

(1999) 08 BOM CK 0050

In the Bombay High Court

Case No : Writ Petition No. 5034 of 1990

Sable Waghire Trust and Another

APPELLANT

Vs

S.R. Achyuta Rao and Another

RESPONDENT

Date of Decision : 31-08-1999

Acts Referred:

Constitution of India, 1950 — Article 226
Income Tax Act, 1961 — Section 147, 148

Citation : (1999) 4 ALLMR 625 : (2000) 158 CTR 55 : (1999) 240 ITR 688 :
(2000) 1 MhLj 453

Hon'ble Judges : D.K. Deshmukh, J;B.P. Saraf, J

Bench : Division Bench

Advocate : P.J. Pardiwala, instructed by Rustamji and Ginwala, for the Appellant;
None, for the Respondent

Judgement

D.K. Deshmukh, J.—By this writ petition, the petitioners challenge the notice issued by the Income Tax Officer u/s 148 of the Income Tax Act, 1961 ("the Act"). Rule was issued in this case on November 20, 1990, and by an interim order, further proceedings pursuant to the said notice were stayed.

2. The petitioners, in their petition, have contended that the notice has been issued by the Income Tax Officer without any authority of law. They contend that the notice has been issued by the Income Tax Officer without obtaining sanction of the Commissioner of Income Tax or the Central Board of Direct Taxes. They also contend that the Income Tax Officer had no material before him for giving him reasons to believe that the income chargeable to tax has escaped to be assessed. The petitioners contend that the notice has been issued for making fishing enquiry. Though this petition was admitted in November, 1990, and an interim order was granted in favour of the petitioners and though the respondents are served, there is no counter-affidavit filed by the respondents. Learned counsel appearing for the petitioners, therefore, relying on a judgment of the Supreme Court in the case of Madhya Pradesh Industries Ltd. Vs. Income Tax Officer, Special Investigation Circle "B", Nagpur, , submitted that as there is

no counter affidavit filed, this court has to accept the allegations made in the petition and quash the notice which is challenged in the petition. Learned counsel also relies in support of this contention on a judgment of the Division Bench of this court in the case of Devji Ravji Patel Vs. Balasubramaniam and others, .

3. The matter has come up on board after nine years. None appears for the Revenue. No affidavit has been filed in support of the notice u/s 148 of the Act. The petitioners, in this petition also challenge the existence of the conditions precedent for issuance of notice u/s 148 of the Act. Law is well-settled on this point that if the existence of the conditions precedent for issuance of notice u/s 148 of the Act is challenged by an assessee before the court on oath, it is for the Income Tax Officer to satisfy the court about the existence of the conditions precedent by filing affidavit and/or producing relevant records. If in consideration of the said material, the court is satisfied that the conditions precedent did exist at the time the notice was issued, the challenge may be turned down by the court. In the absence of any material whatsoever placed by the Income Tax Officer to disprove the challenge of the assessee to the existence of the conditions precedent, the writ petition cannot be dismissed. Reference may be made in this connection to the decision of the Supreme Court in Madhya Pradesh Industries Ltd. Vs. Income Tax Officer, Special Investigation Circle "B", Nagpur, . That was a case u/s 34 of the Indian Income Tax Act, 1922 (corresponding to Section 148 of the Income tax Act, 1961). The notice was challenged by the assessee before the High Court by filing writ petition. The High Court dismissed the writ petition in limine. The Supreme Court held that where, upon the issue of a notice u/s 34 of the Indian Income Tax Act, 1922, a claim was made in a writ petition that the Income Tax Officer had no power to issue the notice and that the power was exercised not for any legitimate purpose for which it may be used, but for the purpose of making a fishing enquiry and to review a previous order made in favour of the petitioner, a rule upon the Income Tax Officer to show cause why the notice should not be set aside and an opportunity to him either to accept or to deny the facts and to set out such other material facts as had a bearing on the question, was at least called for. The Supreme Court also observed that when the party claiming relief challenges on oath the existence of the conditions precedent which confer jurisdiction and sets out facts which may, unless disproved, support his case, an order dismissing his petition in limine may not properly be made.

