IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 19549 of 2018
With
R/SPECIAL CIVIL APPLICATION NO. 19550 of 2018
With
R/SPECIAL CIVIL APPLICATION NO. 19551 of 2018

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE J.B.PARDIWALA **Sd/-**
and
HONOURABLE MR. JUSTICE ILESH J. VORA **Sd/-**

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	YES
2	To be referred to the Reporter or not ?	YES
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	NO

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KANTIBHAI DHARAMSHIBHAI NAROLA
Versus
THE ASSISTANT COMMISSIONER OF INCOME TAX, WARD 3(2)(4)

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Appearance:
MR TUSHAR HEMANI, SR.ADVOCATE with MS VAIBHAVI K.PARIKH for the Petitioner(s) No. 1
MRS KALPANAK RAVAL(1046) for the Respondent(s) No. 1

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CORAM: **HONOURABLE MR. JUSTICE J.B.PARDIWALA**
and
HONOURABLE MR. JUSTICE ILESH J. VORA

Date : 06/01/2021

COMMON ORAL JUDGMENT
(PER : HONOURABLE MR. JUSTICE J.B.PARDIWALA)

1. Since the issues raised in all the captioned writ-applications are interrelated, those were heard analogously and are being disposed of by this common judgment and order.

2. For the sake of convenience, the Special Civil Application No.19549 of 2018 is treated as the lead matter.

3. By this writ-application under Article 226 of the Constitution of India, the writ-applicant seeks to challenge the legality and validity of the notice dated 28th March 2018 (Annexure-A to the writ-application) issued by the respondent under Section 148 of the Income Tax Act, 1961 (for short, 'the Act 1961') seeking to reopen the writ-applicant's income tax assessment for the Assessment Year 2011-12 on the ground of being illegal, contrary to law and without jurisdiction.

4. The facts giving rise to this writ-application may be summarised as under :

5. The writ-applicant derived income from a partnership firm, salary, capital gains and income from other sources during the Assessment Year 2011-12, i.e. the year under consideration.

6. It appears from the materials on record that the writ-applicant along with three other co-owners (writ-applicants of the connected writ-applications) sold a parcel of agriculture land bearing Revenue Survey No.203/2, Khata No.2367, old tenure land admeasuring 7000 sq.yards of Draft Town Planning Scheme No.50, Final Plot No.68, situated at village Katargam, Surat, to two individuals, namely, Ankitkumar Gagjibhai

Koshiya and Swintubhai Arvindbhai Mavani, vide the sale-deed dated 29th March 2011 for the total sale consideration of Rs.1,46,33,000=00.

7. It is the case of the writ-applicant that the sale consideration was received by cheque. The details as to the share holdings of all the four co-owners of the land in question are as follows :

Name	**Share**
Kantibhai Dharamshibhai Narola (Petitioner)	1/6th
Vijaybhai Dharamshibhai Narola	1/6th
Jerambhai Bhikhabhai Khokariya	1/3rd
Ambalal Laljibhai Patel	1/3rd

8. The writ-applicant filed his return of income for the Assessment Year 2011-12 on 29th December 2011 declaring the total income at Rs.6,67,350=00, which included the long-term capital gain of Rs.22,48,496=00 arising on account of sale of the land in question.

9. The case of the writ-applicant for the year under consideration was selected for scrutiny and various details were called for by the then Assessing Officer and the same were duly furnished by the writ-applicant from time to time.

10. It is the case of the writ-applicant that he had furnished a declaration in writing at the stage of the original assessment, whereby it was pointed out that he himself along with three other co-owners had sold the land in question. The

writ-applicant also furnished the purchase-deed as well as the sale-deed with respect to the land in question.

11. Upon due examination of all the relevant aspects of the matter, the then Assessing Officer chose not to make any addition in respect of the capital gains arising on account of the sale of the land in question while framing the assessment under Section 143(3) of the Act 1961 vide order dated 31st December 2013.

12. It appears that after a period of four years from the end of the relevant Assessment Year, the respondent issued the impugned notice dated 28th March 2018 under Section 148 of the Act 1961 for the purpose of reopening of the assessment for the year under consideration.

13. The reasons assigned for reopening of the assessment are as under :

> *"In the case of assessee, a piece of information was received from the DCIT, CC-4, Surat, regarding that a search and survey operation was carried at the residential and business premises in the case of K.Star Group on 17.08.2016. During the course of search and survey, it was found that the M/s. K. Star Corporation was purchased land amounting to Rs.1,46,33,000/-, situated at moje. Katargam, Dis: Surat, having F.P. No. 68, T.P. No.50, R.S. No. 203/2, sale deed registration no. SRT/4/KTG/7068/2011 dated 25.03.2011. Total area 5853 Sq. and Meters = 7000 sq. yards. The project "Silverstone River" was developed by M/s. K.Star Corporation upon the said piece of land. The*

