

Suchitra

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.1145 OF 2017

1. SMT. NIRUPA UDHAV PAWAR

aged about 41 years,
Indian National, Flat No.244,
Landscape Park,
Behind Reliance World,
Campal, Panaji-Goa.

2. UDDHAV MAHADEV PAWAR,

aged about 42 years,
Indian National, Flat No.244,
Landscape Park,
Behind Reliance World,
Campal, Panaji-Goa.

...PETITIONERS

Versus

1. THE ASSISTANT COMMISSIONER

OF INCOME TAX, Circle 1(1),
Office of Income Tax Department,
Aayakar Bhawan, First Floor,
5 EDC Complex, Patto Plaza,
Panaji Goa.

2. THE COMMISSIONER OF INCOME

TAX, Aayakar Bhawan, First Floor,
5 EDC Complex, Patto Plaza,
Panaji Goa.

3. THE ASSISTANT COMMISSIONER

OF INCOME TAX/INCOME, Tax
Officer, Ward (1)(4), Panaji Goa.

...RESPONDENTS

Mr. Hanumant D. Naik, Advocate *for the Petitioners*.

Ms. Amira Razaq, Advocate *for the Respondents*.

CORAM: **M. S. SONAK &
M. S. JAWALKAR, JJ.**

Reserved on: **4th October 2021**

Pronounced on: **6th October 2021**

JUDGMENT: (Per M. S. Sonak, J.)

1. Heard Mr. Hanumant Naik for the Petitioners and Ms. Amira Razaq for the Respondents.

2. Rule. With the consent of and at the request of the learned counsel for the parties, the Rule is made returnable forthwith. Even otherwise, the learned counsel for the parties had requested that this petition be disposed of finally at the stage of admission itself, since, the pleadings were complete.

3. The challenge in this petition is to the notices dated 24.03.2017 and 31.03.2017 issued under Section 148 of the Income Tax Act (said Act) seeking to reopen the assessment for the Assessment Year 2010-2011.

4. Ms. Razaq, at the outset, submitted that the petition is premature insofar as petitioner no.2 is concerned. She submitted that the procedure prescribed by the Hon'ble Supreme

Court in *G.K.N. Driveshaft (India) Limited v. Income Tax Officer – 259 ITR 19* was never followed insofar as the petitioner no.2 is concerned.

5. Technically, Ms. Razaq may have a point, but in the peculiar facts of the present case, there is no point in relegating petitioner no.2 to follow the said procedure. This is because it was even admitted by Ms. Razaq that there is no difference whatsoever, either on facts or in law insofar as the positions of the two petitioners are concerned. She pointed out that petitioner no.2 is the husband of petitioner no.1 and having regard to the provisions of Section 5A of the said Act, which are peculiar to the persons from Goa, the Department had to issue separate notices to both the petitioners.

6. Since, there is no difference whatsoever in the positions of the two petitioners, either on facts or in law, we believe that no purpose would be served by bifurcating the matter and relegating petitioner no.2 to follow the prescribed procedure at this belated stage. Besides, it was conceded that the fate of the second petitioner's case will almost entirely depend upon the fate of the first petitioner's case. Ms. Razaq also fairly pointed out that though there was no stay granted in respect of the notice issued to petitioner no.2, the Department stayed its hands in deference to

the interim order made in favor of petitioner no.1. This was because the factual, as well as legal position concerning both the notices, was the same. Having regard to all these factors, no purpose will be served in upholding the objection raised by Ms. Razaq *qua* the case of the second petitioner. There is no dispute that the procedure prescribed in *G.K.N. Driveshaft (India) Limited (supra)* was followed insofar as the first petitioner is concerned.

7. A brief reference to some factual aspects is necessary to appreciate the challenges raised in this petition. Admittedly, petitioner no.1 purchased a property bearing Survey No.26/2 at Baiguinim in a public auction held by the Goa State Co-operative Bank for a consideration of ₹1.36 crores or thereabouts. This is evidenced by the Sale Certificate dated 17.05.2006 issued by the competent authority. This Sale Certificate has been duly registered before the competent Sub-Registrar.

