(2015) 08 KAR CK 0313

In the Karnataka High Court

Case No : Writ Appeal Nos. 100006/2014, 100002/2014, 100007/2014, 100008/2014, 100009/2014 and 100010/2014 (T-IT)

Income Tax Officer and Others APPELLANT

Vs

Madeeha Enterprises RESPONDENT

Date of Decision : 10-08-2015

Acts Referred:
Income Tax Act, 1961 — Section 127, 153, 220(6), 250(4), 5(7A)

Citation : (2015) 379 ITR 93

Hon'ble Judges : Anand Byrareddy, J;S. Sujatha, J

Bench : Division Bench

Advocate : E.R. Indrakumar, Senior Counsel for Y.V. Raviraj, for the Appellant; M.V. Sheshachala, Senior Counsel for H.R. Kambiyavar, Advocates for the Respondent

Judgement

Anand Byrareddy, J—Heard the learned Senior Advocate Shri E.R. Indrakumar, appearing for the learned counsel for the appellants and Shri M.V. Sheshachala, Senior Advocate, appearing for the learned counsel for the respondent.

2. The brief facts are as follows:--

"a) These appeals are preferred against a common order of a learned single Judge, wherein in the circumstance that the respondents who were the petitioners who are seeking to question the transfer of their cases from the Deputy Commissioner of Income Tax, Ballari, to the Deputy Commissioner of Income Tax, Belagavi, under Section 127 of the Income Tax Act, 1961 (hereinafter referred to as ''the I.T. Act'', for brevity). The petitioners had challenged the order of transfer on the ground that the transfer was made in contravention of Section 127 of the I.T. Act. Secondly, that the principles of natural justice have not been complied with, as the respondents were not heard in the matter before passing of the order and that the order was never communicated to the respondent.

b) It was contended that no reasons were assigned in the order of transfer and that the order of transfer caused hardship to the respondents, since they had to carry a large volume of files to Belagavi, which was a place far away from the place of business of the respondent and the place where the respondents were residing.

c) The learned single Judge has found as a fact, that a show cause notice had been issued on 5.7.2011 directing the assessee to file objections to the proposed transfer and he was also directed to file statements on or before 10.7.2011. The assessee had filed his objections and stated that the department in transferring the file of the petitioners to Belagavi would cause grave hardship and he had to carry a large volume of files and he was also to produce atleast a hundred witnesses on all dates of hearing, it was impossible for the assessee to comply, and therefore, it was expected that no such order of transfer would be passed. However he was shocked to learn that there was an order of transfer which was never communicated to the assessee and it was only on receiving a letter addressed to him, as regards, compliance of Section 153 of the I.T. Act that it dawned on the assessee that there was an order of transfer, transferring all the matters from Ballari to Belagavi.

d) It was contended that since no reasonable opportunity was granted before passing the order of transfer, the order was bad as being contrary to the judgment of the Supreme Court in Ajantha Industries and Others Vs. Central Board of Direct Taxes, New Delhi and Others, AIR 1976 SC 437 : (1976) 102 ITR 281 : (1976) 1 SCC 1001 : (1976) 2 SCR 884 : (1976) 8 UJ 157 and also an unreported judgment of this Court of a learned judge of this Court in Writ Petition No. 33035/2011 and connected matters in M.B. Mallikarjuna v. The Commissioner of Income Tax, Davangere, wherein it was interpreted that unless reasonable opportunity of meeting the proposal of transfer is granted to the assessee and communicated to him and reasons are assigned in passing the order of transfer, the same would fall foul of the law and would have to be set at naught. It is on accepting these contentions that the learned single Judge, placing reliance on Y. Moideen Kunhi and Co. and others Vs. Income Tax Officer and others, (1993) 204 ITR 29 : (1993) 37 KarLJ 437 : (1993) 71 TAXMAN 177 , particularly para No. 17 therein, and also referring to para 7 of Ajantha Industries case (supra), had opined that there was non compliance of a mandatory requirement of law and not only quashed the order of transfer, but also set aside the assessment orders passed by the Assessing Authority, Belagavi. It is that order which is under challenge in the present appeals."