rate of purchase of the above piece of land is Rs.20,000/- per Sq. yard and the purchase value of the piece of land mentioned in the said working is Rs.13,08,80,100/- (may be after some deductions) but the sale deed is made for Rs.1,46,33,000/- only. This proved that the M/s. K.Star Corporation has made unaccounted cash investment of Rs.11,62,47,100/- (Rs. 13,08,80,100/- less Rs.1,46,33,000/-) for purchase of the said land piece of land. The actual and sole developers of the project is Kishorbhai Bhurabhai Koshiya. As such, Shri Kishorbhai Bhurabhai Koshiya made unaccounted cash investment of Rs.11,62,47,100/-, for purchase of the aforesaid land, upon which, the project "Silverstone River' was developed by the assessee group. Similarly, the above unaccounted cash payments and by the assessee also constitute unaccounted income of the seller of the land. The assessee i.e. Shri Kantilal Dharmashibhai Narola was one partner of seller of the land. As per the information, the assessee Shri Kantilal Dharmashibhai Narola has received unaccounted cash receipts of Rs.2,90,61,775/- (as per the assessee share 25% of Rs.11,62,47,100/-) and not shown his return of income for the A.Y. 2011-12.

Information has been analysis and consciously considered. On the perusal of the details received from the DCIT, Central Circle-4, Surat, during the course of survey and search proceedings, it was found that the M/s. K.Star Corporation has made unaccounted investment of Rs.11,62,47,100/- for purchase of the said piece of the land. In this case, the assessee i.e. Shri Kantilal Dharmashibhai Narola has

received unaccounted cash of Rs.2,90,61,775/- (25% of Rs.11,62,47,100/-) during the F.Y. 2010-11 relevant to A.Y. 2011-12. On the verification of the return of income filed by the assessee, it is appeared that he has not disclosed the amount of Rs.2,90,61,775/- cash receipts during the year under consideration and same is requires to be taxed as an unaccounted income of the assessee for A.Y. 2011-12.

In view of the above facts and circumstances of the case, I have therefore reason to believe that income of Rs.2,90,61,775/- has escaped assessment in this case, for which the case of the assessee for A.Y. 2011-12 needs to be reopened within the meaning of section u/s 147 of the I.T. Act."

14. The writ-applicant filed his objections to the reasons referred to above vide letter dated 30th November 2018, which read as under :

"1. The assessee was in receipt of reasons recorded for reopening of the assessee's case for A.Y. 2011-12. From the reason recorded it is evident that during the course of search and survey proceedings in the case of K.Star Group it is found that M/s K.Star Corporation has purchased land amounting to Rs.1,46,33,000/- having total area of 5853 Sq. mts. equivalent to 7000 Sq. yards. In the reasons your Good Self alleged that as per "seized incriminating document" found during the search proceedings the rate of purchase of land is Rs.20,000/- per sq. yard and total purchase value as per said "seized incriminating document" comes to Rs.13,08,80,100/-. On the basis of said alleged working

*Your Good Self have stated that the assessee being one of co-owner of land and having 25% share received cash of Rs.2,90,61,775/- [116247100 (130880100-14633000) * 25%] which was not shown in return of income. On the basis of said alleged working your Good Self have stated that the assessee being one of co-owners of land and having 25% share received cash of Rs.2,90,61,775/- which was not shown in return of income.*

The assessee vehemently objected the alleged receipt of unaccounted cash for the sale of land to M/s K.Star Corporation. However to file detailed objection against your good selves belief of escapement of income i.e. Rs.2,90,61,775/-, the assessee requested Your Good Self to forward the copy of alleged "seized incriminating document" relied upon to work out the rate of purchase of land.

2. With reference to captioned subject the assessee is in receipt of aforesaid letter wherein your Good Self have forwarded the seized incriminating information received from ADIT (Inv) on the basis of which reopening of the assessee's case for A.Y. 2011-12 was made. The said information/excel sheet is reproduced herein below for ready reference purpose :

2	S.N.203/2, FP-68, TP-50 (KATARGAM), LAXMIVADI, SURAT			
	SILVERSTONE RIVER	SQ.FT.	AVERAGE	TOTAL
	SOLD	122475	3434	420635489

	UNSOLD	33699	4800	185755200
	TOTAL	161174	3762	606390689
	LAND COST	7000 * 20000		130880100
	AVERAGE CONSTR. COST PER SQ.FT.	161174	1500	241761000
	TOTAL COST			372641100
	BALANCE			233749589
	SHARE - KB	100		233749589

3. From the reasons it is evident that :

(a) During the course of search and survey proceedings in the case of K.Star Group it is found that M/s K.Star Corporation has purchase land amounting to Rs.1,46,33,000/- having total area of 5853 Sq. mts equivalent to 7000 Sq. yards.

(b) As per working the rate of purchase of land is Rs.20,000/- per sq. yard and total purchase value as per said workings comes to Rs.13,08,80,100/- as against sale deed of Rs.1,46,33,000/-.

