

ALLAHABAD HIGH COURT

Moti Lal Purshottam Das

Vs.

Income-tax Officer

Civil Misc. Writ No. 321 of 1956

(V. Bhargava and B. Upadhya, JJ.)

17.02.1959

JUDGMENT

V. Bhargava, J.

1. The petitioners Moti Lal and Purshottam Das prayed to this Court for issue of a writ in the nature of certiorari to quash a notice issued by the Income-tax Officer, District Kanpur, dated the 4-11-1955, whereby the petitioners were called upon to pay a sum of Rs. 12,125-14-0 and for the issue of a further writ in the nature of prohibition commanding the opposite party not to recover that amount from the petitioners, and not to take any further proceedings for the recovery of the aforesaid amount. The notice, which was thus challenged, called upon the petitioners to deposit this amount, which had been assessed as income-tax on the firm of Messrs. Indian Distillery, Anwarganj, Kanpur, on the ground that the petitioners were jointly and severally liable for the payment of this tax under Section 44 of the Income-tax Act.

It was further stated in the notice that, if the amount was not deposited within the period of three days from the receipt of the notice, the opposite party would be compelled to take suitable action against the petitioners including action under Section 46(1) of the Income-tax Act. The notice was challenged originally in the writ petition on, three grounds : The first ground was that this notice was illegal because Section 44 of the Income-tax Act was not applicable, as the business of the assessee firm had not been discontinued and that had been succeeded to by one of the partners Maclan Behari Singhanian. The second ground urged was that, since the provisions of Section 44 of the income-tax Act were not applicable, the tax could not be recovered from the petitioners, as there was no provision under the Income-tax Act authorising the Income-tax Officer to recover the tax from the petitioners when it was due from the firm. The third ground was that the Income-tax Officer had once agreed to realise the tax assessed on the firm from the partners in proportion to their shares, and thereafter he was not competent to recover the amount of tax of the share of one partner from other partners. During the hearing of this petition, learned counsel for the petitioner moved an application for amending the grounds taken in the petition,

and sought permission to urge that this petition should be allowed on the further ground that the assessment in question, in pursuance of which the recovery was being made, was itself illegal and without jurisdiction.

When taking this ground, the reason for urging that the order of assessment was illegal and without jurisdiction was indicated to be the fact that the assessment of the firm had taken place after its dissolution. This application for taking additional grounds was opposed by learned counsel for the department, but we were of the opinion that the petitioners should be heard on this point because, if the proceedings which were being taken upon the impugned notice were entirely without jurisdiction, it might be in the interest of justice to allow the petition on that ground. Consequently we heard learned counsel for the parties on this additional ground also.

2. Since the additional ground, taken subsequently, raises a question of jurisdiction of the Income-tax Officer who made the assessment, and challenges the validity of that order of assessment, we think it advisable to deal with this point first. The contention of learned counsel for the petitioners, which has to be considered, is that the order of assessment in question, which relates to the assessment year 1944-45, was passed by the Income-tax Officer on the 22nd of February 1949 on the firm as the assessee when the firm had been dissolved earlier, on 7-2-1948. It was contended that after the firm had been dissolved it became non-existent and there could be no assessment of income in the hands of a nonexistent person or entity. When this point was raised, a preliminary objection was taken by learned counsel for the department that the order of assessment having been passed on 22-2-1949, before the Constitution came into force, this Court could not go into the validity of that order in exercise of its powers under Article 226 of the Constitution. It was urged that the order had attained finality before the Constitution came into force, and consequently this Court could not now exercise its powers to vacate that order. This proposition was not seriously challenged by learned counsel for the petitioners. The proposition relied upon by learned counsel for the opposite parties finds support from a decision of the Punjab High Court in *Mahabir Prasad v. Commissioner of Income-tax*¹, The same principle also follows from a decision of the Supreme Court in *Janardan Reddy v. State of Hyderabad*², In the latter case also, there was a judicial order in a criminal case by a Sessions Judge which had been affirmed by the High Court of Hyderabad before the Supreme Court became vested with jurisdiction over the area in which the case arose i.e. Hyderabad. It was held by the Supreme Court that the judgment of the High Court, affirming the conviction and sentence upon the petitioners in that case, had acquired finality in the fullest sense of the term before 26-1-1950, and, by reason of this finality, no one could question the validity of the convictions when the Constitution came into force. It was held that the provisions of the Constitution, which were invoked, were not intended to operate retrospectively and therefore something which was legally good on 25-1-1950 could not be held to have become bad on 26-1-1950. The principle enunciated in that case applies to the case before us because the order of assessment of the Income-tax Officer the validity of which is being challenged, was a judicial order and not merely an executive or administrative order of a public servant. In the case of *Suraj Mall Mohta and Co. v. Visvanatha Sastri*³, the Supreme Court held that "under the provisions of Section 37 of the

