Champa Kumari Singhi and Others

Vs

The Member, Board of Revenue, West Bengal and Others

Civil Appeal Nos. 564, 571 of 1968

(CJI M. Hidayatullah, A. N. Grover, A. N. Ray, I. D. Dua, J. C. Shah, K. S. Hegde JJ)

02.02.1970

JUDGMENT

HIDAYATULLAH, C.J. -

1. This judgment shall dispose of Civil Appeals Nos. 564 to 571 of 1968. Of these, four are against the common judgment and order of a Division Bench of the Calcutta High Court December 10, 1963, dismissing 4 appeals (139 to 142 of 1959), from the order of a learned single judge April 23, 1959 in Writ Petitions Nos. 159 to 162 of 1958. The remaining four appeals are against the order, November 24, 1964, refusing to certify the case as fit for appeal to this court under article 133(1) of the Constitution.

2. The facts are as follows : One Dalchand Singhi held a prospecting license in the erstwhile Korea State (now in Madhya Pradesh). His son, Bahadur Singh Singhi, took a mining lease and started a colliery known as Jhagrakhand Colliery. In 1942, a private limited company called the Jhagrakhand Collieries Ltd. was started with an authorised capital of Rs. 24 lakhs (2,400 shares of Rs. 1,000 each). Bahadur Singh divided equally the 2,400 shares between himself and his 3 sons, Rajendra Singh Singhi, Narendra Singh Singhi and Birendra Singh Singhi. In 1943 the colliery business and its assets were transferred by the joint family to the company. In 1944 the father and his 3 son separated and partitioned the property. Bahadur Singh Singhi died on July 7, 1944, leaving a will. Letters of administration with the will annexed were granted in 1945. The register of Jhagrakhand Collieries Ltd. was rectified and showed thereafter 900 shares in the name of Narendra Singh Singhi and Rajendra Singh Singhi and 600 shares in the name of Birendra Singh Singhi. Birendra Singh Singhi died on December 12, 1950, leaving a widow, Smt. Champa Kumari, and two minor sons, Ashok Kumar Singhi, Chandra Kumar Singhi, and also a minor daughter. These minor have now attained majority.

3. Under what is known as the "Tyagi Scheme" announced on May 19, 1951, a voluntary disclosure was made by the Jhagrakhand Collieries Ltd. and the shareholders. The time limit for such disclosure was August 31, 1951. Before this the Income-tax Officer had filed a complaint for certain offences and under a search warrant seized the books of account of the company from 1945 to 1950. This was on July 3, 1951. The shareholders and the company then disclosed on July 1951, a concealed income of Rs. 42,52,501/- during the years 1945 to 1948.

4. On November 28, 1951, the Commissioner of Income-tax offered to withdraw prosecution if the company and the shareholders agreed to pay taxes due on a total income of Rs. 90,00,000/- to be distributed over the years 1945-1950 (both inclusive), together with a penalty of 20% and interest at 3% p.a. on unpaid tax. There were certain other conditions with which we need not concern

ourselves. Certain representations followed and finally on December 26, 1951, it was agreed that the parties jointly and severally agreed to pay Rs. 67,48,841/11. It was also agreed that a sum of Rs. 55,99,832/6 would be accepted in full satisfaction upon the parties paying the amount in the following instalments :

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(a) By December 31, 1951 - Rs. 7,50,000

(b) By March 31, 1952 - Rs. 5,00,000

(c) By March 31, 1953 - Rs. 9,50,000

(d) By March 31, 1954 - Rs. 9,50,000

(e) By March 31, 1955 - Rs. 9,50,000

(f) By March 31, 1956 - Rs. 9,50,000

(g) By March 31, 1957 - the balance

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On the failure of any of the instalments the which sum of Rs. 67,48,341/11 together with interest would become due. A deed of agreement, guarantee and equitable showing the total income and total net tax liability of each shareholder were shown. They were -

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1947/48 to 1951/52

Total tax

Smt. Champa Kumari's husband Rs. 5,28,917-11

Rajendra Singh Singhi Rs. 9,30,498-03

Narendra Singh Singhi Rs. 9,93,816-15

Jhagrakhand Collieries Ltd. Rs. 43,99,712-11

The company paid the following sums by way of tax :

February 1, 1952 Rs. 3,50,000

April 1, 1952 Rs. 90,000

April 22, 1952 Rs. 1,22,000

Narendra Singh Singhi paid the following sums by way of tax :

February 1, 1952 Rs. 1,50,000

April 1, 1952 Rs. 60,000

April 22, 1952 Rs. 48,000

Smt. Champa Kumari paid the following sums by way of tax :

April 1, 1952 Rs. 1,00,000

April 1, 1952 Rs. 40,000

April 1, 1952 Rs. 32,000

Rajendra Singh Singhi paid the following sums by way of tax :

April 1, 1952 Rs. 1,50,000

April 1, 1952 Rs. 60,000

April 22, 1952 Rs. 48,000

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On April 22, 1952, they signed the agreement. By that date the position in the payment of instalments had reached item (c) above showing Rs. 9,50,000 as due on March 31, 1953.

