BOMBAY HIGH COURT

Nagarmal Baijnath

Vs

Commissioner of Income Tax

(Jeevan Reddy, C.J. B.P. J.)

12.12.2011

JUDGEMNT

JEEVAN REDDY, C.J.

The appellant assessee, a firm which did business during the accounting years relevant to assessment years 1946-47 and 1947-48, was dissolved by a deed of dissolution dated December 2,1946, and Its business discontinued. Notices were issued in the name of the partnership firm and assessments were completed under the Income-tax Act 1922 and Excess Profits Tax Act, 1948. Indeed, the returns were flied in the name of the firm.During the course of the assessment proceedings under both the enactments viz. Income-tax and Excess Profit Tax Act, no objection was taken as to the validity of the proceedings. Against the orders of assessment, appeals were preferred to the Appellate Assistant Commissioner. In these appeals also the validity of the assessment order was not challenged. Even In the further appeals before the Tribunal, no objection was taken to the validity of the assessments. Subsequently, however, permission was sought for raising additional grounds questioning the validity of the assessment proceedings. Though, Revenue opposed the same, the Tribunal permitted the said new ground to be raised on the ground that the Income-tax Officer was aware that the business of the firm was closed. Ultimately, the Tribunal dismissed the appeals. Thereupon the assessee obtained the reference and since it could not succeed even before the High Court the assessee filed the present appeals.
It was contended on behalf of the appellant see that under the unamended Section 44, no assessment could have been made upon a firm which was dissolved by the time the assessment was made. Dismissing the appeals, this Court, HELD:1.1. Section 44 of the Income-tax Act, 1922 (before Its Amendment by Finance Act, 1958) covered two situations: (1) where any business, profession or vocation carried on by a firm or association of persons was discontinued and (2) where an association of persons was dissolved. In either of these situations, every person who at the time of such discontinuance or dissolution was a partner of such firm or member of such association was made jointly and severally liable to assessment under Chapter IV in respect of the Income, profits and pins of the firm or association as the case may be. The joint and several liability extended to the payment of the tax. [650 C-D] 1.2.The instant case Is one where the dissolution of the firm resulted in discontinuance of its business. This Court is not concerned with the situation where the firm was dissolved but its business was not discontinued, a distinction which has to be borne in mind. In the case of dissolution resulting in discontinuance

of business S.44 of the Income-tax Act, 1922 enabled the Income-tax Officer to make an assessment on the dissolved firm. Indeed this aspect is no longer res integra in view of the settled law. [650 E-H]
C.A. Abrahani v. Income Tax Officer, Kottayam & Anr[1]*.,* and *Shivram Poddar v. Incomne Tax Officer, Central Circle II, Calcutta & Anr*[2]*.,* relied on.*C.LT., Bombay v. Devidayal*[3]*, Larmidas v. C.LT Bombay*[4]*, and Nagarmal Baijnath v. C.I.T*[5]*.,* referred to.JUDGMENT: CIVIL APPELLATE JURISDICTION Civil Appeal Nos. 15657/1979. From the Judgment and Order dated 5.11.1977 of the Bombay High Court in Income Tax Reference No. 44 of 1968. U. Rajagopal and Ashok Mathur for the Appellant. A. Raghubir and Ms. A. Subhashini for the Respondent. The Judgment of the Court was delivered by B.P. JEEVAN REDDY, J. These appeals are preferred against the judgment of the Bombay High Court in Income Tax Reference No.44/68. The question referred under Section 66(1) of the Indian Income Tax Act, 1922 and Section 21 of the Excess Profits Tax Act, 1948 for the opinion of the High Court reads thus:

"Whether, on the facts and in the circumstances of the case, the Income-Tax assessments for the years 1946-47 and 1947-48 and excess profits tax assessments for the chargeable accounting period ending 4.11.1945 and 31.3.1946 made on M/s. Nagarmal Baijnath, a firm which was dissolved and whose business was discontinued at the time of the assessments, were validly made?' The appellant assessee, M/s. Nagarmal Baijnath was a firm which did business during the accounting years relevant to assessment years 1946-47 and 1947-48, the previous years being the years ending November 4, 1945 and March 31, 1946 respectively. By a deed of dissolution dated December 2, 1946, the firm was dissolved and its business discontinued. Notice under Section 22(2) of the Act relating to the assessment years 1946-47 was issued in the name of the partnership firm and served on one Satyanarayan who accepted it on behalf of the firm, on August 19, 1946. Subsequent notices under Sections 22(4) and 23(2) were also issued in the name of the firm and assessment completed on March 23, 1951 on the firm. The same procedure was adopted with respect to the assessment year 1947-48 and assessment completed on the firm on March 10, 1. So far as the assessments under the Excess Profits Tax Act are concerned, notices were issued again in the name of the firm and assessments completed in the name of the firm. Indeed, the returns were filed in the name of the firm signed by Baijnath Gajanand for and on behalf of the firm. During the course of the assessment proceedings under both the enactments, no objection was taken by anyone on behalf of the assessee to the validity of the proceedings. Against the orders of assessment, appeals were preferred to the Appellate Assistant Commissioner. Even in these appeals the validity of the assessment orders was not challenged. On the appeals being dismissed, further appeals were filed before the Income Tax Appellate Tribunal. In the grounds of appeal before the Tribunal too, no objection was taken to the validity of the assessments. Subsequently, however, permission was sought for raising additional grounds in appeal questioning the validity of the assessment proceedings. Though, the Revenue opposed the same.' the Tribunal permitted the said new ground to be raised, observing that even from the assessment order relating to the assessment year 1946-47, it appears that "the Income-Tax Officer was aware that the business of the firm was closed." Ultimately,-however, the Tribunal dismissed the appeals. It is thereupon that the appellant obtained the reference under Section 66(1).
The only question urged by the appellant before the High Court was: inasmuch as the firm stood dissolved prior to the date the orders of assessment relating to the said two assessment years were made, the orders of assessment are void. It was urged that Section 44 of the Act did not authorise the Revenue to make an assessment on the firm after it was dissolved. The High Court first

noticed the factual finding recorded by the Tribunal viz., when the assessments were made on the firm, the firm was not in existence, having been dissolved prior to that date and its business discontinued. The High Court also noticed the contention of the assessee that inasmuch as "prior to the dates of the respective assessments, the firm had been dissolved and its business discontinued' the assessments made were contrary to law, in support of which contention the appellant assessee relied upon a judgment of the Gujarat High Court in Special Civil Application No.429/60, disposed of on November 12, 1985. The High Court refused to follow the said judgment in view of the consistent view taken by the Bombay High Court that even under the unamended Section 44, it was permissible for the Revenue to make an assessment upon a dissolved firm after its dissolution and discontinuation of business. Accordingly, it answered the question referred to it in the affirmative i.e., against the assessee and in favour of the Revenue. In this appeal, it is contended by Sri V. Rajagopal, learned counsel for the appellant that under the unamended Section 44, no assessment could have been made upon a firm which was dissolved by the date of the assessment. Learned counsel laid emphasis on the language of the Section. He pointed out that so far as the discontinuance is concerned, it referred both to association of persons as well as the firms, but when it referred to dissolution, it only referred to association of persons but not to the firm. This was a clear pointer, says the counsel, to the fact that the section did not apply to dissolution of a firm though it may have applied to its discontinuation. He further submitted that the mere application of the provisions of Chapter IV for the purpose of assessment did not mean that an assessment could be made upon a non-existent entity. He contrasted the language of unamended Section 44 with the language employed in amended Section 44 and submitted that the very defect pointed out by him in the unamended provision was rectified by the amendment, and the omission supplied. He emphasised the proposition that an assessment cannot be made upon a nonexistent entity and that such an assessment is void in law unless, of course, the law provides for such a course in express terms. No such provision was there in Section 44 before it was amended in 1958, says the counsel. On the other hand, it is contended by Sri A. Raghuvir, learned counsel for the Revenue that the contention urged by the appellant is concluded against him by the decisions of this Court and that it is too late in the day to re-agitate the said question.Section 44 of the Indian Income Tax Act, 1922 prior to its amendment by the Finance Act, 1958, read as follows:

> "Liability in case of discontinued firm or association:
> Where any business, profession or vocation carried on by a firm or association or persons has been discontinued or where an association of persons is dissolved, every person who was at the time of such discontinuance or dissolution a partner of such firm or a member of such association shall, in respect of the income, profits and gains of the firm or association, 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."