4. In the present case, the writ petition was admitted and rule was issued by this court on being prima facie satisfied that if the averments of the petitioners in the writ petition challenging the jurisdiction of the Income Tax Officer are accepted, the notice u/s 148 of the Act may not be tenable. About ten years have passed since the rule is issued. The matter is on board for hearing for the last one week. It has been adjourned on every day. Counsel for the petitioner is present and supports the challenge on the basis of averments made on oath in the writ petition. He submits that in the absence of any material placed by the Revenue in respect of jurisdiction of the Income Tax Officer, this writ petition should be

allowed. The impugned notice should be quashed and set aside. Our attention has also been drawn to the decision of this court in *Devji Ravji Patel Vs. Balasubramaniam and others*, , wherein, relying on the above decision, this court held (page 928) :

"If the existence of these facts is challenged by the assessee before the High Court, it is for the Income Tax Officer to satisfy the court about the existence of the same by filing affidavit and producing the relevant records. If on consideration of such material, the court is satisfied that the conditions precedent did exist, the court may turn down the challenge to the notices but in the absence of anything of the type, the averments of the petitioner supported by the facts set out in the petition are to be accepted and the court is left with no other option than to infer that the Income tax Officer had no material with him to justify the exercise of power u/s 147(a) of the Act and to issue the impugned notices. In other words as observed by the Supreme Court in *Madhya Pradesh Industries Ltd. Vs. Income Tax Officer, Special Investigation Circle "B", Nagpur*, neither the contention whether the disclosure made by the assessee was full and true in respect of all material facts necessary for the assessment can be determined in the absence of an affidavit by the Income Tax Officer nor the plea that the impugned notice was issued with a collateral object rejected without an enquiry."

5. The abovesaid decision squarely applies to the present case. As stated above, neither any affidavit has been filed by the Income Tax Officer to meet the allegation nor even the record is produced to justify the exercise of power u/s 147(a) of the Act and to issue the impugned notice.

6. We further find that a Constitution Bench of the Supreme Court has in its judgment in the case of *C.S. Rowjee and Others Vs. Andhra Pradesh State Road Transport Corporation*, , considered the effect in the case of a respondent against whom allegations have been made in the petition and where a counter-affidavit denying the said allegations is not filed, and observed thus (page 969) :

"It is, no doubt, true that allegations of mala fides and of improper motives on the part of those in power are frequently made and their frequency has increased in recent times. It is also somewhat unfortunate that allegations of this nature which have no foundation in fact, are made in several of the cases which have come up before this and other courts and it is found that they have been made merely with a view to cause prejudice or in the hope that whether they have basis in fact or not some of it at least might stick. Consequently, it has become the duty of the court to scrutinise these allegations with care so as to avoid being in any manner influenced by them, in cases where they have no foundation in fact. In this task which is thus cast on the courts it would conduce to a more satisfactory disposal and consideration of them, if those against whom allegations are made came forward to place before the court either their denials or their version of the matter, so that the court may be in a position to judge as to whether the onus that lies upon those who make allegations of mala fides on

the part of authorities of the status of those with which this appeal is concerned, have discharged their burden of proving it. In the absence of such affidavits or of materials placed before the court by these authorities, the court is left to judge" of the veracity of the allegations merely on tests of probability with nothing more substantial by way of answer. This is precisely the situation in which we find ourselves in the present case."

7. In the present case also, allegations have been made against the Income Tax Officer that he has issued the notice without authority of law, with mala fide intention of conducting a fishing enquiry. The Income Tax Officer has chosen not to appear in the present case, he has also not filed any counter-affidavit, he has also not produced any record before us. Therefore, the only material on the basis of which we have to decide the correctness or otherwise of the allegations is the record of the petition which contains the petition and the documents filed with the petition and the documents that have been placed in the petition substantiate the allegations made in the petition. There is nothing before us which indicates otherwise.

8. Situated thus, we are left with no option but to quash and set aside the impugned notice issued by the Income Tax Officer u/s 148 of the Act and make the rule absolute in the terms of prayer Clause (a) of the petition.

9. The writ petition is disposed of accordingly in the above terms with no order as to costs.