(c) On the basis of alleged working your Good Self have concluded that Shri Kishorbhai Bhurabhai Koshiya, the sole key person of K.Star Corporation has made unaccounted investment of Rs.11,62,47,100/- for purchase of land.

(d) On the basis of said alleged working your Good Self have stated that the assessee being one of co-owner of land and having 25% share received cash of Rs.2,90,61,775/- which was not shown in return of income.

3. The assessee vehemently objects to the alleged receipt of cash from M/s K.Star Corporation or Kishorbhai Bhurabhai Koshiya amounting to Rs.2,90,61,755/- and consequential reopening of his case for A.Y. 2011-12. The sale consideration was received as per document value only.

4. At the outset the assessee state that from the reasons recorded for reopening it is evident that the sole base for the current year's reopening is the alleged details found during the course of search proceedings at K.Star Group. In this connection the assessee state that, now as per the settled law in view of various judicial ruling any proceedings/ additions on the basis of third party evidences is bad in law. The assessee vehemently object to the allegation of the receipt of cash towards the sale of land to M/s K.Star Corporation.

5. In reasons recorded for reopening Your Good Self have solely relied on the working reproduced above found during the course of search and seizure proceeding in the case of K.Star group. In this regard it is submitted that the said sheet seems to be the estimate sheet prepared by the K.Star

Group. This sheet shows the estimated working of project of Silverstone river showing thereof the no. of square feet booked, its average rate, total amount of booked flats, un-booked no. of Sq feets, the estimated rate at which the flats may be booked and its total amount, land cost showing therein the area in Sq. yards, its rate per Square meter and total cost of land. Area of Square foot to be constructed, Average cost of construction per Square Foot and total estimated cost of construction. Working of total estimated cost, total estimated collection and estimated balance amount. Thus as seen above all the figures mentioned in the above reproduced sheet are on estimated basis and therefore the land cost of Rs.13,08,80,100/- cannot be considered as actual consideration received by the assessee along with his co-owners.

6. Further it is submitted that the assessee had not made any transaction with K.Star Corporation. As informed by Your Good Self in the aforesaid letter the said incriminating document on which Your Good Self is relying upon was seized from the back office of M/s. K.Star Corporation. The assessee had sold the land under reference to Shri Swintubhai Mavani and Shri Ankitbhai Koshiya. In this regard copy of sale deed is enclosed herewith. M/s. K.Star Corporation is an unknown entity for the assessee and the assessee had not executed any agreement or made any transactions with the said firm. It also came to the knowledge of the assessee that M/s. K.Star Corporation was not into existence at the time of execution of sale deed. Therefore reopening made on the

basis of the document seized from an unknown entity is not justified and therefore the reopening proceedings should be quashed.

7. Further nowhere in the above sheet it is mentioned that the assessee along with other co-owners have received Rs.13,08,80,100/- for sale of land. The assessee has not received any amount over and above the document value i.e. Rs.36,58,250/- (25% of Rs.1,46,33,000/-). The land cost mentioned in the sheet may be the estimated market value of the land as on the date of preparing the sheet. Thus the assessee vehemently objects alleged receipt of unaccounted cash for the sale of land to M/s. K.Star Corporation just on the basis of the estimate sheet.

8. Further, there is no failure on the part of the assessee to disclose the particulars of sale of land in question during the course of original assessment proceedings and accordingly current reassessment proceedings beyond 4 years is bad in law and need to be quashed.

In view of what is stated herein above, the assessee vehemently object alleged receipt of unaccounted cash and consequential reopening of its case for A.Y. 2011-12. Therefore the assessee requests your goodselves to drop the reassessment proceeding initiated under section 148 of the Act."

15. The objections came to be disposed of by the respondent vide order dated 3rd December 2018, which reads as under :

"As per the information available on record, the assessee along with other co-owners has sold a property for a total sale consideration of Rs.1,46,33,000/- only whereas the seized incriminating documents actual sale was made for Rs.13,08,80,100/- hence, receipt of on-money to the tune of Rs.11,62,47,100/- was allegedly received by the sellers of the land, wherein the assessee's share comes to Rs.3,27,20,025/- (1/4th share). Thus, there was good enough reason to believe that income has escaped assessment within the meaning of section 147 of Income-tax Act, 1961 and accordingly the case was re-opened. The provision of Section 147 of the I.T. Act and ratio of various case laws delivered in the context of the above provisions have imparted a clear direction to the A.O. under which circumstances a case can be re-opened and what are the pre-requisites for doing so. It is worthwhile to note that in all the case laws of the Apex Court as elaborately discussed hereunder, it is commonly held that what is required to re-open a case is "Reason to believe" but not to establish facts of escapement of income. The sufficiency or correctness of the material is not to be considered because it is open to the assessee to prove that the facts assumed by the Assessing Officer in the notice were erroneous (Raymond Woolen Mills vs. ITO [(1999) 236 ITR 34 (SC)].