8. By sale deed dated 02.02.2010 the petitioner no.1 purported to transfer the suit property in favor of Nagueshwar Pandey for total consideration of ₹3 crores. Pandey issued four cheques to cover this amount out of which two cheques were post-dated. The sale deed dated 02.02.2010 specifically states

that the sale was subject to realization of the cheques issued by said, Pandey.

9. There is no dispute that the cheques amounting to ₹2 crores were dishonored and the petitioner no.1, ultimately received an amount of only ₹1 crore. There is also no dispute that petitioner no.1 filed a Civil Suit bearing No.43/2012/C before the Civil Judge, Junior Division at Panaji seeking cancellation of the registration of sale deed dated 02.02.2010 urging *inter alia* that the transfer was subject to realization of the cheque amount and in the absence of realization, there was no sale of the said property.

10. Parallely, M/s. Amina Developers Pvt. Ltd. (ADPL) claimed to have purchased the very same property bearing Survey No.26/2, Baiguinim from one Shri Ravindra Navelkar. ADPL instituted Special Civil Suit No.22/2010/A in the court of the Civil Judge, Senior Division at Mapusa to challenge the sale deed dated 02.02.2010. This suit was disposed of by a consent decree based on consent terms signed by ADPL and Pandey. The petitioner no.1 though a party to this suit did not sign the consent terms. Pandey then proceeded to enter into a development agreement dated 28.06.2013 with another company M/s. Ocean View Properties LLP (OVP).

11. OVP then instituted Special Civil Suit No.22/2014/B *inter alia* for enforcement of agreement dated 28.06.2013. OVP ultimately agreed to purchase rights of petitioner no.1, her husband petitioner no.2, and Pandey to put an end to litigation and to be in a position to own and develop the said property.

12. Therefore, a deed of sale dated 12.12.2014 was entered into by and between the various parties as aforesaid. In terms of this deed, OVP paid to the petitioner no.1 consideration of ₹2 crores, representing the amount that Pandey had failed to pay under the sale deed dated 02.02.2010. OVP paid an additional amount of ₹2.36 crores towards the share of petitioner no.2 and by way of compensation. In short, the petitioners, by the year 2014, received total consideration of ₹5.36 crores for the sale of the said property.

13. For the Assessment Year 2015-2016 therefore, the petitioners filed their return of income disclosing the entire consideration of ₹5.36 crores received by them and offered this entire income to tax. The petitioners, in fact, paid the necessary tax against capital gains received by them for the Assessment Year 2015-2016. This return was duly accepted by the Department and at least presently, there is no dispute raised about the same.

14. On 24.03.2017 however, notices were served under Section 148 of the said Act to the petitioners alleging that the income had escaped assessment for the Assessment Year 2010-2011. On 09.10.2017, petitioner no.1 demanded reasons and then filed objections. On 27.10.2017 objections were rejected. Hence the present petition.

15. Mr. Hanumant Naik submitted that the jurisdictional parameters necessary for invoking powers under Section 147/148 of the said Act do not exist in the present case. He submitted that this was a case of reopening after four years and there was no basis to hold that any material fact had not been disclosed by the assessee in the relevant assessment year. He submitted that there was no reason to believe that any income had escaped assessment particularly because the entire income was disclosed in the Assessment Year 2015-2016 and even tax was paid and accepted by the Department without any demur. He submitted that even otherwise the perusal of the sale deed dated 02.02.2010 made it very clear that the transfer was subject to realization of the cheque amount. Upon the dishonor of cheques, the assessee instituted a suit seeking cancellation of the sale deed. He, therefore, submits that the impugned notices are vitiated for failure to comply with essential jurisdictional parameters.

16. Mr. Naik also submitted that there is no dispute whatsoever that the assessee had not received the amount of ₹3 crores during the Assessment Year 2010-2011. The reasons indicated by the Department proceeded on the basis that such amount was in fact received by the assessee. He submits that the Department has to stand or fall on such reason and it is not open to the Department to now contend that income was “accrued” though not received during the relevant assessment year. He submits that the reasons once supplied, can never be varied nor supplemented in this manner. He submits that this is an additional ground for striking down the impugned notices.

