CALCUTTA HIGH COURT

R.N. Bose

Vs.

Manindra Lal Goswami

A.F.O.O. No. 79 of 1956

(Chakravartti, C.J. and K.C. Das Gupta, J.)

06.03.1957

JUDGMENT

Chakravartti, C.J.

1. By the judgment under appeal before us Sinha, J., has decided two questions, but as the application before him could have been disposed of on a single ground and the present appeal can be disposed of likewise, it is really not necessary to consider the question arising out of the second ground. Mr. Meyer, however; invited us to decide the second question as well, because it had been canvassed before the learned trial Judge and because, he said, the Department needed a decision for its guidance. We shall accede to his request.

2. The facts are these. The respondent was one of three partners of an unregistered firm, carrying on business at 12 Dalhousie Square, Calcutta, under the name and style of Dyes and Chemical Agency. It is said that the firm did business only from 1st of April 1940 up to 31st of March, 1944 and that a notice of its dissolution was given to the Income-tax Department on or about 14th of January, 1947. The Department did not admit or deny receipt of the notice, but since it is seeking to justify the assessment as an assessment on a dissolved firm, the question whether a notice of dissolution was or was not given is not material. It does not appear whether the firm had previously been assessed to income-tax, but towards the end of 1944, the Income-tax Officer, District III (1), Calcutta, came to be of opinion that the firm's income for the assessment year 1943-44 had escaped assessment. Acting on that view, the Income-tax Officer issued a notice under Section 34 of the Income-tax Act on 25th of November, 1944 to the respondent. He was described as "M.L. Goswami, Esqr., Partner of Messrs. Dyes and Chemical Agency" and the income which had been discovered to have escaped assessment was described as "your income". The notice ended by requiring the respondent to deliver to the Income-tax Officer by a certain date a return of "your total income and total world income assessable for the said year ending 31st March, 1944." It is said that a similar notice was addressed to another partner of the firm, named B.R. Das Gupta, in similar terms, but no notice was issued to the third partner, P.C. Mukherji.

3. The notice was received by the respondent on 30th of November, 1944, but he paid no

attention to it. B.R. Das Gupta, on the other hand, complied with the notice served on him and filed a return of the firm's income for the year concerned, showing, however, a loss of Rs. 1,189/-. The Income-tax Officer did not believe that the firm had suffered loss and he determined the total income at Rs. 45,101/-. The assessment he made was an assessment on the firm, Dyes and Chemical Agency, which name was given as the name of the assessee. The tax computed was Rs. 13,264-1-0.

4. On the basis of that assessment, a Demand Notice was directed to be issued to the firm and as far as it appears from the record, a notice was served. In what manner it was served does not, however, appear.

5. The assessment was made on 12th of December, 1947. As no payment was made, the Income-tax Officer, on 30th of March, 1949, forwarded a certificate under Section 46 (2) of the Income-tax Act to the Collector, 24-Parganas. The certificate was a certificate against the firm. On 31st of March, 1949, the Certificate Officer signed and filed his own certificate under the Public Demands Recovery Act which also was a certificate against the firm. Notice under Section 7 of the Public Demands Recovery Act was next issued, but it came back unserved with the report that the certificate-debtor, namely, the firm, was not traceable. The inability to effect service on the certificate-debtor was reported to the Income-tax Officer on 28th of December, 1950 and the usual request for the correct address and the present whereabouts of the certificate-debtor was made. For a while, the Income-tax Officer appears to have hesitated in taking a decision and thought that he would, in the first instance, issue Notices of Demand to the partners. Subsequently, he revised his opinion and came to think that since the firm was an unregistered firm, the partners were liable for the firm's dues and therefore no separate Demand Notice was required to be served on them. Accordingly, he supplied the names of the three partners to the Certificate Officer who added those names in the certificate and directed notices under Section 7 of the Public Demands Recovery Act to be served on the partners. Service appears to have been effected on or about 12th of February, 1953. On receipt of the notice under Section 7 of the Act, the respondent and P.C. Mukherji filed objections under Section 9 of the Act, but those were rejected by the Certificate Officer on 30th of November, 1953. Thereafter, the respondent preferred an appeal to the Commissioner of the Presidency Division and when that appeal was pending, moved this Court under Article 226 of the Constitution on 25th of August, 1954. The Rule obtained by him was a Rule on the appellant and the Union of India, directing them to show cause why an order in the nature of a writ of certiorari should not be made by this Court for the production of the records relating to the assessment proceedings and why an order in the nature of a writ of mandamus should not be made, commanding the respondents to refrain from taking any further steps in connection with the certificate proceedings.

