(2006) 02 J&K CK 0008

In the Jammu And Kashmir High Court

Case No : LPA (OW) No. 153 of 2000

Om Parkash Bamba APPELLANT

Vs

Union of India (UOI) and Others RESPONDENT

Date of Decision : 24-02-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 75
Income Tax Act, 1961 — Section 131, 131(1), 131(1A), 2(14), 55A
Wealth Tax Act, 1957 — Section 16A, 16A(1), 16A(2), 16A(3), 16A(4)

Citation : (2006) 2 JKJ 377

Hon'ble Judges : B.A. Khan, Acting C.J.;J.P. Singh, J

Bench : Division Bench

Advocate : R.K. Gupta, for the Appellant; D.S. Thakur, for the Respondent

Final Decision : Allowed

Judgement

B.A. Khan, C.J. (A)

1. This appeal is directed against the Writ Court judgment dated 20th August, 1999 passed in OWP No. 561/1992, dismissing the appellant's writ

petition.

2. The appellant had filed the writ petition seeking quashing of letter dated 30th March, 1992 and notices dated 9th April, 1992 and 25th June,

1992 issued by second respondent herein in exercise of power under Sections 131(1)(d) read with Section 55A of the Income Tax Act, 1961

seeking information from appellant with regard to the construction of his house property and determination of its value.

3. Appellant's case before the Writ Court was that the action of respondents was incompetent because the Assessing Officer had no power to

make reference to second respondent (Valuation Officer), nor had he any power to issue notices in question either u/s 131(1)(d) or u/s 55A of the

Act.

4. The writ petition was opposed by the revenue justifying the action and claiming that it was covered under both provisions of the Income Tax

Act.

5. The Writ Court interpreted the relevant provisions and took the view that power was exercisable by respondents both u/s 131(1)(d) and

Section 55A. The Writ Court while dealing with the provision of Section 131(1)(d) held:

I am of the opinion that the above conclusions drawn by the learned authors summarise the powers vested in the officers mentioned in Section 131.

A perusal of the provisions indicated at sl. No. (a) makes it apparent that the powers can be exercised even if an individual or entity may not

actually be assessed but may be suspected to have assessable income. Thus, a person who has raised a construction which runs into lacs but has

not disclosed his income, the officer named in Section 131 can examine the matter and can exercise powers in terms of Section 131. Therefore, to

say that the power could not be exercised u/s 131 because the income of the assessee stood assessed or that he was not to be subjected to any

capital gain, is an argument, which cannot be accepted.

6. In respect of power exercisable u/s 55A of the Act, it said:

It be seen that what is sought to be determined u/s 55 is the fair market value of a capital asset. This would be relevant not only for the purposes of

determining the tax payable on income but also for other purposes. Merely because Section 55A happens to be part of that scheme of Section

which deals with the capital gains, it cannot be said that this Section would be attracted only where the issue is vis-'-vis determination of capital

gains. What is required to be determined is the capital asset. The term stands defined in Section 2(14). Therefore, to say that Section 55A can be

resorted to only in the case where the issue is vis-'-vis determination of capital gains is not correct appreciation of scope of Section 55A. What is

required to be assessed is the fair market value of capital asset. ...

7. It was on holding thus and taking the view that Valuation Officer was competent to issue notice for determination of the cost of the house

property of the appellant that the Writ Court dismissed his writ petition giving rise to this appeal.

8. The only question that falls for consideration and determination, therefore, is whether respondents were competent in exercise of power either

u/s 131(1)(d) or Section 55A of the Income tax Act to issue the letter and notices to the appellant seeking information with regard to construction

of his house and determination of its cost, moreso when the appellant's assessment for the relevant accounting years had been accepted by the

Income Tax Assessing Officer which was allegedly sought to be reopened by respondents after eight years or so.

9. Facts disclose that the appellant started constructing a house at 151-AD, Gandhi Nagar, Jammu way back in 1982 and carried it on till 1994.

Thereafter, he got the construction evaluated by an approved valuer and filed the information report along with his returns for the year 1984. The

Assessing Income tax Officer assessed his income taking in regard the valuation report and passed an assessment order dated 22nd August, 1985.

He repeated the same returns for the accounting year 1985-86, which was also assessed for determination of Income Tax by the Income Tax

Assessing Authority.

