
(1980) 07 CAL CK 0014

In the Calcutta High Court

Case No : Appeal from Original Order No. 45 of 1976 (Matter No. 29 of 1974)

S.P. Agarwalla alias Sukhdeo Prasad Agarwalla

APPELLANT

Vs

Income Tax Officer, E-Ward and Others

RESPONDENT

Date of Decision : 28-07-1980

Acts Referred:

Income Tax Act, 1961 — Section 147, 148

Citation : (1983) 140 ITR 1010 : (1981) 5 TAXMAN 299

Hon'ble Judges : A.N. Sen, C.J;M.M. Dutt, J

Bench : Division Bench

Advocate : Sanjay Bhattacharjee, for the Appellant;A. Sengupta, for the Respondent

Judgement

M.M. Dutt, J.—In this appeal, the appellant, S. P. Agarwalla, carrying on a business under the name and style of M/s. S. P. Agarwalla & Co., has challenged the propriety of the judgment of a learned single judge of this court discharging the rule nisi obtained by the appellant on his application under Article 226 of the Constitution.

2. In the writ petition, the appellant had challenged the validity of the notice dated September 26, 1969, issued by the ITO, respondent No. 1, u/s 148 of the I.T. Act, 1961. In the notice it was stated by the ITO that the income of the appellant chargeable to tax for the assessment year 1962-63 had escaped assessment within the meaning of Section 147 of the I.T. Act, 1961. The appellant was directed to file a return of his income for the said assessment year within 30 days of the date of the service of the notice. Further, it was stated in the notice that the necessary sanction of the Commissioner of Income Tax, West Bengal-III, had been obtained before the notice was issued.

3. It was the case of the appellant that he had truly and fully disclosed all material facts in the return filed by him for the assessment year 1962-63, and had produced all evidence in support of the return before the ITO at the time of hearing of the assessment proceedings. The ITO was satisfied and made the

assessment accordingly. It was contended by the appellant that there was no material before the ITO, respondent No. 1, to form the reasonable belief that the income of the appellant had escaped assessment on account of the failure of the appellant to disclose truly and fully all material facts. The appellant challenged the said notice u/s 148 of the I.T. Act, 1961, as illegal, inoperative and void. It was contended that the ITO had no jurisdiction to issue the impugned notice.

4. Respondent No. 1, who issued the impugned notice u/s 148, opposed the rule nisi issued on the writ petition of the appellant by an affidavit-in-opposition. In para. 11 of the affidavit-in-opposition sworn to by the ITO concerned, it has been stated as follows :

"With reference to paragraph 11 of the petition, I say that the assessee had shown to have obtained an alleged loan of Rs. 63,000 from one Prahlad Roy Almal during the previous year relevant to the assessment year 1962-63. The assessee had filed a statement of account of the said Prahlad Roy Almal during the period 2017-18 Dewali, relevant for the assessment year 1962-63, accepting the said purported loan from Prahlad Roy Almal as genuine without any verification and consequently alleged interest thereon was also allowed. In course of the assessment proceedings of the subsequent years information was received from the Inspecting Assistant Commissioner, Survey Range, Calcutta, inter alia, to the effect that the said Prahlad Roy Almal had made a confession on 24th November, 1965, admitting that he and his father were acting as name-lenders in order to accommodate the other parties to introduce in their books their own unaccounted income in the form of bogus loans and all the loan transactions shown in the name of Prahlad Roy Almal were bogus. The said Inspecting Assistant Commissioner, Survey Range, Calcutta, also forwarded the copy of the confession made by the said Prahlad Roy Almal. Further, on enquiry, it transpired that the case meant for the assessment year 1962-63 of the said Prahlad Roy Almal was completed by the Income Tax Officer, Special Circle-II, on 27th February, 1967, u/s 144 and in the assessment order for the assessment year 1962-63 of the said Prahlad Roy Almal the said Income Tax Officer had also recorded that the said Prahlad Roy Almal had confessed that he did not carry on genuine money-lending business and lent his name without lending any money for which he received commission from 3 annas to 4 annas per hundred per annum. After considering the aforesaid materials I prima facie came to the conclusion that the said alleged loan in the name of Prahlad Roy Almal to the extent of Rs. 63,000 and the alleged interest thereon to the extent of Rs. 1,652 was the suppressed income of the assessee which he purported to have introduced by way of alleged loan through the medium of the said Prahlad Roy Almal. In the premises aforesaid I had prima facie reasons to believe and I bona fide believed that due to the omission and/or failure on the part of the petitioners to disclose fully and/or truly all material facts necessary for the said assessment the income chargeable to tax for the said assessment year 1962-63 had escaped assessment and/or had been under-assessed. I, therefore, duly sent the proposal u/s 147 of the Income Tax Act, 1961, to the Commissioner of Income Tax, West

