondisclosure of material facts by the assessee. If these two conditions precedent do not co-exist, the proceedings must be quashed. In other words, it is necessary to consider whether the income tax Officer concerned entertained any belief that there had been under-assessment due to non-discourse of material facts. If, in fact, the income tax Officer entertained such belief, we cannot further enquire about the sufficiency of reasons or the same. The said belief of the income tax Officer must be, however, formed on relevant materials. A belief u/s 147 formed on extraneous and irrelevant considerations is no belief in the eye of law. In my opinion, for the purpose of determination of these points the Court is entitled to take into consideration both the reasons recorded by him u/s 148(2) and also affidavits filed in the case.

9. I am unable to'' accept the extreme contention made on behalf of the Petitioner that, the Respondents are not entitled to file affidavits in the case in order to prove that the conditions precedent for initiation of the proceedings u/s 147 existed. The Supreme Court in Kantamani Venkata Narayana and Sons Vs. First Additional Income Tax Officer, Rajahmundry, relied upon the affidavit filed in the Court of first instance for holding that the income tax Officer in the said case had received information relying upon which he had reason to believe that the assesses had not disclosed fully and truly all material facts necessary for the assessment and that, in consequence of non-disclosure of that information, income chargeable to tax had escaped assessment (vide Paras. G, 7 and 8 of the judgment).

10. In Chhugamal Rajpal v. S.P. Chaliha (Supra) the Supreme Court found that the affidavit filed by the income tax Officer to be vague and indefinite and, accordingly, it had directed the learned Counsel for the department to produce before the Court records of the income tax Officer to show that the income tax Officer had complied with the requirements of Sections 148 and 151(2) of the Act. Although, thereafter, the report submitted by the income tax Officer to the Commissioner and the order of the Commissioner were produced, the order-sheet recording the reasons of the income tax Officer, as required by Section 148(2), was not produced. In these circumstances, the Supreme Court in Chhugamal Rajpal''s case (I) confined itself to the report of the income tax Officer for deciding whether the income tax Officer had any material before him which would satisfy requirements of clauses (a) and (b) of Section 147.

11. Similarly, in Sheo Nath Singh Vs. Appellate Assistant Commissioner of Income Tax, Calcutta, the Supreme Court observed:

Nothing had been disclosed which was relevant for the purpose of finding out whether the income tax Officer had any reason to believe that the income, profits or gains of the Assessee .chargeable to income tax had escaped assessment. The Court gave an opportunity to the Revenue to produce the records containing those reasons.

According to the Supreme Court, all that had been found in the records were certain reports in Form B made in connection with the starting of proceedings u/s 34(1A) of the income tax Act, 1922. Thus, apparently there was no other material in records of the income tax Officer concerned. The Supreme Court in Sheo Nath Singh Vs. Appellate Assistant Commissioner of Income Tax, Calcutta, held:

There is no material or fact which has been stated in the reasons for starting proceedings in the present case on which any belief could be founded of the nature contemplated by Section 34(1-A). The (1) Supra (4) Sheo Nath Singh Vs. Appellate Assistant Commissioner of Income Tax, Calcutta, so-called reasons arc stated to be beliefs thus leading to an obvious self-contradiction.

It was, accordingly, held that the requirements of Section 34(1-A) were not satisfied and, therefore, the notices which had been issued were wholly, illegal and invalid.

12. Similarly, in Chhugamal Rajpal''s case (Supra) the Supreme Court held that the income tax Officer in the said case had no reasons to believe that by reason of the Assessee''s omission to disclose fully and truly all material facts necessary for his assessment for the accounting year in question, income chargeable to tax had escaped assessment for that year, nor could it be said that he, as a consequence of information in his possession, had reason to believe that the income chargeable to tax had escaped assessment for that year.

The Supreme Court further observed that they were not satisfied that the income tax Officer had any material before him which could satisfy the requirements of either Clause (a) or Clause (b) of Section 147.

13. In my view, the Supreme Court in Chhugamal Rajpal''s case did not lay down a general proposition that any one of the infirmities in a report of the income tax Officer, pointed out by them in the said case, would be sufficiently by itself to invalidate a proceeding u/s 148. In view of the vague and indefinite affidavits filed in the said case, the Supreme Court had to confine itself to the report of the ''income tax Officer for the. purpose of deciding whether the income tax Officer had any material before him for satisfying the requirements of Section 147. The Supreme. Court observed (1) that the said report, did not set out the material which was before the income tax Officer. The Court was unable to consider the alleged communications received by him from the Commissioner of income tax, Bihar and Orissa, because the facts contained in those communications were not mentioned in the report. The income tax Officer in Chhugamal Rajpal''s case did not .come to a conclusion that the alleged loan transactions were not genuine.

