(1991) 06 CAL CK 0001

In the Calcutta High Court

Case No : Matter No. 2429 of 1987

Sarvamangala Properties — APPELLANT

Vs

Income Tax officer — RESPONDENT

Date of Decision : 19-06-1991

Acts Referred:

Constitution of India, 1950 — Article 226
Income Tax Act, 1961 — Section 139, 139(8), 143(3), 147, 147(a)

Citation : (1992) 61 TAXMAN 41

Hon'ble Judges : Ruma Pal, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Ruma Pal, J.—The assessment year in question is 1970-71. The subject-matter of challenge is a notice u/s 148 of the income tax Act, 1961 (''the Act'') in respect of the year in question. The said notice impugned in this proceeding is dated 30-3-1987.

The facts briefly stated are :

In 1956 the petitioner purchased premises No. 5, Clive Row, Calcutta (the said premises) at a public auction conducted by the Certificate Officer under the provisions of the Bengal Public Demands Recovery Act, 1913. The petitioner purchased the premises subject to prior encumbrances for a total price of Rs. 2,27,250. The auction under the Bengal Public Demands Recovery Act was for recovery of sales tax and the petitioner took possession of the premises. The next year a suit was filed in this Court being Suit No. 689 of 1957 against the original owner of the premises as well as the petitioner for recovery of sum of Rs. 35,34,063-11-6 by the Hongkong and Shanghai Banking Corporation (the bank) on the ground that the premises had been mortgaged to the bank by the original owner.

2. An interlocutory application was made in the suit by the bank. The

interlocutory application was disposed of by an order dated 29-4-1957. The order insofar as it is material provides as follows (wherein the petitioner is referred to as the defendant firm and the bank as the plaintiff bank):

"It is ordered by and with the consent of the plaintiff bank and the said defendant firm and without prejudice to the rights and contention of the parties that the said defendant firm shall collect the rents, issues and profits of the premises No.5, Clive Row, Calcutta and pay all outgoings thereof. And it is further ordered that the plaintiff bank shall write to all the tenants withdrawing objection to the tenants paying rents to the said defendant firm and the tenants shall pay accordingly and it is further ordered that the said defendant firm shall be at liberty to withdraw rents deposited by tenants with the Rent Controller and it is further ordered that the said defendant firm shall pay monthly and every month a sum of Rs.17,500 to the plaintiff bank first of such monthly payment to be made on or before the 15th day of June next and subsequent payments on or before 15th of each month and every subsequent month. And it is further ordered that in default of the said defendant firm failing to pay any of such monthly payments as aforesaid Mr. R. Mills failing him Mr. S.S.T.B. Laver of the plaintiff bank be appointed receiver of the rents, issues and profits of 5, Clive Row, Calcutta."

Pursuant to the interim order the petitioner paid Rs. 17,500 per month to the bank up to March 1976. From 1961 -62 the income from the premises was assessed in the hands of the petitioner. The petitioner claimed deduction in respect of the sum of Rs. 17,500 on account of interest. It is claimed by the petitioner that for the assessment year 1961-62 the petitioner disclosed all the facts leading up to the purchase of the premises including the pleadings relating to the suit filed by the bank as well as the interim order dated 29-4-1957 before the ITO. The ITO allowed the claim of the petitioner in respect of the said payment of Rs. 17,500 per month on account of interest. This deduction was permitted by the ITO for the assessment years 1962-63 to 1976-77.The said suit was decreed on 22-1-1976 in favour of the bank. The petitioner preferred an appeal from the judgment and decree dated 22-1-1976. The appeal was disposed of on 19-5-1987 by an order of the Appeal Court. The decree dated 22-1-1976 was modified by consent. It was agreed between the parties that the bank would retain Rs. 30 lakhs out of the amounts paid by the petitioner to the bank pursuant to the said interim order dated 29-4-1957 and would refund a sum of Rs. 9,02,292.70 together with a further amount of Rs. 4,40,000 on account of interest. This the bank has done.

