**SUPREME COURT OF INDIA**

M.J. Kanakabai

Vs.

Union of India

(J Shah, S Sikri and V Ramaswami JJ.)

31.03.1967

**JUDGMENT**

**SIKRI, J.**

1. These two appeal by certificate granted by the High Court of Kerala are directed against the judgment of the High Court passed in Appeal No. 1067 of 1959, which arose out of Original Suit filed in the Court of Subordinate Judge, Cochin. Civil Appeal No. 100 of 1966 is by M. J. Kanaka Bai and others (hereinafter referred to as "the plaintiffs"), and Civil Appeal No. 101 of 1966 is by the Union of India (hereinafter referred to as "the defendant").

2. In order to appreciate the contentions raised before us, it is necessary to set out the following facts : One Shri A. N. Padmanabha Shenoi, father of the two plaintiffs, was carrying on a joint Hindu family business under the name of style of "A. N. Guna Shenoi and Bros." in the former State of Cochin. At the relevant time, the Cochin Excess Profits Tax Act, 1117 M. E. (II of 1117 M. E.) (1941 A. D.) and Cochin Income-tax Act, 1117 M. E. (VI of 1117 M. E.) were in force in the Cochin State. Cochin Later became part of the State of Travancore- Cochin. On the commencement of the Constitution, the latter State became a Part B State in the Union of India.

3. The Government of India on May 20, 1951, issued a notification giving certain terms to assessee if they disclosed their hidden income or income which had escaped taxation. We are not concerned with the exact concessions given but only with the question whether this notification was also concerned with the assessment under the Excess Profits Tax Act. Our attention was invited by the plaintiffs to the opening sentence of the notification, which is as follows :

"Detailed measures for launching a special drive for the clearance of arrears of income-tax have now

been finalised by the Government of India."

4. It was also pointed out that only Income-tax Officers were mentioned in various parts of the notification and no reference was made to Excess Profits Tax Officers. In pursuance of this notification, A. N. Padmanabha Shenoi made two statement dated August 30, 1951, and October 22, 1951, disclosing income of the joint family business from 1-1-1115 M. E. (1939) to end of 1122 M. E. (1946) to the extent to Rs. 3,70,000 which had escaped assessment to income-tax in those years. In the disclosure dated October 22, 1951, it was stated that "a portion of these profits amounting to Rs. 81,759 had already been taxed in the assessments for the year 1116 and 1117 and a sum of Rs. 30,000 was added back to the disclosed profits in the year 1123." In paragraph 7 of the disclosure statement dated October 22, 1951, it was stated :

"I request that I may be allowed to pay the aggregate tax due by me in twenty monthly instalments as I am not in a position to command the cash necessary for paying the whole of the deficient tax that may be due by me in a lump."

5. He further requested that certain investigations being carried on against him in respect of the assessment years 1121, 1122 and 1123 be dropped.

6. Various amounts were paid by the said A. N. Padmanabha Shenoi under four challans dated March 23, 1952, February 25, 1953, March 27, 1953, and August 25, 1953, totalling Rs. 1,04,688-13-0 towards payment of income-tax on the disclosed income as a result of reassessment for the year 1119, 1120, 1121, 1122 and 1123 (i.e., 1943-44, 1944-45, 1945-46, 1946-47 and 1947-48). It may be mentioned that the High Court apparently saw these challans inoriginal. The High Court states :

"In the challans, which are Exhibits P3 to P6, the head "Super-tax; Miscellaneous; Surchage; and Excess Profits Tax" are scored and only the head "Income-tax" is left intact, indicating thereby that the demands related only to income-tax and not to excess profits tax."

7. We have mentioned this matter here because it is one of the contentions of the learned counsel for the defendant that these payments were made towards taxes in general and not towards income-tax only, while the plaintiffs contend that the demands related only to income-tax and payments were also made towards income-tax.

8. According to the plaintiffs, on August 11, 1953, for the first time the Income-tax Officer wrote to A. N. Padmanabha Shenoi that excess profits tax was also payable under the voluntary disclosure statements for 1119, 1120 and 1121. The Income-tax Officer stated in this letter that total excess profits tax due was Rs. 1,29,724-3-0, and after adjusting payments already made to the extent of Rs. 71,851-9-0, Rs. 57,972-10-0, was payable as balance excess profits tax. A. N. Padmanabha Shenoi replied on August 19, 1953, requesting that they may be permitted to pay the said amount of Rs. 57,872-10-0 as tax for the income-tax year 1119, in the three equal monthly instalments. However, on August 25, 1953, A. N. Padmanabha Shenoi took the position that no excess profits tax was due as the assessments in respect of excess profits tax for the years 1119, 1120 and 1121 became final by the orders of the Commissioner of Excess Profits Tax in Excess Profits Appeals No. 3 of 1120, 7 of 1121 and Excess Profits Tax r Revenue No. 2 of 1124, respectively. He alleged that the said orders have not been and could not be reopened under the provisions of the Excess Profits Tax Act. He, further assesrted that the Income-tax Officer had no jurisdiction to appropriate the sum of Rs. 71,851-9-0 which had been paid by him as advance tax towards income-tax and super-tax that may

be legally due under the disclosure scheme towards the excess profits tax alleged to be due.

