



Niti

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.496 OF 2023

1. SMT. SUNITA
PURUSHOTTAM VIRGINCAR,
(since deceased, through LRs)
Indian National, about 85 years of
age, r/o. Jose Inacio Loyola Road,
Margao - Goa 403601.
PAN: ABAPV7967Q,
Duly represented by her lawful
Power of Attorney,
Shri. Vissu Purshottam Virgincar,
about 57 years of age, Indian
National, s/o. Smt. Sunita
Purshottam Virgincar, r/o. Jose
Inacio Loyola Road, Margao - Goa
403601, duly authorized by the
Petitioner herein vide the Power of
Attorney dated 10.08.2021.

1a. MR. VISSU VIRGINCAR,
son of late Mrs. Sunita Virgincar,
aged about 61 years, married,
Indian National, businessman;

1b. MRS. LINDA VIRGINCAR,
wife of Mr. Vissu Virgincar,
aged about 57 years, married,
Indian National, housewife.

Both residents of H No 478,
Near Maruti Mandir, Layamati
Davorlim, Navelim Salcete South
Goa 403801.

1c. MRS. GOPIKA SHEKHAR
POY RAITURCAR,
daughter of Late Mrs. Sunita
Virgincar, aged about 62 years,
married, Indian National,
housewife and her husband;

1d. MR. SHEKHAR POY
RAITURCAR, son of Mr. Govind
Poy Raiturcar, aged 65 years,
married Indian National,

Both Residents of A 406 4th Floor
Tridentia Panache Near Chinmay
Mission, Landmark Gogol Margao
403601.

1e. MRS. SEEMA GAURISH
NAIK, daughter of Late Mrs.
Sunita Virgincar, aged about 58
years, married, Indian National,
housewife and her husband;

1f. MR. GAURISH ANANTA
NAIK, son of Mr. Ananta Naik,
aged about 62 years, married
Indian National,

Both Residents of resident of C/o
Kitchen Love, Ground Floor
Apartment, Behind Loyala High
School, Comba Margao - Goa.

... PETITIONERS

Versus

1. INCOME-TAX OFFICER,
WARD 4, MARGAO,

Having his office at Blessing
Pioneer Complex, Old Market,
Opp. District Court,
Margao - Goa 403601.

2. ADDITIONAL/ JOINT/
DEPUTY ASSISTANT/
COMMISSIONER OF INCOME-
TAX,
National Faceless Assessment
Centre/ National e-Assessment
Centre, New Delhi.

3. PRINCIPAL
COMMISSIONER OF INCOME
TAX,

Having his office at Aayakar
Bhavan, Plot No.5, EDC Complex,
Patto Plaza, Panaji, Goa - 403 001.

... RESPONDENTS

Mr Rahul Sarada (through V.C.) with Mr Gaurang Panandikar
and Ms E. Dukle, Advocates for the Petitioner.

Ms Susan Linhares, Standing Counsel for the Respondents.

CORAM: **M. S. KARNIK &
VALMIKI MENEZES, JJ.**

Reserved on: **27th JUNE 2024**

Pronounced on: **4th JULY 2024**

JUDGMENT : (*Per M.S. Karnik, J.*)

1. Heard learned Counsel for the parties.
2. Rule. Rule returnable forthwith at the request of and with the consent of the learned Counsel for the parties.

3. By this petition under Articles 226 and 265 of the Constitution of India, the petitioner seeks to challenge the notice dated 28.05.2019 issued under Section 148 of the Income Tax Act, 1961 (IT Act, for short). The ground of challenge is that the impugned notice is without jurisdiction, without complying with the preconditions required for initiating proceedings under Section 148 of the IT Act and that the same have been initiated without any material on record.

4. The facts in brief are that the petitioner filed a Return of Income (ROI) on 31.03.2017 declaring a total income of ₹17,57,864/-. The petitioner disclosed a sale consideration of ₹2,95,07,000/- and arrived at a capital gain of ₹16,54,200/- after reducing cost of acquisition with indexation at ₹2,78,52,800/-.

