
(1961) 11 AHC CK 0033

In the Allahabad High Court

Case No : Civil Miscellaneous Writs No"s. 841 of 1960, 842 and 843 of 1961

DEVENDRA PRAKASH

APPELLANT

Vs

Income Tax OFFICER, BAREILLY.

RESPONDENT

Date of Decision : 23-11-1961

Acts Referred:

Constitution of India, 1950 — Article 226

Income Tax Act, 1961 — Section 16, 23, 34, 35

Citation : (1963) 47 ITR 501

Final Decision : Dismissed

Judgement

These three petitions under article 226 of the Constitution raise common points and can be conveniently dealt with by a common judgment.

The prayer contained in the petitions is that an order of rectification u/s 35 of the Income Tax Act dated March 3, 1960, made in all the three cases and notices of demand of the same date in consequence of the order of rectification may be quashed. It is also prayed that in the assessment forms accompanying the notices of demand dated March 3, 1960, the interest charged u/s 18A of the Act may be knocked off.

The facts giving rise of the petitions are there was originally a Hindu undivided family carrying on business under the name and style of Hirday Narain Yogendra Prakash. Hirday Narain was the father and Yogendra Prakash was his son from his first wife. On September 30, 1949, there was partial partition in respect of the business and with effect from October 1, 1949, a partnership was constituted by the father and the son, Yogendra Prakash. To the benefits of this partnership out minor sons of Hirday Narain from his second wife were admitted. Three of these minor sons are petitioners in these writ petitions, Devendra Prakash in Petition No. 841, Gajendra Prakash in petition No. 842 and Bhupendra Prakash in Petition No. 843. It appears that the firm was reconstituted with effect from July 12, 1952, as on the preceding day Hirday Narain, the father, ceased to be a member of the firm. It appears that meanwhile Surendra Prakash, the fourth

minor son, had become a major. In consequence of the reconstitution of the firm, the accounting period relevant to the assessment year 1953-54 with which we are concerned in these petitions was split up into two partitions, one comprising of the period from the commencement of the accounting period on October 10, 1951, to July 11, 1952, until which date Hirday Narain, the father, continued to be a partner in the firm and the other period commencing subsequently to Hirday Narain ceasing to be a partner from July 12, 1952, to September 27, 1952, the end of the accounting period. In due course on March 28, 1956, an assessment order was made u/s 23(5)(a) against the firm in respect of the assessment year 1953-54. This order has not been made an annexure to the petition. An extract from that order has been quoted in paragraph 3 of the petition. It is not possible to say whether the extract represents the correct state of affairs which is necessary for the purpose of disposal of the petition. I cannot help observing that it is an entirely wrong practice to quote extracts from orders which form the backbone of a petition and not annex to the petitions complete copies of the orders from which extracts are sought to be relied on. To say the least this creates a suspicion against the bona fides of a petitioner. In the absence of complete copies of orders or documents it is not possible for the court to come to the conclusion that if the complete document had been produced before the court it might not have yielded a different result than that contended for on the basis of the extract from such order or document. Be that as it may, it appears from this extract that the apportionment of the income of the firm amongst the various partners of the firm was made for the two periods separately in specific sums of monies mentioned against the names of the different partners. The share income of the three partners and of their father is stated in that extract as follows :

Rs.

"Income up to 11-7-1952 :

Hirday Narain

...

52,772

Devendra Prakash

...

52,772

Gajendra Prakash

...

52,772

Bhupendra Prakash

...

52,771

Income from 12-7-1952 to 27-9-1952 :

Devendra Prakash

...

13,193

Gajendra Prakash

...

13,193

Bhupendra Prakash

...

13,193

It is also provided therein that "out of the above income the entire profit up to July 11, 1952, will be assessed in the hands of Hirday Narain u/s 16(3)(a)(ii)."

In consequence of this orders assessments were made against the father, Hirday Narain, and three petitioners in this way, that for the period ending July 11, 1952, the share income of the minor sons was clubbed together with the share income of the father and was assessed in his hand alone. In other words, the share income of the minors was not assessed in the hands of the minors at all for this period. As regards the period commencing from July 12, 1952, the minors were assessed individually on a share income of Rs. 13,193 each. Obviously this was in conformity with the view of the Income Tax Officer as expressed in the above order. It appears that on assessment being made upon the father, Hirday Narain, in respect of his share income along with the share incomes of his three minor sons he felt disgruntled and took the matter in appeal to the Appellate Assistant Commissioner of Income Tax. The point taken by him in the appeal was that he should not have been assessed in the status of individual but should have been assessed in the status of a Hindu undivided family as he still constituted a Hindu undivided family with his minor sons from his second wife. The Appellate Assistant Commissioner does not appear to have accepted his point and he filed a further appeal to the Income Tax Appellate Tribunal. The Tribunal by order dated January 13, 1959, accepted his appeal and held that he should have been assessed in the status of a Hindu undivided family and not in the status of an individual. It followed that section 16(3)(ii) became inapplicable to his case and the income of his minor sons could not be clubbed with his income. In due course effect seems to have been given, as it was bound to be given to this order of the Tribunal, and the share income of the three minor sons were knocked off from his assessment. The result was that the three sums of Rs. 52,772, the share