Bengal III, along with the letter dated 26th August, 1969. After obtaining the necessary approval of the Commissioner of Income Tax, West Bengal III, I duly issued the said notice u/s 148 of the Income Tax Act, 1961, to the assessee for the said assessment year 1962-63. Before issuing the said notice I duly recorded my reasons. I shall crave leave to refer to the communications received from the Inspecting Assistant Commissioner, Survey Range, Calcutta, confession made by the said Prahlad Roy Almal, assessment order of Prahlad Roy Almal for the assessment year 1962-63, and the letter dated 26th August, 1969, whereunder the proposal u/s 147(a) was forwarded to the Commissioner of Income Tax, West Bengal III, Calcutta, at the hearing of this application.

The learned judge came to the finding that there were sufficient materials before the Income Tax Officer for the formation of the reasonable belief for reopening the assessment for the assessment year 1962-63. In that view of the matter, the learned judge discharged the rule nisi and dismissed the writ petition. Hence this appeal."

5. Mr. Sanjoy Bhattacharjee, learned counsel appearing on behalf of the appellant, has strenuously urged that there was nothing on record to show that the ITO had in his possession relevant materials to reopen the assessment for the assessment year 1962-63. He has specifically drawn our attention to the reasons as recorded by the ITO before he issued the notice u/s 148. The learned judge also has referred to the following reasons as recorded by the ITO:

"I have reason to believe that by reason of failure on the part of the assessee to disclose truly and fully all material facts necessary for this assessment at the time of original assessment for the assessment year 1962-63, income chargeable to tax has escaped assessment to the extent of Rs. 64,652 for that year."

6. The reasons as recorded by the ITO do not disclose the existence of any material on which he relied for the formation of a reasonable belief for reopening the assessment for the assessment year 1962-63. It has been urged by Mr. Bhattacharjee that the recorded reasons must disclose the material which is the foundation for the formation of the belief of the ITO justifying the service of a notice u/s 148 of the I.T. Act, 1961. While, in our opinion, it is desirable that the material on which reliance has been placed by the ITO for the issuance of a notice u/s 148, the non-disclosure of such a material in the recorded reasons will not, however, vitiate the notice, provided such material appears from the record and there is evidence to show that the ITO had placed reliance on such material. Be that as it may, we, however, fail to understand why the ITO has not referred to the material in the recorded reasons. In our opinion, merely quoting the section will not satisfy the requirement of law. The reopening of an assessment should not be lightly treated and the court will insist on the strict compliance of the provision of law. No explanation has been given before us on behalf of the respondents why the ITO did not refer to the material on evidence upon which he had placed reliance before he issued the notice u/s 148.

7. It is contended on behalf of the appellant, that the Commissioner should not have accorded sanction on the basis of the reasons as recorded by the ITO. The appellant has, accordingly, challenged that the sanction of the Commissioner permitting the ITO to issue the impugned notice u/s 148 was granted without jurisdiction and the impugned notice should be struck down on that ground alone.

8. The material that has been relied on by the ITO in issuing the notice u/s 148 appears to be the confessional statement made by one Prahlad Roy Almal. It is apparent on the face of the statement made by the ITO in para. 11 of the affidavit-in-opposition that the assessment has been sought to be reopened on the ground that the sum of Rs. 63,000 entered in the books of account of the appellant for the assessment year 1962-63, as loan taken from the said Prahlad Roy Almal including a sum of Rs. 1,652.38 alleged to be the interest paid by the appellant on the said sum was a bogus transaction and the said Prahlad Roy Almal was dealing in a name-lending business of fictitious loan transactions. The question whether such a confessional statement constituted a material for the formation of the belief by the ITO will be considered later. Now, we are concerned with the question whether the Commissioner was justified in according sanction for the issuance of the impugned notice u/s 148. If the records had not contained anything except the recorded reasons of the ITO in that case, it should be held that the Commissioner was not at all justified in according sanction. It may be observed that the sanction should not be granted by the Commissioner only mechanically, but before such sanction is accorded it is incumbent upon the Commissioner to apply his mind to the material relied on by the ITO asking for such sanction. The Commissioner is to consider the sufficiency and the relevance of the material before he grants, or refuses to grant, the sanction. In the instant case, the ITO had also sent a forwarding letter to the Commissioner along with the recorded reasons. The body of the letter dated August 26, 1969, reads as follows :

