

(1991) 06 MAD CK 0052

In the Madras High Court

Case No : Tax Case No. 148 of 1980 (Reference No. 116 of 1980)

Commissioner of Income Tax

APPELLANT

Vs

A. Samarapuri Chetty

RESPONDENT

Date of Decision : 10-06-1991

Acts Referred:

Income Tax Act, 1922 — Section 14(2)

Income Tax Act, 1961 — Section 143, 144, 147, 148, 149

Citation : (1991) 76 CTR 77 : (1992) 195 ITR 371

Hon'ble Judges : V. Ratnam, J; Abdul Hadi, J

Bench : Division Bench

Advocate : N.V. Balasubramaniam, for the Appellant; K. Ramgopal, for the Respondent

Judgement

Abdul Hadi, J.—In this tax case reference u/s 256(1) of the Income Tax Act, 1961 (hereinafter referred to as "the Act"), at the instance of the Revenue, the questions of law arising out of the Tribunal's order dated March 2, 1979, in ITA. No. 221/Mds/1978-79 with reference to the assessment year 1974-75, are as follows :

"1. Whether, on the facts and in circumstances of the case, the Appellate Tribunal was right in law in cancelling the order of the Commissioner of Income Tax passed u/s 263 for the assessment year 1974-75 in the assessee's case ?

2. Whether, on the facts and in the circumstances of the case, the Appellate Tribunal's finding that the order of the Income Tax Officer dated March 11, 1976, should be treated as non est is sustainable in law ?"

2. The facts of the case are as follows :

The assessee filed a return on November 6, 1974, showing an income of Rs. 6,860. An assessment was made on him on December 23, 1975. On December 31, 1975, the assessee filed a revised return showing an enhanced income. No notice u/s 148 of the Act was issued by the Income Tax Officer. On March 11,

1976, however, another assessment order, on an income of Rs. 17,097, was made on the assessee.

3. Subsequently, the Commissioner of Income Tax, looking into the file of the assessee, held in his order dated February 7, 1978, u/s 263 of the Act, that the abovesaid second assessment order of the Income Tax Officer dated March 11, 1976, was erroneous, in so far as it was prejudicial to the interest of the Revenue. For coming to this conclusion, apart from stating that only one assessment could be made for a year, he made the following observations :

"In the original return, the assessee has admitted net agricultural income of Rs. 2,500 while in the revised return, net agricultural income admitted is Rs. 5,000. In the original return, the assessee has not admitted any income from property. Only in the return filed on January 5, 1976, (this must be the revised return filed on December 31, 1975), the assessee has admitted property income of Rs. 1,816 for the first time. In addition, to this, the assessee had admitted purchase of 2 acres and 47 cents of wet lands at Kaveripettai on February 20, 1974, for a sum of Rs. 13,710. After deducting savings from agricultural income of Rs. 5,000 he has admitted an income of Rs. 8,710 under the head "Business" in addition to the income originally returned. The Income Tax Officer has not examined as to how the assessee has claimed savings of Rs. 5,000 in the second return while he has actually admitted Rs. 2,500 in the original return. Further, he has not also examined the source for the purchase of property in respect of which he has admitted an income of Rs. 1,816 for the first time in the return filed on January 5, 1976. Therefore, I consider that these aspects are prejudicial to the interests of the Revenue as it is likely that the income to be assessed should be more than what has been actually returned by the assessee in the second return."

4. The assessee then appealed against the said order to the Tribunal. Before the Tribunal, it was submitted on behalf of the assessee that by his order dated March 11, 1976, the Income Tax Officer had made an assessment on a higher figure of Income than earlier and hence such order could not be regarded as prejudicial to the interest of the Revenue and that there was no error in the order. It was also submitted that the assessment order dated March 11, 1976, could be treated as a valid order, the assessee having waived the issue of notice u/s 148 of the Act.

5. The Tribunal observed that a notice u/s 148 of the Act was mandatory to give jurisdiction to the Income Tax Officer to make a reassessment, where the original assessment had already been made and that there was no evidence to indicate that the assessee had waived notice u/s 148 of the Act. The Tribunal, therefore, held that the alleged assessment order dated March 11, 1976, was non est and that the Commissioner could not treat a non est order as prejudicial to the Revenue and pass an order u/s 263 of the Act. For the said reason alone, the Tribunal held that the Commissioner's order had to be set aside. But the Tribunal did not go into the merits of the case as to whether there was actually any prejudice done to the Revenue.

