

(1979) 02 CAL CK 0037
In the Calcutta High Court
Case No : Civil Rule No. 114/W of 1975

Ganga Properties

APPELLANT

Vs

Income Tax Officer

RESPONDENT

Date of Decision : 26-02-1979

Acts Referred:

Constitution of India, 1950 — Article 226
Income Tax Act, 1922 — Section 35
Income Tax Act, 1961 — Section 147, 154, 263(1), 263(2), 55A
Wealth Tax Act, 1957 — Section 16(6)

Citation : (1979) 118 ITR 447

Hon'ble Judges : S.C. Deb, J

Bench : Single Bench

Advocate : R.N. Bajoria, S.K. Bagaria and A.K. Dey, for the Appellant; B.L. Pal and N.L. Pal, for the Respondent

Judgement

Deb, J.—This rule under Article 226 of the Constitution is directed against the notice dated November 23, 1974, issued by the respondent No. 4, the Commissioner of Income Tax, u/s 263 of the I.T. Act, 1961, for the assessment year 1971-72.

2. The petitioner No. 1 is an existing company within the meaning of the Companies Act, 1956. Before the 1st January, 1954, petitioner No. 1 became the owner of the lands situated at 62/5, Ballygunge Circular Road, Calcutta.

3. During the previous year relevant to the assessment year, petitioner No. 1 sold a major portion of the aforesaid lands to different persons for a total sum of Rs. 7,51,512 and in its return of income declared the aforesaid amount as the full value of the consideration received by it for the purposes of computation of the capital gains.

4. In the course of assessment proceedings respondent No. 1, the ITO, referred the valuation to the Valuation Officer u/s 55A of the I.T. Act, 1961, and thereafter in the assessment order dated March 22, 1974, he recorded, inter alia,

as follows :

"I have come to know that there is no possibility of getting the valuation report by 31-3-74. Since this is a time-barring assessment, I cannot wait for his report for the purpose of this assessment.

I, therefore, accept the value of the consideration declared by the assessee for the present. On receipt of the report from the Valuation Officer, such action, as may be necessary, will be taken according to the provisions of the Act."

5. After the assessment was completed, petitioner No. 1 paid the tax as demanded by respondent No. 1 and, thereafter, respondent No. 4 issued the impugned notice which reads, inter alia, as follows :

"2. It is seen that the Income Tax Officer computed the capital gains on sale of several plots of land at 62/5, Ballygunge Circular Road, Calcutta, by accepting the full value of the consideration declared by you at Rs. 7,51,512. It was also made clear by the Income Tax Officer in the assessment order that on receipt of the valuation report from the Government Valuation Officer, necessary action will be taken according to the provisions of law. It is seen from the valuation report of the Government Valuation Officer that he has valued the fair market value of the asset at Rs. 10,85,250 in place of Rs. 7,51,512 declared by you. It, therefore, appears that the Income Tax Officer erred in accepting the value of consideration declared by you.

3. In view of what has been stated in the foregoing para., the said order of the Income Tax Officer dated 22-3-74 appears to be erroneous in so far as it is prejudicial to the interests of the revenue.

4. I, therefore, propose to pass such order in respect of the said assessment order as the circumstances of the case justify including an order setting aside or enhancing or modifying the assessment or cancelling the said order of assessment and directing a fresh assessment."

6. The petitioners have, therefore, challenged the validity of this proceeding on several grounds and their learned advocate, Mr. R.N. Bajoria, has pressed all those grounds before me, but I would like to deal only with one ground and keep the other grounds completely open.

7. As the valuation report was not in existence at the time respondent No. 1 passed the aforesaid order, Mr. Bajoria argues that respondent No. 4 had no jurisdiction to initiate the revisional proceeding u/s 263 of the Act, on the basis of the valuation report. In support of this contention he places reliance on several cases under the Sales Tax Act, In State of Gujarat v. Chelabhai Bhanabhai Prajapati [1974] 33 STC 147 , the Gujarat High Court, by following two decisions of the Supreme Court on a similar provision, held that the initiation by the Deputy Commissioner of suo motu revisional proceeding was without jurisdiction and invalid as it was based on materials which did not form part of the assessment proceedings.

8. In *Jagatjit Distilling and Allied Industries Ltd. v. State* [1971] 28 STC 709, the Punjab and Haryana High Court by following the said decisions of the Supreme Court has also held that the power of revision cannot be invoked by the authority concerned on a new material which was not before the assessing authority.

9. Mr. B.L. Pal, learned advocate for the respondents, rightly and fairly concedes that the order of respondent No. 1 was not an erroneous order at the time it was passed, but he argues that the said order became erroneous and prejudicial to the interests of the revenue in view of the subsequent fact, namely, the fair market value estimated by the Valuation Officer u/s 55A of the Act. In support of this contention, he argues that the word "record" in Section 263 means the record as it stands at the time it is examined by the CIT and, therefore, the valuation report which was in the file at the time it was examined by respondent No. 4 should be regarded as forming part of the record of the assessment proceeding although it was not in existence at the time respondent No. 1 made the assessment in view of the observation of the Privy Council in (1938) 6 ITR 414 (Privy Council) , on the words "mistake apparent from the record" used in, Section 35 of the Indian I.T. Act, 1922, and followed by the Supreme Court in *M.K. Venkatachalam, I.T.O. and Another Vs. Bombay Dyeing and Mfg. Co., Ltd.* , *Maharana Mills (Private) Ltd. Vs. Income Tax Officer, Porbandar*, and *Mahendra Mills Ltd. Vs. P.B. Desai*, Appellate Assistant Commissioner of Income Tax and Another, . But I am not impressed by his arguments based on these decisions.

