
(1971) 02 CAL CK 0008
In the Calcutta High Court
Case No : Matter No. 235 of 1970

Sitaram Jindal

APPELLANT

Vs

Income Tax Officer, "E" Ward and Others

RESPONDENT

Date of Decision : 12-02-1971

Acts Referred:

Income Tax Act, 1961 — Section 148

Citation : (1972) 84 ITR 162

Hon'ble Judges : Ghose, J

Bench : Single Bench

Advocate : Debi Pal, P.K. Pal and S. Bhattacharji, for the Appellant; Balai Pal and A.K. Sen Gupta, for the Respondent

Judgement

Ghose, J.

S 1. This is an application under Article 226 of the Constitution in the writ constitutional jurisdiction of this court, inter alia, for the issue of a writ in the nature of mandamus commanding the respondents to cancel or withdraw or rescind the notice dated 28th March, 1970, issued by the respondent No. 1 u/s 148 of the Income Tax Act, 1961, for the assessment year 1961-62, for the issue of a writ in the nature of certiorari quashing or setting aside the said notice and also for the issue of a writ in the nature of prohibition commanding the respondents to forbear from giving any effect to the said notice dated 28th March, 1970, issued u/s 148 of the Income Tax Act, 1961, for the said assessment year 1961-62.

2. The petitioner at all material times carried on business in co-partnership under the name and style of Jai Bharat Industries, Hissar, in the State of Haryana. The petitioner also used at all material times to carry on business in speculation in shares in joint-stock companies. The petitioner was also at all material times a director of Jindal (India) Private Ltd. during the assessment year with which we are concerned, i.e., 1961-62, which is the accounting year ending 31st March, 1961.

3. The petitioner derived income from the aforesaid two several businesses as well as by way of director's remuneration of the said company and dividend in respect of shares held by the petitioner in the said company. The petitioner filed his return of income for the said assessment year 1961-62 under the Indian Income Tax Act, 1922 (hereinafter referred to as the "old Act"). The petitioner duly appeared before the respondent No. 1 who is the assessing authority of his income u/s 23(2) of the old Act, explained all queries connected with the return filed by the petitioner. At the time of the said assessment, the income of the firm of Jai Bharat Industries of Hissar was not assessed. The respondent No. 1 assessed the total income of the petitioner for the said assessment year 1961-62 under Sections 23(3) of the old Act subject to any rectification that might be necessary u/s 35(5) of the old Act when the said firm's assessment would be completed. The amount of tax demanded on such assessment has been paid by the petitioner.

4. The petitioner received a notice dated 28th March, 1970, issued u/s 148 of the Income Tax Act, 1961 (hereinafter referred to as "the new Act"). By the said notice, the respondent No. 1 informed the petitioner that the respondent No. 1 proposed to reassess the income of the petitioner for the very same assessment year 1961-62 and called upon the petitioner to deliver to the respondent No. 1 a return of his income for the said assessment year on the ground that the respondent. No. 1 had reason to believe that the petitioner's income chargeable to tax for the said assessment year 1961-62 had escaped assessment.

5. On receipt of the said notice the petitioner wrote to the respondent No. 1 denying that the respondent No. 1 had any reason to believe that income of the petitioner for the assessment year 1961-62 had escaped assessment. The petitioner further denied in the said letter that the respondent. No. 1 had any material before him on which the respondent No. 1 could have any reason to believe that the petitioner's income had escaped assessment. The petitioner by the said letter asked respondent No. 1 to cancel or withdraw or rescind the said notice.

6. In the petition filed under Article 226 the petitioner had taken various grounds in challenging the said notice u/s 148 of the new Act. The petitioner has stated in the petition that the petitioner's wife, Smt. Jamuna Devi Jindal, was a partner together with five other persons in a firm, Messrs. Om Prakash & Co., carrying on business at 161/1, Mahatma Gandhi Road, Calcutta. Amongst the five other partners of the said firm, three were ladies and two were male persons. The ladies were Smt. Ram Devi Jindal, Smt. Vidya Devi Jindal and Sm. Parameshwari Jindal. The said firm is duly registered under the Indian Partnership Act. The said firm applied for registration u/s 26A of the old Act before the Income Tax Officer, "J" Ward, District 111(2), Calcutta. While granting such registration to the said firm of Messrs. Om Prakash & Co. for the assessment year 1961-62, the said Income Tax Officer held, inter alia, that Jamuna Devi Jindal, the petitioner's wife, was a mere benamidar of the petitioner in the said firm. The real partner in the

said firm was the petitioner.