6. Before us, learned counsel for the Revenue submitted that the Tribunal was wrong in cancelling the order of the Commissioner of Income Tax passed u/s 263 of the Act, without even going into the merits of the case as to whether there was prejudice done to the Revenue. Learned counsel contended that the Tribunal had also failed to appreciate the true scope of the expression "prejudicial to the interest of the Revenue". In that context he brought to our notice Smt. Tara Devi Aggarwal Vs. Commissioner of Income Tax, West Bengal, Calcutta, , where it was held that (at page 328) :

"Even where an income has not been earned and is not assessable, merely because the assessee wants it to be assessed in his or her hands in order to assist someone else who would have been assessed to a larger amount, an assessment so made can certainly be erroneous and prejudicial to the interest of the Revenue." (underlining is ours)

7. Then, he referred to Venkatakrishna Rice Company Vs. Commissioner of Income Tax, , where after reiterating that for invoking section 263, the order of the Income Tax Officer must not only be erroneous, but also the error must be of such a kind that it can be said of it that it is prejudicial to the interests of the Revenue, this court observed as follows (at page 137) :

"In our judgment, the expression, "prejudicial to the interests of the Revenue" is not to be constructed in a petty-fogging manner, but must be given a dignified construction.... The interests of the Revenue are not to be equated to rupees and paise, merely.... the interests of the Revenue are not tied up merely with realising as much revenue as possible, willy nilly, merely looking to the productivity aspect of taxation. The jurisdiction of the Commissioner u/s 263 is undoubtedly a supervisory jurisdiction.... In this context, therefore, the expression prejudicial to the interests of the Revenue must be regarded as involving a conception of acts or orders which are subversive of the administration of revenue. There must be some grievous error in the order passed by the Income Tax Officer, which might set a bad trend or pattern for similar assessments, which on a broad reckoning, the Commissioner might think to be prejudicial to the interests of the Revenue Administration. There might be cases where the Commissioner might wish to interfere with an order of the Income Tax Officer in order to safeguard the fair name and reputation of the Income Tax Department without any thought of going into the particular aspects of the assessment. Assessments which are mala fide, politically and communally motivated may be, however, set aside as being prejudicial to the interest of the Revenue. It is unnecessary for us to illustrate the point any further. All that we wish to observe is that the scope of the interference under this section is not to set aside merely unfavourable orders and bring to tax some more money to the treasury. Nor is the section meant to get at sheer escapement of revenue which as is well known, is taken care of by provisions elsewhere in the Act such, for instance, as section 147 of the Act. The prejudice must be prejudice to the revenue administration. (underlining is ours).

8. Learned counsel for the Revenue also brought to our notice *Balchand Vs. Income Tax Officer, Sagar*, where it has been held that the assessee cannot file a second return after the assessment order was passed. In the present case, it has already been pointed out that the second return was filed on December 31, 1975, after the original assessment order was made on December 23, 1975. To the same effect is *Kerala Kaumudi (P.) Ltd. Vs. Commissioner of Income Tax*, .

9. Learned counsel pointed out that even though the abovesaid second assessment order by the Income Tax Officer was a void order, yet it has to be set aside and it cannot be ignored and the Tribunal erred in holding that since the said second order of the Income Tax Officer was non est, the subsequent order of the Commissioner u/s 263 was not justified. Learned counsel for the Revenue also cited *V. Raju Vs. Commissioner of Income Tax, Tamil Nadu-II*, where it was held that any order passed by an authority without following the principles of natural justice was null and void even though it had been passed well within its jurisdiction. However, it was observed in the said decision as follows (at page 217) :

"So long as the order is passed under a statutory provision, it continues to be enforceable, unless it is set aside by the appropriate forum constituted under the same Act. Therefore, the assessee will be acting at his risk and peril if he ignores the order as being null and void."

10. Learned counsel for the Revenue also cited the following passage from *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 2 AC 147 at page 169 :

"If it is a nullity, that could only be established by raising some kind of proceedings in Court."

11. He also cited a passage quoted from *Naresh Shridhar Mirajkar and Others Vs. State of Maharashtra and Another*, in *A.R. Antulay Vs. R.S. Nayak and Another*, . That passage was made in the context of the rule which required furnishing of security in a petition under article 32 of the Constitution of India and which was struck down in *Prem Chand Garg Vs. Excise Commissioner, U.P., Allahabad*, as offending fundamental rights and hence void. Hence, the earlier order of the court to furnish such security based on that rule was set aside. In that context the Supreme Court, in *Naresh Shridhar Mirajkar and Others Vs. State of Maharashtra and Another*, , referred to the above referred passage which is as follows :

"But a judicial decision based on such a rule is not any better and offends the fundamental rights just the same and not less so because it happens to be a judicial order. If there be no appropriate remedy to get such an order removed because the court has no superior, it does not mean that the order is made good. When judged under the Constitution it is still a void order although it may bind the parties unless set aside."

