IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO. 15980 of 2010
TO
SPECIAL CIVIL APPLICATION NO. 15985 of 2010

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE AKIL KURESHI

and

HONOURABLE MR.JUSTICE A.J. SHASTRI

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

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RAJESH SUNDERDAS VASWANI....Petitioner(s)

Versus

ASSISTANT COMMISSIONER OF INCOME TAX....Respondent(s)

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Appearance:

MR KETAN H SHAH, ADVOCATE for the Petitioner(s) No. 1

MR MANISH J SHAH, ADVOCATE for the Petitioner(s) No. 1

MRS MAUNA M BHATT, ADVOCATE for the Respondent(s) No. 1

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CORAM: **HONOURABLE MR.JUSTICE AKIL KURESHI**
and
HONOURABLE MR.JUSTICE A.J. SHASTRI

Date : 10/10/2016

ORAL JUDGMENT

(PER : HONOURABLE MR.JUSTICE AKIL KURESHI)

1. These petitions arise in common background. Facts being similar, we may refer from Special Civil Application No.15980/2010. The petitioner is an individual. He has challenged a notice dated 28.8.2009 issued by the respondent Assessing Officer under section 153C of the Income-tax Act, 1961("the Act" for short).

2. Facts are as under. A search operation under section 132 of the Act was conducted against a group of entities (for convenience referred to as "Avirat Adi group") on 23.5.2008. According to the Revenue, during the course of such search, documents and incriminating materials belonging to the petitioner surfaced. The Assessing Officer of the searched person namely, one Kamlesh Dhanopia recorded his satisfaction on 28.8.2009 that such documents belonged to the petitioner assessee. On the basis of such satisfaction note recorded by the Assessing Officer of the searched person, the Assessing Officer of the petitioner issued the impugned notice calling upon the petitioner to furnish the return of the income for the assessment year 2003-2004. It is this notice, the petitioner has challenged on various grounds. Main ground of the petitioner however, is that the respondent authority had no jurisdiction to issue such a notice. Firstly, because

according to the petitioner, no satisfaction as required under section 153C of the Act was recorded by the Assessing Officer of the searched person and secondly, that the materials on record would in any case not permit him to record such a satisfaction since no document belonging to the petitioner was seized during such search.

3. Appearing for the petitioner, learned counsel Shri J.P. Shah vehemently contended that the authority have not produced the satisfaction recorded by the Assessing Officer of the searched person in terms of section 153C of the Act. In any case, no document belonging to the petitioner was seized during the search conducted by the authority on the Avirath Adi group of entities. The petitioner has not been engaged in any undisclosed transactions. The petitioner had not made any purchases from B. Nanji nor had made any payments for any purchase of land. The entire premise for issuing notice against the petitioner is factually incorrect. In short, he questions the very foundation for issuing notice.

4. On the other hand, learned counsel Shri Manish Bhatt for the department opposed the petition contending that the Assessing Officer of the searched person had on the basis of available materials on record formed a satisfaction which was recorded in the note. On the basis of materials being placed before the Assessing Officer of the petitioner, impugned notice came to be issued. He referred to the affidavit in reply dated 28.1.2011 filed by one Saurabh Singh to contend that there was sufficient material with the authorities to commence the assessment against the

petitioner under section 153C of the Act. At our request, he had also placed original files of the department for our perusal which contains a satisfaction note dated 28.8.2009, as also a detailed personal appraisal compiled on 21.8.2008. Referring to such materials, counsel for the Revenue submitted that in face of such overwhelming evidence, the petitions be dismissed. He contended that the petitions are filed at a premature stage and at this stage, even before the assessment is completed, the Court would not interfere. In this context, counsel relied on decisions of Supreme Court in case of **Commissioner of Income-tax v. Vijaybhai N. Chandrani** reported in (2013) 357 ITR 713(SC) and in case of **Commissioner of Income-tax and others v. Chhabil Dass Agarwal** reported in (2013) 357 ITR 357(SC) .