"The assessee named above had introduced a sum of Rs. 63,000 in his books of account for the year 2018 Dewali, relevant for the assessment year 1962-63 in the name of Prahlad Roy Almal of 35, Burtolla Street, Calcutta. The total credit in this account was Rs. 64,652.38 including Rs. 1,652.38 charged as interest. As the assessee did not disclose the true particulars regarding this account the same was accepted. It now reveals that Prahlad Roy Almal was not a genuine party but only a name-lender. In the circumstances, I am enclosing herewith a proposal u/s. 147(a) for reopening the assessment for the assessment year 1962-63 for your kind approval."

9. The letter undoubtedly contains some more particulars, but it is contended on behalf of the appellant that the letter does not also refer to the confessional statement of the said Prahlad Roy Almal. The existence of such a confessional statement is not in dispute and it can be reasonably presumed that such a statement was in the records when the Commissioner considered the grant of sanction for the issuance of the impugned notice u/s. 148. Indeed, the said

confessional statement was received by the ITO from the Commissioner. In these circumstances, it can also be presumed that the Commissioner was in the know,, of such a confessional statement made by the said Prahlad Roy Almal. We do not, therefore, think that the sanction accorded by the Commissioner for the impugned notice u/s 148 was granted without jurisdiction.

10. Now, we come to the more important point, namely, whether the said confessional statement of Prahlad Roy Almal can be said to be a relevant material justifying the ITO to issue the impugned notice u/s 148. The confessional statement was not filed by the respondents in the trial court. Mr. Sengupta, learned counsel appearing on behalf of the respondents, has, however, produced before us a copy of the said confessional statement. It appears that the statement made by the said Prahlad Roy Almal was recorded in the form of questions and answers. The statement is dated November 24, 1965, According to the said Prahlad Roy Almal, his father was a registered broker in gunny, hessians, etc., and he died on May 16, 19,65. His father also had a bank account in the United Bank of India till two or three months before the date of the statement. The bank account was operated by Prahlad Roy Almal even after his father's death. It is not clear from his statement how it was possible for him to operate the bank account standing in the name of his father. It was, however, alleged by him that he had been carrying on name-lending business since 1958-59. He did not maintain any books of account for such business. When he was asked to state the names and addresses of some of the alleged borrowers who were still showing credits in his name in their books of account, he only referred to the names of two companies and could not mention the name of any other alleged borrowers on the ground that it was not possible for him to say so, without looking into the files containing the confirmatory letters, which had been seized by the I.T. Dept. on November 17, 1965. It also appears from his statement that he had a good credit in the market inasmuch as he could get an aggregate amount of loan of Rs. 81,000 from one Srinivas Bullewa in 1953-54. Further, he had contracted other loans from the market but he could not give the names of the parties from whom he had taken such loans. Relying on the said confessional statement, the ITO, respondent No. 1, issued the impugned notice u/ s 148. The question that naturally arises is whether this confessional statement is a material for the formation of a reasonable belief by the ITO that the income of the appellant had escaped assessment on account of his omission or failure to disclose truly and fully all relevant facts. The principle of law in this regard is now well settled. In the case of Income tax Officer, Calcutta and Others Vs. Lakhmani Mewal Das, , the Supreme Court observed as follows (p. 448):

"As stated earlier, the reasons for the formation of the belief must have a rational connection with or relevant bearing on the formation of the belief. Rational connection postulates that there must be a direct nexus or live link between the material coming to the notice of the Income Tax Officer and the formation of his belief that there has been escapement of the income of the assessee from assessment in the particular year because of his failure to disclose fully and truly

all material facts. It is no doubt true that the court cannot go into the sufficiency or adequacy of the material and substitute its own opinion for that of the Income Tax Officer on the point as to whether action should be initiated for reopening assessment. At the same time we have to bear in mind that it is not any and every material, howsoever vague and indefinite or distant, remote and farfetched, which would warrant the formation of the belief relating to escapement of the income of the assessee from assessment."