3. In the meantime a series of notices u/s 148 were issued to the petitioner. These notices have been separately challenged in different proceedings as noted below:

Assessment year

Date of notice

Nature of proceedings

1.

1970-71

30-3-1987

Matter No, 2429 of 1987 Rule nisi and interim order issued.

2.

1971-72

29-3-1988

Matter No. 3389 of 1988.

3.

1972-73, 1974-75

31-3-1989

Matter No. 622 of 1990. Interim order issued.

4.

1975-76, 1976-77

...

Appeals pending before Tribunal.

5.

1977-78

...

Proceedings dropped.

4. The reasons recorded for issuing of the impugned notices have been disclosed by the respondents. The reasons read as follows:

"The assessee filed the return of income for the assessment year 1970-71 disclosing a total income of Rs. 31,594. In the profit & loss A/c for the year ending 31-3-1970 at the time of filing original return the assessee has shown income from rent as under:

Rent

Rs. 5,60,721

Less: Paid to Hongkong & Shanghai

Bank Corpn. in terms of High Court''s

order dated 28-5-1957 in Suit No. 689 of 1957

Rs. 2,10,000

Rs. 3,50,721

In computation of property income filed along with the return, the assessee has claimed, amongst others, deduction of Rs. 2,10,000 as interest. The ITO acted upon the information filed by the assessee and accepted the income from property by allowing Rs. 2,10,000 as interest as worked out by the assessee. In this connection the relevant portion of the High Court''s order dated 28-4-1957 is extracted below :

''And it is further ordered that the said defendant firm shall pay monthly and every month a sum of Rs. 17,500 to the plaintiff bank first of such monthly payment to be made on or before the 15th day of June next and subsequent payments on or before the 15th of each month.'' Nowhere in the said judgment of the High Court the word ''interest'' has been mentioned. Only the word ''payment'' has been mentioned. However in the said concise statement in para 4 page 6 of the plaint dated 3-4-1987 it is mentioned as under:

"The plaintiff from time to time lent and advanced to the defendant No.1 various sums of money for the purpose of the latter''s business and after giving credit to the defendant No.1 for all sums paid by it or realize by the plaintiff on account of the defendant No.1 a sum of Rs.35,34,063-11-6 is due and owing by the defendant No. 1 to the plaintiff Calcutta, as on December 1956''.

A reading of the statement of the plaint and the judgment of the Calcutta High Court suggests that the payment of Rs.2,10,000 was never towards the interest. Hence the assessee failed to disclose fully and truly in the original return all the primary facts necessary.

I have, therefore, reason to believe that assessee''s income to the extent of Rs. 2,10,000 chargeable to tax has escaped assessment for the assessment year 1970-71 due to failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment."

5. The petitioner filed a return in respect of the assessment year 1970-71 pursuant to the impugned notice. According to the petitioner this return was filed under cover of a letter in which it was made clear that the same was being filed without prejudice in the petitioner''s rights and contentions.

6. The petitioner offered to settle the proceedings between the parties. Several letters were written. Ultimately the last letter written on 9-3-1989 was to the following effect:

"(a) We will have also no objection if the sum of Rs. 9,02,292 received from Hong Kong Bank during the previous year relevant to assessment year 1988-89 is subjected to tax during the assessment year 1988-89.

(b) In that case however the department will have to cancel the assessments already made u/s 147(a)/143(3) for the assessment years 1975- 76 and 1976-77.

(c) It will also drop further proceedings in connection with re-opening of assessments for the assessment years 1970-71 and 1971-72.

(d) The department will also have to agree not to reopen assessments u/s 147 for any of the years.

(e) The department will not also charge interest u/s 139(8)/215/ 217 of the income tax Act in respect of assessment year 1988-89 and also will not start any penalty proceedings u/s 273/271(1)(a) in respect of the said year."

