(1950) 11 CAL CK 0002

In the Calcutta High Court

Case No : Appln. No. 48 of 1950

Elbridge Watson APPELLANT

Vs

R.K. Das RESPONDENT

Date of Decision : 28-11-1950

Acts Referred:

Constitution of India, 1950 — Article 226
Income Tax Act, 1922 — Section 33A, 46(2), 46(5A), 67

Citation : AIR 1951 Cal 430 : (1951) 19 ITR 538

Hon'ble Judges : Das Gupta, J

Bench : Single Bench

Advocate : R.B. Pal and M.N. Ghose, for the Appellant;E.R. Mayer, for the Respondent

Judgement

Das Gupta, J.—This is an appln. by one Mr. El-bridge Watson for a writ of mandamus or a writ of like nature or an order directing the resp. Sri R. K. Das, an Income Tax Officer, to show cause why the orders complained of & dated 18-3-1949, should not be set aside & for quashing the said orders.

2. The case of the petnr. before me is as follows : The petnr., an American citizen by birth, is a citizen of India & thereafter of the Union of India for about 16 years. The petnr. is the Manager & Director of Messrs. Chrestian Mica Industries Ltd. The total income which the petnr. gets from the said company is the net sum of Rs. 60,000 to Rs. 70,000 annually after deducting the Income Tax payable by him. On 22-10-1948, the petnr. was assessed an Income Tax for assessment year 1946-47. The tax assessed was Rs. 5,30,526 & after crediting the sums of Rs. 50,252-11-0 & Rs. 12,616-4-0 realised by the resp. a sum of Rs. 4,67,657-1-0 became due & payable by the petnr. to the Income Tax authorities. On 18-11-1948, the resp. caused a notice of attachment u/s 46 (5A), Income Tax Act, 1922, to be issued & served upon the Chrestian Mica Industries Ltd., the employers of the petnr. By the said notice of attachment, the said Messrs. Chrestian Mica Industries Ltd. were required to pay to the resp. forthwith any

money due from them to the petnr. or held by them for or on account of the petnr. & also to pay any money which may become due to him or any money which the said Messrs. Chrestian Mica Industries Ltd. may subsequently hold for or on account of the petnr. within the next three months. On 21-12-1948, the resp. forwarded to the office of the Certificate Officer, 24 Parganas, Alipore, a certificate for Rs. 4,67,657-1-0 u/s 46 (2), Income Tax Act for recovery of the said sum by the Certificate Officer under the Bengal Public Demands Recovery Act, 1913. The said certificate was filed with the Certificate Officer, 24 Parganas, Alipore, & the case was numbered & registered as No. 201 I. T. of 1948-49. After having forwarded to the office of the Certificate Officer, 24 Parganas, the Certificate as aforesaid, the Income Tax Officer on 18-3-1949, caused another letter of attachment to be served upon the employers of the petnr. namely, Messrs. Chrestian Mica Industries Ltd. & caused an attachment to be effected u/s 46 (5A), Income Tax Act. By the said notice Messrs. Chrestian Mica Industries Ltd. were required u/s 46 (5A), Income Tax Act, 1922, to pay to the resp. forthwith any amount due from them to the petnr. or held by them for or on account of the said petnr. up to the amount of arrears shown in the said letter which was Rs. 3,37,345-5-0 & also requiring the said Messrs. Chrestian Mica Industries, Ltd. to pay any money which may subsequently become due from them to the petnr. or which they may subsequently hold for or on account of him up to the amount of arrears still remaining unpaid. Thereafter on 28-12-1949, the petnr. made an appln. to the Certificate Officer for payment of his dues in monthly instalments. The said appln. was not disposed of but kept pending at the instance of the resp. On 25-5-1950 another appln. was made to the Certificate Officer & on that appln. an order was made allowing the petnr. to pay his dues in monthly instalments of Rs. 5000 each, the first of such instalments being payable on 15-6-1950 & subsequent instalments by the 15th of subsequent months. The material portions of the order passed by the Certificate Officer run as follows :

"....... I do not understand why a petn. for instalments as submitted by the C.D. should have been kept hanging fire like this at the instance of the I. T. O.

* * * * I permit the C. D. to pay for the present at the rate of Rs. 5000 p. m., each payment being made by the 15th of each month. The rate of instalment is, however, liable to be reconsidered & refixed on the right of future developments. The first payment is to be made by 15-6-1950. Also write to I.T.O. for information re: other payments that may have since been made him."

