
(1983) 12 CAL CK 0019
In the Calcutta High Court
Case No : C.R. No. 1825 (W) of 1978

Biswanath Pasari

APPELLANT

Vs

Income Tax Officer, "B" Ward and Others

RESPONDENT

Date of Decision : 14-12-1983

Acts Referred:

Income Tax Act, 1961 — Section 147, 148

Citation : 88 CWN 318 : (1985) 154 ITR 419

Hon'ble Judges : G.N. Ray, J

Bench : Single Bench

Advocate : D. Pal, R.K. Murarka and A.K. Dey, for the Appellant; A.C. Maitra and Ram Chandra Prosad, for the Respondent

Judgement

Ray, J.—This rule is directed against a notice dated February 16, 1978, issued by the ITO, Central Circle XV, Calcutta u/s 148 of the I.T. Act, 1961, for the assessment year 1969-70, and any other notice, order or proceeding relating thereto. The petitioner's case is that the petitioner was and is still an assessee under the I.T. Act and he regularly maintains his accounts in accordance with the mercantile system of accountancy. During the assessment year 1969-70 corresponding to the accounting year ending on March 31, 1969, the petitioner was a partner in Biswa Engineering Works and Sitaram Shankarlal Agency. Apart from the said partnership business, the petitioner also carried on the business of dealing in shares, paper, miscellaneous goods and as commission agent of M/s. Wood Craft Products Ltd. The petitioner received dividend on shares and also earned commission on general insurance. The petitioner filed his return for the said assessment year 1969-70 before the ITO, "B" Ward, District III(I), Calcutta, and, according to the petitioner, he disclosed fully and truly all the primary facts and materials necessary for his assessment. In response to a notice u/s 143(2) of the I.T. Act, the petitioner's authorised representative also appeared before the said ITO and produced the requisite information and documents and books of account which were looked into and considered by the ITO. The petitioner further contends that brokers' memos, confirmations and bills in respect of share

dealings, profit and loss account, balance-sheet, capital account, details of share accounts, etc., were also produced by the petitioner before the said ITO. By an order of assessment dated October 30, 1971, made u/s 143(3) of the I.T. Act, the said ITO had assessed the petitioner for the said assessment year 1969-70 on a total income of Rs. 249. The said assessment order has been annexed to the writ petition being annexure "A". It appears that the petitioner thereafter preferred an appeal challenging various additions and disallowances made by the ITO for the said assessment year before the AAC of Income Tax, Range "H", Calcutta, who by his order dated September 18, 1972, partly allowed the said appeal. The appellate order has also been annexed to the writ petition being marked with letter " B". On February 17, 1978, the ITO, Central Circle XV, Calcutta, issued the impugned notice dated February 16, 1978, u/s 148 of the I.T. Act for the assessment year 1969-70, wherein respondent No. 2, inter alia, alleged that he had reasons to believe that the petitioner's income chargeable to tax for the said assessment year had escaped assessment within the meaning of Section 147 of the I.T. Act and as such it was proposed to reassess the income for the said assessment year. The petitioner was, therefore, required to file a return for the said assessment year. It was also stated in the said notice that the same was issued after obtaining the necessary approval of the Commissioner of Income Tax, Central I, Calcutta, The said notice is annexure "C" to the writ petition. The petitioner by his letter dated February 24, 1978, addressed to the ITO contended that the assessment had been made after full and true disclosure of the primary facts and documents and as such there was not and could not be any material or information before the said ITO, Central Circle XV, which could lead him to believe that any income of the petitioner for the assessment year 1969-70 had escaped assessment. The petitioner, therefore, requested the said ITO to withdraw and/or cancel the said notice and/or to disclose the alleged reasons and belief for the issuance of the same. A copy of the said letter of the petitioner disputing the validity of the said notice is annexure "D" to the writ petition. The petitioner, however, filed under protest a return under the said notice for the said assessment year and reiterated the statements and submissions made in his earlier letter referred to hereinbefore. The petitioner contends that there was no omission or failure on the part of the petitioner to disclose fully and truly primary and material facts necessary for the assessment" for the said assessment year 1969-70. No new material or fact can or has come to the possession of the said ITO which was not known to the ITO who had assessed the tax for the assessment year 1969-70. Accordingly, there was no occasion to contend that the income of the petitioner had escaped assessment and/or there was any omission or failure on the part of the petitioner to disclose primary facts truly and fully. The petitioner contends that the alleged belief that income had escaped assessment is merely a pretence and such contention has not been made in good faith. The petitioner contends that the notice was issued without any justification whatsoever and mechanically without application of mind and such notice must have been issued on irrelevant and extraneous material in order to start a probing and/or fishing proceeding, although such