12. This passage was quoted with approval in A.R. Antulay Vs. R.S. Nayak and Another, . In A.R. Antulay Vs. R.S. Nayak and Another, , the question was whether the direction given by the Supreme Court on February 16, 1984, in R.S. Nayak Vs. A.R. Antulay, , withdrawing a criminal case pending in the court of the special judge and transferring the same to the High Court in breach of section 7(1) of the Criminal Law Amendment Act, 1952, which mandates that the offences in question shall be tried by a special judge only, thereby denying at least one right of appeal, was violative of articles 14 and 21 of the Constitution, was not valid. The Supreme Court in A.R. Antulay Vs. R.S. Nayak and Another, referred to above, held that the said direction violated fundamental rights, recalled it and quashed all proceedings subsequent to the said direction and directed trial of the offences to be proceeded with under the said Act of 1952.

13. The Supreme Court in A.R. Antulay Vs. R.S. Nayak and Another, , referred to above also referred to Kiran Singh and Others Vs. Chaman Paswan and Others, and observed as follows :

"In Kiran Singh and Others Vs. Chaman Paswan and Others, , Venkatarama Ayyar J., observed that the fundamental principle is well established that a decree passed by a court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon - even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the very authority of the court to pass any decree, and such a defect cannot be cured even by consent of parties."

14. After referring to Kiran Singh and Others Vs. Chaman Paswan and Others, , thus, the Supreme Court in A.R. Antulay Vs. R.S. Nayak and Another, , also, observed as follows :

"This question has been well put, if we may say so, in the decision of this court in Shri M.L. Sethi Vs. Shri R.P. Kapur, , where Mathew J., observed that the jurisdiction was a verbal coat of many colours and referred to the decision in Anisminic Ltd. v. Foreign Compensation Commission [1969] 2 AC 147, where the majority of the House of Lords dealt with the assimilation of the concepts of "lack" and "excess" of jurisdiction or, in other words, the extent to which we have moved away from the traditional concept of jurisdiction. The effect of the dicta was to reduce the difference between jurisdictional error and error of law within jurisdiction almost to a vanishing point. What is a wrong decision on a question of limitation, he posed referring to an article of Professor H. W. R. Wade, "Constitutional and Administrative Aspects of the Anisminic case" ([1969] 89 LQR 198) and concluded (at page 2385 of 1972 AIR and [1972] 2 SCC 435) : "It is a bit difficult to understand how an erroneous decision on question of limitation or res judicata would oust the jurisdiction of the Court in the primitive sense of the term and render the decision or a decree embodying the decision a nullity liable to collateral attack..... and there is no yardstick to determine the magnitude of the error other than the opinion of the court".

15. Learned counsel for the revenue also cited the following passage from professor H. W. R. Wade's Administrative Law, Fifth Edition, page 314 (which relied on several English decisions) :

"The truth of the matter is that the court will invalidate an order only if the right remedy is sought by the right person in the right proceedings and circumstances. The order may be hypothetically a nullity, but the court may refuse to quash it because of the plaintiff's lack of standing, because he does not deserve a discretionary remedy, or for some other legal reason. In any such case the "void" order remains effective and is, in reality, valid.... The statute does not say that the void order shall be valid; but by cutting off legal remedies it produces that result. `Void' is, therefore, meaningless in any absolute sense. Its meaning is relative, depending upon the court's willingness to grant relief in any particular situation. If this principle of legal relativity is borne in mind, confusion over "void or voidable" can be avoided." (underlining is ours)

16. He also referred to the following passage at pages 310 and 311 of the same book :

"A source of complication introduced in certain decision of recent years is the question whether unlawful administrative acts are void or voidable. Up to a point there is a sound basis for this distinction. But attempts have been made to carry it beyond that point and to use it as a means of turning firm rules of law into matters of discretion. Although it is now reasonable clear that these attempts have failed, a good deal of confusing reasoning has accumulated and requires to be sorted out. `Void or Voidable' is a distinction which applies naturally and without difficulty to the basic distinction between action which is ultra vires and action which is liable to be quashed for error on the face of the record. Action which is ultra vires is unauthorised by law, outside jurisdiction, null and void, and of no legal effect. But an order vitiated merely by error on its face is, as has been seen, intra vires and within jurisdiction, but liable to be quashed because of the exceptional powers of control which the courts established three centuries ago and which they recently revived. Such an order is voidable, being intra vires and valid and effective, unless and until the court quashes it." (underlining is ours)

17. The author, in relation to the above said order which is "outside jurisdiction, null and void and of no legal effect", in the footnote at page 310 refers to the above-referred passage at page 314 for necessary qualification even to the said rule relating to such an order.

