

(1977) 06 CAL CK 0013

In the Calcutta High Court

Case No : Appeal from Original Order No. 1 of 1976

Smt. Sova Sarkar and Others

APPELLANT

Vs

Income Tax Officer

RESPONDENT

Date of Decision : 02-06-1977

Acts Referred:

Constitution of India, 1950 — Article 226

Income Tax Act, 1961 — Section 139, 143, 143(3), 147, 148

Citation : (1983) 139 ITR 386

Hon'ble Judges : Ram Krishna Sharma, J; Murari Mohan Dutt, J

Bench : Division Bench

Advocate : Sanjay Bhattacharyya, Amal Baran Chatterjee and Aparna Dutta, for the Appellant; Nanda Lal Pal and R.N. Mitra, for the Respondent

Judgement

M.M. Dutt, J.—This appeal is directed against the judgment of the learned trial judge, discharging the rule nisi obtained by the appellant on his petition under Article 226 of the Constitution.

2. The appellant carries on his business as a government contractor, and he is an assessee under the I.T. Act, 1961. He filed his return for the A. Ys. 1967-68, 1968-69 and 1969-70, within the period prescribed therefore. He was served with a notice u/s 143(2) of the I.T. Act, 1961 on May 25, 1971, whereby he was called upon by the ITO to appear and produce the relevant evidence in support of the returns filed by him. The date of hearing of the assessment proceedings was fixed as June 17, 1971, which was subsequently adjourned to September 22, 1971. On that date, the appellant was heard by the ITO. He produced before the ITO, the payment certificate in original as given to him by the government, the bank pass book and other relevant documents in connection with the hearing of the assessment proceedings. No order of assessment was, however, passed and no notice of demand was sent to the appellants. On June 15, 1973, the appellant made an application for an I.T. clearance certificate. On June 16, 1973, a certificate was given to the appellant by one P.K. Chatterjee, ITO, Project Circle,

North Bengal, Siliguri. In para. A(ii), at page 2 of the certificate, it was inserted in ink by the said P.K. Chatterjee that the returns of income filed by the appellant for the assessment years 1967-68 to 1969-70 were invalid. It is the case of the appellant that on coming to know of the said insertion, he, by his letter dated August 22, 1973, addressed to the said ITO, stated that all the returns in question were submitted by him in time, but he was not informed of the alleged invalidity of the returns filed by him. Further, it was stated by him in the said letter that he was not given any opportunity of being heard as to the alleged invalidity of the returns and requested the ITO to issue to him a fresh Income Tax clearance certificate without any such remark.

3. The appellant did not receive any reply to his said letter dated August 22, 1973, but on March 18, 1974, he was served with three notices u/s 148 of the I.T. Act, 1961, all dated March 14, 1974, and issued by the said P.K. Chatterjee, wherein it was alleged that the ITO had reasons to believe that the income of the appellant, chargeable to tax for the A. Yrs. 1967-68, 1968-69 and 1969-70, had escaped assessment within the meaning of Section 147 of the Act, and the appellant was called upon to file returns for the said assessment years within 30 days of the date of the receipt of the notices. Immediately on receipt of the aforesaid notices, on March 29, 1974, the appellant wrote to the ITO contending, inter alia, that since the returns for the said assessment years were already submitted by him and the assessment proceedings were pending, the ITO had no jurisdiction to issue notices u/s 148 of the Act. It was the case of the appellant that there was absolutely no material before the ITO on which he could form a reasonable belief that the appellant's income had escaped assessment for the said assessment years or that the alleged escapement of income was on account of any omission or failure on the part of the appellant to file his returns for the assessment years in question. By a writ petition, the appellant challenged the legality of the said notices u/s 148 of the Act.

4. The respondents filed an affidavit in opposition which was sworn to by the ITO, respondent No. 2. The respondents admitted the filing of the returns by the appellant for the said assessment years. It was, however, alleged that on a scrutiny of the returns, the ITO found that the particulars of profits and gains from business were not submitted by the appellant along with the returns, although in the note appended to the annexure to each return it was clearly mentioned that such particulars must accompany the return. It was contended that a return which was not properly verified was not valid and if the requisite particulars, balance-sheet, etc., were not appended to the return, the same would also be invalid in law.

5. The learned judge held that the returns filed by the appellant did not show the prescribed particulars and, therefore, the Revenue was entitled to ignore the returns and proceed to issue notices u/s 148 of the I.T. Act, 1961. Upon the said findings, the learned judge discharged the rule. Hence, this appeal.

