IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.1548 OF 2023

Sahjeevan Co-operative Housing Society Limited
Through Mr. Sandip Anant Deshpande
Age: 57 years, Occupation: Business
R/o Sahjeevan Co-operative Housing Society,
Samarth Nagar, Aurangabad

… Petitioner

Versus

1. Principal Commissioner of Income Tax,
Income Tax Department, Income Tax Office,
Pune

2. Assessment Officer, Income Tax
Income Tax Department, Income Tax Office,
N-5 Cidco, Aurangabad … Respondents

…

Mr. Sanjeev B. Deshpande (Senior Advocate) a/w Mr. Chetan B. Chaudhari,
Advocate for the Petitioner
Mr. Alok S. Sharma, Standing Counsel for Respondent Nos.1 & 2

…

CORAM : MANGESH S. PATIL &
S. G. CHAPALGAONKAR, JJ.

RESERVED ON : 21.02.2023

PRONOUNCED ON : 03.03.2023

JUDGMENT : [PER S. G. CHAPALGAONKAR, J.]

1. The petitioner, a Co-operative Society registered under the provisions of Co-operative Societies Act, 1960 approaches this Court under Article 226 of the Constitution of India with the following prayers :

> *"A) By allowing the writ petition and by issuing appropriate writ in the nature of certiorari or of like nature, impugned order passed by Ld. Assessment Officer, Income Tax, Aurangabad dated 29.07.2022 under section 148A (d) of Income Tax Act, 1961 (Exh. 'I') may kindly be quashed and set aside.*
>
> *B) By allowing the writ petition and by issuing appropriate*

> *writ in the nature of certiorari or of like nature, impugned notice passed by Ld. Income Tax Officer, Ward-1 (5), Aurangabad dated 29.07.2022 under section 148 of Income Tax Act, 1961 (Exh. 'J') may kindly be quashed and set aside."*

2. Learned Senior Advocate Mr. Sajiv B. Deshpande appearing for the petitioner would submit that petitioner/society entered into the settlement deed in respect of land situated in Survey No.91, CTS Nos.17851, 17857, 17858, 17859, 17860 and 17849/5, which has been duly approved by the Superintendent of Land Records, Aurangabad under its order dated 18th May, 2015. All the aforesaid plots are kept intact as per measurement plan No.306/2008. This area of Survey No.91 is deducted from CTS No.17849/5. It is ordered that some portion of layout in Survey No.91 is actually part of CTS No.17849/5 owned by Mr. Ranjit Darak. The settlement deed has been arrived with an intention to correct the mistake caused while sanctioning the layout. The petitioner/society has secured the area owned and possessed by five members as per Map No.306/2008 in Survey No.91. There was nothing like transfer of the property for consideration in favour of either petitioner/society or Mr. Ranjit Darak.

3. Learned Senior Advocate would further submit that the petitioner/society had submitted it's Income Tax Returns (ITR) for the assessment year 2015-2016. The government value of the said land was Rs.51,70,500/- and indexed cost of acquisition was Rs.24,31,464/-. Accordingly, capital gain was computed at Rs.27,39,036/- which is less than Rs.50 Lakhs. The Income Tax Authorities accepted the aforesaid returns of the year 2014-2015.

4. Learned Senior Advocate would further submit that respondent no.2 issued a notice to the petitioner under Section 148A (b) of the Income Tax Act, 1961 [hereinafter referred to as 'the Act' for short] alleging that the petitioner/society sold the property at CTS No.17852 at sale consideration of Rs.6,51,000/- against the Government valuation of Rs.51,70,500/-. The

petitioner is liable to pay capital gain tax on Rs.45,19,500/-. Accordingly, the petitioner was called upon to show-cause. The petitioner responded to the notice and pointed out that it would not be permissible under law to open the assessment of income tax returns filed by the petitioner for the year 2014-2015 since the valuation of alleged escaped assessment is less than Rs.50 Lakhs. The indexed cost of acquisition, litigation cost and capital gain in the alleged transaction was less than Rs.50 Lakhs. Therefore, the proceeding under Section 148 of the Act could not have been initiated after six years.