5. Section 153C of the Act, as it stood at the relevant time, provided that notwithstanding anything contained in sections 139, 147, 148, 149, 151 and 1534 of the Act, where the Assessing Officer is satisfied that any money, bullion, jewellery or other valuable article or thing or books of account or documents seized or requisitioned belongs or belong to a person other than the person referred to in section 153A, then the books of account or documents or assets, shall be handed over to the Assessing Officer having jurisdiction over such other person and that the Assessing Officer shall proceed against each such other person and issue notice and assess or reassess income of such other person in accordance with the provisions of section 153A of the Act. Under this provision, therefore, the first requirement would be of the Assessing Officer of the

searched person to record a satisfaction in terms of section 153C of the Act that any money, bullion, jewellery or other valuable article or thing or books of account or documents seized or requisitioned belongs or belong to a person other than the searched person.

6. In this context, we have perused the original files. This is not a case where no such satisfaction note was recorded by the Assessing Officer of the searched person. In fact, on 28. 8.2009, he had recorded that a search was conducted in case of one Kamlesh Dhanopia at his residence on 23.5.2009. During the course of search proceedings, certain loose papers were found in the premises which were seized. One such document was a computer print-out taken from the books of accounts of the present petitioner maintained on the computer and, therefore, belonged to him. In view of such facts, he was satisfied that the documents belonging to the petitioner had been seized from the residence of Kamlesh Dhanopia. In the present case, therefore, by recording brief reasons, the Assessing Officer of the searched person had recorded requisite satisfaction in terms of section 153C of the Act. The first contention of the petitioner that there was no such satisfaction note ever recorded, therefore, cannot be accepted. Whether such satisfaction could have been recorded or not and to what extent we can examine the petitioner's grievance in this respect at this stage, are the issues which, for the present, we are not commenting.

7. We may now advert to the petitioner's contention of this being a case of no evidence. According to the counsel for

the petitioner, we may recall, in the present case, the Assessing Officer of the searched person could never have recorded such a satisfaction. Before referring to the materials on record and dealing with this contention, we may notice that in case of **Vijaybhai N. Chandrani**(supra), the Supreme Court had occasion to deal with the Revenue's appeal against the judgement of Gujarat High Court in which on the basis of materials on record, the Court came to the conclusion that though the seized documents may have reference to the assessee, such documents did not belong to him. The Supreme Court left the question of true interpretation of terms "belongs or belong to" open and placed the matter before the Assessing Officer to proceed in accordance with law. In the process, the Supreme Court made the following observations :

"13. In the instant case, it transpires from the record that the jurisdictional Assessing Authority, upon having a reason to believe that the documents seized indicate escapement of income, has issued Show Cause Notices under Section 153C to the assessee for reassessment of his income during the assessment years 2001-2002 to 2006-2007. Thereafter, upon request of the assessee, the Assessing Authority has furnished him with the copies of documents seized under Section 132A. The assessee being dissatisfied with the said documents instead of filing his explanation/reply to the Show Cause Notices, has filed a Writ Petition before the High Court impugning the said notices.

14. In our considered view, at the said stage of issuance of the notices under Section 153C, the assessee could have addressed his grievances and explained his stand to the Assessing Authority by filing an appropriate reply to the

said notices instead of filing the Writ Petition impugning the said notices. It is settled law that when an alternate remedy is available to the aggrieved party, it must exhaust the same before approaching the Writ Court. In Bellary Steels & Alloys Ltd. v. CCT, (2009) 17 SCC 547, this Court had allowed the assessee therein to withdraw the original Writ Petition filed before the High Court as the said proceedings came to be filed against the show-cause notice and observed that the High Court should not have interfered in the matter as the Writ Petition was filed without even reply to the show cause notice. This Court further observed as follows:

“3….In the circumstances, we could have dismissed these civil appeals only on the ground of failure to exhaust statutory remedy, but for the fact that huge investments involving the large number of industries is in issue.”

