

(1958) 04 OHC CK 0015
In the Orissa High Court
Case No : O.J.C. No. 441 of 1956

Bajranglal Chowkhani and Another

APPELLANT

Vs

Income Tax Officer and Another

RESPONDENT

Date of Decision : 21-04-1958

Acts Referred:

Bihar and Orissa Public Demands Recovery Act, 1914 — Section 11, 7
Constitution of India, 1950 — Article 258, 258(1)
Income Tax Act, 1922 — Section 44, 46(2), 46(6)

Citation : AIR 1958 Ori 280 : (1959) 37 ITR 522

Hon'ble Judges : R.L. Narasimham, C.J;G.C. Das, J

Bench : Division Bench

Advocate : C.K. Ghose and B.N. Mohanty, for the Appellant; H. Mohapatra and A.G., for the Respondent

Final Decision : Dismissed

Judgement

G.C. Das, J.—This is an application under Articles 226 and 227 of the Constitution for issuance of a Writ of Mandamus to the Certificate Officer, Cuttack, prohibiting him from proceeding with the certificate case against the petitioners. It was further prayed that the opposite party No. 1, the Income Tax Officer, Cuttack, be prohibited from collecting the arrears of tax in question by the aforesaid certificate proceedings from the petitioners. The facts leading upto this application are these: One Natabarlal alone with the petitioners carried on a partnership business under the name and style of Messrs. Natabarlal Tayasankar, agent to Orient Dyeing and Printing Works, Cuttack. The sole purpose of the partnership, it is "stated, was to work as commission agent of the Orient Dyeing and Printing Works.

It is an admitted fact that the partnership worked for three years, that is from September 1946 to March 1949. The assessment to Income Tax for the year 1948 49 was completed on 19-11-49 and the assessment for the subsequent year 1949-50, was similarly completed on 23-12-49. The assessment for the

assessment year 1947-48, however, escaped assessment and a notice u/s 34 of the Indian Income Tax Act was issued. The assessment for the said year was eventually completed on 19-3-52. A previous application u/s 26A of the Indian Income Tax Act for the registration of the firm having been rejected, assessment was made on the former firm of Natabarlal Jaya-shankar in the status of an unregistered firm.

Though a demand notice u/s 29 was issued in the name of the said unregistered firm, no tax, however, was paid. Accordingly the Income Tax Officer filed a certificate case being Case No. 255 of 1953-54 in the Court of the Certificate Officer Cuttack against the said unregistered firm. The notice u/s 7 of the Bihar and Orissa Public Demands Recovery Act, (Act 4 of 1914) was only issued against the firm. But since the firm discontinued business from March, 1949, the notices could not be served. The Certificate Officer at the instance of the Income Tax Officer u/s 11 of Act 4 of 1914 substituted the names of the petitioners as partners of the aforesaid firm and again issued notice u/s 7 to them. The partners of the firm appeared before the certificate officer and registered their objections amongst others on the following grounds:

- (1) That the petitioners are not the assesseees in default and hence the Income Tax Officer, Cuttack, had no cause of action against the petitioners;
- (2) That there is no demand against the petitioners and hence it could not be enforced against them.
- (3) That Article 258(1) of the Constitution of India read with Section 46(6) of the Income Tax Act, 1922, was a bar against the realisation of the Income Tax dues by the certificate officer, Cuttack.
- (4) That petitioner No. 2, being a minor, he should not be proceeded against.

The certificate officer after hearing the parties disallowed these objections fit proceeded to realise the tax from the present petitioners leaving out one partner Natabarlal Vyas. Against this order of the certificate officer the present petitioners preferred an appeal before the Collector which was dismissed in due course by the Additional District Collector, Cuttack. Against this order, the petitioners filed a revision petition before the Member, Board of Revenue (Revision Case No. 158 of 1955-56) which also was dismissed. It is against this order of the Member, Board of Revenue, that the present petition is directed.

