

S. S. Gadgil

Vs

Lal And Co

Civil Appeal No. 322 of 1963

(K. Subha Rao, J. C. Shah JJ)

30.04.1964

JUDGMENT

SHAH J. -

Messrs. Lal and Company, hereinafter called the assessee, carry on business in Bombay as commission agents. In the course of assessment proceedings for the year 1954-55 the assessee's books of account were examined by the Income-tax Officer and it was noticed that the assessee had business connections with certain non-resident parties. On March 12, 1957, the Income-tax officer issued a notice calling upon the assessee to show cause why in respect of the assessment year 1954-55 the assessee should not be treated under section 43 of the Indian Income-tax Act, 1922, as an agent in respect of twenty-five non-resident parties named in the notice. The assessee denied that he had "direct dealings" with any non-resident party and that in any event the proposed action was barred because the period prescribed for initiation of proceeding had expired, and requested the Income-tax Officer initiation of proceeding had expired, and requested the Income-tax Officer to drop the proceeding. The Income-tax Officer,

The Income-tax Officer also rejected the contention of the assessee that action under section 34 was barred at the date of the notice issued to the assessee. Relying upon the first proviso to section 34(1)(b)(iii) inserted by the Finance Act, 1956, the Income-tax Officer held that the legislature had by amendment extended the "time- limit in clear and express terms so as to cover" action under section 34 against a person on whom the assessment or reassessment is to be made as an agent of a non-resident person under section 43 of the Act for the assessment year 1954-55, and accordingly assessed the income of the assessee at Rs. 60,684, estimating the income of the parties residing outside the taxable territories, in the absence of accounts, to be Rs. 50,000.

The assessee then filed a petition under article 226 of the Constitution in the High Court of Judicature at Bombay praying that a writ in the nature of mandamus or prohibition to issue restraining and prohibiting the Income-tax Officer from giving effect to or taking any steps of proceedings by way of recovery or otherwise in pursuance of the orders of assessment. The assessee pleaded, inter alia, that the proceedings for assessment under section 34 of the Act commenced by the Income-tax Officer after the expiry of one year from the end of the assessment year 1954-55 were without the authority of law. The High Court of Bombay, following its earlier judgment in S. C. Prashar v. Vasantsen Dwarkadas, held that at the date when the notice was issued, by reason of the proviso which was in operation under section 34(1) in respect of the assessment year 1954-55, the notice was out of time and that the period provided thereby could not be extended by the Finance Act of 1956 so as to authorise the Income-tax Officer t

In order to appreciate the contention raised by the assessee and which has found favour with the High Court, it is necessary to refer to the relevant provisions of section 34, as they stood before the section was amended by the Finance Act, 1956. The relevant clause prescribing the period within which notice may be issued read as follows :

By section 18 of the Finance Act, 1956, section 34 was extensively amended and clause (iii) of the proviso was substituted by the following proviso :

"Provided further that the Income-tax Officer shall not issue a notice under this subsection for any year after the expiry of two years from that year if the person on whom an assessment or reassessment is to be made in pursuance of the notice is a person deemed to be the agent of a non-resident person under section 43".

Initially a notice of assessment or reassessment under section 34(1) against a person deemed to be an agent of a non-resident person under section 43 could not be issued after the expiry of one year from the end of the year of assessment : under the amended section this period was extended to two years from the end of the year 1954-55 the relevant law applicable prescribed that a notice of assessment year. That period expired on March 31, 1956, and after that date no notice could be issued, relying upon the law as it stood before amendment for assessment or reassessment treating the assessee as an agent of a non-resident under section 43. But the Income-tax Officer sought recourse to the amended provision which gave him a period of two years from the end of the assessment year, for initiating assessment proceedings, and the authority of the Income-tax Officer to so act is challenged by the assessee.

