

(1964) 11 RAJ CK 0002
In the Rajasthan High Court
Case No : Civil Writ Petition No. 347 of 1962

Daya Ram and Another	Vs	APPELLANT
The Additional Collector and Others		RESPONDENT

Date of Decision : 16-11-1964

Acts Referred:

Constitution of India, 1950 — Article 226
Income Tax Act, 1922 — Section 2(2), 29, 44

Citation : AIR 1965 Raj 205 : (1965) RLW 530

Hon'ble Judges : D.S. Dave, C.J; Kan Singh, J

Bench : Division Bench

Advocate : J.P. Jain, for the Appellant; C.M. Lodha, for the Respondent

Final Decision : Dismissed

Judgement

Kan Singh, J.—This is a writ petition under Article 228 of the Constitution filed by Daya Ram and Jeth Mali who were at one time partners of a firm Messrs. K. Gunamal and Company at Jaipur, challenging the recovery proceedings taken up by the Additional Collector of Jaipur on a demand of Income Tax to the tune of Rs. 1,42,150/57 nP. issued by the Income Tax Officer, A-Ward, Jaipur, as a result of the assessment proceedings taken against the firm Messrs. K. Gunamal and Company.

2. The petitioners along with some other persons started a business of manufacturing biscuits and confectionery in the city of Jaipur under the name and style of Messrs. K. Gunamal and Company sometime in September, 1950. The deed of Partnership is said to have been executed on 5-2-50, before the business was started by the firm. On 5-2-52, an application was made on behalf of the firm for its registration under the Income Tax Act before the Income Tax Officer, A-Ward, Jaipur, but the application was rejected by the Income Tax Officer.

The petitioner's case is that one of them namely, Daya Ram left the firm from

30-5-53, and by a deed of relinquishment executed between Daya Ram and other partners, he was discharged from all the liabilities and obligations of the firm. Later on three other partners) with whom we are not concerned, are also said to have left the firm. Sometime in September, 1954, petitioner No. 2 Jeth Mal also left the firm and when he left the firm the same was dissolved by a deed of dissolution dated 27-9-54, and thereafter Gunamal became the sole proprietor of the firm.

Amongst the assets of the firm was a factory which came under the exclusive control of Gunamal. The firm was assessed to Income Tax as an unregistered firm for the assessment years 1951-52 and 1952-53 by the Income Tax Officer, D. Ward, Jaipur. For the assessment year 1951-52, the Income Tax, that was assessed, was Rs. 463/13/- and for the year 1952-53, the amount of Income Tax assessed was Rs. 37,451/1.2/. Notices of demand were issued in the name of the firm Gunamal, the sole proprietor of the firm applied for extension of time to pay the tax and the Income Tax Officer granted him time to make the payment upto 15-3-55. As this amount was not paid during the time allowed, the Income Tax Officer issued a certificate under the Public Demands Recovery Act against the firm for the aggregate amount of Rs. 37,915/9/- and forwarded it to the Collector, Jaipur for making the recovery. The Collector in his turn transferred the certificate to the Additional Collector, Jaipur, who, on 1-8-55 attached the factory building along with the goods lying there. On 2-8-55 Gunamal applied to the Inspecting Assistant Commissioner of Income Tax, Rajasthan arid Madhya Bharat for releasing the factory and he offered to pay Rs. 4,000/- by two instalments of Rs. 2,000/- each within one month and also undertook to furnish security for the balance. This offer of Gunamal seems to have been accepted by the Income Tax Authorities who consequently requested the Collector to withdraw the attachment. The Collector accordingly withdraw the attachment and released the factory and the goods. Gunamal did pay Rs. 4,000 in two instalments as promised, but it appears that no security was actually taken from him for the amount remaining in balance. The insult was that after the factory was released from attachment Gunamal and his son claiming to be the sole proprietors of the firm mortgaged the factory building with other parties.