2. The sole contention of the petitioners was that the requisitioning Officer (the Income Tax Officer, Cuttack) has no jurisdiction to assess the petitioners in 1952, the unregistered firm having been discontinued in March, 1949 and accordingly the certificate officer had no jurisdiction whatsoever to realise the same from the petitioners.

3. Before the Member, Board of Revenue, two contentions were raised:

- (1) Article 258(1) of the Constitution read with Section 46(6) of the Income Tax

Act is a complete bar against the realisation of the Income Tax dues by the certificate officer.

(2) The assessment being on a firm, the partners have no liability for it and they are not the persons to be called upon to pay the arrears of tax. The Member, Board of Revenue negated both the contentions.

4. Under Article 258(1) of the Constitution of India the President may, notwithstanding anything contained in the Constitution, with the consent of the Government of a State, entrust either conditionally or unconditionally to that Government or to its officers functions in relation to any matter to which the executive power of the Union extends. Thus, the provision under Article 258(1) contemplates entirely different circumstances in relation to matter to which the executive power of the Union applies. Here, in this case, no executive function of the Union Government has been conferred on the State Government. The Income Tax is levied under the Indian Income Tax Act by authorities mentioned therein who are doubtless officers of the Union Government.

The legality of the tax has not been challenged by the petitioners although the present petitioners carry an appeal against the order dismissing the petition u/s 26A of the Income Tax Act. All that is sought to be challenged is that the Income Tax Officer has no jurisdiction u/s 46(6) of the Income Tax Act. This contention cannot be accepted for a moment, for as I have stated earlier, Article 258(1) contemplates different circumstances and hence Section 46(6) has no application whatsoever; and much less a bar against any recovery. The only section thus applicable is Section 46 (2).

Accordingly, the whole argument of the learned counsel on behalf of the petitioners is based upon a loose expression used by the Member, Board of Revenue, that the "unregistered firm stood dissolved in March, 1949." He has also used the expression "discontinuance" at places. Hence the sole contention on behalf of the petitioners depends upon the fact whether the firm was dissolved or discontinued its business. The petitioners' case throughout had been that "the unregistered firm discontinued its business in about March, 1949. No case of dissolution was set up at any time.

Taking advantage of the use of the expression "dissolution" in the judgment of the Member, Board of Revenue, the learned counsel for the petitioners urged that Section 44 of the Income Tax Act would have no application after the dissolution of the firm whether it was a registered firm or an unregistered one. Thus, he contended that an assessment to Income Tax of its income before the dissolution can only be made on the persons who were partners of the firm at the time of the dissolution jointly or severally and cannot be made on the firm. Section 44 of the Income tax Act runs as follows :

"Where any business, profession or vocation carried on by a firm or association of 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 incomes profits and gains of the firm or association, be jointly and severally liable to assessment under Chapter IV and for the amount of tax payable and all provisions of Chapter IV shall be applicable to such farms".

Thus, Section 44 refers to liability in case of discontinuance of a firm or an association of persons. Therefore, when any business, profession Or vocation is carried on by a firm or an association of persons & is discontinued, every person who was at the time of such discontinuance a partner of such a firm, shall, in respect of the income, profits, or gains of the firm be jointly & severally liable to assessment under Chapter IV and for the amount of tax payable. Hence, the unregistered firm having, according to the contention of the petitioners, discontinued business, the petitioners are jointly and severally liable for the assessment which is payable by them. Thus, the provisions of Section 44 are clearly attracted.

5. Section 2(6B) of the Income Tax Act lays down that "firm", "partner" and "partnership" have the same meanings respectively as in the Indian Partnership-Act, 1932 (Act IX of 1932), provided that the expression "partner" includes any person who being a minor has been admitted to the benefits of partnership under the Indian Partnership Act. "Partnership" has been defined in Section 4. According to that section "partnership" is the relation between the persons who have agreed to share the profits of business carried on by all or any of them acting for all. Persons who have entered into partnership with one another are called individually "partners" and collectively a "firm" & the name under which their business is carried on is called the firm name. Under this Act the liability of a partner for the acts of the firm has been laid down in Section 25, in accordance with which every partner is liable, jointly with all the other partners and also severally for all the acts of the firm done, while he is a partner. Thus, one has to look to Section 25 for the liability of an individual partner for acts of the firm.

