(2018) 09 BOM CK 0095

In the Bombay High Court

Case No : Writ Petition No. 3388 Of 2005

M/S. Rambilas Gulabdas (Huf) APPELLANT

Vs

Tax Recovery Officer, Range-7, Room No. 314 & Another RESPONDENT

Date of Decision : 27-09-2018

Acts Referred:
Income Tax Act, 1961 — Section 256(2)

Citation : (2018) 09 BOM CK 0095

Hon'ble Judges : B.P. Dharmadhikari, J;M.G. Giratkar, J

Bench : Division Bench

Advocate : N.S. Bhattad, Anand Parchure

Final Decision : Disposed Off

Judgement

B.P. Dharmadhikari, J

1. The petitionerÂHUF assails the notice for auction dated 18.11.2004 on the ground that it is barred by limitation because of Rule 68ÂB of Second

Schedule of Income Tax Act, 1961.Â This Court, has on 23rd August, 2005, admitted petition for final hearing and issued Rule on interim relief which

was made returnable in four weeks.Â On 2nd February, 2006, after hearing the parties, this Court granted interim relief thereby restraining

respondents from proceeding to sell the attached agricultural land by auction in furtherance of impugned notice dated 18.11.2004.

2. Shri Bhattad, learned Counsel for petitioner, at the outset, submits that when petition was drafted, considering the period of limitation of four years

appearing in Rule 68ÂB(1), the challenges have been raised accordingly.Â He submits that said period prior to 01.03.1996 was three years and the

amendment making it four years was by Central Board of Direct Taxes.Â As CBDT could not have exercised such power to amend legislative provisions, Andhra Pradesh High Court in judgment in the case of S.V. Gopala Rao and others .v. Commissioner of Income Tax and others (reported

at 2004 ITR Vol. 270, page 433) quashed that amendment.Â In view of this, from August 09, 2004 i.e. date of Andhra Pradesh High Court judgment,

stipulation of four years as limitation ceased and period of three years only remained relevant for computing limitation.Â He further submits that

respondents are relying upon an earlier instance in case of similar firm, the HUF therein was a coÂpartnerÂ withÂ present petitioner.Â Â Â

ThereÂ theÂ contentionÂ ofÂ said R.B. Sriram Durgaprasad (HUF) was period of limitation prescribed in Rule 68ÂB(1) needed to be calculated

from the date of judgment in reference proceedings by High Court.Â Contention, therefore, was auction then scheduled was beyond stipulated

period.Â High Court accepted that contention of R.B. Sriram Durgaprasad.Â Hon'ble Apex Court, however, has overruled High Court's judgment

and held that it is the date on which SLP was dismissed that the assessment attained finality and hence period needed to be computed from date of

dismissal of SLP.Â Advocate Bhattad explained that in present matter that issue need not be gone into because the SLP was dismissed by Hon'ble

Apex Court on 16.01.2001. Hence, the period under Rule 68Â?B(1) commences from 01.04.2001 and the auction notice impugned is, therefore, beyond

limitation of three years.

3. Shri Parchure, learned Counsel for respondents points out that in judgment in the case of coÂpartner namely R.B. Sriram Durgaprasad, Hon'ble

Apex Court itself has on 04th September, 2015 applied limitation of four years.Â Hence, even if period of limitation is reckoned from 01.04.2001,

18.11.2004 falls within four years and, therefore, the petition is liable to be dismissed.Â Learned Counsel for revenue also adds that when date of

dismissal of SLP is decisive, here the SLP against judgment of Andhra Pradesh High Court dated 09th August, 2004 has been dismissed on 13th July,

2017.Â Hence till then period of limitation must be held to be four years.

4. Without prejudice to these arguments, Advocate Parchure also invites our attention to facts disclosed in para 8 of writ petition to submit that it was

a notice for resale and hence in terms of proviso to Rule 68B(1), period of limitation is four years.Â He, therefore, submits that on both these counts,

the petition is liable to be dismissed.Â He points out that amount of tax outstanding is in excess of rupees two crores.

5. In reply arguments, Advocate Bhattad has invited our attention to Rule 68ÂB(4) to urge that as auction has not been conducted within stipulated

time, action of attachment also gets vitiated.

6. Perusal of memo of writ petition does not show any effort made by revenue after 16.01.2001 till 18.11.2004 for auction of attached property.Â The

only effort appears to be on 18.11.2004.Â It, therefore, is not a case of resale but first or initial sale or auction only.

7. Perusal of judgment dated 09th August, 2004 delivered by Andhra Pradesh High Court shows that CBDT does not have power to issue notification

to amend a provision enacted by parliament. Notification dated 01st March, 1996 enhancing period of limitation of three years stipulated in Rule 68Â?

