
(1942) 09 BOM CK 0021

In the Bombay High Court

Case No : O.C.J. Miscellaneous No. 86 of 1942

DINSHAW DARABSHAW SHROFF

APPELLANT

Vs

COMMISSIONER OF Income Tax, CENTRAL.

RESPONDENT

Date of Decision : 16-09-1942

Acts Referred:

Government of India Act, 1935 — Section 226
Income Tax Act, 1922 — Section 67

Citation : AIR 1943 Bom 77 : (1943) 11 ITR 172

Hon'ble Judges : Beaumont, C.J

Bench : Division Bench

Judgement

BEAUMONT, C.J. - This is a petition presented to the Court by an assessee making respondents the Commissioner of Income Tax, Central, the Income Tax Officer, Section III, and the Inspecting Assistant Commissioner, Central, and the relief asked for is that this Court may be pleased to issue a writ of certiorari against the respondents calling upon them to send up the records of the assessment of the petitioner for the year 1937-38 for the purpose of inquiring into the legality of the assessment order passed by respondent No. 2 on February 16, 1942, and the proceedings in respect of which such order was passed and to quash the same. Further relief asked for is that the Commissioner of Income Tax Central, the Inspecting Assistant Commissioner, and the Income Tax Officer, Section III, Central, be ordered to forbear from (i) taking or continuing any proceedings for the purpose of levying any penalty under the provisions of Section 28 or otherwise; (ii) taking or continuing any proceedings or exercising any jurisdiction or passing any orders in respect of or arising out of the said assessment order or assessment proceedings under the Indian Income Tax Act; and (iii) exercising any jurisdiction or passing any orders in respect of the premises. The further relief seems to be consequential upon or ancillary to the primary relief asked for, namely, the issue of a writ of certiorari.

The grounds on which the petitioner bases his claim are two. First, that the assessment made against him for the year 1937-38 was made by an Income Tax

Officer who had no jurisdiction to assess him, since the petitioners assessment for that year had never been legally transferred to the officer who made the assessment, that is Mr. Shah; and, secondly, that the proceedings before the Income Tax Officer were so grossly irregular as to offend against the principles of natural justice.

On those two grounds, it is said that we ought to send for the record, and quash the assessment.

The Crown have taken a preliminary objection that the Court has no jurisdiction to issue a writ of certiorari in a case of this nature by reason of Section 226 of the Government of India Act, 1935, and Section 54 or Section 67 of the Indian Income Tax Act, 1922. For the purpose of considering the preliminary objection, we must assume that the petitioners contentions are justified, and particularly that his case had not been legally assigned to the Income Tax Officer who made the assessment.

Section 226 of the Government of India Act, 1935, enacts : "Until otherwise provided by Act of the appropriate Legislature, no High Court shall have any original jurisdiction in any matter concerning the revenue, or concerning any act ordered or done in the collection thereof according to the usage and practice of the country or the law for the time being in force."

It is well-known that the provision has appeared in many previous Acts, and has its origin historically in the disputes between Warren Hastings as Governor-General of Bengal and Sir Elijah Impey as Chief Justice. However, we are not concerned with the reasons for the enactment, and we have to carry out the law as we find it. It has been held by the Privy Council in *Alcock Ashdown and Company v. Chief Revenue Authority, Bombay* that an order of a high Court directing a revenue officer to carry out his statutory duty would not involve the exercise of original jurisdiction in any matter concerning the revenue, and if there were any illegalities relating to the carrying out of this assessment, it may well be that we might have interfered at an earlier stage. But the difficulty here is that an assessment order has in terms been made, even if by the wrong Officer, and we are asked to send for the record, and satisfy ourselves whether the order is legal or illegal, and if illegal, to quash it, and in effect stay execution upon it. It seems to me impossible to say that in so acting we should not be exercising original jurisdiction in a matter concerning the revenue. There is no doubt that the issue of a writ of certiorari is within the competence of this Court in a proper case, and that such issue is in exercise of the original jurisdiction of this Court. But we have been referred to no authority in support of the proposition that a writ of certiorari can properly issue to challenge the validity of an Income Tax assessment purporting to be made under the Indian Income Tax Act.