6. Although the first part of the Rule did not say that the records were to be produced before this Court in order that the order of assessment might be quashed, the clear implication was that the assessment order was the object of the challenge. The Rule was thus a two-pronged one, being directed against the assessment order and also against the proceedings instituted under Section 46 (2) of the Income-tax Act on its basis.

7. Before the Rule came up for hearing, the respondent's appeal to the Commissioner, Presidency Division, had already been heard and allowed. The Commissioner held that no notice of dissolution under Section 25 (2) of the Income-tax Act having been given to the Income-tax

Authorities, Section 44 of the Act was not applicable and consequently the assessment could not be sustained as an assessment of a dissolved firm. Who told the Commissioner that no notice of the dissolution had been served, does not appear. The Commissioner held further that a certificate against a firm could not be executed against its partners. In that view, the proceedings under the Public Demands Recovery Act were set aside.

8. It will thus appear that at the date of the final hearing of the Rule, the respondent no longer required to be relieved of any certificate proceedings pending against him or to be protected against any such proceedings that might be launched in the future. The assessment order, however, was subsisting and, therefore, although the Income-tax Department might not proceed against the respondent any longer under Section 46 (2), it might try to recover the tax from him in other ways. Accordingly, Sinha, J., proceeded to consider whether on the assessment, as made, the respondent could be proceeded against for the recovery of the tax due under it at all, and, secondly, whether after the dissolution of a firm, any assessment of the firm as a firm for income earned by it before the date of the dissolution was possible in law. The learned Judge answered both the questions in the negative. The actual order he made, however, was only that a writ in the nature of mandamus would issue, directing the respondents to forbear from enforcing the assessment order against the present respondent. He did not quash the assessment order itself and took care to add that the order he was making would not exonerate the present respondent from liability or prevent the respondents before him from proceeding against the present respondent or any other partner of the dissolved firm in accordance with law.
Nor, he added, was he saying anything about the validity of the notice under Section 34.

9. It is against the above order that a successor to the Income-tax Officer who had made the assessment preferred the present appeal. The Union of India is not an appellant, nor has it been impleaded as a respondent.

10. The first question is whether on the notice or notices under Section 34 as issued, there could be any assessment of the firm at all and whether a partner of the firm could be proceeded against for the recovery of the tax imposed by such an assessment. The appellant's case is that even after the dissolution of a firm, assessment of the firm's income in the firm's name is warranted by law, namely, Section 44 of the Indian Income-tax Act. The respondent's case is that after the dissolution of a firm, its income earned during the period prior to the date of dissolution can be assessed only in the name and hands of the partners at the relevant time, jointly and severally. Whichever of these views may be correct, it seems perfectly clear to me that the notice under Section 34, as issued in this case, could not possibly be the basis of a valid assessment of the firm or the firm's income. I have already referred to the terms of the notice, as served upon the respondent. He was addressed by name at the top of the notice. In the body of the notice he was addressed in the second person singular and the Income-tax Officer told him that his income assessable for the year ending on 31st of March, 1944, had escaped assessment. The respondent was further asked to file a return of his own income the language used being "your total income and total world income". I find it quite impossible to see how such a notice could be understood by anybody as relating to any income other than the personal income of the individual who was being addressed. It was contended that the respondent had been described as a partner of Messrs. Dyes and Chemical Agency and that it was only in the character of a partner that he had been addressed. I enquired of Mr. Meyer in what form notices relating to the assessment of living firms were addressed, but unfortunately he could give us no definite information. But even

assuming that when the respondent found himself described as a partner of the firm, he ought to have understood that the notice was concerned only with the firm's income, still the further meaning conveyed by the notice to him would clearly be that in the Income-tax Officer's view, his share of the firm's income had escaped assessment and that he was being asked to state to the Income-tax Officer what his own total income and total world income was. If it was intended that the notice should do duty for a notice on the firm, served on a partner, it should at least have been made clear in the body of the notice that what in the Income-tax Officer's view had escaped assessment was the income of the whole firm and not the income of an individual partner and that the return called for was a return of the total and world income of the firm and not the income of an individual partner. In my view, even assuming that after the dissolution of a firm, an assessment of the firm itself in the firm name for the income earned prior to the date of dissolution is possible in law, no such assessment was possible on the basis of a notice of the kind that was served on the respondent. The assessment must be held to have been invalid on that ground alone.