5. On 14.08.2018, survey action under Section 133A of the IT Act was carried out in the case of M/s. Adwalpalkar Constructions & Resorts Pvt. Ltd. In the post-survey proceedings, it was found that by a Sale Deed cum exchange executed on 20.01.2015 between the petitioners and M/s. Adwalpalkar Constructions & Resorts Pvt. Ltd., the actual payment made by M/s. Adwalpalkar Constructions & Resorts Pvt. Ltd. to the petitioners was ₹3,59,50,000/-. According to the Assessing Officer, the petitioner has not disclosed the amount of ₹64,43,000/- (₹3,59,50,000/- - ₹2,95,07,000/-) in her ROI dated 31.03.2017. Thus, it is the case of the Revenue that the petitioner had failed to disclose fully and truly all material facts in her ROI dated 31.03.2017.

6. A notice under Section 148 was issued on 28.05.2019. Since there was no response from the petitioner to the above notice under Section 148 of the IT Act, the respondent issued notice under Section 142(1) of the IT Act requesting the petitioner to furnish ITR in response to the notice under Section 148 of the IT Act. In compliance to the notice dated 28.05.2019, the petitioner filed ROI on 08.02.2021, almost after two years.

7. Thereafter, respondents issued notice under Section 143(2) read with Section 147 of the IT Act dated 24.02.2021 giving reasons for reopening the assessment as under:

“The petitioner filed a return of income (ROI) dated 31.03.2017 declaring a total income of ₹17,57,864/-. The petitioner has disclosed a sale consideration of ₹2,95,07,000/- along with capital gains of ₹16,54,200/- after reducing the cost of acquisition with indexation at ₹2,78,52,800/- capital gains. From the material available on record actual payment made by M/s. Adwalpalkar Constructions & Resorts Pvt. Ltd. to the petitioner was ₹3,59,50,000/-. The petitioner did not disclose the amount of ₹64,43,000/- in her ROI. Thus, the petitioner had failed to disclose fully and truly all the material facts in her ROI.”

It was the case of the Revenue that in the ROI dated 08.02.2021, the petitioner did not declare capital gain on the ground that the capital asset was agricultural land. However, no documentary evidence in support of the contention that the capital asset was agricultural land was furnished by the petitioner.

8. The petitioner filed objections on 26.02.2021 against the reasons for reopening the assessment. The respondent no.2 – Additional/Joint/Deputy Assistant/Commissioner of Income Tax vide order dated 16.07.2021 rejected the objections and requested the petitioner to furnish information in compliance to notice under Section 142(1) dated 05.02.2021.

9. Learned counsel for the petitioner, assailing the impugned order, submitted that the reasons recorded contained patent errors, which make it clear that no income chargeable to tax has escaped assessment.

(a) According to the original petitioner, the petitioner only had a 50% share in the properties since the original petitioner and her late husband were governed by the Portuguese Civil Code applicable to the residents of Goa.

(b) Ignoring the registered sale deeds which are available in the public domain and information regarding which would have been clearly transmitted to the Income Tax Department, clearly show that the original petitioner was only a 50% owner of the properties.

(c) Ignoring the fact that sale consideration corresponding to her share of 50% had been duly offered in the Return of Income and hence there was no escapement of income.

(d) Comparison of ₹3,59,50,000/- (total sale consideration as per Section 50C for property no.II) with ₹2,95,07,000/-

(original petitioner's share in sale consideration of all three properties) is an erroneous comparison.

In support of his submissions, learned counsel relied upon the following decisions:

*(i) Nivi Trading Ltd. V/s. Union of India*¹

*(ii) Ankita A. Choksey V/s. ITO & Ors.*²

*(iii) Smt. Nirupa Udhav Pawar & Anr. V/s. ACIT & Ors.*³

10. On the other hand, Ms Susan Linhares learned counsel for the respondents argued in support of the impugned notices and proceedings while opposing the petition. It is submitted that from the material it is clear that the petitioner did not disclose the amount of ₹64,43,000/- in her ROI. Thus, the petitioner had failed to disclose truly and fully all material facts in her return of income. Further, it is submitted that the petitioner did not declare capital gain on the ground that the capital asset was agricultural land. However, no documentary evidence in support of the contention that the capital land was agricultural was furnished by the petitioner. The order rejecting the objection dated 16.07.2021 is passed as the petitioner did not make available the Sale Deed wherein she claims half share in the properties.

11. Heard learned Counsel for the parties. Before dealing with the submissions, we find it apposite to refer to the legal position laid down

¹ (2015) 375 ITR 308 (Bom.)