proceeding is not warranted in the facts of the case and is also not permissible in law. The petitioner also contends that the alleged reasons and/or information, if any, have no rational connection, nexus and live link for the formation of the requisite belief as required u/s 147 of the I.T. Act. Dr. Pal appearing with Mr. Murarka contended that the reasons for belief contemplated in Section 147(a) of the I.T. Act for the reopening of the assessment must have a rational nexus or live link between the materials coming to the notice of the ITO and the formation of belief by him. In this connection, he referred to a decision of the Supreme Court made in the case of Income tax Officer, Calcutta and Others Vs. Lakhmani Mewal Das, It has been held in the said decision that the powers of the ITO to reopen the assessment, though wide, are not plenary and the words of the statute are "reasons to believe" and not "reasons to suspect". The reopening of assessment after the lapse of many years is a serious matter. The provisions of the Act in this regard departs from the normal rule that there should be, subject to right of appeal and revision, finality about the orders made in judicial or quasi-judicial proceedings. It is, therefore, essential that before such action is taken, the requirements of law should be fulfilled. The learned counsel also contended that before the ITO can be reasonably permitted to contend that he had reasons to believe that some income had escaped assessment, he must show that some relevant materials were placed before him from which he could have drawn such inference objectively that income had escaped assessment. In this connection, the learned counsel referred to a Supreme Court decision made in the case of Union of India and Others Vs. Rai Singh Deb Singh Bist and Another, . In the said decision, reliance was also made on an earlier decision of the Supreme Court made in the case of Chhugamal Rajpal Vs. S.P. Chaliha and Others, In the said decision, the court took the view that the Central Board of Revenue before reaching its satisfaction that it was a fit case to be proceeded with u/s 34(1)(a) (which corresponds to the provisions of Section 147) must have examined the reasons given by the ITO and arrived at its own finding. It is not permissible to act mechanically. A Bench decision of this court made in the case of East Coast Commercial Company Ltd. Vs. Income Tax Officer and Others, was also referred to by the learned counsel for the petitioner. In the said decision, reference was also made to the decision of the Supreme Court made in the case of Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, The Supreme Court has held in the said decision that when a statutory authority makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and such reasons cannot be supplemented by fresh reasons in the shape of an affidavit or otherwise. Otherwise, an order bad in the beginning, may by the time it comes to court on account of challenge, gets validated by additional grounds later brought out. Referring to the said decision, the learned counsel for the petitioner contended that in the notice, no basis for the reasons have been disclosed and on the face of the notice, it is apparent that there was no valid reason for which the ITO concerned could objectively come to a view that income had escaped assessment and/or there had been no full and complete disclosure of primary and relevant facts. The learned counsel for the

