

(1956) 06 CAL CK 0007

In the Calcutta High Court

Case No : Ordinary Original Civil Jurisdiction Matter No. 137 of 1954

JAGANNATH HANUMANBUX

APPELLANT

Vs

Income Tax OFFICER.

RESPONDENT

Date of Decision : 28-06-1956

Acts Referred:

Income Tax Act, 1961 — Section 29, 46(2), 46(5A)
Public Demands Recovery Act — Section 7

Citation : (1957) 31 ITR 603

Judgement

The facts in this case are shortly as follows :

Ladhuram Taparia and Ganpatrai Taparia are two brothers. Hanumanbux and Ganeshmall are the sons of Ladhuram. Sovachand is a son of Ganpatrai. There are four firms, namely, (1) Ladhuram Taparia, (2) Jagannath Hanumanbux, (3) Jagannath Harnarain, and (4) Ganpatrai Jorawarmal. It is claimed that these are partnership firms. The only outside partner is Bhairadan Maheswari in No. 1 firm and Mahalchand Baid and Kanayalal Lohia in firm No. 4. So far as firm No. 2 is concerned, with which we are directly interested in this application, it is claimed that the partners are Hanumanbux and Ganpatrai. These firms were being assessed for Income Tax separately and the firm of Jagannath Hanumanbux was also registered under the Income Tax Act separately, until the assessment year 1945-46. In that year, the Income Tax authorities found that all these firms really were owned by Ladhuram and his brother Ganpatrai, carrying on business as Ladhuram Taparia, and in which Ladhuram was the dominant partner. It was held that the other persons who claimed as partners were mere employees, and at least one of them could not be traced and might not have existed at all. The original assessment order concerned six firms, all of which were held to be benami business carried on by the firm of Ladhuram Taparia. Upon appeal, the Income Tax Appellate Tribunal, Calcutta, held that the above-mentioned four firms were all benami businesses of Ladhuram Taparia, but that the remaining two were partnership firms in which outsiders were interested. There have been further appeals from the Appellate Tribunal and the matter is now pending before

the Supreme Court. Meanwhile the firm of Jagannath Hanumanbux submitted a return for the year 1945-46. As has been mentioned above, the Income Tax authorities had already held that the firm did not consist of the two alleged partners, Hanumanbux and Ganpatrai, but was a business carried on in benami by the firm of Ladhuram Taparia. The authorities were, therefore, put in a very difficult situation. If they refused to assess the firm of Jagannath Hanumanbux and if the appeal now pending before the Supreme Court is successful, in that event, the assessment of the firm of Jagannath Hanumanbux might be barred by limitation. Therefore, what they have done is to make what is called a "protective assessment." A copy of the assessment order dated the 30th of March, 1950, is annexed to the petition and marked with the letter "A". The order recites that a return had been submitted by the firm of Jagannath Hanumanbux on the footing that Hanumanbux and Ganpatrai were the partners, which fact was not acceptable to the Income Tax authorities. The Income Tax Officer proceeded to say as follows :

"For the reasons elaborately discussed in file No. CC-II/492, I have come to the conclusion that the constitution of the firm shown in the return submitted by the assessee is not acceptable and the business styled Jagannath Hanumanbux does not belong to a firm consisting of (1) Hanumanbux Taparia and (2) Ganpatrai Taparia, as partners only as alleged. The assessee, however, in the return submitted has shown the profits from the firm of Jagannath Hanumanbux. With a view to safeguard the interest of revenue against any adverse finding arising, if any, on appeal, I am accepting the assessee's contention here and form the assessment as below....."

The firm has been assessed upon a total income of Rs. 1,94,367-0-0. Thereafter, there was a notice of demand u/s 29 of the Income Tax Act for payment of the sum of Rs. 1,15,334-10-0. The amount not having been paid, the Income Tax Officer forwarded a certificate to the Certificate Officer, 24 Pargannas, Alipore, u/s 46 (2) of the Indian Income Tax Act. In the certificate proceedings, notice u/s 7 of the Public Demands Recovery Act was served on the petitioners and they preferred an objection u/s 9. The objection was that under the orders of the Appellate Tribunal, the income of the firm has to be treated of Ladhuram Taparia. The Income Tax authorities asked that these certificates against Jagannath Hanumanbux be kept pending.