18. Learned counsel for the Revenue also drew our attention to the following passage of Privy Council in Calvin v. Carr [1980] AC 574 (E) at pages 589 and 590 :

"This argument led necessarily into the difficult area of what is void and what is voidable, as to which some confusion exists in the authorities. Their Lordships' opinion would be, if it became necessary to fix upon one or other of these

expressions, that a decision made contrary to natural justice is void, but that, until it is so declared by a competent body or Court, it may have some effect, or existence, in law."

19. Therefore, learned counsel submitted that the Tribunal misdirected itself in going into the question whether the second assessment order dated March 11, 1976, was non est or not and that it should have actually gone into the other question whether the second assessment order was "erroneous in so far as it is prejudicial to the interests of the Revenue."

20. On the other hand, learned counsel for the assessee argued that even according to learned counsel for the Revenue, the abovesaid second assessment order dated March 11, 1976, was non est and hence the above referred second question referred to us has, therefore, to be answered in the affirmative. He further argued that the Tribunal did not actually set aside the order of the commissioner passed u/s 263 and, therefore, the first question referred to this court was purely academic and so need not be answered as laid down in Mathura Prasad Vs. Commissioner of Income Tax, Uttar Pradesh, and other decisions.

21. We do not think that this argument of learned counsel for the assessee is correct. What learned counsel for the Revenue contended was that even though the abovesaid second assessment order dated March 11, 1976, was a void order, unless it was set aside by any process known to law, it would bind the parties, in the light of the abovesaid decisions and other authorities cited by him. So, it cannot be taken that learned counsel for the Revenue conceded that the above said second assessment order dated March 11, 1976, was non est. In the light of the observations in the above referred decisions and authorities cited by learned counsel for the Revenue, in particular the above-referred A.R. Antulay Vs. R.S. Nayak and Another, we agree with his contention and hold that the Tribunal was not justified in holding that the above-referred second assessment order of the Income Tax Officer was non est in any absolute sense, since it would bind the parties unless set aside. Till it was set aside by the Commissioner u/s 263, it bound the parties and the question is only whether the Commissioner was right in setting it aside u/s 263 and ordering fresh assessment.

22. Then, with reference to the first question referred to us, viz., whether the Tribunal was right in cancelling the said action of the Commissioner, though we find that the Tribunal has not expressed in so many words that the order of the Commissioner u/s 263 was cancelled or set aside, we will be justified in holding that the Tribunal, by implication, has set aside the said Commissioner's order, because paragraph 3 of the Tribunal's order states as follows :

"The Commissioner cannot treat a non est order as prejudicial to the Revenue..... For this reason alone the order of the Commissioner has to be set aside."

23. So, it cannot be said that the first question is academic.

24. Learned counsel for the assessee also drew our attention to Y. Narayana

Chetty and Another Vs. The Income Tax Officer, Nellore and Others, and Commissioner of Income Tax, Kerala Vs. Thayaballi Mulla Jeevaji Kapasi (Decd.) (by his Legal representatives), , where the Supreme Court held that if no notice was issued u/s 34 of the Indian Income Tax Act, 1922, for initiating reassessment or if the notice issued therein was shown to be invalid, then the proceeding taken by the Income Tax Officer without a notice or in pursuance of an invalid notice, would be illegal and void. But, the said decisions may not have any bearing on the present case, since here, the assessee has voluntarily submitted a second return after the assessment order was passed and the Income Tax Officer accepted the said return and passed another assessment order. In such a case, learned counsel for the Revenue contended that though the said second assessment order was void, it would bind the parties. Learned counsel for the assessee also drew our attention to the following passage at page 130 of Garner's Administrative Law :

"If the decision is voidable only, it will stand until it has been challenged before a competent court, whereas if the decision is void it is a nullity ab initio, as is an order made without jurisdiction. Professor de Smith... also points out that the question whether a decision will be declared void or voidable will often, as a "rough guide", depend on the seriousness of the defect."

25. But, we find that this passage does not support very much the argument of learned counsel for the assessee, particularly in view of the above-referred to submissions of learned counsel for the Revenue based on the above-referred observations in the Several decisions and several other text books.

26. Learned counsel for the assessee also pointed out that if as stated by learned counsel for the Revenue, the ingredients of section 263 of the Act were not gone into by the Tribunal, this court cannot go into those ingredients and that what is referred to this court alone can be dealt with by this court.