But he merely entertained a vague feeling that they might be bogus transactions. The reasons recorded by him u/s 148 merely showed that the same was a case for investigation as to the truth of the alleged transactions.

14. In the instant case, however, the Respondents in their affidavit-in-opposition affirmed by Amaresh Bagchi, who was the income tax Officer, Central Circle, Cuttack, at the relevant time, have affirmed a lengthy affidavit setting out the circumstances under which the notice u/s 148 of the income tax Act, 1961, was served upon the Petitioner. According to the said deponent, at the time of the original assessment of 1957-58, the Petitioner had'' filed. a. copy of the agreement between him and M/s. B. Patnaik Mines Pvt. Ltd. dated March 31, 1956, and also the balance-sheet of the said company for the year ending March 31, 1956. The Petitioner through his authorised representative had represented that actual transfer of the mining business was effected on March 31, 1956. The said position, as claimed by the Petitioner, was then accepted by the income tax Officer and the capital gains of Rs. 15,00,000 was left out of the assessment for the assessment year 1957-58. According to the deponent of the said affidavit-in-opposition dated June 16, 1967, the income tax department subsequently came into possession of information which clearly indicated that the facts relating to the date of transfer of the said mining business had not been disclosed fully and truly by the Petitioner to the income tax Officer. From this information the income tax Officer had reason to believe that the transfer of the mining business actually took place after March 31, 1956, and more precisely on November 3, 1956. The Petitioner and his wife were originally only Directors of the company in question.. The company had furnished to the Chief Inspector of Mines, Dhanbad, all the particulars by letter dated December 6, 1957, which clearly stated that the date of change of ownership of the mines was made on November 3, 1956. According to the Respondents, the records of the Government of Orissa also indicated the date of transfer was November 3, 1956. The said information was received from a letter from the Directorate of Mines, Orissa, dated June 29, 1965 (vide annex. B to the said affidavit-in-opposition). In the said affidavit-in-opposition reference was made to the letter of the Petitioner dated October 4, 1956, by which he had complied with conditions for renewal of working permission over an area of 3-99 acres in Keonjhar which did not mention about the taking over of the mining business by the company. Only on October 30, 1956, the Petitioner had made request for grant of lease to the company. Certain communications made by the Petitioner in connection with the renewal of the said working permission have been also referred to by the Respondents as materials for formation of belief by the income tax Officer that the transfer of mining business did not take place on March'' 31, 1956, as represented by the Petitioner before the income tax department.

15. The Respondents in their said -affidavit-in-opposition have further stated that after the initiation of the proceedings the Petitioner had requested for allowing inspection on the materials on which the said proceedings had commenced. The Petitioner''s authorised representative was allowed such inspection of the

materials on the basis of which the. proceedings were started.

16. The fact whether the Petitioner transferred the mining right before or after March 31, 1956, was the material fact, and prima facie the Petitioner was required to disclose "the same in connection with the assessment of his income in the year 1957-58. If the Petitioner at the time of his original assessment had made any incorrect statement about the actual date of such transfer, as alleged by the income tax authorities, such act could certainly be described as an omission or failure on the part of the petitioner to disclose fully and truly all the primary facts. It may be noted that in case the transfer in question, in fact, took place after March 31, 1956, it would be chargeable to tax whereas no assessment was originally made on the ground that such transfer was effected on March 31, 1956.

17. In my opinion, the Respondents have satisfactorily established that there were materials before the income tax Officer concerned for formation of his prima facie belief as to whether the Petitioner''s income for the aforesaid year had escaped assessment. The materials were relevant. The letters, communications and documents referred to in the affidavit-in-opposition were certainly germane for deciding whether capital gains was chargeable in respect of the consideration received by the Petitioner for the, transfer of the mining interest in question. There was no suggestion by the Petitioner that the officer concerned did not act bona fide. It is not for this Court to decide the sufficiency of these materials. It had been uniform laid down by the Supreme Court and also by this Court that it was the income tax Officer to decide whether the materials were sufficient for drawing up of proceedings u/s 147 or not. The -present case is certainly unlike a case where the income tax Officer initiates a proceeding without-any material or on irrelevant materials. The materials mentioned in the affidavit-in-opposition cannot be also described as vague and devoid of particulars.