11. In *Income tax Officer, Calcutta and Others Vs. Lakhmani Mewal Das*, , referred to above, one of the alleged name-lenders was one Mohansingh Kanayalal. He also made a confessional statement on the basis of which the assessment was reopened. The Supreme Court, while upholding the majority view of the High Court striking down the notice reopening the assessment, observed as follows (p. 447) :

"We may now deal with the first ground mentioned in the report of the Income Tax Officer to the Commissioner of Income Tax. This ground relates to Mohansingh Kanayalal against whose name there was an entry about the payment of Rs. 74, annas 3, as entered in the books of the assessee, having made a confession that he was doing only name-lending. There is nothing to show that the above confession related to a loan to the assessee and not to someone else, much less to the loan of Rs. 2,500 which was shown to have been advanced by that person to the assessee-respondent. There is also no indication as to when that confession was made and whether it relates to the period from April 1, 1957, to March 31, 1958, which is the subject-matter of the assessment sought to be reopened. The report was made on February 13, 1967. In the absence of the date of the alleged confession it would not be unreasonable to assume that the confession was made a few weeks or months before the report. To infer from that confession that it relates to the period from April 1, 1957, to March 31, 1958, and that it pertains to the loan shown to have been advanced to the assessee, in our opinion, would be rather farfetched."

12. The confession, that was made by the said Income tax Officer, Calcutta and Others Vs. *Lakhmani Mewal Das*, , was to the effect that he was doing only name-lending business. Mr. Sengupta has sought to distinguish the confessional statement made by the said Mohansingh Kanayalal in the Supreme Court case and that made by the said Prahlad Roy Almal in the instant case. It is submitted by him that the confession of Mohansingh Kanayalal that he was doing "only name-lending" means that all his transactions were not bogus or name-lending transactions. In other words, it is his contention that the word "only" does not mean "all"; on the other hand, he submits, Prahlad Roy Almal has confessed that all the loan transactions were bogus. We are unable to accept this distinction as sought to be made by the learned counsel. We do not find any difference in meaning between the word "only" used in the statement of Mohansingh Kanayalal, and the word "all" occurring in the statement of Prahlad Roy Almal. In both the cases, in our opinion, the confession was that all the loan transactions

were not genuine and they carried on name-lending business. Thus, the facts in the case of Income tax Officer, Calcutta and Others Vs. Lakhmani Mewal Das, and in the instant case are more or less similar so far as the confessional statement in either case are concerned. Prahlad Roy Almal did not at all refer to the name of the assessee who is the appellant before us. There is, therefore, no direct nexus or live link between the confessional statement of Prahlad Roy Almal and the formation of the belief of the ITO that the income of the appellant has escaped assessment. In the absence of a direct nexus or live link, such confessional statement will not constitute a relevant material justifying the reopening of the assessment. In this connection, it should not be lost sight of that one ITO had, after considering the evidence that was produced by the assessee before him, believed his case of incurring of loan of the said sum of Rs. 63,000. Unless, therefore, there is some material pointing to the assessee in regard to the alleged transaction, the ITO will not be justified to reopen the assessment by a notice u/s 148. The belief that is referred to in Section 147 of the I.T. Act, 1961, must be supported by some evidence or material justifying the formation of such belief. In this connection, I may refer to the judgment of my Lord the Chief Justice (as he then was), presiding over the appeal court in the case of Madnani Engineering Works Ltd. v. ITO (Appeal from Original Order No. 221 of 1970, disposed of on April 11, 1974). In that case, it was held that the ITO had no material justifying the formation of a reasonable belief in reopening the assessment. One of the questions that came up for consideration was whether, in the facts and circumstances of that case, the assessee could be said to have not disclosed fully and truly all material facts. My Lord made the following observations :

"An assessee who claims deductions for payment of interest in respect of any hundi loans is to make the claim only on the basis that the hundi loan is genuine and it becomes the duty of the assessee to establish the genuineness of the loan by adducing necessary evidence and producing relevant materials. The assessee is not presumed to make a false or fictitious claim and in any event the assessee who has made such a claim is not expected to tell the assessing authority that he has made a false and a fictitious claim. It is indeed the duty of the assessing authority to consider the relevant materials and to decide whether the loan transaction is genuine or not."

13. The Revenue went up to the Supreme Court against the judgment in Madnani's case. The Supreme Court upheld the judgment and also reiterated the same principle. It was observed by the Supreme Court that the respondent produced in the original assessment proceeding all the hundis on the strength of which it had obtained loans from creditors as also entered in the books of account showing payment of interest and it was for the ITO to investigate and determine whether these documents were genuine or not; the respondent could not be said to have failed to make a true and full disclosure of the material facts by not confessing before the ITO that the hundis and the entries in the books of account produced by it were bogus (See Income Tax Officer and Others Vs.

