
(1980) 04 P&H CK 0031

In the Punjab And Haryana At Chandigarh

Case No : Civil Writ No"s. 6792 and 6793 of 1976

Dharam Pal

APPELLANT

Vs

Income Tax Officer

RESPONDENT

Date of Decision : 02-04-1980

Acts Referred:

Constitution of India, 1950 — Article 226

Income Tax Act, 1961 — Section 143(1), 143(3), 144B, 144B(4), 147

Citation : (1980) 4 TAXMAN 349

Hon'ble Judges : Kulwant Singh Tiwana, J

Bench : Single Bench

Advocate : Bhagirath Dass Seth and S.K. Hirajee, for the Appellant; D.N. Awasthy, for the Respondent

Final Decision : Dismissed

Judgement

Kulwant Singh Tiwana, J.—Two Writ Petitions Nos. 6792 of 1976 (Dharam Pal v. ITO) and No. 6793 of 1976 (Vidya Parkash v. ITO) have been filed by two partners of M/s. Nagesh Hosiery Mills, Ludhiana, which is a firm duly registered having two partners, namely, Dharam Pal and Vidya Parkash, petitioners, under arts. 226 and 227 of the Constitution of India, for quashing the notice, annex. P-3, dated February 10, 1976, for assessment of the income for the assessment year 1970-71, on the ground that it had escaped assessment, and also annexure P-4, the draft assessment order. The case set up by both the petitioners is identical and shall be decided by one judgment. The facts of this case are that the firm, M/s. Nagesh Hosiery Mills, was started in the year 1951. Dharam Pal and Vidya Parkash, partners, were being assessed as representatives of their HUFs in their individual names. Up to the assessment year 1966-67, there was no dispute about the assessment. On March 31, 1967, Dharam Pal, petitioner, made a partial partition amongst the members of his family with respect to the investment of the HUF headed by him in the firm of M/s. Nagesh Hosiery Mills and his share of income from each investment was also partitioned with the other petitioners in Civil Writ Petition No. 6792 of 1976 with the overriding share

of Dharam Pal from the said concern of M/s. Nagesh Hosier Mills. Similarly, Vidya Parkash, on March 31, 1967, made a partial partition with the members of his family constituting all the petitioners in Civil Writ Petition No. 6793 of 1976 on the same terms and conditions as in the case of Dharam Pal. The partition deed has been annexed as annex. P-1 in both these petitions.

2. The petitioners in both these cases filed returns for the assessment year 1968-69 in their individual names for their respective shares from the said firm of M/s. Nagesh Hosier Mills, In CWP No. 6792 of 1976, the share of each petitioner came to 1/6th of one-half share, which was of Dharam Pal in the firm. In CWP No. 6793 of 1976, the petitioners filed returns to the extent of 1/5th share each, of the one-half share of Vidya Parkash, who was a partner having half share in M/s. Nagesh Hosier Mills. After due enquiries, the then ITO made six assessments in the case of the petitioners in CWP No. 6792 of 1976. Similar returns were submitted by the petitioners in CWP No. 6793 of 1976 and five assessments in this case were made. The assessed taxes were paid by them and the same process continued till the assessment year 1973-74. It is the case of the petitioners that nothing was concealed from the said ITO making those assessments and the facts were truly disclosed.

3. On February 10, 1976, that is, after the expiry of four years from the end of the assessment year 1970-71, a notice u/s 148 of the income tax Act issued by the ITO was received by the petitioners for the assessment year 1970-71, along with notices for the years 1968-69, 1969-70 and 1971-72. In this case, the petitioners have restricted their challenge only to the notice for the year 1970-71.

