

CALCUTTA HIGH COURT

Ramgopal Khemka

Vs

Union of India

(Chatterjee J.)

23.04.1965

JUDGMENT

Chatterjee J.

1. This is a petition under article 227 of the Constitution Ram Gopal Khemka and others against the Union of India represented by the Commissioner of Income-tax. It is stated in the petition that Messrs. Industrial Financing Corporation was a partnership firm which carried on business during the years 1941-1953 at 37 Royd Street. It is further stated that during the assessment year 1949-1950, 15 persons were the partners of the firm and their names are in paragraph 2 of the petition to this court. The partnership is stated to have been constituted under a deed of partnership dated the 25th January, 1947. The firm was an unregistered firm in the sense that it was not registered in accordance with the provisions of the Income-tax Act. The assessment of the firm for then assessment year 1949-50 was made on the 22nd August, 1953, and on the basis of that assessment, a demand notice under section 29 was issued against the said firm. But it is stated that no demand notice was ever served upon any of the petitioners or their predecessors-in interest. The Income-tax Officer, thereafter, issued a requisition under section 46(2) of the Indian Income-tax Act to the Collector of 24-Paraganas against the said firm. On the basis of the said requisition, a certificate, No. 556 I.T. (C)/54-55, under the Bengal Public Demands Recovery Act, was filed in the office of the certificate officer on the 31st March, 1955. It is further stated in the petition that no notice under section 7 of the said Act was served upon the Firm. The notice under section 7, however, was served on the 11th February, 1957, on the petitioner No. 1 and one Kishore Lal Khemka, since deceased, whose heirs and legal representative are the petitioners Nos. 2 to 5. On the 13th March, 1957, the petitioner No. 1 and late Kishore Lal Khemka filed a petition of objection. It was stated in that petition of objection that the firm having been discontinued long ago, the present assessment on the discontinued firm itself is illegal and invalid. Mr. Jyotish Chandra Pal, who appeared on behalf of the petitioners, referred us to a letter of the Income-tax Officer, Districts 24-Parganas, dated the 25th June, 1957, which is as follows :

"... The firm was not discontinued before the completion of the assessment and, therefore, the assessment is quite legal." This statement has not been challenged by Mr. Pal with his usual fairness. We, therefore, proceed on the basis that the firm neither discontinued its business nor the firm was dissolved at any time before the assessment was completed. The completion of the assessment would be by a notice under section 29. Therefore, we proceed on the basis that the firm was still functioning at the date when the notice under section 29 was served. There is no definite statement as to when the firm was dissolved. But Mr. Balai Pal for the Union of India has asked us to say that the firm was not dissolved at least at the date when the certificate was issued by the certificate officer. Mr. Balai Pal has referred us to a paragraph in the petition of objection which is as follows : "That the original certificate being in the name of Messrs. Industrial Financing Corporation the substitution of your petitioners names in the same is illegal and beyond the express provision of the Public Demands Recovery Act." Mr. Balai Pal for the Union asked us to hold that, if it was the case of the petitioner at any stage that the firm was dissolved before the certificate was issued, then, they would have taken the objection that the certificate was void, it being against a dissolved firm and further there would have been no question of substitution of somebody else was on the record. In the appeal to the Commissioner which the petitioners filed, they stated that the petitioners were "formerly the partners" of the said firm. It is further stated that the firm having defaulted in making payment, a certificate was sent to the certificated officer. It is not stated that at the date of the certificate the firm stood dissolved. In the petition to this court as well it was stated that a certificate was issued upon the firm and no notice under section 7 of the said Act was served upon the firm. It is indeed true that in the first paragraph it is stated that the firm carried on business during 1941-53. But there is no definite statement on which date the firm was dissolved. The certificate-debtor means a person named as a debtor in a certificate. The word "person" under the General Clauses Act includes a firm. But it was not urged before us that the firm being dissolved there was issued. The argument proceeded on the basis that the firm did not discontinue its business nor was it dissolved at the date of the certificate. But the firm discontinued its business or was dissolved subsequently and it is Mr. Jyotish Chandra Pals argument, whether the firm was dissolved or not, in any case the certificate officer had no authority to proceed in execution against persons on whom no notice under section 29 of the Income-tax Act was served. We shall come to that matter later on. After the certificate was issued and filed, as we have stated, objections were filed on behalf of the petitioners. All objections were overruled by the certificate officer who is the Additional District Magistrate, 24-Parganas. Thereafter, an appeal was filed by the certificate debtor to the Commissioner of Presidency Division. There the petitioners described the respondents as follows :