Thereafter on 30-5-1950, the petnr. though his advocate made an appln. to the resp. asking him to withdraw the notices u/s 46 (5A), Income Tax Act, In the said appln. it was inter alia stated as follows :

"I have the honour to state that by an order of the Certificate Officer in Certificate Case No. 201 I.T./1948-49, the learned Certificate Officer has been pleased to grant me instalments of Rs. 5000 p. m.

I would, therefore, request you to withdraw all notices u/s 46 (5A) which you have issued for the realisation of the aforesaid dues so that my client abovenamed may be able to make the payments according to the instalments granted & that he may have something to live upon."

Nothing was done regarding the said appln. & the said appln. has been kept pending since May 1950 & no order on the same to the knowledge of the petnr. has been passed by the resp.; but the resp. in his affidavit in opposition has stated that the same was rejected on 5-6-1950. Under the circumstances the petnr. has made the present appln. for the reliefs mentioned.

3. Dr. Pal appearing on behalf of the petnr. contended before me that in view of the order passed by the Certificate Officer on 25-5 1950 granting instalments the resp. should either withdraw the attachment which had been made on 18-3-1949 or at least modify the same. He relies on Section 46 (5A) & contends before me that in any event the attachment which has been effected by the notice of 18-3-1949, should be revised to this extent, namely, that the employers of the petnr. should be asked to pay Rs. 5,000 p. m. being the amount of instalments which has been ordered to be paid by the Certificate Officer & it is incumbent on the Income Tax Officer to do so.

4. It is necessary for me, in order to determine this matter, to consider the effect of Section 46 & particularly Section 46 (5A), Income Tax Act. The material provisions of Section 46 necessary for me to consider are as follows :

46 (2). "The Income Tax Officer may forward to the Collector a certificate under his signature specifying the amount of arrears, due from an assessee, & 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, a civil Court has for the purpose of the recovery of an amount due under a decree."

46 (5A). The Income Tax Officer may at any time or from time to time, by notice in writing (a copy of which shall be forwarded to the assessee at his last address known to the Income Tax Officer) require any person from whom money is due or may become due to the assessee or any person who holds or may subsequently hold money for or on account of the assessee to pay to the Income Tax Officer, either forthwith upon the money becoming due or being held or at or within the time specified in the notice (not being before the money becomes due or is held) so much of the money as is sufficient to pay the amount due by the tax-payer in respect of arrears of income tax & penalty or the whole of the money when it is equal to or less than that amount.

The Income Tax Officer may at any time or from time to time amend or revoke any such notice or extend the time for making any payment in pursuance of the notice."

The point which specifically arises for my consideration is what would be the "amount due" as mentioned in Section 46 (5A), Income Tax Act? Is it, in the present case the whole of the amount which is payable to the Income Tax authorities by the petnr., viz., Rs. 3,37,345-5-0, or is it Rs. 5000 p. m. as & when the instalments become due ?

5. Dr. Pal contended before me that the Income Tax Officer should either withdraw or amend his notice so as to make it consistent with the order for payment by instalments which has been due. In other words, he should in any event direct the debtors of the assessee to pay at the rate of Rs. 5000 p. m. The expression "the amount due" appearing in Section 46 (5a), according to him, must mean the amount which becomes "due for payment;" in other words the amounts of the instalments as & when they fell due.

6. Mr. Meyer appearing on behalf of the resp. on the other hand contends that "the amount due" must mean the whole of the amount for which the assessee has been assessed by the Income tax Officer which has to be paid.