[Emphasis supplied]

7. The reassessment is sought to be made u/s 147(a) of the Act as it then stood. Section 147(a) at the material time prior to its amendment read as follows:

"Income escaping assessment. - If

(a) the income tax Officer has reason to believe that, by reason of the omission or failure on the part of an assessee to make a return u/s 139 for any assessment year to the income tax Officer or to disclose fully and truly all material facts necessary for his assessment for that year, income chargeable to tax has escaped assessment for that year, or

(b) ****

he may, subject to the provisions of sections 148 to 153, assess or reassess such income or recompute the loss or the depreciation allowance, as the case may be, for the assessment year concerned (hereafter in sections 148 to 153 referred to as the relevant assessment year).

Explanation 1 : For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely:-

(a) where income chargeable to tax has been under-assessed; or

(b) where such income has been assessed at too low a rate; or

(c) where such income has been made the subject of excessive relief under this Act or under the Indian income tax Act, 1922 (11 of 1922); or

(d) where excessive loss or depreciation allowance has been computed.

Explanation 2 : Production before the income tax Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the income tax Officer will not necessarily amount to disclosure within the meaning of this section."

8. The petitioner has filed this writ petition challenging the impugned notice basically on the ground that there was no omission or failure on the part of the petitioner justifying the reopening of the assessment for the assessment year in question u/s 147(a).

9. The respondents have contended :

(1) By letter dated 22-7-1988 written by the petitioner, the petitioner had stated that it was agreeable to accept the disallowance in question and was prepared to submit the returns in respect of the years 1972-73 to 1974-75 subject to the respondents issuing notices in respect of the years in question u/s 148. The petitioner was, therefore, stopped from challenging the impugned notice.

(2) In respect of the assessment years in 1975-76 and 1976-77 the petitioner had preferred appeals which were dismissed by the first appellate authority under the Act. Further appeals were pending before the Tribunal. The petitioner''s case was barred by res judicata. The notice in respect of the assessment years 1975-76 and 1976-77 was similar to the impugned notice and was, therefore, sub judice. The petitioner cannot be allowed to pursue two parallel remedies before the Tribunal as well as the writ court against the identical notice. Reliance has been placed on the following decisions: Purshottam Thackersey v. K.N. Anantarama Ayyar, CWT [1985] 154 ITR 395 1 (Bom.) , Mani and Co. Vs. Income Tax Officer and Another, and Radhey Shyam Jaiswal v. Asstt. CIT [1990] 186 ITR 354 2 (All.).

(3) The petitioner having filed a return pursuant to the impugned notice had waived its rights to challenge the same under article 226 of the Constitution. The respondents were statutorily bound to deal with the return filed by the petitioner u/s 143(3) of the Act.

(4) At the time of the initial assessment of the income from the premises in the petitioners hands the petitioner had wrongly claimed deduction of the payment of Rs. 17,500 per month on account of interest. This was allowed by the ITO. In fact the payment was towards payment of the mortgage debt and was a capital expenditure. The petitioner had, therefore, failed to disclose the matter fully or truly to the ITO as a result whereof income had escaped assessment justifying the reassessment u/s 147(a).

(5) The petitioner had an alternative remedy available under Act. Reliance has been placed on the following decisions: Kirpa Ram Ramji Dass Vs. Income Tax Officer, A-Ward and Another, Coca-Cola Export Corpn. v. S.C. Tewari, ITO [1986] 158 ITR 439 3 (Delhi) , Central India Industries Ltd. Vs. Income Tax Officer and Others, Rodney Shyam Jaiswal''s case (supra) and VXL India Ltd. Vs. Income Tax Officer and Others, .