3. We feel constrained to say that we are surprised to notice that there has been a serious lapse on the part of some officer in the Income Tax Department. The trouble in making the recovery of the tax has arisen only as a result of this lapse. If the factory, which was a valuable asset of the firm were available for being proceeded against, or a solvent surety were there, then the Income Tax Department should have been able to realise its dues or good part of them long back.

4. The Income Tax Officer then proceeded to assess Income Tax for subsequent years 1953-54 and 1954-55. As a result of the assessment proceedings a new demand of tax was created and on 22-5-58, Income Tax Officer issued a certificate for a sum of Rs. 1,12,020.11 nP. representing the aggregate amount

of tax for the assessment years 1951-52, 1952-53 and 1953-54 and sent the same to the Collector for making the recovery. Gunamal then filed returns for the assessment year 1954-55 showing a loss of Rs. 33,000 and odd, but as the Income Tax Officer was not satisfied with the correctness of the returns and Gunamal did not produce the account books when asked to do so, the Income Tax Officer made a best judgment assessment and assessed the tax for that year at Rs. 30,030.15 nP. A consolidated certificate for the entire amount of Rs. 1,42,150.57 nP, was issued by the Income Tax Officer in respect of the four assessment years and the recovery proceedings were started by the Additional Collector, Jaipur. The petitioners filed their objections before the Additional Collector disputing their liability for the amount demanded of them, but they were dismissed. The petitioners then went up in appeal to the Revenue Appellate Authority who dismissed the appeal holding that the same was not competent inasmuch as the proceedings had commenced under the Rajasthan Land Revenue Act, which did not provide for any appeal.

5. The petitioners seek to challenge the recovery proceedings on the ground that they were never served with any demand notice, or any notice of assessment in accordance with Section 29 of the Income Tax Act, with the result that the proceedings are without jurisdiction. Their bone of contention is that as ex partners of the firm, which stood dissolved, they could not be regarded as assesseees in default so as to entitle the authorities to initiate proceedings under the Public Demands Recovery Act, or the Land Revenue Act against them. They also sought to challenge the assessment itself as illegal, but in the course of hearing the learned counsel appearing for the petitioners felt that it would not be possible for him to challenge the assessment orders made in the name of the firm and consequently he confined his arguments to the question of legality of the recovery proceedings only.

6. The writ petition has been opposed by respondent No. 3, the Income Tax Officer. It is denied by him that the firm M/s. K. Gunamal and Company had been dissolved. It is submitted that no information about the dissolution of the firm was ever received by the Income Tax Department. The respondents state that the plea of alleged dissolution of the firm has been put forward only with a view to avoid the recovery of legitimate Income Tax dues against the firm. It is further submitted that the petitioners were assesseees in defendant. It being the partners of the firm. It is submitted in the alternative that even if the firm is taken to be dissolved then, in accordance with the provisions of Section 44 of the Income Tax Act, the firm could be assessed as such, as if it were not dissolved and the partners or ex partners continued to be liable for the tax due against the firm.

7. It is a question of fact, whether the firm has or has not been dissolved and when the fact is disputed by the department we are not in a position to determine this controversy in exercise of our extraordinary jurisdiction under Article 226 of the Constitution.

8. The essential question of law that arises for determination in the case is,

whether the petitioners, who were at one time partners of the firm, can be proceeded against on the basis of the assessment proceedings taken against the firm. This question will have to be examined in the light of the relevant provisions of the Income Tax Act and in particular Section 29 thereof.

9. At this stage it will be convenient to refer to the relevant provisions of the Income Tax Act. Section 2(2) which defines the term "assessee" runs as follows :

"Section 2(2)--"assessee" means a person by whom Income Tax or any other sum of money is payable under this Act, and includes every person in respect of whom any proceeding under this Act has been taken for the assessment of his income or of the loss sustained by him or of the amount of refund due to him."