In the affidavit-in-opposition affirmed by A. Bukshi dated January 15, 1955, paragraph 9, it is stated as follows : "With reference to paragraph 9 of the said petition, I admit that a certificate u/s 46 (2) of the Indian Income Tax Act was forwarded to the Collector for recovery of the arrears due from the petitioner in respect of the assessment year 1945-46, But I say that the Certificate Officer was requested not to execute the certificate in view of the fact that the demand nevertheless was in respect of a protective assessment."

The Certificate Officer did not accede to this request but cancelled the certificate against Jagannath Hanumanbux, holding that these certificates should merge

with the certificates issued against Ladhuram Taparia. It is stated that the Income Tax authorities have appealed against this order.

On the 12th August, 1954, and the 25th August, 1954, the Income Tax authorities have issued seven notices to various parties u/s 46 (5A) of the Indian Income Tax Act. The parties to whom such notices have been given are as follows : (1) The Liquidator, Bengal Textiles Association, 22 Chittaranjan Avenue, Calcutta; (2) The Manager, United Commercial Bank Ltd., Burra Bazar Branch, 160, Cross Street, Calcutta; (3) The Manager, Bank of Jaipore Ltd., Jodhpur; (4) The Manager, Bank of Bikaner, 8 Lyons Range, Calcutta; (5) Srimati Surabala Dassi; (6) Sitanath Pal; (7) Heranath Pal; (8) Jagannath Pal and (9) Ramnath Pal, all of No. 102, Hari Ghosh Street, Calcutta.

In each case it has been stated that they held monies on behalf of Messrs. Jagannath Hanumanbux and its partner; and inasmuch as a sum of Rs. 1,15,334-10-0 was due from that firm, they were directed to make over the sums due from them, or held buy them on account, and not to pay the same to the said firm of its partners.

This rule was issued on the 8th day of September, 1954, upon the respondent, the Income Tax Officer, Central Circle II, to show cause why a writ in the nature of mandamus should not be made by this court directing the respondent to cancel, and/or withdraw the notices u/s 46 (5A) of the Indian Income Tax Act, and forbear from giving effect to them.

The argument of Mr. Roy, appearing on behalf of the petitioner, is very simple. He says that the Income Tax Act authorities have held that there is no such firm as Jagannath Hanumanbux, and, therefore, a return made but such a firm is nit acceptable. Nevertheless, they have proceeded to assess the very same firm as a partnership firm consisting of the partners Hanumanbux and Ganpatrai and are proceeding to enforce the tax. This, Mr. Roy says, is not allowable in law. Mr. Roy says, points out that section 2 (2) of the Income Tax Act defines "assessee" so as to mean a person by whom Income Tax or any other money was payable under the Income Tax Act. An assessment against a fictitious person is not possible. Mr. Roy points out to those cases where it has been held that assessment against a dead person was a nullity. He also points out that a firm is a distinct entity for purposes of assessment (Talipatigala Estate v. Commissioner of Income Tax, Madras; Commissioner of Income Tax, West Bengal v. A. W. Figgis). Mr. Roy continued to argue that the procedure adopted was one which is not to be found in the Indian Income Tax authorities invent new and novel procedures for the realisation to tax. He quoted the Privy Council decision of Commissioner of Income Tax, West Punjab etc. v. Tribune Trust, Lahore, which laid down that the remedy arising out of the Indian Income Tax Act must be confined within the four corners of the Act. If the Indian Income Tax Act does not provide for a situation like this, then it cannot be helped. Learned counsel quoted the case of Vestey's (Lord) Executors and Another v. Inland Revenue Commissioners, where Lord Normand stated as follows :

"Parliament in its attempts to keep pace with the ingenuity devoted to tax avoidance may fall short of its purpose. That is a misfortune for the taxpayers who do not try to avoid their share of the burden, and it is disappointing to the Inland Revenue. But the Court will not stretch the terms of taxing Acts in order to improve on the efforts of Parliament and to stop gaps which are left open by the statutes. Tax avoidance is an evil, but it would be the beginning of much greater evils if the Courts were to overstretch the language of the statute in order to subject to taxation people of whom they disapproved."

