
(1955) 05 CAL CK 0006

In the Calcutta High Court

Case No : Civil Rules No's. 2453 and 2454 of 1954

KASHIRAM AGARWALLA

APPELLANT

Vs

COLLECTOR OF 24-PARGANAS AND OTHERS.

RESPONDENT

Date of Decision : 26-05-1955

Acts Referred:

Income Tax Act, 1961 — Section 46(2)

Citation : 62 CWN 83 : (1958) 33 ITR 800

Hon'ble Judges : Guha, J; Das Gupta, J

Bench : Full Bench

Judgement

DAS GUPTA, J. - These rules are directed against proceedings now pending against the petitioners before the Collector of 24-Parganas for their arrest and detention for recovery of Rs. 41,39,617-13-0 on account of Income Tax and excess profit tax. This sum is made up of different sums said to be due from a Hindu undivided family, Messrs. Sriram Jhabarmal, of which Nandaram Agarwalla was the karta, on account of Income Tax for the years 1944-45, 1945-46 and 1947-48 and on account of several assessments of account of excess profit tax. In each case the Income Tax Officer sent a certificate to the Collector of 24-Parganas, Alipore, stating that a certain sum was due on account of Income Tax or excess profit tax and that it was in arrears. In one case the amount was mentioned as due from Messrs. Sriram Jhabarmal while in the other cases the sums are said to be due from Nandaram Agarwalla, as karta of the undivided Hindu family of Messrs. Sriram Jhabarmal. In all these cases certificate proceedings were commenced under the Public Demands Recovery Act at the instance of the Collector for recovery of the sums said to be in arrears. While these proceedings were pending, the Commissioner of Income Tax as representing the Union of India prayed to the Collector of 24-Parganas for recovery of the amounts mentioned in the certificate sent by the Income Tax Officer by arrest and detention of Nandaram Agarwalla, karta of the undivided Hindu family of Messrs. Sriram Jhabarmal and Kashiram Agarwalla, a member of the Hindu undivided family of Messrs. Sriram Jhabarmal. The Collector

proceeding to use for the recovery of the sum the powers which a civil court has in recovering amounts due under a decree, issued notice, in accordance with the provisions of Order XXI, rule 37, of the Code of Civil Procedure, on these persons to show cause why they should not be arrested and detained. Showing cause they contended inter alia that the Collector had no jurisdiction to proceed in this manner. The Collector has overruled that contention and has directed that evidence should be taken, apparently to ascertain whether the conditions mentioned in the proviso to section 51 of the CPC have been satisfied or not.

The petitioners now ask for this courts interference under article 227 of the Constitution, their case being that the Collector has no jurisdiction to recover the alleged arrears in the manner in which a civil court may proceed for recovering the amounts due under a decree.

The Collectors jurisdiction, if it exists at all to recover the arrears in this manner, rests entirely on the provisions of section 46(2) of the Income Tax Act. These provisions are in these words :

"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, a civil court has for the purpose of the recovery of an amount due under a decree."

The main ground taken before us in support of the contention that the Collector has no jurisdiction though this ground was not taken in the original application is that the proviso to section 46(2) is ultra vires the Constitution. The argument may be summarised thus : Under the proviso the Collector has at least two alternative modes of recovering the dues, one by proceeding under the Public Demands Recovery Act and the other by proceeding in the manner laid down in section 51 of the CPC and the relevant rules of Order XXI. If he proceeds under the Public Demands Recovery Act, and has a certificate drawn up under that Act, even then the assessee may be arrested under the provisions of the Public Demands Recovery Act. If action is taken under the Public Demands Recovery Act, the assessee has an opportunity of showing that there was in fact no liability at all and can attack the certificate proceedings in other ways as null and void; further, if the Certificate Officers decision is against him, he has remedy by way of appeal. If the Collector proceeds under the provisions of section 51 of the CPC the assessee has no chance of showing that in fact he is not liable and there is no appeal against the Collectors decision. As the proviso stands it is open to the Collector to proceed at his sweet will in one case under the Public Demands Recovery Act and in another case under the Civil Procedure Code. As the provisions in the latter procedure are obviously more rigorous than those under

the procedure of the Public Demands Recovery Act, this freedom of the Collector to proceed in one way against one assessee and under the other procedure against another assessee without any indication by the Legislature as to how he will use his discretion, amounts to denial of equal protection of laws.

