PATNA HIGH COURT

State of Bihar

Vs

Kameshwar Singh Bahadur

Misc. Judicial Case No. 244 of 1949

(Ramaswami and Sarjoo Prasad, JJ.)

19.02.1952

JUDGMENT

Ramaswami, J.

1. This case is stated by the Board of Agricultural Income-tax under Section 25(1) of the Bihar Agricultural Income-tax Act (Act 7 of 1938).

2. On 28th December 1945, the Agricultural Income-tax Officer of Darbhanga made an order of assessment holding that the agricultural income of Maharaja of Darbhanga was Rs. 37,43,520 for the accounting year 1944-45. The assessee had claimed a sum of Rs. 2,82,192 as capital receipt according to the terms of a 'zarpeshgi' lease. The claim was accepted by the Agricultural Income-tax Officer who completed the assessment on 28th December 1945. The Assistant Commissioner approved the assessment and demand notice was issued. The assessee paid two out of three instalments of the amount of tax but, on 22nd March 1946, the Agricultural Income-tax Officer issued notice under Section 26 on the ground that agricultural Income from Gaya zarpeshgi lease should have been taxed. In response to the notice the assessee filed a fresh return and after examination of the accounts the Agricultural Income-tax Officer determined the net income from the Gaya zarpeshgi lease to be Rs. 2,50,879 and after adding it to the total income imposed a tax of Rs. 39,512 and odd. The assessment was approved by the Assistant Commissioner on 23rd March 1946. The assessee appealed to the Commissioner who held that no Income had escaped assessment and the Agricultural Income-tax Officer had no jurisdiction to apply Section 26 of the Act. The Commissioner allowed the appeal. On behalf of the State of Bihar, a revision application was filed before the Board of Agricultural Income-tax who has referred the case to High Court under Section 25 (1) of the Act.

3. The questions referred are : (1) Whether in view of the circumstances of the case, and particularly the manner in which, after due consideration, the Agricultural Income-tax Officer in his first judgment dated the 10th March 1947, had held that the assessee was not liable to be assessed for the receipt on account of the zarpeshgi lease, the Agricultural Income-tax Officer had jurisdiction to revise his own order under Section 26 of the Act; and (2) assuming he had the jurisdiction to revise his own order under Section 26 of the Act, whether the income from the

zarpeshgi lease of the assessee was taxable under the Act.

4. The first question is whether the Agricultural Income-tax Officer was competent under Section 26 of the Act to review the previous order of assessment and to hold that the assessee was liable to be assessed for the income from the properties granted in zarpeshgi lease. On behalf of the assessee, Dr. Sultan Ahmad argued that there was no 'escape of income' from the process of assessment and that Section 26 has been wrongly applied in this case. It was contended by the learned Counsel that in order to hold that the income had escaped assessment there must have been either some fresh tacts brought to the notice of the Agricultural Income-tax Officer or some alteration in the state of the law. It was urged that a mere change of view on the part of the Agricultural Income-tax Officer was not sufficient. In my opinion the argument is not correct. Section 26 states –

> "If for any reason any agricultural income chargeable to agricultural income-tax has escaped assessment for any financial year, or has been assessed at too low a rate, the Agricultural Income-tax Officer may, at any time within one year of the end of that financial year, serve on the person liable to pay agricultural income-tax on such agricultural income, or, in the case of a company, on the principal officer thereof, a notice containing all or any of the requirements which may be included in a notice under sub-section 2 of Section 17, and may proceed to assess or reassess such income."

