

(1968) 10 GUJ CK 0003

In the Gujarat High Court

Case No : Special Civil Application No. 1327 of 1965

Bai Chandanben Jivanlal

APPELLANT

Vs

L.D. Joshi, Collector, Bhavnagar

RESPONDENT

Date of Decision : 09-10-1968

Acts Referred:

Income Tax Act, 1922 — Section 23(4)

Citation : (1969) 74 ITR 448

Hon'ble Judges : P.N. Bhagwati, C.J;B.J. Divan, J

Bench : Division Bench

Judgement

Bhagwati, C.J.—One Parmanand Narsidas Shah (hereinafter referred to as "the deceased") was a partner with his nephew, Nagindas Jadavji, in two firms, namely, Messrs, Jadavji Narsidas & Company (Pedhi) and Messrs. Jadavji Narsidas (Cotton Department), which carried on business at 79, Masjid Bunder Road, Bombay-3. The deceased went out of the said two firms as from Aso Vad 30, Samvat year 2003, that is, 12th November, 1947, and led a retired life thereafter in Bhavnagar until his death on 11th November, 1951. During the time that the deceased was a partner of the said two firms as the said two firms were registered u/s 26A of the Income Tax Act, 1922 (hereinafter referred to as the "old Act"). The deceased was assessed in the status of an individual as non-resident in some years as resident in others. When the deceased retired from the said two firms, the assessment proceedings for the assessment years 1947-48 and 1948-49 had not yet commenced and, subsequent to his retirement, notices u/s 22(2) of the old Act for the assessment years 1947-48 and 1948-49 were sent to the deceased at the address of the said two firms, namely, 79, Masjid Bunder Road, Bombay-3. Both the notices were issued in the name of the deceased and while the notice for the assessment year 1947-48 was served on 8th August, 1947, the notice for the assessment year 1948-49 was served on 18th October, 1948. The deceased was admittedly alive at the date when these two notices were served at the address of the said two firms. It is apparent that these two notices were served on the deceased at the address of the said two

firm since no notice of the retirement of the deceased from the said two firms was given to the revenue authorities and the revenue authorities were therefore legitimately under the impression that the deceased still continued to be a partner in the said two firms. On service of the notice for the assessment year 1947-48, Nagindas Jadavji filed a return on behalf of the deceased on 13th August, 1951, and thereafter, though the deceased had died on the meantime, he filed revised returns on behalf of the deceased on 26th November, 1951, and 21st April, 1956. He also filed on behalf of the deceased a return for the assessment year 1948-49 on 25th June, 1952, though the deceased was not alive at that date. The deceased was a partner in the said two firms during both Samvat years 2002 and 2003, being the account years relevant to the assessment years 1947-48 and 1948-49, and on completion of the assessment of the said two firms, his share in the profits of the said two firms was assessed in his hands u/s 23(5) (a) and the total income of Rs. 83,453-6-0 was assessed for the assessment year 1947-48 and the total income of Rs. 1,35,794-15-0 was assessed for the assessment year 1948-49. The respective orders of assessment were passed on 31st March, 1952, and 31st March, 1953, and the only income included in the assessments was the share of the deceased in the profits of the said two firms. Subsequent to the passing of the receptive orders of assessment, notices of demand u/s 29 were issued in the name of the deceased and they were addressed to "Parmandna Narsidas by his heirs and legal representatives" and sent by registered post at the address of the said two firms, namely, 79 Masjid Bunder Road, Bombay-3. The notice of demand in respect to the assessment year 1947-48 was received at the said address on 23rd May, 1952, while the notice of demand in respect of the assessment year 1948-49 was received at the said address on 24th April, 1953. The case of the petitioners was that neither of these two notices of demand was served upon any of them nor did any of them receive either of these two notices of demand and they had accordingly no knowledge of the making of the order of assessment until some time in 1955, when recovery proceeding were stated for revering the amounts alleged to be due under the assessment orders.