In my judgment this contention is unsound. It is important to remember that the law provided in section 46(2) is the same for all assessees. The law does not provide that some assessees may be dealt with in one manner while others belonging to the same class may be dealt with in another. That was the position in section 5(4) of the Income Tax Investigation Commission Act. That became again the position in section 5(1) of that Act, after section 34 of the Income Tax Act was amended. It was on this ground that the Supreme Court held section 5(4) of the Income Tax Investigation Commission Act to be ultra vires the Constitution in Mohtas case, and again held in Sree Meenakshi Mills case, section 5(4) of the Act to be ultra vires. I am unable to see how these decisions at all help the contention of the present petitioners that the provisions of section 46(2) of the Income Tax Act is void. The law as enacted in the proviso is the same for all assessees. Every assessee is liable to be proceeded against in the manner provided in the CPC or in any other mode including that under the Public Demands Recovery Act. The question is : does the fact that the Collector may in his discretion apply one procedure in one case and another procedure in another case, the second procedure being more rigorous than the first, offend against article 14 of the Constitution ? It appears to be that if this contention be correct, the various provisions of law which provide alternative remedies leaving it to the court to give any one of those remedies to a litigant at his discretion would be void. The provisions of the Indian Penal Code providing for alternative penalties for the same offence would also become void. These considerations would, in any case, make us pause before holding that the provision in law of the alternative procedure were everybody is liable to be proceeded against in either procedure, but the authority proceeding is given full discretion which procedure to apply, means a denial of equal protection of law. The matter is, in my judgment, set at rest by the decision of the Supreme Court in Kedar Nath Bajorias case. It was contended there that as under the impugned Act, it was open to Government to allot some cases to the special tribunals and not to allot other cases exactly similar to such tribunals, there was denial of equal protection of laws. In repelling that argument their Lordships of the Supreme Court said : "It has been further contended that even assuming that the scheduled offences and the persons charged with the commission thereof could properly form a class in respect of which special legislation could be enacted, section 4 of the Act is discriminatory and void, vesting, as it does, an unfettered discretion in the Provincial Government to choose any particular case of a person alleged to have committed an offence falling under any of the specified categories for allotment to the special court to be tried under the special procedure, while other offenders of the same category may be left to be tried by ordinary courts. In other words, section 4 permits the Provincial Government to make a discriminatory choice among

persons charged with the same offence or offences for trial by a special court, and such absolute and unguided power of selection, though it has to be exercised within the class or classes of offences mentioned in the schedule, is no less discriminatory than the wider power of selection from the whole range of criminal law conferred on the State Government by the legislation impugned in Anwar Ali Sarkars case. The vice of discrimination, it is said, consists in the unguided and unrestricted power of singling out for different treatment one among a class of persons all of whom are similarly situated and circumstanced, be that class large or small. The argument overlooks the distinction between those cases where the Legislature itself makes a complete classification of persons or things and applies to them the law which it enacts, and other where the Legislature merely lays down the law to be applied to persons or things answering to a given description or exhibiting certain common characteristics, but being unable to make a precise and complete classification, leaves it to an administrative authority to make a selective application of the law to persons or things within the defined group, while laying down the standards or at least indicating in clear terms the underlying policy and purpose, in accordance with, and in fulfilment of, which the administrative authority is expected to select the persons or things to be brought under the operation of the law. A familiar example of this type of legislation is the Preventive Detention Act, 1950, which having indicated in what classes of cases and for what purposes preventive detention can be ordered, vests in the executive authority a discretionary power to select particular persons to be brought under the law. Another instance in point is furnished by those provisions of the Criminal Procedure Code which provide immunity from prosecution without sanction of the Government for offences by public servants in relation to their official acts, the policy of the law being that public officials should not be unduly harassed by private prosecution unless in the opinion of the Government, there were reasonable grounds for prosecuting the public servant which accordingly should condition the grant of sanction. It is not, therefore, correct to say that section 4 of the Act offends against article 14 of the Constitution merely because the Government is not compellable to allot all cases of offences set out in the schedule to special judges but is vested with a discretion in the matter."

This is, in my judgment, clear authority for holding that where the law is the same for all, the provision of alternative procedure making it possible for the relevant authority to apply one procedure in some cases and the other procedure in other cases does not offend against article 14 of the Constitution.