Income-tax Act proceedings before the Income-tax Officer are judicial proceedings and all the incidents of such judicial proceedings have to be observed before the result is arrived at". The proceedings being judicial proceedings, the order of assessment passed on termination of the

¹1952-22 ITR 296 : AIR 1953 Punjab 16. 31954-26 ITR 1

² AIR 1951 SC 217

proceedings is an order of a judicial Tribunal, and, in the present case, the order of assessment which was passed before the Constitution, therefore, was a judicial order which attained finality before the Constitution came into force. The result is that we are now not competent to exercise our powers under Article 226 of the Constitution to quash that order.

3. On this view, it was contended by learned counsel for the petitioners that what the petitioners desired was not a quashing of that order at all, but they only wanted that the Court should treat that order as a nullity and restrain the further proceedings under that order which are being taken subsequent to the Constitution coming into force. This point raised on behalf of the petitioners is also met by the decision of their Lordship of the Supreme Court in the case of Janardan Reddy, AIR 1951 Supreme Court 217 cited above. In considering this aspect of the case their Lordships said (at page 225) :

"If we had no jurisdiction to sit in appeal over the judgment of the Hyderabad High Court, can we not reinvestigate the cases and pass orders which cannot be passed without virtually setting aside the judgments of the High Court which have become final? Can we, in other words, do indirectly what we refused to do directly? It is argued that we are asked not to reopen a past transaction but to deal with the present detention of the petitioners, i.e. their detention at this moment. But, how can we hold the present detention to be invalid unless we reopen what could not be reopened prior to 26-1-1950. This is, in our opinion, one of the greatest difficulties which the petitioners have to face, and it rests not merely on technical grounds but on sound legal principles which have always been and should be respected."

These views expressed by the Supreme Court make it clear that, if an order was passed before the Constitution came into force and had attained finality and it cannot subsequently be challenged before a court, the court cannot indirectly nullify the effect of that order by restraining action being taken in pursuance of that order. In the case before the Supreme Court, the petitioners were under detention in pursuance of the order which had become final, and the Supreme Court held that that detention could not be declared illegal without declaring the judicial order under which the petitioners were detained void, and thus indirectly making that judicial order ineffective. A similar principle was also laid down by a Full Bench of five Judges in this Court in *Azmat Ullah v. Custodian Evacuee Property U.P*³. In the present case before us also, what learned counsel for the petitioners desires is that we should restrain action in pursuance of

the assessment order simply on the ground that that assessment order was a nullity, having been passed at a time when the firm, which appeared as the assessee in that order, had already been dissolved. Whatever be the reason for challenging the order, the order was a judicial order and had become final before the Constitution came into force and since we cannot quash it in exercise of powers under Article 226, we cannot even restrain further action in pursuance of it by treating that order to be a nullity. This ground sought to be raised by learned counsel,

³1955 All LJ 521 : AIR 1955 All 435

therefore, fails.

