(1989) 05 CAL CK 0028

In the Calcutta High Court

Case No : A.F.O.O. No. 84 of 1982

Income Tax Officer and Others — APPELLANT

Vs

James Joseph O''Gorman — RESPONDENT

Date of Decision : 11-05-1989

Acts Referred:
Income Tax Act, 1961 — Section 131, 131(1)

Citation : (1993) 204 ITR 454

Hon'ble Judges : Padma Khastgir, J;Mahitosh Majumdar, J

Bench : Division Bench

Advocate : Ram Chandra Prasad, for the Appellant; D. Pal, Pranab Pal and Manisha Seal, for the Respondent

Judgement

Padma Khastgir, J.—Being aggrieved by issuance of a notice u/s 133(6) of the Income tax Act, 1961, and a notice u/s 131 of the Income-lax Act, a writ petition was tiled before this court. By a judgment and order dated August 19, 1980, Mr. Justice Samarendra Chandra Deb, as his Lordship then was, was pleased to quash and set aside the notice u/s 131 issued by the Income Tax Officer and made the rule absolute, Therefrom the present appeal has been preferred by the Income Tax Officer, ''H'' Ward, Companies, District IV, Calcutta. The only point which calls for determination in this appeal is whether the Income Tax Officer was justified in issuing a notice u/s 131 of the Income Tax Act. So far as the notice u/s 133(6) of the said Act is concerned inasmuch as the said notice was addressed to the Grindlays Bank Ltd.''s principal officer in a separate proceeding the bank challenged the said notice. The rule in the said writ proceeding was made absolute in favour of the bank. No appeal had been preferred therefrom by the Income Tax Department. Under the circumstances, the learned trial court was only concerned with the notice that was served upon one J. J. O''Gorman. From the said notice, it appears that the Income Tax Officer, ''H'' Ward, C-IV, had issued the said notice in relation to the assessment year 1969-70. Admittedly, when such a notice was issued, no proceeding was pending in respect of the said assessment year. The said notice directed the writ petitioner to furnish particulars about the daily leave allowance and entertainment expenses. The Income Tax Appellate Tribunal after carefully considering the facts of the case and the rival arguments held that any allowance paid to the employee would be chargeable to tax in his hands and if an entertainment allowance is paid to an employee, it had to be included in the employee''s taxable income. It was further held that if, in course of its business, the customers or other persons connected with the bank''s business were entertained, such entertainment had to be through the officers of the bank and the officers having entertained some customers on behalf of the bank got reimbursed those expenses and such reimbursement could not constitute any benefit or perquisite in the hands of that officer. In spite of such finding by the Tribunal and in spite of the reference made to the High Court having been rejected, the Income Tax Officer also called for particulars of such entertainment expenses and allowances while considering the income of the assessee concerned. It appears that Section 131 of the Income Tax Act provides power regarding discovery, production of evidence, etc. In Sub-section (1) of Section 131, it has been specifically provided that the Income Tax Officer, Appellate Assistant Commissioner, Inspecting Assistant Commissioner, Commissioner (Appeals) and Commissioner shall, for the purposes of this Act, have the same powers as are vested in a court under the Code of Civil Procedure, 1908, when trying a suit in respect of the following matters; namely :--

(a) discovery and inspection ;

(b) enforcing the attendance of any person, including any officer of a banking company and examining him on oath ;

(c) compelling the production of books of account and other documents ; and

(d) issuing commissions.

2. From a plain reading of the said section, it appears that the persons mentioned in the sub-section are vested with powers of a court as provided under the Code of Civil Procedure. Order XI of the CPC empowers a court of discovery and inspection under various Rules of the Order and those rules are only applicable and could be exercised by a court in a pending suit. Under the circumstances, when similar powers have been given to the authorities concerned, as mentioned in Section 131(1) of the Income Tax Act, as it has been given under the CPC to a court, unless there was a proceeding pending before the authorities concerned, no such power could be exercised under Order 11 of the Code. The power given under Sub-section (1A) of Section 131 is to the Assistant Director of Inspection and that too only if he had reason to suspect that any income had been concealed, or was likely to be concealed, by any person or class of persons, within his jurisdiction, then, for the purposes of making any inquiry or investigation relating thereto, it shall be competent for him to exercise the powers conferred under Sub-section (1) on the Income Tax authorities referred to in that sub-section, notwithstanding that no proceedings with respect