9. Further correspondence ensued between the parties. However, on August 31, 1954, three demand notices for income-tax were issued to A. P. Damodara Shenoi, A. N. Padmanabha Shenoi having died in the meantime. P-23 was for recovery of Rs. 3,290-13-0, P-24 for Rs. 38,023-7-0, and P-25 for Rs. 8,886-11-0. The total came to Rs. 55,200-15-0.

10. The plantiffs filed three petitions under article 226 of the Constitution challenging these demand notices. The High Court dismissed the petitions on February 27, 1955, stating :

"We think it desirable, therefore, that the matter be considered in an original suit which the petitioners are free to file."

11. A. P. Damodara Shenoi, son of late A. N. Padmanabha Shenoi, and A. P. Narasinga Shenoi, brother of A. P. Damodara Shenoi, the plaintiffs, thereupon filed a suit in the Anjikaimal District Court, Ernakulam (Original Suit No. 31, of 1955), praying for a decree :

"(A) declaring that the plantiffs or the estate of late A. N. Padmanabha Shenoi are not 'defaulters' in the payment of income-tax, that the demand notices dated August 31, 1954, to the tune of Rs. 55,200-50-0, mentioned in paragraph 4 supra are void, their issue being beyond the competence of the defendants for the reason stated above, and restraining defendants by a permanent injunction from enforcing the said demand by any coercive process;

(B) declaring that no excess profits tax is leviable by the defendants or the income-tax department from the plaintiffs or the estate of the late A. N. Padmanabha Shenoi during the relevant periods and that the amounts paid should credited towards income-tax;

(C) ordering the first defendant to make good to the plaintiffs the sum of Rs. 16,650-0-0 with interest thereon by way of damages at 6 per cent. from September 22, 1954, till date of realisation."

12. The trial court held that Padmanabha Shenoi had not agreed to pay excess profits tax on the disclosed income as per the statement made by him on April 25, 1952, and July 31, 1953. The trial court observed :

"There is no record at all to show that either the plantiffs or their father agreed to pay excess profits tax. . . . . There is also no case of an oral agreement to pay excess profits tax."

13. The trial court further held :

"Admittedly, all the challans for payment of income-tax were filled up and issued from the income-tax officer under the direction of D. W. 1. All other items except income-tax have been scored off and the amounts are paid into the Treasury towards the head 'Income-tax'. . . . It was for the first time on 11th August, 1953, that the adjustment of Rs. 71,851-9-0 was made by the Income-tax Officer. . . . . The letter is not an assessment order. The Income-tax Officer does not say under what authority he has adjusted the said amount towards excess profits tax. . . . . There is nothing in exhibit D-9 show that either Padmanabha Shenoi or his son, the first plaintiff, agreed to pay the excess profits tax."

14. The trial court further held :

"If payments are already made towards income-tax, they could not be re-adjusted or re-opened, the demand notices for payment of income-tax cannot be considered to be valid, because no amount remains to be paid towards income-tax."

15. The trial court also held that excess profits tax was not leviable from the plaintiffs on the relevant dates. The trial court further repelled the contention of the Union of India that the plaintiffs are estopped from denying their liability to pay excess profits tax. In the result, the trial court passed a decree granting the prayers made by the plaintiffs.

16. The defendant appealed to the High Court. The High Court upheld all the findings of the trial court, but observed :

"Having assessed excess profits tax, the department has allowed deduction in regard thereto in the assessment of income-tax for the relevant years. As the assessee is found not liable to excess profits tax and has not therefore to pay the same, we must necessarily quash the deduction made by the department and declare the assessee liable to pay income-tax (inclusive of super-tax) on the income disclosed by him. Counsel for the revenue has submitted a statement showing the amount of tax payable by the plaintiffs as the legal representatives of the assessee if no deduction for excess profits tax is made, and has served a copy thereof on counsel for the plaintiff-respondents who has conceded the correctness thereof before us. Under that statement a sum of Rs. 21,884-13-0 remains due from the plaintiffs to the department. It must then follow that the decree of the court below has to be discharged, except in regard to the declaration of non-liability of the assessee for excess profits tax and the demand notices,

17. Accordingly, the High Court passed a decree in the following terms :

"This court doth order and decree as follows :-

1. that the decree of the below be and hereby is discharged, except in regard to the declaration of non-liability of the plaintiffs (legal representatives of the assessee) for the profits tax.