10. It seems that it was eight years thereafter that Valuation Officer (respondent No. 2) vide letter dated 30th March, 1992 to the appellant sought

enquiry into the construction cost of his house. This was followed by two notices dated 9th April, 1992 and 25th June, 1992, threatening him to

furnish the information and documents or else face penalty of Rs. 10,000. This appears to have constrained the appellant to file the writ petition

challenging the letter and the two notices on the ground that the Valuation Officer (respondent No. 2) had no competence and jurisdiction to seek

information for determination of cost of the house either u/s 131(1)(d) or Section 55A of the Act, more particularly when the Income Tax

Assessing Authority had accepted his returns and had assessed his income for the relevant accounting years.

11. The writ petition was dismissed, as noticed earlier, with the Writ Court proceeding on the premise that the action of Valuation Officer

(respondent No. 2) was within his competence.

12. Learned Counsel for the appellant, Mr. R. K. Gupta, submitted that the issue

was squarely covered by Division Bench judgment of this Court

in Shiv Dass Sawhney v. Union (LPA No. 564/1999) and also by the latest Supreme Court judgment in Amiya Bala Paul Vs. Commissioner of

Income Tax, Shillong, , overruling the proposition laid down by the Writ Court in the present case and holding that Valuation Officer had no such

jurisdiction either u/s 131(1)(d) or Section 55A of the Act.

13. Though the matter should have ended at this but still we deem it appropriate, though at the cost of repetition, to deal with the issue in some

detail to set the controversy at rest for good. For this it would be necessary to reproduce the two sections of the Income Tax Act for better

appreciation of the nature of their provisions and the power conferred by them.

55A. Reference to Valuation Officer.

With a view to ascertaining the fair market value of a capital asset for the purposes of this Chapter, the Assessing Officer may refer the valuation of

capital asset to a Valuation Officer.-

(a) in a case where the value of the asset as claimed by the assessee is in accordance with the estimate made by a registered valuer, if the

Assessing Officer is of opinion that the value so claimed is less than its fair market value;

(b) in any other case, if the Assessing Officer is of opinion.-

(i) that the fair market value of the asset exceeds the value of the asset as claimed by the assessee by more than such percentage of the value of the

asset as so claimed or by more than such amount as may be prescribed in this behalf; or

(ii) that having regard to the nature of the asset and other relevant circumstances, it is necessary so to do,

and where any such reference is made, the provisions of Sub-sections (2), (3), (4), (5) and (6) of Section 16A, Clauses (ha) and (i) of Sub-section

(1) and Sub-sections (3A) and (4) of Section 23, Sub-section (5) of Section 24, Section 34AA, Section 35 and Section 37 of the Wealth-tax

Act, 1957 (27 of 1957), shall, with the necessary modifications, apply in relation to such reference as they apply in relation to a reference made by

the Assessing Officer under Sub-section (1) of Section 16A of that Act.

Explanation.- In this section, ""Valuation Officer"" has the same meaning, as in

Clause (r) of Section 2 of the Wealth-tax Act, 1957.

131. Power regarding discovery, production of evidence, etc.:

(1) The Assessing Officer, Deputy Commissioner (Appeals), Joint Commissioner, Commissioner (Appeals) and Chief Commissioner or

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 (5 of

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 baking company and examining him on oath;

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

(d) issuing commissions.

14. Section 55A figures in Chapter IV Part E of the Act which deals with capital gains arising from transfer of a capital asset. It is in the course of

assessment of such gain and for the purposes of this Chapter that this provision empowers the Assessing Officer to make a reference to the

Valuation Officer for evaluation of the capital assets to ascertain its fair market value. In other words the power to make such reference is limited

only for purposes of Chapter IV as distinct from the purposes of the Act. It is not, all-embracing or loose, or so wide a power which could be

applied and would be attracted to any proceedings under the Income Tax Act. This section, obviously, is not attracted in the present case as has

been noticed also by the Supreme Court and it becomes unnecessary to trace the history of how the Valuation Officer comes to be appointed

under the Wealth-tax Act, what are the powers he enjoys under that Act and how is it distinct from the Assessing Officer's powers under that Act.

