

IN THE HIGH COURT OF JUDICATURE AT PATNA

Miscellaneous Appeal No.338 of 2006

- =====
1. Dr. Pavan Prakash, son of Late Prof. Suresh Chandra Lal, resident of Saketpuri, Near Bazar Samiti, Rajendra Nagar, P.O. Rajendra Nagar, Police Station- Bahadurpur Gumati, District- Patna.
 2. Sri Navin Prakash, aged about 46 years, son of Late Prof. Suresh Chandra Lal, resident of Saketpur, Near Bazzar Samiti, Rajendra Nagar, P.O. Rajendra Nagar, Police Station- Bahadurpur Gumati, District- Patna.
 3. Smt. Bina Devi, wife of Late Prof. Suresh Chandra Lal, resident of Saketpur, Near Bazzar Samiti, Rajendra Nagar, P.O. Rajendra Nagar, Police Station- Bahadurpur Gumati, District- Patna.

.... Appellants

Versus

1. Commissioner of Income-tax (Central), Patna
2. Assistant Commissioner of Income-tax, Central Circle-3, Patna.

.... Respondents

=====

Appearance :

For the Appellants : Mr.Ajay Kumar Rastogi

For the Respondents : Mrs. Archana Sinha

=====

CORAM: HONOURABLE MR. JUSTICE RAMESH KUMAR DATTA

and

HONOURABLE MR. JUSTICE SUDHIR SINGH

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE RAMESH KUMAR DATTA)

Date: 15-01-2016

Heard learned counsel for the appellants and learned counsel
for the Respondents.

The appeal has been filed by the assessee challenging the
order of the Income Tax Appellate Tribunal, Patna Bench, Patna,
passed on 27.04.2006 in IT (SS) A. No. 115/Pat/05 whereby the order
dated 5.11.2004 of the Commissioner of Income Tax (Appeals)-I,
Patna, passed in ITA No. 154/A-1/01-02 has been reversed and the
order dated 27.06.2001 of the Deputy Commissioner of Income Tax,

Central Circle-3, Patna regarding addition of Rs. 2,21,338/- and Rs.5,21,300/- in the income of the assessee under the head 'Deposit in Bank Account' and further addition of Rs.93,819/- under the head 'Construction of House Property' has been upheld.

The following substantial questions of law have been framed by this Court while admitting the appeal :-

(1) Whether on the facts and in the circumstances of the appellant's case the Income Tax Appellate Tribunal is justified in sustaining addition of Rs.2,21,338/- and Rs.5,21,300/- in view of the ratio laid down in the case of **Kamal Kumar Saharia v. Commissioner of Incometax** reported in (1995 Vol.216 I.T.R. 217) ?

(2) Whether on the facts and in the circumstances of the case the Tribunal is justified in discarding the evidence and admitted fact of payment in April, 1995 and possession of property in June, 1995 while sustaining addition of Rs.93,819/- ?

The original assessee, who had filed the appeal, has died and is being represented by his heirs and legal representatives. A search and seizure operation was carried out under Section 132(1) of the Income Tax Act, 1961 on 18.6.1999 at the residential premises of the assessee. The assessee was issued notice under Section 158BC by the



Assessing Officer directing to file return of income for the block period 1990-91 to 1998-99 up to 18.6.1999. The assessee filed the said returns in which he made disclosure of undisclosed income of Rs.18, 46,350/-. The Assessing Officer thereafter passed an order in which apart from others he made the aforesaid additions to income. So far as Rs.2,21,338 and Rs.5,21,300/- are concerned, those were added in the income on the ground that the loans were shown to have been returned in cash or bearer cheques and not by account payee cheques or bank drafts, although there was confirmation of identity of the person who had refunded the loans. The Assessing Officer has further added the investments made in house property owned by the assessee at plot no. 4, Saketpuri, Near Bazar Samiti, Rajendra Nagar, Patna. The said property comprising land and building was purchased from Sri Dinesh Mishra for a consideration of Rs.3,25,000/-. This investment has been disclosed in the block return for the assessment years 1994-95, 1995-96 and 1996-97 whereas certain papers in course of search were found bearing identification mark NP-17, pages 11-20 which indicated details of expenses on construction including electrical works, purchase of sanitary ware and hardware fittings incurred during the same period the above property was purchased. The assessee was asked to explain why this amount totaling Rs.93,819/- should not be considered as unexplained investment in