7. I have carefully considered this matter but I cannot accept Mr. Meyer''s contention & I accept the contention of Dr. Pal on this point. It seems to me that after the Certificate Officer has allowed instalments at Rs. 5000 p.m. the assessee has the right to pay only Rs. 5000 p. m. & the Income tax authorities would be under an obligation to take, so long that order stands, only at such instalments. If that is so, then the Income Tax Officer cannot direct the debtors of the assessee to pay anything more than at the rate of Rs. 5000 p. m. & it was incumbent on the Income Tax Officer at least to amend his notice accordingly. The position, it seems to me, would be entirely anomalous if, on the one hand the Collector, who is authorised to do so, allows the assessee to pay in certain instalments, but the Income Tax Officer issues notices for payment of the entire sum all at once. The result in that case is that an order passed by the Collector granting instalments is nullified by the order of attachment passed by the Income Tax Officer. The interpretation which Dr. Pal asks me to put on the section seems to me to be the only sensible & logical interpretation to put upon it. The expression "amount due" in this case to my mind must mean the amount of instalments as & when they become due. The use of the words "in respect of" after the words ''the amount due by the tax-payer'' & before the words ''arrears of Income Tax & penalty'' also supports the contention of Dr. Pal. If that is so, then in my opinion, it was incumbent on the Income Tax Officer to revise the order which had been made by him on 18-3-1949, so as to make it consistent with the order passed by the Certificate Officer, 24-Parganas.

8. Mr. Meyer then contends that this appln. is not maintainable in view of the provisions of Section 67, Income Tax Act. Section 67, Income Tax Act runs as follows :

67. "Bar of suit in civil Court. -- No suit shall be brought in any civil Court to set

aside or modify any assessment made under this Act, and no prosecution, suit or other proceeding shall lie against any (officer of the Government) for anything in good faith done or intended to be done under this Act." Mr. Meyer contends that the provisions of this section of the Income Tax Act is a bar to any suit, prosecution or other proceedings unless it can be shown that the act complained of was done in bad faith. Mr. Meyer pointed out to me that there was hardly any allegation, far less any satisfactory proof, of any bad faith on the part of the Income Tax Officer in making the said order. If that is so, then Mr. Meyer contends that this appln. is not maintainable. In support of his contention he cited before me the decision of Bachawat J. in Pragdas Mathuradas v. Income Tax Officer, Central Circle I, Calcutta 86 C. L. J. 77 & on the strength of this authority contended that the provisions of Section 67, Income Tax Act, is a bar to the maintainability of the present appln.

9. Dr. Pal on behalf of the petnr. on the other hand contends that the appln. before me is under Article 226, Indian Constitution & Article 226, Indian Constitution, cannot be subject to the provisions of Income Tax Act. In other words he contends that Article 226 of the Constitution gives to the H. C. very wide powers which cannot be fettered by any provisions of any Act.

10. The circumstances under which the Ct. can interfere with an action of the executive has been the subject matter of decision by the Ct. of Appeal of this Ct. Banerjee J. sitting with Harries C. J. in a recent decision carefully laid down the principles on which this Ct. can interfere with the action of the executive. In Amulya Pal v. R. N. Roy 54 C. W. N. 850, Banerjee J. observed as follows :

"The resp. must act within the four corners of the authority given him by the Act & cannot act beyond that authority."

In the subsequent case of Patrishaw v. R. N. Roy 54 C. W. N. 855, Banerjee J. again observed as follows :

"The only question before the Ct. when the matter is brought before it, is to see whether (1) the order has been made by a competent authority; (2) whether that authority has acted within the four corners of the powers committed to it; (3) whether it has acted honestly. If the Ct. answers these questions in the affirmative, the Ct. has no jurisdiction to interfere with any order made by such authority. The Ct. has nothing to do with the rightness or wrongness of the order."

The net result of the decisions to which I have just now referred is that the Ct. can interfere if the act complained of does not come within the four corners of the Act. It can also interfere if the act complained of is mala fide. But in the absence of either of those two conditions the Ct. has no authority to interfere with the action of the executive. The Ct. cannot, as Banerjee J. pointed out, question the rightness or the wrongness of the order complained of. The two decisions which I have just now cited relate to the provisions of the West Bengal Securities Act (Act III [3] of 1948). Section 34 of the said Act contains exactly similar provision as that of Section 67, Income Tax Act. I should have mentioned that Mr. Meyer drew my attention & laid emphasis upon the words ''intended to be done'' appearing in Section 67, Income Tax Act, but I find that the same words were also used in the West Bengal Securities Act which came to be considered in the two decisions which I just now cited. It does not seem to me that the two decisions to which I have just now referred were placed before Bachawat J. for his Lordship''s consideration. In any event, I am bound to follow the principles laid down by the Ct. of Appeal & I also respectfully agree with the same. If that is so, & if I come to the conclusion that the action of the Income Tax Authorities was not within the four corners of the powers committed to it u/s 46 (5a), Income Tax Act, then the said order should be set aside. Apart from this, in my opinion, Article 226 of the Constitution is an overriding Article and is not fettered by any provisions of law & in this respect I accept the contention of Dr. Pal. Article 226 of the Constitution lays down :

"Notwithstanding anything in Article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases any Govt. within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warran-to, certiorari, or any of them for the enforcement of any of the rights conferred by Part III & for any other purpose."