10. Sub-section (6B) of Section 2 defines the terms "firm", "partner" and "partnership" which have the same meaning as given in the Indian Partnership Act and runs as under :--

"Section 2(6B)--In this Act, "firm," "partner" and "partnership" have the same meaning respectively as in the Indian Partnership Act, 1932," with one difference viz., ""that for the purposes of this Act "partner" includes a minor admitted to the benefits of partnership".

11. The term "registered firm" means a firm registered under the provisions of Section 26A) and unregistered firm means a firm which is not a registered firm.

12. Section 3 provides for various units of assessment and enacts that tax is chargeable in accordance with the provisions of the Act and subject to the provisions thereof in respect of the total income of previous year from every individual, Hindu undivided family, company and local authority, and of every firm and other association of persons or the partners of the firm or the members of the association individually.

13. Section 22 provides for giving of notice to assessee and Section 23 provides for the mode of assessment.

14. Section 29 provides for the issuing a notice of demand after the tax has been assessed and it runs as follows :

"Section 29-Notice of demand.--When any tax, penalty or interest is due in consequence of any order passed under or in pursuance of this Act, the Income Tax Officer shall serve upon the assessee or other person liable to pay such tax, penalty or interest a notice of demand in the prescribed form specifying the sum so payable."

14A. Section 30 provides for appeal against assessments under the Act and the period for appeal runs from the date of the service of the demand notice u/s 29.

14B. Section 44 provides for the liability in case of discontinuance of any business or where an association of persons is dissolved. As this section has been amended in 1958, the old section and the section as amended are

reproduced below in juxtaposition:--

Section 44

(as prior to 1958)

Section 44

(as amended in 1958)

"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 income 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 the provisions of Chapter IV shall, so far as may be, apply to any such assessment.

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

15. Section 45 provides the mode of recovery of tax and penalties. It provides for the mode of realisation of tax from assesses in default and relevant portions thereof run as follows :

"Section 45-Tax when payable.-- Any amount specified as payable in a notice of demand under Sub-s. (3) of S. 23A or under S. 29 or an order u/s 31 or Section 33, shall be paid within the time, at the place and to the person mentioned in the notice or order, or if a time is not so mentioned, then on or before the first day of the second month following the date of the service of the notice or order, and any assessee failing so to pay shall be deemed to be in default, provided that, when an assessee has presented an appeal u/s 30, the Income Tax Officer may in his discretion treat the assessee as not being in default as long as such appeal is undisposed of".

16. Section 40 lays down the procedure for effecting the recovery and amongst other things it clothes the Collector making the recovery with the powers of a Civil Court for recovering the amount, as if, it were an amount due under a decree. The relevant portion of Section 48 is also reproduced below :

"Section 48. Mode and time of recovery (1) When an assessee is in default in making a payment of income tax, the Income Tax Officer may in his discretion direct that, in addition to the amount of the arrears, a sum not exceeding that amount shall be recovered from the assessee by way of penalty.

(1A) For the purposes of Sub-section (1), the Income Tax Officer may direct the

recovery of any sum less than the amount of the arrears and may enhance the sum so directed to be recovered from time to time in the case of a continuing default, so however, that the total sum so directed to be recovered shall not exceed the amount of the arrears payable.

2. The Income Tax Officer may forward to the Collector a certificate under his signature specifying the amount of arrears due from an assessee, and the Collector, on receipt of such certificate, shall proceed to recover from such assessee the amount specified therein as if it were an arrear of land revenue:

Provided that without prejudice to any other powers of the Collector in this behalf, he shall for the purpose of recovering the said amount have the powers which under the Code of Civil Procedure, 1908 (V of 1908), a Civil Court has for the purpose of the recovery of an amount due under a decree".

17. Then Section 63 provides as to how notices and requisitions under the Income Tax Act may be served and it is reproduced below :--

"Section 63-Service of notices.-- (1) A notice or requisition under this Act may be served on the person therein named either by post or, as if it were a summons issued by a Court, under the Code of Civil Procedure, 1908 (V of 1908).