11. Before proceeding to the second question, I might point out, with respect to the learned Judge; that he seems to have been under some misapprehension as to the method in which a firm can be assessed. He has said that under Section 23 (5) (b), the Income-tax Officer can proceed in the case of an unregistered firm "either against the firm as such or against the partners individually" and that in the particular case before him, the Income-tax Officer had elected to proceed according to the latter method. The observation of the learned Judge seems to suggest that, according to him, there can be an assessment of the partners of an unregistered firm individually even from the beginning. If that was what the learned Judge thought, he was not right. Whether a firm be a registered firm or an unregistered firm, the Income-tax Officer cannot in any circumstances proceed against the partners individually at the beginning. In both cases, the proceedings, when commenced, are proceedings as against the firm. In the case of registered firms, the proceeding, after the amount of the assessable income has been determined, does not proceed further, but what is done is that the income, so determined, is distributed among the several partners in accordance with their shares and the share allotted to each is transferred to his own income-tax account, to be assessed there along with his other income. In the case of an unregistered firm, the proceedings may remain proceedings against the firm up to the last and the assessment of the tax also can be made in the firm's hands. If the firm pays the tax, the partners are not to pay it again, because Section 14 (2) (a) protects them from a double liability, although the share of each partner in the income is taken into account in his personal assessment under Section 16 (1) (b) for the purpose of determining the rate of tax applicable. The procedure I have just indicated is the normal procedure for assessing unregistered firms. If, however, the Income-tax Officer comes to think that it will be more advantageous to the revenue to tax an unregistered firm as a registered firm, he can follow the other procedure and can, after he has determined the income, allocate it as between the different partners according to their shares, to be assessed in their own hands along with their other income. Neither in the case of a registered firm, nor in the case of an unregistered firm, however, can the partners be proceeded against individually from the beginning.

12. What I have said with regard to the first point decided by the learned trial Judge is sufficient for a disposal of this appeal. If the assessment, as made, was invalid, because the notice issued was not appropriate, the respondent cannot obviously be proceeded against for the tax due under that assessment and, therefore, no other question arises. The learned trial Judge, however, considered the wider question of the proper method of assessment to be followed in the case of a

dissolved firm and as I have already stated, we were invited to give our opinion thereon.

13. The learned Judge has held that if, after the dissolution of a firm, any part of its pre-dissolution income falls to be assessed, the partners will have to be assessed for it either jointly or individually, but the firm as a unit can no longer be assessed, although the tax due will be calculated as if there was no discontinuance. In stating his conclusion in various parts of his judgment, the learned Judge has unfortunately always said that the partners have to be assessed "jointly or severally", which appears to have been an accidental slip. But, save that the partners are to be assessed jointly and severally and not jointly or severally, the learned Judge's conclusion is, in my view, correct.

14. The question, as presented to us, turns on the true construction of Section 44 of the Indian Income-tax Act. That section speaks of a case where any business, profession or vocation carried on by a firm or association of persons has been discontinued and a case where an association of persons is dissolved. It does not speak of a case, at least expressly, where a firm has been dissolved. It will be noticed that when speaking of the discontinuance of a business, profession or vocation, the section speaks of both a firm and an association of persons, but when speaking of dissolution, it drops the 'firm'. It is, therefore, arguable that the dissolution of a firm is not within the contemplation of Section 44 at all and, therefore, the Department cannot invoke its aid for the purpose of assessing the income of a dissolved firm. Mr. Meyer agreed that if the Department could not rely on Section 44, there was no other section in the Act which would authorize it to assess the income of a dissolved firm, but he contended that discontinuance included dissolution. I am unable to accept that contention, because although the dissolution of a firm must involve discontinuance of its business, the converse need not necessarily be true and a firm may conceivably continue to exist after deciding to discontinue its business as firms very often do for various purposes, such as collecting their debts. Why the section should have dropped the firm when speaking of dissolution, it is difficult to understand, but I need not pause to speculate about the reasons. The parties have throughout proceeded on the footing that Section 44 applied to the case of a dissolved firm and, for the purpose of this case, I shall proceed on the assumption that Section 44 applies.

