IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 1746 OF 2024

Sumathi Janardhana Kurup **...Petitioner**
Versus
Income Tax Officer, Ward-28(3)(1), Mumbai **...Respondent**

Ms. Ritika Agarwal a/w Ms. Ayesha S. Ansari i/b Acelegal for Petitioner.
Mr. Arjun Gupta for Respondent-Revenue.

CORAM: K. R. SHRIRAM &
DR. NEELA GOKHALE, JJ.
DATED: 12th February 2024

PC:-

1. Ms. Agarwal states a physical copy of reply has been handed over to her this morning and she may have to file a rejoinder.

2. Having considered the petition, we do not think there is any need to file a rejoinder. Petition can be disposed at this stage because we are not at all satisfied with the order passed by Respondent. In our view, it is an unacceptable order.

3. Petitioner is a senior citizen aged 75 years. During the year under consideration, i.e., Assessment Year 2015-2016, for which Petitioner has not filed return of income since there was no taxable income, Petitioner paid a sum of Rs. 10,00,000/- in two tranches, i.e., Rs. 5,00,000/- on 28th February 2015 and another Rs. 5,00,000/- on

2nd March 2015 to one M/s. Lucina Land Development Limited ("**Lucina**") against allotment of a flat being Flat No. 5C-2061, Rose in the joint name of Petitioner and her grand-daughter Divya.

4. It is Petitioner's case that this amount as well as the amounts paid earlier to Lucina came out of redemption of Fixed Deposits, Loans from the daughter and son-in-law etc. It is also Petitioner's case that the total consideration for the said flat payable was Rs. 44,03,000/-, of which Petitioner has till date paid Rs. 28,04,337/- of which only Rs. 10,00,000/- were paid during Assessment Year 2015-2016. Ms. Agarwal stated that the balance of Rs. 15,98,663/- has to be paid in the year 2025 when the possession of flat will be given.

5. Petitioner had initially received a notice dated 11th June 2021 under Section 148 of the Income Tax Act, 1961 ("**the Act**"). The notice was not proceeded with. Subsequently, after the Apex Court's judgment in the matter of ***Union of India v. Ashish Agarwal*** [1], a fresh notice dated 26th May 2022 under Section 148A(b) of the Act was served upon Petitioner. It is alleged in the notice that the department had carried out a search and seizure action under Section 132 of the Act in the case of M/s. India Bulls and its group concerns on 13th July 2016. During the search operation, there was some material they found regarding unaccounted income, which included on-money

1. [2022]444 ITR 1 (SC).

(cash) receipts on sale of certain flats/units by different entities for the group which *inter-alia* included an entity M/s. Lucina Land Development Limited and Lucina has admitted having received cash from different customers, which included Petitioner. It is also alleged that Lucina has admitted having received a sum of Rs. 20,91,200/- from Petitioner. Based on this information, the notice under Section 148A(b) of the Act has been issued.

6. Petitioner replied vide a letter dated 13th June 2022, which has been relied upon in the affidavit-in-reply. It is stated in the reply that only Rs. 28,04,337/- has been paid to Lucina of which Rs. 10,00,000/- were only paid during the relevant assessment year and the balance was still payable and Petitioner is not filing return of income as her income was below taxable limits. It is also stated in the reply that the source of payment for the flat is from redemption of Fixed Deposits, Loans from the daughter and son-in-law. The total payments made for the flat also is tabulated in the reply. Further, there is a categorical denial that any amount has been paid in cash to the builder in addition to the basic price of the flat. A final defence also has been taken that the case also does not qualify within the ambit of Section 149 of the Act, as there is no income chargeable to tax represented in the form of an 'asset', which has escaped assessment amounting to Rs. 50,00,000/- or more and therefore, the notice issued under Section 148 of the Act was not valid.

7. After the order dated 23rd July 2022 under Section 148A(d) of the Act was passed, an assessment order has been passed and Petitioner admits having filed an appeal. But the concern is, Petitioner will be directed to deposit 20% of the tax amount and Petitioner is not in a position to pay the same.

8. Ms. Agarwal stated that when on the face of order under Section 148A(d) of the Act it could not have been passed, Petitioner who is 75 years old and looking after her 88 years old husband suffering from Parkinson, should not be made to go through the misery of waiting for the appeal itself to be heard and also having to deposit 20% of the demand. Ms. Agarwal also submitted that penalty proceedings will also be issued and Petitioner will have to endure that also.

9. In view of the peculiar facts and circumstances of the case, we decided to entertain this petition under Article 226 of the Constitution of India.

10. In the order dated 23rd July 2022 passed under Section 148A(d) of the Act, it records Petitioner has denied having paid any cash to Lucina. The Assessing Officer ("**AO**") says Petitioner, however, did not submit any documentary evidence in support of her claim. The only basis on which an allegation is made that Petitioner has paid cash is a statement of somebody from Lucina that it received cash from Petitioner. Moreover, there is nothing on record to indicate that Petitioner has paid the entire amount of Rs. 44,03,000/-. Further, in the order, it is stated that the income of source for purchase of immovable property of Rs. 64,94,200/- remained unexplained and therefore, it would fall within the meaning of "assets" as per Explanation-1 of Section 149 of the Act. There is no explanation as to when it is the AO's case that the market value of the flat itself was only Rs. 51,55,000/-, how could the property be valued at Rs. 64,94,200/-. This has been done, in our view, simply to get over the fetters placed under Section 149(1)(b) of the Act. The AO has not explained any of these factors.

11. Even in the assessment order, it is stated "therefore, during the assessment proceedings, the source of payments alongwith on-money payment towards the purchase of flat have been asked to assessee. However, assessee has failed to provide the justified reply in regard to the complete source of payments, which have been made during the Assessment Year under consideration for purchase of flat." During the assessment year, only a payment of Rs. 10,00,000/- has been paid and there is nothing that the AO has produced to show that any amount in excess of Rs. 50,00,000/- has been paid during the assessment year. The entire basis is the letter received from Lucina. In our view, that alone is not enough, particularly when assessee has denied having paid any cash to Lucina. The onus is on the Revenue to show evidence that assessee has in fact paid cash and purchased immovable property of Rs. 64,94,200/-. Simply relying on a letter allegedly from Lucina is not enough. In our view, there is no tangible matter to issue notice under Section 148A or Section 148 of the Act.

12. We also note from the assessment order that in any case this amount of Rs. 20,91,200/- has been offered by Lucina to tax before the Settlement Commission. If that is the case, we wonder how can the amount be taxed again in the hands of Petitioner.

13. In the circumstances, in our view, the impugned order dated 23rd July 2022 passed under Section 148A(d) of the Act has to be quashed and set aside. Ordered accordingly. Consequently, the notice issued under Section 148 of the Act and the assessment order also are quashed and set aside.

14. In view of the above, Ms. Agarwal states they shall immediately take steps to withdraw the appeal filed. Statement accepted.

15. Petition disposed. No order as to costs.

(DR. NEELA GOKHALE, J.) **(K. R. SHRIRAM, J.)**

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