Finally, Mr. Roy argued that the matter was to be governed entirely by the Indian Income Tax Act and we should not act upon an analogy of the English Act : *Bijay Singh Dudhuria v. Commissioner of Income Tax, Calcutta*.

The point for consideration in this case is, therefore, as to whether it is possible to have such a thing as protective assessment under the Indian Income Tax Act, and to the nature thereof. To start with, it is conceded that there is no specific provision in the Indian Income Tax Act, and that the concept has been borrowed from the law and practice as prevalent in England. The leading case on the subject is *Attorney-General v. Aramayo & Others*. The facts of this case were as follows :

An English company was formed to carry on the business of general merchants and mine-owners in Bolivia. The control and management of its Bolivian business was transferred to a local board of that country, the duties of the directors in London being confined to the declaration of dividends and the formal business necessary for its continuance as a company. The English company denied liability to pay Income Tax. The Special Commissioners made an assessment on the Local Board in the name of the London firm as agents. As the tax due under the assessment remained unpaid, proceedings for its recovery were commenced by way of information against the individual members of the London firm who then took various objections. Meanwhile as a precautionary measure before the time limit expired, the Special Commissioners made an alternative assessment for 1917-18 on the company itself in the same amount as the previously made on the Local Board.

One of the questions raised was that this alternative assessment was valid or not. Rowlatt, J., said as follows (p. 484) :

"Now I pass from that information to the two cases stated; they arise out of these facts : When the matter had been dragging on for nearly two years more, just before the time ran out, the Revenue to make sure of their ground caused an assessment to be made upon the company (which undoubtedly, at any rate so far as the Special Commissioners were concerned, always wanted to go before them) as resident in London and not upon the Bolivian Board by its agent here. So that the case comes before me alternatively; is this business liable to Income Tax either by way of assessment upon the firm as representing the Bolivian Board, or by way of assessment upon the company ? If it is resident in London,

of course it is assessed directly in its own name. Now it looks at first sight that one or the other must be right if these profits are assessable at all. There cannot be any difficulty about the person to be assessed now, as you have them both alternatively before the Court. But Mr. Edwardes Jones does not agree with that. He says, No, because you have one assessment which may be on the wrong man, that prevents you having another assessment on the right man. That seems to me a hard saying, and I am perfectly satisfied that it is not well founded. Of course there are provisions in the Act which say you shall not have two assessments for the same property on the same person; if one has gone wrong, you cannot have another. If it is thought that we have assessed this business in the name of Robinson and it is really carried on by Smith, if it is Smith now and it was Smith or Robinson before, I cannot see the slightest objection to it in common sense, and I cannot see any from the point of view of the statute; so that that difficulty goes and the next thing I have to consider is who is the right person to be assessed."

This is the kind of assessment which is known as protective assessment. There is no reported authority in India with regard to protective assessment but the matter came up before the court of appeal in this High Court in *B. K. Bagchi and Another v. Messrs. Ladhuram Taparia*. Harries, C.J., considering the same set of facts that we are considering here, stated as follows :

"The Income Tax authorities also made an alternative assessment, assessing each of the firms separately and this was what is referred to as a protective assessment and is permissible in order to prevent assessment being barred by limitation."