7. In support of the petition before me, Mr. Debi Pal urged the following points:

(1) The Income Tax Officer, being the respondent No. 1, did not believe, in fact, that the income of the petitioner for the assessment year 1961-62 had escaped assessment.

(2) The respondent No. 1 had, in fact, no material before him to induce himself to have this belief.

(3) Assuming (but without admitting) that the respondent No. 1 had any material before him to hold such belief, such material, if any, could not lead to such belief in a reasonable man.

(4) If it be contended that the finding of the said Income Tax Officer, "J" Ward, District 111(2), Calcutta, in the aforesaid proceeding u/s 26A of the old Act led to such belief on the part of the respondent No. 1, the said finding was not arrived at on any issue involved in the said proceeding and in fact and in law was a finding arrived at in excess of jurisdiction and was null and void.

(5) The respondent No. 1 had not disclosed the material which led to such belief in his mind in the affidavit filed by him in opposition to the instant petition and, therefore, the fulfilment of the conditions precedent for the issue of the said notice u/s 148 of the new Act have not been proved by the respondent No. 1. Hence the rule should be made absolute as no cause has been shown by the respondents as against the rule nisi issued.

Mr. Balai Pal appearing on behalf of the revenue contended before me that in the affidavit-in-opposition filed by the respondent No. 1 the respondent No. 1 has stated about the proceedings and the finding of the said Income tax Officer, "J" Ward, District 111(2), in the said proceedings u/s 26A of the old Act. The respondent No. 1 has also referred to the deposition of the petitioner's wife, Jamuna Devi Jindal, given u/s 131 of the said Act. Thus the respondent No. 1 has stated of the aforesaid finding in the said proceeding.

8. In answer to paragraph 18 of the petition, the respondent No. 1 in paragraph 11 of his affidavit has stated as follows :

" With reference to paragraph 18 of the petition I say that subsequent to the completion of the original assessment for the assessment year 1961-62, materials came into possession which revealed that the petitioner had, inter alia, income from the said M/s. Om Prakash & Co. for the said assessment year. The petitioner failed and/or omitted to disclose the said income at the time of the original assessment as a result whereof the petitioner's income chargeable to tax for the said assessment year escaped assessment. In the premises the said notice u/s 148 was issued after fulfilling all conditions precedent. Save as aforesaid and save as would appear from the records of the petitioner, and the said Om Prakash & Co., each and every allegation contained in paragraph 18 of

the petition is denied and submissions contained therein are disputed. "

From a perusal of the affidavit-in-opposition it appears to me that although the proceedings and finding in the said proceeding u/s 25A of the old Act have been referred to in this affidavit-in-opposition, apart from saying that materials came into possession of the respondent No. 1 after the completion of the assessment of the income of the petitioner for the assessment year 1961-62 that the petitioner had income from Messrs. Om Prakash and Co., during the said assessment year, no particulars of the said materials have been set out or given. From the said affidavit it does not appear that the records of the said proceedings u/s 26A of the old Act or the findings of the Income Tax Officer in the said proceeding led the respondent No. 1 to come to the belief necessary for the issue of the notice u/s 148 of the new Act.

9. From the records of the proceeding u/s 148, Mr. Balai Pal wanted to rely on certain documents. After going through the said records, I gave leave to Mr. Balai Pal to file copies of the said documents and give one copy of each of such documents to Mr. Debi Pal, One of such documents is a letter dated the 12th March, 1970, written by the respondent No. 1 to the Commissioner of Income Tax, West Bengal III, Calcutta, one of the other documents is the order sheet and the last one is the report in connection with the starting of proceedings u/s 147 of the Income Tax Act, 1961. The aforesaid three documents seemed to me to be material for the purpose of the instant application.