"Union of India represented by Income-tax Officer, Companies District IV." The orders of Commissioner dated the 8th November, 1957, was as follows : ". . . Orders of the certificate officer for proceeding against the partners are set aside." Against that order the Union of India

represented by the Commissioner of Income-tax moved the Board of Revenue. The Board of Revenue passed the following order on the 24th October, 1960."Objections are, therefore, allowed. The order of the learned Commissioner, Presidency Division, is set aside and the certificate restored." The certificate officer was directed to proceed in the manner indicated in their order. But in the meantime, after the order of the Commissioner, something more happened in the office of the certificate officer. On the 22nd November, 1957, the following order was recorded Records received from the Commissioner, Presidency Division. Seen Commissioners order dated the 8th January, 1957. The certificate case is cancelled. We have got the records of the certificate officer. He passed a subsequent order on the 1st December, 1960, Which is as follows : Seen the letter dated the 29th November, 1960, from the Commissioner, Presidency Division, Calcutta. The Board has revived the case. Notice on parties."The order was signed on the 3rd January, 1961 Mr. Jyotish Chandra Pal has urged the following four points in support of the petition :

(i) The Commissioner of Income-tax on behalf of the Union of India was not competent to move the Board of Revenue against the order of the Commissioner, Presidency Division, acting as Appellate authority in revenue matters.

(ii) The firm being dissolved after assessment, the certificate proceeding could not be proceeded against the partners except at least by issuing fresh demand notice under section 46(2) of the Act and fresh requisition under section 46(2) of the Income-tax Act.

(iii) The Board of Revenue had no powers to add the petitioners as certificate-debtors. The Board of Revenue could not set aside the of the certificate officer cancelling his certificate in the November, 1957.

(iv) The certificate officer having cancelled the certificate and there being no proceeding pending on the 22nd November, 1957, the Board of Revenue, which was not the appellate authority, could not cancel the order of cancellation of the certificate case without there being any proceeding pending before them as against the order dated the 22nd November, 1957. Mr. Jyotish Chandra Pal has referred to section 46(2) which shows that the Income-tax Officer will forward to the Collector a certificate specifying the amount of arrears due from an assessee and the Collector on receipt of such certificate shall proceed to recover from such assessee the amount specified therein as if it were an area of land revenue. Hence, according to Mr. Pal, the certificate-creditor should not be the Union of India at all but should be the Collector because arrears of land revenue fall due to the Collector as such and section 46(2) refers to the Collector. Hence, the petition to the Board of Revenue being filed by the Union of India represented by the Commissioner of Income-tax, the petition is bad and the Board of Revenue should have rejected the petition on that ground alone. If we refer to the petition of appeal filed by the petitioners

