IN THE HIGH COURT OF JUDICATURE AT BOMBAY, NAGPUR BENCH, NAGPUR

INCOME TAX REFERENCE NO.7 OF 1999
THE COMM.OF INCOMETAX.
V/S
SHRI KRISHNARAO D.DHANWATEY (HUF),NAGPUR.

....

Office Notes, Office Memoranda of Coram, appearances, Court orders or directions and Registrar's orders	Court's or Judge's Order

....

Shri Bhoot, counsel for the appellant.

CORAM : B.P. DHARMADHIKARI & V.M. DESHPANDE, JJ.
DATED : MARCH 4, 2016.

Heard.

We have heard learned counsel Shri Anand Parchure with learned counsel Shri Bhoot on 3.3.2016 and as nobody appeared for the assessee, the matter was shown as part-heard. Today, again when the matter is called out, nobody appears for the assessee.

Following question has been referred to this Court under Section 256(1) of the Income Tax Act, 1961:

"Whether on the facts and in the circumstances of the case, the Tribunal

was justified in law in allowing the assessee's appeal holding that DCIT(A)'s order dt. 26.10.1993 is infructuous?"

The respondent is, HUF consisting of its Karta, Shri Krishnarao Dattaji Dhanwatey, his wife is Smt. Sarala and their a minor son is Sanjay. Karta and his wife (parents) executed deed of relinquishment in favour of minor son Sanjay on 12.9.1974 and gave their 2/3rd interest in the house property i.e. house No.61, Ramdaspeth, Nagpur to him. The deed was registered at Serial No.4149 with the office of the Joint Sub-Register at Nagpur on 12.9.1974 itself and the releasers accepted responsibility to complete necessary formalities. The respondent HUF then filed an application on 24.1.1983 under Section 171 of the Income Tax Act, 1961. It appears that then wealth tax assessment proceedings for Assessment Year 1978-79 pending and the request was made therein that family arrangement in the deed of relinquishment should be treated as partial partition of family in previous year relevant to assessment Year 1978-79. The

assessment officer, vide application dated 24.1.1983, was called upon to recognize partial partition by passing necessary orders under Section 171 of the Income Tax Act, 1961.

The Income Tax Officer, on 30.3.1983, passed an order and de-recognized the partial partition. He also recorded relevant reasons therefor.

This order of de-recognition was challenged by the respondent before the first appellate authority viz. The Commissioner of Income Tax (A). That authority decided the appeal on 29.11.1988. It has recorded in paragraph No.8 reasons for remanding the matter back to the Income Tax Officer. The reasons show need of consideration of necessary facts. The matter was remanded back for *de novo* consideration.

In the light of remand, the Assistant Commissioner of Income Tax, Central Circle-2, Nagpur proceeded to pass fresh orders on 20.12.1990. While passing orders again for reasons

recorded by him, he did not recognize the said partition. This order dated 20.12.1990 formed subject-matter of further appeal by the respondent assessee before the Commissioner of Income Tax (Appeal). The appellate authority on 26.10.1993 maintained the order of the Assistant Commissioner of Income Tax.

This orders of appellate authority dated 26.10.1993 was then questioned before the ITAT by the assessee. The ITAT has on 11.4.1996 set it aside.

As pointed out by learned counsel Shri Bhoot, we are satisfied that order on 11.4.1986 passed by ITAT shows total non-application of mind. The ITAT has, after noticing first order passed by the authority on 30.3.1983 and earlier appellate order dated 29.11.1988, remanded the matter back for *de novo* consideration and observed that it was not in a position to know the fate of further proceeding if any, undertaken after this remand. As there was already order of remand, it found that later order dated 26.10.1993 upholding the orders

de-recognizing partial partition could not have been passed. It has, therefore, allowed the appeal filed by the assessee.

It is apparent that the order of CIT (Appeal) passed subsequently on 26.10.1993 ought to have been perused along the relevant records by the ITAT. Perusal of order dated 26.10.1993 shows that appeal in which that order came to be passed was instituted on 15.2.1991. This verification would have enabled the ITAT to comprehend that there was fresh order of the Assistant Commissioner of Income Tax after that remand and on that fresh cause of action, an appeal was filed before the authority.

In this situation, order dated 11.4.1996 allowing the appeal of the respondent assessee is unsustainable. The order impugned in that appeal and passed by the first appellate authority on 26.10.1993 was not passed in any infructuous manner.

Accordingly, the question referred to this

Court is required to be answered in negative i.e. against the respondent and in favour of the department.

Consequently, the ITAT has to hear appeal in ITA No.61/Nag/94 for Assessment Year 1978-79 afresh in accordance with law.

The reference is answered accordingly.

JUDGE **JUDGE**

!! BRW !!