(i) In this case, notice u/s.148 of the I.T. Act is issued after recording reason applicable to the relevant A.Y. As observed by the Hon'ble Supreme Court in the case of "Centre Provinces Manganese Ore Co. Ltd. vs. ITO (1991) 191 ITR 662, for initiation of action u/s.147(a) (as the

provision stood at the relevant time) fulfillment of the two condition is essential. At that stage, the final outcome of the proceeding is not relevant. In other words, what is required is "Reason to believe" but not to establish fact of escapement of income. At the stage of issue of notice the only question is whether there was relevant material on which a reasonable person could have formed a requisite belief. Whether the material would conclusively prove the escapement is not the concern at this stage. This is so because the formation of belief by the Assessing Officer is within the realm of subjective satisfaction."

16. Being dissatisfied with the above, the writ-applicant is here before this Court with the present writ-application.

SUBMISSIONS :

17. Mr.Tushar Hemani, the learned senior counsel, assisted by Ms.Vaibhavi Parikh, the learned counsel appearing for the writ-applicant, vehemently submitted that the assessment for the year under consideration was framed under Section 143(3) of the Act 1961 and the same is sought to be reopened beyond the period of four years from the end of the relevant Assessment Year on the ground that the Assessing Officer has received information that certain amount was received by the writ-applicant in cash towards his share of the sale consideration.

18. Mr.Hemani would argue that there is nothing on record to even remotely indicate that there was failure on the part of the

writ-applicant to make full and true disclosure of the transaction. The capital gains earned on the sale of land was duly disclosed in the return of income. The then Assessing Officer, after minute examination of all the relevant aspects, had consciously chose not to make any addition in respect of the capital gains while framing the assessment under Section 143(3) of the Act 1961. The respondent now proposes to touch the very same issue by reopening the case of the writ-applicant, which is nothing but mere change of opinion.

19. Mr.Hemani submitted that the writ-applicant and the other co-owners had no transaction worth the name with M/s. K.Star Corporation. M/s. K.Star Corporation is a third party. In the course of the search, which might have been carried out in the case of M/s. K.Star Corporation, some documents might have been collected, and relying on the same, it is now sought to be said that the total sale consideration received was Rs.13,08,80,100=00 as against the sale consideration of Rs.1,46,33,000=00 as mentioned in the sale-deed.

20. Mr.Hemani pointed out that the land was sold to two individuals, viz. Ankitkumar Koshiya and Swintubhai Mavani respectively, and not to M/s. K.Star Corporation. M/s. K.Star Corporation is an unknown entity and the writ-applicant had no transaction with the same.

21. Mr.Hemani would submit that there is nothing in the materials collected from M/s. K.Star Corporation to indicate as regards the actual sale consideration over and above the sale consideration mentioned in the sale-deed.

22. Mr.Hemani submitted that the department, on its own, has prepared a rough estimate as regards the cost of the project put up by M/s. K.Star Corporation. While working out the cost of project, the department has come out with the figure of Rs.13,08,80,100=00 towards the value of the land.

23. Mr.Hemani pointed out that the two individuals named above who purchased the agriculture land in March 2011 from the writ-applicant along with the three co-owners later joined the newly formed partnership firm, namely, M/s. K.Star Corporation, as partners and their respective share in the agriculture land were contributed as share capital.

24. Mr.Hemani would submit that there is absolutely no basis whatsoever or any evidence for the unfounded assumption that the agriculture land was sold for Rs.13,08,80,100=00. He submits that there is no tangible material so as to reopen the case of the writ-applicant.

25. In such circumstances referred to above, Mr.Hemani, the learned senior counsel, prays that there being merit in his writ-application, the same may be allowed and the impugned notice be quashed and set-aside.

26. On the other hand, this writ-application and the connected two writ-applications have been vehemently opposed by Ms.Kalpana Raval, the learned senior standing counsel appearing for the Revenue. Ms.Raval would submit that the office of the respondent received information from the DCIT,

Central Circle-4, Surat, that a search and survey operation was carried out at the residential and business premises of M/s. K.Star Group on 17th August 2016. During the course of the search and survey, it was found that M/s. K.Star Corporation had purchased the land in question situated at Mouje Katargam, Surat. She would submit that the writ-applicant is one of the sellers of the land and at the relevant point of time he had 25% share holding in the land and had received Rs.2,90,61,775=00 towards his share. In such circumstances, the Assessing Officer has formed an opinion that the amount of Rs.2,90,61,775=00 escaped assessment.