before the Commissioner against the decision of the certificate officer, we will find the respondent to be described as follows : "Union of India represented by the Income-tax officer, Companies District IV." If we accept Mr. Jyotish Chandra Pals argument for the petitioners, then there was no appeal pending before the Commissioner and, therefore, the order of the Commissioner, Presidency division, is on order at all and in that case the order of the certificate officer would stand which has been restored by the Board of Revenue. This argument of Mr. Pal would lead to this result that the Board of Revenue might have nothing to do; but the Commissioner, Presidency Division, had also nothing to do and the order passed by the Commissioner is not valid and, therefore, the order of the certificate officer would stand and that is what the Union of India urges. Apart from this, it is difficult to say that the amount for which the certificate was issued became due to the Collector. The amount for which the certificate would be issued or the amount for which a requisition would be sent under section 46(2) would be the amount which did become due not to the Collector but to the Union of India as arrears of income-tax. Under section 29 when the assessment is finalised and notice is served the sum of money becomes due to the Union of India and it does not become due to the Collector. Section 46 merely says that the Collector would realise that sum of money as if it were an arrear of land revenue or, in other words, for purposes of recovery it would be deemed to be an arrear of land revenue and not for every purpose. We must, therefore, reject the first argument of Mr. Jyotish Chandra Pal on behalf of the petitioners. The next point urged by Mr. Pal is that if the firm is dissolved after assessment, the certificate proceeding cannot at all be continued against the partners. Mr. Pal refers us to section 3 of the Income-tax Act and that "income-tax shall be charged in respect of... every firm... the partners of the firm or the members of the association individually..." Hence, the Income-tax Act treats a firm as a "person" for purpose of section 3 of the Indian Income-tax Act. If the firm is registered under section 26A certain consequences follow and the partners may be assessed. But if the firm is not registered, as in the present case, the firm as such would be the assessee and the firm may not be a person in the juristic sense, but the word "person", according to the General Clauses Acts, both Central as well as Provincial, would include a firm. Mr. Pal has asked us further to accept the position that the firm did not cease to function as a firm at the time when the assessment was made. Therefore, the firm could be assessed as a unit for assessment. The requisition was in the name of the firm, the certificate was also in the name of the firm. Mr. Jyotish Chandra Pal urges, if the requisition is in the name of the firm, no notice under section 7 of the Public Demands Recovery Act could be issued on the partners of the firm even if the firm had not been dissolved because the sum of money did never become due as against the partners of the firm as distinct from the firm. Mr. Jyotish Chandra Pal refers to section 3 and says there is a distinction between a firm and the partners of the firm. If arrears of income-tax are to be realised from the partners, it would at least require that notice under section 29 should be served upon the partners as such and it is then and then only

that the sum of money would become due from the partners. Mr. Jyotish Chandra Pal refers to a decision of the Judicial Committee in the case of Doorga Prasad Chamaria and says that a sum of money becomes due only when a notice under section 29 is served upon an assessee. But in this case no notice under section 29 of the Indian Income-tax Act having been served upon the partners of the firm, income-tax never became due as against the partners of the firm, no proceeding for recovery could be started against them unless and until the assessment was completed as against them unless and until a sum of money becomes due from the partners by service of notice under section 29. Mr. Pal in support of his argument refers to a decision, T Govindaswamy v. Income-tax Officer, Special Survey Circle, Bangalore, where the Mysore High Court decided that "the common law idea that a firm was not a juristic person and the term firm was merely a compendious expression to designate collectively the partners constituting it, did not apply in all its force to an assessment under the Income-tax Act, which treated the firm as a unit for purposes of taxation; an unregistered firm under the Income-tax Act has a separate status and existence distinct and different from its partners." It was further held that although by virtue of section 44 the petitioner was liable to pay the tax assessed on the firm before discontinuance, as no notice of demand under section 29 was served on him, he could not be said to have failed to pay the amount demanded in the notice and was not an assessee in default; therefore, there was no jurisdiction to initiate recovery proceedings against him under that section. It was further held that under Order 21, rule 50, of the Code of Civil Procedure, the court might execute a decree against the partners of firm individually even though the decree stood against the firm but not against the partners of the firm. It was held that under the Income-tax Act the unregistered firm was an assessee as an entity separate and distinct from the partners. The Collector, therefore, could not recover from the partners individually in respect of a certificate for recovery of tax due from the firm. This judgment supports Mr., Pals argument completely. Mr. Pal has next referred to Motilal Purshottam Das v. Income-tax Officer for an interpretation of section 44 of the Income-tax Act. He has also referred to two decisions which are against him; one of them is a decision, Union of India v. Satyanarayan Khan, where it was held by this court that tax payable by a firm before its dissolution could be recovered from the partners and there was no necessity for a further assessment of the partners and issue of a demand notice to them. It was further held in that case that the certificates as prepared and filed, i.e., in the name of the firm, could not be executed against the plaintiffs only so long as it was not amended by adding the names of the plaintiffs as certificate-debtors therein and so long as notice under section 7 of the Public Demands Recovery Act was not served on the plaintiffs. But they could execute against a partner after the certificate was amended by adding the name of the partner and after the notice under section 7 was served. We may add that the Board of Revenue followed this judgment and directed the names of the partners to be added by amendment of the certificate and tax would then be realised against the partners. What happened in this case was that a notice under section 7