5. Per contra, learned Advocate Mr. Alok Sharma for respondent nos.1 & 2/Revenue would submit that the disputed question of facts cannot be gone into in exercise of writ jurisdiction under Article 226 of the Constitution of India. The petitioner was served with the notice under Section 148 of the Act regarding the escaped assessment. The petitioner was called upon to furnish his reply. The said notice was served upon the petitioner and a reply was filed to the said show-cause notice. The Assessment Officer has also recorded reasons. The sale consideration of the sold property is taken as per the stamp duty valuation which is Rs.51,70,500/- as per Section 50C of the Act. The claim of the petitioner regarding indexed cost of acquisition amounting to Rs.24,31,464/- was not verifiable at that stage. Hence, the Long-Term Capital Gain for the year under consideration was taken at Rs.51,70,500/- which is above Rs.50 Lakhs and represents the assets. The Assessment Officer has accordingly concluded that there is escapement of income to the tune of Rs.51,70,500/- in case of assessee for the assessment year 2015-2016.

6. Learned Advocate Mr. Alok Sharma for respondent Nos.1 & 2/Revenue would submit that the petitioner has alternate efficacious remedy to file an appeal under Section 246 of the Act challenging the order/notice. The writ petition against the show-cause notice need not be entertained. He

would rely upon respective Judgments of the Supreme Court, Delhi High Court as well as High Court of Madhya Pradesh, which are as under:

(i) **ACIT Vs. Rajesh Jhaveri Stock Brokers (P) Ltd.** reported in **(2007) 161 Taxman 316 (SC)**

(ii) **Raymond Woollen Mills Ltd. Vs. Income-Tax Officer & Others** reported in **(1999) 152 CTR 418 (SC)**

(iii) **Harinder Singh Bedi S/o Shri Teja Singh Bedi Vs. Union of India & Others**, in Writ Petition No.22734/2022 dated 27th October, 2022

(iv) **ERNST and Young U.S. LLP Vs. Assistant Commissioner of Income Tax (International Taxation),** reported in **(2022) 114 CCH 341 [HC-Delhi]**

7. We have considered the respective submissions and considered the documents relied upon by the parties. The petitioner is challenging the show-cause notice issued under Section 148 of the Act. The bone of contention of the petitioner is that the provisions of reopening under the Act have undergone an amendment by the Finance Act, 2021. The preconditions for issue of notice under Section 148 of the Act must be satisfied before issuance of such notice. The impugned show-cause notice dated 29th July, 2022 is in respect of alleged escaped assessment for the assessment year 2015-2016. In view of the amended provisions of the Act, the reassessment would not be permissible after expiry of six years particularly, when escaped assessment amount is less than Rs.50 Lakhs. The impugned notice is without jurisdiction and the same is liable to be quashed and set aside.

8. Perusal of the impugned notice would show that it has been issued on the basis of information regarding sale deed of the land that was received by the revenue from old ward 2(3), Aurangabad. As per sale deed available on the record, the assessee has sold a piece of land at CTS No.17852, Samarth Nagar, Aurangabad for a consideration of Rs.6,51,000/- and market value of such land for stamp duty purpose is determined at Rs.51,70,500/-. However,

for the year under consideration assessee's return of income was not filed, capital gain on consideration of the aforesaid land remained undisclosed. After considering the reply submitted by the petitioner to the show-cause notice, the Assessment Officer has arrived at the conclusion that the valuation of the escaped assessment is more than Rs.51,70,500/- for the assessment year 2015-2016.

9. It is trite, this Court has recognized some exceptions to the rule of alternative remedy, i.e., where the statutory authority has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial procedure, or has resorted to or invoked the provisions which are repealed and such other similar matters. However, while exercising the power under Article 226 of the Constitution, the Court would certainly take note of the legislative intent manifest in the provisions of the Act and would exercise jurisdiction consistent with the provisions of the enactment.

10. In this case, *prima facie,* there is some material on the basis of which a notice for reopening of escaped assessment has been issued. It would be for the petitioner/assessee to show that there are no reasons for reopening the assessment or the valuation of escaped assessment is less than Rs.50 Lakhs which dis-entitles reopening of the assessment after the prescribed statutory period. It would be difficult for us to render our findings regarding correctness or otherwise of the grounds shown in the show-cause notice. If the Authorized Officer has formed the opinion that income tax has escaped and reassessment is necessary, if he has formed the opinion that the valuation of escaped assessment is more than Rs.50 Lakhs based on some material and has also recorded reasons, it is for the petitioner/assessee to establish that the view taken by the Authorized Officer is contrary to the material on record or it is perverse.

11. When the challenge to the show-cause notice is based on disputed

questions of facts, this Court would be slow in entertaining the writ petition in exercise of jurisdiction under Article 226 of the Constitution of India particularly, when decision of authority would be susceptible to appeal in terms of Section 246 of the Act.

12. In view of the aforesaid discussion, we are not inclined to entertain the writ petition. Hence, the writ petition is dismissed accordingly.

(S. G. CHAPALGAONKAR, J.) **(MANGESH S. PATIL, J.)**

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