Having regard to the opening words of the section 'for any reason' there is no justification for giving a restricted meaning to the word 'escape'. In its lexicographic sense, the word 'escape' connotes 'to elude' or 'to succeed in avoiding'. If, an item of income is not charged, because it is not included in the return it will be proper to say that the income has escaped assessment. Similarly, income will be said to have escaped assessment if it has not been charged on account of a mistake or oversight on the part of the taxing authorities. The Agricultural Income-tax Officer is therefore entitled to proceed under this section to reassess income if he thinks that owing to some mistake in the first assessment a part of the income has not been assessed. It is not necessary that there must be new facts brought to the notice of the Agricultural Income-tax Officer or that there should be any change in the law. Dr. Sultan Ahmad also stressed the argument that the phrase 'escaped assessment' must mean not that the question has been considered and decided in favour of the assessee but the Agricultural Income-tax Officer had omitted to consider the question at all. Learned counsel contended that the Section cannot apply to a case where the Agricultural Income-tax Officer has upon consideration reached the erroneous conclusion that a part of the income was not assessable. But such a construction is not possible in view of the later part of the section 'where income..... has been assessed at too low a rate'. This clause cannot refer to a matter of mere inadvertence but must refer to a deliberate assessment made by the Agricultural Income-tax Officer in the preceding year with knowledge of the facts. The phrase 'escaped assessment' must be construed in a similar manner, and must be held to apply to a case where the Agricultural Income-tax Officer deliberately reached an erroneous result as much as to a case where the officer had not considered the matter at all but simply omitted assessment of the property on account of inadvertence.

5. There is a 'cursus curiae' of all the High Courts in support of this interpretation with reference to Section 34 of the Indian Income-tax Act which is in 'pari materia' with Section 26 of the Bihar

Agricultural Income-tax Act : *'Commissioner of Income Tax v. Raja Of Parlakimedi[1]', 'Amir Singh Sher Singh v. Commissioner of Income Tax'[2], 'In Re P.C. Mullick and D.C. Aich[3]',* and *'Chimanram v. Commissioner of Income Tax, (Central) Bombay[4]',* In *'Anglo Persian Oil Company Ltd. v. Commissioner Of Income-Tax[5]',* there is also a dictum of Sir George Rankin to the effect that Section 34 is applicable to put right an assessment by which a deduction has been improperly allowed and that there is nothing in Section 34 which limits it to the case of non-disclosure by the assessee or discovery of new matter or inadvertence.

6. Dr. Sultan Ahmad placed reliance upon a dictum of the Judicial Committee in *'Rajendranath Mukherjee v. Commissioner of Income Tax[6]',* in which the question arose whether it was competent to make an assessment under Section 23 (1) of the Income-tax Act after the expiry of the year for which the tax was charged. It appears that in April 1927, notice was issued to Burn and Co., calling for a return of their income for the year 1926-27 and a return was duly made in 1928. Meanwhile, the Income-tax authorities thought that Martin and Co. had purchased Burn and Co., and made an assessment on Martin and Co., in respect of the joint income of Burn and Co., and Martin and Co. Martin and Co., appealed and the High Court ultimately held on May 16, 1930, that the two companies should have been separately assessed. The assessment of Martin and Co. was accordingly amended by eliminating the income of Burn and Co. and the Income-tax Officer assessed Burn and Co. on November 8, 1930 on their income as returned in 1928. It was held by the Judicial Committee that the assessment made under Section 23 (1) on Burn and Co. ore 8th November 1930 was a legal assessment. It was contended on behalf of the appellant that an assessment once begun if not completed within the year could not be made unless it was done under Section 34. The argument was negatived on the ground that Section 23 under which assessment was made contained no limitation of time during which assessment could be made. The Judicial Committee observed that income had not escaped assessment within the meaning of Section 34 since proceedings for assessment were pending and no final order had been made. The ratio of the case is that an assessment could be made under Section 23 (1) of the Act more than a year, in fact at any time after the assessment year if in the meantime no final assessment has been made. But Dr. Sultan Ahmad referred to the dictum at page 16 :

> "To say that the income of Burn and Co., which in January, 1928, was returned for assessment and which was accepted as correctly returned though it was erroneously included in the assessment of Martin and Co., has 'escaped' assessment in 1927-28 seems to their Lordships as inadmissible reading. The fact that Section 34 requires a notice to be served calling for a return of income which has escaped assessment strongly suggests that income which has already been duly returned for assessment cannot be said to have 'escaped'
> assessment within the statutory meaning. Their Lordships find themselves in agreement with the view expressed in 'IN RE LACHHIRM BASANTLAL', 58 Cal 909 (SB) by the learned Chief Justice (Rankin) : 'Income has not escaped assessment if there are pending at the time proceedings for the assessment of the assessees' income which have not yet terminated in a final assessment thereof."