was served on the partners; but they were not added as parties to the certificate. The Board had directed them to be added as parties. The other decision referred to by Mr. Pal, which is against him, is in *Sahu Rajeshwar Nath v. Income-tax Officer, C-Ward, Meerut*, a decision of the Allahabad High Court. Mr. Pal has also referred to the case of *Ravulu Subba Rao v. Commissioner of Income-tax* decided by the Supreme Court. The Supreme court therein observed that the Indian Income-tax Act is a self-contained code exhaustive of the matters dealt with therein. Mr. Pal, therefore, says that the Income-tax Act is an exhaustive code and the certificate procedure is a self-contained procedure; as such there is no scope for the general law to modify the law laid down either by the Income-tax Act or by the Provisions of the Public Demands Recovery Act. Neither the Indian Income-tax Act nor the Public Demands Recovery Act says that on the dissolution of the firm the partners would be liable and the proceedings for recovery may be started against the partners without even a notice under section 29 of the Income-tax Act against the partners. According to Mr. Jyotish Chandra Pal, the provision of section 3 and the provision of section 44 make it quite clear that the partners may be assessed and tax may become due from the partners; but something must be done under the provision of the Income-tax Act to make tax due from the partners and the minimum that can be done is service of notice under section 29 of the Act. If that bare minimum is not done, no money is due from the partners. If the firm is dissolved before recovery, at least fresh notice under section 29 is to be served upon the partners. Thereafter, fresh requisition is to be issued and fresh certificate signed and filed. Unless these things are done, there is no law either procedural or substantive which would make the partners liable. Hence, the present proceedings must be quashed. The third point of Mr. Jyotish Chandra Pal was that the Board of Revenue had no powers to add the petitioners as certificate-debtors. According to Mr. Pal, under the Indian Income-tax Act, a firm is a distinct entity and that entity continues till the conclusion of the proceedings relating to assessment. In this case the certificate was issued against the firm and not against the partners. The requisition under section 46(2) was issued against the firm-not against the partners. Therefore, the Board of Revenue could not direct addition of parties under the Public Demands Recovery Act, because, if they added the partners, as certificate debtors, they merely introduced persons who are not bound to pay tax as no demand has been served upon them individually and, consequently, on tax is due from them. Finally, the Board of Revenue passed an order restoring the certificate, but the Board had no powers to restore the certificate. The certificate was cancelled by the certificate officer; there was no appeal against the order of the certificate officer and no proceedings by anybody against the order of the certificate officer cancelling the certificate; hence, the Board could not restore the certificates. We now consider the second point urged by Mr. Pal. Section, 3, as we have referred to already, makes a firm a unit for purposes of assessment. It also makes the partners of the firm different units for assessment. Therefore, there is no difficulty in saying that a firm as much as such could be assessed just in the same manner as a firm as such can sue or be

sued under Order 30 of the Code of Civil Procedure. We have also been referred to section 23(5), clause(b), of the Act, but that has no application. Section 44 provides for the liability of the partners in case a firm is dissolved or discontinued. It is stated that if a firm is dissolved or discontinued, a partner of such firm shall, in respect of income, profits and gains of the firm, be jointly and severally liable to assessment under Chapter IV and for the amount of tax payable all the provisions of Chapter IV as far as may be apply to such assessment. Mr. Pal says, if the firm is assessed, there is no question of the firm or the partners of the firm being again assessed for the same income; the only manner to make the partners liable for the assessment is by a notice under section 29 of the Act. But the liability of the partners under section 44 is a liability to assessment after the dissolution of the firm. If the firm is dissolved before assessment is complete, the partners may be liable to be assessed and in that case the amount of tax may be payable by the partners and all the provisions of Chapter IV would apply. That means a notice under section 29 need be served upon them and the partners may prefer an appeal. If a firm is dissolved after assessment but before notice under section 29 is served, section 44 may require another proceeding for the assessment of the partners and they may not at once become assessed because the firm was assessed. But in the circumstances of this case the firm was not dissolved before assessment. It was dissolved after assessment. Hence, section 44 is not attracted. If a firm as a distinct unit has been assessed and notice of demand served upon it as a distinct unit and requisition issued with regard to the firm, that assessment remains a final assessment so far as the firm is concerned and so far the same income of the firm which has been assessed, the firm after notice became a debtor to the Union of India. There is no further question of assessment but a simple question of recovery of debt from a firm which has subsequently been dissolved. After the debt is fixed, the Income-tax Act refers to other laws for purpose of recovery. In Bengal it is the Public Demands Recovery Act. Regarding recovery, the Income-tax Act has nothing to add except that the authority for recovery will have all powers of a civil court. The question, therefore, is whether a debt due from a firm can be recovered from its partners after it is dissolved ? That is not a matter within the scope of the Income-tax Act : the Income-tax Act deals with rights and liabilities as between the Union and the assessee, but it does not deal with rights and liabilities of the assessee inter se or between an assessee and third party. We need, therefore, refer to some other law for that purpose and that law is the Indian Partnership Act. In order, therefore, to understand what are the relative liabilities as between the partners of the firm and the firm itself, we cannot but refer to the Indian Partnership Act. If the firm is dissolved, section 49 says, when there are joint debts from the firm and also separate debts due from the partners, the property of the firm shall be applied in the first instance in the payment of the debts of the firm..... Separate property of any partner shall be applied first in the payment of separate debts and surplus, if any, in the payment of the debts of the firm. Therefore, on the dissolution of a firm under section 49, the partners become liable to pay the debt of the firm. The Income-tax