income of each one of the three minors up to July 11, 1952, became derelict and was not assessed at all either in the hands of the father or in the hands of the three minors. It is plain that as a result of the decision of the Tribunal if the sum was not assessable in the hands of the father it became clearly assessable in the hands of the sons. By notice dated August 8, 1959, u/s 35 of the Income Tax Act, the Income Tax Officer sought to rectify this omission. He proposed in the notice which he served upon the petitioners that their share income had been assessed only at the figure of Rs. 13,193, whereas it should have been assessed at a much larger figure presumably because the share income up to July 11, 1952, also became assessable in the hands of the petitioners as a result of the decision of the appeal by the father. The petitioners objected to rectification and urged that section 35 had no application in the circumstances of the case. The Income Tax officer overruled the objections of the petitioners by order dated March 3, 1960, included income for the period up to July 11, 1952, also in the assessment of the three petitioners. The Income Tax Officer did not stop there. In the assessment form which he issued with the notice of demand he included in the assessment of each one of the petitioners, a sum of Rs. 1521.71 nP. in the case of Devendra Prakash, Rs. 1531.47 nP. in the case of Gajendra Prakash and a sum of Rs. 1521.71 nP. in the case of Bhupendra Prakash as interest u/s 18A of the Income Tax Act and the notice of demand was issued in respect of the total amount of the tax on the larger amount of income which came to be assessed in their hands as well as the respective amount of interest as mentioned above. On March 22, 1960, these writ petitions were filed in this court.

Three points have been raised before me by learned counsel for the petitioner. His first point is that section 35 has no application to the facts of the case and the orders passed by the Income Tax Officer on March 3, 1960, rectifying the assessment orders against the petitioners were without jurisdiction. His second point is that u/s 34(4) the notice of demand upon rectification being made has to be issued in a prescribed form. No notice has been prescribed u/s 35(4). The notice which was issued to the petitioners was a notice which is prescribed u/s 29. According to learned counsel a notice prescribed u/s 29 cannot do duty for a notice which is contemplated u/s 35(4). Accordingly, learned counsel has argued that the notices issued to the petitioner were invalid and are liable to be quashed. The third and the last point urged by the learned counsel is, that even assuming that the Income Tax Officer could properly proceed u/s 34, so far as the imposition of the interest u/s 18A of the Act is concerned, it clearly amounted to an enhancement and before liability for interest was imposed upon the petitioners a notice should have been given to the petitioners under the first proviso to section 35(1) of the Act. That a notice was given to the petitioners is not denied, but what is argued is that that notice gave no indication at all of the intention to impose a liability for payment of interest u/s 18A. It is argued that in the absence of such a notice the imposition of liability for penal interest in the three sums mentioned above was illegal.

So far as the first point is concerned the position appears to me to be as follows :

The firm in this case consisted of the father and his sons. Apart from the fact that in the case of the every firm the two entities, namely, the firm and the partners, are closely connected, in this particular case where the partners, inter se, were a father and his sons the relation not only between the firm and the partners but also as between the partner themselves was intimated. So far as the particular items of share income of the minors of the period to July 12, 1952, are concerned, they were assessable either in the hands of the father if section 16 applied or in the hands of the son if that section did not apply. The assessability of those sums in the hands either of the father or the son was in a sense inter-dependent. It cannot be gainsaid that the sums were assessable. If the sums were assessed in the hands of the father then they could not be assessed in the hands of the sons. If they were assessed in the hands of the sons they could not be assessed in the hands of the father. In this state of inter-dependence whether the decision was in the case of the father or the decision was in the case of the sons it was inevitable that the decision should affect the position so far as assessability of these sums is concerned in the hands of the sons and vice versa. It also appears to me to be inevitable that the assessment of the firm and the assessment of the father and the assessment of the sons being thus closely inter-related, the records relating to them must in a sense be part and parcel of the same record. It follows that when as a result of the appeal of the father having been allowed by the Tribunal the share incomes of the minor sons were knocked off from the assessment of the father, the fact must have been clearly before the Income Tax Officer who was dealing with the matter in the records of the firm, the father and the sons. In the circumstances I am inclined to take the view that, as a result of the appeal of the father, a mistake became apparent from the records of the case in the assessments of the sons and u/s 35(1) of the Income Tax Act the Income Tax Officer was fully competent to make the impugned rectification orders.

