C. R.

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE ANTONY DOMINIC
&
THE HONOURABLE MR. JUSTICE DAMA SESHADRI NAIDU

TUESDAY, THE 7TH DAY OF MARCH 2017/16TH PHALGUNA, 1938

ITA.No. 49 of 2015

AGAINST THE ORDER IN ITA 19/2014 of I.T.A.TRIBUNAL,COCHIN BENCH DATED 12-12-2014

APPELLANT:

SUNIL THOMAS
KANJOOPARAMBIL BUILDING, CONVENT ROAD, KOCHI - 682035.
PAN : ABRPT 6088M

BY ADVS.SRI.V.V.ASOKAN (SR.)
SRI.K.I.MAYANKUTTY MATHER
SRI.R.JAIKRISHNA

RESPONDENTS:
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1. INCOME TAX OFFICER
WARD NO.2(1), RANGE -2, C.R. BUILDING, I.S PRESS ROAD.
KOCHI - 682018.

2. COMMISSIONER OF INCOME TAX (APPEALS) III,
6TH FLOOR, KERA BHAVAN, SRVH ROAD, ERNAKULAM - 682 011.

R1-R2 BY ADV. SRI.P.K.R.MENON,SR.COUNSEL, GOI(TAXES)
R1-R2 BY ADV. SRI.JOSE JOSEPH, SC, FOR INCOME TAX

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON 07-03-2017, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

C. R.

ANTONY DOMINIC & DAMA SESHADRI NAIDU, JJ.

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I.T.A.No.49 of 2015

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Dated this the 7th day of March, 2017

JUDGMENT

Antony Dominic, J.

This appeal is filed by the assessee challenging the order of the Income Tax Appellate Tribunal, Cochin Bench in ITA 19/2014 concerning the assessment year 2009-2010. The issue raised in this appeal is confined to assessment of an amount of ₹1,66,01,834/- as the income of the assessee on the ground that he failed to prove the genuineness of the transaction and the capacity of the donor, his brother, to advance the money as required under Section 68 of the Income Tax Act. The said order was confirmed by the Commissioner of Income Tax (Appeals) and the Income Tax Appellate Tribunal by dismissing the appeals filed by the assessee. It is in this

background, the assessee has filed these appeals framing the following questions of law for consideration of this court:

> *"i) Whether the Department is right in law to enquire and insist the assessee to prove the source of the donor, when the assessee discharges his primary burden that the subject amount has received by way of Gift from his brother (relative) through banking channel? Were not the authorities below in error as regards their interpretation about Section 68 of the Income Tax Act, 1961?*
>
> *ii) Is not the onus and burden of proof on the department to probe into and establish by itself the source of the donor placed abroad when the assessee establishes the fact that he received the amount by way of gift from his brother (exempted under Section 56(2) through banking channel?*
>
> *iii) Whether on the facts and circumstances of the case the authorities below were justified in holding that a sum of Rs.1,66,01,834/- is the undisclosed income of the assessee?"*

2. Briefly stated, the facts of the case are that the assessee is the Director of a private limited company known as Core Fundamental and Developers Private Limited. In his return for

the assessment year 2009-2010, the assessee had declared a total income of ₹1,95,000/-. The return was processed under Section 143(1) of the Income Tax Act. The case was selected for scrutiny through CASS and a notice under Section 143(2) of the Income Tax Act was issued. It was found that the assessee had shown income from other sources as 'nil' claiming deduction under Section 56(2) in respect of gift of ₹1,66,01,834/- received from his brother, Sri.Sudeep Thomas, a Non Resident Indian employed in Dubai. Various opportunities were given to the assessee to prove the requirements of Section 68 of the Act such as identity of the donor, genuineness of the transaction and the capacity of his brother to advance the money, etc.

3. Reading of the impugned orders show that the identity of the donor, his brother, Sri.Sudeep Thomas, was not a matter of dispute. However, insofar as the genuineness of the

transaction and the capacity of the donor are concerned, the conclusion arrived at by the authorities concurrently is that the assessee has failed to prove these requirements. Insofar as these two aspects are concerned, it is seen that the assessee has produced only documents which evidenced that the money was transferred to him through banking channels and from the account of his brother in Abudabi Commercial Bank. However, despite repeated opportunities that were extended to the assessee, no evidence whatsoever was produced by him to prove that his brother had capacity to gift the amounts gifted to his brother or that the transaction was genuine. It was in these circumstances that the Income Tax Officer assessed the amount as income of the assessee.