2. Since, according to the revenue, the amounts specified in the notices of demand were not paid by the heirs and legal representatives of the deceased even though the notices of demand were served upon them, the Income Tax Officer, Section VII, Central, Bombay, treated the heirs and legal representatives of the deceased as in default and forwarded to the Additional collector, Bombay, u/s 46(2) of the old At a certificate under his signature specifying, in the aggregate, Rs. 2,19,248-5-0 made up of Rs. 83,453-6-0 in respect of the assessment year 1947-48 and Rs. 1,35,794-15-0 in respect of the assessment year 1948-49, as arrears of tax due from the heirs and legal representatives of the deceased. The Additional Collector, Bombay, by his letter, dated 7th December, 1954, forwarded the said recovery certificate to the collector, Bhavnagar District, who is the first respondent before us and the first respondent proceeded to receiver form the petitioners the amount specified in the said

recovery certificate as if it were an area of land revenue. The first respondent by an order dated 21st December, 1954, attached the properties of the petitioners and by another order, dated 1st December, 1955, restrained petitioners Nos. 2 and 3 from transferring and/or alienating the attached properties by ways of mortgage, gift, or sale or in any other manner. The attached properties consisted of a building situate at Jamadar Street, Bhavnagar, and another building known as Navnidh Nivas situate near Kala Nala in Bhavnagar. The petitioner filed their objections against the attachment of the properties on 16th February, 1955, contending that the properties were not liable to be attached and sold in recovery of the tax dues of the deceased. So far as the building at Jamadar Street was concerned, the case of the petitioners was that it had come to the share of petitioners Nos. 2 and 3 as a result of a partition effected between the deceased and petitioners Nos. 2 and 3 under a registered deed of partition dated 9th May, 1951, and prior to the said partition deed, petitioners Nos. 2 and 3 had gifted the northern portion of that building to Dosabhai Abhehand Swetamber Murtipujak Sangh by a registered gift deed, dated 20th April, 1951. The petitioners contended that the building known as Navnidh Nivas situate near Kala Nala was also not liable to be proceeded against since under the said partition deed it was given to petitioners Nos. 2 and 3 subject to the right of resident of petitioner No. 1. The petitioners also contended that the orders of assessment were null and void and the proceedings instituted to recover the amounts determined to be due under the assessment orders were therefore illegal and invalid.

3. The petitioners, as pointed out above, had no knowledge of the orders of assessment when they were made and it was only when the recovery proceedings were instituted that the petitioners came to know about the making of the orders of assessment. The petitioners, as soon as they came to know about the making of the orders of assessment. The petitioners, as soon as they came to know about the making of the orders of assessment, immediately preferred appeal against the same to the appellate Assistant commissioner but the Appellate Assistant Commissioner by an order, dated 19th March, 1960, dismissed both the appeals on the ground that they were barred by limitation. The petitioners preferred further appeals to the Tribunal but the Tribunal also by an order dated 29th March, 1961, rejected the appeals holding that the Appellate Assistant Commissioner was right in taking the view that the appeals before him were barred by limitation. It appears that in the meantime the firm of Messrs. Jadvji Narsidas (Pedhi) had already preferred appeals to the Appellate assistant commissioner against the orders of assessment made against the said firm for the assessment years 1947-48 and 1948-49. The appellate Assistant commissioner partly allowed those appeals and reduced the assessment of the said firm for both the assessment years. Consequent upon the reduction of the assessment of the said firm by the appellate Assistant Commissioner in the appeal preferred by the said firm, the Income Tax Officer passed orders dated 8th February, 1963, ratifying the orders of assessment in

respect of the income of the deceased u/s 35(5) and reducing the assessable income of the deceased to Rs. 35,629 and Rs. 86,042, respectively, for the assessment years 1947-48 and 1948-49. The tax liability of the deceased under the rectified order of assessment for the assessment year 1947-48 was already met by the said firm and therefore only the tax liability under the ratified former of assessment for the assessment year 1948-49 remained to be paid by the petitioners as heirs and legal representatives of the deceased. that tax liability amounted to Rs. 41,228 as appears from the fresh notice of demand dated 11th April 1963, issued by the revenue authorities, annexure "E" to the petition.

4. The first respondent thereafter proceeded further with the recovery proceedings in so far as the tax liability of Rs. 41,228 for the assessment year 1948-49 remained unpaid by the petitioners. The first respondent heard the petitioners in regard to the objections lodged by them against the attachment of the properties and by an order dated 13th September, 1965, rejected those objections and held that both the properties were liable to be attached and sold in recovery of the tad dues of the deceased for the assessment year 1948-49. The petitioners thereupon filed the present petition challenging the validity of the recovery proceedings culminating in the said order, dated 13th September, 1965.