17. Mr. Naik has relied upon several decisions in support of his contentions including, but not restricted to. - (i) *The Commissioner of Income Tax-8 Mumbai v. Mrs. Hemal Raju Shete – Income Tax Appeal No.2348/2013 decided on 29.03.2016*, (ii) *Smt. Raj Rani Devi Ramna v. Commissioner of Income Tax – 1992 (2) BLJR 1207*, (iii) *Commissioner of Income Tax v. Excel Industries Ltd.*, (iv) *Mira Ananta Naik and others v. Deputy Commissioner of Income Tax (Investigation) & Ors. - (2009) 221 CTR (Bom) 149*, (v) *Nilamben Sandipbhai Parikh v. Assistant Commissioner of Income Tax, Circle 4(2) – (2019) 266 Taxman 191 (Guj)*, (vi) *Commissioner of Income Tax v.*

Balbir Singh Maini – (2018) 12 SCC 354, (vii) GKN Sinter Metals Ltd. v. Ramapriya Raghavan - (2015) 371 ITR 225 (Bom) and (viii) Nivi Trading Ltd. v. Union of India – (2015) 64 Taxman.com 92 (Bombay).

18. Ms. Razaq defended the impugned notices *inter alia* relying upon the decisions in (i) *John Sebastian Zezito Lobo v. Assistant Commissioner of Income Tax, Circle-2(1), Panaji & 2 Ors. - Writ Petition No.1066 of 2019 decided on 17.08.2021*, (ii) *Assistant Commissioner of Income Tax v. Rajesh Jhaveri Stock Brokers (P.) Ltd. - (2017) 161 Taxman 316 (SC)*, (iii) *Income-tax Officer v. Lakhmani Mewal Das – (1976) 103 ITR 437 (SC)*, (iv) *Chaturbhuj Dwarkadas Kapadia v. Commissioner of Income Tax – (2003) 260 ITR 0491*, (v) *Morvi Industries Ltd. v. Commissioner of Income Tax – (1971) 82 ITR 835 (SC)*, (vi) *The Commissioner of Income Tax-111 Pune v. Dr. Arvind S. Phake – Income tax Appeal No.139 of 2015 decided on 20.11.2017* and (vii) *Commissioner of Income-tax, Delhi v. Kelvinator of India Ltd. - (2010) 187 Taxman 312 (SC)*.

19. She submitted that in this case, the assessee failed to disclose the sale deed dated 02.02.2010 and the income of ₹1 crore admittedly received by them in the relevant assessment year.

She submits that this was more than a sufficient reason to reopen the assessment. She submits that sufficiency of reasons cannot be gone into at this stage. She submits that the issue as to whether the capital gains were indeed payable or not in the Assessment Year 2010-2011 is quite irrelevant at this stage. She submits that the assesseees can file their detailed response before the assessing officer who is bound to adjudicate the matter in great detail. She submits that there is no infirmity whatsoever in the impugned notices and therefore, this petition may be dismissed, if necessary, leaving open all defenses on merits.

20. Ms. Razaq submits that the transfer of the said property was complete on the date of execution of the sale deed dated 02.02.2010 and the amount of ₹3 crores was accrued to the assesseees on the said date itself. She submits that it was incumbent upon the assesseees to have disclosed these transactions in the Assessment Year 2010-2011 itself and the subsequent disclosures for the Assessment Year 2015-2016 were not sufficient or were possibly not made in the proper assessment year. She, therefore, submits that this petition is liable to be dismissed.

21. The rival contentions now fall for our determination.

22. At the very outset, we deem it appropriate to refer to the reasons recorded by the assessment officer for reopening the assessment under Section 147 of the said Act. The same read as follows:

“ The assessee had filed return of income for A.Y. 2010-11 declaring total income of Rs.2,50,985/- and the assessment was completed u/s. 143(3) r.w.s. 153C of I.T. Act, 1961 on 27.12.2011 accepting the return income of the assessee.