We are referred to a decision of a single judge of the madras High court in *K.P.M.T.T. Thyagaraja Chettiar v. The Chettiar*, in which it was held that the Court

could not issue a writ of certiorari to prevent the execution of an alleged illegal assessment order. That case seems to me to be an authority directly in point. There is another case in the same volume in *Ramjidas Mahaliram, In re*, in which a single Judge of the Calcutta High Court intimated the view that a writ of certiorari could issue in order to challenge the legality of an Income Tax assessment. But in the course of that proceeding, the relief claimed was limited to a writ of prohibition; so that the learned Judges observations as to a writ of certiorari, were obiter dicta only; and as eventually no writ, even of prohibition, was issued, the case is not a direct authority. In my opinion, the decision of the Madras High Court was right, and it is not open to this Court, in view of Section 226 of the Government of India Act, to call for the record of the Income Tax Department in order to satisfy ourselves that this assessment was legal.

It is stated in Lord Halsburys Laws of England, Vol. 9, para. 1446, at p. 854, in dealing with the writ of certiorari that -

"The writ can only be issued in respect of matter which are within the jurisdiction of the High Court of Justice; for proceeding will not be removed into the superior Court unless they are capable of being determined there."

It seems to be clear that we are not capable of determining in this Court any question as to the validity of an assessment in Income Tax under a writ of certiorari. We are not concerned with any matter except the claim to a writ of certiorari and consequent relief. Assessors have various rights under the Indian Income Tax Act, right of appeals and other rights, with which we are not concerned in this case; nor are we concerned to consider whether the assessee has such remedy as was allowed in *Haji Rehemtulla v. Secretary of State* where the Court made a declaration of nullity, against an assessment order, and even ordered refund of the money, though the latter relief might be difficult to reconcile with later decisions of the Privy Council. Our decision is limited to holding that we have no power to issue a writ of certiorari in the circumstances of this case. As we think that the relief claimed is barred by Section 226 of the Government of India Act, 1935, it is not necessary to consider whether Section 54 or 67 of the Indian Income Tax Act affords a further bar.

As the preliminary objection prevails, it is not necessary to deal with the merits of the petitioners case and I do not propose to say anything upon the question whether the Income Tax Officer who made the assessment was empowered to do so; but it is, I think, desirable to say something about the second ground relied on by the petitioner namely, that there were such irregularities in the assessment as to infringe the principles of natural justice. It seems necessary to say something on that question, because the Income Tax Officers have justified in their affidavits the course which was adopted. Their view of the matter is stated in para. 32 of the affidavit made by Mr. Pais, Office Superintendent, to respondent No. 1, and it appears from his affidavit, as well as from the affidavit of the petitioner, that when the Income Tax Officer, Mr. Shah, was dealing with the assessment of the petitioner for the year 1936-38, he allowed the petitioners

partners to be present, one of them with his solicitor, and to take part in the proceedings, although they were not concerned with the assessment of the petitioner. It is, I think, difficult to justify that course in view of the terms of Section 54 of the Indian Income Tax Act, which require that all proceedings under the Act should be treated as confidential. An assessee may well desire that his partners should not know what return he has made under the Act. But a more serious irregularity was this. The Inspecting Assistant Commissioner. Central, who is alleged to be the superior officer of the Income Tax Officer making the assessment, was not only present when the assessment was made, but claimed the right to put questions to the assessee, and when that course was objected to, he said that he would put the questions through the pitch of the Income Tax Officer who was conducting the inquiry, and was an officer subordinate to him. Now, it seems to me that that procedure was grossly irregular. The competent revenue authorities, I will assume, had assigned the assessee's case to Mr. Shah. That is the Crown case, and I assume for the present purpose that it is correct. It was then the duty of Mr. Shah to make the assessment himself. If the authorities were not satisfied with the conduct of Mr. Shah, they could have removed him, and appointed some other officer, but there is nothing to show that they were dissatisfied with his conduct, and, in my opinion, it was grossly improper for any other revenue officer, particularly a superior officer, to appear in the proceedings, and in effect dictate to the Income Tax Officer to whom these proceedings had been transferred what questions were to be asked, and presumably what conclusion he was to arrive at. It would be as sensible to suggest that a high court Judge can sit in a Subordinate Judges Court, not as a spectator only, but as an active participant, and can direct the trial Judge, as a Judge subordinate to the High Court, how to conduct the trial. That is not the way in which proceedings of a judicial nature should be conducted. Although, no doubt, an Income Tax Officer making an assessment is not strictly acting as a court of law, it is clear from Section 37 of the Indian Income Tax Act that he is acting in a quasi judicial capacity, and he ought to conform to the more elementary rules of judicial procedure, and in particular to conduct the case himself, and not allow somebody else, even his superior officer, to take the conduct out of his hands. It is desirable to make these observations, because, I have no doubt that, had an application been made to this Court, at an earlier stage of the proceedings, we should have interfered to prevent this irregularity, and ordered Mr. Shah to carry out his duty in a proper manner. However, these observations are by way of caution only, and the actual decision of this Court is that we have no jurisdiction to issue a writ of certiorari in a case of this nature.