On August 29, 1952, the Income-tax Officer made several assessment orders in respect of the assessment years 1947-48 to 1951-52. Each such order included the following :

> "In accordance with the terms of the agreement dated 22nd April, 1952, executed in connection with the petitions dated 18th July, 1951, filed by the assessee and others under concessional scheme for the settlement of disclosures announced by the Government of Indian, the assessment is made as under :"

and then follows the computation of total income, the computation of tax and the total amount demanded.

5. On September 22, 1952, the Income-tax Officer (Companies District 1), Calcutta, sent the following letter to each assessee. The one sent to Smt. Champa Kumari Singhi may alone be quoted here as an example :

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From :

Shri V. Satyamurti,

M.A., B.L.,Income Tax Officer,

Companies District I,

Calcutta.

To

Smt. Champa Kumari Singhi,

49, Guriahat Road,

Calcutta.

Madam,

I am sending today by separate post (Regd. with A/D) copies of assessment orders, penalty orders, demand notices and chalans, etc., in regard to the amount of taxes and penalties payable by you in accordance with the terms of the agreement dated22nd April 1952, between you and the Government drawn up in connection with the disposal of the disclosure petition filed by you under the concessional scheme.In the Demand notices and chalans, demands have been shown to be payable on or before the 31st March, 1953, when the next instalment of payment under this agreement falls due. Needless to say, if there is no default in the matter of payment of that instalment (viz., Rs. 9,50,000 with all interest due thereon by 31stMarch, 1953), further extension of time for payment of the balance will be granted by me.

Yours faithfully,

(Sd.)

Illegible,

Dated 22-9-52.

Income-tax Officer."

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With this letter were forwarded the assessment orders and notices of demand under section 29 of the Indian Income-tax Act, 1922. These notices of demand reached the several appellants on 24th September, 1952. Similar notices of demand for excess profits tax and business profits tax were also served calling upon the assessee to pay the dues on or before March 31, 1953.

6. On March 25, 1953, the appellants filed application for revision under section 33A of the Income-tax Act against the orders of assessment and application of section 23A of the Income-tax Act. The commissioner held the assessments to be proper as they were made in accordance with the settlement after the appellants' disclosures. The appellants next asked that Rs. 1,00,000 be accepted instead of Rs. 9,50,000 payable on March 31, 1953, and they be not treated as defaulters. The amount was appropriated towards the current liability for the current financial year.

7. In February 1954, the Commissioner, after hearing the appellants promised reference to the Board of Revenue for a variation of the agreement of April 22, 1952. The main variation was to be that the penalty would be reduced to half and the appellants would have to pay Rs. 5,60,000 on March 31, 1954, and similar instalments each year for six years. The agreement was revised on December 27,

1954. The company sent a cheque for Rs. 5,60,000 on March 31, 1954, earmarking it as the said payment but it was appropriated towards the demand on the company for 1947-48.

8. On March 14, 1956 certificates under Section 46(2) of the Indian Income-tax Act, 1922 were issued and notices under Section 7 of the Bengal Public Demands Recovery Act, 1913 were served on the appellants in May, 1956. In June, 1956 the appellants filed several petitions under Section 9 of the Recovery Act contending inter alia that the proceedings were barred by limitation. This objection was overruled on January 5, 1957.

9. The appellants appealed to the Commissioner under section 51 of the Recovery Act and the objection that the certificates were barred by limitation under section 46(7) of the Indian Income-tax Act, 1922, was accepted and the certificates were cancelled. The Union of India thereupon filed several divisions before the Board of Revenue under section 53 of the Public Demands Recovery Act, against the order of the Commissioner. They were allowed by a common order dated June 27, 1958. The appellants were again called upon to pay the amount on pain of distress warrants.

10. The above facts were necessary to understand the background of the dispute from which the petitions under article 226 of the Constitution arose.