There is another way of looking at the matter. Under the second proviso to section 34(3) of the Income Tax Act, an assessment or reassessment can be made against the assessee or any person in consequence of or to give effect to any finding or direction contained in an appellate or revisional or reference order. I am aware that so far as the assessability of a person other than an assessee under this proviso is concerned the Bombay High Court has held that the provisions in this proviso are ultra vires. That however is not the view which this court has taken of the provisions of the proviso. In a case reported in Pt. Hazari Lal v. Income Tax Officer, Kanpur, this court has held that even if the person who is sought to be reassessed in consequence of a direction or a finding is not himself the assessee but is another person, but if that other person is intimately connected with the assessee, then he can be proceeded against under the proviso. It follows that the view of this court is that the proviso is not ultra vires qua all classes of person other than the assessee. It may or may not be valid as regard persons who have no connection at all with the assessee or who may have only a remote connection with him, but so far as person who are closely

connected with the assessee are concerned, this court has held that the provisions of the proviso are valid. It has already be shown above that in this particular case a very close connection existed between the three entities involved and which comprised of the father and the sons as partners, the firm and the partners and the partners inter se. The Income Tax Officer had ample power in consequence of the finding of the Tribunal that the father was not to be assessed in the status of an individual, but in the status of an Hindu undivided family and also in consequence of the direction in that order that the income of the minor sons was not to be assessed in his hands, but that income could properly be assessed in the hands of the sons by an order of assessment or re-assessment. The mere fact that the Income Tax Officer did not profess to proceed u/s 34(3), second proviso, but sought to proceed u/s 35 can, to my mind, make no difference at all. A notice was admittedly served upon the petitioners of the intention of the Income Tax officer to assessee the particular income in the hands of the petitioner. So long as there was power in the Income Tax Officer to assessee that income in the petitioners hands in made no difference at all that the Income Tax Officer professed to proceed u/s 35 and not u/s 35(3), second proviso. It follows that for this reason also the impugned order dated March 3, 1960, must be upheld.

There is yet another way of looking at the matter. So far as relief under article 226 of the Constitution is concerned, it is well settled upon authorities of the Supreme Court and upon decisions of this court that a petitioner cannot be entitled to relief merely upon showing that the authority below had committed an error or law, however gross that error might be or upon showing merely that the authority below had no jurisdiction in the matter, even though there might be complete absence of jurisdiction. He has additionally to show that manifest injustice has been done to him. Upon the facts stated above it is quite clear that no injustice at all has been done to the petitioners. The income was properly theirs. It was assessable in their hands. They were under a liability to pay tax on it. It was only by reason of the provision in section 16 that if the father happened to be a partner in the same firm and, provided that the father was assessed as an individual, the income of the sons would be assessable in the hands of the father and not in the hands of the sons. Upon the finding of the Tribunal the father is no longer liable to pay tax on these sums of movies. If the petitioners are bound to pay and in respect of the liability for payment of which it has not even been urged that the liability is not theirs, it will result in injustice if the petitioners are relieved against that liability. Clearly the court exercising jurisdiction under article 226 cannot do this.

On all these grounds the first point urged by learned counsel for the petitioners in support of these petitions must be overruled.

As regards the second point relating to the validity of the notices in consequence of the rectification orders issued to the petitioners it is sufficient to say that provisions in section 35(4) do not give countenance to the submission made by

the learned counsel for the petitioners. The view which I take of the provisions in that sub-section is that notice of demand in the prescribed form has to be issued to an assessee in consequence of an order made u/s 35. The notice of demand prescribed under the Act is what is usually described as notice of demand u/s 29. No notice of demand is prescribed u/s 35. Once such a notice of demand has been issued in consequence of rectification, that notice has to be treated by the fiction enacted u/s 35(4) as a notice issued u/s 29. It followed that the notice issued to the petitioners in consequence of the order of rectification was a perfectly valid notice. I, therefore, overrule the second point argued by the learned counsel.

The last point was that the imposition of liability for payment of interest in consequence of rectification u/s 35 was invalid for omission to issue a notice of the intention to impose such interest. In the assessment as originally made against the petitioners no amount as interest was levied against the petitioners. If that was done, perhaps no notice at that stage may have been required. The amount of interest may merely have been calculated and included in the assessment made. The situation however in the circumstances of this case is entirely different. Here it was only following upon the rectification orders that the liability for interest u/s 18A was imposed. It may, therefore be treated as an additional burden or enhancement of the demand as a result of the rectification. In this connection reference may be made to the decision of the Supreme Court reported in *C. A. Abraham v. Income Tax Officer, Kottayam*, where their Lordships have observed that a penalty or even a penal interest imposed under the nature of additional tax. From this it is clear that imposition of interest u/s 18A results in the enhancement of an assessment. It follows that under the proviso to section 35(1) notice should have been issued to the petitioners before liability for interest could be imposed upon the petitioners. For non-compliance with this requirement the imposition of interest in the three amounts mentioned above against the three petitioners must be held to be invalid.

The result is that the writ petitions succeed to this extent only that the amount of interest imposed upon the petitioners u/s 18A of the Act shall be deleted from the assessment forms and the notice of demand. This will not stand in the way of the Income Tax Officer to proceed according to law now, if that is permissible. In all other respects the petitions fail and are dismissed with costs.

Order accordingly.