5. There were four grounds on which the validity of the recovery proceedings was challenged on behalf of the petitioners and they were :

"(A) The assessment order for the assessment year 1948-49 was null and void for the following reasons :

(1) the assessment was made after the death of the deceased without issuing any notice to the petitioners as heirs and legal representative of the deceased and such an assessment was not warranted by section 24B;

(2) the assessment order was made on the basis of a return filed by a person who was not an heir or legal representative of the deceased and was therefore incompetent to file a return in respect of the income of the deceased.

6. The assessment order being null and void, no valid notice of demand could be issued u/s 29 and without a valid notice of demand the petitioners could not be treated as defaulters u/s 45 and no recovery proceedings could be instituted against the petitioners u/s 46.

(B) The notice of demand in respect of the assessment year 1948-49 was not served on any of the petitioners and they could not therefore be regarded as assesseees in default and consequently the recovery certificate issued by the Income Tax Officer was invalid and no recovery proceedings could be started against the petitioners on the strength of such recovery certificate.

(C) The assessment order for the assessment year 1948-49 as originally made on 31st March, 1953, was ratified by an order made on 8th February, 1963, u/s 35(5) consequent on the deduction of the assessment of the firm of Messrs. Jadavji Narsidas (Pedhi) and on the amount of tax being reduced in consequence

of the order of certification, the default under the original assessment order and the recovery proceedings instituted on the basis of such default were superseded and wipe out and fresh notice of demand had to be served on the petitioners before they could be treated as defaulters and recovery proceedings instituted against them : no such fresh notice of demand was at any time served on the petitioners.

(D) The properties sought to be attached and sold in recovery proceedings belonged to petitioners Nos. 2 and 3 subject to the right of residence of the first petitioner in regard to the building known as Navnidh Nivas, situated near Kala Nala and they were not liable to be attached and sold in recovery of the tax dues of the deceased."

7. We shall examine these grounds in the order in which we have set them out.

8. Re Ground A (1) :

The question which arises under this head of challenge is whether the order of assessment for the assessment year 1948-49 could be validly made after the death of the deceased without any notice to the petitioners as heirs and legal representatives of the deceased. The order of assessment being made u/s 24B, the determination of this question depends on a true interpretation of that section. Section 24B, sub-section (2) and (3), provides the machinery for assessment of the income of a deceased person in these terms :

"24B. (1).....

(2) Where a person dies before the publication of the notice referred to in sub-section (1) of section 22 or before he is served with notice under sub-section (2) of section 22 or section 34, as the case may be, his executor, administrator or other legal representative shall, on the serving of the notice under sub-section (2) of section 22 or order section 34, as the case may be, comply therewith, and the Income Tax Officer may proceed to assess the total income of the deceased person as if such executor, administrator or other legal representative were the assessee.

(3) Where a person dies, without having furnished a return which he has been required to furnish under the provisions of section 22, or having furnished a return which the Income Tax Officer has reason to believe to be incorrect or incomplete, the Income Tax Officer may make an assessment of the total income of such person and determine the tax payable by him on the basis of such assessment, and for this purpose may, by the issued of the appropriate notice which would have had to be served upon the deceased person had he survived, require from the executor, administrator or other legal representative of the deceased person any accounts, documents or other evidence which he might under the provisions of section 22 and 23 have required from the deceased person."