4. However, the learned counsel for the appellant contended that admittedly, money has been gifted by his brother. His brother is a Non Resident Indian employed in

Dubai having substantial earnings. The money has been transferred from his bank account in Abudabi Commercial Bank to the assessee's bank, and has been utilised by the assessee, the manner of which has also been explained to the Assessing Officer.

5. According to the learned counsel, once these factual aspects are proved to his satisfaction, the Assessing Officer ought to have accepted the explanation offered by the assessee and exempted the amount from the assessment under Section 56(2) of the Act. In support of this plea, counsel invited our attention to the judgments of the Gauhati High Court in ***Nemi Chand Kothari v. Commissioner of Income Tax [264 ITR 254 (Gauhati)]*** and the Delhi High Court in ***Commissioner of Income Tax v. Value Capital Services Private Limited [(2008) 307 ITR 334]*** and *ITA 429/2003* ***(Commissioner of Income Tax v. Dhooti Pearls and Investment Limited)***. On the other

hand, the learned Senior Counsel for the Revenue argued that it is plain and evident that the assessee, despite various opportunities granted, did not prove the requirements of Section 68 of the Act. Therefore, according to him, the amount cannot escape assessment at the hands of the assessee.

6. We have considered the submissions made.

7. The fact that an amount of ₹1,66,01,834/- was received by the assessee from his brother Sudeep Thomas by bank transfer in instalments during the assessment year is not in dispute. Assessee claimed benefit of exemption under Section 56(2) of the Income Tax Act. A reading of Section 56 shows that, it deals with income from other sources. As per this Section, income from every account which is not to be excluded from total income shall be chargeable to income tax under the head, income from other sources, if it is not chargeable to income tax under any of the heads specified in items A to E of

Section 14 of the Act. Sub-section 2 enumerates the incomes that are chargeable to income tax under the head, income from other sources. However, in the proviso to sub-section 2, the legislature has declared that Section 56(2) shall not apply to any sum of money received from persons enumerated in clauses (a) to (g). Clause-(a) provides that Section 56(2) does not apply to any sum of money received from any relative. The term "relative" has been explained in the explanation to the proviso and among others, brother or sister of the individual is also included therein. Therefore, the benefit of the proviso is available to any sum received from the brother of an assessee, and such exclusion from assessment can be claimed by an assessee only if he satisfies the requirements of Section 68 occurring in Chapter-VI of the Act.

8. Section 68 provides that where any sum is found credited in the books of the assessee maintained for any

previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by the assessee is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income tax as the income of the assessee of that previous year. Therefore, it is the duty of the assessee to offer explanation about the nature and source of any sum found credited in the books maintained by him for the previous year or if the explanation offered by him is not found satisfactory to the Assessing Officer, the sum credited in the books of accounts of the assessee may be charged to income tax as the income of the assessee of that previous year.

9. The scope of Section 68 has been considered by the Apex Court in its judgment in ***CIT v. P. Mohankala [2007] 291 ITR 278 (SC)***. Following the said judgment, this Court considered an identical question in the judgment in I.T.A.

No.210/2010 and connected case. In that judgment, this Court reiterated that a reading of Section 68 shows that identity of the creditor, the genuineness of the transaction and the creditworthiness of the creditor are the conditions that are required to be established by an assessee. It was held that once these three essential requirements are prima facie proved by the assessee, then the onus would shift to the Department and that merely by establishing the identity of the creditor or anyone of the other conditions of Section 68, the assessee cannot claim to have discharged his burden.

10. Bearing in mind these principles, if the facts that are available in this case are appreciated, it is obvious that though the assessee had established the identity of the creditor, viz. his own brother, the assessee has not succeeded in establishing either the genuineness of the transactions, the capacity or creditworthiness of the creditor. The fact that the amount

received by him has been through banking channels, or that the amount has been utilised by him in any particular manner would not improve the case of the assessee. According to us, the genuineness of the transaction and the creditworthiness of the creditor ought to have been proved by the assessee by producing necessary documents with respect to the monetary ability of the creditor to make such substantial gifts to the assessee. Although it is seen from the records that, assessee and his brother had at different points of time promised to make available documents to prove these requirements of Section 68, such documents were not made available at any stage of the proceedings. In fact, even in the affidavit dated 11.02.2015 filed by Sri.Sudeep Thomas, the assessee's brother, before this Court, apart from furnishing his employment particulars and confirming the gift that he made and also furnishing the details of the utilisation of the amounts by the

assessee, he has not made any endeavour to explain the genuineness of the transactions or his creditworthiness. In such circumstances, we are not in a position to find any illegality in the order of the Assessing Officer confirmed by the first appellate authority and the Tribunal assessing the sum of ₹1,66,01,834/- as the income of the assessee.