10. In the letter dated the 12th March, 1970, the respondent No. 1 wrote to the Commissioner as follows :

"Re: Proposal u/s 147(a) for the assessment year 1961-62 (1) Sitaram Jindal of 161/1, M.G. Rd. Cal. & (2) Shri Om Prakash Jindal of 161/1, M.G. Rd., Cal. G.I.R. No. III(2)/202-J/E. & III(2)/204, J/E. respectively.

Kindly refer to the above. I have just received a communication from Income Tax Officer, " J " Ward, District 111(2), Cal., intimating me that he has granted registration to the firm, M/s. Om Prakash & Co., for the assessment year 1961-62 while he held that the partners in that firm, Vidya Devi Jindal and Jamuna Devi Jindal, were the benamidars of their respective husbands, viz., Sri Om Prakash Jindal and Sri Sitaram Jindal. Accordingly he wanted me to club the share income of these ladies in the hands of their respective husbands assessed by me. Hence I am submitting the proposals for your kind approval,

Encl: Two proposals under Sections 147(a)

Sd. A. K. Kundu I.T.O., "E" Ward. Dt. III(2)/Cal. (sic.) "

In terms of the said letter two proposals for sanction to issue notice u/s 148 were submitted to the Commissioner. One such proposal was with regard to Om Prakash Jindal and the other one was with regard to Sitaram Jindal, the petitioner in the instant case. In the copy of the order sheet filed by the revenue, it appears that on 12th March, 1970, that is the date of the said letter, the

respondent, No. 1 passed the following order :

"12-3-70. Smt. Jamuna Devi Jindal, wife of the assessee, a partner in M/s. Om Prakash & Co., assessed by Income Tax Officer, "J" Ward, District III(2), Calcutta, has been treated as a benamidar of the assessee for the year. The assessee did not disclose this fact at the time of original assessment whereby the share income of the assessee through his wife from M/s. Om Prakash and Co. has escaped assessment. Send proposal u/s 147(a) to the Commissioner of Income Tax."

The proposal with regard to the petitioner in the instant case which was sent to the Commissioner, as one of the enclosures to the said letter dated the 12th March, 1970, was as follows :

"No. 7

Smt. Jamuna Devi Jindal, wife of Sri Sitaram Jindal, my assessee, is a partner in M/s. Om Prakash & Co., of 161/1, M.G. Rd. Calcutta. I have information in my possession that the said Smt. Jamuna Devi Jindal is the benamidar of my assessee, Sri Sitaram Jindal. Sri Sitaram Jindal's income through his wife from the firm, M/s, Om Prakash & Co., during the year was Rs. 14,304. The assessee did not disclose this fact at the time of original assessment. Hence, I have reason to believe that for this failure or omission on the part of the assessee to disclose fully and truly all material facts necessary for his assessment, income chargeable to tax for the year has escaped assessment to the extent of Rs. 14,304 during the year ; hence this proposal.

Tax effect will be Rs. 4,890."

From the said letter dated the 12th March, 1970, it appears that the Income Tax Officer, " J " Ward, District III(2), Calcutta, informed respondent No. 1 that he had held that a partner, amongst others, Smt. Jamuna Devi Jindal, wife of the petitioner, was a benamidar for her husband in the firm of Messrs. Om Prakash & Co., for the assessment year 1961-62. The said Income Tax Officer, " J " Ward, District III(2), wanted the respondent No. 1 to club the share income of, amongst others, Jamuna Devi Jindal, in the hands of her husband the petitioner, and so respondent No. 1 stated: " Hence, I am submitting the proposals for your kind approval. "The order dated the 12th March, 1970, as appearing in the order sheet shows that respondent No. 1 ordered the proposal u/s 147(a) for sanction to be sent to the Commissioner, as Jamuna Devi Jindal, a partner in M/s. Om Prakash & Co., had been treated as a benamidar of the petitioner for the year 1961-62 and as the assessee did not disclose this fact at the time of original assessment. The proposal contained in the report shows that respondent No. 1 had information in his possession that Jamuna Devi Jindal is the benamidar of the assessee in the firm of Om Prakash & Co. As the said fact was not disclosed at the time of the original assessment there was failure or omission on the part of the assessee to disclose fully and truly all material facts necessary for his assessment of income during that year. Hence, the said proposal was forwarded

to the Commissioner for sanction.