9. Now, section 24B, sub-section (2) on its plain terms appeals only where a

person dies before the publication of the notice u/s 22(1) or before he is served with a notice u/s 22(2) or section 34, as the case may be. Here, in the present case, the deceased died on 11th November, 1951, and before his death not only was the notice u/s 22(2) was also served on him. It was common ground between the parties that a notice u/s 22(2) was issued by the Income Tax Officer in the name of the deceased and was sent by registered post at the address of the said two firms in which he was a partner until Aso Vad 30, Samvat year 2002, that is 12th November, 1947, and it was not in dispute that it was received at the said address on 18th October, 1948, at a time when the deceased was alive. The deceased had no doubt ceased to be a partner in the said two firms at the said two firms but the defused had not at any time informed the revenue about his retirement from the said two firms and the revenue authorities were therefore entitled to presume that the deceased continued to be a partner in the said two firms and service of the notice u/s 22(2), at the address of the said two firms would be proper and effective service on him. The notice u/s 22(2) must therefore be held to have been duly served on the deceased on 18th October, 1948. Section 24B, sub-section (2) had consequently no application on the facts of the present case and the petitioners could not found on the sub-section (3), and since the deceased died without furnishing a return which he was required to furnish under the provisions of section 22, the Income Tax Officer was entitled to make assessment of the total income of the deceased and determine the tax payable by him on the basis of such assessment u/s 24B, sub-section (3). The Income Tax Officer had certainly power u/s 24B, sub-section (3), if he thought it necessary to require the petitioners as heirs and legal representatives of the deceased to produce any accounts, documents or other evidence which he might under the provisions of section 22 and 23 require from the deceased by serving an appropriate notice on the petitioners but, in the circumstances of the present case, the Income Tax Officer did not consider it necessary to do so as the only income which he sought to include in the assessment of the deceased was his share in the profits of the said two firms and that was determined in the assessment of the said two firms u/s 23(5) (a). The Income Tax Officer therefore proceeded to assess the total income of the deceased and determined the tax payable by him on the basis of such assessment without issuing any notice to the petitioners as heirs and legal representatives of the deceased. There is nothing in section 24B, sub-section (3), which requires that where a person dies without having furnished a return, notice must issue to the heirs and legal representatives of the deceased before the Income Tax Officer an proceed to make an assessment in respect of the income of the deceased. If the Income Tax Officer want any accounts, documents or other evident for the purpose of making the assessment, he would certainly issue an appropriate notice to the heirs and legal representatives of the deceased requiring them to proceed such accounts, documents or other evident but he is not bound to do so and where he finds that he does not nee production of any accounts, documents or other evidence, he may proceed to make assessment without issuing notice to the heirs and legal representatives of the deceased. The order of assessment for the assessment

year 1948-49 made in the present case cannot therefore be assailed on the ground that it was made after the death of the deceased without issuing notice to the petitioners as heirs and legal representatives of the deceased.

10. Re Ground A (2) :

It is undoubtedly true that the return for the assessment year 1948-49 was filed by Nagindas Jadavji after the death of the deceased and since Nagindas Jadavji was not an heir or legal representative of the deceased, he was not competent to file a return for the assessment of the income of the deceased and the Income Tax was entitled to proceed on the basis that there was no return of income before him. If there was no return of income filed before him, the Income Tax Officer could proceed to make a best judgment assessment and in the present case the Income Tax Officer had no difficulty at all in making the assessment since, as pointed as above, the only income which was to be included in the assessment of the deceased was his share in the profits of the said two firms and the amount of that share was determinable in the assessment proceedings of the said two firms u/s 23(5) (a). The assessment of the deceased was not made on the basis of the return filed by Nagindas Jadavji but it was made on the basis of his share in the profits of the said two firms as determined in the assessment proceedings of the said two firms. This contention urged on behalf of the petitioners also therefore fails and must be rejected.

11. Re Ground (B) :

It is now well settled that it is only when a notice of demand is served upon an assessee that tax or other sum of money payable under the Act becomes a debt due to the Government. This was decided a long time ago by the Judicial committee of the Privy council in *Doorga Prosad v. Secretary of State*, where it was said :

"In their Lordships' opinion, although Income Tax may be popularly described as due for a certain year, it is not in law so due. It is calculated and assessed by reference to the income of the assessee for a given year, but it is due when demand is made u/s 29 and section 45. It then becomes a debt due to the crown, but not for any particular period."

12. When a notice of demand is served upon an assessee and he does not comply with it, he can be treated as a person in default u/s 45 and he can be made liable to pay penalty equal to the amount of the tax u/s 46(1). When the assessee is deemed to be in default, the Income Tax Officer may also u/s 46(2) forward to the collector a certificate under his signature specifying the amount of arrears due from the assessee and the Collector would then start recovery proceedings against the assessee and proceed to recover the amount of the tax as if it were an arrear of land revenue. The service of the notice of demand thus constitutes a vital step in the process of recovery of the amount of tax determined to be due under the order of assessment. The amount of tax becomes a debt due to the government on the service of the notice of demand