Section 18 of the finance Act, 1956, is, it is common ground, not given retrospective operation before April 1, 1956. The question then is, whether the Income-tax Officer may issue a notice of assessment to a person as an agent of a non-resident party under the amended provision when the period prescribed for such a notice had before the amended Act came into force expired ? Indisputably the period for serving a notice of reassessment under the unamended section had expired, and there was in the Act, as it then stood, no provision for extending the period beyond the end of one year from the year of assessment. The Income-tax Officer could therefore commence a proceeding under section 34 on March 27, 1957, only if the amended section applied and not otherwise. The amending Act came into force after the period provided for the issue of a notice under section 34, proviso (iii), before it was amended. But there was no overlapping period either. Prima facie, on the expiry of the period prescribed by section 34 a

Reliance was placed by counsel upon *Tomlinson v. Bullock* and *English v. Cliff*. In *Tomlinson's* case, the question was whether an order of affiliation could be made on an application made in respect of a child born at any time of the day on August 10, 1872, under the Bastardy Act (35 and 36 Vict., c. 65). In an application made for an order of affiliation, it was held that the order could competently be made in respect of a child born at any time of the day on the 10th of August, 1872, because the Act, in the contemplation of law, for this purpose came into effect from the commencement of the day on which it received the royal assent, and that normally an Act which comes into operation becomes law as soon as it commences. In *English v. Cliff*, it was held by the Court of Chancery that the trustees under a deed of settlement dated May 13, 1892, who stood possessed of an estate during the term of twenty-one years from the date of settlement upon trust to apply the rents and profits mentioned therein and who were

Reliance was also placed by counsel for the Commissioner upon the rule which has prevailed in the Supreme Court of the United States of America that "a new statute should be construed as a continuation of the old one with the modification contained in the new one, although it formally repeals the old statute, when it re-enacts its substantial provisions and the two statutes are almost identical" (*Bear Lake and River Water Works and Irrigation Company and Jarvis Conklin Mortgage Trust Company v. William Garland and Corey Brother and Co.*). It appears to have been recognised in the Supreme Court of the United States of America in *Pacific Mail S.S.Co. v. Joliffe*, that repeal in terms of a former statute does not necessarily indicate an intention of the legislature thereby to impair rights which had arisen under the Act which was repealed. As the provisions of the new Act took effect simultaneously with the repeal of the old one, the Supreme Court held that the new one might more properly be said to be substituted

Counsel also submitted that section 34 lays down a rule of limitation for commencing an action for assessment or reassessment, and that in the absence of an express provision to the contrary, a statute of limitation in operation at a given time governs all proceedings from the moment of its enactment even though the case of action on which the proceeding was based came into existence before the Act was enacted. Equating a proceeding under section 34 of the Indian Income-tax Act with a suit or a proceeding in a civil court, counsel said that the law of limitation being a law of procedure, assessment proceedings including proceedings for reassessment are governed by the law in force at the date on which they are instituted, and that the rule that the repeal of a statute without express words or clear implication in the repealing statute, cannot take away a right vested in a party acquired under the repealed statute when it was in force, is a rule of prescription and not of procedure, and notwithstanding *general med Mehdi Faya v. Sakinabai* (a suit for restitution of conjugal rights); *M. Krishnaswami Naicker v. A. Thiruvengada Mudaliar* (a suit for recovery of a debt); *Shumbhoonath Saha v. Guruchurn Lahiri* (an application for execution); and *Nepal Chandra Roy Chowdhury v. Niroda Sundari Ghose* (an application for setting aside an *ex parte* decree). Again soon after it was delivered the authority of *Baleswar's* case was weakened by the judgment in *Jagdish v. Saligram* where the court doubted the correctness of the earlier view.