11. Such sanction was granted and forwarded to respondent No. 1 for necessary action on or about the 26th March, 1970. From the order sheet it appears that on the 28th March, 1970, respondent No. 1 saw the Commissioner's approval and directed issue of notice u/s 148 upon the petitioner.

12. I now intend to deal with the cases cited at the Bar. At the outset I want to deal with the two cases in which, to my mind, the principles applicable to such cases were laid down by the Supreme Court. The other cases, it seems to me, which were also cited, were really application of the said principles to the facts and circumstances of each particular case. The said two cases are Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another, and S. Narayanappa and Others Vs. Commissioner of Income Tax, Bangalore, .

13. In the aforesaid case of Calcutta Discount Co. Ltd. v. Income Tax Officer, the assessee was a private limited company incorporated under the Indian Companies Act having its registered office in Calcutta. For the assessment years 1942-43 and 1943-44 the assessee was assessed by one L.D. Rozario, u/s 23(3) of the Indian Income Tax Act, 1922, upon return filed by it together with the statements of account by orders dated the 26th January, 1944, and the 12th February, 1944. For the assessment year 1944-45, the assessee was assessed by one, K.D. Banerji, upon return filed by it together with the statement of account by order dated the 15th February, 1945. The taxes assessed were paid up by the assessee.

14. On the 28th March, 1951, three several notices purporting to be issued u/s 34 of the Indian Income Tax Act, 1922, were issued by the Income Tax Officer calling upon the assessee to submit fresh return of its total income and the total world income, assessable for the accounting years relating to the aforesaid three assessment years, namely, 1942-43, 1943-44 and 1944-45. The assessee filed returns in compliance with the notices but on 18th September, 1951, moved the High Court of Calcutta for the issue of appropriate writs or orders under Article 226 of the Constitution, commanding the Income Tax Officer not to proceed to assess the assessee in pursuance of the said notices.

15. Two grounds were taken in support of the said application :

" (i) The pretended notices were issued without the existence of the conditions precedent necessary for conferring jurisdiction to issue such notices u/s 34 to the, assessment for the years 1942-43/1943-44 and 1944-45 which became barred before March, 1951, and (ii) the amendment of Section 34 of the Income Tax Act, 1922, in 1948 was not retrospective."

Order was passed- in favour of the assessee by the first court, In appeal the appellate court allowed the appeal and the assessee's application under Article 226 was dismissed with costs. In appeal, the Supreme Court observed as

follows :

"To confer jurisdiction under this section to issue notice in respect of assessments beyond the period of four years, but within a period of eight years, from the end of the relevant year, two conditions have, therefore, to be satisfied. The first is that the Income Tax Officer must have reason to believe that income, profits or gains chargeable to Income Tax have been under-assessed. The second is that he must have also reason to believe that such "under-assessment" has occurred by reason of either (i) omission or failure on the part of an assessee to make a return of his income u/s 22, or (ii) omission or failure on the part of an assessee to disclose fully and truly all material facts necessary for his assessment for that year. Both these conditions are conditions precedent to be satisfied before the Income Tax Officer could have jurisdiction to issue a notice for the assessment or reassessment beyond the period of four years, but within the period of eight years, from the end of the year in question."

The Supreme Court also observed that Section 147(a) "postulates a duty on every assessee to disclose fully and truly all material facts necessary for his assessment. What facts are material and necessary for assessment will differ from case to case. In every assessment proceeding the assessing authority will, for the purpose of computing or determining the proper tax due from an assessee, require to know of the facts which help him in coming to the correct conclusion. From the primary facts in his possession, whether on disclosure by the assessee, or discovered by him on the basis of the facts disclosed or otherwise, the assessing authority has to draw inferences as regards certain other facts; and, ultimately, from the primary facts and the further facts inferred from them, the authority has to draw the proper legal inferences, and ascertain on a correct interpretation of the taxing enactment, the proper tax leviable."

