(2008) 07 GUJ CK 0115

In the Gujarat High Court

Murlidhar Thakurmal APPELLANT

Vs

L.K. Koolwal or his Successor in Office RESPONDENT

Date of Decision : 24-07-2008

Acts Referred:

Constitution of India, 1950 — Article 226
Finance Act, 1998 — Section 95(i)(c)

Citation : (2008) 07 GUJ CK 0115

Hon'ble Judges : K.A. Puj, J;Bankim N. Mehta, J

Bench : Division Bench

Final Decision : Allowed

Judgement

K.A. Puj, J.—The petitioner has filed this petition under Article 226 of the Constitution of India challenging the order dated 18-2-1999 passed by the respondent rejecting the petitioner''s declaration filed under Kar Vivad Samadhan Scheme, 1998 ("KVSS" for short) and the order dated 25-2-1999 giving additional reasons for such rejection.

2. The petition was admitted by this Court and rule was issued on 7-9-1999.

3. It is the case of the petitioner that the petitioner was a partner of firm M/s. Jhelelal Builders, which has preferred a settlement petition before the Settlement Commission in respect of assessment year 1989-90 to 1991-92. The assessments of the said firm for the later two years, i.e. 1992-93 and 1993-94 were also later on taken for adjudication by the Settlement Commission. The Commission decided the matters of the firm for the first three years vide its order dated 14-9-1995 and for later two years vide its order dated 26-3-1997. The Settlement Commission passed orders on the basis of the representation made by the assessing officer and also taxes were paid in part by the firm on 31-12-1996. Thereupon the assessing officer sought to recover total amount of taxes of Rs. 6,96,291 comprising of tax liability of Rs. 1,50,393 and the balance amount of interest from the petitioner. On account of recovery initiated against the petitioner being bad, illegal, contrary to law and without jurisdiction, the

petitioner filed Special Civil Appln. No. 10759 of 1998 before this Court on 16-12-1998. Since KVSS came into force, the petitioner filed his declaration on 21-12-1998 seeking settlement of his disputes for the assessment years 1989-90 to 1992-93.

On coming to know that his declaration was being rejected, the petitioner gave letter to the Chief Commissioner on 18-2-1999 requesting him to do justice. Instead of considering the said representation, the Chief Commissioner passed order on the same day, i.e. on 18-2-1999, rejecting the petitioner''s declaration under the KVSS. Thereafter, the petitioner received an order dated 25-2-1999 wherein new ground was given for rejecting the petitioner''s declaration stating that the writ petition filed by the petitioner was not admitted on the date of filing declaration.

Being aggrieved by the said rejection orders dated 18-2-1999 and 25-2-1999, the petitioner has filed the present petition before this Court.

4. Mr. S.N. Soparkar, learned senior advocate appearing for the petitioner, has submitted that the impugned orders of the respondent in not accepting the declaration and in making incorrect calculation of tax arrears are patently bad, illegal, contrary to law and violative of the fundamental rights guaranteed to the petitioner. He has further submitted that the grounds stated by the respondent while rejecting the petitioner''s declaration are absolutely irrelevant and unsustainable. He has submitted that there is no substance in the assumption of the respondent that the petitioner is prohibited from approaching under the KVSS because the proceedings were carried by the firm. He has submitted that this issue is covered by the decision of this Court in the case of Kailash T. Agrawal v. M.S. Thanvi Designated Authority dated 1-7-2008 rendered in Special Civil Appln. No. 2221 of 1999. In almost similar fact situation, this Court has laid down in the case of Manibhai Prabhudas Patel and Another Vs. L.K. Koolwal, Designated Authority, that the embargo provided for in Section 95(i)(b) of the KVSS is only with regard to the share of income from the firm in which the order u/s 245D(4) of the Act is passed and it does not preclude the partners from approaching the Designated Authority under KVSS for settlement of their other disputes.

5. So far as other ground stated by the respondent while rejecting the petitioner''s declaration is concerned, Mr. Soparkar, learned senior advocate for the petitioner, has submitted that u/s 95(i)(c) of the Act, the only prohibition contained against the approach under KVSS is where ''no appeal or reference or writ petition is admitted and pending before any appellate authority or High Court or the Supreme Court on the date of filing of declaration''. He has, therefore, submitted that so far as the term ''admitted'' is concerned, the same has to be given a natural meaning, viz., filed within the prescribed time. He has, therefore, submitted that merely because this Court has not issued rule, it cannot be said that the petition was not pending before this Court. The term ''admission'' must necessarily mean validly filed and cannot be regarded as

requiring the petitioner to obtain issuance of order of rule in the matter. He has, therefore, submitted that action of the respondent is patently bad, illegal and contrary to law. He has further submitted that even otherwise, the issue was concluded by this Court in the case of Sheela Ashokkumar Goenka v. Designated Authority under KVSS decided on 1-7-2008 in Special Civil Appln. No. 1888 of 1999 wherein all earlier decisions of this Court as well as the apex court were. referred to by the Court and a view is taken that whether an appeal is valid or competent is a question entirely for the appellate court before whom the appeal is filed to decide and this determination is possible only after the appeal is heard, but there is nothing to prevent a party from filing an appeal, which may ultimately be found to be incompetent, e.g. when it is held to be barred by limitation. From'' the mere fact that such an appeal is held to be unmaintainable on any ground whatsoever, it does not follow that there was no appeal pending before the Court. He has, therefore, submitted that if the petition is filed and that is pending before the Court, simply on that ground the petitioner cannot be prevented from approaching the Designated Authority under KVSS. He has, therefore, submitted that the second ground given by the respondent while rejecting the petitioner''s declaration is also contrary to the provisions of law.

6. Mr. M.R. Bhatt, learned senior standing counsel appearing for the revenue, has relied upon the affidavit-in-reply filed on behalf of the respondent. He, however, could not dispute the fact that both the grounds canvassed by the respondent while rejecting the petitioner''s declaration are covered by the decision of this Court in favour of the petitioner.

7. Having heard the learned senior advocate appearing for the petitioner and Mr. M.R. Bhatt, learned senior standing counsel appearing for the revenue and having gone through the earlier decisions of this Court as well as pleadings of the parties, we are of the view that the grounds given by the respondent while rejecting the petitioner''s declaration are not acceptable in view of the binding decisions of this Court as well as the apex Court. We, therefore, allow this petition and direct the respondent to issue fresh orders under KVSS by including Income Tax liability arising out of the assessment for the years under consideration.

The petition is accordingly allowed. Rule is made absolute without any order as to costs.