15. If Section 44 applies, the method of assessment to be followed in assessing the pre-dissolution income of a dissolved firm can only be the method prescribed by that section. I have already indicated, though only in outline, what the method of assessment is, when the income of a registered firm, which is a living firm, is to be assessed and similarly what the method is when the firm concerned is an unregistered firm. In both cases, the assessee is the firm which is a distinct and separate entity under the Income-tax Act - in one case up to the determination of the income and, in the other case, if the method applicable to registered firms is not followed, up to the assessment of the tax. The provision contained in Section 44, however, is noticeably different. It says, not that the firm shall be assessed as if it had not been dissolved, nor that tax shall be charged for the income of the firm in the name and in the hands of the firm in spite of the dissolution, but that "every person who was at the time of such discontinuance or dissolution a partner of such firm * * * shall, in respect of the income, profits and gains of the firm * * * be jointly and severally liable to assessment under Chapter IV and for the amount of tax payable and all the provisions of Chapter IV shall, so far as may be, apply to any such assessment." The direction of the section, therefore, is that, not the firm but the partners of the firm, shall be "jointly and severally liable to assessment", and that they shall also be liable "for the amount of

tax payable." It is pertinent to notice in this connection that before the last amendment of the section, the language was "shall be jointly and severally liable for the amount of the tax payable in respect of the income, profits and gains of the firm." The amended section has maintained the liability for the tax and indeed has made a separate provision for that liability, but it has added a new liability which is a liability to assessment. I can see no escape, in view of this language, from the conclusion that if the pre-dissolution income of a firm falls to be assessed after the dissolution, the assessment can be made only on the partners at the time of the dissolution, jointly and severally, and that the method laid down in Section 23 (5) (a) or Section 23 (5) (b) can no longer be followed. Section 44, it appears to me, makes no distinction between registered and unregistered firms, but prescribes a common procedure for the assessment of pre-dissolution income of dissolved firms of both classes.

16. It was contended that by adding the words "to assessment, the amended section had not added to the content of the old section, but had merely stated the liability for the tax twice. Otherwise, it was said, there was no reason why the section should continue to speak of the liability "for the amount of tax payable," because such liability would follow from the liability to assessment, if the section really meant that the partners themselves were to be jointly and severally assessed. I do not think that after the amended section had said that the partners would be jointly and severally liable to assessment it became unnecessary to say that they would also be liable for the amount of tax payable, because questions might arise as to whether, in the case of an unregistered firm, the tax would have to be levied in the first instance from the assets of the firm and whether if the tax was in fact realised, Section 14 (2) (a) would apply. In the case of the registered firm, again a question might arise as to what 'assessment' meant and whether only the income would be determined first in the proceeding taken against the partners jointly and severally and whether thereafter the income would have to be distributed as between the partners for the purpose of assessment along with their other income and taxed there. In view of all these complications some of them, I confess, might be more apparent than real it was obviously necessary to say in clear terms that the joint and several assessment of the partners of a dissolved firm for the pre-dissolution income would be a separate assessment, complete in itself, and they would not only be liable to be assessed, but also liable for payment of the tax payable thereunder. In my view, there is nothing in the provision about the liability for tax which obscures the clear intent of the section that the assessment contemplated is a joint and several assessment of the partners and such assessment alone.