this property but he could not allegedly explain properly the expenditure incurred on the basis of these documents of Rs.15,951/- for the assessment years 1994-95 and Rs.77,868/- for the assessment years 1995-96. Accordingly, the addition of Rs.93,819/- was also made. The assessee challenged the aforesaid finding in appeal before the Commissioner of Income Tax (Appeals)-I, Patna and the same was allowed. The order of the Commissioner of Income Tax (Appeals)-I, Patna, was challenged by the revenue before the Income Tax Appellate Tribunal, Patna Bench, Patna, and the Tribunal restored the order of the Assessing Officer. Thereafter, the present appeal has been filed.

With regard to the first question, learned counsel for the appellants submits that the genuineness of the transaction of giving loan by the assessee having been accepted by the revenue, it was not open to it to disbelieve the genuineness of refund. It is further submitted that credit-worthiness is not relevant in a case of refund as opposed to a case where loan has been given by a person. As a matter of fact, it is submitted on the strength of two Division Bench decisions of this Court in the case of Sarogi Credit Corporation vs. Commissioner Income-tax: (1976) 103 ITR 344 (Pat) and the case of Additional Commissioner of Income-tax vs. Hanuman Agrawal: (1985) 151 ITR 150 (Pat), in which after citing several Bench

decisions, including that of this Court, Nagpur High Court, Allahabad High Court and Bombay High Court it has been held as follows:-

“In my view, the law is too well-settled, and this I say not only on account of consensus of judicial opinion, but also for the additional reason that, stretching the doctrine of onus too far, in the case of entries in favour of third parties, who themselves come forth and admit that they had advanced the loans, the addition of such amounts as from undisclosed sources or secreted profits in the assessee’s books of account, on rejection of such statements made by disinterested third parties, would lead to an absurd inconvenience, which the statute does not envisage. Decisions are numerous; to wit, a Bench decision of this court *Radhakrishna Bihari Lal v. Commissioner of Income Tax*: (1954) 26 ITR 344 (Patna), a Bench decision of Nagpur High Court in *Jainarayan Balabakas of Khamgaon v. Commissioner of Income Tax*, MANU/NP/5002/1956, a Bench decision of the Allahabad High Court in *Rama Kishan Das Munnu Lal v. Commissioner of Income Tax* [1961] 41 ITR



452 (All) and a Bench decision of the Bomay High Court in Orient Trading Co. Ltd. vs. Commissioner of Income Tax: [1963] 49 ITR 723 (Bom), may be referred to as authorities for the proposition that, if a credit entry stands in the name of the assessee himself, the burden is undoubtedly on him to prove satisfactorily the nature and source of that entry and to show that it does not constitute apart of his income liable to tax. If the credit entry stands in the names of the assessee's wife and children, or in the name of any other near relation, or an employee of the assessee, the burden lies on the assessee, though the entry is not in his own name, to explain satisfactorily the nature and source of that entry. But, if the entry stands not in the name of any such person having a close relation or connection with the assessee, but in the name of an independent party, the burden will still lie upon him to establish the identity of that party and to satisfy the Income Tax Officer that the entry is real and not fictitious. Once the identity of the third party is established before the Income Tax Officer and other such evidence are prima facie placed



before him pointing to the fact that the entry is not fictitious, the initial burden lying on the assessee can be said to have been duly discharged by him. It will not, therefore, be for the assessee to explain further as to how or in what circumstances the third party obtained the money and how or why he came to make advance of the money as a loan to the assessee. Once such identity is established and the creditors, as in the instant case, have pledged their oath that they have advanced the amounts in question to the assessee, the burden immediately shifts on to the department to show as to why the assessee's case could not be accepted and as to why it must be held that the entry, though purporting to be in the name of a third party, still represented the income of the assessee from a suppressed source. And, in order to arrive at such a conclusion, even the department has to be in possession of sufficient and adequate materials."