B(1) to four years is, therefore, found to be bad.Â This judgment of Andhra Pradesh High Court was challenged by department before Hon'ble Apex

Court.Â Civil Appeal No. 4901 of 2010 is decided by Hon'ble Apex Court on 13th July, 2017.Â Hon'ble Apex Court has endorsed the findings of

Andhra Pradesh High Court.Â With the result, it follows that period of limitation of three years enacted by parliament in Rule 68ÂB(1) could not

have been altered by CBDT.Â The period, therefore, was always three years.

8. Contention of Advocate Parchure that said period continued to be four years till Hon'ble Apex Court decided Civil Appeal against Andhra Pradesh

High Court's judgment also cannot be accepted.Â If it is accepted, it leads to a situation in which an amendment effected to a statute by an

incompetent authority is allowed to operate for certain period.Â The authority (CBDT) does not have that power at all and hence its act is void.Â

With the result, we have to accept submission of Advocate Bhattad that all the while said period was three years only.

9. Though in judgment in the case of coÂpartner R.B. Sriram Durgaprasad (HUF) in Civil Appeal No. 4723 of 2006, Hon'ble Apex Court has on 04th

September, 2015 set aside the order of High Court and in the process found that certificate issued on 15.07.2004 was within period of four years of

limitation, the discussion therein does not enable us to hold that Hon'ble Apex Court has held that period of limitation under Rule 68ÂB(1) is four

years.Â The consideration therein shows that application under Section 256(2) of Income Tax Act, 1961 was dismissed on 08.04.1987 and R.B.

Sriram Durgaprasad thereafter filed SLP before Hon'ble Apex Court where leave was granted and Civil Appeals 69446952 of 1995 were

registered.Â That appeal was finally dismissed on 16.01.2001.

10. The contention of R.B. Sriram Durgaprasad before High Court was the certificate for recovery issued on 15.07.2004 was barred by limitation.Â

High Court accepted the said contention and found that assessment proceedings were finalized on 08.04.1987 only.Â The Hon'ble Apex Court in this

backdrop found that period of limitation needed to be counted from date 16.01.2001 when civil appeal filed by assessee was dismissed and not from

08.04.1987.Â It has, therefore, calculated period of four years from 16.01.2001 and found the date 15.07.2004 within four years.

11. This judgment, therefore, does not deal with that the controversy raised before us i.e. whether period of three years enacted by legislative process

because Rule 68Â?B(1) has to prevail or then till 13th July, 2017, the period of four years stipulated by CBDT should prevail.

12. Here the SLP of partnership firm of assessee is also dismissed on 16.01.2001 by the Hon'ble Apex Court.Â The period of limitation, therefore,

begins to run from 01.04.2001.Â The period of three years expired on 31.03.2004 and period of four years expired on 31.03.2005.

13. The steps are initiated by department in present matter on 18.11.2004 i.e. after expiry of period of three years but before expiry of period of four

years.Â The judgment of Apex Court which endorses reasoning of Andhra Pradesh High Court on lack of authority in CBDT to increase the period

from three years to four years.Â The incompetent authority, therefore, cannot prejudice legal rights of petitioner flowing from statutory provisions or

eclipse the same in any manner.Â Notice dated 18.11.2004 is, therefore, beyond period of three years and, therefore, hit by Rule 68Â?B(1).

14. Here, we have to take note of effort of Advocate Bhattad to urge that the Hon'ble Apex Court has in Civil Appeal No. 4723 of 2006 applied

period of limitation of four years because it was case of resale. Period of four years is statutorily prescribed in proviso to Rule 68ÂB(1) when first

auction/sale cannot materialize in contingency stipulated thereunder.Â Such material is not seen in the judgment delivered by Hon'ble Apex Court or

then it is not on record before us.Â We, therefore, cannot accept that the certificate issued on 15.07.2004 and which formed subject matter of Civil

Appeal No. 4723 of 2006 was in process of resale.

15. Similarly, Advocate Parchure has attempted to urge that notice dated 18.11.2004 impugned before this Court is a resale.Â Again material on

record does not show that it is a resale.

16. In this situation, we find the notice dated 18.11.2004 unsustainable.Â It is accordingly quashed and set aside.Â Consequently, in view of mandate

of Rule 68Â?B(4), attachment of properties which formed subject matter of said notice dated 18.11.2004 is also set aside.

17. Needless to mention that it is open to respondents to proceed further as per law for recovery of their dues.

18. Petition is accordingly allowed and disposed of.Â No costs.Â Â