The second ground urged on behalf of the petitioners that on the face of it, the assessment under the Income Tax Act was invalid as there was no valid law under which the assessment could be made. It is pointed out that the Finance Acts enacting the rates for assessment were extended to the excluded area, where the business of the joint family was carried on, u/s 92(1) of the Government of India Act, several days later than the day when the day when the Act came into force in India. It is contended that the Governor could not give any retrospective operation to any law extended therein u/s 92(1); and so there

could be no valid assessment as regards the period from the 1st April of the year of assessment which had elapsed before the date of the notification and consequently, no valid assessment for the year at all. This argument appears to me to be entirely misconceived. The liability to Income Tax is u/s 3 of the Income Tax Act. The annual Finance Acts legislate about the rate of tax and other facts that effect the assessment. Where, therefore, say, on the 6th April, 1945, a law is passed that for the year commencing with the 1st April certain Income Tax would be chargeable at a certain rate, there is no question of the retrospective operation at all. The law does not exist in the period from the 1st April to the 5th April. It comes into existence on the 6th April, and when it comes into existence it provides that for the unit 1st April to the following 31st March a certain rate will be chargeable. If assessment was made on one of these days, between the 1st and the 5th April, on the basis of the provision that became law on the 6th April, that assessment would be void unless the Act was given retrospective operation, for assessment on those dates could be made u/s 67A of the Income Tax Act at the old rates. But when the assessment is made on the 6th April or later, there is no question of retrospective operation at all, and the assessment would be valid in respect of the entire unit of the year for which the enactment is made. The fact, therefore, that the Finance Act became law in the excluded area on a date later than the date on which it became law in the excluded area on a date later than the date on which it became law in India is of no consequence, for on the date the assessments were made the Finance Act had already become law.

A somewhat similar question arose before an English court in *Eastwood v. Inland Revenue Commissioners*; section 21(1) of the (English) Finance Act of 1936 deals with income for the benefit of a child in any year of assessment. The income under the settlement, for the first relevant year was all applied for the benefit of the child before the date of the royal assent, viz., July 16, 1936. It was argued that subsection (1) would only apply to the case of an income received after that day. This argument was rejected. Lord Greene, M.R., observed as follows :

"It invariably happens that the Finance Act for a particular year does not pass into law until the then current financial year has to some extent elapsed, but the time unit with which the Act deals for the purposes of assessment is the financial year, and it deals normally with the taxable income in respect of the then current financial year. That does not mean that it is retrospective."

In the case of *Chatturam v. Commissioner of Income Tax*, the Federal Court had to deal with a notification u/s 2(1) by which the Governor of Bihar directed that the Indian Income Tax (Amendment) Act, 1939 (VII of 1939), the Income Tax Law (Amendment) Act, 1940 (XII of 1940), the Excess Profits Tax Act, 1940 (XV of 1940), and the Indian Finance Act, 1940 (XVI of 1940), shall be deemed to have been applied to the Chota Nagpur Division and the Santal Parganas District. It was argued that the Governor had no authority to apply the different Acts

retrospectively. Their Lordships did not think it necessary to decide this question, but proceeding on the assumption that the notification was invalid in so far as it gave retrospective operation to the Acts, observed :

"Even so the appellants contention about the invalidity of the order of assessment made against them must fail. It is conceded that the Finance Act of 1940 did come into operation in the partially excluded areas from the date of the publication of the Notification, viz., 26th May, 1940. The dispute is only about its retrospective operation. The assessment under the circumstances would be proper because on the 26th May, 1940, when the Notification was issued, the assessment proceedings were pending before the Income Tax Officer. The blank left in section 3 of the Income Tax Act was filled in and the Income Tax Officer had therefore to make a computation on the footing of the then existing legislation and pass his order. On that interpretation of the Notification therefore the assessment order passed by the Income Tax Officer would be valid."

For the reasons mentioned earlier and on the authority of *Chatturams* case in which that reasoning appears to me to have received support, I hold that the different Finance Acts which were extended to Kalimpong where the business was carried on, several days after this did not affect the validity of the assessment.

The next ground urged is that the present proceeding before the Collector was barred by the provisions of section 46(7) of the Income Tax Act. The relevant portion of section 46(7) is in these words :

"..... no proceedings for the recovery of any sum payable under this Act shall be commenced after the expiration of one year from the last day of the financial year in which any demand is made under this Act."