In Hanuman Agrawal's case (supra), at page 156, this Court held as follows:



“ The assessee having been called upon to explain the nature and the source of the deposit, it immediately filed the confirmatory letter from the creditor. The confirmatory letter contained the address of the party at Bombay as well as at Calcutta. It also contained the G.I.R. number. In my opinion, the assessee having furnished the correct name and address of the creditor, having given the G.I.R. number and having filed the confirmatory letter from the creditor, did all that it could do and these three materials showed prima facie not only the identity of the creditor but also the genuineness of the transaction and also the capacity of the creditor and, as such, the assessee completely discharged its initial onus under S.68 of the Act. The Revenue, on its part, did not summon the creditor under S.131 of the Act. It took no steps to verify the statement of the assessee. Thus, after the assessee filed the confirmatory letter with the correct name and address of the creditor and the G.I.R. number as well, in my opinion, the onus immediately shifted on

the Department which was not discharged by the Department in this case and the Tribunal has rightly held so.

It is true that the onus having shifted on the Department, if the Department would have found to the contrary, the onus would have shifted back on the assessee to discharge the onus by adducing positive evidence. Thus, I hold that, on the facts of the case, the initial onus put upon the assessee under s. 68 of the Act was fully discharged by the assessee and the Tribunal took a correct view in law. I, accordingly, answer the question in the affirmative and hold that, on the facts and in the circumstances of this case, the deletion of addition of Rs.41,500 and allowing the interest by the Tribunal was legal and proper. Thus, the question is answered in the affirmative, in favour of the assessee and against the Revenue...

...The question then remains in such cases as to how the capacity to prove the competence of the creditor for furnishing such a loan can be decided. The answer, to my mind, is very plain and simple. The



very object of s. 131 of the Act is for that purpose. It can never be within the exclusive knowledge of the debtor to know the sources of income of the creditor. Once he is supplied the credit that he wants, he is satisfied. Once he has furnished the true identify, the correct address, the correct G.I.R. number of the creditor, he fulfils his obligation under the Act. The question then still remains with regard to the genuineness of the transaction and the capacity of the creditor to furnish the loan concerned. It is for that specific purpose that s. 131 has been engrafted in the Act. Section 131 provides, inter alia, that the ITO, the AAC, the IAC and the Commissioner shall, for the purpose of this Act, have the same powers as are vested in a court under the Code of Civil Procedure, 1908, when trying a suit in respect of the following matters, namely, (a) discovery and inspection, (b) enforcing the attendance of any person, including any officer of a company and examining him on oath, (c) compelling the production of books of account and other documents, and (d) issuing Comissions.”



In the present matter, it is pointed out by learned counsel for the appellants that the CIT (Appeals) had asked the Assessing Officer at the time of appellate proceedings for remand report and in the remand report, the reference was made to the Inspector, Income-tax having made local enquiry and also contacted as many as 9 persons, whose names had been earlier furnished and who also filed affidavits affirming the transactions. Further the Assessing Officer had issued summons under Section 131 of the Act to as many as 11 persons and had examined them. All the aforesaid 20 persons had affirmed the fact about the loan having been taken by them from the assessee and the return of the said loan as appeared from the records of the assessee and thus in view of the establishment of the identity of the creditors which is admitted in the remand report itself, there was no material either to disbelieve the genuineness of the transaction or credit worthiness of the said persons. It is further submitted that most of the persons in the first category, i.e., eight out of nine were admittedly Professors of the Science College in the same Department as the original appellant and one was class-IV employee who had been given loan which he has returned. Thus, even the capacity to pay of the said persons could not have been doubted. It is also submitted that none of the 11 persons, barring one, who were summoned, came under the

category of relations as defined under the Income Tax Act and they have also supported the fact of loan amount having been taken by them from the original appellant and having refunded the said loan.