10. As far as the respondent''s first contention is concerned: according to the petitioner the letter dated 22-7-1988 has been taken out of context and was in any event written without prejudice. According to the petitioner the said letter

was written in the course of a settlement sought to be arrived at by the petitioner with the respondents. The petitioner has stated that the petitioner had agreed to be taxed at the sum of Rs. 17,500 per month in the relevant assessment year to the extent of Rs. 9,02,292.70 as the petitioner had received the same by way of refund pursuant to the order of the Appeal Court dated 19-5-1987. Alternatively the petitioner had offered to be taxed on the said sum of Rs. 9,02,292.70 for the assessment year 1988-89 provided the department agreed to cancel the reassessment for the assessment years 1975-76 and 1976-77 and dropped the proceedings for the assessment years 1970-71 and 1971-72 and did not reopen the assessment for any other year. The text of the letter dated 9-3-1989 written by the petitioner to the Commissioner has been set out herein in an earlier part of this judgment.

11. It is stated by the respondents that pursuant to the letter of the petitioner in assessment order has been passed for the assessment year 1988-89 including the sum of Rs.9,02,293. It is stated that the petitioner should not be allowed to approbate and reprobate. As such it submitted that the writ petition should be dismissed with a direction to the ITO to pass an order on the return filed by the petitioner. In the alternative it has been stated that if the petitioner accepts the assessment for the assessment year 1988-89 the income tax authorities will withdraw all notices issued under sections 147-148 for the assessment year 1970-71 and the writ petition can be disposed of accordingly. In answer to this submission the petitioner has stated that the respondents not having accepted the offer made by the respondent, it was not open to the respondents to rely on the offer at this stage particularly when the petitioner had already preferred an appeal from the assessment order in respect of the assessment year 1988-89.

12. I am of the view that if the respondents wish to rely on the offer of the petitioner at this stage, they must be prepared to accept the offer subject to all conditions contained therein. It is not open to the respondents to accept that part of the offer which is beneficial to the revenue and reject the part which is to benefit the assessee. It appears that the offer was made by the petitioner not only on condition that all the reassessment proceedings in respect of all the assessment years were dropped, insofar as they relate to payment of Rs. 17,500 per month but also on condition that no interest or penalty would be levied in respect of the assessment for 1988-89. This portion regarding non-levy of the penalty has not yet been accepted by the respondents.

13. I am of the view that the offer of the petitioner was made without prejudice and clearly was a part of a ''package deal''. This matter was adjourned from time to time to enable the respondents to intimate the court whether they were agreeable to the ''package deal''. The respondents, however, did not accept the same ultimately. On the other hand this Court may assume that the respondents having accepted the offer to bring to tax the amount of Rs. 9,02,293 for the assessment year 1988-89 are also agreeable to the impugned notice being struck down. In seeking to uphold the notice it is the respondents who appear to

be approbating and reprobating. In any event the respondents cannot treat the offer of the petitioner as an admission of liability of concession as to the validity of the impugned notice.

The second contention of the respondents is now dealt with. In my view the mere fact that the petitioner has preferred an appeal in respect of the assessment years 1975-76 and 1976-77 could not preclude the petitioners from challenging the proceedings for any other assessment years by way of a writ proceeding as each assessment year is separate.

It cannot also be stated that the petitioner is pursuing parallel remedies. In the case of Purshottam Thackersey (supra) cited by the respondents the court declined permission to the petitioner to challenge the penalty imposed under an assessment order because the petitioner had already preferred an appeal in respect of that very assessment order in respect of which an appeal was pending before the Tribunal. In this case, however, the notice which is the subject-matter of challenge has not been appealed from. In the second case cited by the respondents in this connection, namely, Mani & Co.''s case (supra) the Court had again to consider a situation where the assessee had filed an application u/s 256 of the Act in respect of an order passed by the Tribunal and simultaneously challenged the same by an application under article 226.