It is noticed that assessee has sold one property vide sale deed dt 02.02.2010 for a sum of Rs. 3,00,000/- to Sri. Nagueshwar Pande. The sale deed was registered in the sub-registrar Ilhas, Panaji which states that the assessee has received the sale consideration of Rs.3,00,00,000/- as under:-

Rs.1,00,00,000/- Cheque No. 030519 dt. 10.02.2010

Rs.1,00,00,000/- Cheque No. 030520 dt. 15.02.2010

Rs. 45, 00,000/- DD dt. 02.02.2010 of Indian Overseas Bank

Rs. 55,00,000/- Cheque No. 030521 dt. 02.02.2010

The assessee has not declared the above transaction in her return of income for the AY 2010-11. It is learnt from the information received that the said property was purchased in 2006 for Rs.1,36,52,400/-. Thus there is concealment/ escapement of income (Long Term Capital Gain) for the AY 2010-11 as below :

Particulars	Amount (In Rs.)
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Sale Consideration (As per Sale Deed)	3,00,00,000/-
Purchase (2006)	1,36,52,400/-
Indexed Cost	(1,36,52,400 * 632/ 519) Rs.1,66,75,113
Capital Gain	1,33,75,113/-

In view of the above facts, it is abundantly clear that there is failure on the part of the assessee to disclose fully and truly all material facts necessary for her assessments for the AY 2010-11. Therefore, I have a reason to believe that income chargeable to tax amounting to Rs.1,33,75,113/- has escaped the assessment, within meaning of provision of section 147 of the Income Tax Act, 1961. Accordingly, assessment for A.Y. 2010-11 is proposed to be reopened by issuing notice u/s 148 of the I.T. Act, 1961.”

23. This Court, in a catena of decisions beginning from *Hindustan Lever Ltd. v. R.B. Wadkar, Asstt. Cit (No. 2) – 268 ITR 332* has held that the notice for reopening of assessment would stand or fall based on the reasons recorded at the time of issuing notice for reopening of assessment. This Court has held that the reasons are required to be read as recorded by the assessing officer and the same cannot be improved upon either by substitution, addition, or deletion. This Court held that the reasons recorded by the assessing officer cannot be supplemented by filing an affidavit or making any oral submission, otherwise, the reasons which were lacking in the material particulars would get supplemented, by the time the

matter reaches the Court, on the strength of the affidavit or oral submissions. Thus, the legal position is quite clear that the validity of notice for reopening of an assessment is to be examined based on the reasons recorded at the time of issuing the notice and the impugned notice cannot be supported by any additional material which does not find a place in the reasons recorded while issuing the notice.

24. Now, in this case, the reasons recorded by the assessment officer are based on the alleged receipt of sale consideration of ₹3 crores by the assesseees in terms of the sale deed dated 02.02.2010. Reference is to the actual receipt of this consideration and not to the accrual of this consideration of ₹3 crores. Even the capital gain workings in the reasons are entirely based on the premise that the entire consideration of ₹3 crores was received by the assesseees during the Assessment Year 2010-11 and not on the basis that this income was only accrued to the assesseees during the relevant assessment year. All this was supposed to be based on the disclosures made by the assesseees during the Assessment Year 2015-16 itself when the assesseees, placed on record the sale deed dated 12.12.2014 which in turn, had referred to the sale deed dated 02.02.2010.

25. In fact, the sale deed dated 12.12.2014 supersedes the sale deed dated 02.02.2010 and records the compromise reached between the petitioners, Pandey and OVP. This deed very clearly refers to the receipt of only ₹1 crore by petitioner no.1 in pursuance of sale deed dated 02.02.2010 and certainly not to the receipt of ₹3 crores during the Assessment Year 2010-11. Perhaps, realizing this difficulty, submission was now made before this Court that the consideration of ₹3 crores was “*accrued*” to the petitioners during the Assessment Year 2010-11 and therefore, there were capital gains during the said assessment year which had escaped assessment due to the failure on the part of the assessee to disclose the transaction dated 02.02.2010.

26. As noted earlier, the reasons proceeded on the basis that an amount of ₹3 crores was in fact received by the petitioners during the Assessment Year 2010-11. The submission now made before the Court is not based on any factum of receipt but rather, based on “*accrual*”. This was not at all the reason that prompted the assessing officer to reopen the assessment. A fresh reason or a new reason, cannot be advanced either orally or by filing an affidavit to add to or supplement to the reasons already recorded. This is impermissible in terms of the law laid down in *Hindustan Lever Ltd. (supra)*. This decision was reiterated in *GKN Sinter*

Metals Ltd. (supra). Applying this principle, therefore, the impugned notices are required to be quashed and set aside.