It is, thus submitted that the case of the appellants is squarely covered by the decision of this Court and it was not open to the Assessing Officer or the Tribunal to come to a different view in the matter. It is further submitted by learned counsel that the authorities of the Income-tax having accepted and relied upon one part of the transaction they could not have rejected the other part of the same transaction and made the addition to the income as they have done in the present matter, which proposition has been clearly laid down by a Division Bench of the Gauhati High Court in the case of Kamal Kumar Saharia vs. Commissioner of Income-Tax: (1995) 216 ITR 217, in the last but one paragraph of which it has been held as follows:-

“It is settled law that tax authorities, having relied on one part of a transaction, cannot reject the other part of the same transaction. In the instant case, the expenditure shown to have been incurred by the assessee having been accepted by the income-tax authorities, there was no justification, on the facts and circumstances of the

case, not to accept the receipt as disclosed by the assessee.”

On the second question of law, learned counsel for the appellants submits that the finding of the Tribunal is evidently perverse as the addition in the present matter had been made for the assessment years 1994-95 and 1995-96 totalling Rs.93,819/-, only on the ground that the details of the materials seized from the assessee pertain to expenses incurred by him on the construction, including electrical works, purchase of sanitary ware, hardware, etc. and the assessee failed to explain the reasons for keeping details of expenses with him, if these expenses were not incurred by him but by the seller of the flat before he took possession. It is submitted that the explanation of the assessee was clearly on the record which was that firstly, the possession of the flat itself was taken by the assessee on 30.06.1995, that is, for the assessment year 1996-97 and thus any document pertaining to previous assessment year could not have shown expenditure with regard to the property purchased by the assessee in a subsequent assessment year.

It is further submitted that the explanation of the assessee was that the said papers had been given to the assessee by the seller during the course of negotiation of the price of the property which was



ultimately purchased by the assessee at Rs.3.25 Lacs and which valuation has not been doubted even in the Departmental Valuation Report. Thus, it was not possible that any addition could have been made before the purchase of the property which was not even in the possession of the assessee during the assessment year, for which the addition has been made. It is also submitted that it has never been the stand of the revenue that the documents produced were in the handwriting of the assessee. It is thus submitted that the findings of the Tribunal are clearly perverse and there was no material to reverse the decision of the CIT (Appeals) in the matter.

Learned Senior Standing Counsel for the Income-tax Department, on the other hand, sought to argue that all the loanees of the second category to whom notices have been issued under Section 131 of the Act and who had appeared before the Assessing Officer were close relatives of the assessee and some of them were not even income-tax payers and thus the transaction in relation to them has rightly been disbelieved. It is also submitted that the other persons in category one also, who had not been examined by the Income-tax Inspector, were persons who were professors working in the Department of the assessee and thus their capacity to refund could have rightly been questioned by the Department.

In support of the aforesaid stand, learned counsel relies upon

several decisions of the Supreme Court and High Courts. The first is the case of Commissioner of Income-tax v. P. Mohanakala, in paragraph No.24 of which it has been held as follows:-

“It is true that even after rejecting the explanation given by the assessee if found unacceptable, the crucial aspect whether on the facts and circumstances of the case it should be inferred the sums credited in the books of the assessee constituted income of the previous year must receive the consideration of the authorities provided the assessee rebut the evidence and the inference drawn to reject the explanation offered as unsatisfactory. We are required to notice that section 68 of the Act itself provides, where any sum is found credited in the books of the assessee for any previous year the same may be charged to income-tax as the income of the assessee of the previous year if the explanation offered by the assessee about the nature and source of such sums found credited in the books of the assessee is in the opinion of the Assessing Officer not satisfactory. Such opinion formed itself constitutes a prima facie



evidence against the assesseees, viz, the receipt of money, and if the assesseees fail to rebut the said evidence the same can be used against the assesseees by holding that it was a receipt of an income nature. In the case in hand the authorities concurrently found the explanation offered by the assesseees unacceptable. The authorities upheld the opinion formed by the Assessing Officer that the explanation offered was not satisfactory. The assesseees did not take the plea that even if the explanation is not acceptable the material and attending circumstances available on record do not justify the sum found credited in the books to be treated as a receipt of an income nature. The burden in this regard was on the assesseees. No such attempt has been made before any authority. All the decisions cited and referred to hereinabove are required to be appreciated and understood in the light of the law declared by this court in Sumati Sayal (1995) Supp 2 SCC 453.”