(2) Any such notice or requisition may, in the case of a firm or a Hindu undivided family, be addressed to any member of the firm or to the manager, or any adult male member of the family and, in the case of any other association of persons, be addressed to the principal officer thereof".

18. A comparison of Section 44 as it stood prior to its amendment in 1958 and as it stands after the amendment will show that while the amended section makes provision for assessment even in respect of a dissolved firm, there was no such express provision under the unamended section. But, to our mind, this should not make any difference. This was the view taken by a Division Bench of this Court to which one of us was a party in *Naseer Mohd. v. Income Tax Officer, "B" Ward, Jaipur* 1963 R L W 72, which case will be considered on other aspects of the matter hereinafter at proper place. The following observations are pertinent for showing that the amendment of Section 44 did not introduce any new principle and it was only explanatory in character :

"The amended section clearly provides that the Income Tax Officer shall make assessment on the income of the firm or association of the persons as such as if no discontinuance or dissolution had taken place. In our opinion, the above amendment does not introduce a new principle, but is of a explanatory character and seeks to clear doubts entertained on the language of the earlier section. In this connection, we may refer to two Supreme Court cases referred to by Mr. Chand Mal appearing for the department. They are *C.A. Abraham, Uppotttil, Kottayam Vs. The Income Tax Officer, Kottayam and Another*, and *Income tax Officer, V Circle Madras v. V. S. K. Habi-bullah* AIR 1962 S C 18. These two cases of course, do not directly deal with the liability of the firm or partners to the

assessment but with the question as to the liability of the firm to penalty u/s 28 of the Act. Sub-section (2) of the amended section has clearly provided for it."

The consideration of the main question formulated above will depend on the answer to the subsidiary question, whether within the meaning of Section 29 of the Income Tax Act a partner of a dissolved firm comes in the ambit of the word "assessee", or within the ambit of the words "other persons liable to pay such tax." If he comes in the first category then Section 45 will immediately make him an assessee in default, if the tax is not paid and he can therefore be proceeded against. On the other hand if he is not an assessee, but "other person liable to pay such tax," then Section 45 is silent about this category of persons. Section 46 will come into play only when a person is an assessee in default as contemplated by Section 45. In other words, Sections 45 and 46 do not deal with persons who are not assesseees in default 30 that the recovery proceedings could be taken against them. Thus, while Section 44 creates a liability on the partners in respect of the liabilities of the dissolved firm it is to be seen whether such a partner can be regarded as an assessee within the meaning of Section 29, or for that matter under Sections 45 and 48 of the Act, As the matter is not *res integra* and both the learned counsel have placed the available authorities before us, it will be convenient to advert to them. We may first refer to the cases cited by Mr. Jain.

19. In *Gokuldas Vs. Kikabhai Abdulali and Others*, , proceedings were started against an unregistered firm. One Gokuldas made a return for certain assessment years. He produced a deed of partnership in which Kikabhai was shown to be one of the partners. Gokuldas wanted the assessment to be done in his own name as an individual, but the Income Tax Officer treated the business to be that of the firm of Gokuldas and Kibabhai and made the assessment without giving any notice to Kikabhai. On the basis of this assessment Kikabhai's property was sought to be attached in payment of the tax found due against the firm. The question arose whether, when the assessment was against the unregistered firm the proceedings could be taken for recovery against the partner. The learned Judges of the Bombay High Court held that when the firm itself was assessed its partners would fall within the expression "other persons liable to pay such tax" in Section 29 and consequently it was essential that a notice of demand should be served on such a person u/s 29. In the circumstances proceedings of recovery taken without giving such a notice to a partner were held to be bad. Rationale of that case was that in such a case a partner who is proceeded against will have no remedy by way of appeal, because it is only when a notice of demand is issued to a person that he can file an appeal u/s 30 of the Income Tax Act.