But the passage must be read in context of the whole report. When the Judicial Committee remarked that the expression 'escaped assessment' was not equivalent to 'has not been assessed'

the Judicial Committee meant that the expression 'escaped assessment' can have no possible application to a case where the course of assessment was not yet complete and there had in fact been no final assessment order. The Judicial Committee was more concerned with the meaning of the word 'assessment' to which it gave wide interpretation than with defining exact meaning of the word 'escaped'. All that the Judicial Committee held about the latter word was that it was not wide enough to include income as to which no final assessment order had been made and as to which assessment proceeding was still running its course.

7. Upon the first question therefore, I hold that in the circumstances of the case income had escaped assessment and the Agricultural Income-tax Officer had jurisdiction to make fresh assessment under Section 26 of the Act.

8. Upon the second question, Dr. Sultan Ahmad argued that the receipt from the zarpeshgi lease was not taxable. It was contended that the assessee had advanced a loan of 17 lacs and odd to Rani Bhuvaneshwari Kuer and that the receipt from the leasehold properties was appropriated by the assessee in recoupment of the loan and interest. But it was argued for the State of Bihar that under the terms of the zarpeshgi lease the assessee was to remain in possession and enjoy the usufruct of the properties given in lease for fixed term of years and whatever income was derived during the term of the lease was income of the assessee and was liable to be taxed. In order to determine which of the contentions is right, it is necessary to examine the true nature and character of the transaction between the assessee and Rani Bhuvaneshwari Kuer. The zarpeshgi lease is based on two documents called indentures of lease between the assessee and Rani Bhuvaneshwari Kuer. From these documents, it is apparent that the lessee had advanced a sum of Rs. 17,16,000/- to Rani Bhuvaneshwari Kuer; that in consideration thereof, the assessee was granted right to enjoy rent and profits of the villages mentioned in schedule I for a term of 28 years commencing from the first day of Asarh 1342 Fs. The other conditions were (1) that Rs. 1000/-should be annually paid by the lessor to the lessee as rent of the leasehold properties, (2) that revenue and other Government demands will be paid by the lessor as the leasehold properties were only part of certain touzis for which public dues were jointly payable (3) that after payment of the stipulated rent of the lessor and after deducting 12½ per cent. of the aggregate amount payable by the mokarraridars as expenses of collection the assessee was entitled to appropriate the remaining profits to himself. According to the terms of the zarpeshgi lease the assessee is de facto landlord and has sole right to collect rent from the tenants. There is no stipulation in the document that the usufruct would be taken towards adjustment of the loan of 17 lacs and odd. There is no rate of interest fixed. The assessee has in effect exchanged capital for income for a period of 28 years. The assessee advanced capital of 17 lacs in place of which he obtained usufruct of the properties for a fixed term of 28 years. There is no question of redemption after paying of the advance. The lease terminates by the expiration of the term and the lessor may re-enter the properties as on the termination of any other lease. The re-entry does not depend upon the redemption of the advance nor can the property be held after the termination of the lease to secure repayment as there is nothing to repay. Upon construction of the terms of the zarpeshgi lease, it is plain that the amount of Rs. 2,52,879/- is taxable as agricultural income in the hands of the assessee.

9. The distinction which is to be drawn for the purpose of tax between payment of income character and payment of capital nature is sometimes very fine and rather artificial one. The question in each case depends upon the precise character of the transaction. To take an example,

if the true bargain is that a capital sum shall be paid, the fact that the method of payment which is adopted in the document is that of payment by instalments will not have the effect of giving those instalments the character of income. Their character is determined by the circumstance that the obligation is to pay a capital sum and instalments are merely a method of effecting the payment. On the other hand, where there is no undertaking to pay a capital sum and no capital obligation is in existence and all that exists is an undertaking to let the assessee appropriate the usufruct of certain properties the sum so appropriated would be stamped with the character of income for the purpose of tax. Dr. Sultan Ahmad relied upon *'Secy. Of State v. Scoble[7]',* in which the Indian Government purchased the G. I. P. Railway for a certain sum. In exercise of their option, the Government elected to pay off the purchase price by annual installments which were called in the contract 'annuities'. The House of Lords held upon an analysis of the transaction that the 'annuity' was merely the payment of the purchase price by installments together with interest at a certain rate, and that the tax was payable only in respect of that portion of each installment which represented on an actuarial valuation the interest on the unpaid purchase price. To put it in other words there was no transmutation of the principal sum into annuities but the annual payments were installments of the principal sum with interest on actuarial valuation calculated in a way familier to accountants and actuaries. The material facts of the present case are manifestly different.