petitioner also contended that in the affidavit-in-opposition filed on behalf of the Department, an attempt has been made to state certain facts to show that on the basis of such facts there was occasion to hold prima facie that income for the said assessment year had escaped assessment for want of relevant materials. The learned counsel for the petitioner has contended that although the facts set out in the affidavit-in-opposition cannot stand scrutiny, yet even assuming that, on such facts, a reasonable basis may be formed by the ITO, the existence of such material will be of no consequence if those materials were not taken into consideration by the ITO, but he issued the notice mechanically without reasonably forming any opinion. The learned counsel for the petitioner in this connection referred to a decision of the Supreme Court made in the case of *Income Tax Officer and Others Vs. Madnani Engineering Works Ltd., Calcutta*, In the said decision, an affidavit was filed by the ITO contending that there were reasons to prima facie hold that the hundi transactions were fictitious. The Supreme Court held in the said decision that the ITO had merely stated about his belief about fictitious hundi transactions but he had not set out any material on the basis of which he had arrived at such belief. Hence, there was nothing on the basis of which the court would be satisfied about the existence of any material for the belief. The learned counsel contended that ultimately materials may be found out for justification of the suspicion but such finding out of existence of materials at a later stage is not permissible for the issue of a notice u/s 148 on mere suspicion.

2. In this connection, the learned counsel for the petitioner has referred to a decision of this court made in the case of *Murarka Paints and Varnish Works Ltd. and Another Vs. Income Tax Officer and Another*, . In the said decision, this court has held that merely because in a subsequent assessment proceeding, a fictitious share transaction has been detected, the same ipso facto will not establish that for the earlier years such fictitious share transactions were relied on by the assessee for concealment of his real income. The learned counsel for the petitioner contends that the facts and circumstances of the decision in *Murarka Paints and Varnish Works Ltd. and Another Vs. Income Tax Officer and Another*, , are quite similar to the facts and circumstances of the instant case and for the same reasoning as given in the said decision, the instant notice should also be quashed. The learned counsel for the petitioner also referred to a Full Bench decision of the Gujarat High Court made in the case of *Poonjabhai Vanmalidas and Sons (H.U.F.) Vs. Commissioner of Income Tax, Gujarat*, . It has been held in the said Full Bench decision that if the assessee had disclosed primary facts relevant to the assessment, he is under no obligation to instruct the ITO about the inference to be drawn by the ITO. Where on the evidence and material at the time of the original assessment, an inference has been drawn, no proceeding u/s 34(1)(a) will lie merely on the ground that the ITO had earlier drawn an inference which he may later on regard as erroneous. Relying on the said decision, the learned counsel for the petitioner contended that the assessee had disclosed primary and material facts by producing the accounts of the share

transactions. There was no obligation on the part of the assessee to instruct the ITO about the inference to be drawn by him in respect of such share transactions. The ITO, as a matter of fact, had accepted the account books of the petitioner-assessee and the genuineness of the share transactions on the basis of primary and relevant materials produced before him at the time of assessment. It is, therefore, not permissible to reopen the assessment on the ground that the inference which had been drawn earlier by the ITO was erroneous. The learned counsel for the petitioner also contended that a rational connection for the belief for reopening the assessment u/s 147(a) postulates that there must be a direct nexus or live link between the material coming to the notice of the ITO and the formation of his belief that there has been escapement of income. The learned counsel, therefore, contended that the notice, on the face of it, must be held to be bad on the finding that the statement that there are reasons to believe that the income had escaped assessment has been made mechanically without any material on the basis of which, objectively, such a view can be held.