According to the dicta of that case if any person were to challenge his partner of the firm then, he will have no remedy for establishing that to avoid his liability. We may quote the relevant observations in *extenso*, as the other cases cited by Mr. Jain employ almost the same reasoning in dealing with the point :

"Now, in the case of an unregistered firm, the firm itself is assessed and its partners would fall, in our opinion, within the expression "other persons liable to pay such tax" in Section 29 and if it is sought to enforce the liability against any such person, in our opinion, it is essential that a notice of demand should be served on such person u/s 29. Incidentally no such notice was served on Kikabhai in this case, but the question is when and in what proceedings does the Income Tax Officer determine whether an alleged partner was in fact a partner of the unregistered firm and, therefore, a person liable to pay the tax imposed on the unregistered firm. It might have been arguable that the power to determine whether he was so liable was implicit in Section 29 and should be exercised after the assessment on the unregistered firm had been completed; but that leads to the result that the person so held liable is without any remedy by way of appeal, because, a notice of demand u/s 29 is not a notice against which an appeal lies u/s 80 of the Act. We would, therefore, be reluctant to read a power in Section 29, after the assessment proceedings are completed, to determine whether an alleged partner is a partner in order to saddle him with liability. Then, when we come to the recovery proceedings, Section 45 provides that if a person on whom a notice of demand has been served does not pay the amount within the time prescribed, he would be deemed to be in default and when an assessee is in default, Section 46(1) empowers the Income Tax Officer to impose a penalty on him. Then Section 46, Sub-section (2), empowers the Income Tax Officer to forward to the Collector a certificate under his signature specifying the amount of arrears due from the assessee and the Collector on receipt of such certificate shall proceed to recover from such assessee the amount specified therein as if it were arrears of land revenue; and if the recovery was made on the basis of arrears of land revenue under the Land Revenue Code, there is no provision under the Land Revenue Code for disputing the amount thus specified at the stage of recovering the amount that is certified to be due. Then the proviso to Sub-section (2) provides that without prejudice to any other powers of the Collector in this behalf he shall for the purpose of recovering the said amount have the powers which under the Code of Civil Procedure, 1908, a civil Court has for the purpose of the recovery of an amount due under a decree. The effect of the proviso is that if the Collector does not choose to exercise his power to recover the tax due as arrears of land revenue and proceeds to recover it under the Code of Civil Procedure, then he has all the powers under that Code "for the purpose of recovering the said amount." This is the proviso on which Mr. Pandit relies for the purpose of his argument that the proper place to dispute the liability as a partner of an unregistered firm is before the Collector in recovery proceedings. But Mr. Pandit forgets that the Collector is not bound to recover the amount under this proviso and he may choose to recover it under the Land Revenue Code in which case the alleged partner from whom the recovery is sought to be made appears to be at the stage of recovery entirely without any remedy."

20. The Kerala High Court had followed Gokuldas Vs. Kikabhai Abdulali and

Others, in *CHERIAN Vs. Income Tax OFFICER, ERNAKULAM, AND ANOTHER.*, . It was held by it that as long as notice of demand for payment of tax u/s 29 of the income Tax Act was not served on a partner he would not be deemed to be an assessee in default. The notice of demand in that case was served on one of the partners, in the name of the firm, and that was not held to be sufficient for the purposes of Section 29. of course, that was a case of imposition of penalty but the principle was the same.

21. The Calcutta High Court had observed in *Manindra L. Goswami Vs. R.N. Bose, Income Tax Officer*, that where a notice of demand was issued on a firm, but not against the partners, the recovery proceedings could not be started against the partner because he was not an assessee in default.

22. The Allahabad High Court, in *Moti Lal Purshottam Das Vs. The Income Tax Officer, Kanpur*, , observed that :

"It is true that Section 44 of the Income Tax Act or the Partnership Act makes a partner liable in respect of the tax due from a firm, but the question was whether proper recovery proceeding can be started under Sections 45 and 46 of the Income Tax Act by treating a partner as an assessee in default."