6. Before proceeding to consider the respective contentions of the parties on the

merits of the case, we may first of all dispose of a preliminary objection taken by Mr. Nanda Lal Pal, learned advocate appearing on behalf of the respondents. It was contended by him that by virtue of the provisions of Section 58(2) of the Constitution (Forty-Second Amendment) Act, 1976, the petition under Article 226 of the Constitution, on which the rule nisi was issued, had abated. In order to consider this contention, we may refer to Clause (i) and Clause (3) of Article 226 as substituted by Section 38 of the Constitution (Forty-Second Amendment) Act, 1976. The said provisions are as follows :

"226. (1) Power of High Courts to issue certain writs.--Notwithstanding anything in Article 32 but subject to the provisions of Article 131A and Article 226A, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any government within those territories, directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them,--

(a) for the enforcement of any of the rights conferred by the provisions of Part III; or

(b) for the redress of any injury of a substantial nature by reason of the contravention of any other provision of this Constitution or any provision of any enactment or ordinance or any order, rule, regulation, bye-law or other instrument made thereunder ; or

(c) for the redress of any injury by reason of any illegality in any proceedings by or before any authority under any provision referred to in Sub-clause (b) where such illegality has resulted in substantial failure of justice.

(2)

(3) No petition for the redress of any injury referred to in Sub-clause (b) or Sub-clause (c) of Clause (1) shall be entertained if any other remedy for such redress is provided for by or under any other law for the time being in force."

7. Section 58(2) provides as follows :

"(2) In particular, and without prejudice to the generality of the provisions of Sub-section (1), every pending petition before a High Court which would not have been admitted by the High Court under the provisions of Article 226 as substituted by Section 38 if such petition had been made after the appointed day, shall abate and any interim order (whether by way of injunction or stay or in any other manner) made on, or in any proceedings relating to, such petition shall stand vacated :

Provided that nothing contained in this sub-section shall affect the right of the petitioner to seek relief under any other law for the time being in force in respect of the matters to which such petition relates and in computing the period of limitation, if any, for seeking such relief the period during which the proceedings

relating to such petition were pending in the High Court shall be excluded."

8. Under Clause (3) of Article 226, no petition shall be entertained if any other remedy for such redress is provided for by or under any other law for the time being in force. In the instant case, the appellant has challenged the jurisdiction of the ITO to reopen the assessment by the service of notices u/s 148 of the I.T. Act, 1961, The said Act does not contain any provision providing for any remedy for the redress which the appellant sought by the petition under Article 226. It was, however, argued on behalf of the respondents that although the said Act did not contain any such provision, still, if the assessment had been reopened and an order making the assessment passed, the appellant could have preferred an appeal against the order of assessment and in such appeal he could also challenge the jurisdiction of the ITO to issue the impugned notices u/s 148. It was contended that the appellant was not without any remedy for such redress and, accordingly, by virtue of the provisions of Sub-section (2) of Section 58 of the Constitution (Forty-second Amendment) Act, 1976, the writ petition stood abated. We are unable to accept this contention. The redress which was sought for by the appellant by filing the writ petition in this court was against an injury that he might suffer by the reopening of the assessments. In other words, he challenged the jurisdiction of the ITO to issue the impugned notices u/s 148. The remedy referred to in Clause (3) of Article 226 contemplates an immediate remedy for the redress of the injury complained of and not a remote or a farfetched remedy. The appellant has prayed for restraining the respondents from reopening the assessments on the ground that the ITO has no jurisdiction to reopen the assessments. The injury complained of is the reopening of the assessments and not the assessment orders that will be passed after the assessments are reopened. The remedy for appeal as provided for in Section 246 of the I.T. Act, 1961, is against the injury that might be caused to the appellant by the assessment orders. There is, however, no provision in the I.T. Act, 1961, providing for any remedy for the redress of the injury that might be caused to the appellant if the assessments are allowed to be reopened. Even under the un-amended Article 226, the provision for appeal against an order of assessment was not considered as an alternative remedy which would bar a writ petition challenging the jurisdiction of the ITO to issue a notice u/s 148. We do not, therefore, think that Clause (3) of Article 226 is attracted.

9. It was, however, contended on behalf of the respondents that in spite of the absence of any provision in the I.T. Act, 1961, the appellant could still get redress against the injury complained of by instituting a suit in a civil court. There can be no doubt that a suit may be instituted by the appellant challenging the jurisdiction of the ITO to issue the impugned notices u/s 148, but, in our view, when the challenge is against the action of the ITO purporting to act under the provisions of the I.T. Act, 1961, Clause (3) of Article 226 will be applicable only if the said Act provides for remedy against the illegal act of the ITO. The remedy for the redress sought for by the appellant not having been provided for by or under the I.T. Act, 1961, it would be unreasonable to drive the appellant to