A proceeding for assessment is not a suit for adjudication of civil dispute. That an income-tax proceeding is in the nature of a judicial proceeding between contesting parties, is a matter which is not capable of even a plausible argument. The income-tax authorities who have power to assess and recover tax are not acting as judges deciding a litigation between the citizen and the State : they are administrative authorities whose proceedings are regulated by statute, but whose function is to estimate the income of the taxpayer and to assess him to tax on the basis of that estimate. Tax legislation necessitates the setting up of machinery to ascertain the taxable income, and to assess tax on the income, but that does not impress the proceeding with the character of an action between the citizen and the State : *Commissioner of Inland Revenue v. Sneath and Shell Company of Australia Ltd. v. Federal Commissioner of Taxation*

Again the period prescribed by section 34 for assessment is not a period of limitation. The section in terms imposes a fetter upon the power of the Income-tax Officer to bring to tax escaped income. It prescribes different periods in different classes of cases for enforcement of the right of the State to recover tax. It was observed by this court in *Ahmedabad Manufacturing and Calico Printing Co. Ltd. v. S. G. Mehta, Income-tax Officer* :

"It must be remembered that if the Income-tax Act prescribes a period during which the tax due in any particular assessment year may be assessed, then on the expiry of that period the department cannot make an assessment. Where no period is prescribed the assessment can be completed at any

time but once completed it is final. Once a final assessment has been made, it can only be reopened to rectify a mistake apparent from the record (section 35) or to reassess where there has been an escapement of assessment of income for one reason or another (section 34). Both these sections which enable reopening of back assessment provide their own periods of time for action but all these periods of time, whether for the first assessment or for rectification, or for reassessment, merely create a bar when that time passed against the machinery set up by the Income-tax Act for the assessment and levy of the tax. They do not create an exemption in favour of the assessee or grant an absolution on the expiry of the period. The

Counsel for the Commissioner sought to derive some support from *Income-tax Officer, Companies District I, Calcutta v. Calcutta Discount Company Ltd.* in which Chakravarti C.J., dealing with the effect of the Income-tax and Business Profits Tax (Amendment) Act, 1948, observed :

"The plain effect of the substitution of the new section 34 with effect from March 30, 1948, is that from that date the Income-tax Act is to be read as including the new section as a part thereof and if it is to be so read, the further effect of the express language of the section is that so far as cases coming within clause (a) of sub-section (1) are concerned all assessment years ending within eight years from March 30, 1948, and from subsequent dates, are within its purview and it will apply to them, provided the notice contemplated is given within such eight years. What is not within the purview of the section is an assessment year which ended before eight years from March 30, 1948."

But it may be recalled that the amending Act of 1948, with which the court was concerned in *Calcutta Discount Company's* case, came into force on September 8, 1948, but section 1(2) prescribed that the amendment in section 34 of the Income-tax Act, 1922, shall be deemed to have come into force March 30, 1948, and the period under the unamended section within which notice could be issued under section 34(3) against the assessee company ended on March 31, 1951. Before that date the amending Act came into operation, and at no time had the right to reassess become barred.

In considering whether the amended statute applies, the question is one of interpretation, i.e., to ascertain whether it was the intention of the legislature to deprive a taxpayer of the plea that action for assessment or reassessment could not be commenced, on the ground that before the amending Act became effective, it was barred. Therefore the view that even when the right to assess or reassess has lapsed on account of the expiry of the period of limitation prescribed under the earlier statute, the Income-tax Officer can exercise his powers to assess or reassess under the amending statute which gives an extended period of limitation, was not accepted in *Calcutta Discount Company's* case.

As we have already pointed out, the right to commence a proceeding for assessment against the assessee as an agent of a non-resident party under the Income-tax Act before it was amended, ended on March 31, 1956. It is true that under the amending Act by section 18 of the Finance Act, 1956, authority was conferred upon the Income-tax Officer to assess a person as an agent of a foreign party under section 43 within two years from the end of the year of assessment. But authority of the Income-tax Officer under the Act before it was amended by the Finance Act of 1956, having already come to an end, the amending provision will not assist him to commence a proceeding even though at the date when he issued the notice it is within the period provided by that amending Act. This will be so, notwithstanding the fact that there has been no determinable point of time between the expiry of the time provided under the old Act and the commencement of the amending Act. The legislature has given to section 18 of the Finance A

The appeal fails and is dismissed with costs.

Appeal dismissed.

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