* **IN THE HIGH COURT OF DELHI AT NEW DELI**

% *Judgment Reserved on: 14.01.2011*
Judgment Delivered on: 31.01.2011

\+ **ITA No.1604/2006**

S.K.BAHADUR .....Appellant
Through: Appellant in person.

Versus

UNION OF INDIA .....Respondent
Through: Mr.Sanjeev Sabharwal, Advocate

ITA No.1691/2006

S.K.BAHADUR .....Appellant
Through: Appellant in person.

Versus

UNION OF INDIA .....Respondent
Through: Mr.Sanjeev Sabharwal, Advocate

ITA No.1692/2006

S.K.BAHADUR .....Appellant
Through: Appellant in person.

Versus

UNION OF INDIA .....Respondent
Through: Mr.Sanjeev Sabharwal, Advocate

ITA No.1693/2006

S.K.BAHADUR .....Appellant
Through: Appellant in person.

Versus

UNION OF INDIA .....Respondent
Through: Mr.Sanjeev Sabharwal, Advocate

ITA No.363/2009 & CM No.1201/2010

S.K.BAHADUR .....Appellant
Through: Appellant in person.

Versus

UNION OF INDIA THROUGH C.I.T. .....Respondent
Through: Mr.Sanjeev Sabharwal, Advocate

ITA No.532/2009

S.K.BAHADUR .....Appellant
Through: Appellant in person.

Versus

UNION OF INDIA THROUGH C.I.T. .....Respondent
Through: Mr.Sanjeev Sabharwal, Advocate

ITA No.533/2009

S.K.BAHADUR .....Appellant
Through: Appellant in person.

Versus

UNION OF INDIA THROUGH C.I.T. .....Respondent
Through: Mr.Sanjeev Sabharwal, Advocate

AND

ITA No.534/2009

S.K.BAHADUR .....Appellant
Through: Appellant in person.

Versus

UNION OF INDIA THROUGH C.I.T. .....Respondent
Through: Mr.Sanjeev Sabharwal, Advocate

CORAM:

HON'BLE MR. JUSTICE A.K.SIKRI
HON'BLE MS. JUSTICE INDERMEET KAUR

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest?

(Per se) INDERMEET KAUR, J.

1. These appeals filed by the appellant Mr.S.K. Bahadur have impugned the orders of the ITAT dated 28.07.2006 and thereafter the subsequent order dated 27.02.2009. ITA Nos. 363/2009, 532/2009, 533/2009 & 534/2009 have impugned the later order i.e. order dated 27.02.2009. The other appeals have impugned the order dated 28.07.2006.

2. On 04.12.1984 the Anti-Corruption Wing of the Central Bureau of Investigation (CBI) conducted a house search of the appellant. Incriminating documents were seized.

3. Since the assessment filed by the appellant for th assessment year 1985-1986 was pending, the Assessing Officer took into consideration the documents forwarded to him by the CBI and on that basis added certain incomes as unaccounted income of the appellant. The appellant preferred appeal before the Commissioner of Income Tax (Appeals) CIT (A) as also before the Income Tax Tribunal ITAT but was unsuccessful. Appeals impugning the order of the ITAT were registered as ITA Nos. 1604/2006, 1691/2006, 1692/2006 & 1693/2006. The order of the ITAT was questioned on merits. The alternative argument was the challenge to the jurisdiction on the ground that since a criminal case was pending under the Prevention of Corruption Act, 1988, the income tax authorities had no jurisdiction to pass assessment orders.

4. Simultaneously, the appellant had also filed a writ petition being W.P.(C) No. 9262/2006 raising the issue of want of jurisdiction on the part of the Income Tax Department to proceed with the matter. Vide order dated 26.05.2006, the petitioner was permitted to withdraw the writ petition with liberty to raise all these issues before the Tribunal. On 12.06.2006, an application was filed by the appellant before the Tribunal for deciding the issue of jurisdiction which was raised as a preliminary issue. This was on the strength of the order of

this Court dated 26.05.2006. On 02.07.2008, this Court permitted the appellant to withdraw the pending ITA Nos. 1604/2006, 1691/2006, 1692/2006 & 1693/2006 and again granted liberty to him to approach the Tribunal by filing an application under Section 254(ii) of the Income Tax Act. This application was accordingly filed by the appellant before the Tribunal. The Tribunal dismissed his application vide its order dated 27.02.2009.