3. Mr. Maitra, the learned counsel appearing for the I.T. Department, contended that the assessee does not discharge his duties to disclose fully or truly material facts necessary for the assessment of the relevant year by merely producing the books of account and other evidence. He has to bring to the notice of the ITO particular items in the books of account or portions of the documents which are relevant. Even if it is assumed that from the books of account produced at the time of assessment, the ITO could have found out the truth, the ITO on that account is not precluded from exercising the power to assess the income which had escaped assessment. For this contention, Mr. Maitra has referred to a decision of the Supreme Court made in the case of Kantamani Venkata Narayana and Sons Vs. First Additional Income Tax Officer, Rajahmundry, Mr. Maitra has also referred to a later decision of the Supreme Court made in the case of Sowdagar Ahmed Khan (Deceased) (By his Legal representatives) Vs. Income Tax Officer, Nellore, wherein the decision made in Kantamani Venkata Narayana and Sons Vs. First Additional Income Tax Officer, Rajahmundry, was followed. Mr. Maitra has also referred to a Bench decision of this court made in the case of Income Tax Officer and Others Vs. Mahadeo Lal Tulsian and Others, . It has been held in the said decision that if full and true disclosure has been made by an assessee but there has been escapement due to error or omission on the part of the ITO, then such error or omission is no ground for n proceeding u/s 147(a). Similarly, where the assessee has discharged his onus, any change of opinion by the successor ITO is also no ground for reopening u/s 147(a). The facts concerning the said decision in Income Tax Officer and Others Vs. Mahadeo Lal Tulsian and Others, , are that hundi loans were disclosed at the time of regular assessment. Later on, a proceeding u/s 147(a) was initiated on the footing that the hundi loans were not genuine. It has been held in Mohadeolal Tulsian's case that the successor ITO did not proceed on the basis of change of opinion but on actual facts as subsequently found out that a part of the income had escaped assessment due to untrue disclosure. Certain transactions were not believed to

be true when similar transactions in subsequent years with the same persons were found to be not genuine. The court has held that at the stage of forming the opinion, the existence of relevant materials on the basis of which a view can be objectively formed is all that is necessary and no firm opinion is also required to be formed. In another case, a Division Bench of this court has also held a similar view. Such decision has been made in the case of Income Tax Officer, "I" Ward and Others Vs. Mahadeo Lal Tulsyan, . Mr. Maitra has contended that there can be no truthfulness in non-existing facts. Facts or materials placed by an assessee at the time of regular assessment must be based on true state of affairs and not on fictitious and imaginary materials. If the assessee has relied on a bogus hundi or hawala dealings or share transactions which in reality had not taken place, then such fictitious dealings cannot be held to be a true disclosure of material facts. He has contended that the decisions of the Supreme Court made in Income tax Officer, Calcutta and Others Vs. Lakhmani Mewal Das, and Income Tax Officer and Others Vs. Madnani Engineering Works Ltd., Calcutta, , can be distinguished for the simple reason that the transactions disclosed by the petitioner-assessee at the time of regular assessment were not genuine transactions but were all imaginary and fictitious. Accordingly, there had not been any true and full disclosure of the facts and as such there had been no occasion for drawing an inference by the ITO on the existing facts. Mr. Maitra has referred to certain paragraphs of the affidavit-in-opposition, in particular paragraphs 7, 11, 13, 15, 16 and 17 and contended that the said facts will clearly show that the notice u/s 147 was issued not by way of probing or fishing proceeding, but on the basis of materials which warranted a reasonable belief that income had escaped assessment due to non-disclosure of the true state of affairs. The learned counsel for the respondent has submitted that in the impugned notice it has been clearly stated there were reasons to believe that income chargeable for the assessment year 1969-70 had escaped assessment within the meaning of Section 147 of the I.T. Act. Since a challenge has been thrown in the writ petition that such notice was issued in the absence of any material on which such a belief can be objectively formed, the facts warranting formation of opinion objectively have been disclosed in the affidavit-in-opposition to satisfy the court that the materials had in fact existed on the basis of which such a belief could be reasonably formed and a notice u/s 147 could be issued. Mr. Maitra also contended that simply because a share transaction for a particular assessment year has been found to be fictitious, such finding will not automatically lead to the conclusion that similar transactions in earlier years are also fictitious but the facts and circumstances of the instant case are different. He, therefore, submits that the notice must be held to be a valid one and the rule should be discharged.

4. In reply to the aforesaid contention of the learned counsel for the respondents, the petitioner's learned counsel has contended that in Income Tax Officer and Others Vs. Mahadeo Lal Tulsian and Others, ; The Commissioner of Income Tax, Calcutta Vs. Burlop Dealers Ltd., has not been considered. He also

contended that the decision of the Supreme Court made in the case of Income Tax Officer and Others Vs. Madnani Engineering Works Ltd., Calcutta, , is a later decision and as such this court had no occasion to consider the import of the decision made in Madnani Engineering's case and both the decisions in Mahadeo Lal Tulsian's case, as referred to hereinbefore, should not be accepted. The learned counsel, therefore, contended that the impugned notice has been issued mechanically without any relevant material at the time of issuing the said notice and the same has been issued for the purpose of starting a probing proceeding.