2. that the demand notices, exhibits P-23, P-24 and P-25, dated August 31, 1954, issued by the appellant - 1st defendant to the plaintiffs are held valid for the aggregate sum of Rs. 21,884.81 nP. and

3. that the appeal is allowed as indicated above."

18. The learned counsel for the plaintiffs in Civil Appeal No. 100 of 1966, contends that the High Court erred in holding, (a) that the demand notices, P-23, P-24 and P-25, were valid to the extent of Rs. 21,884.81 nP. and (b) that the plaintiffs were not entitled to a refund of Rs. 16,650, with interest from September 22, 1954. The learned counsel for the defendant in Civil Appeal No. 101 of 1966 contends that the High Court erred in holding, (a) that the father of the plaintiffs, A. N. Padmanabha Shenoi had not agreed to pay excess profits tax; (b) that, at any rate, he was estopped from saying that he had not agreed to pay excess profits tax; and (c) that the suit was barred by the provisions of section 111 of the Cochin Income-tax Act of 1117 M. E., which, inter alia, provides that no suit shall be brought in any civil court to set aside or modify any assessment made under this Act. We will

first deal with the points raised in Civil Appeal No. 101 of 1966, by the learned counsel for the defendant, seriatim.

19. Whether the plaintiff's father had agreed to pay excess profits tax in addition to income-tax is question of fact. Both the trial court and the High Court have found that there was no such agreement. No writing is produced in support of this contention. The notification of the Government of India, dated May 20, 1951, does not mention excess profits tax or Excess Profits Tax Officers. We have not been shown any material to enable us to set aside this concurrent finding. In the result, it must be held that it is not proved that the plantiff's father had agreed to pay excess profits tax.

20. There is also no force in the plea of estoppel. Apart from the fact that in the letter dated August 19, 1953, the plaintiff's father did not contest his liability to pay excess profits tax, no fact has been brought to our notice which could sustain the plea of estoppel. It appears that the plaintiff's father in the letter dated August 25, 1953, definitely took the stand that no excess profits tax was due. The learned counsel for the defendant also relied on the payment of Rs. 1,04,688-13-0 under four challans dated March 23, 1952, February 25, 1953, March 27, 1953, and August 25, 1953. But both the trial court and the High Court have found that in these challans the heads "Super-tax, miscellaneous, surcharge and excess profits tax" were scored out. In our opinion, there is no force in this point.

21. The last point regarding jurisdiction is equally without any substance. First, no such point was raised in the trial court or the High Court. It appears that the defendant successfully pleaded in the writ petitions filed in the High Court that the proper remedy for the plaintiffs was a suit and not writ petition under article 226. Be that as it may, there is no force in this point. Section 111 of the Cochin Income-tax Act of 1117 M. E. bars a suit to set aside an assessment. No prayer was made in the suit for setting aside any assessment. What was claimed in the suit was that the plaintiffs' father had not agreed to pay excess profits tax and the department had no jurisdiction to appropriate payments made towards income-tax or excess profits tax, due not under any assessment orders made under the Excess Profits Tax Act but under executive orders or calculations made on the supposition that the plaintiffs' father had agreed to pay tax. Such a suit, in our opinion, lies wholly outside the scope of section 111. We may here deal with the question of refund of Rs. 16,650 ordered by the trial court but denied by the High Court. The learned counsel for the plaintiffs says that the plaintiffs have filed an application or applications for refund and as these applications have not been disposed of yet, he does not press for the passing of a decree for the refund of Rs. 16,650. In view of this statement we do not consider it necessary to deal with the point whether the High Court was right in reversing the trial court on this point. In the result we hold that there is no merit in the appeal filed by the defendant. Civil Appeal No. 101 of 1966 is accordingly dismissed with costs.

22. Coming to the plaintiff's appeal, we are of the view that the High Court erred in holding that the demand notices P-23, P. 24 and P-25 were valid to the extent of Rs. 21,884.81. This sum was arrived at by revising the assessment orders, not under any provision of the Income- tax Act, but by the counsel for the revenue. The assessment orders stand as they were before. We are unable to appreciate how the assessment orders can be revised except under the provisions of the Income-tax Act. Neither the counsel for the defendant nor the High Court has power to revise any assessment order. Indeed, section 111 of the Cochin Income-tax Act interdicts the High Court. It is true the High Court has not done it directly, but indirectly it has done so. Consequently, we set aside the findings of the High Court that the demand notices, P-23, P-24 and P-25, were valid to the extent of Rs. 21,884.81.

23. In the result, Civil Appeal No. 100 of 1966 succeeds to the extent indicated above. The plaintiffs will have their costs in this court.

24. There will be one bearing fee in both the appeals.

25. Civil Appeal No. 100 of 1966 allowed in part.

26. Civil Appeal No. 101 of 1966 dismissed.