5. On 03.12.2009 while dealing with ITA Nos.363/2009, 532/2009, 533/2009 & 534/2009 had taken note of the aforenoted facts and was of the opinion that the order of the Tribunal was prima-facie not correct in view of the specific directions issued to it vide orders dated 26.05.2006 and 02.07.2008; the Tribunal had not decided the case on merits. The orders dated 02.07.2008 passed in ITA Nos. 1604/2006, 1691/2006, 1692/2006 & 1693/2006 were accordingly recalled which have now been heard on merits.

6. The substantial question of law was formulated in ITA Nos.532/2009, 533/2009, 534/2009 & 363/2009 which inter-alia reads as under:-

"Whether it is within the jurisdiction of Income Tax Department to frame assessment under the Income Tax Act,

1961, during the pendency of trial under the Prevention c Corruption Act?"

7. On 14.01.2011 it was noted that proper question of law has not been framed. The following substantial question of law was accordingly formulated:-

"Whether the order of the learned ITAT is perverse in so far as it takes into consideration irrelevant facts in determining undisclosed income in the hands of the assessee?"

8. Appellant S.K. Bahadur was a Member of the Indian Legal Services and was working as Joint Secretary and Legal Advisor in the Department of Legal Affairs, Ministry of Law, New Delhi. On 04.12.1984, the CBI made a search in his house i.e. house No. D1/153, Satya Marg, Chanakyapuri, New Delhi. His office was also searched on 05.12.1986. In the course of search, CBI recovered incriminating documents relating to immoveable and moveable properties; unaccounted sets were found and seized. Lockers in the joint names of the appellant and his wife Smt. Asha Bhatnagar were also seized. The search list was prepared on the same day i.e. on 04.12.1984.

9. The assets which were seized pursuant to this house search were divided into the following three groups:-

GROUP-I

(1) Cash of ₹14 lac seized from the assessee's residence;

(2) Foreign Exchange of US$ 2596 seized from the residence of the assessee and

(3) cash amounting to ₹ 12,78,900/- seized from lockers held jointly by Sh. S.K. Bahadur and Smt. Asha Bhatnagar as per details given below:-

a)	*Locker No. 63-B, PNB Gurgaon*	*₹6,44,200/-*
b)	*Locker No.38-C, PNB Gurgaon*	*₹3,84,700/-*
c)	*Locker No. 369, Allahabad Bank, Parliament Street, New Delhi*	*₹ 2,50,000/-*
	Total	*₹ 12,78,900/-*

GROUP-II

(1) Expenses concerning foreign tour to Japan and Hong Kong undertaken by the assessee and his wife in May, 1984 and the various purchases made by them

(2) Jewellery as per following details seized from the assessee's residence/lockers.

Place	*Weight*	*Value (₹)*
a) Jewellery seized from residence	*1122.95 Grs*	*2,88,405*
b) Jewellery seized from locker No. 38-C, PNB Gurgaon	*457.8 "*	*84,675*
c) Jewellery seized from locker No. 369, Allahabad Bank, Parl. St. New Delhi	*704.85"*	*1,57,650*
d) Jewellery seized from locker No. 2243, SBI, main Branch, New Delhi	*579.65*	*75,615*
e) Silver found at residence, but not seized	*2.5 kg.*	*8,500*
TOTAL		*6,14,847*

(3) House at KD-63, Kavi Nagar, Ghaziabad in the name of Smt. Asha Bhatnagar, wife of the assessee

(4) Flat No. 402, DDA (Multi-storeyed), East of Kailash, New Dell in the name of Sh. S.K. Bahadur.

(5) Valuables s per items No. 3 of search list dated 04.12.1984, found at the assessee's residence.

GROUP-III

(i) FDRs in various banks of total face value of ₹ 1,94,000/- in the name of the assessee, his wife and three daughters.

(ii) Deposits of ₹15,000/- each in the names of the assessee's daughters, Km. Taral Bahadur and Viral Bahadur in June, 82 for booking of DDA flats.

(iii) Deposits of ₹10,000/- made in the names of Km. Taral Bahadur and Km. Viral Bahadur for the booking of two Maruti Cars in May, 1983.

(iv) Flat No. 93, Block 'B', Sector 27, Noida, purchased in the name of Smt. Asha Bhatnagar on 27.04.1983.

10. The Assessing Officer on the basis of the oral and documentary evidence led before it vide its order dated 30.03.1988 repelled the contentions raised by the assessee that the items in Group II & Group III belonged to his wife and treated it as income in the hands of the assessee S.K. Bahadur; CIT (Appeals) had confirmed the findings of the Assessing Officer; additions made in the income of the assessee were re-affirmed.

11. This order was impugned before the ITAT who vide the impugned order dated 28.07.2006 dismissed the appeals of the

assessee. The cross-appeal filed by the Revenue also stoo dismissed.

