

SUREME COURT OF INDIA

Commissioner of Income-Tax, Madras

Vs.

M. Ganapathi Mudaliar

(J Shah, K S Rao and S Sikri JJ.)

27.04.1964

JUDGMENT

SIKRI, J.

1. These are two appeals by way special leave against the judgment and order of the Madras High Court dated October 23, 1959, in a case referred to the High court relating to the assessment years 1947-48 and 1948-49. The respondent, M. Ganapathi Mudaliar, hereinafter referred to as the assessee, joined the cloth business started by Ayyaru in Singapore, in the name of Thyagesan and Company. The assessee had married Ayyaru's sister. By an agreement dated September 23, 1940 (annexure "A") between Ayyaru and the assessee, the assessee was engaged as a manager for a period of three years from September 23, 1940. His remuneration was to be fixed salary at the rate of \$ 18 per month and a commission of 10% on the net profits of the business, to be calculated at the end of the said three years. He was also to be provided with free board and lodging. Clause 4 of the agreement provided that the net profits of the business shall be as shown in the profit and loss account of the business. On the same day, a power of attorney (annexure "B") was executed by Ayyaru in favour of the assessee, enabling him to carry on the business of a cloth and general merchant, being carried on at No. 182, Selgie Road, Singapore. It appears that on September 29, 1945 (annexure "C"), Ayyaru sold the said business and the goodwill thereof with the other assets of the said business, at the price of \$ 4,441.78.

2. By an assessment order dated December 30, 1950 for the assessment year 1947-48, the Income tax Officer assessed the remittances from Singapore at Rs. 61,538. He assessed profits at Rs. 2,10,600 which covered the remittances. The Income-tax Officer came to the following conclusion :

"(1) The assessee was the sole manager of the old Thyagesan and Company remunerated by a large share of profits for his sole conduct of the business.

(2) The alleged profits of \$1,10,000 for the entire period of five years and the assessee's share thereof \$11,000 are not correct and they have not been proved to be correct by the production of accounts that existed for the business as per the narration in the sale deed.

(3) The accounts have been purposely withheld from production and if they had been produced,

they would disclose the true profits of the business and the assessee's exact relationship with the business and his share of profits. The profits of the business and the share of profits due to the assessee must be much more than that admitted now. The share of profits due to the assessee are entered in the folio of Ayyaru Mudaliar in the guise of sale proceeds of goods, closing stock, etc. These are simply bogus credits to conceal the real facts as they have not been mentioned in the sale deed. In the circumstances, I estimate the accrued income at \$ 1,35,000 or Rs. 2,10,500 at 156 exchange. This estimate will include \$9,500 credited in Ayyaru Mudaliar account on 20th October, 1946, under the following narrations :

"I issued a reference to the assessee's auditors Messrs. G. Natesan and Company (copy of which was sent to the assessee) asking them to explain the entry fully to furnish the Indian and foreign address of S. A. Md. Sahib, and the circumstances under which the amount was received, etc. , and to produce a copy of the kailuthu letter of referred to in the entry. The auditors have sent a reply stating that the amount due by S. A. Md. Sahib was given to the assessee as per letter given by Ayyaru Mudaliar. The burden of the proving the credit lies on the the assessee as the amount has been credited in his accounts in the name of Ayyaru Mudaliar which account is only a bogus one has been noted before."

3. By an order of the same date for the year 1948-49, the Income-tax Officer estimated the remittance at Rs. 1,58,501. He found that enough profits out of the current year (Rs. 17,461), and out of the unassessed but unremitted profits of earlier year (Rs. 1,41,040) existed.

4. The assessee appealed to the Assistant commissioner against both the orders. In the appeal relating to the year 1947-48, the Assistant Commissioner disbelieved the story that the account books had been lost. He did not place any reliance on the affidavit of the Ayyaru because the statements in the affidavit were at variance with the facts, as shown by the sale deed and entries of account. He found that the very description given by the sum of \$ 87,500 in the books raises a strong suspicion about the nature of this credit. He agreed with the Income-tax Officer that the income declared by the assessee could not be accepted, but he held that all the credits in Ayyaru's account could not be treated as unexplained and suspicious. He came to the conclusion "that in the absence of accounts showing the exact income which the appellant got from this source I think his income inclusive of the profit from his own business may be put at Rs. 1,80,000.. This will be substituted for the sum of Rs. 2,10,600 estimated by the Income-tax officer". He estimated the remittance at Rs. 30,000, instead of the sum of Rs. 61,538 adopted by the Income-tax Officer.