27. Ms.Raval invited the attention of this Court to the averments made in paragraphs 5, 6 and 7 of the affidavit-in-reply, which read thus :

> *"5. With reference to para no. 3.2, I state that this office has received information from the DCIT, Central Circle-4, Surat wherein it was communicated that a search and survey operation was carried out at the residential and business premises in the case of K.Star Group on 17.08.2016. During the course of search and survey, it was found that the M/s. K.Star Corporation was purchased land amounting to Rs.1,46,33,000/- situated at Moje Katargam, Dist.Surat situated at F.P. No.68, T.P. No.50, RS. No.203/2, sale deed registration No.SRT/4/KTG/7068/2011 dated 25.03.2011. Total area of 5853 sq. mts = 7000 sq. yard. The project "Silverstone River" was developed by M/s. K.Star Corporation upon the said piece of land. The rate of purchase of the above piece of land was Rs.20,000/- per sq. yard and the purchase of the above piece of land mentioned*

in the said working was Rs.13,08,80,100/- (may be after some deductions) but the sale deed was executed for Rs.1,46,33,000/- only. The above working proved that M/s. K.Star Corporation had made unaccounted cash investment of Rs.11,62,47,100/- (Rs.13,08,80,100/- - Rs.1,46,33,000/-) for purchase of said piece of land. The actual and sole developers of the project were Shri Kishorbhai Bhurabhai Koshiya. So, it is ascertained that Shri Kishorbhai Bhurabhai Koshiya made unaccounted cash investment of Rs.11,62,47,100/- for purchase of the aforesaid land, upon which, the project "Silverstone River" was developed by the assessee group. The assessee is one of the sellers of the land and was 25% share holder in the land and received Rs.2,90,61,775/- (25% of Rs.11,62,47,100/-) and the same is not shown in his return of income for the AY 2011-12. After recording the above reasons and forming satisfaction that the amount of Rs.2,90,61,775/- escaped assessment, the case was reopened u/s. 147 of the Act. Further, notice u/s. 148 of the Act was issued after following the procedure prescribed as per the Act and obtaining approval from the Competent Authority which was duly served upon the assessee.

6. With reference to para no. 3.3 to 7, this office is in possession of specific information received from the DCIT, Central Circle which is further based on Investigation Wing and these are the internal limbs of the Department and the decision of the Hon'ble High Court in the case of Aradhana Estate P. Ltd. Vs. DCIT is applicable in this case. It is once again reiterated that there is no change of opinion. Further,

impounded material was also received wherein the above facts could clearly be examined. So, after forming the belief and obtaining necessary approvals and as per the procedure laid down in the Act, the case was reopened u/s. 147 of the Act. There is no estimation of the figures but the working was made after deducing the figures on the documentary evidences collected during the course of search. In view of the above discussion and on the ratio laid down by the Hon'ble High Court there is no borrowed satisfaction and all the reasons recorded for reopening are valid and this office duly followed the complete procedure as per the provisions of the Act. There is no deviation from the procedure. The contention that the impugned notice is bad, illegal, contrary to law and is required to be appropriately quashed and set aside is totally ruled as this office based on the information available and after examining the same, reopened the assessment of the assessee.

7. In view of the above stated facts, there is no illegality in the issue of the notice u/s 148 dated 28.03.2018 and the prayers sought in the present petition are required to be rejected and petition is required to be dismissed with costs."

28. In such circumstances referred to above, Ms.Raval prays that there being no merit in this writ-application and also the connected two writ-applications, those be rejected.

29. As regards the averments made in paragraphs 5,6 and 7 of the reply referred to above filed by the Revenue, the writ-applicant has filed rejoinder, wherein paragraph 5 states that :

"5. As regards Para 5 and 6 of the Affidavit-in-reply, contents thereof are denied. It is submitted that the Petitioner has sold the land in question to two individuals [viz. (1) Ankitkumar Gagjibhai Koshiya and (2) Swintubhai Arvindhbhai Mavani) and not to M/s. K.Star Corporation. There is no involvement of any unaccounted cash investment over and above the sale consideration recorded in the conveyance deed. The project 'Silverstone river" has not been developed by the Petitioner. The so called seized material was found during the course of search carried out in the case of a third party namely M/s. K.Star Corporation and the same appears to be merely some rough estimates prepared by M/s. K.Star Corporation with respect to some construction project namely "Silverstone river" on the land in question. In this paper, it was also mentioned that flats/apartments already build up and sold are not less than 1,22,000 sq. ft. and remaining area is unsold. It suggests that this is fully developed land and this sheet has been prepared after full development in the year 2014-15. Also the Petitioner has not entered into any transaction with M/s. K.Star Corporation. It is also nowhere stated in the so called seized material that the Petitioner or any of the other co-owners was given any cash towards sale consideration over and above the amount mentioned in the conveyance deed. It has been baselessly stated that the sole developer of the project was Kishore Bhurabhai Koshiya and it has been further baselessly assumed that the said person has made unaccounted cash payment of Rs.11,62,47,100/-. In any case, this reopening beyond a period of four years and

there is no failure on the part of the Petitioner as to full and true disclosure. Also the issue on hand was threadbare examined at the original assessment stage. Validity of reopening is to be tested strictly on the basis of reasons recorded prior to reopening. Also reopening is based on borrowed satisfaction. Also the share of the Petitioner has been erroneously presumed to be 25%. All these fallacies clearly show that no case is made out for reopening. Hence, the impugned notice deserves to be quashed."

ANALYSIS :

30. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the only question that falls for our consideration is, whether the impugned notice should be quashed.