4. This notice is being challenged on the ground that the assessment could not be reopened under sections 147(a) and 147(b) of the income tax Act, as the facts had been truly and faithfully disclosed by the petitioners in their returns and the ITO, at the time of original assessment, was satisfied with the genuineness of the partition and acted in accordance therewith to make assessments in their individual names as members of the HUF, according to their shares, which were specified in the deed of partition and did not assess them as unregistered firms though it was open to him. There was no failure on the part of the petitioners to make any disclosure which could have resulted in the escapement of any income chargeable to tax. The mere fact that the ITO later wanted to change his opinion did not give him any jurisdiction to reopen the assessment for the year 1970-71 on the mere change of opinion.

5. It is averred that the notice issued was without jurisdiction having been issued after a period of four years, in consequence of which proceedings could not be taken. In consequence of the notice, the petitioners submitted a return on March 10, 1976, with the note "under protest without prejudice to claim that jurisdiction has been wrongly and unlawfully assumed and that no firm (partnership) as alleged u/s 148 was ever formed or was in existence at any time. The notice, therefore, is misconceived and infructuous". The respondent, without deciding whether the notice was valid or not, sent to the petitioners the

draft order, which he proposed to pass u/s 143(3) read with section 144B of the income tax Act.

6. Through these petitions, notice, annexure P-3, and the proceedings being taken in consequence thereof, and the draft order, annexure P-4, are challenged on the ground that the notice was without jurisdiction and it could not be issued on the basis of a mere change of opinion alone, when the facts were fully and truly disclosed by the petitioners and the ITO could on enquiry know the facts and that the order of the Commissioner passed u/s 151 of the Act was passed without the application of mind.

7. Respondent No. 1 in the written statement took preliminary objections that the writ petition was premature as only the draft order u/s 144B had been served on the petitioners and they were given an opportunity to make objections. If and when those objections are made, those will be considered by respondent No. 3. Final assessment, if any, will be made subject to the directions, if any, of respondent No. 2, who is yet to consider the matter. The other objection is that the remedy of the petitioners lies wholly within the statute and the income tax Act, in itself, provides an elaborate machinery for the redressal of the grievances of the assessee.

8. On merits, the contentions, of the petitioners about the partnership of Dharam Pal and Vidya Parkash, partners of firm, M/s. Nagesh Hosier Mills, Ludhiana, and their assessment in that capacity were accepted. It was also accepted that on the basis of the partition deed, returns were submitted by the petitioners and they were being assessed in accordance with the terms of the partnership deed till the notice, annexure P-3, was issued. It was averred that correct facts were not placed before the ITO so far as the position after the aforesaid partial partition was concerned. The facts were also not correctly placed regarding the alleged overriding title of Dharam Pal and Vidya Parkash for the assessment year 1968-69 and this assessment was made by the ITO subject to rectification after assessment of the afore-; said Messrs. Nagesh Hosier Mills. Assessments for the assessment years 1970-71, 1971-72 and 1972-73 were completed without calling upon the petitioners u/s 143(1) of the Act. It was further averred that the sub-partnership, which in the view of the respondent No. 2 had come into existence, was never disclosed. Notice u/s 147(a)/148 of the income tax Act was issued by the ITO on February 10, 1976, after taking into consideration the whole set of circumstances and applying his mind. The sanction of the Commissioner was based on the detailed order passed by the ITO. The rest of the contentions of the petitioners were denied. The reopening of the assessment was supported on the ground that the previous assessments were made on the information which was not truly and correctly disclosed and some facts were concealed and it was not only a mere change of opinion by the ITO. It was further averred that at the time of the arguments on behalf of the petitioners before respondent No. 1, the legality of the notice u/s 148 of the Act was not challenged. Replying, on merits, on the contentions of the petitioners, it was

stated that it was open to the petitioners to take objection in response to the opportunity afforded to them u/s 144B of the Act and have the matter determined by the IAC whose directions are binding on the ITO.

9. From the contents of the petition, the grounds of attack made out are (1) whether the ITO, during the relevant period, could not assess the petitioners in their individual capacity as partners of a firm; (ii) whether the case for the reopening of the assessment is covered by section 147(a) or section 147(b) of the income tax Act (hereinafter called the Act); and (iii) whether the assessment amounts to a change of opinion and whether he, on this ground, can take the proceedings.