12. The items in Group I have not been challenged. The items in Group III pertained to earlier years and were not directly relevant to the assessment year under consideration. This has been noted by the Assessing Officer in his order dated 30.03.1988. It has been urged by the assessee that his wife Asha Bhatnagar had her independent sources of income; there was sufficient evidence led before the Assessing Officer to establish her plea that besides her prior marriage savings, she had income from tuitions; she had also been bequeathed substantial sums of money by her father in law Ram Bahadur in terms of his Will which had enabled her to purchase the properties which were owned by her in her name on which she had also paid wealth tax.

13. It is an admitted fact that Smt. Asha Bhatnagar had filed her wealth tax return on 30.10.1984 which order had been upheld by the ITAT. It is also relevant to point out that this assessment order of the Wealth Tax Officer is dated 30.10.1984 which was prior in time to the raid which had been conducted by the CBI on the house of the appellant which was on 04.12.1984.

14. The contention of the appellant before this Court is that the assets for which wealth tax already stood paid by his wife Smt. Asha Bhatnagar could not be the subject matter of the additions which have been upheld by the ITAT in the impugned order.

15. It is not in dispute that wealth tax on items mentioned in Group II and Group III (as aforenoted) had been paid by Asha Bhatnagar for the assessment year 1984-1985 (except for DDA flat No. 402, East of Kailash which is in the name of S.K. Bahadur); this return was filed on 30.10.1984 which was more than one month and four days prior to the search by the CBI in the house of her husband.

16. On the date when this wealth tax return was filed, there was no conceivable reason to apprehend or suspect that the assessee could have information that a search in her house would be conducted more than one month later i.e. on 04.12.1984. The wealth tax returns in these circumstances, cannot be a suspect document; these returns cannot now be reopened which had been affirmed thereafter in appeal on 30.03.1989 by the Commissioner of Income Tax (Appeals) and thereafter reaffirmed by the ITAT. The same property which had been the subject matter of the wealth tax returns filed by Smt. Asha Bhatnagar cannot become the subject matter of the

additions made by the ITAT in the impugned order. The same property cannot be assessed twice for tax. It is also not the case of the Revenue that the assets which were the subject matter of the wealth tax returns had earned any income for which it was incumbent upon Smt. Asha Bhatnagar to file income tax returns.

17. In *(1992) 4 SCC 45 titled M. Krishna Reddy Vs. State Deputy Superintendent of Police, Hyderabad* on the question of benami transaction alleged by the CBI and where there was evidence of income tax and wealth tax returns submitted by the accused prior in time to the search conducted by the Anti-Corruption Branch in his house, it was held that the burden of proof in disproving the claim of the accused had to be discharged by the prosecution. The Apex Court had returned a finding that the wealth tax and the income tax returns which had been filed prior in time to the search conducted had become unimpeachable documents, they could not have been manipulated or concocted prior in time anticipating a prosecution which was subsequent in time.

18. In the instant case as well when the wealth tax return was filed on 30.10.1984 by Smt. Asha Bhatnagar, there was no conceivable reason to entertain even a suspicion or surmise that one month and four days later, the Anti-Corruption Branch would make a house search of the husband of the assessee.

These wealth tax returns having attained a finality and whicl wealth tax having being paid for the assets mentioned in groups II & III, the same could not have been the subject matter of additions made by the ITAT in the impugned order. This is an illegality and liable to be set aside.

19. The evidence which has been led before the Revenue shows that the wife of the assessee Smt. Asha Bhatnagar had been subjected to a detailed examination. Her statement was recorded under Section 131 of the Income Tax Act, 1961 on 25.02.1988 and on subsequent dates thereafter. Admittedly the parties had been married in the year 1959. The questions and queries put to her all related to her savings in her name prior to the marriage period as also in the period thereafter. The witness gave explanation for the savings made by her prior to her marriage period and which amount stood deposited by her in her bank account i.e. a sum of ₹ 10,500/-; she candidly admitted that she had no documentary proof of the said savings and rightly so as it is difficult to conceive that for a saving effected prior to 1959, the party would retain documents evidencing such a saving on a notion that proof for such a transaction would be required more than two decades later. She had explained that she was working as a teacher in this period at a salary of ₹ 200/- per month and thereafter at ₹ 300/- per month.