Act does not include such provisions. There is no provision in the Income-tax section 49 of the Indian Partnership Act. Hence, once the debt becomes due from a firm under the provisions of the Income-tax Act and if, thereafter, the firm is dissolved, the partners become liable to pay the debt, first out of the property of the firm and then out of their separate property. That liability is not affected or modified by the provisions of the Indian Income-tax Act. Therefore, that liability cannot be wiped out. The Bengal Public Demands Recovery Act deals with the matter of recovery and does not determine the liability. If there is a liability of the partners under section 49 of the Partnership Act for the debt of the dissolved firm, it could be recovered as against them.

The next point is regarding the procedure for recovery. A certificate-debtor in the Bengal Public Demands Recovery Act is defined as follows :

"Certificate-debtor means the person named as a debtor in a certificate filed under this Act and includes any person whose name is substituted or added as debtor by the certificate officer."

The word "person" under the Bengal General Clauses Act includes a firm. Therefore a firm may be a certificate-debtor and if a firm is a certificate-debtor, any person whose name is substituted or added as debtor by the certificate, would also be a certificate-debtor. Hence, the question is whether on the dissolution of a firm the partners can be added or substituted as debtors by the certificate officer. It goes without saying that only those persons can be added or substituted on whom devolves the liability of the debtors. If the liability of "debtor" does not devolve on a person, he cannot be substituted nor added. In the ordinary case where a person dies his natural death, if he dies intestate the liability devolves upon his heirs, and if testate the liability devolves upon the executor. Therefore, such persons may be added or substituted. This law relating to devolution of liability is not law relating to recovery but law defining the liability. Hence the Public Demands Recovery Act does not define who would be liable; that must be gathered from other laws. We shall again refer to the decision of the Mysore High Court between T. Govindaswamy v. Income-tax Officer, Special Survey Circle, Bangalore. It was held by the Division Bench of that court that by virtue of section 44 the petitioner, who was undoubtedly a partner, was liable to pay the tax assessed on the firm before discontinuance :

"It is clear from sections 45 and 46 of the Act dealing with recovery of tax that proceedings under section 46(2) could be initiated only against an assessee in default. Section 45 states when an assessee is to be treated as an assessee in default."

Their Lordships then proceeded to observe : "The highest that can be said therefore of the petitioner is that he must be taken to be an assessee by virtue of his liability to pay tax under section 44. No notice under section 29 having been admittedly issued to him, he cannot be said

to have failed to pay the amount demanded in the notice and cannot, therefore, be described as an assessee in default." In our opinion, if the firm was not dissolved before assessment and if the firm was served with a notice under section 29, the firm became a debtor to the Union. In such circumstances, if the firm is subsequently dissolved, the liability of the partner would be under section 49 of the Indian Partnership Act and the partners need not be deemed to be assessed under section 44. That section 44 will apply only if the firm was dissolved before assessment. With very great respect, so far as this part of the case is concerned, we do not agree with the views expressed by the Division Bench of the Mysore High Court. The next case referred to by Mr. Jyotish Chandra Pal is *Moti Lal Purshottam Das v. Income-tax Officer*. In that case, section 44 was construed. But, in our opinion, as the firm in question was not dissolved during the entire time while the assessment matter was pending, no question of section 44 arises. An unregistered firm was a separate entity and if the firm was an assessee and did not discontinue its business or dissolve at any time when the assessment proceedings continued, section 44 would not come into play. Therefore, we need not consider the matter further. We hold the liability of the firm for the debt could on dissolution be enforced against partners. The third point urged by Mr. Jyotish Chandra Pal is that the Board of Revenue had no powers to add the petitioners as certificate-debtors. The order of the Board of Revenue is as follows :