27. Apart from the aforesaid, we find that there was no omission on the part of the assesseees to disclose fully or truly all the material facts necessary for the assessment Year 2010-11. There is no dispute that the assesseees had purchased the property in question for ₹1.36 crores or thereabouts in the year 2006. Even in terms of the reasons furnished by the assessing officer the indexed cost for the Assessment Year 2010-11 came to ₹1.66 crores or thereabouts. From the material relied upon by the respondents, only an amount of ₹1 crore was actually received by the assesseees during the Assessment Year 2010-11. Thus, for the said assessment year, there was no question of any capital gains and consequently, no question of any income escaping assessment.

28. There was nothing on record to suggest that the assesseees were following the accounting system based on accruals rather than receipts. Rather, the material on record placed by the assesseees themselves before the Department indicated that the sale in the deed dated 02.02.2010 was subject to realization of the cheque amount. Further, once the cheques were dishonored, the assesseees instituted a suit seeking cancellation of the sale deed and

not for the recovery of the balance amount. The ultimate sale deed dated 12.12.2014 has to be construed pragmatically because, by that stage, the parties had settled their disputes, compromised the litigations and the entire objective was to vest full ownership rights in the suit property in OVP free from all encumbrances or claims from other parties.

29. Even in *Rajesh Jhaveri Stock Brokers (P.) Ltd. (supra)* the Hon'ble Supreme Court has held that the function of the assessing officer is to administer the statute with solicitude for the public exchequer with an inbuilt idea of fairness to taxpayers. True, at this stage, what is required is "*reason to believe*", but not the established fact of escapement of income. Even sufficiency of material is not to be gone into at this stage but at the same time, as was explained in *Lakhmani Mewal Das (supra)* it is open to the assessee to contend that the assessing officer did not hold the belief that there had been non-disclosure. The existence of the belief could always be challenged though not the sufficiency of the reasons for the belief. The expression "*reason to believe*" does not mean a purely subjective satisfaction. The reason must be held in good faith. It cannot be merely a pretense. More importantly, it is open to the Court to examine whether the reasons for the formation of the belief have a rational connection with or a relevant bearing on the formation of the belief and are

not extraneous or irrelevant for the section. To this extent, the action of the assessing officer is open to challenge in a Court of law.

30. In *Oriental Insurance Co. v. Commissioner of Income-tax – 378 ITR 421 (Delhi)*, it was held that powers under Section 147 of the said Act can be invoked only in cases where the assessing officer has reason to believe that income chargeable to tax has escaped assessment. The reason to believe must be based on tangible material and cogent facts. The powers cannot be exercised merely on suspicion or apprehension. A bonafide reason to believe is a necessary pre-condition that clothes the assessing officer with the power to reopen the assessment that has otherwise attained finality. The reason to believe must have a direct nexus and a live link with the formation of the opinion that taxable income has escaped assessment. Therefore, where notice of reopening was based on an erroneous assumption of fact, such notice was quashed.

31. In *Dr. Ajit Gupta v. Assistant Commissioner of Income Tax – 383 ITR 361 (Delhi)*, the reason for reopening the assessment was a mistaken factual premise that the assessee had changed the system of accounting from the mercantile to cash system. Since this factual premise was found to be

erroneous, the reopening of the assessment was held unsustainable.

32. In *Calcutta Discount Co. v. ITO – 41 ITR 191 (SC)*, the Hon'ble Supreme Court has explained the circumstances in which a writ petition can be entertained to question a notice seeking to reopen the assessment. It was held by the Bench of five judges that where the jurisdictional parameters were not satisfied, it became the duty of the courts to grant relief to the assessee and the courts would be failing to perform their duty if relief were refused. In *Jeans Knit Private Ltd. v. Deputy Commissioner of Income Tax – 390 ITR 10 (SC)*, the Hon'ble Supreme Court distinguished *CIT V. Chhabil Das Agarwal 357 ITR 357 (SC)* and relying on *Calcutta Discount (supra)* set aside the High Court's order dismissing petitions challenging notices under Section 148 of the said Act seeking to reopen assessment that had attained finality.