11. Insofar as the judgments of the Gauhati High Court in ***Nemi Chand Kothari v. C.I.T.*** (supra) and the Delhi High Court in ***CIT v. Value Capital Services P. Ltd.*** (supra) relied on by the learned counsel for the assessee are concerned, we find that the judgment of the Gauhati High Court has been relied on by the Delhi High Court while disposing of I.T.A.429 of 2003 and the relevant paragraphs of the judgment reads as follows:

> "12. The Court has examined the decision of the Gauhati High Court in Nemi Chand Kothari (supra). Therein the Gauhati High Court referred to Section 68 of the Act and observed that the onus of the

Assessee "to the extent of his proving the source whom which he has received the cash credit." The High Court held that the AO had ample 'freedom' to make inquiry "not only into the source(s) of the creditor, but also of his (creditor's) sub-creditors and prove, as a result, of such inquiry, that the money received by the Assessee, in the form of loan from the creditor, though routed through the sub-creditors, actually belongs to, or was of, the assessee himself." Thereafter, the High Court, on a harmonious construction of Section 106 of the Evidence Act and Section 68 of the Act, held as under:

> "What, thus, transpires from the above discussion is that while Section 106 of the Evidence Act limits the onus of the Assessee to the extent of his proving the source from which he has received the cash credit, Section 68 gives ample freedom to the Assessing Officer to make inquiry not only into the source(s) of the creditor, but also of his (creditor's) sub-creditors and prove, as a result, of such inquiry, that the money received by the Assessee, in the form of loan from the creditor, though routed through the sub-creditors, actually belongs to, or was of, the Assessee himself. In other words, while Section 68 gives the liberty to the Assessing Officer to enquire into the source/ sources from where the creditor

has received the money, Section 106 makes the Assessee liable to disclose only the source(s) from where he has himself received the credit and it is not the burden of the Assessee to show the source(s) of his creditor nor is it the burden of the Assessee to prove the creditworthiness of the source(s) of the sub-creditors. If Section 106 and Section 68 are to stand together, which they must, then, the interpretation of Section 68 has to be in such a way that it does not make Section 106 redundant. Hence, the harmonious construction of Section 106 of the Evidence Act and Section 68 of the Income Tax Act will be that though apart from establishing the identity of the creditor, the Assessee must establish the genuineness of the transaction as well as the creditworthiness of his creditor, the burden of the Assessee to prove the genuineness of the transactions as well as the creditworthiness of the creditor must remain confined to the transactions, which have taken place between the Assessee and the creditor. What follows, as a corollary, is that **it is not the burden of the Assessee to prove the genuineness of the transactions between his creditor and sub-creditors nor is it the burden of the Assessee to**

> **prove that the sub-creditor had the creditworthiness to advance the case credit to the creditor from whom the cash credit has been, eventually, received by the Assessee.** It, therefore, further logically follows that the creditor's creditworthiness has to be judged vis-a-vis the transactions, which have taken place between the Assessee and the creditor, and **it is not the business of the Assessee to find out the source of money of his creditor or of the genuineness of the transactions, which took between the creditor and sub-creditor and/or creditworthiness of the sub-creditors, for, these aspects may not be within the special knowledge of the Assessee**."
> (emphasis supplied)"

12. A reading of the aforesaid judgment of the Delhi High Court and the extracted portion of the judgment of the Gauhati High Court would show that after discussing the burden of proof that is required to be discharged by the assessee, the Delhi High Court has finally concluded that the burden does not extend to proving the sub-creditors creditworthiness. In our

view, that principle has no application insofar as the case of the assessee is concerned for the reason that the assessment has been completed against the assessee primarily on the basis that he has failed to prove his creditor's creditworthiness and not sub-creditors creditworthiness. Secondly, these judgments do not dilute the burden of proof on the assessee, in discharge of which alone the onus would shift to the Assessing Officer. According to us, the judgment would have had relevance if the assessee had proved his brother's source of income to the Department and the Department had demanded proof of creditworthiness of the assessee's creditor's creditor, which has not been done in this case. Therefore, these judgments are of no assistance to the assessee in contending that he has discharged the burden under Section 68 of the IT Act.

In conclusion, we are of the considered opinion that the Assessing Officer, the first appellate authority and the Tribunal

has not committed any illegality justifying interference. Therefore, answering the questions of law in favour of the Revenue and against the assessee, this appeal is dismissed.

Sd/-
ANTONY DOMINIC
JUDGE

Sd/-
DAMA SESHADRI NAIDU
JUDGE

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P.S. TO JUDGE