Therefore, it is the duty of the assessee to disclose all primary facts before the assessing authority; that certainly would include bringing to the attention or notice of the assessing authority particular details or items in the account books or particular portions of the relevant documents to enable the assessing authority to make the assessment. But, if the primary facts are disclosed by the assessee before the assessing authority, the duty of the assessee ends and it is then for the assessing authority to come to his conclusion and arrive at a finding by taking into consideration the primary facts and making and drawing inferences of fact as well as of law, on the basis of such primary facts. In the aforesaid case it was held on the facts of the said case that the assessee disclosed all primary facts including the particulars of his sales of shares before the assessing authority. It was for the assessing authority to draw his inferences from the said facts. Only because an assessing authority changed his opinion as to the subject-matter or the nature of the transactions did not entitle the assessing authority to issue a notice u/s 34 of the old Act if there was no failure or omission on the part of the assessee to disclose all primary facts fully and truly. It seems that where the Income Tax Officer founds his belief on the

misapprehension of the true effect of facts in his possession, such, belief would not be in consequence of any information. That is not an information but merely a change of opinion. An Income Tax Officer cannot institute a fishing enquiry or embark upon a roving investigation on coming into possession of certain facts which only give rise to suspicion (see *R.B. Bansilal Abirchand Firm Vs. Commissioner of Income Tax, Madhya Pradesh*,).

16. However, if at the time of the issue of the notice of reassessment, there was reason to entertain a belief in the mind of the Income Tax Officer that due to the omission or failure to disclose certain primary facts relevant or necessary for the purpose of assessment of the income of the assessee for any particular assessment" year and that such omission or failure led to escapement of assessment, the Income Tax Officer would have the jurisdiction to issue notice u/s 148 of the new Act, even if it be found later that the belief could not be sustained on the basis of the information relied on. If all the primary facts are disclosed by the assessee, the Income Tax Officer would not have the jurisdiction to reopen the assessment u/s 147(a) of the new Act.

17. The statement of law on the point as stated by the Supreme Court in the aforesaid case of *Calcutta Discount Co. Ltd. v. Income Tax Officer* was again restated by the Supreme Court in the case of *Narayanappa v. Commissioner of Income Tax* in the following words, to wit:

"The belief must be held in good faith ; it cannot be merely a pretence. To put it differently, it is open to the court to examine the question whether the reasons for the belief have a rational connection or a relevant bearing to the formation of the belief and are not extraneous or irrelevant to the purpose of the section. To this limited extent, the action of the income tax Officer in starting proceedings u/s 34 of the Act is open to challenge in a court of law See *Calcutta Discount Co. Ltd. v. Income Tax Officer*.

18. In the instant case, if the respondent No. 1 considered the information sent to him by the Income Tax Officer, "J" Ward, District III(2), with regard to his opinion as to the benami character of the share of Jamuna Devi Jindal in the firm of Om Prakash & Co. and came to believe that the fact of such ownership and the interest in the said firm by the assessee in the name of his wife was concealed or omitted at the time of the assessment of his income for the assessment year 1961-62 and further believed that such omission led to the escapement of income of the petitioner from the said firm of Om Prakash & Co. from assessment then certainly the condition precedent for exercise of jurisdiction u/s 147(a) and issuing notice u/s 148 of the new Act would have been satisfied.

19. The finding or the opinion of the Income Tax Officer, "J" Ward, District III(2), as mentioned above, might not have been a finding on an issue or matter germane to the issue involved in the said proceedings u/s 26A of the old Act and might have been arrived at without jurisdiction but, nevertheless, the said finding would, in my opinion, be an information. That information would be

evidence in any event to induce the belief that there was omission to disclose the said fact of benami character of the ownership of the share in the partnership firm by the wife for the assessee and consequential escapement of income of the assessee out of the said firm from assessment.

20. The information might have been acquired subsequent to the assessment made. That, however, does not make the assessee acquire the interest in the firm subsequent to the assessment because the benami character of the share of the wife in the said firm had been in existence from the very inception of the said partnership and in any event at a time prior to the assessment. That merely was discovered subsequent to the assessment. This would have been sufficient to find jurisdiction in respondent No. 1 to issue the impugned notice u/s 148.