11. The appellants filed Writ Petitions Nos. 159 to 162 of 1958, asking for a writ of certificate to quash the orders of the Board of Revenue and prohibiting the certificate officer from enforcing the recovery certificates. The writ petitions were heard by Sinha, J. and were dismissed on April 23, 1959. The recovery proceedings were held not barred by limitation. The appellants then filed appeals in the High Court against the judgment and order of Sinha J. (Nos. 139-142 of 1959). These appeals were heard by Mokerji and Sen, JJ., who, by the common judgment now under appeal in four of these appeals, dismissed them. The applications for certificate under article 133(1) of the Constitution were also rejected and have given rise to the other four appeals before us.

12. Mr. Chagla who argued these appeals submitted the question of limitation at the forefront and then attempted to argue the merits such as the interpretation of the agreements and the reliance placed on them in the High Court and distribution pro rata to the amounts paid on March 31, 1954. These points were not allowed to be raised by us. These questions were not raised before Sinha J. The Divisional Bench also did not allow these points to be raised.

13. The short question, therefore, is one of limitation applicable in this case. We are concerned in answering this question with section 46 of the Indian Income-tax Act, 1922. We are not required to consider the entire section but only sub-section (1) and (7) which are relevant. They read :

> "46. Mode and time of recovery. - (1) When an assessee is in default in making a payment of income-tax the Income-tax Officer may in his discretion direct that, in addition to the amount of the arrears, a sum not exceeding that amount shall be recovered from the assessee by way of penalty."
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> "(7) Save in accordance with the provisions of sub-section (1) of Section 42, or of the proviso to Section 45, no proceedings for the recover of any sum payable under this Act shall be commenced after the expiration of one year from the last day of the financial year in which any demand is made under this Act :

Provided that the period of one year herein referred to shall -

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(iv) where the sum payable is allowed to be paid by instalments, from the date on which the last of such instalments was due :

Provided further that nothing in the foregoing proviso shall have the effect of reducing the period within which proceedings for recovery can be commenced, namely, after the expiration of one year from the last day of the financial year in which the demands in made.

Explanation. - A proceedings for the recovery of any sum shall be deemed to have commenced within the meaning of this section, if some action is taken to recover the whole or any part of the sum within the period hereinbefore, referred to, and for the removal of doubts it is hereby declared that the several modes of recovery specified in this section are neither mutually exclusive, nor effect in any way other law for the time being in force relating to the recovery of debts due to Government, and it shall be lawful for the Income-tax Officer, if for any special reasons to be recorded he so thinks fit, to have recourse to any such mode of recovery notwithstanding that the tax due is being recovered from an assessee by any other mode."

The contention of the appellants is that we have to find out when they could be treated as defaulters within the first sub-section and whether under the main part of sub-section (7) the proceedings for the recovery of the tax with penalty could be commenced after expiration of one year from the last day of the financial year in which the demand was made. The argument of the department is that the matter is covered by clause (iv) of the first proviso which allows limitation of one year to be calculated from the date on which the last instalment was due in the present case.

14. To begin with there is an error in the fourth clause of the first proviso inasmuch as the words "be reckoned" have been inadvertently left out in that clause. The intention to use those words is obvious from the way in which the first three clauses are worded. Supplying those words because they were inadvertently omitted it is clear that one of two limitation is applicable to the present case, according to the circumstances of the case. If it is to be considered under the main clause of sub-section (7), then we have to find out whether the whole of the amount was payable by a particular date on which the assessee can be said to have become a defaulter. If, however, the fourth clause of the proviso applies then we have to see whether by reason of the grant of instalments, limitation would only commence to run from the date on which the last of the instalments was payable. In this connection reference has been made by the High Court and the Board of Revenue to the agreements and the letters written sending the assessment orders and the notices of demand. The agreements set out of a scheme of payments by instalments and the entire sum payable was Rs. 67,48,841/11/-. This was payable in different instalments, from 1952 to 31st March, 1957.

It was, however, provided as follows :

"..... provided however that in the event of due and punctual payment of all instalments Government will give us the sum of Rs. 11,49,019/5/- with interest thereon, from the last instalment and accept of the sum of Rs. 55,99,822/6/- with interest thereon in full settlement of the balance due; provided further that in the

event of any default in payment of any sum of due date therefrom or in the event of it being found that the guarantee hereby given or any part thereof is not enforceable for any reason whatsoever there will be no abatement and the parties of the first and second part will pay the full sum of Rs. 67,48,841/11/-.