She further relies upon a decision of the Allahabad High Court in the case of Ram Lal Agrawal v. Commissioner of Income-

Tax (2006) 280 ITR 547, in paragraph No.9 of which it has been laid down as follows:-

“9. It is a settled principle of law that under section 68 of the Act if any amount is found credited in the books of account of the assessee the burden lies upon the assessee to prove its nature and source. While proving the same the assessee has to prove the identity of the person, genuineness of the transactions and creditworthiness of the person who has given the money. In the present case, though the identity of the person, who has given the money has been established the assessee has failed to prove the creditworthiness of those persons making the payment of such amount to the assessee. All the authorities found that both the persons, who are alleged to have made the payment had no source and capacity to make such payment. Learned counsel for the assessee is not able to make out any case to the contrary. The view taken by the Tribunal is based on the material on record and does not appear to be unreasonable which requires any interference.”



She also relies upon a decision of the Punjab and Haryana High Court in the case of Gumani Ram Siriram v. Commissioner of Income-Tax, Patiala: (1975) 98 ITR 337, in the last but one paragraph of which it has been observed as follows:-

“The language of this section shows that it is general in nature and applies to all credit entries in whomsoever name they may stand, that is, whether in the name of the assessee or a third party. This section has, therefore, removed the distinction which was drawn in some decisions between the credits held in the name of the assessee and those held in the name of a third party. Under section 68 now the assessee has to prove that such third party was in a position to lend such sums and that he did, in fact, so lend to the assessee in order to satisfy the Income-tax Officer that the credits shown in the account books were genuine. This section has laid the onus of proof on the assessee. The Income-tax Officer, therefore, called upon the assessee-firm



to prove the source of the deposits by the two ladies and since he was not satisfied with the explanation given by the representative of the assessee-firm, he treated those two deposits as the income of the firm. Under the circumstances, no question of wrong placing of onus arises in the case and no question of law arises out of the order of the Income-tax Appellate Tribunal.”

Learned counsel further submits that no substantial questions of law are involved in the present matter and relies upon a decision of the Apex Court in the case of Vijay Kumar Talwar v. Commissioner of Income-tax: (2011) 330 ITR 1 (SC), paragraph Nos. 18 and 21 of which it has been laid down as follows:-

“18. It is manifest from a bare reading of the section that an appeal to the High Court from a decision of the Tribunal lies only when a substantial question of law is involved, and where the High Court comes to the conclusion that a substantial question of law arises from the said order, it is mandatory that such question (s) must be formulated. The expression “substantial



question of law” is not defined in the Act. Nevertheless, it has acquired a definite connotation through various judicial pronouncements. In *Sir Chunilal V. Mehta and Sons Ltd. v. Century spinning and Manufacturing Co. Ltd.*, AIR 1962 SC 1314, a Constitution Bench of this Court, while explaining the import of the said expression, observed that (headnote):

“The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law.”



21. A finding of fact may give rise to a substantial question of law, inter alias, in the event the findings are based on no evidence and/or while arriving at the said finding, relevant admissible evidence has not been taken into consideration or inadmissible evidence has been taken into consideration or legal principles have not been applied in appreciating the evidence, or when the evidence has been misread (see *Madan Lal v. Mst. Gopi* (1980) 4 SCC 255, *Narendra Gopal Vidyarthi v. Rajat Vidyarthi* (2009) 3 SCC 287, *Commissioner of Customs (Preventive) v. Vijay Dasharath Patel* (2007) 4 SCC 118, *Metroark Ltd.v. Commissioner of Central Excise, Calcutta* (2004) 12 SCC 505, *West Bengal Electricity Regulatory Commission v. CES Ltd.* (2002) 8 SCC 715).