10. The provision of Section 263(1) of the Act has to be understood on its own language and in the context of the revisional jurisdiction of the Commissioner conferred by it and also of the scheme of the Act and not on the basis of the words "mistake apparent from the record" in Section 35 of the 1922 Act or Section 154 of the 1961 Act, because these words and also the scope and purposes of these two sections are different from the words, scope and ambit of Section 263(1) of the Act.

11. Section 35 of the 1922 Act and Section 154 of the 1961 Act empower the authorities concerned to correct their mistakes apparent from the record within the period of limitation as provided therein, whereas Section 263(1) of the Act confers on the Commissioner the power to revise the order of the ITO if such order is erroneous and prejudicial to the interests of the revenue. But in view of Section 263(2) of the Act the Commissioner has no power to revise after the expiry of two years from the date of the order, the order of the ITO which is sought to be revised by the Commissioner, nor has the Commissioner any power to revise an order of reassessment u/s 147 of the Act. The period of limitation provided in Section 263 is different from the period of limitation prescribed in Section 35 and Section 154 of the Act. Similarly, the period of limitation prescribed for reassessment is different from the period of limitation prescribed for exercising the revisional jurisdiction by the Commissioner u/s 263 of the Act. Therefore, it is not the intention of the legislature that the same power should be exercised by two different authorities, namely, the Commissioner u/s 263(1) and

the ITO u/s 147 or Section 154 of the Act.

12. For the purposes of rectifying any mistake u/s 35 of the 1922 Act, or Section 154 of the 1961 Act, any subsequent relevant material or an order of an appellate or higher authority replacing the order appealed from must form part of the record of the proceedings in view of the aforesaid cases cited by Mr. Pal and also in view of the expression "any mistake apparent from the record" used in these two sections.

13. Whereas Section 263(1) of the Act uses the words "is erroneous" and not the words "has become subsequently erroneous". Under this section, the Commissioner may call for and examine "the record" of the "proceeding" in order to consider in his revisional jurisdiction as to whether the order in question by the ITO "is erroneous". Therefore, he is to call for the "record" of the "proceeding" which was before the ITO and examine it in order to consider whether on the basis of the materials which were before the ITO and formed part of that record the order passed by the ITO is "erroneous" and prejudicial to the interests of the revenue.

14. Therefore, the materials which were not in existence at the time the assessment was made but afterwards came into existence cannot form part of the record of the proceeding of the ITO at the time he passes the order and, accordingly, it cannot be taken into consideration by the Commissioner for the purposes of invoking his jurisdiction under this section, for he is not an appellate authority under this section and exercises only a revisional jurisdiction and hence he can only take into consideration the record as it stood before the ITO and the materials in such record for the purposes of ascertaining whether the order in question was erroneous and prejudicial to the interests of the revenue.

15. In other words, any material which comes into existence later on cannot form part of the record of the ITO for the purposes of invoking the Commissioner's power u/s 263(1) of the Act. And it is only after the proceeding is lawfully initiated by the Commissioner on the basis of the record of the ITO that the Commissioner can take into account any material which may come into existence later on in view of the expression "after making or causing to be made such enquiry as he deems necessary" used in the second limb of this section.

16. Further, in view of Section 16(6) of the W.T. Act, 1957, read with Section 55A of the I.T. Act, 1961, the subsequent order passed by the Valuation Officer in the reference u/s 55A of the Act must necessarily form part of the record for the purposes of Section 147(b) and also of Section 154 of the 1961 Act. Therefore, the order of the respondent No. 1 was not an erroneous order, nor was it prejudicial to the interests of the revenue. His order is also beneficial to the interests of the revenue, for it was the only order that he could pass at that time as otherwise the assessment would have been wholly time barred. He had also the power to act either u/s 147(b) or Section 154 of the Act after receiving the copy of the order of the Valuation Officer u/s 16(6) of the W.T. Act, 1957, read

with Section 55A of the I.T. Act, 1961.

17. Furthermore, if the revisional jurisdiction u/s 263(1) can be exercised by the respondent No. 4 on the basis of the subsequent report of the Valuation Officer it will conflict with the jurisdiction of the respondent No. 1 u/s 147(b) or Section 154 of the Act as rightly and fairly conceded by Mr. Pal.

18. In view of the aforesaid scheme and the provisions of the Act including the reasons already given, the word "record" in Section 263(1), in my opinion, cannot mean the record as it stands at the time of examination by the Commissioner but it means the record as it stands at the time the order in question is passed by the ITO.

19. The order of the Valuation Officer passed in the reference u/s 55A of the Act was not in existence at the time respondent No. 1 passed the aforesaid order and as such it could not and did not form part of the record on which his aforesaid order is based. It must, therefore, be held that the proceeding initiated by respondent No. 4 u/s 263(1) of the Act is without jurisdiction and invalid. Further, the instant case is also covered by the aforesaid decisions of the Gujarat High Court and the High Court of Punjab and Haryana.

20. In the premises, this rule is made absolute and the proceeding initiated by respondent No. 4 is quashed.

21. There will be no order as to costs.

22. Operation of the order will remain stayed for 8 weeks as prayed by Mr. Pal.