5. Regarding the assessment year 1948-49 the Appellate Assistant Commissioner estimated the income of the assessee from business in Singapore as follows :

Rs. A. P.

"Accrued profits of the current year which have been fully remitted. 17,461 0 0
Remittance of previous year profits from Pudukkottai 90,000 0 0 -----
Total 1,07,461 0 0

6. The assessee filed two appeals to the Income-tax appellate Tribunal, Madras, hereinafter referred to as the Tribunal, and the Income-tax Officer filed two appeals against the orders of the Appellate Assistant Commissioner. All these four appeals were dealt with by a common order. The Tribunal came to the conclusion that it was the assessee who was the owner of the business and not Ayyaru,

as now claimed. The Tribunal also came to the following conclusions :

"We are not disposed to take the version of the assessee that the credit in Ayyaru's folio of \$ 87,500 alleged to represent the sale proceeds of closing stock of goods of the old Thyagesan and Company is the truth. The conclusion of the department that they are not genuine items, but only bogus credit representing the assessee's share of profits in addition to that revealed by him, is nearer the truth. It has to be remembered that in support of the loan of \$ 87,500 except the bare entry in a book brought into being on 7th January, 1946, there is not a scrap of paper to evidence this transaction. There is, of course, the affidavit of Ayyaru Mudaliar speaking to the version put forward by the assessee, but we are not inclined to place any reliance upon it."

7. Dealing with the question of remittances, it held as follows :

"The intention with which the monies were sent to Puddukottai is quite plain. It cannot be said that the income-tax department was wrong in concluding that the assessee would not have remitted monies to Pudukkottai, if the same were not his own profits. Even judging from another angle, the assessee's version cannot be believed. If the money was needed for business what need was there for putting the money as fixed deposit in Pudukkottai banks ?

Then again, the assessee says that he kept a sum of \$ 87,500 belonging to Ayyaru Mudaliar to finance the business operation in Singapore. That obviously seems not to have been done. The purchase of properties soon after would only strengthen the conclusion of the department. We see no basis whatsoever for the assertion of the assessee that the purchases of properties were made from borrowings and that the fixed deposit was kept safe at Pudukkottai so that Ayyaru Mudaliar may be repaid later on. The plain fact is Ayyaru Mudaliar never seems to have been intent or insistent in getting back the so-called loans. Likewise, we are not inclined to believe that the values of goods amounting to \$ 12,035, of sundries amounting to \$ 6,807 and the sum of \$ 5,114 representing the cash balance in the bank taken over by the petitioner would represent what they are stated to be. The conclusion is irresistible that the assessee enjoyed the bulk of the profits of Thyagesan and Company, that the statement that \$ 11,000 represented his share of profits cannot be believed, that the account books were wilfully not produced and that the credit entries and other entries referred to above are not genuine entries. Therefore, the assessee's real income could not be determined on the basis of the books or the evidence produced before the Income-tax Officer."

8. Dealing with the assessment year 1948-49, the Tribunal upheld the order of the Appellate Assistant Commissioner, and in the result all the appeals were dismissed by the Tribunal. The Tribunal, however, stated a case and referred two questions to the High Court, which are as follows :

"(1) Whether there was evidence to come to the conclusion that the computation of the income of the assessee at Rs. 1,80,000 and remittance at Rs. 30,000 in the assessment for the year 1947-48 was right; and

(2) Whether there was evidence for the conclusion that the sum of Rs. 1,07,461 was remitted into India and was assessable to tax in the assessment year for the year 1948-49 ?"

9. By an order dated July 31, 1958 the High Court of Madras came to the conclusion that the finding of the Tribunal that Ayyaru was only a benamidar was manifestly wrong. It called for a fresh

statement of the case and directed "the Tribunal to go into the matter again and after giving an opportunity to both sides to submit further argument and further evidence, if any, submit a fresh statement of the case. In doing so it will eschew the theory that Ayyaru was a benamidar of Ganapathi Mudaliar and record its findings on the material on record uninfluenced by this hypothesis". The High Court further observed as follows :

"The Tribunal will also bear in mind what we have already pointed out. The departmental authorities accepted the agreement of service, annexure "A" and the power of attorney, annexure "B", as evidencing genuine transactions. The assessee's case it should be remembered, was that his 10 per cent. of the profits came to 11,000 dollars. If so, the total profit of Thyagesan and Company for five years should have been 1,10,000 dollars, which was the assessee's case. The Tribunal was not inclined to accept the claim of the assessee that his share of the profits amounted only to 11,000 dollars. In arriving at an estimate of the assessee's share of the profits, the Tribunal should also take into account what the total profits should have been and what the assessee's share of the profits was."