Now looking at the Article itself one does not find any fetter to the same. It is not made subject to any existing laws or to any restrictions imposed by the law. A reference to some other provisions of the Indian Constitution makes this position more clear. Article 225 of the Constitution lays down :

"Subject to the provisions of this Constitution & to the provisions of any of the appropriate Legislature made by virtue of powers conferred on that Legislature by this Constitution, the jurisdiction of & the law administered in any existing High Court, & the respective powers of the Judges thereof in relation to the administration of justice in the Court, including any power to make rules of Court & to regulate the sittings of the Court & of members thereof sitting alone or in Division Courts, shall be the same as immediately before the commencement of this Constitution."

There is a proviso to this Article Which is not necessary to be considered.

11. Thus, under Article 225, Indian Constitution, the H. C. & the Judges thereof should administer the law which the appropriate Legislature by virtue of the powers conferred on the Legislature by this Constitution could promulgate but that must be subject to the provisions of the Constitution itself.

12. Again under Article 372 of the Constitution, the existing laws are to be continued in the territory of India which were in existence immediately before the commencement of this Constitution until altered, repealed or amended but this is to be subject to the other provisions of the Constitution. Thus, both in the matter of the existing laws & in the matter of future laws which are to be promulgated by the Legislature empowered by the Constitution, such laws are to

be subject to the provisions of the Constitution. Therefore, such laws must be subject to Article 226, Indian Constitution. The Article 226 is unfettered & the powers conferred by Article 226 are not subject to any restrictions imposed by any existing law or to be imposed by any future enactment.

13. In view of this, I have come to the conclusion that the powers conferred by Article 226, Indian Constitution, are not subject to the restrictions imposed by the provisions of Section 67, Income Tax Act, & the same cannot override or control the provisions of Article 226, Indian Constitution.

14. Mr. Meyer appearing on behalf of the resp. then contended before me that Article 226 cannot have any retrospective effect. In other words, Article 226 can be applied only to such acts of the executive which had been committed after the passing of the Indian Constitution. In support of this proposition he relied on a decision of this Ct. in Rishindra Nath Sarkar Vs. Sakti Bhusan Ray, in which Sen J. sitting with Chunder J. came to the conclusion that assuming that the H. C. has been given powers of interference, by Article 227, Constitution of India, with final orders, that would not entitle it to interfere with an order which was passed at a time when such power of interference did not exist. In this case their Lordships were considering the effect of the provisions of Article 227 & not the provision of Article 226, Indian Constitution. Their Lordships were not called upon to decide the point which is now before me or to consider the scope of Article 226, Indian Constitution. The only question which their Lordships were considering was whether Article 227, Indian Constitution, gives them the right to interfere in cases of decrees which have already been passed & under which rights have been vested. The principle on which their Lordships proceeded in deciding that case is that the rights which have already vested under decrees which have been passed, cannot be interfered with under Article 227, Indian Constitution, & their Lordships relied on the decision of the Judicial Committee in AIR 1927 242 (Privy Council) & the principle laid down, namely, that while provisions of a statute dealing merely with matters of procedure may properly, unless that construction be textually inadmissible, have retrospective effect attributed to them provisions which touch a right in existence at the passing of the statute are not to be applied retrospectively in the absence of express enactment or necessary intendment. I also respectfully agree with the view which was taken by their Lordships. Rights which have already accrued to the parties cannot be taken away unless clear provisions have been made to that effect, & Article 227 does not purport to take away that right. But these considerations, to my mind, do not arise in the case of Article 226, Indian Constitution, & particularly to the present case. Under Article 226, Indian Constitution, powers have been given to the H. C. to issue to any person in authority orders or directions for enforcement of fundamental rights & there is no question of taking away rights which have already vested.

15. Dr. Pal also contended before me that ''the High Court'' can exercise powers conferred upon it by Article 226, Indian Constitution, & it is ''the High Court''

sitting after 26-1-1950 which will have those powers. Dr. Pal contends that the only condition to the use of that power is that it must be exercised by a H. C. as constituted by the Constitution & sitting after 26-1-1950 & if that condition is fulfilled, there is nothing to fetter the powers which are conferred upon the H. C. under Article 226, Indian Constitution. I cannot accept the contention of Mr. Meyer on this point.