10. The objection about the maintainability of the petition requires to be settled first and in my view, the decision on the three questions referred to in para. 6 need not be gone into. The extraordinary jurisdiction of the High Court on the writ side cannot be invoked in normal circumstances. If an authority acts under a statute and the action of the authority in exercising powers is under the provisions of that statute, then the High Courts do not ordinarily interfere in the exercise of that power by that authority. The person seeking the invocation of this jurisdiction of the High Court has to show that the authority lacks jurisdiction or is acting in clear disregard of the law and procedure or has violated the principles of natural justice and has done great injustice to him. Unless such things are made out, the writ jurisdiction, which is discretionary, is difficult to be exercised to redress the grievance of the aggrieved party approaching the court.

11. In the case in hand, it cannot be disputed that the ITO had the authority to issue notice u/s 148 of the Act, if, in his opinion, a case for reassessment was made out u/s 147 of the Act. Before the issue of notice, he has to apply his mind on the existence of the circumstances or material, which, in his view, makes it a case of escapement of assessment either because of the failure of the assessee to fully and truly disclose all material facts necessary for his assessment or some other information in his possession which calls for reassessment. In the case in hand, the ITO gave detailed reasons for such an action in his order dated February 7, 1976, reproduced in para. 10 of the written statement. The sanction of the Commissioner was obtained for reopening the assessment. The draft assessment order, annexure P-4, dated February 10, 1976, was served on the petitioners in both the cases and they were asked to file objections, if they wanted to file any, within the given time. Their counsel appeared before the ITO on September 15, 1976, and objected to the initiation of the proceedings u/s 147 of the Act. These petitions were filed in this court on September 28, 1976.

12. These are the facts which are admitted by the parties. The income tax Act is a complete code in itself and provides a complete machinery for the redressal of the grievances of the assessee feeling aggrieved by the orders of the assessing authorities. The petitioners can raise all these objections which they have raised in these petitions before the ITO. In case of objection against the draft assessment order, it, along with the objections, has to be submitted to the IAC u/

s 144B (4) of the Act for the guidance of the ITO. In case any assessee remains dissatisfied with the directions given by the IAC, then there is a provision for appeal. These are all the remedies provided by the Act. Before these alternative remedies are resorted to by an assessee, he cannot come to the High Court craving for a relief under its writ jurisdiction. This is the consistent view of this court and the Supreme Court. Examining the matter under the Act in C.A. Abraham, Uppoottil, Kottayam Vs. The Income Tax Officer, Kottayam and Another, on a challenge to a similar notice as in the case in hand, where during the course of assessment, on the basis of returns submitted by the assessee as a partner of an unregistered firm, it was found that the firm had transacted business in fictitious names in different commodities and had failed to disclose substantial income earned and a notice was given by the ITO, the Supreme Court observed (p. 428):

In our view, the petition filed by the appellant should not have been entertained. The income tax Act provides a complete machinery for assessment of tax and imposition of penalty and for obtaining relief in respect of any improper orders passed by the income tax authorities, and the appellant could not be permitted to abandon resort to that machinery and to invoke the jurisdiction of the High Court under article 226 of the Constitution when he had adequate remedy open to him by an appeal to the Tribunal.

13. Following C.A. Abraham, Uppoottil, Kottayam Vs. The Income Tax Officer, Kottayam and Another, the Supreme Court again in Shivram Poddar Vs. Income Tax Officer, Central Circle II, Calcutta, and Another,

It is, however, necessary once more to observe, as we did in C.A. Abraham, Uppoottil, Kottayam Vs. The Income Tax Officer, Kottayam and Another, that the income tax Act provides a complete machinery for assessment of tax, and for relief in respect of improper or erroneous orders made by the revenue authorities. It is for the revenue authorities to ascertain the facts applicable to a particular situation, and to grant appropriate relief in the matter of assessment of tax. Resort to the High Court in exercise of its extraordinary jurisdiction conferred or recognised by the Constitution in matters relating to assessment, levy and collection of income tax may be permitted only when questions of infringement of fundamental rights arise, or where on undisputed facts the taxing authorities are shown to have assumed jurisdiction which they do not possess. In attempting to bypass the provisions of the income tax Act by inviting the High Court to decide questions which are primarily within the jurisdiction of the revenue authorities, the party approaching the court has often to ask the court to make assumptions of facts which remain to be investigated by the revenue authorities.