31. On 14th December 2018, a Coordinate Bench of this Court, while issuing the notice, passed the following order :

"1. Mr. Tushar Hemani, learned advocate for the petitioner has invited the attention of the court to the reasons recorded for reopening the assessment, to submit that the Assessing Officer seeks to reopen the assessment on the ground that the assessee has received unaccounted cash in respect of the sale of the property described therein. It was pointed out that in this case, scrutiny assessment had been carried out for the assessment year under consideration, during the course of which, details had been called for by the Assessing Officer, which had been duly furnished. Reference was made to Annexure-B to the

petition to point out that the details with regard to the sale transaction had been duly submitted to the Assessing Officer. The attention of the court was further invited to the communication dated 28.10.2013 of the petitioner to the Assessing Officer furnishing details with regard to the property in question and the working of the capital gain calculation as per indexation, to submit that during the course of scrutiny assessment, the Assessing Officer has looked into all these aspects in detail and, therefore, the assessment is sought to be reopened on a mere change of opinion.

2. It was further submitted that the document in question was seized during the course of search in the case of M/s. K.Star Corporation, however, the petitioner has not sold the land in question to M/s. K. Star Corporation but to two other persons, and hence also, the very basis for the formation of the belief that income chargeable to tax has escaped assessment, is incorrect.

3. Having regard to the submissions advanced by the learned advocate for the petitioner, Issue Notice returnable on 5th February, 2019. By way of ad-interim relief, the respondent is permitted to proceed further pursuant to the impugned notice; he, however, shall not pass the final order without the permission of this court. Direct service is permitted today."

32. The law as regards the reopening of the assessment under Section 147 of the Act 1961 is well-settled.

(i) The Court should be guided by the reasons recorded for the reassessment and not by the reasons or explanation given by the Assessing Officer at a later stage in respect of the notice of reassessment. To put it in other words, having regard to the entire scheme and the purpose of the Act, the validity of the assumption of jurisdiction under Section 147 can be tested only by reference to the reasons recorded under Section 148(2) of the Act and the Assessing Officer is not authorized to refer to any other reason even if it can be otherwise inferred or gathered from the records. The Assessing Officer is confined to the recorded reasons to support the assumption of jurisdiction. He cannot record only some of the reasons and keep the others upto his sleeves to be disclosed before the Court if his action is ever challenged in a court of law.

(ii) At the time of the commencement of the reassessment proceedings, the Assessing Officer has to see whether there is prima facie material, on the basis of which, the department would be justified in reopening the case. The sufficiency or correctness of the material is not a thing to be considered at that stage.

(iii) The validity of the reopening of the assessment shall have to be determined with reference to the reasons recorded for reopening of the assessment.

(iv) The basic requirement of law for reopening and assessment is application of mind by the Assessing Officer,

to the materials produced prior to the reopening of the assessment, to conclude that he has reason to believe that income has escaped assessment. Unless that basic jurisdictional requirement is satisfied-a postmortem exercise of analysing the materials produced subsequent to the reopening will not make an inherently defective reassessment order valid.

(v) The crucial link between the information made available to the Assessing Officer and the formation of the belief should be present. The reasons must be self evident, they must speak for themselves.

(vi) The tangible material which forms the basis for the belief that income has escaped assessment must be evident from a reading of the reasons. The entire material need not be set out. To put it in other words, something therein, which is critical to the formation of the belief must be referred to. Otherwise, the link would go missing.

(vii) The reopening of assessment under Section 147 is a potent power and should not be lightly exercised. It certainly cannot be invoked casually or mechanically.

(viii) If the original assessment is processed under Section 143(1) of the Act and not Section 143(3) of the Act, the proviso to Section 147 will not apply. In other words, although the reopening may be after the expiry of four years from the end of the relevant assessment year, yet it would not be necessary for the Assessing Officer to show

that there was any failure to disclose fully or truly all the material facts necessary for the assessment.

(ix) In order to assume jurisdiction under Section 147 where assessment has been made under sub-section (3) of section 143, two conditions are required to be satisfied;

(i) The Assessing Officer must have reason to believe that the income chargeable to tax has escaped assessment;

(ii) Such escapement occurred by reason of failure on the part of the assessee either (a) to make a return of income under section 139 or in response to the notice issued under sub-section (1) of Section 142 or Section 148 or (b) to disclose fully and truly all the material facts necessary for his assessment for that purpose.

(x) The Assessing Officer, being a *quasi judicial* authority is expected to arrive at a subjective satisfaction independently on an objective criteria.

(xi) While the report of the Investigation Wing might constitute the material, on the basis of which, the Assessing Officer forms the reasons to believe, the process of arriving at such satisfaction should not be a mere repetition of the report of the investigation. The reasons to believe must demonstrate some link between the tangible

material and the formation of the belief or the reason to believe that the income has escaped assessment.

(xii) Merely because certain materials which is otherwise tangible and enables the Assessing Officer to form a belief that the income chargeable to tax has escaped assessment, formed part of the original assessment record, *per se* would not bar the Assessing Officer from reopening the assessment on the basis of such material. The expression "tangible material" does not mean the material alien to the original record.