Madnani Engineering Works Ltd., Calcutta, . In the instant case also, the appellant had made a disclosure of the loans that he had obtained from the said Prahlad Roy Almal. He also produced before the ITO at the hearing of the assessment proceedings the confirmatory letters issued by the said Prahlad Roy Almal. It was the duty of the ITO to investigate the genuineness or otherwise of such loans or confirmatory letters. He was satisfied about the genuineness of the transaction of loan that took place between the assessee and the said Prahlad Roy Almal. There can be no doubt that the ITO has the jurisdiction to reopen the assessment proceedings but such reopening cannot be made on mere suspicion. There must be some material which should have a direct nexus or live link with the formation of the belief that the income of the assessee has escaped assessment as he has not made a true and full disclosure of all material facts.

14. Mr. Sengupta has placed reliance on a judgment delivered by me in the appeal court in Income Tax Officer, "I" Ward and Others Vs. Mahadeo Lal Tulsyan, . In that case, the notice u/s 148 of the I.T. Act, 1961, reopening the assessment proceedings was upheld. It has been submitted by the learned counsel that though the facts of that case were somewhat similar to those of the present case before us, the notice u/s 148 was upheld to be legal and valid. In our opinion the facts in the case of Mahadeo Lal Tulsyan are different from those of the instant case. In that case, in the assessment proceedings for the subsequent year, namely, for the assessment year 1964-65 of the respondent-assessee, the loans from identical hundi merchants were found to be not genuine after investigation. The said hundi merchants were found to be only name-lenders. In the circumstances, the notice u/s 148 was not issued by the ITO merely on suspicion or without relevant material justifying the issuance of such a notice. That case is, therefore, of no assistance to the Revenue.

15. Learned counsel for the respondents has also placed reliance on a Bench of this court presided over by my learned Chief Justice (as he then was) in Biju Patnaik Vs. Income Tax Officer, . In that case also, there was a confessional statement by the hundi merchants and it was held that the confessional statement was a relevant material for the formation of the reasonable belief by the ITO for reopening the assessment proceedings. In that case, the merchants concerned in their statement mentioned the names of persons with whom they had entered into genuine loan transactions, and it was confessed that all other transactions were bogus transactions, that confessional statement was construed to have impliedly contained a confession that the loans alleged to have been given by them to the assessee were not in fact given by them. Thus, it appears that the statement in that case was not a vague statement that they were only carrying on name-lending, but a positive statement that except in the cases of certain persons, the names of whom were mentioned, the hundi merchants did not enter into any other genuine loan transactions. In our opinion, Biju Patnaik Vs. Income Tax Officer, does not lend any support to the contention of the respondents.

16. Lastly, counsel for the Revenue, has placed strong reliance on a Bench decision of this court in H.A. Nanji and Co. Vs. Income Tax Officer, "A" Ward and Others, . It is contended that the principles of law laid down in this case support the contention of the Revenue in the instant case before us and also justify the notice u/s 148. It is not necessary for us to refer to the principles which have been laid down in Nanji's case, for, all the principles are well settled by the Supreme Court. The principles of law in this regard may be applicable to a particular set of facts and may not be so applicable to a different set of facts. In Nanji's case not only that there was a confessional statement by the hundi creditors but also some of the hundi creditors of the assessee had specifically confessed that they had been mere name-lenders for the purported loans which were entered in the books of account of various assessees including the assessee concerned for the assessment year in question. There can be no doubt that if there be such a confession that would surely be a relevant material on the basis of which the ITO can form a reasonable belief that the income of the assessee has escaped assessment for his omission or failure to disclose fully and truly all material facts. But in the instant case the facts were not like that and, accordingly, H.A. Nanji and Co. Vs. Income Tax Officer, "A" Ward and Others, , has no application. No other point has been urged on behalf of either party.

17. For the reasons aforesaid, we set aside the judgment of the learned judge and make the rule nisi absolute. Let a writ in the nature of certiorari issue quashing the impugned notice u/s 148 of the I.T. Act, 1961. Further, let a writ in the nature of mandamus issue commanding the respondents not to give any effect or further effect to the impugned notice and not to proceed with the assessment proceedings reopened on the basis of the impugned notice.

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

A.N. Sen, C.J.

19. I agree.