to such person or class of persons are pending before him or any other Income Tax authority. An examination of the impugned notice u/s 131 which was the subject-matter of challenge under the writ proceeding clearly indicates that such notice was given by the Income Tax Officer, ''H'' Ward, and not by the Assistant Director of Inspection. Under the circumstances, in view of the fact when no proceeding was pending for the assessment year 1969-70, the Income Tax Officer could not exercise his power u/s 131(1) and call for documents in respect of entertainment allowance. In the case of Dwijendra Lal Brahmachari and Others Vs. New Central Jute Mills Co. Ltd. and Another, , a Division Bench of this High Court while considering the power of an Income Tax Officer to compel production of documents, and the scope of such power it was observed by the learned judges of the Division Bench that the Officer concerned should apply his mind about the necessity of production of the documents and if the Officer did not apply his mind while issuing such notice, then the validity of such notice u/s 131 could be challenged by the person aggrieved thereby. It was held that the power of the Income Tax Officer u/s 131 was co-extensive with that of a court trying a suit u/s 30 of the Civil Procedure Code, read with Rules 12, 14 and 15 of Order XI of the Code. The learned judges observed that the statutory power could not be exercised without application of mind in regard to the question of relevancy of the documents to the lis involved in the matter before the Income Tax Officer just as a civil court could not order discovery, production or inspection of documents unless it was of the opinion that such documents were relevant for the purpose of the issues involved in the suit pending before it. The officers mentioned in Section 131 of the Income Tax Act had been vested with powers to make the orders as mentioned therein provided they were satisfied that the orders made would be relevant for the purpose of deciding the case pending before them. In that case, the learned judges were of the view that the Officer did not apply his mind to the question of relevancy of the documents in determining any issue required to be determined by him and for that reason the summons issued in the said proceeding was held to be bad and had to be struck down by the Division Bench of this court. The learned judges further observed at page 574, while discussing the exercise of the statutory power without application of mind, that if such powers were granted then such powers would be so naked that the section itself would become ultra vires. Application of mind must be in regard to the question of relevancy of the documents to the lis involved in the matter before the Income Tax Officer. A civil court could not order discovery, production or inspection of documents until it was of the opinion that such documents were relevant for the purpose of the issues involved in the suit pending before it. Similarly, the Income Tax Officer u/s 131 although vested with the powers to make orders he will have to be satisfied that such order would be relevant for the purpose of deciding the case pending before him. Admittedly, it has been averred in the affidavit-in-opposition also that there was no pending case before the Income Tax Officer for the assessment year 1969-70, This view of the Division Bench of this High Court had been followed by a learned judge at Bombay in the case of Jamnadas Madhavji and Co. and another Vs. J.B. Panchal, Income Tax Officer and another, . The learned single judge by following the Division Bench observed that the Officers mentioned in Section 131(1) of the Income Tax Act, 1961, were conferred with the same powers as were vested in a court under the CPC when trying a suit. The CPC conferred upon a court powers, for the exercise whereof, existence of a suit or a proceeding was a sine qua non. In pari materia, therefore, powers in respect of matters mentioned in Section 131(1), that is, discovery and inspection, enforcing the attendance of any person and examining him on oath, compelling the production of books of account and other documents, issuance of commissions, could be exercised only if a proceeding was pending before the concerned Officer and not otherwise. Under the circumstances, it appears that the issuance of such notice by the Income Tax Officer was without jurisdiction. It has been averred in paragraph 10 of the writ petition that in respect of proceedings which were pending similar notices were issued by the Income Tax Officer and those had been duly complied with. Under the circumstances, as very rightly observed by the learned court below, the Income Tax Officer was not entitled to exercise such power as a mere cloak for the purpose of making a fishing investigation and a roving enquiry in order to take proceedings u/s 147 of the Act. Dr. Pal appearing in support of the writ petitioner had drawn our attention to the fact that in fact proceedings were initiated u/s 148 and ultimately those proceedings had been dropped. Under those circumstances, this, court does not find any merit in this appeal. As a result, this appeal is dismissed. No order is made as to costs.

Mahitosh Majumdar, J.

3. I agree.