3. Shri E.R. Indrakumar, learned Senior Advocate appearing for the learned counsel for the appellants, would point out that the sequences of events have not been addressed in their right perspective by the learned single Judge. It is pointed out that the order of transfer though was communicated to the respondent, for reasons best known, the postal authorities, had returned it un-served, this is placed on record.

4. He would thereafter point out that though the order of transfer was passed in the year 2011, the writ petition challenging the same was filed in the year 2013. In the meanwhile the assessee had appeared before the Assessing Authority, Belagavi and had participated in the proceedings and had then suffered an order of assessment which was even challenged in appeal and an application for stay was also filed when the writ petitions came to be filed. And on the writ petition being allowed, and the Assessment Order having been set aside, the appeals have been withdrawn.

5. He would contend that once the respondents had acceded to the jurisdiction of the Assessing Authority at Belagavi, the assessees were precluded from questioning his jurisdiction after having suffered an Assessment Order and therefore the order of the learned single Judge is bad in law. He places reliance on a judgment of a Larger Bench in the case of PANNALAL BINJRAJ AND ANOTHER Vs. THE UNION OF INDIA AND OTHERS. (AND OTHER CASES)., AIR 1957 SC 397 : (1957) 31 ITR 565 , to support the proposition that once the assessee accedes to the jurisdiction of the Assessing Authority and having suffered an order of assessment and also having challenged the same in appeal, would not be in a position to question the transfer order, which would be redundant, thereafter.

6. The appellants seeking to claim that they have suffered grave prejudice by virtue of the order of transfer having been passed without assigning reasons or communicating the same to the respondent assessee is also incorrect. A copy of the transfer order would indicate that the reasons are assigned and the objections of the assessee have also been considered. In that, the order of transfer was warranted, in order to consolidate and coordinate and investigate several assessments together and it is for the sake of administrative convenience that the order of transfer was passed and therefore, the assessee having acquiesced in the jurisdiction of the Assessing Authority cannot seek to question the order of transfer and indirectly attack the Assessment Order, which he had sought to challenge by way of an appeal. The sum effect of the delay in challenging the transfer order that he has already suffered an order on merits and now to question the order of transfer, as it were, and the single Judge having set aside the Assessment Order has resulted in a premium being placed on the assessees own fault in not having questioned the order of transfer at the appropriate time.

7. The learned Senior Advocate Shri M.V. Sheshachala, on the other hand, points out that the decision in Pannalal Binjraj, supra, relied upon by the appellants was in relation to Section 5(7A) of the Income Tax Act, 1922, which provided an omnibus power to the authority to pass orders of transfer, whereas Section 127 of the I.T. Act is worded differently and has come in for interpretation by the Supreme court in the case of Ajantha Industries, supra, wherein the Court has held that it is mandatory to hear the assessee before an order of transfer is passed and to assign reasons for the transfer and to communicate the order of transfer, none of

which has been complied with in the present case on hand and therefore the reliance placed on Pannalal''s case, supra is misconceived and the alleged delay in filing the writ petition questioning the order of transfer is also not tenable for the reason that no order of transfer was furnished to the assessee at all and it is also indirectly that the assessee had learnt about the order of transfer. The writ petition having been entertained on the ground that non compliance of the mandatory requirement of Section 127 of the I.T. Act rendered the order of transfer a nullity and the Assessment Order having been set at naught is in order and in accordance with other judgments of this Court and in line with several decisions which have taken a similar view.

8. Further, it is pointed out that grave apprehension of hardship and inability of the assessee to carry large volumes of files and large number of witnesses from Ballari to Belagavi has indeed proved a handicap resulting in the assessee having suffered an Assessment Order for want of such material being made available to the Assessing Officer. This was the primary objection raised to the order of transfer and which indeed has proved true insofar as prejudicing the case of the assessee. Hence the intervention of the learned single Judge was in the above circumstances which is fully justified and would submit that the Revenue does not suffer any prejudice and since the matter has been reopened, it would be available for the Revenue to establish its case, if at all, and the assessee having been provided an opportunity in law to place all the available material through its witnesses cannot be said to cause any prejudice or hardship to the Revenue. It only ensures complete justice, which is the object of the law and this Court having intervened was in the interest of justice and seeks that the appeals be dismissed.