18. As already stated in Chhugamal Rajpal''s case (Supra (A.I.R 732, para 8)) the affidavit filed by the income tax authority was found to be vague and indefinite. Even the order-sheet recording the reasons was not produced. Hegde J. considered the said report. But the learned Judge was not satisfied that the income tax Officer had any material before him which could satisfy the requirement of either d. (a) or Clause (b) of Section 147. But in the instant case, as already stated, the Respondents by their affidavit had simply disclosed the materials which were before the income tax Officer for issuing the notice u/s 148. The report of the income tax Officer was also not vague. The Full Bench in Lakhmani Mewalal Das v. The income tax Officer, I Ward, District VI (Supra) followed the Supreme Court decision in Chhugamal. Rajpal''s case (Supra). For reasons already given the majority judgment in the said Full Bench decision is also distinguishable on facts from the present case.

19. I am unable to hold that mere omission to specifically mention these materials in the reasons recorded u/s 148 was sufficient-to invalidate the

proceedings, particularly when these materials were on record of the officer. Further, the income tax Officer while giving the reasons for starting the proceedings (vide Ex. A) stated:

The Assessee sold his mining business during the relevant accounting year to a company named M/s. B. Patnaik Mines (P.) Ltd. and earned a profit of Rs. 15 lakhs which was assessable as capital gains but was not shown by the Assessee in his return. The transfer of the business was stated by the Assessee to have been made on 31.3.1956, and, as such, the amount of capital gains was not liable to taxation, it was claimed by the Assessee since capital gains was not subjected to taxation in the assessment year 1956-57. But from. information now available it appears that the transfer of the business took place on 3.11.1956 and thus the Assessee was liable to be taxed, on the capital gains earned in the accounting year ended 31.3.1957. Hence, action u/s 147(a) is required to assess the said sum of Rs. 15 lakhs which escaped'' assessment.

This report of the income tax Officer clearly disclosed that he had formed a belief that a sum of Rs. 15 lakhs had escaped assessment because the same was not shown by the Assessee in his return. According to the income tax Officer, the Assessee had stated that the transfer of business was made on March 3.1, 1956, and as such, the amount of capital gains was not liable to taxation. The income tax Officer did not entertain any vague feeling. The income tax Officer had come to the "prima facie conclusion that the said transfer was made on November 3, 1956, and that the sum of Rs. 15,00,000 had escaped assessment in the relevant year. Therefore, even if he did not expressly use the words that he had reason to believe, upon a reading of his entire report, I am bound to say that the income tax Officer had, in fact, formed a belief that the income of the Petitioner for the year 1957-58 had been under-assessed because of the omission on the part of the Petitioner to include Rs. 15,00,000 in his return. I have already held that whether the transfer in question took place on a particular date was a primary fact and not an .inferential one to be deduced from other facts. Therefore, I conclude that the report submitted by the income tax Officer u/s 151(2) did give reasons for his belief that it was a fit case for issue of a notice u/s 148. In the facts of this case, it cannot also be'' said that the Commissioner of income tax, Bihar and Orissa, did not apply his mind or that he had acted mechanically. As already stated, there was a large volume of records, papers and documents which had come into the possession of the income tax Officer" after the ''assessment was made and before the proceeding u/s 147 was initiated. The income tax Officer duly recorded to his reasons. The Commissioner, before according sanction, had before him these materials and the reasons recorded by the income tax Officer. Therefore, I accordingly hold that the Commissioner of income tax had acted in accordance with law in the matter of granting "of sanction u/s 151 of the Act.

20. The learned Advocate for the Petitioner at the time of the hearing of the Rule tried to contend that the sum of Rs. 15,00,000 ?received by the Petitioner was

paid as a consideration for transferring his goodwill in the mining business, and, therefore, the same could be classed as capital gains. The said point has not yet been taken by the Petitioner in his communication to the income tax department. The said point was also not taken in the writ petition. The Petitioner has sought to take this new point for the first time in his affidavit-in-reply.

21. Accordingly, I am not prepared to permit the Petitioner to take the said point. At this stage, upon the materials on record it is possible to decide whether the payment of Rs. 15,00,000 received by the Petitioner was a consideration only for his goodwill in the mining business or the same was a consideration for transfer of the Petitioner''s right to work the mines and to get a formal lease and for other assets and properties of his mining business. By entering into the said question we will be really embarking on an enquiry as to the sufficiency of materials for the formation of the prima facie belief of the income tax Officer that the Petitioner''s income had escaped assessment. I may, however, observe that it would be open to the Petitioner hereinafter to raise before the income tax Officer the said point about the true character of- payment of Rs. 15,00,000 received by him at the time of the transfer of the mines rights to the above company.

22. In the above view, the Petitioner is not entitled to any relief at the present stage.

23. I, accordingly, discharge the Rule. There will be no order as to costs. Operation of the order will be stayed for seven weeks from the date on the prayer of the learned Advocate for the Petitioner.