After it was amended, the Section read thus: "44. Liability in case of firm discontinued or dissolved.

(1)Where any business profession or vocation carried on by a firm on other association or persons has been discontinued, or where a firm of other association of persons is dissolved, the Income Tax Officer shall make an assessment of the total income of the firm or other association of persons as such as if no such discontinuance or dissolution had taken place.

(2)Every person who was at the time of such discontinuance or dissolution a partner of the firm or a member of the association, as the case may be, shall be jointly and severally liable for the amount of tax or penalty payable, and all the provisions of Chapter I Vso far as may be, shall apply to any such assessment or imposition or penalty.' Unamended Section 44, it is evident, covered two situations: (1) where any business, profession or vocation carried on by a firm or association of persons was discontinued and (2) When as association of persons was dissolved. In either of these situations, every person who at the time of such discontinuance or dissolution was a partner of such firm or member of such association was made jointly and severally liable to assessment under Chapter IV in respect of the income, profits and gains of the firm or association, as the case may be. The joint and several liability extended to the payment of the tax held payable. All the provisions of Chapter IV, so far as the case may be, were made applicable for such assessment.In this case, we are dealing with the situation where the dissolution of the firm resulted in discontinuation of its business. We are not concerned herein with the situation where the firm was dissolved but its business was not discontinued. It is necessary to bear this factual premise in mind. Indeed, on a pointed query from us, the counsel for the appellant stated that this was a case where the dissolution resulted in discontinuance of business. The question is whether in such a case, does not Section 44 enable the Income Tax Officer to make an assessment on the dissolved firm? We are of the opinion that it does. Indeed this aspect is no longer res integra in view of the decisions of this Court in *C.A. Abraham v. Income Tar Officer, Kottayam & Anr*[6]*.,* and *Shivram Poddar v. Income Tar Officer, Central Circle II, Calcutta & Anr*[7]*.,* In Abraham, the firm stood dissolved on the death of a partner and the penalty under Section 28 of the Act was imposed after its dissolution. It was contended by the assessee that such imposition was illegal, which contention was negatived with reference to unamended Section 44. That was also a case where the business of the firm was discontinued because of the dissolution. The purport of Section 44 was stated by Shah, J., speaking for the Ben in the following words:

"Section 44 sets up machinery for assessing the tax liability of firms which had discontinued their business and provides for three consequences,
(1)that on the discontinuance of the business of a firm, every person who was at the time of its discontinuance a partner is liable in respect of income, profits and gains of the firm to be assessed jointly and severally (2) each partner is liable to pay the amount of tax payable by the firm, and (3) that the provision of Chapter IV, so far as may be, apply to such assessmentIn effect, the Legislature had enacted by Section 44 that the assessment proceedings may be commenced and continued against a firm o f
which business is discontinued as if discontinuance has not taken place. It is enacted manifestly with a view to ensure continuity in the application of the machinery provided for assessment and imposition of tax liability notwithstanding discontinuance of the .business of firms. By a fiction, firm is deemed to continue after discontinuance for the purpose of assessment under Chapter IV."
In our opinion, the above observations squarely apply to the present case which is also a case where the dissolution of the partnership firm led to discontinuance of its business. To the same effect is the decision in Shivram Poddar. The firm consisted of four partners including Shivram Poddar. It was dissolved in February, 1950 and thereupon its business was discontinued. For the assessment year, 1949- 50, one of the partners of the firm submitted a return of its income and the assessment was made on October 28, 1952 in the status of an unregistered firm. Subsequently, in March, 1955 notice was issued under Section 44 of the Act proposing to reopen the assessment 'for the said assessment year whereupon Shivram Poddar approached the Calcutta