4. Then we have to consider whether proceedings under the notice dated 4-11-1955 should be restrained on the other ground raised in the petition, even on the basis that the assessment order by which the tax now being sought to be recovered was a valid order. In dealing with this point we cannot ignore the fact that, at the time when the recovery proceedings are being taken, the firm has ceased to exist as a result of its dissolution, the dissolution of the firm is not only asserted by the petitioners in their petition but is admitted by the opposite party. Apart from the dissolution of the firm, it was urged by learned counsel for the petitioners that there was no assertion in this case that the business of the firm had been discontinued and consequently Section 44 of the Income-tax Act could not apply. Learned counsel for the department on the other hand put forward the case that there had been discontinuity of the business of the firm, and it was on that basis that the Income-tax Officer proceeded to apply the provision of Section 44 of the Income-tax Act. In order to justify realisation of the tax assessed against the firm from the petitioners who were partners in that firm, it was urged that under Section 44 of the Income-tax Act all the partners were jointly and severally liable both to assessment of tax in respect of the income earned by the firm as well as to pay the tax. It appears that, in the particular circumstances of this case, it is not at all necessary for us to decide the question whether Section 44 of the Income-tax Act is or is not applicable to the present case. We are at present called upon only to examine the validity of the proceedings that are being taken by the Income-tax Officer by issuing the notice dated the 4th November 1955. It is the admitted case of the parties that the income was earned by the firm and not by the petitioners in their individual capacities. It is also the admitted case of the parties that the assessment of the tax was also made on the firm and not on the partners severally and jointly. There is no information whether, when the assessment of the firm took place, notice of this proceeding was sent to all the partners or to only some of them. In fact there is no information available whether any notice was at all sent to these two petitioners even in their capacity as partners of the firm. For the purposes of this petition, therefore, we have to treat the order of assessment dated 22-11-1949 as an order of assessment of the firm as a separate entity. As the tax assessed on the firm as an entity was clearly recoverable from the firm itself, the ordinary procedure was to issue a notice under Section 29 of the Income-tax Act to the assessee firm, and, if that notice was not complied with, the department could proceed against the firm in the manner laid down in the other provisions of the Act. This procedure cannot now be followed when the firm has admittedly ceased to exist. In these circumstances, it has been contended by Mr. Gopal Behari learned advocate for the department, that the Income-tax

department is entitled to enforce the assessment order against the partners of the erstwhile firm under Section 44 of the Income-tax Act. In the alternative, it was also urged that, if Section 44 of the Income-tax was not applicable, the partners would still be liable to discharge this debt of the firm, because of the provisions of the Partnership Act under which all acts of the partnership are binding on all the partners.

It was thus urged by Mr. Gopal Behari that if Section 44 of the Income-tax Act was applicable to present proceedings the action sought to be taken by the Income-tax Officer was correct and that, even if it was not applicable, we should hold that the Income-tax Officer had merely committed an error in form in referring to Section 44 of the Income-tax Act in his notice dated the 4th November 1955, because in substance the proceedings were of the same nature as would have to be taken for realising the tax from the partners after the dissolution of a firm on the basis that the partners were liable to discharge the debts of the firm. On behalf of the petitioners it was contended that Section 44 of the Income-tax Act did not apply and that the provisions of the Partnership Act could not be resorted to for fastening the responsibility for this tax on the partners after the dissolution of the firm. These are no doubt questions of importance but we think, in the present case, it is not at all necessary for us to pronounce on them. The notice dated 4-11-1955 sent by the Income-tax Officer proceeds on the basis that the petitioners are liable to the tax which was assessed on the firm and thereafter calls upon the petitioners to deposit the tax failing which the petitioners are threatened with suitable action including action under Section 46(1) of the Income-tax Act. We think that we should confine ourselves to the narrow question, whether such a notice was validly given by the Income-tax Officer and further action in pursuance of it could be taken by him. In considering this question, we have first before us the fact that these petitioners are not the assesseees under the assessment order. The assessment order under Section 23 was passed against the firm and consequently under Section 23(3) the sum payable by the firm was determined. No sum was determined as being payable by these partners. If these partners are liable to pay the tax in spite of the fact that they did not appear as assesseees in the assessment order either because of the applicability of Section 44 of the Income-tax Act or because of the provisions of the Indian Partnership Act, they would still come under the class of "other persons liable to pay tax" mentioned in Section 29 of the Income-tax Act. Notice under Section 29 issued to the firm cannot be treated as a notice issued under that provision to these petitioners, because, for the purposes of assessment and collection of tax, an unregistered firm under the Income-tax Act is treated as an entity separate from its partners. Of course, it may be that, for purpose of fixing the liability for tax, the provisions of the Partnership Act may be available or the liability may pass to the partners under Section 44 of the Income-tax Act. In such cases, the partners would still not be covered by the word 'assesseees' as used in Section 29 and proceedings against them would have to be taken on the basis that they were other persons liable to pay tax under the section. In this position, it was necessary that, before taking any proceedings for recovery, notices under Section 29 should have been served on the petitioners. A notice under Section 29 has to be in a prescribed form and has to be accompanied by an assessment form as laid down in the rules framed under the Income-tax Act. It was urged by Mr. Gopal Behari that a mere error in not sending the notice in the proper form should not induce this Court to exercise