27. Learned counsel for the assessee also drew our attention to one other passage in the above-referred case of Venkatakrishna Rice Company Vs. Commissioner of Income Tax, at page 138 :

"The mainspring of action for the Commissioner of Income Tax in the present case would seem to be really to circumvent the position of law which has become well-settled in the matter of assessment of an association and/or the members thereof. Since the Income Tax Officer's order makes it difficult for the Department to get at the total income of the association of persons, it had to be removed out of the way. If it is removed out of the way, the resulting position would be as though there had been no such order even in the first instance, and the field may be clear for the exercise of option once more, as though the Department can begin from the very beginning. This intention to circumvent the clear consequence of the law, as laid down by the courts, is not definitely a purpose which could actuate the Commissioner of Income Tax u/s 263 of the Act. This is because, far from the Income Tax Officer's order being prejudicial to the

interests of the Revenue, the present action of the Commissioner in seeking to set aside that order is really prejudicial to the Revenue since it is prejudicial to the law laid down by the courts."

28. In the above said case in Venkatakrishna Rice Company Vs. Commissioner of Income Tax, , the Income Tax Officer originally assessed the share of income of the assessee from a joint venture in its hands. The Commissioner, in his order u/s 263 of the Act, set aside the above said order of the Income Tax Officer to assess the income from the joint venture in the hand of the association of persons as well. Under the Act, the Income Tax Officer can assess either the association as a whole or the respective share of income of individual members of the association. So, in the abovesaid decision, this court held that the abovesaid order of assessment of the Income Tax Officer was in accordance with law and could not, therefore, be held to be erroneous and that the Commissioner cannot revise such an order u/s 263. Only in that context this court made the abovesaid observations cited by learned counsel for the assessee. But the said observations will not help the assessee in the present case since the abovesaid second assessment order of the Income Tax Officer was not in accordance with law, but void. In the above quoted case in Venkatakrishna Rice Company Vs. Commissioner of Income Tax, , the order of the Income Tax Officer in assessing the share income of the assessee therein from a joint venture in its hands was in accordance with law and this court observed that despite the fact that the Income Tax Officer's order was in accordance with law, the action of the Commissioner of Income Tax "would seem to be really to circumvent the position of law" as stated in the above said observation, cited by learned counsel for the assessee. That is why this court held that the Commissioner's action u/s 263 of the Act was alone prejudicial to the Revenue and not the order of Income Tax Officer therein.

29. As per the earlier observations made in the same decision by this court, cited by learned counsel for the Revenue, the said second assessment order was certainly prejudicial to the Revenue administration, though not prejudicial to the coffers of the State since more tax comes to the State by virtue of the said second assessment order. The emphasis made by this court in the abovesaid decision is that section 263 is not "meant to get at sheet escapement of revenue which, as is well known, is taken care of by provisions elsewhere in the Act, for instance, section 147 of the Act." That is why it further emphasises that the expression "prejudicial to the interests of Revenue" must be regarded as involving a conception of acts or orders which are subversive to the administration of the Revenue.

30. No doubt, learned counsel for the assessee argued that in the present case also the Commissioner, in passing the order u/s 263 of the Act, sought to circumvent another provision of law. Section 153 of the Act provides two years" time from the end of the assessment year in question for passing the assessment order u/s 143 or section 144 of the Act. But, if an order is passed u/s 263 by the

Commissioner, further time is secured for making a fresh assessment because section 153(2A) itself provides two years' time from the end of the financial year in which the order u/s 263 is passed by the Commissioner. So, learned counsel for the assessee argued that in order to gain more time only the abovesaid order u/s 263 was passed. In reply to this argument, learned counsel for the Revenue pointed out that there was no such circumvention at all because the assessment order related to 1974-75 and the first assessment order was made on December 23, 1975, and the second assessment order was made on March 11, 1976, that is, even within one year of the end of the said assessment year, and on that very date, viz., March 11, 1976, the Commissioner's order u/s 263 was also passed. If reassessment had to be made invoking section 147, there was enough time for the issuance of the required notice as per section 149 of the Act.

31. The result is, in the light of the observations of this court in the above-referred Venkatakrishna Rice Company Vs. Commissioner of Income Tax, , cited by the Revenue and with which we concur, the abovesaid second assessment order of the Income Tax Officer was certainly erroneous in so far as it was prejudicial to the Revenue and so that the Tribunal is not right in coming to the conclusion that the said assessment order was non est and that the Commissioner cannot treat such non est order as prejudicial to the Revenue. Therefore, we answer the second question referred to us in the negative and in favour of the Revenue and, consequently, we answer the first question also in the negative and favour of the Revenue. In the circumstances, there will be no order as to costs.