That being so, the Valuation Officer (respondent No. 2) was not competent to issue any letter or notice to the appellant assessee seeking

information for determination of the value of his house property nor could any such reference have been made to him by the Assessing Officer to

do so u/s 55A. The action was, therefore, clearly beyond jurisdiction of second respondent and the view taken by the Writ Court in this regard is

wholly incorrect.

15. This takes us to the other related issue as to whether the Valuation Officer

could exercise the power to do so u/s 131(1)(d) of the Act?

16. This section also, as would be evident on its plain reading, deals with the powers of the Assessing Officer and other appellate authorities under

the Income Tax Act regarding discovery, inspection, production of books of accounts and other documents and enforcing the attendance for

examination on oath, etc. It says that they would have the same powers as are vested in a civil court under the CPC while trying a suit in respect of

discovery and production of documents etc., enforcing attendance of any person, including any officer of a banking company and examining him on

oath; compelling the production of books of account and other documents; and also issuing commissions.

17. In the present case it remains to be seen whether the Income Tax Assessing Officer's action in making the reference to the Valuation Officer

could be covered under Sub-clause (d), i.e., to issue a commission by asking the Valuation Officer to determine the cost of appellant's property.

This aspect has also been dealt with though briefly by the Supreme Court in its judgment in Amiya Bala Paul u. CIT (supra) and answered in the

negative, i.e., that the Income Tax Assessing Officer cannot make any reference to the Valuation Officer in the nature of a power of issuing

commission for making assessment of the assessee which had been already assessed and accepted by the Income Tax Assessing Officer, because

the issuance of such commission had a different scope u/s 75 and Order 26 of the Civil Procedure Code.

18. Provisions of Section 131 of the Act have come up for interpretation by various High Courts and there is by and large unanimity of the view

that power regarding discovery, production of documents, issuing of commissions etc., which is parametria with the power enjoyed by the civil

court under the Code of Civil Procedure, was exercisable only in a pending proceeding. Because this power was coextensive with the power of

the civil court under the CPC and just as a civil court could not issue a commission unless there was a proceeding or a suit pending, similarly the

authorities mentioned in Section 131 of the Act could not issue such commission unless there was a proceeding pending before them.

19. This also finds support by a comparative reading of the provisions of Section 131(1A) which empowers the authorities mentioned in that

section to take action when there was ""reason to suspect that any income had been concealed, or was likely to be concealed, by any person or

class of persons"" even though no proceeding with respect to such person or class of persons was pending before him or any other Income Tax

authority. The authorities specified in Section 131(1) of the Act can do so only if any proceeding is pending before them.

20. There are several judgments of various High Courts supporting this view. The Patna High Court in Rina Sen Vs. Commissioner of Income Tax

and Others, has held that in order to confer jurisdiction on the Assessing Officer etc., i.e., the authorities mentioned in Section 131, to issue

commission by way of reference to the Valuation Officer, a proceeding must be pending before the Authority. The proceeding within the meaning

of Section 131(1) of the Act must, therefore, be an independent proceeding pending before the Authority and it is only in connection with those

proceedings that commission may be issued. This judgment in turn derives support from judgment of the Bombay High Court in Jamnadas

Madhavji and Co. and another Vs. J.B. Panchal, Income Tax Officer and another, , wherein it was held that existence of a pending proceeding

was a condition precedent and sine qua non for exercise of power u/s 131(1).

21. Tested thus, it goes without saying that there was no independent pending proceeding before the Income Tax Assessing Authority in which he

could have issued a commission in exercise of power u/s 131 in the nature of making a reference to the Valuation Officer for determination of the

cost of the appellant's house property. Therefore, the action of issuing the letter and notices by second respondent was wholly incompetent and

without jurisdiction.

22. For all this, we fall in line with the view taken by the Supreme Court and various High Courts on the issue and hold that neither the Income -

Tax Assessing Officer had any authority to make a reference to the Valuation Officer nor had the Valuation Officer any competence to issue the

letter and notices to the appellant in the facts and circumstances of the case and in exercise of the power u/s 131(1)(d) and 55A of the Income tax

Act.

23. The appeal is resultantly allowed, the impugned judgment dated 20th August, 1999 passed in OWP No. 561/1992 is reversed and set-aside

and so are the letter dated 30th March, 1992 and notices dated 9th April, 1992 and 25th June, 1992 issued by second respondent quashed.