"I hold that if the income-tax department wants to proceed against the partners, they must bring the partners on record as certificate-debtors and certificate should proceed in the same manner indicated in *Satyanarayans case*."

The operative portion of the order is, "The petitions are, therefore, allowed. The order of the learned Commissioner, Presidency division, is set aside and the certificate restored. The certificate officer shall proceed in the manner indicated in this order." Therefore, the Board of Revenue did not direct any addition. If the income-tax department so like, they may apply to the Collector in the manner indicated in *Satyanarayans case* referred to above. Therefore, we cannot say that the Board directed any addition of party and if a party is added, the party would have enough opportunity to contest such addition. Sections 9 and 10 protect the petitioner so far as his right to object is concerned and that is a matter which is yet to be decided by the certificate officer. It is urged in this connection that the Additional District Magistrate could not act as the authority for recovering the income-tax dues. The reason is that the requisition is to be issued to the Collector and the Collector is to proceed to recover from the assessee the amount specified therein as if it were land revenue. The word "Collector" in the Central General Clauses Act, X of 1897, means the chief officer in charge of revenue administration of a district. The definition of the word "Certificate Officer" under the Bengal Public Demands Recovery Act is as follows :

"Certificate Officer means a Collector, a Sub-divisional Officer, and any officer appointed

by a Collector with the sanction of the Commissioner to perform the functions of a Certificate Officer under this Act."

The word "Collector" for the purpose of this Act has now been defined and the word "Collector" means the chief officer of the revenue administration of a district and includes an Additional District Magistrate. The word "Collector" for the purpose of the Income-tax Act means the chief officer-in-charge of the revenue administration and under the Bengal Act that chief officer is also designated as the Collector even if he is an Additional District Magistrate. We, therefore, find no substance in this argument. Finally, it is urged that the Board of Revenue could not set aside the order of the certificate officer cancelling the certificate. Mr. Balai Pal has referred us to the order of the appellate authority, namely, the Commissioner of the Presidency Division, who directed that the proceedings against the partners should be set aside. The revision petition to the Board of Revenue was against the said order of the Commissioner, Presidency Division. The certificate offer however did not cancel the certificate; he cancelled the certificate case. His order is as follows and dated the 22nd November, 1957 : "Records received from the Commissioner, Presidency Division. Seen the Commissioners order dated the 8th November, 1957. The certificate case is cancelled". After the order of the Board of Revenue, the certificate office further passed the following order on 1st December, 1960 :

"Seen the letter dated the 29th November, 1960, from the Commissioner, Presidency Division, Calcutta. The Board has revived the case".

It is, therefore, clear that the Board of Revenue did not revive the certificate but revived the certificate case. A Certificate Case No. 556 I.T. (C) of 1954-55 was started on the certificate. The certificate was issued and then that was entered into and the case was started. The Commissioner directed the said proceedings to be set aside. That was understood by the certificate officer that the certificate case was cancelled. In the order of the Board of Revenue it is stated that the certificate is restored. It is clear from the order of the certificate officer that the certificate officer thought and the Commissioner of Presidency Division also thought that the certificate case was restored. We have no doubt there is a slip of pen and the Board of Revenue really restored not the certificate which was never cancelled but the certificate case which was dismissed by the Commissioner when he observed that the proceedings are set aside. Before leaving this subject we may say, considered from another point of view, it may appear to be simple. The certificate-debtor was a firm. It is dissolved after the debt accrued and then execution was started against the partners without adding them as certificate-debtors. The Board of Revenue has said that execution against partners can proceed after the partners are added as certificate-debtors. The order is perfectly right.

All the objections of Mr. Jyotish Chandra Pal are overruled and the rule is discharged with costs.

Hearing fee being assessed at 10 gold mohurs. Gupta J. - I agree.