6. Mr. B. N. Mohanty, learned counsel for the petitioners, strongly relied upon a recent decision of the Calcutta High Court reported in R.N. Bose Vs. Manindra Lal Goswami, . That was a decision against the judgment of a single Judge (Sinha, J.) in Manindra L. Goswami Vs. R.N. Bose, Income Tax Officer, . The facts of that case were that the respondent Manindralal Goswami was one of the three-partners of an unregistered firm carrying on business under the name and style of Dyes and Chemical Agency. The firm did business only from 1-4-1940, upto 31-3-1944. A notice of its dissolution was given to the Income Tax department on or about 14-1-1947.

The department did not admit or deny receipt of the notice, but since it was seeking to justify the assessment as an assessment on a dissolved firm, the question whether notice of dissolution was or was not given was not material. It did not appear whether the firm had previously been assessed to Income Tax but towards the end of 1944, the Income Tax officer came to be of opinion that the firm's income for the assessment year 1943-44 had escaped assessment, and in

that view issued a notice u/s 34 of the Income Tax Act on 25-11-1944, to the respondent describing him in the notice as "M. L. Goswami, Esqr., Partner of Messrs. Dyes and Chemical Agency" and the income which had been discovered to have escaped assessment was described as "your income".

The notice ended by requiring the respondent to deliver to the Income Tax Officer by a certain date a return of "your total income and total world income assessable for the said year ending 31-3-1944." A similar notice was also addressed to another partner of the firm, named B. R. Dasgupta, in almost similar terms, but no notice, however, was issued to the third partner, P. C. Mukherji. Notices were received by the respondent on 30-11-1944, but he paid no heed to them. B. R. Dasgupta on the other hand, complied with the notice served on him and filed a return of the firm's income for the year concerned showing a loss of Rs. 1,189/-.

The Income Tax Officer did not believe that the firm had suffered loss and he determined the total income at Rs. 45,101/-. The assessment thus made was ultimately an assessment on the firm, Dyes and Chemical Agency. A demand notice was directed to be issued to the firm which was duly served. Since no payment was made, the Income Tax Officer forwarded a certificate u/s 46(2) of the Income Tax Act and a certificate case was registered against the firm. Notice u/s 7 of the Bengal Public Demands Recovery Act was next issued, but it came back unserved with the report that the certificate debtor, viz., the firm was not traceable.

The Income Tax Officer, thought that since the firm was an unregistered firm, the partners were liable for the firm's dues and hence no separate demand notice was required to be served on them. Accordingly, he supplied the names of the three partners to the certificate officer who in his turn, directed notice u/s 7 to the partners. On receipt of the notice u/s 7, several objections were registered by the partners including P. C. Mukherji on whom no notice was served. The objections, however, were rejected by the certificate officer u/s 9. An appeal was carried against this decision to the Commissioner of the Presidency Division.

During the pendency of that appeal an application under Article 226 of the Constitution was moved in the Calcutta High Court, and a Rule was issued on the appellant and the Union of India directing them to show cause why an order in the nature of certiorari should not be made for the production of the records relating to the assessment proceedings, and why an order in the nature of Mandamus should not be made commanding the respondents to refrain from taking any further steps in connection with the certificate proceedings. Before the rules came up for hearing, the respondent's appeal to the Commissioner, Presidency Division, was heard and allowed.

The Commissioner held that no notice of dissolution u/s 25(2) of the Income Tax Act having been given to the Income Tax authorities, Section 44 of the Act was not applicable, and consequently the assessment could not be sustained as an

assessment of a dissolved firm. He further held that a certificate against a firm could not be executed against its partners. In that View, he set aside, the proceedings under the Public Demands Recovery Act. Thus, at the date of the final hearing of the Rule, the respondent was no longer required to be relieved of any certificate proceedings pending against him or to be protected against any such proceeding that might be launched in future.