We must, therefore, discharge the rule with costs.

KANIA, J. - I agree. Two points arise for consideration on this petition. The first is whether prayer (1) could be granted in fact of section 226 of the Government of India Act of 1935. In that connection it must be remembered that the order of assessment has been made, and no question as to what the Court would have

done to stop the order of assessment, on the ground of want of jurisdiction or irregularity amounting to miscarriage of justice in the conduct of the inquiry, arises.

Section 226 of the Government of India Act prevents the exercise of original jurisdiction by this Court in any matter concerning the revenue, or concerning any act ordered or done in the collection thereof. The order of Mr. Shah made on February 16, 1942, on the face of it is an order directing the assessee to pay. The first prayer is asking the Court to call for the records of these proceedings and to quash that order. In view of the clear words of Section 226, I agree that it is not permitted to this court to exercise such jurisdiction.

The question of irregular exercise of jurisdiction is apart from the question whether the Income Tax Officer had any jurisdiction at all. The question of stopping him from exercising a jurisdiction which is never vested in him is clearly arguable under the decision of the Privy Council in a lock Ashdown and Co. v. Revenue Authority, Bombay. But that case does not lend support to the argument of the petitioner that after an order of assessment is made, the Court has jurisdiction to set aside such order. In Alcock Ashdowns case the Court was asked to direct the Commissioner to state a case, that is to perform a duty which the Court held was on him to perform. Conversely, u/s 45 of the Specific Relief Act, if an officer having no jurisdiction whatsoever was attempting to act as if he had jurisdiction, the Court may restrain him from acting in that way. But no case has been pointed out which goes to the length of saying that an order in fact made by a revenue officer could be set aside under an application for a writ of certiorari. It is clear that without setting aside that order the Court cannot give the relief asked for in prayer (2), because the foundation of the second prayer is that the order should be set aside, and on that footing the Court should order the officer to prevent further step being taken. If the Court has no jurisdiction to set aside the order of assessment, it is equally incompetent to issue a writ of certiorari or make a prohibitory order in respect of the enforcement of the order which it cannot set aside. In view of the clear words of Section 226, therefore, I agree that the Court is unable to grant to the petitioner the relief in the form asked in this petition. The petitioner, may, if he is so advised, and is entitled to, take step under the Indian Income Tax Act by way of appeal, etc., or under other Acts to contest the validity of the order made, and refrain from payment.

Under Section 37 of the Indian Income Tax Act the proceedings are for certain sections of the Indian Penal Code, 1860, called "Judicial Proceedings." In the judgment of the learned chief Justice just delivered, the question of how improperly the matter was conducted in the matter of re-assessment has been fully dealt with, and I do not propose to add anything to those observations. But this judgment must be clearly understood as not absolving the taxing authorities from meeting the contention of the petitioner in appropriate proceedings in respect of the inquiry made for re-assessment. The decision of this court is only in respect of the two reliefs asked for in the present petition. By virtue of Section

226 of the Government of India Act as the Court considers that it is unable to entertain the present petition in the present form, the only order made is that the petition is dismissed. I agree, therefore, that the same should be dismissed with cost.

Petition dismissed.