High Court for issuance of a writ of mandamus commending the Income Tax Officer to forbear from giving effect to the said notice. The High Court dismissed the Writ Petition, whereupon the matter was brought to this Court. The question arising for consideration was stated by Shah, J., speaking for the Bench in the following words:
“The question which falls to be determined in this appeal is whether the income earned by the firm in the year ending March, 1950 could be assessed to tax under Section 44 of the Indian Income-Tax Act, 1922, after the firm was dissolved.The learned Judge set out the unamended Section 44 and its object as adumberated in Abraham and observed thus: “Section 44 operates in two classes of cases: where there is discontinuance of business, profession or vocation carried on by a firm or association, and where there is dissolution of an association. It follows that mere dissolution of a firm without discontinuance of the business will not attract the application of section 44 of the Art. It is only where there is discontinuance of business, whether as a result of dissolution or other cause, that the liability to assessment in respect of the income of the firm under Section 44 arises.In the case of an association, discontinuance of business for whatever cause, and dissolution with or without discontinuance of business, will both attract section 44. The reason for this distinction appears from the scheme of the Income-Tax Act in its relation of assessment of the income of a firm.’ After explaining the scheme of the 1922 Act and after referring to the relevant provisions in that behalf, the learned Judge proceeded to state:

> “Section 44, is therefore, attracted only when the business of a firm is discontinued, i.e., when there is complete cessation of the business and not when there is a change in the ownership of the firm, or in its reconstitution, because by reconstitution of the firm, no change is brought in the personality of the firm and succession to the business and not discontinuance of the business results The learned Judge concluded, on a examination of the scheme of the Act, that:
> “absence of reference to dissolution of firm (not resulting in discontinuance in Section 44) in section 44 was therefore a logical sequel to the provisions relating to assessment of firms contained in Chapter IV, especially sections 23(5), 25(1), 26(1) and (2).”

In our opinion, these two decisions are conclusive on the question arising herein. The appeals are accordingly liable to fail.So far as the unreported decision of the Gujarat High Court is concerned, the facts of that case appear to be different. It is sufficient to mention that even the said decision recognized that where the dissolution of the firm resulted in discontinuance of its business, assessment could be made on the dissolved firm having regard to the provisions contained in unamended Section 44. This is what the Division Bench observed, i.e.:

> “Now if there was discontinuance of the business of the first petitioner firm on its dissolution, it is clear that the unamended Section 44 would have governed the question of assessment of the first petitioner firm and having regard to the decisions of the Supreme Court just referred to, the Revenue would have been entitled to assess the first petitioner firm as a firm despite its dissolution.’ The very same idea was repeated at a later stage in the following words:

“If there is discontinuance of the business, Section 44 would apply and the Revenue would be entitled to proceed to assess the firm as if no dissolution had taken place. (Vide C-A.Abraham v. Income Tax Officer, Commissioner of Income Tax_ v. Angadi Chettiar & Commissioner of Income tax v. Rais Reddy Mallaram (supra).

But if there is no discontinuance of the business and there is succession, the case would fall within Section 26(2). That section, however, does not enact a provision enabling the Revenue to assess a dissolved firm on its pre-dissolution income in case of succession.' We are, therefore, of the opinion that the said decision does not lay down any principle contrary to the one enunciated in Abraham or Shivram Poddar. In this view of the matter, we do not think it necessary to deal with the facts and principles enunciated in the decisions of the Bombay High Court referred to in the order under appeal. Suffice it to say that the decisions in *CLT, Bombay v. Devidayal, 68 I.T.R. 425(Supra), Laxmidas v. CLT. Bombay. 72 I.T.R. 88(Supra)*and the one in *Nagarinal Baijnath v. C.I. T*[8]*,* affirm and follow the principle in Abraham. For the above reasons, the appeal fails and is accordingly dismissed. No costs.
G.N. Appeal dismissed.

Cases Referred.

141 I.T.R. 425
2 51 I.T.R. 823
368 I.T.R. 425
472 I.T.R. 88
5114 I.T.R. 133
641 I.T.R. 425
751 I.T.R. 823
8114 I.T.R. 133