The monies payable on 31st March, 1953, 31st March, 1954, 31st March, 1955, 31st March, 1956, and 31st March, 1957, shall be applied pro rata towards the tax liability of the party of the first part and the parties of the second part mentioned in schedule "Y" hereto.

The said parties shall however be at liberty to make any part payment at any time towards the said instalments not less than Rs. 10,000/- (Rupees ten thousand) at a time.

4. In the event of any instalment not being paid within the time mentioned above (such time being deemed to be of the essence of the arrangement) or in the event of it being found that the guarantee hereby given or any part thereof is not enforceable for any reason whatsoever the whole of the balance of the said sum of Rs. 67,48,841/11/- will at one become due and payable with interest at the rate aforesaid and Government will (in addition to all rights for enforcement of this documents) be entitled to take all steps to enforce payment including issue of certificate under section 46(2) of the Income-tax Act and proceedings under the West Bengal Public Demands Recovery Act and Revenue Recovery Act."

15. The contention of the appellants is that the letters of the 22nd September, 1952 (one of which has been reproduced above as a sample) were accompanied by the notices of demand and on the breach of the payment of the instalment of Rs. 9,50,000/- on 31st March, 1953, the appellants became defaulters within the meaning of the Act in respect of the whole amounts of tax. Therefore, recovery proceedings could only commence within the end of a financial year commencing from 31st March, 1953, since the payment of the instalment was co-terminus with the end of the financial year. This, according to them, was provided in the agreement itself in the extract just reproduced from the agreements above. The other side contends that clause (iv) of the proviso to section 46, sub-section (7), takes on account of the eligibility of the whole amount under a scheme of payment by instalments. Whenever instalments are granted the period of limitation counts from last instalment and here it would be one year from March 31, 1957. The default could be taken note of earlier also, because the whole amount remained exigible the moment the first default was made. In the present case the certificate was issued on March 14, 1956, and, therefore, it was well within the period of limitation.

16. The learned single judge in the case (Sinha J.) very rightly pointed out that under the agreements two things were done. Firstly, the total liability of the parties was calculated and each party became jointly and severally liable for the whole sum. Then instalments were fixed and on the breach of a single instalment the whole of the amount became exigible. The assessment order reproduced the agreement as part of it and the agreement therefore became the assessment order. Under the assessment order a notice of demand was sent to pay the money of the first instalment of Rs. 9,50,000/- by March 31, 1953. On breach of it the whole amount was said to be exigible and the demand in respect of that was also made. The appellants, therefore, rightly concluded the judge, became defaulters on the failure to pay the first instalment. Since instalments were granted, clause (iv) of the proviso to sub-section (7) of section 46 applied to the case. This conclusion is correct.

That clause does not mention about the exigibility of the whole amount or exigibility of any particular instalment. It only says that if instalments are granted time of one year ending with the end of a financial year is to be calculated from the date on which the last instalment is payable. The language of clause (iv) of the proviso was unfortunate in expressing this intent and has now been corrected in the new Act, but the intention was always obvious. Even in the second agreement which replaced the first agreement the same condition obtained. There was a concession shown in the matter of penalty and smaller instalments were fixed. But the Central Board of Revenue had stipulated even then that the concession mentioned above would only be available if the revised scheme of payment was strictly followed. In other words, payment was to be made by instalments and this concession, therefore, attracted the provisions of clause (iv). The Government could always accept any instalment even if paid late without having to worry about the period of limitation of one year from the date of demand, since clause (iv) of the first proviso gave them an option to wait till the last instalment was payable. The scheme of the instalments took the matter out of the main part of sub-section (7) and brought it within the proviso to clause (iv). We are, therefore, satisfied that the High Court was right in holding that the certificates were issued within the period of limitation prescribed by law and were not by law and were not barred by time. The first four appeals therefore fail and are dismissed with costs. The other appeals need not be considered since special leave was granted against the main order and those appeals themselves have failed. The remaining four appeals against order refusing certificate are accordingly dismissed as infructuous with no separate order as to costs.

The dissenting Judgment of the Court was delivered by

HEGDE, J. [illegible]

These appeals should be allowed, as in my opinion the impugned certificate is barred under sub-section (7) of section 46 of the Indian Income-tax Act, 1922 (in short 'the Act').

18. The facts of the case are fully set out in the judgment of my Lord, the Chief Justice. Hence, there is no need to state them over again.