33. By applying the aforesaid restrictive parameters as well, we find that the only material relied upon by the assessing officer, in this case, is the material supplied by the assessee themselves along with their return for the Assessment Year 2015-16. There is nothing in this material that could constitute a ground for a reason to believe that there was a failure to disclose a

material fact and further, that an income had escaped assessment for the Assessment Year 2010-11. The reasons stated by the assessing officer speak about the receipt of ₹3 crores by the assessee during the Assessment Year 2010-11. However, based on the very material relied upon by the assessing officer, this contention was virtually given up and a new reason about “*accrual*” was sought to be put forward.

34. Reliance was placed on the decision of the Hon'ble Supreme Court in the case of *Morvi Industries Ltd. (supra)* to submit that certain accounting systems contemplate income on an accrual basis. While it is true that certain systems indeed admit income on an accrual basis, this was not even the reason recorded by the assessing officer for the reopening of the assessment. As noted earlier, neither can new reasons be furnished nor can there be any additions to the reasons already disclosed or the reasons already existing and recorded at the time of the issuance of the impugned notices. Therefore, *Morvi Industries Ltd. (supra)* can be of no assistance to the Department in the present case.

35. Other decisions relied upon by Mr. Naik need not be considered in detail. In *Smt. Raj Rani Devi Ramna (supra)* the Division Bench of Patna High Court, relying on the decision of

the Division Bench of Calcutta High Court in *Nita Chandra Naskar v. Smt. Champahlna Debi – (1919) 29 CLJ 250* has held that the true test of determining whether there is a transfer of ownership or not is the intention of the parties to the transaction. If the intention is that the title should pass immediately, even though the consideration has not been paid, the title passes, i.e., failure to pay the consideration for a conveyance does not defeat the conveyance except where there is an agreement that it should take effect only if the consideration is first paid. This decision is considered in several other decisions which take the view that title does not pass on mere execution of a document but what is important is the intention of the parties which is to be gathered from the document itself. Based upon such principles, the Division Bench held that the parties before it had clearly intended that despite the execution and registration of the sale deeds, transfer was to be effective only on payment of the entire consideration amount and since, there was no such entire payment, there was no liability for capital gains tax under Section 45 of the Income Tax Act.

36. In the facts of the present case, there is no necessity to even rely upon the aforesaid principles laid down by the Division Bench of the Patna High Court. Even without adverting to such

principles, the reasons referred to above are quite sufficient to quash the impugned notices.

37. The other decisions relied upon by Ms. Razaq do not assist the case of the Department in this matter. The factual position in *John Lobo (supra)* was entirely different. There, no sooner than the objections were filed, a petition was instituted before this Court and it is in that context that we held that the petition was premature. Similarly, *Chaturbhuj Kapadia (supra)* concerns the case of a transfer within the meaning assigned to this term under Section 2(47)(v). Such an issue is not directly involved in the present case. Besides, this decision will now have to be considered in the light of the subsequent decisions of the Hon'ble Supreme Court in *Balbir Singh Siyami (supra)* as well as *M/s. Sheshasai Steels Pvt.Ltd v. Assistant Commissioner of Income Tax – Civil Appeal No.9209/2019 decided on 04.12.2019*.

38. The decision in *Dr. Arvind S. Phake (supra)* also turns on facts that are not at all comparable to the fact situation in the present case. The issue involved in the said matter was entirely different.

39. The decision in *Kelvinator of India Ltd. (supra)* assists the case of the petitioners because this decision holds that the assessing officer has the power to reopen the assessment provided there is tangible material to conclude that there is escapement of income from assessment and further, the reasons must have a live link with the formation of the belief. A mere change in opinion cannot be a reason to reopen. This decision holds that there is a conceptual difference between power to review and power to reassess and that the assessing officer has no power to simply review.

40. For all the aforesaid reasons we allow this petition and quash and set aside the impugned notices. There shall be no order for costs.

M. S. JAWALKAR, J.

M. S. SONAK, J.