10. In my opinion the present case comes within the authority of *'Gopal Saran Narain Singh v. Commissioner of Income Tax B and O[8]',* in which the appellant had transferred an estate to Rani Bhuvaneshwari Kuer in consideration of (a) payment of the transferor's debts of 10 lacs and odd; (b) cash payment of 4 lacs and odd and (c) annual payment of Rs. 2,40,000/- to the transferor for his life. It was held by the Judicial Committee that the owner of the estate had exchanged capital asset for a life annuity which was taxable as income in his hands, that the annual payments were not instalments of the capital sum, that they were part of the 'price' of the sale but that did not make them necessarily capital payments. The same principle is stated in *'Chadwick v. Pearl Life Insurance Co[9].',* in which an unexpired term of a leasehold was assigned to an Insurance Company in payment of a lump sum of £ 1625/- to be paid until the expiration of the term. It was held by Walton, J., that the intention of the transaction was that the plaintiff should continue to receive as income to the end of
the term the same net amount that he had previously received as rent; that the payments were payments of an annuity or other annual payment within the meaning of Section 40 of the Income-tax Act, 1853, and were not the payment of a fixed amount by installments, and that the deduction in respect of income-tax had therefore been properly made by the defendants. At p. 154 Walton, J., states :

> "It is obvious that there will be cases in which it will be very difficult to distinguish between an agreement to pay a debt by installments, and an agreement for good consideration to make certain annual payments for a fixed number of years. In one case there is an agreement for good consideration to pay a fixed gross amount and to pay it by installments; in the other there is an agreement for good consideration not to pay any fixed gross amount, but to make a certain, or it may be an uncertain, number of annual payments. The distinction is a fine one, and seems to depend on whether the agreement between the parties involves an obligation to pay a fixed gross sum".

11. Upon this survey of the authorities, it is plain that the income from the zarpeshgi lease in the present case is not capital receipt but is income receipt. Learned Government Pleader contended that the receipt was agricultural income. Dr. Sultan Ahmad did not dispute that if the amount in question is not capital receipt it would bear the character of agricultural income. It was indeed pointed out by the Government Pleader that under the terms of the zarpeshgi lease, the assessee was granted possession of the villages in question, that he was given sole right to collect rents from the tenants and to enjoy the profits. The facts are closely parallel to *'Commissioner of Income Tax, Bihar And Orissa v. Maharajadhiraj Of Darbhanga'*[10], in which a money-lender lent money on a zarpeshgi lease and usufructuary mortgage of agricultural lands under which he was put in possession with the general powers and obligations of an owner to manage the estate, collect rents, pay the Government revenue and taxes and to exercise all powers in relation to raiyats that an owner might exercise. There was also a clause in the contract that after deducting from a gross estimated rental the estimated costs of management and 'thika' rent he was to take the balance ('thicka' profits). It was held by the Judicial Committee that the 'thicka' profits were agricultural income and not income from money-lending business.

12. In view of these considerations, I would answer both the questions referred in favour of the State of Bihar. The assessee must pay the cost of this reference. Hearing fee 10 gold mohars.

Sarjoo Prosad, J.