19. Under the agreement entered into between the assessees and the department, if the assessees fail to pay any one or more of the instalments fixed, the entire tax became recoverable forthwith. Admittedly, the assessees failed to pay the instalments as stipulated in the agreement and, therefore, it was open to the department to recover the entire arrears of tax. It is true that the default clause in the agreement was intended for the benefit of the department and therefore under the law of contract, it was open to the department to waive that clause and sue for the recovery of the various instalments as and when they fell due. But that aspect of the question is not relevant for considering the true scope of sub-section (7) of section 46. Section 46 creates a special machinery for the recovery of arrears of tax. Section 46 is found in Chapter VI of the Act, which deals with recovery of tax and penalties. Section 45 prescribes when an assessee becomes a defaulter. The main part of that section says :

> "Any amount specified as payable in a notice of demand under sub-section (3) of section 23A or under section 29 or an order under section 31 or section 33, shall be paid within the time, at the place and to the person mentioned in the notice or order, or if a time is not so mentioned, then on or before the first day of the second months following the date of the service of the notice or order, and any assessee failing so to pay shall be deemed to be in default, provided that, when an assessee has presented

> an appeal under section section 30, the Income-tax Officer may in his discretion treat the assessee as not being in default as long as such appeal is undisposed of."
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> (The proviso to that section and the Explanation are not relevant for our present purpose.)

20. For finding out whether an assessee is a defaulter or not, all that we have to see is whether he has failed to comply with the provision of section 45. If he has failed to comply with the demand made in accordance with the provisions in section 45 within the time mentioned therein then he is "defaulter" within the meaning of "the Act". Unless the assessee is a defaulter, no action can be taken against him under section 46. Non-fulfilment of the terms of the agreement does not amount to a default under section 45. Therefore, the first thing we have to see is when the assessees became defaulters. For deciding that question reference to the agreement is irrelevant. Admittedly, demand notices under section 29 had been issued to the assessee on September 22, 1952, in respect of the entire tax due from them. Therefore, they became defaulters as soon as they failed to comply with those demands.

This takes us to section 46. Sub-section (1) of section 46 says :

> "When an assessee is in default in making a payment of income-tax, the Income-tax Officer may in his discretion direct that, in addition to the amount of the arrears, a sum not exceeding that amount shall be recovered from the assessee by way of penalty."

21. The default referred to in this sub-section is necessarily a default under section 45. That much is obvious from the scheme of Chapter VI. Now let us read sub-section (7) of section 46. It is as follows :

> "Save in accordance with the provision of sub-section (1) of section 42, or of the proviso to section 45, no proceedings for the recovery of any sum payable under this Act shall be commenced after the expiration of one year from the last day of the financial year in which any demand is made under this Act;
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> Provided that the period of one year herein referred to shall -
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> (iv) where the sum payable is allowed to be paid by instalments, from the date on which the last of such instalments was due."

22. If we read the impugned sub-section (7) of section 46, it is clear that no proceedings for the recovery of any sum payable under the Act can be commenced after the expiration of one year from the last day of the financial year in which any demand is made under the Act. In the instant case, the demands in question were made on September 22, 1952. Therefore, the recovery proceedings should have been commenced before 31st March, 1953, but actually they were commenced on March 14, 1956. Hence they are prima facie barred.

23. This takes us to sub-clause (iv) of the proviso to sub-section (7) of the section 46. Under that proviso where the sum payable is allowed to be paid by instalments, the one year prescribed in sub-section (7) of Section 46 will be computed from the date on which the last of such instalments was

due. The expression "was due" does not appear to be grammatically correct. It should have been "is due". This correction has been made in the corresponding provision of the 1961 Indian Income-tax Act; but that error is immaterial for our present purpose. The words "was due" can only mean "is due" even under the Act. For finding out when the sum claimed "was due", we must again go back to section 45. In view of the demand notices issued in September, 1952, the sum became due when the assessees became defaulters and therefore, the recovery proceedings under the Act should have been initiated before March, 1954. The same having not been initiated before that date, the proceedings in question must be held to have been barred. In my opinion, for finding out the date on which the last instalment was due, we cannot fall back on the agreement between the assessee and the revenue. Chapter VI of the Act has nothing to do with the agreement between the assessees and the revenue. The expression "was due" in section 46(7) has reference to the tax which is due in accordance with the provision in section 45 and 46.

24. For the reasons mentioned above I allow these appeals.

ORDER

25. In accordance with the opinion of the majority, Civil Appeals Nos. 564, 566, 568 and 570 of 1966 (arising from the common judgment and order of the Division Bench of the Calcutta High Court, December 10, 1963) are dismissed with costs. The other appeals are also dismissed as infructuous with no separate order as to costs.

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