its extraordinary jurisdiction and restrain the action being taken by the Income-tax Officer. But this argument ignores the important consideration that a notice under Section 29 is not a mere process for the purposes of informing the person liable to pay the tax that he is required to do so. That notice gives rise to several legal implications. Firstly, it is only after a notice under Section 29 has been issued that the person to whom the notice is issued can be treated as being in default under Section 45 of the Income-tax Act. It is only after issue of the notice that proceedings under Section 46 can be taken against him. The provisions of Section 46(1) apply only to a person in default. Section 46(2) permits recovery proceedings by issue of a certificate to the Collector. Even these proceedings under the certificate are dependent on the issue of a notice of demand, as is clarified by Sub-Section (7) of Section 46, which lays down that no proceedings for the recovery of any sum payable under the Income-tax Act are to be commenced after the expiration of one year from the last day of the financial year in which any demand is made under that Act. The last day for proceedings of recovery which will include proceedings under Section 46(2), is dependent upon the issue of a notice of demand under the Act. In these circumstances, before the income-tax Officer could take recovery proceedings against the petitioners, it was necessary for him to serve notices of demand on them, even if this view, that the petitioners are liable to pay the tax which was assessed on the firm, be correct.

Because of this view taken by us, we need not express any opinion on the further questions whether the petitioners are liable to pay the tax assessed on the firm and whether the provisions of Sections 45 and 46(1) can be invoked against them when the asses-see, in the assessment order was the firm and not these persons. All that we are concerned with is the fact that no recovery proceedings of any nature can be taken against any person under the Income-tax Act unless first a notice is served on that person under the Income-tax Act. Such a notice not having been served on the present petitioners, the proceedings which are being taken under the demand dated 14-11-1955 have to be restrained.

5. When we took into consideration this aspect of the case, Mr. Gopal Behari learned counsel for the department urged that no ground had been taken in this petition on this basis by the petitioner and therefore the Court should not interfere on such a ground. In our opinion, this contention of Mr. Gopal Behari cannot be accepted. The petitioners no doubt challenged the validity of the notice dated 4-11-1955 on different grounds but these grounds are not being decided by us because we have found that under the Income-tax Act this notice, as it now stands, is not a valid notice and is unenforceable as such. What we are doing is to allow the petitioners prayer for a writ to restrain the proceedings under this notice though on a ground different from those urged in the petition. The ground for our interference is based on facts appearing from the petition, the affidavit and the counter affidavit filed before us. Since the point on which we are deciding the case very simply disposes of the matter raised before us, we think that it is not necessary to decide the other questions of law raised by the petitioner. We are interfering on this ground because it is a ground which shows that the Income-tax Officer has committed a manifest error apparent on the face of the record in taking proceedings in the manner in which he has done. Consequently, we allow this petition to the extent that a writ of Mandamus shall issue to the

opposite party directing him not to take any proceeding for recovery of this tax in pursuance of the notice dated 4-11-1955. We make it clear that this order will not stand in the way of the Income-tax Officer taking any other proceeding for the recovery of the tax against the petitioners, if permitted by law. In this case, though we are allowing the petition, the main grounds which were raised by the petitioners have not succeeded and consequently we direct that parties shall bear their own costs of this petition.

6. Considering that this case raised complicated questions and had to be argued before us for about 5 days, we fix the fee for counsel on each side at Rs. 500/- even though it is not necessary to fix it just at present for the purpose of taxation of fees.

Petition allowed.