10. We may mention that a further statement of the case, with the directions reproduced above, was uncalled for. As held by this court in *Petlad Turkey Red Dye Works Co. Ltd. v. Commissioner of Income-tax* the supplemental statement of the case may contain such alternations or additions as the High court may direct but the statement must necessarily be based on facts which are already on the record. The High Court had no power to ask for additional evidence to be taken.

11. The Tribunal submitted a fresh statement of the case, and it stated that it had come to the following conclusion :

"(i) that there is no proof that even after December, 1941, that the agreement of 23rd September, 1940 enured with the same terms as the division of profit, at any rate, after Ayyaru returned to the business after the shop in which he was employed was burnt down;

(ii) that 87,500 dollars credited to Ayyaru's account was not available for being used for the purpose of the business because, as stated above, by 12 th January 1946, at any rate, Rs. 1,50,000 had been remitted to India;

(iii) the income from business and other source in the relevant year was more than Rs. 1,80,000; and

(iv) there was no dispute about the income for the second year."

12. By its judgment dated October 23, 1959, the High court answered the two questions, referred to it, as follows :

"The two questions referred to this court dealt with the problems arising in the successive assessment years. Both have to be answered virtually on the basis of the same material and findings of the Tribunal. It is not possible in the circumstances of this case to answer these questions by a simple 'yes' or 'no'. Once again we have to point out that the real questions in controversy from the stage of Tribunal onwards was whether the 87,500 dollars which the assessee had at his disposal, was borrowed money or was part of his accumulated income. As the findings of the Tribunal that it was part of his accumulated income was vitiated, and as that finding has to be set aside on that basis, that amount has to be set aside on that account in deciding how much the assessee held abroad

to which the remittances to the taxable territories could be traced. We have pointed out that certain items of credit entries made on 7th January, 1946, were excluded by the Assistant Commissioner himself. The item of 87,500 dollars will also have to be excluded. The net result is that all could be held to have been available to the assessee as his accumulated savings held abroad were 36,000 dollars up to 12th January, 1946, and two further sums, 11,371, dollars which constituted the income in 1946 and 11,193, dollars which constituted his income at Singapore in 1947. There was no controversy about these items since the assessee himself admitted that these constituted income. It is with reference only to these items that the assessment will have to be revised in both the assessment years. That is our consolidated answer to both the questions."

13. The appellant having obtained leave from this court, the appeals are now before us for disposal.

14. As the High Court rightly observed, the real controversy between the assessee and the department was on the issue whether the sum of 87,500 dollars, which was credited to Ayyaru in the assessee's account on January 7, 1946, was Ayyaru's money, which had been borrowed by the assessee or whether the entry was fictitious and the money really belonged to the assessee himself. This question is really one of fact and unless the finding of the Tribunal is vitiated, the High Court had no jurisdiction in a reference to reverse the findings. The High Court was cognizant of the limitation of its jurisdiction. The High Court, however has held, that the finding of the Tribunal that 87,500 dollars represented the accumulated income of the assessee was vitiated by a wrong approach of the Tribunal.

15. It has been urged by Mr. Kapur, the learned counsel for the appellant that the Tribunal adopted the right approach. It was for the assessee to explain the credit of 87,500 dollars standing in his books, and he having failed to show that this sum was borrowed from Ayyaru, the conclusion was irresistible that the said sum was income of the assessee. He relied on the decisions of this court in *A. Govindarajulu Mudaliar v. Commissioner of Income tax* and *Kale Khan Mohammed Hanif v. Commissioner of Income-tax*. In *Mudaliar's* case, this court held that "there is ample authority for the position that where an assessee fails to provide satisfactory the source and nature of certain amount of cash received during the accounting year, the Income-tax Officer is entitled to draw the inference that the receipts are of an assessable nature."

16. In *Kale Khan Mohammad Hanif v. Commissioner of Income-tax* this court, in answering the question "Whether the burden of proving the source of the cash credit is on the assessee" observed that :

"It seems to us that the answer to this question must be in the affirmative and that is how it was answered by the High court. It is well established that the onus of proving the source of a sum of money found to have been received by the assessee is on him. If he disputes liability for tax it is for him to show either that the receipt was not income or that if it was, it was exempt from taxation under the provisions of the Act. In the absence of such proof, the Income-tax Officer is entitled to treat to as taxable income."