² (2019) 411 ITR 207 (Bom.)

³ WP No.1145 of 2017 decided on 06.10.2021

in the decisions placed by the learned counsel for our consideration. In *Nivi Trading Ltd. V/s. Union of India* (supra), it is observed that:

*“The important words in Section 147 of the IT Act are **“has reason to believe”** and they are stronger than the words **“is satisfied”**. The belief entertained by the Income Tax Officer must not be arbitrary or irrational. It must be reasonable or in other words it must be based on reasons which are relevant and material. While the Court cannot investigate into the adequacy or sufficiency of the reasons which have weighed with the Income Tax Officer in coming to the belief, but the Court can certainly examine whether the reasons are relevant and have a bearing on the matter in regard to which he is required to entertain the belief before he can issue notice under Section 147(a). If there is no rational and intelligible nexus between the reasons and the belief, so that, on such reasons, no one properly instructed on the facts and law could reasonably entertain the belief, then, the exercise undertaken by the Income Tax Officer can be interfered with.”*

12. In *Ankita A. Choksey V/s. Income Tax Officer & Ors.* (supra), it is held thus:

“It is a settled position in law that the AO acquires jurisdiction to issue a reopening notice only when he has reason to believe that income chargeable to tax has escaped assessment. The basic condition precedent is applicable whether the return of income was processed under Section 143(1) of the Act by intimation or assessed by scrutiny under Section 143(3) of the Act. Further, the reasons to believe that income chargeable to tax has escaped Assessment must be on correct facts. If the facts, as recorded in the reasons are not correct and the assessee points out the same in its objections, then the order on objection must deal with it and prima facie, establish that

the facts stated by it in its reasons as recorded are correct. In the absence of the order of objections dealing with the assertion of the assessee that the correct facts are not as recorded in the reason, it would be safe to draw an adverse inference against the Revenue.”

13. In *Smt Nirupa Udhav Pawar & Anr. V/s. The Assistant Commissioner of Income Tax & Ors.* (supra), this Court in para 23 held as under:

“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.”

14. From the materials on record and the submissions made, the total sale consideration disclosed by the original petitioner in the return of income admitted by the Revenue in the recorded reasons at page 261 of

the paperbook is ₹2,95,07,000/-. The original petitioner's share in the property was 50%. The sale consideration disclosed is as under:

Sr. No	Property	Sale Consideration as per Sec. 50C		Offered in Return of Income by original petitioner
		Total	Share of original petitioner (50%)	
1.	Property I - Described in Para 6.1/pg.11 of Petition - Sale Deed dated 04.11.2014 (Ex H/103)	1,37,16,000 (Clause 13 @ Pg.110)	68,58,000	70,00,000 (Pg. 237)
2	Property II - Described in Para 6.2/pg. 13 of Petition - Sale Deed dated 15.01.2015 (Ex I/ 121)	3,59,50,000 (Clause 16 @ Pg. 133)	1,79,75,000	1,79,75,000 (Pg. 237)
3	Property III - Described in Para 6.3/pg. 14 of Petition - Sale Deed dated 20.01.2015 (Ex J/175)	90,64,000 (Clause 15 @ Pg. 186)	45,32,000	45,32,000 (Pg. 237)
Total sale consideration disclosed by the original petition in the Return of Income (Admitted by the Revenue in the recorded reasons @ pg. 261)				2,95,07,000

15. The Revenue is seeking to reopen the assessment under Section 148 of the IT Act on the alleged ground that the income chargeable to tax has escaped assessment. The recorded reasons in detail state that "... From the material available on record, the actual payment made by M/s. Adwalpalkar Constructions & Resorts Pvt. Ltd (TAN : BLRA14822D) to the Assessee is ₹3,59,50,000. The Assessee has not disclosed an amount of ₹64,43,000/- in her return of income filed. ...". According to learned Counsel for the petitioner, recorded reasons contain the

following patent errors which make it clear that no income chargeable to tax has escaped assessment:

i. Ignoring that the original petitioner only had 50% share in the Properties since the original petitioner and her late husband were governed by the Portuguese Civil Code applicable to residents of Goa.

ii. Ignoring the sale deeds which are available on record clearly show that the original petitioner was only a 50% owner of the Properties.