9. By way of reply, Shri E.R. Indrakumar would point out that to complete the sequence of events he would submit that even during the pendency of the assessment proceedings certain discoveries having been made on search, it was necessary to re-do the assessment on the basis of such additional material that was gathered and that exercise having been carried out to its hilt by giving full opportunity to the assessees, it cannot be said that there is any injustice caused insofar as addressing the case on merits is concerned and even if the alleged injustice to the assessees. Further, since the Appellate Authority is also a fact finding authority and since it is a continuation of the assessment proceedings, it is possible for the Appellate Authority to call for a report from the Assessing Authority at Ballari, as provided under Section 250(4) of the I.T. Act, whereby the assessee would be enabled to produce such material and examine such witnesses who, according to the assessee, have not been examined or any material not having been produced on account of the distance from his place of residence to the office of the assessing authority who conducted the assessment proceedings. And on the basis of such a report it would be available for the assessee to urge the grounds of appeal and even possibly to substantiate the same. Therefore no prejudice would be caused to the assessee, if even the appeals that were withdrawn as having been rendered infructuous, on the

learned single Judge allowing the writ petitions, could be restored to file. Such a measure could be taken by the Appellate Authority, thereby not only satisfying the assessees but also ensuring complete justice as is sought to be canvassed by the petitioner. For otherwise the entire exercise of having gone through the assessment proceedings is rendered a nullity and there is duplication of work for the department which results in avoidable waste of effort, time and expense and hence would seek that this alternative approach may be adopted and the appeals could be restored to file and opportunity be granted to the assessee to place additional material and examine such material as may be available, by recourse to Section 250(4) of the I.T. Act.

10. Therefore, in the above circumstances, it is to be kept in view that several judgments cited by Shri M.V. Sheshachala, are all instances where the orders of transfer under Section 127 have been promptly challenged before the High Court. The given circumstance that there was clearly a lapse of time in questioning the transfer orders and in the interregnum assessment orders having been passed and the same also having been challenged in appeal would render the challenge to the transfer order as being redundant. For this reason alone the present facts of the case stand distinguished. But however the circumstance that the assessee was unable to produce additional material documents and was unable to examine a large number of witnesses, would also have to be kept in view. Therefore in order to ensure that there is fairness and opportunity of hearing, it would be necessary to balance the claims of both the parties and since the law provides for the procedure where this can be addressed, the writ appeals are allowed. The order of the learned single Judge is set aside and modified to the extent that the Assessment Orders are restored to file.

11. The appeals preferred against the Assessment Orders are also restored to file. The Appellate Authority shall call for a report under Section 250(4) of the I.T. Act, from the Central Assessing Authority, Ballari, who in turn shall permit the assessee to tender such additional documents and tender witnesses as may be necessary in support of his case and on the basis of the said report, further proceedings shall be taken by the Appellate Authority and appropriate orders be passed in accordance with law. The office of the Central Assessing Authority which is now created at Ballari would be competent to furnish such a report.

12. The learned Senior Advocate Shri M.V. Sheshachala would at this stage submit that the department is likely to take precipitative action and therefore the interest of the assessee be safeguarded. In this regard, it is pointed out by Shri E.R. Indrakumar that there is provision under Section 220(6) of the I.T. Act, which provides that on an application before the Assessing Authority, he shall not treat the assessee as a defaulter, if there is an appeal pending and subject to such conditions as may be imposed, shall not recover any amount, pending disposal of the appeal. Hence it is open for the assessee to make such an application before the assessing authority. It is made clear that since there is centralized Assessing Authority at Ballari, it is open for the assessee to approach

that authority with such an application.