Thus, I must hold that under the Indian law it is permissible to make a protective assessment. I do not think that the principles of law put forward by Mr. Roy are in any way wrong. There can be no doubt that taxing statutes must be strictly construed in favour of the assessee. It is also true that there cannot be any assessment excepting of an assessee, and there can be no doubt that the Income Tax authorities must confine themselves within the four corners of the statute and not invent new procedures outside the limits of the Indian Income Tax Act. But let us see what they have really done. It is not as if they have made an assessment outside the Indian Income Tax Act. The trouble is that owing to the various litigations mentioned above, it is not established finally as to who is the proper assessee. It is not permissible to assess a fictitious person, but I do not see that there is anything to prevent assessment of a person of whom it is not finally known whether he is fictitious or not. What is the most important thing to consider is the running of time. If the Income Tax authorities are precluded from making an alternative assessment, then by the time the disputes are over, the real assessment would be barred. Therefore, I cannot see why an alternative assessment, that is to say, protective assessment, should be declared to be illegal. But while a protective assessment is permissible, I do not see that a protective recovery is to be allowed. It is one thing to say that the

authorities are merely making an assessment and leaving it as a paper assessment until the matter is decided one way or the other, and another thing to say that at one and the same time they could not only make two assessment in respect of one set of dues but proceed to realise both. Mr. Meyer argues that if in the case of protective assessment the principle is followed, namely, that the revenue has to be protected against the bar of limitation, equally, protective recovery should be allowed because recovery also may be barred. I cannot agree. If the Income Tax authorities decided that the present assessment was the valid assessment and kept another alternative assessment in cold storage, then I could understand the force of the argument that the present assessment should proceed to the stage of recovery. But having once stated that the present assessment was not correct, because according to the authorities the firm was mere benamidar of another firm, it would be entirely against the spirit and tenor of the Income Tax Act to proceed to recover the tax on the basis of the professedly wrong assessment. From this point of view, the notices given to the various parties to pay money appear to be defective. The question, therefore, is as to whether on the facts and circumstances of the case as I have stated above, the petitioner is entitled to any relief in this application. The position is that the monies in the hands of these various parties are prima facie due to Messrs. Jagannath Hanumanbux. If that firm consists of the partners Ganpatrai and Hanumanbux, then the Income Tax authorities will be entitled to receive these sums direct. But supposing that they are not the partner and that Ladhuram Taparia is the real assessee and that Jagannath Hanumanbux is the benamidar of Ladhuram Taparia, then also the monies in the hands of these parties will be payable to the Income Tax authorities, because taxes are payable Ladhuram Taparia and notices u/s 46 (5A) have also been served, in respect of trades due from that firm. If that is the position, then they should this Court come to the aid of the petitioner, which will only mean that it will be enabled to take away the monies and defeat the claim of the Income Tax authorities. Mr. Meyer on behalf of the Income Tax authorities agreed to give an undertaking that they will take this money and keep it in a suspense account until the Supreme Court had decided the rights of the parties on be way or the other, and further that the Income Tax authorities will not execute or enforce the taxes twice over, that is to say, once against Jagannath Hanumanbux and a second time against Ladhuram Taparia. The petitioners, however, are not agreeable to this course. It is quite evident that they are anxious to take away the money. After all, relief under article 226 is discretionary and it ought not to be exercised so as to defeat a lawful claim, particularly that of the States revenue. So far as these debtors are concerned, I do not think that they can with any safety to themselves pay the monies to Messrs. Jagannath Hanumanbux. Under the circumstances, I do not see why I am compelled to make an order which will confuse all these debtors and be instrumental in aiding the immediate petitioner before me to realise monies and take it beyond the reach of the Income Tax authorities. While I cannot hold that a protective recovery is permissible in law, I do hold that on the facts and circumstances of the cases, this Court ought not to come to the aid of

the petitioner under article 226 of the Constitution. If they have any other relief and remedies, it is open to them.

In my opinion, the proper order will be to discharge this rule but record the undertaking given to Court by the respondent through his learned counsel that if any monies are recovered by virtue of notice u/s 46 (5A) it would be kept in a suspense account and that there will not be a double recovery, namely, once against Jagannath Hanumanbux and for the same amount against Ladhuram Taparia. There will be no order as to costs. Interim orders are discharge.

Ordered accordingly.