15. We are fortified by the decision of this Court in Indo Asahi Glass Co. Ltd. v. ITO, (2002) 10 SCC 444, wherein the assessee had approached this Court against the judgment and order of the High Court which had dismissed the Writ Petition filed by the assessee wherein challenge was made to the show cause notice issued by the Assessing Authority on the ground that alternative remedy was available to the assessee. This Court concurred with the findings and conclusions reached by the High Court and dismissed the said appeal with the following observations:

“5. This and the other facts cannot be taken up for consideration by this Court for the first time. In our opinion, the High Court was right in coming to the conclusion that it is appropriate for the appellants to file a reply to the show-cause notice and take whatever defence is open to them.”

16. In the present case, the assessee has invoked the Writ jurisdiction of the High Court at the first instance without first exhausting the alternate remedies provided under the Act. In our considered opinion, at the said stage of

proceedings, the High Court ought not have entertained the Writ Petition and instead should have directed the assessee to file reply to the said notices and upon receipt of a decision from the Assessing Authority, if for any reason it is aggrieved by the said decision, to question the same before the forum provided under the Act.

17. In view of the above, without expressing any opinion on the correctness or otherwise of the construction that is placed by the High Court on Section 153C, we set aside the impugned judgment and order. Further, we grant time to the assessee, if it so desires, to file reply/objections, if any, as contemplated in the said notices within 15 days' time from today. If such reply/objections is/are filed within time granted by this Court, the Assessing Authority shall first consider the said reply/objections and thereafter direct the assessee to file the return for the assessment years in question. We make it clear that while framing the assessment order, the Assessing Authority will not be influenced by any observations made by the High Court while disposing of the Writ Petition. If, for any reason, the assessment order goes against the assessee, he/it shall avail and exhaust the remedies available to him/it under the Act, 1961."

8. In case of **Chhabil Dass Agarwal** (supra), the Supreme Court reiterated that when alternative remedy is available, the High Court would not ordinarily entertain a writ petition under Article 226 of the Constitution. The Court observed as under :

"20. In the instant case, the Act provides complete machinery for the assessment/re-assessment of tax, imposition of penalty and for obtaining relief in respect of any improper orders passed by the Revenue Authorities, and the assessee could not be permitted to abandon that machinery and to invoke the jurisdiction of the High Court under Article 226 of the Constitution when he had adequate remedy open to him by an appeal to the Commissioner of Income Tax (Appeals). The remedy under the statute, however, must be effective and not a mere formality with no substantial relief. In Ram and Shyam Co. vs. State of Haryana, (1985) 3 SCC 267 this Court has noticed that if an appeal is from "Caesar to Caesar's wife" the existence of alternative remedy would be a mirage and an exercise in futility. In the instant case, neither has the assessee-writ petitioner described the available alternate remedy under the Act as ineffectual and non-efficacious while invoking the writ jurisdiction of the High Court nor has the High Court ascribed cogent and satisfactory reasons to have exercised its jurisdiction in the facts of instant case."

9. We are conscious that these judgements do not completely fetter the powers of High Court under Article 226 of the Constitution to issue a prerogative writ in an appropriate case. It was in this context, counsel for the petitioner had strenuously urged that this being a case of no evidence and there being no reliable materials, it would not permit any person to form a satisfaction that the documents seized during the search belonged to the petitioner. Only in order to meet with such a contention, we may refer to some of the documents and other materials on record. The document in question is a print-out from the computer which was allegedly seized from the premises of the searched person Shri Kamlesh Dhanopia which carried a title Sunderdeep Builders with which the petitioner is related and it is a copy of ledger between 1.4.2007 to 31.3.2008 of the account of one B. Nanji Enterprises. It showed a debit balance of Rs.40 lacs. Two debit entries of Rs.40 lacs and 15 lacs made a total debit balance at Rs.55

lacs and on the credit side, there was a payment of Rs.15 lacs, thus leaving a debit balance of Rs.40 lacs. It is undisputed that all these payments were made through the banking channel. However, this document contained a hand written entry at the bottom which reads as under :