The Allahabad High Court held that a partner was not covered by the term "assessee" in Section 29 and, therefore, without a demand notice he could not be held to be an assessee in default.

The same view has been taken by the Madras High Court in *K. Shanmugha Sundaram Vs. Special Deputy Tahsildar, Income Tax Collections, Coimbatore, and Another*,

In *Naseer Mohammad's case* 1963 Raj L W 72, this Court had to consider the question whether an assessment completed in the name of the firm was invalid and ineffective in law and not binding on the partners, and it was observed as follows :

After a critical review of the various provisions of Chapter IV of the Act, it was further observed that ""in effect" the legislature has enacted by Section 44 that the assessment proceedings may be commenced and continued against a firm of which business is discontinued "as if discontinuance has not taken place". The underlined (here into " ") portion of the observation in our opinion, makes the position perfectly clear. The same view was reiterated in AIR 1962 S C 918. In the light of the foregoing observations, we are not prepared to emphasise the distinction between the firm and the partners in construing Section 44 and are not prepared to hold that an assessment completed in the name of the firm is invalid and ineffective in law and cannot be binding upon the partners who are not altogether separate from the firm."

It is true that the test recognised in *Naseer Mohammad's case* 1963 Raj L W 72 was, as to how the proceedings had started and whether the individual partners did or did not have the notice of the assessment proceedings, but all the same it

was recognised that for the purposes of applying Section 44 of the Act, the partners cannot be regarded as separate from the firm altogether. Reference was made in that case to C.A. Abraham, Uppoottil, Kottayam Vs. The Income Tax Officer, Kottayam and Another, decided by their Lordships of the Supreme Court.

23. We may now refer to the decision of the Supreme Court in C.A. Abraham, Uppoottil, Kottayam Vs. The Income Tax Officer, Kottayam and Another, It was observed in that case that Section 44 of the Income Tax Act sets up machinery for assessing the tax liability of firms which have discontinued their business and provides for three consequences : (1) on the discontinuance of the business of a firm every person, who was at the time of its discontinuance a partner is liable, in respect of the income, profits and gains of the firm, to be assessed jointly and severally, (2) each partner is liable to pay the amount of tax payable by the firm, and (3) the provisions of Chapter IV, so far as may be, apply to such assessment. It was further observed that :

"The expression "assessment" used in the section of Chapter IV of the Income Tax Act is not used merely in the sense of computation of income and when Section 44 declares that the partners or members of the firm or association shall be jointly and severally liable to assessment, it refers to the liability to computation of income u/s 23 as well as the application of the procedure for declaration and imposition of tax liability and the machinery for enforcement thereof. Nor has the expression, "all the provisions of Chapter IV shall so far as may be apply to such assessment" a restricted content; in terms it says that all the provisions of Chapter IV shall apply, so far as may be, to assessment of firms which have discontinued their business. By Section 28, the liability to pay additional tax which is designated penalty is imposed in view of the dishonest contumacious conduct of the assessee. This liability arises only if the Income Tax officer is satisfied about the existence of the conditions which give him jurisdiction and the quantum thereof depends upon the circumstances of the case. The penalty is not uniform and its imposition depends upon the exercise of discretion by the taxing authorities but it is imposed as a part of the machinery for assessment of tax liability. The use of the expression "so far as may be" in the last clause of Section 44 also does not restrict the application of the provisions of Chap. IV only to those which provide for computation of income. By the use of the expression ""so far as may be" it is merely intended to enact that the provisions in Chap. IV which from their nature have no application to firms will not apply therein by virtue of Section 44. In effect, the Legislature has enacted by Section 44 that the assessment proceedings may be commenced and continued against a firm whose business is discontinued as if discontinuance has not taken place. It is enacted manifestly with a view to ensure continuity in the application of the machinery provided for assessment and imposition of tax liability notwithstanding discontinuance of the business of the firm."