16. The only other point which remains to be considered & urged by Mr. Meyer is that there is adequate remedy provided by the Income Tax Act itself, which the petnr. could have availed himself of &if there is an adequate remedy provided by the Income Tax Act, then the H. C. cannot interfere under Article 226, Indian Constitution. Although I do not accept the extreme proposition which Mr. Meyer wants me to accept, namely, that under Article 226, Indian Constitution, the H. C. has no power to interfere if there is a suitable enactment in the statute itself, I am inclined to agree with him to this extent, namely, that if there is an adequate legal remedy provided in the statute itself, then H. C. should not interfere under Article 226, Indian Constitution. Mr. Meyer for this purpose relied on Section 33A, Income Tax Act which runs as follows :

"33A : Power of revision by Commissioner: (1) The Commissioner may of his own motion call for the record of any proceeding under this Act in which the order has been passed by any authority subordinate to him and may make such enquiry or cause such enquiry to be made and, subject to the provisions of this Act, may pass such order thereon not being an order prejudicial to the assessee, as he thinks fit:

Provided that the Commissioner shall not revise any order under this sub-section if: --

(a) where an appeal against the order lies to the Appellate Assistant Commissioner or to the Appellate Tribunal, the time within which such appeal may be made has not expired, or

(b) the order is pending on an appeal before the Appellate Assistant Commissioner or has been made the subject of an appeal to the Appellate Tribunal or

(c) the order has been made more than one year previously."

''Sub-section (2) which is important for the present purpose runs as follows :

"The Commissioner may, on application by an assessee for revision of an order under this Act, passed by any authority subordinate to the Commissioner, made within one year from the date of the order, call for the record of the proceeding in which such order was passed, and on receipt of the record may make such enquiry or cause such enquiry to be made, and subject to the provisions ,of this Act, may pass such order thereon, not being an order prejudicial to the assessee, as he thinks fit."

Then there is a proviso which is in the same terms as the proviso to Sub-section (1). The question for my decision is whether the remedy provided by Section 33A is an adequate legal remedy & whether on the facts & circumstances of this case the petnr. could have availed himself of the same. The remedy in question must be a specific remedy at law which is not leas convenient, beneficial & effective. (Halsbury Laws of England, Hailsham Edn., Vol. 9 Article 1309). In my opinion the remedy provided by Section 33A is not such a remedy which should disentitle me, if I am otherwise satisfied about this matter, from giving relief on this application. Section 33A merely gives a discretion to the Commissioner, which he may or may not exercise, to call for the records & intervene in the matter. The petnr. cannot ask for such intervention as a matter of right. Besides, I am doubtful whether in the facts & circumstances of this case the petnr. could have even availed himself of the said remedy. It appears that the attachment in question was made on 18-3-1949 & at that time it was a perfectly valid attachment order. The order for instalments was made on 25-5-1950, that is, more than one year after the attachment was effected. It was because of the order which was passed on 25-5-1950 that the position was altered & the order for attachment which was made on 18-3-1949 has to be withdrawn or revised. If then, it is a question of revising the order dated 18 3-1949 which is to be asked for, the same cannot be done because of the fact that the said order was made more than one year ago. The delay in obtaining the order for instalment does not seem to be due to any default on the part of the petnr. because his original appln. was kept pending & in the opinion of the Certificate Officer, at the instance of the Income tax Officer. In any event, I am not satisfied that the remedy provided by Section 33A is such an effective specific remedy at law which should disentitle me from making an order on this appln.

17. I am, therefore, of the opinion that it was incumbent on the Income Tax Officer either to withdraw the attachment effected on 18-8-1949 or at least to revise the same so as to make it consistent with the order for instalments which has been made by the Certificate Officer, 24 Parganas. I am of the opinion, therefore, that the applt. is entitled to a relief on this appln. & the direction which I give is that the Income Tax Officer do revise the order which has been made on 18-3-1949 & make it consistent with the order for instalments which have been granted by the Certificate Officer, 24 Parganas, on 25-5-1950.

18. The petnr. is entitled to the costs of this appln. Certified for two counsel.