13. I agree that the questions under reference should be answered in the manner proposed by my learned brother.

14. The decision of the question : whether in the circumstances of the case the Agricultural Income-tax Officer had jurisdiction to revise his order under Section 26 of the Agricultural Income-tax Act, has caused me considerable embarrassment. The argument on behalf of the assessee that the Officer had no jurisdiction to do so when
he had already decided on a previous occasion to exempt the zarpeshgi income from assessment gathered much strength on the dictum of the Judicial Committee in *'Sir Rajendranath Mukherji v. Commissioner of Income Tax*[11]*',* Lord Macmillan, while interpreting Section 34 of the Indian Income-tax Act, which is undoubtedly in 'pan materia' with Section 26 of the Agricultural Income-tax Act, with which we are at present concerned, is reported to have observed therein as follows :

> "The appellants, however, submit that this is a case of income escaping assessment within the meaning of Section 34. Assessment, they argue, is a definite act, indeed the most critical act in the process of taxation. If an assessment is not made on income within the tax year, then that income, they submit, has escaped assessment within that year, and can be subsequently assessed only under Section 34 with its time limitation. This involves reading the expression 'has escaped assessment' as equivalent to 'has not been assessed'. Their Lordships cannot assent to this reading. It gives too narrow a meaning to the word 'assessment' and too wide a meaning to the word 'escaped'."

15. True it is that Section 34 played an "important part in the debate" before their Lordships and

it is needless to ignore the fact that the attention of their Lordships was duly focussed upon the terms of the section. I admit that the language used by his Lordship is broad enough to encourage the submission of the learned Counsel for the assessee - a submission which is also in consonance with the ordinary and accepted notions of procedural law relating to review of orders and judgments. Left to myself, I would have been loath to resist the aforesaid contention of the assessee; but I have had the advantage of examining the said decision of the Judicial Committee in the light of the other authoritative pronouncements. I agree that the decision has to be confined to its own context.

16. An analysis of the decision in 'RAJENDRANATH MUKHERJI'S CASE', (61 Ind App 10 (PC)) (ibid) shows that the assessment under consideration by their Lordships purported to be one under Section 23 of the Indian Income-tax Act. The appellants argued that on a sound construction of the provisions of the Income-tax Act, it was incompetent to make any assessment to tax after the expiry of the year for which the tax was charged, except in the cases provided for in Section 34 of the Act. This argument, their Lordships, did not entertain. They held that there was no such limitation in Section 23 of the Act itself. They then proceeded to examine the provisions of Section 34, in view of the argument advanced, and opined thus :

> "Their Lordships do not accept the inference sought to be drawn from Section 34, that it is only where income has escaped assessment in the tax year, or has been assessed too low in that year, that an assessment may be made after the expiry of the tax year. It may be that, in the two cases to which the section applies, if no notice is served within the year following the tax year, no subsequent assessment or re-assessment can be made of the income which has escaped assessment or been assessed too low, but that is not to say that in no other case can an assessment be made after the expiry of the tax year."

17. This is really the crux of their judgment. It would thus be clear that the appellants also agreed that Section 34 was applicable to the case in question and on that hypothesis asked the Judicial Committee to draw an inference in their favour which it refused to do. Their Lordships apparently were not examining there the question with which we are now confronted and it may not be therefore desirable to extend their dictum too far. It was on similar lines that Kania, J., (as he then was) distinguished the above observations of the Judicial Committee in *'Chimanram Motilal v. Commissioner of Income Tax (Central) Bombay*[12]*',* The matter appears to have been placed beyond any realm of doubt by various other judicial pronouncements both before and after the said decision of the Judicial Committee. It is needless for me to refer to all those cases most of which have been already cited in the judgment of my learned brother. I agree with him that the 'cursus curiae' of the various High Courts in India is in favour of the interpretation of Section 26 of the Agricultural Income-tax Act adopted by him, which Section is substantially similar to Section 34 of the Income-tax Act considered in those cases. For the reasons aforesaid, I have eventually agreed to the answers proposed as well as to the directions for costs allowed in this reference. Reference answered in affirmative.

Cases Referred.

[1]49 Mad 22
[2]1935-3 ITR 171 (Lah)

[3]1940-8 ITR 236 (Cal)
[4] AIR 1943 Bom 132
[5]1933-1 ITR 129 (Cal)
[6]61 Ind App 10 (PC)
[7](1903) AC 299
[8]14 Pat 552
[9](1905) 2 KB 507
[10]14 Pat 623
[11]61 Ind App 10 (PC)
[12] ILR (1943) Bom 206 : AIR 1943 Bom132 at page 137