a separate suit which is not, in the facts and circumstances of the case, contemplated by Clause (3). It is no doubt true that in certain cases, particularly those involving disputed questions of fact or disputed questions of title, the High Court would not entertain a petition under Article 226. In such cases, the remedy of the aggrieved parties would be by suits. There is hardly any matter or any dispute which cannot be decided or any relief which cannot be granted in a suit of a civil nature, and if in all cases, the suit is considered to be a remedy for redress against the injury as mentioned in Clauses (b) and (c) of Article 226(1), we are afraid, no petition under Article 226 would be maintainable for the redress of any injury under Clauses (b) and (c). In our opinion, by amending Article 226, the legislature never intended to take away in an indirect way the jurisdiction of the High Court to issue writs. The maintainability of a petition under Article 226, in our view, depends on the facts and circumstances of each particular case. But when any act or omission of a statutory authority is challenged, and the statute concerned does not provide for any remedy against such act or omission, a writ petition would be maintainable. In the instant case, we do not think that the appellant had or has any remedy for the redress of the injury by or under any other law for the time being in force. In these circumstances, in our view, the petition under Article 226 had not abated as contended on behalf of the respondents.

10. We may now consider the case on merits. It was contended by Mr. Sanjoy Kumar Bhattacharyya, learned advocate appearing on behalf of the appellant, that the returns were not invalid as alleged by the respondents and as found by the learned judge, and that when the appellant had filed returns, the ITO had no jurisdiction to ignore the same and to proceed to issue notices u/s 148 of the Act without completing the assessments. On the other hand, it was urged by Mr. Pal that as the returns did not include the prescribed particulars, the same were invalid and could not be regarded as returns of income, and so the ITO had jurisdiction to issue notices u/s 148.

11. There can be no doubt that when there is no question as to the validity of a return filed by an assessee, the ITO has to complete the assessment in accordance with Section 143 of the Act and before such completion he would not have any jurisdiction to ignore the return and to issue a notice u/s 148. But the question is whether the ITO has such jurisdiction when the return is not strictly in accordance with the provisions of the Act. u/s 147(a) of the Act one of the grounds which enables the ITO to assess or reassess the income of an assessee by issuing a notice u/s 148 is that the ITO has reason to believe that, by reason of the omission or failure on the part of the assessee to make a return u/s 139 of the Act for any assessment year, income chargeable to tax has escaped assessment for that year. Section 139 provides, inter alia, that the assessee shall furnish a return of his income during the previous year in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed; Section 143 of the Act, as it stood before its amendment in 1970, runs as follows :

"143. (1) Where a return has been made u/s 139 and the Income Tax Officer is satisfied without requiring the presence of the assessee or the production by him of any evidence that the return is correct and complete, he shall assess the total income or loss of the assessee, and shall determine the sum payable by him or refundable to him on the basis of such return.

(2) Where a return has been made u/s 139, but the Income Tax Officer is not satisfied without requiring the presence of the assessee or the production of evidence that the return is correct and complete, he shall serve on the assessee a notice requiring him, on a date to be therein specified, either to attend at the Income Tax Officer's office, or to produce, or to cause to be there produced, any evidence on which the assessee may rely in support of the return.

(3) On the day specified in the notice issued under Sub-section (2) or as soon afterwards as may be, the Income Tax Officer, after hearing such evidence as the assessee may produce and such other evidence as the Income Tax Officer may require on specific points, and after taking into account all relevant material which the Income Tax Officer has gathered, shall, by an order in writing, assess the total income or loss of the assessee, and determine the sum payable by him or refundable to him on the basis of such assessment."

12. The expression "that the return is correct and complete" is significant. It obviously refers to Section 139 of the Act, for, a return is not correct and complete if it does not conform to the provisions of that section. In other words, if a return is not verified, in the prescribed manner and does not contain the prescribed particulars, it is not correct and complete. Section 143 lays down the procedure to be followed by the ITO when a return filed by an assessee is not correct and complete or when it is so, as the case may be; There is a distinction between the case of a non-filing of a return and the case of filing an incorrect and incomplete return. The former contemplates when no return has been actually filed by the assessee, while the latter contemplates the presence of a return which is not correct and complete. An incomplete return, that is, a return which does not comply with the provisions of Section 139 may be said to be an invalid return. But the Act does not contain any provision for the rejection of an invalid return ; on the contrary, u/s 143(3), a duty is cast on the ITO to assess the total income or loss of the assessee after serving on him a notice u/s 143(3) and after hearing such evidence as the assessee may produce or the ITO may gather. We should not, however, be understood to lay down this proposition that whenever a return is filed, the ITO must proceed in accordance with Section 143, no matter whether or not the return conforms to the provisions of Section 139. For instance, there may be cases where the returns are incomplete to such an extent that they cannot be regarded as returns in the eye of law, namely, where the return is not signed by the assessee or where a blank return signed by him is filed. In either case, though the return is filed, it will not be treated as a return under the law, and the ITO may proceed to issue a notice u/s 148 on the footing that the assessee has not filed any return.