and if the assessee does not make payment of the amount of the tax within the time specified in the notice of demand, the assessee is deemed to be in default and then the Officer process of recovery an be instituted against the assessee for the purpose of recovering from him the amount of tax as if it were an arrear of land revenue. The service of the notice of demand thus constitutes the foundation of the institution against the assessee for the purpose of recovering from him the amount of tax as if it were an arrear of land revenue. The service of the notice of demand thus constitutes the foundation of the institution of recovery proceedings and unless the notice of demand is served on the assessee, no proceedings an be instituted against the assessee for recovery of the amount of tax. This would appear to be clear on a plain reading of section 29, 45 and 46 but we find that there are two decisions of the Mysore High Court, one in B. Shah Mahmood v. Assistant Commissioner and the other in Segu Buchiah Setty v. Income Tax Officer, Kolar Circle, which have also taken the same view. This view also find support from the following observations of Hidayatullah J. in Income Tax Officer, Kolar Circle v. Seghu Buchiah Setty :

"Further still, when the notice of demand is not complied with, the assessee an be treated as a person in default and he is liable to pay a penalty equal to the tax debt u/s 46(1) of the Income Tax Act. Lastly, on the failure of the assessee to pay after a notice of demand is issued, the recovery proceedings an be started within a time limit and the amount of tax an be treated as an arrear of land revenue.

..... the notice of demand is a vital document in many respects. Disobedience to it makes the assessee a defaulter. It is a condition precedent to the treatment of the tax as an arrear of land revenue."

13. If therefore we find in the present case that the notice of demand was not served on the petitioners, the petitioners could not be treated as defaulters and no recovery proceedings could be initiated against them.

14. We must, therefore, proceed to examine the question whether the notice of demand in the present case was served on the petitioners. Now, so far as this question is concerned, the learned Advocate-General appearing on behalf of the revenue with his usual frankness conceded that it would be difficult for him to contend that the notice of demand was served on the petitioners. The notice of demand was addressed to "Parmanand Narsidas by his heirs and legal representatives" and was sent by registered post at the address of the said two firms, namely, 79, Masjid Bunder Road, Bombay-3. It is difficult to see how the address of the said two firms could possibly be regarded as the address of the petitioners after the death of the deceased. The Income Tax Officer must have certainly known, at any rate ought to have known, that on the death of the deceased the connection of his estate with the said two firms would come to an end and that unless the petitioners, as heirs and legal representatives of the deceased, were admitted as partners in the said two firms in place of the deceased, the address of the said two firms could not possibly be the address of

the petitioners. Even so, the Income Tax Officer instead of serving the notice of demand on the petitioners at their respective places of residence or business merely sent the notice of demand at the address of the said two firms. Now even on these facts if the notice of demand had in fact been received by the petitioners, something could have been said on behalf of the revenue and it might have been possible to urge that the notice of demand was in fact served on the petitioners. But the petitioners stated on oath that the notice of demand was not received by and of them. We must, therefore reach the conclusion that the notice of demand was not served on any of the petitioners and if the be so, none of them could be treated as a defaulters and the recovery proceedings initiated against them must be held to be invalid.

15. Re Ground (C) :

On the view we have taken as regards ground (B), it is not necessary for us to consider the validity of this ground but we may point out that a complete answer to this ground is provided by the Taxation Laws (Continuation and Validation of Recovery Proceedings) Act, 1964. Section 3 of that Act in terms provides that where any notice of demand in respect of tax dues in served upon an assessee by a taxing authority under the Act and the tax dues are either enhanced or reduced in any appeal or other proceedings, it is not necessary to issue a fresh notice of demand.

16. Re Ground (D) :

This ground also becomes unnecessary to decide on the view taken by us that the entire recovery proceedings are vitiated by reason of want of service of the notice of demand on the petitioners. We may point out that in any even this ground involves determination of a disputed question of fact and we would not, therefore, in and view of the matter, entertain it in the exercise of our extraordinary jurisdiction under article 226. Moreover, the petitioners have an alternative remedy available to them under rule 11, clause (6), of the Second Schedule to the Act.

17. We therefore allow the petition and make the rule absolute to the limited extent that a writ of mandamus shall issue quashing and setting aside the certificate of recovery forwarded by the Income Tax Officer to the Additional collector, Bombay, as also the recovery proceeding instituted against the petitioners on the strength of such recovery certificate. The respondents will pay the costs of the petition to the petitioners.