(xiii) The order, disposing of objections or any counter affidavit filed during the writ proceedings before the Court cannot be substituted for the "reasons to believe".

(xiv) The decision to reopen the assessment on the basis of the report of the Investigation Wing cannot always be condemned or dubbed as a fishing or roving inquiry. The expression "reason to believe" appearing in Section 147 suggests that if the Income Tax Officer acts as a reasonable and prudent man on the basis of the information secured by him that there is a case for reopening, then Section 147 can well be pressed into service and the assessments be reopened. As a consequence of such reopening, certain other facts may come to light. There is no ban or any legal embargo under Section 147 for the Assessing Officer to take into consideration such facts which come to light either by discovery or by a fuller probe into the matter and reassess

the assessee in detail if circumstances require.

(xv) The test of jurisdiction under Section 143 of the Act is not the ultimate result of the inquiry but the test is whether the income tax officer entertained a "bona fide" belief upon the definite information presented before him. Power under this section cannot be exercised on mere rumours or suspicions.

(xvi) The concept of "change of opinion" has been treated as a built in test to check abuse. If there is tangible material showing escapement of income, the same would be sufficient for reopening the assessment.

(xvii) It is not necessary that the Income Tax Officer should hold a quasi judicial inquiry before acting under Section 147. It is enough if he on the information received believes in good faith that the assesee's profits have escaped assessment or have been assessed at a low rate. However, nothing would preclude the Income Tax Officer from conducting any formal inquiry under Section 133(6) of the Act before proceeding for reassessment under Section 147 of the Act.

(xviii) The "full and true" disclosure of the material facts would not include that material, which is to be used for testing the veracity of the particulars mentioned in the return. All such facts would be expected to be elicited by the Assessing Officer during the course of the assessment. The disclosure required only reference to those material

facts, which if not disclosed, would not allow the Assessing Officer to make the necessary inquiries.

(xix) The word "information" in Section 147 means "instruction or knowledge derived from the external source concerning the facts or particulars or as to the law relating to a matter bearing on the assessment. An information anonymous is information from unknown authorship but nonetheless in a given case, it may constitute information and not less an information though anonymous. This is now a recognized and accepted source for detection of large scale tax evasion. The non-disclosure of the source of the information, by itself, may not reduce the credibility of the information. There may be good and substantial reasons for such anonymous disclosure, but the real thing to be looked into is the nature of the information disclosed, whether it is a mere gossip, suspicion or rumour. If it is none of these, but a discovery of fresh facts or of new and important matters not present at the time of the assessment, which appears to be credible to an honest and rational mind leading to a scrutiny of facts indicating incorrect allowance of the expense, such disclosure would constitute information as contemplated in clause (b) of Section 147.

(xx) The reasons recorded or the material available on record must have nexus to the subjective opinion formed by the A.O. regarding the escapement of the income but then, while recording the reasons for the belief formed, the A.O. is not required to finally ascertain the factum of

escapement of the tax and it is sufficient that the A.O had cause or justification to know or suppose that the income had escaped assessment [vide Rajesh Jhaveri Stock Brokers (P.) Ltd.'s case (supra)]. It is also well settled that the sufficiency and adequacy of the reasons which have led to the formation of a belief by the Assessing Officer that the income has escaped the assessment cannot be examined by the court.

33. It appears from the materials on record, more particularly, the objections filed by the writ-applicant, that from day one he has been telling the respondent that the land was not sold to M/s. K.Star Corporation. The land was sold to two individuals named above. Later, if those two individuals sell the land and join M/s. K.Star Corporation, then the same has nothing to do with the transaction of sale between the writ-applicant and the two individuals, namely Ankitkumar Koshiya and Swintubhai Mavani. Even, while disposing of the objections, the Assessing Officer has kept a conspicuous silence in this regard. This aspect of the matter has not been dealt with while considering the objections.

34. We are of the view that having accepted the entire transaction on the basis of the scrutiny assessment under Section 143(3) of the Act 1961, the reopening on the basis of some information is not valid in the eyes of law and liable to be quashed for the reason that the Assessing Officer failed to apply his mind. Thus, the reasons were merely recorded on the borrowed satisfaction by the Assessing Officer. The source for all the conclusions was the information received from the DCIT,

CC-4, Surat, and that too, based on a search and survey carried out at the residential and business premises in the case of K.Star Group.