5. After considering the contentions of the learned counsel appearing for the respective parties, it appears to me that the power of the ITO to reopen an assessment cannot be exercised arbitrarily and capriciously. The Supreme Court has clearly indicated in Income tax Officer, Calcutta and Others Vs. Lakhmani Mewal Das, , that such power, though wide, is not plenary and the words of the statute are "reasons to believe" and not "reasons to suspect". The ITO, therefore, must act objectively on the basis of the materials placed before him that there was prima facie reason to believe that income had escaped assessment. 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 and on that score a reopening proceeding as contemplated in Section 147 of the I.T. Act cannot be made. At the same time, it should also be noted that mere disclosure of certain alleged facts will not ipso facto absolve the responsibility of the assessee that he has disclosed fully and truly the primary and material facts. 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. If the ITO on the basis of subsequent discovery made in a later assessment proceeding has occasion to believe objectively that for the earlier assessment year, true income had escaped assessment for non-disclosure of genuine facts, it cannot be held that he was proceeding on mere surmise and conjecture. From the facts and circumstances of the case, it appears to me that there were materials before the ITO on the basis of which such an opinion could be objectively formed. The assessee may establish at a later stage that the opinion which was formed by the ITO for reopening the assessment proceeding is not correct. But it cannot be contended that on the basis of the materials on record, such opinion could not be formed objectively and a probing or fishing proceeding was initiated mala fide and without application of mind. In the circumstances, no interference by the writ court is called for and the rule, therefore, fails and is discharged. Interim order, if any, is vacated. There will be no order as to costs.

6. On the prayer of the learned counsel for the petitioner, let the operation of this order be stayed for a period till one week after the Christmas holidays.

Civil Rule Nos. 4455 (W) and 4457 (W) of 1977

7. In these two matters being C.R. No. 4455(W) of 1977 and C.R. No. 4457(W) of 1977, Mr. Bajoria appearing for the petitioner submits that although the

judgment of G.N. Ray. J. in *Biswanath Pasari v. ITO*, being C.R. No. 1825(W) of 1978, may be said to be applicable yet certain aspects of the matter which were argued before His Lordship by the petitioner were not really considered by His Lordship nor did His Lordship discuss how the principles laid down in the various decisions which were cited on behalf of the petitioner before His Lordship were not applicable to the instant case. In that view of the matter, he submits that although the present rules may be disposed of by following the decision of Mr. Justice G N. Ray yet those points should be kept open.

8. Mr. Pal appearing for the respondents submits that those points were noted by His Lordship, Mr. Justice G.N. Ray, and His Lordship found as a fact that there were materials before the ITO on the basis of which such an opinion could be objectively formed by him and His Lordship gave liberty to the assessee to establish at a later stage that the opinion which was formed by the ITO for reopening the assessment proceeding was not correct. His Lordship further observed that it could not be contended that on the basis of the materials on record such an opinion could not be formed objectively and that a probing or fishing proceeding was initiated mala fide and without application of mind. It was submitted that in view of the above findings of His Lordship, whether the principles laid down in the decisions cited by the petitioner before His Lordship were neither discussed nor considered by His Lordship did not really matter. Be that as it may, as at present advised. I find that the decision of G.N. Ray J. covers these two matters. The petitioner may, however, urge other points which have been raised by Mr. Bajoria before me, if so advised in subsequent proceedings that may be taken by the petitioner. Accordingly, no interference is called for by me and the rules are, therefore, discharged. All interim orders are vacated. There will be no order as to costs.

9. On the prayer of Mr. Bajoria, learned counsel for the petitioner, let the operation of this order be stayed for a period of three weeks from today.