It is not disputed that the reasons for reopening the assessments for the assessment years 1975-76 and 1976-77 are the same as the reasons for reopening the assessment for the assessment year in question. However, the cases relied upon by the respondents in this connection do not support their contention of res judicata or parallel proceedings. In the first case, namely, Chiranji Lal Ramji Das Vs. Income Tax Officer and Others, a single Bench of the Delhi High Court held that -

"The plea of res judicata is a fundamental doctrine based on the view that there must be an end to litigation. Where a question has been decided by a court of competent jurisdiction in a lis inter parties, those parties are estopped from reopening the same question in subsequent proceedings between themselves. But the decision must be a decision of a court of competent jurisdiction. The IT authorities are not properly courts. The question before them is of liability for a particular year. Their decisions can change in a different year''s tax and a different year''s assessment. The subject-matter is different. The cause of action is different. But it is not so with the decisions of courts. That is a domain where principles of estoppel and res judicata apply."(p. 851)

In the case of CIT v. Shri Agastyar Trust [1984] 149 ITR 609 1 (Mad.) the Court was considering whether the principle of estoppel or res judicata applied to decisions rendered in proceedings under the Act on a reference. There is no question of a judicial decision in these proceedings operating in the field.

The third contention of the respondents relates to the question of waiver. According to the petitioner the return in response to the impugned notice was filed under cover of a letter in which it has been specifically stated that the same was being filed without prejudice to the petitioner''s rights and contentions. In any event as held by a Division Bench of the Gujarat High Court in P. DOSHI Vs. COMMISSIONER OF Income Tax, GUJARAT, in the context of section 147-

"The legal position about waiver of such a mandatory provision created in the wider public interest to operate as fetter on the jurisdiction of the authority is well settled that there could never be waiver, for the simple reason that in such cases jurisdiction could not be conferred on the authority by mere consent, but only on conditions precedent for the exercise of jurisdiction being fulfilled. If the jurisdiction cannot be conferred by consent, there would be no question of waiver, acquiescence or estoppel or the bar of res judicata being attracted because the order in such cases would lack inherent jurisdiction unless the conditions precedent are fulfilled and it would be a void order or a nullity....." (p. 30).

The fourth contention of the respondents also cannot be upheld. It is stated in the affidavit-in-opposition filed on behalf of the respondent that

"From the records it is found that except claiming the deduction of interest paid to the bank in the statement of computation of the property income, no other documentary evidence and/or explanation on which it relies upon were filed by the petitioner."

14. The definition of omission or failure to disclose fully and truly all material facts necessary has been stated in the case of Calcutta Discount Co. Ltd. v. ITO [1961] 41 ITR 191 (SC) as-

"...What facts were material and necessary for assessment differed from case to case. In every assessment proceeding, the assessing authority would, for the purpose of computing or determining the proper tax due from an assessee, require to know all the facts which help him in coming to the correct conclusion...So far as primary facts were concerned. It was the assessee''s duty to disclose all of them - including particular entries in account books, particular portions of documents and documents and other evidence which could have been discovered by the assessing authority, from the documents and other evidence disclosed. The duty, however, did not extend beyond the full and truthful disclosure of all primary facts. Once all the primary facts were before the assessing authority, it was for him to decide what inferences of facts could be reasonably drawn and what legal inferences had ultimately to be drawn. It was not anybody else - far less the assessee - to tell the assessing authority what inferences, whether of facts or law, should be drawn...." (p. 194)

It is not stated in the recorded reasons as to what other primary fact was required to be disclosed by the petitioner, before the ITO. However, from the recorded reasons it appears that the decision to reassess is based upon a construction of the plaint and the ''judgment'' of the Court. It is not stated when the said documents were disclosed to the ITO. If by judgment is meant the decree, that was given in 1976 long after the assessment year in question. If by ''judgment'' the ITO was referring to the interim order dated 29-4-1957 that was made available to the ITO by the petitioner admittedly in 1962.

15. It also appears from an assessment order for the assessment year 1958-59 in respect of one of the partners of the petitioner, that the fact that the premises was purchased by the petitioner subject to the liability of Rs.35 lakhs to the bank had been disclosed to the ITO.