17. Mr. Rajagopal Sastri, learned counsel for the respondent, contended that there was no material to support the finding of the Tribunal, He said that the Tribunal's findings that Ayyaru was a benamidar of the assessee was held to have been vitiated by the High Court in its order dated July 31, 1958, and the Tribunal in its further statement of the case has found the income to arise from a different source, a source, other than the business of Thyagesan and Co. There was no material he said, in

support of the finding that the income was from Thyagesan and Co.

18. It seems to us that answering the questions referred to it, the High Court has unwittingly acted as an appellate court. What it had to consider was whether there was any material to support the finding of the Tribunal, and not whether the finding was justified.

19. In our opinion, the answer to the questions referred should be in the affirmative. There is ample material on the record in support of the finding that the assessee's income, in the assessment year 1947-48, was Rs. 1,80,000. In the accounts of the business, the following entries appear on January 7, 1946 :

"Sale proceeds of balance of goods relating to the business carried on in the name of Thyagesan and Company (old Thyagesan and Company) from 23rd september, 1940, to 29th September, 1945 87,500.00 Value of goods of old Thyagesan and Company, transferred to No. 180 12,035.15 Value of sundries of old Thyagesan and Company being the entire balance transferred to No. 180 6,807.95 Indian Overseas Bank balance of old Thyagesan and Company,taken over 5,114.19 Dr. amount due to the assessee as per agreement 10 percent. of \$ 1,10,000 of old Thyagesan, and Company, for the five years 11,000 Compassionate gift for troubles ,tribulations, etc., undergone by the assessee during the Japanese occupation 25,000 ----- 40,844 1,20,743.34 -----
Net credit 79,899. 07

20. In respect of the first item of 87,500 dollars, the case of the assessee was that this represented sale proceeds of goods belonging to Ayyaru, and that he loaned this money to the assessee. The assessee had no capital with him when he started life in Singapore, on a salary 18 dollars a month, plus 10% profits. That the sum of 87,500 dollars was actually not used for business at Singapore is clear from the remittances made by the assessee. The remittance of Rs. 75,000 on December 19,1945, found no place in the books maintained for No. 180 shop. It was also significant that there was no mention in the deed of September 29, 1945 about credits in Ayyaru's folio of the 87,500 dollars or 12,036.15, 6,807.97 and 5,114.12 dollars. Further the story of the assessee has not been consistent. At first it was said that a promissory note was executed for 87,500 dollars; later a kanieluthu letter was produced instead.

21. It is further significant that if the ex gratia payment of 25,000 dollars was made to the assessee, for suffering undergone under the Japanese regime and for having been locked up during the Japanese war and having undergone suffering, and because the assessee was suffering from deficiency of capital why did Ayyaru think fit to leave 87,500 dollars in assessee's hands at the time of leaving the business ? It is further noteworthy, as stated above, that this sum was not actually used for the business at Singapore. The Tribunal was entitled to disbelieve the assessee's version that no books were kept because the assessee gave meticulous details of all transactions on January 7, 1946, when doing his own business, but when acting in a fiduciary capacity under annexure "B", he has not maintained any accounts, or, at any rate, made no attempt to preserve them. The Tribunal was entitled to hold that if the accounts of No. 182 shop did exist, and if they had been produced, it would have shown that the assessee made not 10% during the whole period of five years for which the business of old Thyagesan and Company was carried on, but much more. The Tribunal noted the impossibility of believing the story that the assessee needed to borrow 87,500 dollars at interest from Ayyaru for business purposes, if all that sum together with all cash sales of 11,425 dollars was to be sent to Pudukkottai by January 12, 1946. Further, it rightly felt difficulty in believing that Ayyaru would lend 87,500 dollars without even a promote and seeing it all being sent to Pudukkottai in the assessee's name. Once it is held that 86,500 dollars was the income of the

assessee, it was not necessary for the revenue to locate its exact source. On this material, we cannot say that there is no evidence in support of the finding of the Tribunal.

22. With great respect, the High Court did not appreciate the findings of the Tribunal recorded in the supplementary statement. The Tribunal had accepted the earlier findings of the court, recorded in the order dated July 31, 1958, but in spite of discarding the theory of benami on the material before it, it came to the conclusion that no other conclusion except that 87,500 dollars was the income of the assessee was possible.

23. Once it is held, as we do hold, that there was material for the finding of the Tribunal that 87,500 dollars represented the income of the assessee, no other issue survives.

24. In the result, the appeals are allowed and the question referred to the High Court answered in the affirmative. No costs.

25. Appeals allowed.