14. Refusing permission to the assessee's counsel to argue about the invalidity of the notice u/s 34(1)(a) of the income tax Act of 1922, which was equivalent to section 147(a) of the present Act, on the ground that it was barred by time, the Supreme Court in Lalji Haridas Vs. R.H. Bhatt and Another,

Mr. Pathak for the appellant attempted to argue that the notice issued against the appellant is, on the face of it, invalid, because it is barred by time. We did not allow Mr. Pathak to develop this point, because we took the view that a plea of this kind must ordinarily be taken before respondent No. 1 himself. The jurisdiction conferred on the High Court under article 226 is not intended to supersede the jurisdiction and authority of the ITOs to deal with the merits of all the contentions that the assessee may raise before them, and so it would be entirely inappropriate to permit an assessee to move the High Court under article 226 and contend that a notice issued against him is barred by time. That is a matter which the income tax authorities must consider on the merits in the light of the relevant evidence.

15. Dealing with a similar argument, a Division Bench of this court in the case of **RATTAN CHAND Vs. CENTRAL BOARD OF DIRECT TAXES AND ANOTHER.** (ON REFERENCE BY P. D. SHARMA).,.

In my opinion, although in terms article 226 does not contain any restriction on the exercise of power by this court to grant suitable relief, except that of territorial jurisdiction, the exercise of power under this article, as a large number of decisions of the Supreme Court and various High Courts amply establish, is subject to a self-imposed restriction that this court would normally be disinclined to interfere at the instance of a party who is guilty of undue delay, laches or acquiescence or where the party invoking this court's jurisdiction can have equally adequate and efficacious redress from subordinate Tribunals. These restrictions have been inspired by considerations of public policy and are also guided by sense of respect to the legislature which has enacted laws providing for relief to the aggrieved parties by machinery provided by relevant enactments. In such circumstances this court is normally disinclined to allow its constitutional jurisdiction to be invoked, unless there are some special cogent grounds justifying interference. It was never the object of this article to convert High Courts into appellate assessing authorities whenever an assessee may choose to attack an assessment order on the merits. This reasoning would apply to cases where the assessment order is challenged on the ground that the notice initiating the proceedings which culminated in the assessment is bad in law, if such objection can appropriately be taken before the appellate authorities. In order to warrant the entertainment of a petition under this article, in my opinion, there must ordinarily be something to show that it would cause palpable injustice to the assessee to force him to adopt the remedies provided by the statute. It is true that this court may persuade itself to interfere if there is something going to the root of the jurisdiction of the ITO, but, then again, this is a matter of discretion to be exercised on the facts and circumstances of each case, whether it would be more appropriate that this court decides to intervene itself ignoring the machinery which the legislature has in its wisdom provided for redress of grievances.

16. This matter was again considered by the Supreme Court in **Champalal Binani**

Vs. The Commissioner of Income Tax, West Bengal and Others, wherein it was held (p. 695):

