
(1971) 03 CAL CK 0008

In the Calcutta High Court

Case No : Matter No. 180 of 1970 with Chamber Application

Dhaniram Gupta and Co.

APPELLANT

Vs

Union of India (UOI) and Another (No. 2)

RESPONDENT

Date of Decision : 18-03-1971

Acts Referred:

Income Tax Act, 1961 — Section 132, 132(10), 132(9), 142, 142(1)

Citation : (1973) 89 ITR 288

Hon'ble Judges : Sabyasachi Mukharji, J

Bench : Single Bench

Advocate : S.R. Banerjee and Mukherji, for the Appellant; S. Sen, for the Respondent

Judgement

Sabyasachi Mukharji, J.—This application under Article 226 of the Constitution challenges the assessment order u/s 144 of the Income Tax Act, 1961, in respect of the firm, Dhaniram Gupta & Co., for the assessment year 1965-66. The main ground urged in this application was that documents have been seized by the Income Tax department u/s 132 of the Income Tax Act, 1961, and, as such, it was not possible to comply with the notice under Sections 142(1) and 143(2) of the Income Tax Act, 1961. I am unable to accept this contention. It has to be further noted that the order u/s 132 has not been challenged in this application. Merely because there has been a seizure u/s 132, in my opinion, Sections 143 and 144 of the Income Tax Act do not become inapplicable. The notice that was given in this case was a notice which could have been reasonably complied with if the petitioner had availed itself of the provisions of Sections 132(9) and 132(10) of the Income Tax Act, 1961. The petitioner did not make any attempt to avail itself of the said provisions nor did the petitioner make any attempt to comply with the notice. I have dealt with this contention in the judgment just delivered in Matter No. 184 of 1970 Dhaniram Gupta Vs. Union of India (UOI) and Another (No. 1), .--See supra. For the reasons given therein I am unable to accept the contention that it was not possible for the petitioner to comply with the notice under Sections 142 and 143 of the Act, in the facts and circumstances

of this case. The petitioner had an alternative remedy u/s 146 of „the Income Tax Act, 1961. The petitioner has not availed itself of the same. The petitioner has not given any explanation for the same either, nor has the petitioner indicated any ground why the same would not be efficacious or adequate. Furthermore, this assessment order is appealable. Indeed, an appeal has been preferred after the filing of this writ petition. It was contended that the appeal was preferred by another partner without knowledge of the other partner. In any case, that appeal is pending. Under the Partnership Act the appeal was competent. Indeed, before the Income Tax Officer, when time was sought for, it was urged that Dhaniram Gupta was the partner who was looking after the affairs of the firm and as he was undergoing an eye operation, it was not possible to comply with the notice under Sections 142 and 143 of the Income Tax Act, 1961. Yet, when Shri Dhaniram Gupta filed the appeal, the petitioner has sought to contend that the said appeal was preferred without authority of the petitioner. This betrays an inconsistency of approach. An appeal against assessment, once preferred, cannot however be withdrawn. Reliance may be placed for the proposition on the decision of the Supreme Court in the case of Commissioner of Income Tax, Calcutta Vs. Rai Bahadur Hardtroy Motilal Chamaria, where the Supreme Court has observed that an assessee having once filed an appeal could not withdraw it. This, however, can only apply so far as the assessment order is concerned. This observation cannot apply to the question of an order u/s 184(7) of the Income Tax Act, 1961, cancelling the registration of the petitioner.

2. Where an assessee has resorted to the alternative forum this court should not entertain an application under Article 226 of the Constitution. Reliance may be placed on the decision of this court in the case of Sheo Nath Singh Vs. Appellate Assistant Commissioner of Income Tax (Central Range) and Others, . In the case of Gita Devi Aggarwal Vs. Commissioner of Income Tax, West Bengal and Others, the Supreme Court has observed that where an assessee gave no explanation in his writ application for not preferring an appeal provided under the Act and justifying recourse to the special jurisdiction of the High Court under Article 226 of the Constitution, the High Court would be justified in dismissing the writ petition in limine. In the instant case also no explanation has been given. Indeed, the fact that the petitioner was going to the appellate forum was not mentioned in the petition; yet Dhaniram Gupta has preferred an appeal and has verified the petition. The petitioner had an alternative remedy of appeal. The petitioner has taken resort to that. The petitioner had an alternative remedy by means of an application u/s 146 of the Act. The petitioner did not make any such application. The petitioner has not given any explanation why resort was not made to Section 146 of the Act.

3. Mr. S." R. Banerjee drew my attention to the decision in the case of Baburam Prakash Chandra Maheshwari Vs. Antarim Zila Parishad now Zila Parishad, Muzaffarnagar, where the Supreme Court has held that in cases of infringement of fundamental rights and violation of principle of natural justice the existence of alternative remedy would be no bar. Mr. Banerjee further argued that in this case

the assessment order was violative of the principles of natural justice because the Income Tax Officer had relied on various grounds without intimating to the petitioner the same. Mr. Banerjee contended that reliance was made on conjectures and surmises and the order was not fair. I am, however, unable to accept this contention. In an order u/s 144 of the Income Tax Act, 1961, there is bound to be certain amount of guess-work. For this proposition reliance may be placed on the decision of the Judicial Committee in the case of Commissioner of Income Tax v. Laxminarain Badridas [1937] 5 ITR 170 where the Privy Council, dealing with Section 23(4) of the Indian Income Tax Act, 1922, stated that the officer concerned was to make an assessment to the best of his judgment against a person who was in default as regards supplying information. The officer must not act dishonestly or vindictively or capriciously because he must exercise his judgment in the matter. The officer must make what he honestly believed to be a fair estimate of the proper figure of assessment and for this purpose he must, according to the Judicial Committee, be able to take into consideration local knowledge and repute in regard to the assessee's circumstances and his own knowledge of the previous returns by, and assessments of, the assessee. The Privy Council further observed that there must necessarily be guess-work in the matter and it must be an honest guess-work. It has been further held that finding of facts did not lose the character of finding of facts merely because they were inferences drawn from other facts. In that view of the matter it cannot be said that in this case there has been violation of the principles of natural justice in making the assessment order.

4. Mr. Banerjee contended that there had been non-compliance of Section 186(7) of the Act. I am unable to accept this contention. Mr. Banerjee's client has proceeded under a misconception. Registration for the previous year was cancelled by an order u/s 186 on the 18th March, 1967, and this assessment order was passed on the 18th March, 1970. It has been recorded that the assessee did not file an application for registration for this assessment year. The petitioner disputes that. That is a disputed question of fact. It can better be agitated in an appeal. Furthermore, appeal has also been preferred from the previous year's orders cancelling the registration.

5. Taking into consideration all the facts and circumstances of the case, it appears that not only the petitioner had an alternative remedy but the said remedy was more adequate in the facts and circumstances because the disputed questions of fact have to be determined in this case. The petitioner has indeed taken resort to the alternative remedy and there is no explanation why now the petitioner should be permitted to abandon that alternative remedy. Taking into consideration all the facts and circumstances of this case I am of opinion that the petitioner is not entitled to any reliefs in this application. The application, therefore, fails and is accordingly dismissed. The rule nisi is discharged. There will be no order as to costs.

Re: Chamber application

6. In view of the order made in the main rule no order is made in the connected chamber application. There will be no order as to costs.