16. In any event, the nature of payment of Rs. 17,500 per month, i.e., whether on account of interest or by way of capital expenditure to the bank could not have been ascertained from the order itself. The intention of the court also cannot be said to have been clear. It was only when the decree was passed in 1976 that the payment could be said to have been towards the payment of the principal claim of the bank. There was as such no question of the petitioner failing to disclose any fact at the time of the assessment or misrepresenting any fact.

17. In the affidavit-in-opposition the respondent had alleged that the petitioner was bound to disclose that the property had been purchased subject to capital liability of Rs. 35 lakhs. Assuming that the recorded reasons can be supplemented by statements made in the affidavit, even then it could not have been stated that the order dated 29-4-1957 was a direction for payment towards such capital liability. It was perfectly possible in law for the court which subsequently decreed the suit to treat the payment of Rs. 17,500 per month as payments on account of interest only.

18. There is also no question of misrepresentation. It is wrongly assumed that the petitioner could have disclosed other facts at the material time which could have led the ITO to the conclusion that the payment of Rs. 17,500 per month was on account of capital expenditure. Until the decree was passed in 1976 it was not possible for the parties to the litigation including the petitioner to state with certitude that the bank would at all be successful in the suit and, therefore, would be entitled to appropriate the amount paid by the petitioner. Secondly it could not be predicted with any certainty for what amount the decree would be passed, whether interest ante litem, pendente lite or upon judgment would be allowed on the principal claim of the bank and how the payments directed to be made by the petitioner to the bank as an interim measure would be directed to be adjusted. If that is so, the question of omission or failure on the part of the petitioner to disclose that the monthly payments for the assessment year in question were towards capital expenditure did not arise.

19. In that view of the matter the cases cited by the respondents are not apposite. These are noted below:

Brihan Maharashtra Sugar Syndicate Ltd. v. CIT [1973] 87 ITR 136 (Bom.), Nand Kishore Jhajharia v. ITO [1973] 89 ITR 229 (Cal.), Indian Oil Corpn. v. ITO [1986] 159 ITR 956 1 (SC), Indo-Aden Salt Mfg. & Trading Co. (P.) Ltd. v. CIT

[1986] 159 ITR 624 2 (SC) and Tarachand Ghanshyamdas v. CIT [1983] 139 ITR 571 3 (Cal.).

It is also not necessary to deal in detail with decisions cited by the petitioner which basically affirm the principle laid down in the case of Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another, However the decisions are briefly noted:

Naga Hills Tea Company Ltd. Vs. Income Tax Officer and Others, , The Commissioner of Income Tax, Calcutta Vs. Burlop Dealers Ltd., Gemini Leather Stores v. ITO [1975] 100 ITR 1 (SC), Income Tax Officer and Others Vs. Madnani Engineering Works Ltd., Calcutta, Indian Oil Corpn.''s case (supra), Kuberdas Hargovindas Modi Vs. K.N. Lalchandani, Income Tax Officer, Circle II, Word C, Ahmedabad, and Johri Lal (HUF) v. CIT [1973] 88 ITR 439 (SC).

20. As far as the last contention of the respondents is concerned it is too well established to need any authority for the proposition that where a question of jurisdiction is involved the Court will interfere under article 226. In fact in one of the cases relied upon by the respondents, namely Central India Industries Ltd.''s case (supra) the Court held:

"...the writ court will interfere where the acts done and/or caused to have been done are without jurisdiction or in excess of jurisdiction...." (p. 246)

There is no doubt that in this case in view of the finding that there was no omission or failure on the part of the petitioner to disclose any material fact, the issuance of the notice u/s 148 must be held to have been without jurisdiction.

21. For all the reasons aforesaid I allow the writ petition and I set aside the impugned notice in question. Let an appropriate writ be issued quashing the impugned notice dated 30-3-1987 and all proceedings thereunder. There will be no order as to costs.