Before parting with the case we deem it necessary once more to emphasize that the income tax Act provides a complete and self-contained machinery for obtaining relief against improper action taken by the departmental authorities, and normally the party feeling himself aggrieved by such action cannot be permitted to refuse to have recourse to that machinery and to approach the High Court directly against the action. The assessee had an adequate remedy under the income tax Act which he could have availed of. He, however, did not move the income tax Appellate Tribunal, which was competent to decide all questions of fact and law which the assessee could have raised in the appeal including the grievance that he had not adequate opportunity of making his representation and invoked the extraordinary jurisdiction of the High Court. In our judgment no adequate ground was made out for entertaining the petition. A writ of certiorari is discretionary; it is not issued merely because it is lawful to do so. Where the party feeling aggrieved by an order of an authority under the income tax Act has an adequate alternative remedy which he may resort to against the improper action of the authority and he does not avail himself of that remedy, the High Court will require a strong case to be made out for entertaining a petition for a writ. Where the aggrieved party has an alternative remedy, the High Court would be slow to entertain a petition challenging an order of a taxing authority which is, *ex facie*, with jurisdiction. A petition for a writ of certiorari may lie to the High Court, where the order is on the face of it erroneous or raises a question of jurisdiction or of infringement of fundamental rights of the petitioner.

17. A Full Bench of this court in *Jai Hanuman Trading Co. Pvt. Ltd. Vs. The Commissioner of Income Tax, Patiala and Another*, took a similar view.

18. The above-quoted extracts from the judgments clinch the matter against the petitioners in these two petitions that bypassing the provisions of the Act and without resorting to the remedies under the Act they cannot crave for the discretion of this court for the issuance of a writ to quash the proceedings, which the ITO had the power under the Act to initiate and continue. The petitioners can take all these objections, including the question of limitation and the disability of the ITO to reopen the case for reassessment on the question of a mere change of opinion, before the concerned authorities dealing with the case. It cannot be assumed on the basis of conjectures that the proceedings will be conducted by the ITO with a prejudice against the petitioners, which might result in a failure of justice. I do not find any material to justify such an apprehension.

19. Another argument advanced by Shri Bhagirath Dass, advocate on behalf of the petitioners, is that the condition precedent for a notice u/s 148 of the Act is that the material should be existing on which the ITO can proceed and that condition precedent to the exercise of jurisdiction does not exist in this case. According to him, on these grounds, the proceedings require to be quashed. In a similar situation in *Commissioner of Income Tax, Gujarat Vs. A. Raman and*

Company, it was held (p. 15):

The High Court exercising jurisdiction under article 226 of the Constitution has power to set aside a notice issued u/s 147 of the income tax Act, 1961, if the condition precedent to the exercise of the jurisdiction does not exist. The court may, in exercise of its powers, ascertain whether the income tax Officer had in his possession any information; the court may also determine whether from that information the income tax Officer may have reason to believe that income chargeable to tax had escaped assessment. But the jurisdiction of the court extends no further. Whether on the information in his possession he should commence a proceeding for assessment or reassessment must be decided by the income tax Officer and not by the High Court. The income tax Officer alone is entrusted with the power to administer the Act: if he has information from which it may be said, *prima facie*, that he had reason to believe that income chargeable to tax had escaped assessment, it is not open to the High Court, exercising powers under article 226 of the Constitution, to set aside or vacate the notice for assessment on a reappraisal of the evidence....

Jurisdiction of the income tax Officer to reassess income arises if he has in consequence of information in his possession reason to believe that income chargeable to tax has escaped assessment. That information must, it is true, have come into the possession of the income tax Officer after the previous assessment, but even if the information be such that it could have been obtained during the previous assessment from an investigation of the materials on the record, or the facts disclosed thereby or from other enquiry or research into facts or law, but was not in fact obtained, the jurisdiction of the income tax Officer is not affected.

20. In view of the position of law and the circumstances discussed above, the petitioners cannot make a short cut by bypassing the authorities under the Act competent to deal with the case, and who are actually dealing with it, and approach the High Court on the writ side. The petitioners have failed to make out a case for interference by this court at this stage.

21. I have avoided discussing the merits of the three questions referred to in para. 6 above in order to avoid prejudice to the parties, as, in view of the decision on the preliminary point to dismiss these petitions, the authorities have yet to take a decision on merits. Any expression of opinion on the merits of the contentions of the petitioners would result in prejudice to any of the parties. For the foregoing reasons, the petitions do not call for interference and are dismissed, however, with no order as to costs.