13. In the instant case, however, the appellant filed returns, but they did not include certain particulars regarding the profits and gains of his business. After having looked into the returns, we find that the same were signed and verified by the assessee. We are unable to subscribe to the view of the learned judge that because the returns did not state the particulars of the profits and gains of the business of the assessee they were invalid and should be regarded as non-existent. If it is laid down that an incorrect and incomplete return is not a return in the eye of law and should be ignored or disregarded, then Section 143 would become nugatory. If that was the intention of the Legislature, there would not have been any necessity for it to provide for the procedure which the ITO is to follow when a return is not correct and complete.

14. In the case of Commissioner of Income Tax, Madras Vs. S. Raman Chettiar, , a return was filed pursuant to a notice u/s 34 of the Indian I.T. Act, 1922. The said notice was invalid as the sanction of the Commissioner was not obtained. The income shown by the assessee in the return was below the taxable limit and, consequently, the assessment proceeding was dropped as infructuous. Subsequently, another notice was issued u/s 34 of the said Act and the ITO made the assessment assessing the assessee to tax. It was held by the Supreme Court that although the first notice u/s 34 was invalid, the return submitted by the assessee pursuant to that notice was a return within the meaning of Section 22(3) of the said Act, and the ITO could not ignore or disregard that return and issue another notice u/s 34 on the assumption that there had been an omission or failure on the part of the assessee to make a return of his income u/s 22 of the said Act. In the case before the Supreme Court, the notice u/s 34 was an invalid notice pursuant to which the return was filed by the assessee. Even then, it was held by the Supreme Court that the ITO could not ignore the return and issue a fresh notice u/s 34.

15. In Hargovindsingh Narainsing, Present Karta, Damodardas Hargovindsingh Vs. Commissioner of Income Tax, Bombay II, , the ITO issued a notice, u/s 22(2) of the Indian I.T. Act, 1922, in the name of the HUF, to the court receiver for the assessment year 1956-57. In response to the notice, the court receiver filed returns. The ITO did not pass any order on the ground that the notice served on the court receiver and the returns submitted by him were invalid. But he proceeded to initiate proceedings u/s 34 of the said Act. It was held by the Bombay High Court that even if it were assumed that the returns were invalid that would not authorise the ITO to initiate proceedings u/s 34. Further, it was observed that it could not be regarded as a case where no return had been filed by the assessee or that his income had escaped assessment.

16. Mr. Pal, however, strongly relied on a decision of the Lahore High Court in (1934) 2 ITR 358 (Lahore) . In that case, it was held that the return was invalid and the ITO was justified in making an assessment u/s 23(4) of the said Act, namely, a best judgment assessment. We are unable to agree with the view expressed by the Lahore High Court in Lal Mohammad Sardar Mohammad's

case. It does not appear that the Lahore High Court considered the provisions of Sub-section (1), (2) and (3) of Section 23 of the Indian I.T. Act, 1922, which were somewhat similar to Section 143 of the I.T. Act, 1961. Moreover, the facts of that case are different from those of the present case before us. The respondents also relied on a decision of the Allahabad High Court in BEHARI LAL CHATTERJI Vs. COMMISSIONER OF Income Tax, U.P., . In our opinion, the law that has been laid down by the Allahabad High Court does not at all militate against the view taken by us, but it supports the same. It has been held in that case that, when a return was not signed and verified, there was no valid return at all and the ITO would be justified in making an assessment to the best of judgment u/s 23(4) of the I.T. Act, 1922.

17. It thus appears to be well-settled that when a return has been filed by an assessee, it cannot be ignored by the ITO and he will have no jurisdiction to issue a notice u/s 148 without completing the assessment on the return filed by the assessee. Even though a return is invalid in the sense that it is not correct and complete within the meaning of Section 139 of the I.T. Act, 1961, the ITO cannot ignore or disregard the same for the purpose of issuing a notice u/s 148 of the Act, unless the return can be regarded as not a return in the eye of law as in the case of the two illustrations given above. In the instant case, the ITO acted on the returns filed by the appellant, issued notices u/s 143(2) and heard the appellant for the assessment years in question u/s 143(3), but without completing the assessments he took recourse to reopen the assessments u/s 147 by issuing the impugned notices u/s 148 of the Act. In our view, the ITO has acted without jurisdiction in issuing the impugned notices,

18. For the reasons aforesaid, we set aside the judgment of the learned judge and make the rule absolute. We direct that a writ in the nature of certiorari issue quashing the impugned notices u/s 148 of the I.T. Act, 1961. Further, we direct that a writ in the nature of mandamus issue commanding the respondents not to give any effect or further effect to the said notices or to any proceedings started thereon or any orders made pursuant to the same.

19. The appeal is allowed, but in view of the facts and circumstances of the case, there will be no order for costs.

Sharma , J.

20. I agree.