It has been urged by Mr. Das on behalf of the petitioners that these proceedings may be considered to be within time only if the proceedings under the Public Demands Recovery Act were alive and he wanted to convince us that these proceedings, under the Public Demands Recovery Act are null and void. I am unable to seem however, how the nullity or otherwise of the proceedings under the Public Demands Recovery Act affect this question. These proceedings before the Collector are quite independent of the proceedings under the Public Demands Recovery Act. They could be commenced even if no action under the Public Demands Recovery Act was at all taken. We have, therefore, refused to go into the question whether the certificate proceedings under the Public Demands Recovery Act are null and void or suffer from any defect at all.

But though these are independent proceedings they are still subject to the limitation provision in section 46(7) of the Act. The question is : when did the proceedings commence ? If they are held to commence only with the application on behalf of the Union of India for action under the provisions of the CPC for the arrest and detention of the petitioners, they are well beyond the last date provided in section 46(7). It is necessary, however, to take note of the

explanation in section 46(7) that a proceeding for the recovery of any sum shall be deemed to have commenced within the meaning of this section, if some action is taken to recover the whole or any part of the sum within the period hereinbefore referred to.

In my opinion, forwarding of the certificate by the Income Tax Officer is "some action" taken to recover the dues within the meaning of the explanation and consequently the proceedings for recovery commenced as soon as the certificate was forwarded. It is important to remember that the limitation is provided against the person seeking to recover. The person seeking to recover is the Income Tax Department. It would be odd to think that the action taken to commence the proceedings would be action by somebody other than the person who seems to recover. The Collector or any other authority that may under the law take action to recover after the Income Tax Officer has taken the initial action by forwarding the certificate may act quickly or otherwise. It cannot be believed that the Legislature intended that delayed action on their part would have the effect of barring the remedy of the Income Tax Department. For these reasons, I am of opinion, that the action taken by the Income Tax Officer in forwarding the certificate to the Collector u/s 46(2) is action on the taking of which a proceeding shall be deemed to have commenced.

It may be mentioned that this view was taken also by the Madras High Court in *Aruna Devi Jajodia v. Collector of Madras*.

In dealing with the question of limitation I have already said that action taken under the CPC can in law be taken by the Collector even though no action has been taken under the Public Demands Recovery Act. Mr. Das tried to persuade us that unless the Collector has already proceeded to recover the tax in exercise of other powers, he cannot proceed to exercise the powers which the civil court has for the purpose of recovery of an amount under a decree under the CPC and that consequently in this case though the Collector asked the certificate officer to take necessary action and the certificate proceedings were commenced under the Public Demands Recovery Act the certificate proceedings being for various reasons void, the Collector had no authority to exercise the power under the Code of Civil Procedure, even apart from the question of limitation. I can see nothing in the words of section 46 or anywhere else in the Act to justify a conclusion that the Collector must have already taken action under his other powers or that he must be continuing in that action in order to be able to exercise the powers under the Code of Civil Procedure. The words "without prejudice to any other power of the Collector in this behalf" clearly authorise the Collector to use the power which the civil court for the purpose of recovering a sum due under the decree holds under the CPC independently of the exercise of any other power.

It appears that on the date when the Union of India made the application to the Collector for use of powers under the CPC appeals were pending against the different assessments. We are informed that two of these appeals have been

successful and that the assessments have been set aside. If that be the position, there are no dues in respect of those two assessments and the Collector cannot take action to recover the dues said to be in arrears in respect of those assessments. It was contended by Mr. Das that even as regards the other assessments, as appeals are pending now, the Income Tax Officer was bound in law to treat the amounts as not in default. If that was the correct position in law, it would necessarily follow that there are no arrears to be recovered u/s 46(2) and the Collector has no jurisdiction to direct arrest and detention of the assessee. But I am unable to agree that that is the correct legal position. The relevant provision of the Income Tax Act appears in section 45 thereof which after specifying the time within which payment must be made proceeds to say that 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. It was contended by Mr. Das that "may" here should be interpreted as "must". I am unable to accept this argument. If "may" is to be interpreted as "must", the words "in his discretion" become, in my judgment, meaningless. Mr. Das has drawn our attention to the judgment of Mr. Justice Bose in *Ladhuram Taparia v. Bagchi*, in which the learned Judge expressed himself in these words :

"... there is a duty on the respondent to refrain from enforcing payment of the tax under the notice of demand and to grant extension of time and stay their hands till the appeal is disposed of by the appellate authority."