She further relies upon the decision of the Supreme Court in the case of *Gouri Prasad Bagaria and others v. Commissioner of Income-tax, West Bengal*: (1961) 42 I.T.R. 112 (SC), in the last but two paragraphs of which it has been observed as follows:-

“In our opinion, this was a perfectly simple case, in



which a question of law hardly arose. The Tribunal had believed the assessee's word in view of his conduct and past history, such as they had been able to see. Where the assessee's statement is believed, there is obviously material on which the finding is based; and to seek for other material is tantamount to saying that a statement made by an assessee is not material on which a finding can be given. In our opinion, the Tribunal having believed the assessee's statement, there was an end of the matter in so far as that fact was concerned, and if the finding was based upon a statement which was good material on which it could be based, no question of law really arose. However, treating the question as one of law, the answer is irresistible that there was material, viz, the statement of the assessee believed by the Tribunal, on which the finding could be given."

We have considered the rival submissions of learned counsels for the parties.

So far as the first question is concerned, it appears that the decision of the Gauhati High Court in Kamal Kumar Saharia' s case



(supra) squarely applies to the matter. Even the decision relied upon by learned counsel for the Revenue does not support the findings arrived at by the Assessing Officer or the Tribunal. As a matter of fact, if the finding is based upon no evidence or while arriving at the said finding, relevant admissible evidence has not been taken into consideration or the legal principles have not been applied correctly in appreciating the evidence then the same would be a substantial question of law as laid down in Vijay Talwar's case (supra) relied upon by the Revenue.

As held by the Allahabad High Court in Ram Lal Agrawal's case, which is also relied upon by the Revenue, Section 68 requires the assessee to prove the identity of the person, genuineness of the transaction and creditworthiness of the person who has given the money and then it further held that all the authorities in the said case found that both the persons, who are alleged to have made the payment, had no source and capacity to make such payment. In the present matter, no such clear finding has been recorded by the Assessing Officer or by the Tribunal that the 20 persons named by the assessee as the persons who had refunded the loan amounts, had no source of income and capacity to make such payment. As a matter of fact, no such findings could have been recorded with respect to the said persons barring two or three of them, as all the persons were



properly employed, who had sufficient source of income. There being no attempt on the part of the Tribunal or the Assessing Officer to establish the said point, a mere say-so would not amount to a proper finding of fact. Such finding has to be held perverse and contrary to all settled propositions of appreciation of evidence. Thus, the criteria laid down in Ram Lal Agrawal's case (supra) relied upon by the Revenue, as a matter of fact, has not been followed by the assessing authority and the Tribunal themselves.

Moreover, this is not a case of the original appellant receiving any loan from certain persons in which case the question of creditworthiness may have much greater significance, rather it is a case of refund of loan given to persons who were known to the assessee and they have income and capacity to pay, which re-payment was also not only affirmed by them in the affidavit but further asserted during the course of examination by the Income-tax Inspector at the stage of remand report as also during Section 131 proceedings.

Moreover, we find that both the Division Bench decisions of this Court relied upon by the appellants clearly support the stand of the assessee in this regard.

We are also of the view that the respondent authorities having accepted one part of the transaction regarding the loan having been given by the assessee, it was not open to them to have so lightly

disbelieved the other part of the transaction.

So far as the second question is concerned, the findings recorded by the Assessing Officer are clearly perverse and the CIT (Appeals) had specifically taken into consideration the fact that the addition pertains to the assessment years 1994-95 and 1995-96 during which time the property in question had not been purchased by the assessee and there was no occasion to make investment on construction including electrical works, purchase of sanitary ware and hardware fittings etc. at the stage when the assessee was not even in possession of the property. No fact to the contrary has come on the record and thus the stand of the assessee was rightly accepted by the CIT (Appeals).

Thus, in view of our aforesaid discussions and findings, both the questions of law are answered in the negative in favour of the assessee and against the Revenue.

The appeal is, accordingly, allowed.

(Ramesh Kumar Datta, J)

V.P.Sinha/-

(Sudhir Singh, J)

U			
---	--	--	--