The assessment order, however, was subsisting and therefore although the Income Tax department might not proceed against the respondent any longer u/s 46(2) it may try to recover the tax from him in other ways. Accordingly, Sinha J. proceeded to consider whether on the assessment as made, the respondent could be proceeded against for the recovery of the tax due under it at all and whether after the dissolution of a firm any assessment of the firm as a firm for income earned by it before the date of the dissolution was possible in law. The learned Judge answered both the questions in the negative.

On appeal from the judgment of Sinha, J., Chakravarty, C. J. and Dasgupta, J. held that the notice u/s 34 as issued on two persons could not form the basis of a valid assessment of the firm or the firm's income and the said two persons could not be proceeded against for the recovery of the tax due under that assessment. The Harned Chief Justice also held that whether a firm be a registered firm or an unregistered firm, when the firm is subsisting the Income Tax Officer cannot in any circumstances proceed against the partners individually at the beginning.

In both cases, the proceedings, when commenced are proceedings as against the firm, in the case of a registered firm, after the amount of the assessable income has been determined the income so determined, is distributed among the several partners in accordance with their shares and the share allotted to each is transferred to his own Income Tax account, to be assessed there along with his other income, in the case of an unregistered firm, the proceedings may remain proceedings against the firm upto the last and the assessment of the tax also can be made in the firm's hands.

Assuming that Section 44 of the Income Tax Act applies, after the dissolution of a firm, whether it be a registered firm or an unregistered firm, an assessment to Income Tax of its pre-dissolution income can only be made on the persons who were the partners of the firm at the time of the dissolution jointly and severally and cannot be made on the firm. I have given a narration of the facts of this case in detail in order to show how widely the facts of that case were different from the facts of the present case. What the learned Judges of the Calcutta High Court were considering was a case of dissolution of a partnership and notices were issued to two of the partners leaving out the third when the partnership was in subsistence.

In the instant case, the notice was issued on the unregistered firm and the assessment was completed on the firm. A demand notice was subsequently

issued u/s 29 on the unregistered firm. A significant fact to be remembered in this case is that the quantum and the legality of the assessment is not under challenge. Once the, quantum and the legality of the assessment is not challenged the Income Tax Officer is quite within his jurisdiction to proceed to realise the arrears of tax u/s 46(2) read with Section 44 of the Income Tax Act.

The certificate officer substituted the present petitioners u/s 11 of the Bihar and Orissa Public Demands Recovery Act (Act 4 of 1914). Section 11 empowers the certificate officer to amend the certificate by addition, omission or substitution of parties. Hence the certificate officer was well within his jurisdiction to substitute the partners of the unregistered firm and to proceed against them, since the partners are jointly and severally liable for the Income Tax dues u/s 44 of the Income Tax Act.

Thus, the decision in R.N. Bose Vs. Manindra Lal Goswami, is clearly distinguishable and does not appear to have any application to the facts of the present case, this being a case of discontinuance and not a case of dissolution of the partnership. In this connection, I would refer to a decision of the Madras High Court reported in Commissioner of Income Tax, Madras v. Chengalvarova Chettier AIR 1937 Mad 300. A Special Bench of the Madras High Court in that case held that :

"The object of Section 44 is perfectly clear. It is to enable the tax on the profits of firm which has been discontinued to be got by the Income Tax authorities and to prevent the avoidance of taxation by the discontinuance of the firm. The words "tax, payable" in the section mean "that is due to be paid", "tax which the firm of partnership would be liable to pay, if it had not been discontinued" or "tax either found to be due already or that will be found to be due in the future. Therefore the partners of the discontinued firm are jointly and severally liable to be assessed in respect of the profit earned by the firm before it was discontinued."

This decision seems to apply in all fours to the present case.

7. Accordingly, the sole contention of Mr. Mohanty having failed, the Rule is discharged and the petition is dismissed with costs. Hearing fee is assessed at Rs. 100/-. "

R.L. Narasimham, C.J.

8. I agree.