17. It is impossible in this connection not to notice the contrast between Section 44 and Section 25-A (2). The latter section deals with a case where the Income-tax Officer has recorded an order to the effect that there has been a partition of a Hindu undivided family. In such a case, if the income received by or on behalf of the joint family before the partition falls to be assessed, Section 25-A (2) directs that the Income-tax Officer shall make an assessment of the income "as if no partition had taken place" and the section proceeds to provide for the liability for the tax by saying that "each member or group of members shall, in addition to any income-tax for which he or it may be separately liable and notwithstanding anything contained in sub-section (1) of Section 14, be liable for a share of the tax on the income so assessed according to the portion of the joint family property allotted to him or it." The provision, therefore, is that in spite of the partition, the joint family is still to be assessed as a joint family and it is not that the members of the family are to be assessed, either jointly and severally, on the total income of the family during the period concerned or on their shares of the income, taken along with any other income that

they may have. The only difference which the section makes between the assessment of the income of an unpartitioned Hindu joint family and the assessment of a prepartition income of such a family, is that, in the former case, the individual members of the family or groups of such members are protected by Section 14 (1) from having to pay any tax in respect of the share he or they have received of the joint family income, whereas, in the latter case, individual members or groups of members have to pay proportionate shares of the tax. The reason for this difference is obvious, because in the former case, the tax on the family income is paid by the family itself out of joint family assets and when a share of the income comes to the hands of an individual member, it comes as income which has already paid tax. In the case of a partitioned family, there is no longer any joint family assets out of which the tax can be paid and, quite intelligibly, the liability for the tax on the pre-partition income, although assessed as if no partition had taken place, is laid on the individual members between whom the family assets have been divided. It is true that in the case of both a Hindu joint family and an unregistered firm, the exemption of the individual members is dependent on the tax being paid by the family or the firm, as the case maybe, and the joint and several liability of the members in case the tax is not paid by the body to which they belong, has been preserved by the Act, but that provision need not be considered in the present context.

18. What has to be noticed in Section 25-A (2) is the clear provision that the assessment is to be made as if no partition of the family had taken place. As I have already pointed out, there is no like provision in Section 44 and it is not said there that the assessment is to be made as if no dissolution of the firm had taken place. I may also refer to Section 24-B (2) which deals with the case where a person dies before the publication of the notice referred to in Section 22 (1) or before he is served with a notice under Section 22 (2). It is laid down that in such a case the executor, administrator or other legal representative of the deceased assessee is to be assessed as if he were the assesses. The language of Section 44 is not equally emphatic, but when it says that every person who was a partner at the time of the dissolution shall be "jointly and severally liable to assessment", it says in effect that the assessment shall be made on them as if they were the assessees. There may have been good reasons why the provisions made in the Act for the assessment of the income earned by a Hindu undivided family before its partition, the income earned by a person before his death and the income earned toy a firm before its dissolution, are not precisely similar, but there is no obscurity as to what the sections mean and intend. In my view, Sinha, J., was entirely right in holding that in view of the terms of Section 44 of the Act, a firm could no longer be assessed as a firm after its dissolution for its predissolution income and that the assessment could only be made on the partners jointly and severally, although the tax due would be computed on, on one side, the whole income of the firm and, on the other side, on noother income - the personal income of the partners from other sources not coming into the account at all.

19. It remains to deal with a case which was cited on behalf of the appellant and which the learned Judge has held to be applicable, but, according to him, wrongly decided. In support of its contention that even after the dissolution of a firm, an assessment of its pre-dissolution income could be made on the firm in the firm name, reliance was placed on the decision of the Madras High Court in the case of *A.G. Pandu Rao v. The Collector of Madras*[1], The decision relates to Sections 13 and 14 of the Excess Profits Tax Act, read with Section 44 of the Income-tax Act, as adapted by the Central Board of Revenue and it is extremely unfortunate that the learned Judge should have been told that the law applicable to cases of excess profits tax was the same as that

under the Indian Income-tax Act. Apparently, on that statement being made without protest from the respondent, the learned Judge did not consider it necessary to compare the provisions of the two Acts. If such a comparison is made, it will be found at once that, taken as a decision on Sections 13 and 14 of the Excess Profits Tax Act, as applied to the assessment of the pre-dissolution profits of the business of a dissolved firm, there is no reason whatever to think that the decision was not correct. The relevant provisions of the Indian Income-tax Act are noticeably different and the mistake was to seek to apply a decision under the Excess Profits Tax Act to the present case.