On that view Mr. Justice Bose directed the respondent, the Income Tax Officer, to forbear from taking steps by enforcing the notice of demand until the disposal of the appeal. This decision was, however, reversed on appeal, while the main ground on which the appeal was allowed was that no appeal had been filed against the assessment, and so the Income Tax Officer could not possibly be asked to use his discretion. Harries, C.J., delivering the judgment observed :

"Once an appeal was filed, however, it would be for the Income Tax Officer then to consider whether in the particular circumstances it would be just and proper to treat them as defaulters. If, for example, the questions involved in the appeal were difficult and the prospects of success in the appeal were bright, it would be a very bold Income Tax Officer who could hold that the assessee was still a defaulter. The matter is in his discretion having regard to the circumstances of the case."

With great respect I am unable to agree with the view taken by Mr. Justice Bose, and respectfully agree with the observations of Harries, C.J., that whether or not an assessee would be considered to be in default after an appeal is filed against the assessment is a matter entirely in the discretion of the Income Tax Officer, who has, however, to exercise his discretion after due regard to the circumstances of the case. If in a particular case, the question of exercise of discretion has not been considered properly by the Income Tax Officer that might

be a good ground for issuing a writ directing him to treat the assessee to be not in default. But that question cannot be considered by us in the present rule. The position is that the Income Tax Officer has not in exercise of his discretion treated the assessee to be not in default. He is not, however, bound to do so and so and so the assessee must be held for the purpose of the present case to be in default.

Mr. Das has also urged that as the Collector appears to be the certificate holder in some of the cases, he is an interested party and cannot bring an unbiased mind in the disposal of this case. It appears to me that the Collector is the certificate holder only as a matter of form. He has no concern with the Income Tax Department and cannot be said to be interested in the recovery except in so far as he is bound to exercise certain powers to recover the tax. In fact, he is mentioned as the certificate holder in only two of the certificate proceedings. But even if he was mentioned as the certificate holder in all the cases, it would, in my opinion, be wholly improper to think that he is an interested party. There is, in my judgment, no reason to think that he will be biased in favour of the Income Tax Department.

All the grounds urged in favour of Nandaram Agarwalla, therefore, fail and it must be held that the Collector has jurisdiction to continue the proceedings against Nandaram Agarwalla. Mr. Das has repeatedly said that it is unfair that his client should be arrested and detained even though the results of the appeals now pending may be that the assessments will be set aside or reduced. For myself I would think it ordinarily proper that the Collector should stay his hands till the appeals are disposed of specially when the amounts are large. There might be extraordinary circumstances in which it will be right not to stay his hands even though appeals might be pending. In any case that has nothing to do with the question of jurisdiction and the rule obtained by Nandaram Agarwalla must be discharged.

As regards Kashiram Agarwalla, the additional ground taken that even supposing, as stated, that he is a member of the undivided Hindu family which has been assessed, he is not liable to arrest, requires consideration. There can be no doubt that Kashiram is liable for the debt even though he may not be the assessee. It is equally clear that the joint family property in his hands is liable for all the debts of the joint family, but properties other than those which belong to the joint family cannot be touched by any creditor of the joint family. The position, in my opinion, seems to be the same as regards the liability for the Income Tax. As the assessment is in this case in the name of the Hindu undivided family Messrs. Sriram Jhabarmal, it is proper to consider the assessment made only with respect to the income of the business. In the case of families whose hereditary occupation is trade, there is no distinction between their family properties and the trade assets and the whole of their joint family property would, therefore, be also assets of the business - Vide Mayne on Hindu Law, page 390. Assuming that the hereditary occupation of this family is trade, the entire property of joint

family is liable for the Income Tax assessed. But property which is the personal property of some members is not liable for the debt. Before, therefore, Kashiram may be held to be liable to arrest or detention for the recovery of the Income Tax arrears, it must be shown that Kashiram was in charge of some part of the joint family property. That case has not been made; Nandaram is said to be the sole karta of the undivided Hindu family and Kashiram only an ordinary member, without any share in managing the property. When he is not in charge of any portion of the joint family property which alone is available for payment of the debt, I cannot see how the question of his doing any of the acts mentioned in clauses (a) and (b) of the proviso to section 51 can arise at all. I have, therefore, come to the conclusion that as Kashiram Agarwalla is not a karta of the joint family and is not said to have charge and control of any part of the joint family property, the Collector has no jurisdiction to recover the arrears in question by his arrest and detention.

I would, therefore, make the rule obtained by Kashiram Agarwalla absolute and quash the proceedings pending against him before the Collector.

In view of the circumstances of the case, I would order that the parties will bear their own costs.

GUHA, J. - I agree.