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1105
  40
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1145   total payment
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10. The Revenue would thus contend that this document would demonstrate that the petitioner had made total payment of Rs.11.45 crores to B. Nanji, of which Rs.40 lacs was through the banking channel. To further this argument, the Revenue would rely upon a document which the petitioner has produced at Annexure-J-1 to this petition which is a handwritten loose document containing various entries with dates and figures, total of which comes to 1105. Reference to B. Nanji is found against several of these entries. With the aid of other documents, materials and recorded statements, the Revenue would correlate this handwritten document with the ledger account of the petitioner maintained in case of B. Nanji Enterprise. In short, the Revenue's contention is that there was sufficient material to prima facie show that in such handwritten noting in the seized document, reference to 1105 was a cash payment by the petitioner to B. Nanji. In addition to appreciating these two documents, we have also taken note of affidavit in reply filed by the respondent in which it is stated inter-alia as under :

“Page No-89 of Annexure-L is the copy of the ledger account of M/s B. Nanji Enterprises Ltd. in the books of accounts of Sunderdeep Builders, proprietory concern of the petitioner. It is a computer printout taken from the books of accounts of the petitioner maintained on computer and hence belongs to the petitioner. Hence as per the provisions of section 153C of the Act as the document belonging to the petitioner was seized during the course of search, the notice under section 153C of the Act was rightly issued by the Assisstant Commissioner of Income Tax, Central Circle-2(1), Ahmedabad and duly served on the petitioner.

The assessee has challenged the legality of the notice on the ground that the notice does not states as to what has been seized from “Avirat-Adi Group” which makes the petitioner liable u/s 153C of the Income-tax Act, 1961. In this respect it is pertinent to mention that as per the Act there is no statutory or legal requirement of providing along with the notice, the details of the seized material on the basis of which the proceedings u/s 153C have been initiated. However, the copy of the relevant seized documents were duly provided to the assessee during the course of assessment proceedings along with the notice dated 23/11/2010 issued u/s 142(1) of the Act for A.Y. 2009-10.

...The petitioner himself has admitted that Page No-89 are the amounts given by the petitioner in FY. 2007-08 by cheques to Ms B. Nanji Enterprises Ltd. 'The said document indicates payment of Rs. 40,00,000/- on 17/04/07 and Rs. 15,00,000/- on 01/06/07 and receipt of Rs. 15,00,000/- on 24/10/07. The cheques issued by Sunderdeep Builder have been credited in Indian Bank A/c No. 482314869. The cheque received by Sunderdeep Builders have been credited in Lord Krishna Bank. Below, in handwriting, details of total payment of Rs. 11.45

crores are mentioned, which includes the net payment of Rs. 40 lakh as reflected in the ledger account. The noting on this page has to be read with the noting on page no. 27 and 78 of Annexure-L, a copy of which has been provided to the petitioner. As per the notings on page 27, the total payment of Rs.11.05 crores have been made by Sunderdeep Builders to B. Nanji Enterprises Ltd. To the amount Rs.11.05 crores, the amount of Rs.40,00,000/-as reflected in the ledger account has been added and the total payment has been noted at Rs. 11.45 crores. The notings on Page no. 89 are corroborated by the recordings made in other documents which were seized during the course of search and are recordings of the transactions between the petitioner and Ms B. Nanji Enterprises Ltd. Hence the contention of the petitioner is not true. The documents discussed above i.e. Pages 27,78 and 89 are enclosed herewith marked EXHIBIT-A1, A2 and A3."

11. Additionally, we have also glanced through the appraisal report. The materials on record noted above would persuade us to hold that this is not a case where the satisfaction recorded by the Assessing Officer of the searched person can be stated to be based on no material. There is thus prima facie material to suggest that incriminating documents seized during the search belonged to the petitioner. The Revenue has for the purpose of brief scrutiny available at this stage led before the Court sufficient material not to interfere with the pending assessments. Facts in all petitions are common. They are therefore, not separately recorded or referred.

12. All the petitions are therefore, dismissed.

(AKIL KURESHI, J.)

(A.J. SHASTRI, J.)

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