Though, it was a case relating to imposition of penalty yet all the ramifications of the process of assessment including recovery were examined and it was held

that a partner will be liable, for the tax due from the firm, notwithstanding the discontinuance of business.

24. Shri Lodha, learned counsel for the Income Tax Department, invited our attention to three other cases of the Supreme Court. He first relied on E.M. Muthappa Chettiar Vs. The Income Tax Officer, Special Circle, Coimbatore, . This was a case under the Excess Profits Tax. The decision of the case turned on construction of the proviso to Section 21 of the Excess Profits Tax Act, which ran as under :

"Provided that reference in the said provisions to the assessee shall be construed as reference to a person to whose business this Act applies."

In that case their Lordships of the Supreme Court adverted to Section 29 of the Income Tax Act and posed the question whether a partner will be an assessee in default or for that matter will be included in the term "assessee", or will come under the category "other persons liable to pay the tax", but their Lordships left the question open. This decision is thus not quite helpful.

25. In The Additional Income Tax Officer, Salem Vs. E. Alfred, their Lordships of the Supreme Court had to consider the import of the term "assessee" as defined in Section 2(2) of the Indian Income Tax Act in respect of a legal representative of a deceased person and their Lordships observed as follows :

"The generality of the definition of "assessee" in Section 2(2) of the Indian Income Tax Act, 1922, is sufficient to include even a legal representative who is to pay the tax, though out of the assets of the deceased person."

Their Lordships further observed in construing the term "assessment" as follows:

"The word "assessment" bears different meanings, and in one sense it comprehends the entire process of computation and levy of tax. It is in this sense that the legal representative becomes an assessee by the fiction, and this fiction has to be fully worked out to its logical conclusion."

26. The same position was reiterated by their Lordships of the Supreme Court in a later case-- First Additional Income Tax Officer, Karaikudi, and Another Vs. T.M.K. Abdul Kassim, .

27. In view of these pronouncements of their Lordships of the Supreme Court to the effect that Section 44 of the Income Tax Act enacts a fiction by which a dissolved firm is to be taken to be a firm in existence for the purpose of assessment of tax and the term assessment will include even processes for recovery of the tax, a partner of the dissolved firm will have to be taken to be an assessee within the meaning of Section 2(2) of the Act. He is undoubtedly a person by whom Income Tax is payable under the Act. While the decisions of several High Courts relied on by Shri Jain have not been referred to in the judgments of the Supreme Court referred to above, we are convinced that the rationale of those decisions cannot legitimately be adopted by us now for the

determination of the question before us.

28. Proviso to Sub-section (2) of Section 46 extracted above also) in our view, lends support to our conclusion. Assuming that the assessee is a firm and the individual partner thereof is not the assessee, then too Section 46 empowers the Collector to exercise the powers of a civil Court and the certificate to be executed acquires the status of a decree for the purposes of execution. Now it cannot be gainsaid that under the CPC a decree against a firm is executable against the partners as well. Thus, Section 46(2) clothes the Collector to recover the amount of the certificate even from an individual partner as thereunder he acts like a Court executing a decree against the firm. We are not unmindful of the fact that under the CPC a dissolved firm has no entity, but for Income Tax purposes Section 44 of the Income Tax Act, as discussed above, creates a fiction and regards a dissolved firm as a firm still in existence for the purposes of assessment which, as per dicta in Supreme Court cases, takes in its ambit the process of recovery of the tax assessed- In these circumstances, we are not satisfied that there is any illegality when the respondents are taking steps to recover the tax found due against the firm from the petitioners who were admittedly its partners at one time.

29. As noted by us already, the petitioners did not challenge the validity of the assessment proceedings in the name of the firm, nor were we persuaded to permit them to do so specially when the Act provides specific remedies for challenging the validity of assessments.

30. In the result we hold that the writ petition has no substance and consequently we hereby dismiss it, but in the circumstances of the case we leave the parties to bear their own costs.