20. The excess profits tax is a tax on a business, taken as a whole and it is not a tax on the individuals who own the business. As the business is taken to be the unit which earned the profits, the Act does not provide for assessing the tax on the individual members of a firm carrying on a business. But the method of assessment when a business is being carried on by two or more persons, is laid down in Section 14 (3). That section reads as follows :-

> "Where two or more persons were carrying on the business jointly in the chargeable accounting period, the assessment shall be made upon them jointly and, in the case of a partnership, may be made in the partnership name."

It will be seen that even in the case of a firm which is functioning and has not been dissolved, assessment for excess profits of the business carried on by the firm shall be made not on the firm but upon the persons carrying on the business 'jointly' and that where the persons carrying on a business have formed a partnership, the assessment may be made in the partnership name. This seems to be a somewhat curious combination of the assessment of the individual members of a firm, although it may be a joint and several assessment, and an assessment of a firm as a distinct entity. Be that as it may, the assessment is directed to be made upon persons carrying on the business jointly and in the case of a partnership in the partnership name. Where a partnership, carrying on business, has been dissolved and excess profits earned by the business before the dissolution of the firm falls to be assessed, the assessment is to be made under Section 44 of the Indian Income-tax Act, as adapted and recast by the Central Board of Revenue. Section 44, as adapted for the purposes of excess profits tax, reads as follows :-

[1](1954) 26 ITR 99 : AIR 1954 Mad 1049

> "Where any business carried on by a firm or association of persons has been discontinued, every person who was at the time of such discontinuance a partner of such firm or a member of such association shall, in respect of the profits of the firm or association, be jointly and severally liable to assessment under Section 14 of the Excess Profits Tax Act, 1940, and for the amount of tax payable, and all the provisions of the said Act shall, so far as may be, apply to any such assessment."

21. It will thus be seen that in the case of excess profits tax, there is no difference in the method of assessment prescribed for the assessment of the profits of a running business and that prescribed for the assessment of the past profits of a business carried on by a firm, since dissolved. In the case of a running business too, the assessment is to be made on the persons, carrying on the business, jointly. In the case of the business of a firm which has been dissolved, it is to be made on the partners jointly and severally; and since Section 44 of the Act is made

applicable to the assessment of pre-dissolution profits of the business of a dissolved firm, such assessment can obviously be made in the partnership name. It was obviously in view of these provisions that the learned Judge in the Madras case stated that even assuming that the firm had been dissolved by the date of the issue of the notice under Section 13, still, the machinery provided for by Sections 13 and 14 of the Act could be availed of and the partners would continue to be jointly and severally liable to assessment under Section 14 of the Act and for the amount of tax payable after determination. "The result of Section 44" observed the learned Judge, "as amended by the Central Board of Revenue, is to attract the procedure applicable to an undissolved firm to a dissolved firm, and, therefore, if two or three persons carry on business as a firm, the assessment could be made on the partnership in the partnership name and the persons who carried on the business during the chargeable accounting period will be liable to pay the tax as provided by sub-section (2) of Section 14, read with Section 44 of the Income-tax Act, as modified by the Central Board of Revenue," These observations made by the learned Judge are clearly warranted by the special language of Section 14 (3) of the Excess Profits Tax Act, read with Section 44 of the Income-tax Act, as recast by the Central Board of Revenue. They have no bearing whatsoever to a case of the assessment of income-tax on the pre-dissolution income of a dissolved firm under the provisions of Section 44 of the Act as it stands in the statute itself. There is, therefore, no reason to feel embarrassed by the decision in (1954) 26 ITR 99 : AIR 1954 Madras 1049, nor any reason to hold that the case was wrongly decided.

22. The conclusions for which I have endeavoured to give my reasons at some length are (1) that on the notice under Section 34, as issued on the respondent in the present case and issued also on another partner, there could not possibly be an assessment of the firm or of the firm's income; and (2) that hence, after the dissolution of a firm, an assessment to income-tax of its pre-dissolution income can only be made, assuming Section 44 applies, on the persons who were partners of the firm at the time of the dissolution jointly and severally and it cannot be made on the firm, as a firm, and this whether the firm was a registered or an unregistered one.

23. The result of the above conclusions is that this appeal is dismissed. As the respondent falsely alleged in his petition to this Court that he had received no notice under Section 34, for which his application might well have been dismissed at sight, we shall make no order as to costs.

Das Gupta, J.

24. I agree.

Appeal dismissed.