35. The power to reopen a completed assessment under Section 147 of the Act 1961 has been bestowed on the Assessing Officer, if he has reason to believe that any income chargeable to tax has escaped assessment for any assessment year. However, this belief that income has escaped assessment has to be the reasonable belief of the Assessing Officer himself and cannot be an opinion and/or belief of some other authority. On the basis of the information by itself received from another agency, there cannot be any reassessment proceedings. However, upon receipt of the information/material received from other source, the Assessing Officer is required to consider the material on record in case of the assessee by applying his mind and thereafter is required to form an independent opinion on the basis of the material on record that the information has bearing on the income of the assessee and such income has escaped assessment. Without forming such an opinion, solely and mechanically relying upon the information received from other source, there cannot be any reassessment. It is also established principle of law that if a particular authority has been designated to record his/her satisfaction on any particular issue, then it is that authority alone who should apply his/her independent mind to record his/her satisfaction and further mandatory condition is that the satisfaction recorded should be 'independent' and not 'borrowed' or 'dictated' satisfaction. Law in this regard is now well-settled.

36. The Supreme Court in the case of Anirudh Sinhji Karan Sinhji Jadeja vs. State of Gujarat reported in [1995] 5 SCC 302 as well has held that if a statutory authority has been vested with the jurisdiction, it has to exercise it according to its own discretion. If discretion is exercised under the direction or in compliance with some higher authorities instruction, then it will be a case of failure to exercise discretion altogether. The cases reopened on the basis of information received from the other departments are also governed by the aforesaid principle of making an independent inquiry and recording of satisfaction by the Assessing Officer issuing notice under Section 148 of the Act.

37. A third party information is only an information and does not constitute 'reason to believe' until and unless the third party information is subjected to investigation and, on the basis thereof, independent reasons are recorded by the Assessing Officer before issuance of notice under Section 148 of the Act.

38. We have noted above that the assessee was already assessed under the provisions of Section 143(3) of the Act 1961 vide order dated 31st December 2013. Accordingly, the first proviso in Section 147 of the Act 1961 has a direct bearing on the issue on hand. It is stated therein that there cannot be any action under Section 147 of the Act after the expiry of a period of four years from the end of the relevant assessment year until and unless the income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make disclosure of all the material facts truly and fully necessary for assessment. In the present case, we have already held that initiation of the proceedings

under Section 147 of the Act was based on the borrowed satisfaction. Thus, it is implied that the Assessing Officer has not applied his mind to arrive at the conclusion that there was of failure on the part of the assessee to disclose fully and truly all the material facts. In other words, mentioning by the Assessing Officer that the assessee has failed to disclose all material facts in the reasons recorded is not sufficient enough. Rather the Assessing Officer is under the obligation to arrive at such conclusion that the assessee failed to disclose all material facts necessary for the assessment after applying his mind and verification of the facts. But the Assessing Officer has not done so. In holding so we draw support and guidance from the judgment of the Bombay High court in case of Gateway Leasing (P.) Ltd vs. ACIT reported in 117 taxmann.com 442 where it was held as under:

> *"35. Having discussed the above, we may once again revert back to the reasons furnished by Respondent No. 2 for re-opening of assessment under Section 147 of the Act. After referring to the information received following search and seizure action carried out in the premises of Shri Naresh Jain, it was stated that information showed that Petitioner had traded in the shares of M/s. Scan Steels Ltd., and was in receipt of Rs. 23,98,014.00 and therefore, Respondent No. 2 concluded that he had reasons to believe that this amount had escaped assessment within the meaning of Section 147 of the Act.*
>
> *36. First of all it would be evident from the materials on record that Petitioner had disclosed the above information to*

the Assessing Officer in the course of the assessment proceedings. All related details and information sought for by the Assessing Officer were furnished by the petitioner. Several hearings took place in this regard where-after the Assessing Officer had concluded the assessment proceedings by passing assessment order under Section 143 (3) of the Act. Thus it would appear that Petitioner had disclosed the primary facts at its disposal to the Assessing Officer for the purpose of assessment. He had also explained whatever queries were put by the Assessing Officer with regard to the primary facts during the hearings.

37. In such circumstances, it cannot be said that Petitioner did not disclose fully and truly all material facts necessary for the assessment. Consequently, Respondent No. 2 could not have arrived at the satisfaction that he had reasons to believe that income chargeable to tax had escaped assessment. In the absence of the same, Respondent No. 2 could not have assumed jurisdiction and issued the impugned notice under Section 148 of the Act."

39. The entire basis for reopening the assessment is on the premise that there was a cash transaction of a huge amount, and having regard to the same, there was no true and full disclosure. We have already explained that this issue of cash transaction is nothing but a mere guess, and at the cost of repetition, the transaction of sale was not with K.Star Corporation. M/s. K.Star Corporation, in the present case, is the second buyer.

40. In our opinion, there is no escapement of income chargeable to tax. The conditions precedent for resorting to reopening of the assessment under Section 147 of the Act 1961 are not satisfied in the present case.

41. In the overall view of the matter, we are not convinced with the satisfaction arrived at by the respondent for the purpose of reopening of the assessment for the relevant Assessment Year 2011-12.

42. In the result, this writ-application succeeds and is hereby allowed. The impugned notice is hereby quashed and set-aside. As a result, the connected two writ-applications also succeed and the impugned notice challenged in the two writ-applications is hereby quashed and set-aside.

(J. B. PARDIWALA, J.)

(ILESH J. VORA, J.)

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