20. She had produced the Will of her father in law Mr. Ran Bahadur dated 15.06.1980 to substantiate the submission that she had received ₹ 26,000/- from him for the purchase of the plot at Ghaziabad, cash of ₹1,77,000/- for the purchase of FDRs in the name of herself and her daughters, cash of ₹3,47,150 as also ancestral jewellery weighing 1200 gms. To support this stand, she had also filed affidavits of Smt. Suraj Bhatnagar dated 22.11.1985 (sister of her husband), affidavit of Smt. Rani Bhatnagar dated 03.06.1985 (another sister of her husband) as also the details annexed along with the Will of her father-in-law i.e. Annexure 'A' which had bequeathed the aforenoted properties to her. It is also not in dispute that in the wealth tax returns filed by Asha Bhatnagar for the assessment year 1984-85, the same aforenoted assets have been detailed on which she has paid wealth tax; net taxable wealth was ₹7,11,000/- It is also relevant to point out that the details as aforenoted and given by Asha Bhatnagar before the Income Tax authorities on 25.02.1988 were the same details which had been given by her on 07.01.1985 when her statement was recorded by the Enforcement Directorate and thereafter in her statement before the CBI on 07.05.1985; in her affidavit dated 09.05.1985 and her subsequent statement dated 04.11.1985. If the story was concocted and sham as has been concluded by the Assessing

Officer, the same narration would not have been found in her statement which was recorded on 07.05.1985 which was less than six months after the search conducted in the house of her husband. It is difficult to believe that a lady in that emotional turmoil of mind could have fabricated a story which is not only reflected in the wealth tax returns which have been filed prior in time but the same story is affirmed and re-affirmed in subsequent years. She had further explained that out of the amount of ₹13.5 lacs which had been given by Sq. Leader R.K. Bhatnagar (her nephew) for keeping in safe custody, she had taken a loan of ₹71,000/- from the said amount. She had further explained that since her father had not given her any immoveable property, she was, however, compensated on various occasions with monetary gifts which included cash and jewellery which had become a part of her savings.

21. The Assessing Officer had cursorily and illegally ignored this statement of Asha Bhatnagar. His finding that she did not have any documentary proof to evidence her savings which were in the prior marriage period was obviously for the reason that for a saving which was affected almost three decades ago, it would be difficult to conceive that a party would retain documents of such a saving on the premise that almost 30 years later, she would require proof of the same.

22. The Will of her father in law Mr. Ram Bahadur was also rejected without any cogent reason. The affidavits of Smt. Rani Bhatnagar and Smt. Suraj Bhatnagar who had supported the version of Asha Bhatnagar were not adverted to. The attesting witnesses of the Will could not be produced as one of them namely Mr. Chandi Prasad had died. The second attesting witness Inderjit Bahadur had reportedly refused service. The other attesting witness Mr. Krishan Swaroop Bhatnagar could not be produced because of cataract surgery. The Assessing Officer had proceeded on the premise that Mr. Krishan Swaroop Bhatnagar is a resident of Hardoi and cataract is not a major surgery which would unable the person to undertake a journey to Delhi; on this ground the conclusion was drawn that the Will is not a genuine document. The attesting witnesses namely Krishan Swaroop Bhatnagar & Inderjit Bhatnagar had in fact given their statements under Section 161 of the Cr. PC to the Investigating Officer in the anti-corruption proceedings wherein both had admitted their signatures as attesting witnesses on the Will of S.K. Bahadur. These documents are not disputed. The Assessing Officer's conclusion that the Will did not bequeath anything to the second son Mr. Inderjeet Bahadur or his wife Smt. Suraj Bhatnagar or to Kumari Rani Bhatnagar was the other another reason to reaffirm this conclusion that this

document was fabricated. This was a perversity. The Assessing Officer could not have ignored the affidavits of facts which had been filed by Rani Bhatnagar & Suraj Bhatnagar who were admittedly closely related to the deceased being his daughters; yet they had chosen to support the stand of Asha Bhatnagar. The Will had stipulated that the marriage expenses of ₹50,000/- for his unmarried daughter Kumari Renu Bhatnagar would be borne by Asha Bhatnagar and she would also give her a part of the jewellery. The interest of his only unwed child had been taken care of. Yet this document was rejected. The lengthy discussion on the Will is clearly based on surmises and conjectures.