(iii) Ignoring the fact that sale consideration corresponding to her share of 50% had been duly offered in the Return of Income (Pg. 236 to 238) and hence, there was no escapement of income.

iv. Comparison of ₹3,59,50,000/- (Total sale consideration as per sec. 50C for Property No. II) with ₹2,95,07,000/- (Orig. Petitioner's share in sale consideration of all 3 Properties) is an erroneous comparison.

16. Learned Counsel for the petitioner submitted that the order dated 16.07.2021 suffers from the aforesaid jurisdictional error. So far as the reason cited by the respondents for rejecting the explanation, “In the return of income, the original petitioner had not stated that she was governed by the provisions of Section 5A of the income Tax Act”, it is the submission of the learned Counsel for the respondent that such

reasoning is ex-facie incorrect and untenable in law. We find force in this submission.

17. Let us consider the submissions in the context of Section 5A of the IT Act which reads as under:

“5A. Apportionment of income between spouses governed by Portuguese Civil Code.

(1) Where the husband and wife are governed by the system of community of property (known under the Portuguese Civil Code of 1860 as "COMMUNIAO DOS BENS") in force in the State of Goa and in the Union territories of Dadra and Nagar Haveli and Daman and Diu, the income of the husband and of the wife under any head of income shall not be assessed as that of such community of property (whether treated as an association of persons or a body of individuals), but such income of the husband and of the wife under each head of income (other than under the head "Salaries") shall be apportioned equally between the husband and the wife and the income so apportioned shall be included separately in the total income of the husband and of the wife respectively, and the remaining provisions of this Act shall apply accordingly.

(2) Where the husband or, as the case may be, the wife governed by the aforesaid system of community of property has any income under the head "Salaries", such income shall be included in the total income of the spouse who has actually earned it.]”

The husband of the original petitioner had already passed away in the year 1986 and hence there was no question of the original petitioner being governed by Section 5A of the IT Act which is applicable only to the division of incomes between the spouses who are governed by the

Portuguese Civil Code. Section 5A does not deal with the division of assets. Hence, the question of stating that the original petitioner was governed by the provisions of Section 5A of the IT Act does not arise. In our view, therefore, the original petitioner could not be governed by the provisions of Section 5A of the IT Act.

18. Moreover, we find that the substantive rights of the original petitioner were governed by the provisions of the Portuguese Civil Code. The fact that the original petitioner is governed by the Portuguese Civil Code has been duly brought before the respondents. In our opinion, mere non-mention of the same in the return of income would not give rise to a situation where the tax on the sale of property beyond the share of the original petitioner could be taxed in her hands. The respondents do not appear to have disputed that the original petitioner was indeed governed by the provisions of the Portuguese Civil Code and this was already on record of the Revenue (Exhibit E/97). Moreover, the petitioner's husband had passed away way back in the year 1986 and the share of her husband had devolved from the date of his demise equally on his children. This position was also known to the Revenue when their return of income was filed.

19. The next reason cited by the Revenue for rejecting the explanation is, "Copy of the Sale Deed was not available at the time of recording of reasons". We find that even such reasoning is fallacious and not tenable in law. The information from the office of the Sub-Registrar's for any registration is duly transmitted to the respondents.

The execution of such Sale Deed was already on record. In such a case if the respondents fail to take note of the document which was available for transmission to the respondents from the Sub-Registrar's office, in our view, the assumption of jurisdiction will have to be regarded as erroneous. In any case, we find that at the time of passing of the order dated 16.07.2021, the Sale Deeds (which were available) ought to have been taken into consideration.

20. For the reasons aforesaid, we are satisfied that in view of the aforesaid jurisdictional errors, the notice dated 28.05.2019 and the order dated 16.07.2021 deserve to be quashed and set aside. The petition is allowed in terms of prayer clause (a) which reads as:

“(a) This Hon’ble Court be pleased to issue a Writ of Certiorari or a writ in the nature of Certiorari or any other appropriate writ, order or direction under Article 226 of the Constitution of India calling for the records of the petitioner’s case and after examining the legality and validity thereof quash and set aside the notice dated 28.05.2019 (Exhibit A) issued by respondents under Section 148 of the Act seeking to reopen the assessment for the assessment year 2015-16 and order rejecting objections dated 16.07.2021 (Exhibit Y).”

21. No order as to costs.

VALMIKI MENEZES, J.

M. S. KARNIK, J.