21. But a perusal of the letter dated 12th March, 1970, written by respondent No. 1 to the Commissioner of Income Tax, West Bengal III, shows that respondent No. 1 put forward the said proposal for sanction by the Commissioner of Income Tax only at the request of the Income Tax Officer, " J " Ward, Dist. III(2). Respondent No. 1 made that abundantly clear in the said letter, namely, that he was forwarding the proposal for sanction with a view to club the income of the wife in the hands of the assessed only at the behest of the said Income Tax Officer, "J" Ward, Dist. III(2).

22. Although the order with regard to such proposal submitted to the Commissioner of Income Tax, West Bengal III, was recorded in the order sheet on the same day, the proposal contained in the report being one of the enclosures to the letter dated 12th March, 1970, speaks no doubt of the belief of respondent No. 1 that there was omission on the part of the assessee to disclose the fact of the said ownership of the said shares in the partnership firm of Om Prakash & Co., in the benami name of the wife by the assessee and that as a consequence thereof the income of the assessee for the said assessment year had escaped assessment. But the words in the order sheet and the report to the aforesaid effect, it seems, were empty repetitions of words of Section 147(a)(ii) of the new Act.

23. It is true that the said three documents, namely, the letter dated 12th March, 1970, one of its enclosures, namely, the report submitted to the Commissioner as well as the order sheet were written out in or about the same time. But, it seems to me that the real and correct state of affairs were recorded in the letter dated 12th March, 1970.

24. From the aforesaid it is clear that respondent No. 1 did not consider for himself any fact which led to such a belief as alleged in the order sheet or the proposal.

25. It is admitted that the order granting registration in the said proceeding u/s 26A of the old Act to the firm of Messrs. Om Prakash & Co. was passed on 16th March, 1970, that is, 4 days after the said 12th March, 1970.

26. On 12th March, 1970, the Income Tax Officer, " J" Ward, Dist. III(2), must have only tentatively formed a view in the said matter with regard to the benami character of the ownership of share in the said firm by Jamuna Devi Jindal. The request on the basis of such tentative opinion to proceed against the assessee was made by the Income Tax Officer, "J" Ward, District III(2) on or prior to 12th of March, 1970. It is clear from the facts recited hereinabove that respondent No. 1 did not himself consider or apply his mind to any fact in order to come to any belief with regard to the omission or failure of the petitioner to disclose any primary fact relevant for the purpose of assessment of his income for the assessment year 1961-62. Thus respondent No. 1 could not have any belief that as a consequence of such failure or omission the income for that year of the petitioner had escaped assessment. Thus the conditions precedent to the issue of the impugned notice u/s 148 in the instant case were not satisfied. The impugned notice in the instant case, therefore, in my opinion, must be struck down.

27. In view of the conclusion arrived at by me on the basis of the facts in the instant case, it is not necessary for me to deal with the other cases cited at the Bar. The said cases, as I have stated earlier, are mere applications of the principles on the question involved before me as stated by the Supreme Court in the aforesaid case of Calcutta Discount Co. Ltd., and restated by the Supreme Court in Narayanappa's case.

28. In the instant case, I am told that when interim order was sought for from this court by the petitioner, an order was passed giving leave to respondent No. 1, to continue and conclude the proceedings initiated by the impugned notice u/s 148 of the new Act, dated 28th March 1970. But respondent No. 1 was restrained from communicating or enforcing the order to be passed in the said proceedings finally by him.

29. In view of the aforesaid, the said proceedings and the orders made in the proceedings initiated by the impugned notice dated 28th March, 1970, must also be struck down.

30. In the premises the rule is made absolute. In the facts and circumstances of the case, I make no order for costs.

31. I, however, make it clear that respondent No. 1 will be entitled to proceed in accordance with the provisions of Section 147 of the new Act to initiate reassessment on proper materials and this judgment and order shall not stand in the way of any such reassessment.

32. If such proceedings are taken, however, the petitioner also will have all his rights and remedies under the law open.

33. There shall be stay of operation of this order for six weeks.