23. The further conclusion drawn was that the income received by Asha Bhatnagar from tuitions must have been consumed as it was only a pocket money. This source of income of Asha Bhatnagar had been rejected for the reason that there was no documentary evidence. Smt. Bharti Bhatnagar wife of Sq. Leader R.K. Bhatnagar i.e. (nephew's wife) had also come into the witness box. She had affirmed on oath that her jewellary (which was recovered from the house of Mr. S.K. Bahadur on 04.12.1984) had been given by her to Asha Bhatnagar for safe custody because her husband was in the Air Force and had to be transferred from time to time and she did not wish to carry her jewellery as she had to travel along with her husband; for

convenience she had kept her jewellery weighing 50 tolas with Asha Bhatnagar. This same statement and details of the jewellery given in safe custody to Asha Bhatnagar had been given by Bharti Bhatnagar to the CBI as early as 09.05.1985. She had come before the Revenue in the year 1988 when this stand was again reiterated This version was however rejected summarily on the ground that Smt. Bharti Bhatnagar had not adduced any documentary proof of handing over this jewellery to Asha Bhatnagar. To say the least, this conclusion is not only strange but perverse. While handing over or taking articles, even if they are valuable, no document in the normal course is prepared between close relatives. Rejection of this statement of Smt. Bharti Bhatnagar on this sole ground is nothing short of an illegality.

24. A perusal of the assessment order shows that it is surely based on surmises and conjectures. Presumptions have been made; statement on oath of Smt. Asha Bhatnagar has been repelled cursorily although she had in detail explained the circumstances under which she had made her savings; her earning earned by tuition; amounts received by her in terms of the Will of her father in law enabling her to purchase the aforenoted properties as noted in Group II in her own name. The findings on this score by the ITAT upholding the findings of the

Assessing Officer are based on surmises and being perverse ar liable to be set aside.

25. In *2005 X AD (SC) 368 titled D.S.P. Chennai Vs. K. Inbasagaran* where pursuant to a raid by the Income Tax Department in the house of the accused, huge amounts of cash amounting to Rs.30 lacs and seven gold biscuits as also other incriminating documents had been recovered, the Court had held that where the wife fully owned this money and other wealth owned by her by reflecting it in her income tax returns, in such a case it would be difficult to hold that this money belonged to her husband; where the evidence had substantiated that this money had in fact belonged to the wife, it has to be treated as money in the hands of the wife especially keeping in view the fact that this money had been reflected by her in her income tax returns. This was not withstanding of the fact that husband and wife were admittedly living together in the same house.

26. In *Vol. XXVI ITR 74 Dhirajlal Girdharilal Vs. Commissioner of Income Tax*, the Supreme Court has held that a finding by the ITAT which is based on mere surmises and conjectures is perverse and is liable to be set aside. In the said case, it had been conceded by the Attorney General that the Tribunal had

drawn upon its own imagination and had made use of a number of surmises and conjectures.

27. In *Vol. XXXVII ITR 288 Lalchand Bhagat Ambica Ram Vs. Commissioner of Income Tax, Bihar and Orissa,* the Supreme Court in this context had held as under:-

"When a court of fact arrives of its decision by considering material which is irrelevant to the enquiry or acts on material, partly relevant and partly irrelevant, and it is impossible to say to what extent the mind of the court was affected by the irrelevant material used by it in arriving at its decision, a question of law arises; whether the finding of the court of fact is not vitiated by reason of its having relied upon conjectures, surmises and suspicious not supported by any evidence on record or partly upon evidence and partly upon inadmissible material.

Whereas, however, the fact finding authority has acted without any evidence or upon a view of the facts which could not reasonably be entertained or the facts found are such that no person acting judiciously and properly instructed as to the relevant law could have found, the court is entitled to interfere.

A finding on a question of fact is open to attack under section 66(I) as erroneous in law when there is no evidence to support it or if it is perverse.

The income-tax Appellate Tribunal is a fact finding tribunal and if it arrives at its own conclusions of fact after due consideration of the evidence before it thecourt will not interfere. It is necessary, however, the every fact for and against the assessee must have been considered with due care and the Tribunal must have given its finding in a manner which

would clearly indicate what were the questions which arose fo determination, what was the evidence pro and contra in regard to each one of them and what were the findings reached on the evidence before it. The conclusions reached by the Tribunal should not be coloured by any irrelevant considerations or matters of prejudice and if there are any circumstances which required to be explained by the assessee, the assessee should be given an opportunity of doing so. On no account whatever should the Tribunal base its, finding on suspicious, conjectures or surmises, nor should it act on no evidence at all or on improper rejection of material and relevant evidence or partly on evidence and partly on suspicious, conjectures and surmises, and if it does anything of the sort, its findings even though on questions of fact will be liable to be set aside by the court."

28. The instant is one such case. The Tribunal has indulged in suspicion, conjectures and surmises and acted contrary to the evidence which position is judicially un-sustainable amounting to a perversity and liable to be set aside.

29. Appeals are allowed.

A.K.SIKRI, J.

INDERMEET KAUR, J.

JANUARY 31, 2011
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