

(1973) 03 KL CK 0001
In the High Court Of Kerala
Case No : O.P. No. 6144 of 1970

K.P. Mathew

APPELLANT

Vs

AITO, Alwaye

RESPONDENT

Date of Decision : 21-03-1973

Acts Referred:

General Clauses Act, 1897 — Section 13(2)
Income Tax Act, 1961 — Section 159

Citation : (1974) 96 ITR 121

Hon'ble Judges : M.U. Issac, J

Bench : Single Bench

Advocate : N. Parameswaran Moothath, for the Appellant; P.A. Francis, Government Pleader, for the Respondent

Judgement

M.U. Isaac, J.—This case raises an important question, which though simple, has become difficult to answer in the light of various judicial pronouncements. The question is whether an assessment of the income of a deceased person made without issuing notice to all his legal representatives is wholly bad under law, or whether it is good at least in respect of those legal representatives to whom all the notices have been duly issued. The case arises under the Agricultural Income Tax Act, 1950. The relevant provisions in this Act and in the Income Tax Act, 1961 are similar; and the same question would arise also under the latter Act. So I issued notice to the Income Tax Counsel of the Central Government; and I had the able assistance of Shri. P.A. Francis, Counsel for the Central Revenue, who placed before me all the relevant decisions on the question. It is now necessary to briefly state the facts of the case. One Ittiachan Poulouse, who was an assessee under the Agricultural Income Tax Act, 1950 within the jurisdiction of the respondent, the Agricultural Income Tax Officer, Alwaye, filed a return of his total agricultural income for the assessment year 1970-71. In response to a notice issued under S. 18 (2) of the Act, he produced his books of account before the respondent on 26-6-1970 in support of the return. The accounts appeared to be defective and unacceptable. The respondent issued a notice to the assessee on

21-10-1970 to show cause why his accounts should not be rejected and his income assessed to the best of judgment for the reasons and in the manner stated in the notice. The assessee died intestate on 26-9-1970, leaving three sons as his legal representatives. The petitioner is one of them. The above notice was issued to the assessee, without knowing about his death. The notice was, however, received by the petitioner, who filed an objection to the proposed best judgment assessment. The objection was over-ruled; and the respondent, by his order Ext. P-4 dated 30-10-1970, made an assessment determining the total income to the best of his judgment. The name of the assessee is described in the order as "Shri Poullose Mathew for and on behalf of late Shri. Ittiachan Poullose". Shri. Poullose Mathew is the petitioner. Admittedly, the assessment was made without issuing notice to the other two legal representatives. The contention is that such an assessment is bad under law.

2. S. 24 of the Agricultural Income Tax Act, 1950 contains the provision for assessment of the legal representatives of a deceased person in respect of his income. That section reads:

24. Tax of deceased person payable by representative. (1) Where a person dies his executor, administrator or other legal representative shall be liable to pay out of the estate of the deceased person, to the extent to which the estate is capable of meeting the charge the agricultural income tax assessed as payable by such person or any agricultural income tax which would have been payable by him under this Act if he had not died.

(2) Where a person dies before the 1st June in any year or before he is served with a notice under Sub-section (2) of S. 17 or under S. 35, as the case may be his executor, administrator or other legal representative shall, on the serving of the notice under subs (2) of S. 17 or under S. 35, as the case may be, comply therewith, and the Agricultural income tax Officer may proceed to assess the total agricultural income of the deceased person as if such executor, administrator or other legal representative were the assessee.

(3) Where a person dies without having furnished a return which he has been required to furnish under S. 17, or having furnished a return which the Agricultural income tax Officer has reason to believe to be incorrect or incomplete, such officer may make an assessment of the total agricultural income of such person and determine the agricultural income tax payable by him on the basis of such assessment, and for this purpose may, by the issue of the appropriate notice which would have had to be served upon the deceased person had he survived, require from the executor, administrator or other legal representative of the deceased person any accounts, documents or other evidence which he might under S. 17 or S. 18 have required from the deceased person.

The corresponding provision is S. 24B in the Indian Income Tax Act, 1922, and S. 159 in the Income Tax Act, 1961. The latter section contains a more detailed

provision. The law is the same under all these three Statutes regarding the procedure for assessment of the legal representative and the extent of his liability for the tax payable on the income of the deceased. The assessment has to be made on the legal representative in accordance with the same procedure as would have been necessary to assess the deceased, if he were alive.

3. In support of the contention that an assessment made against some of the legal representatives alone without issuing notice to the others is bad under law. reliance is mainly placed on the decision of the Supreme Court in *First Additional Income Tax Officer, Kozhikode Vs. Susheela Sadanandan and Another*, . In that case the assessee died leaving a registered will under which his widow, his eldest son and a third party were appointed executors. The family of the deceased consisted of his widow, two sons, three daughters and a grand-son through a deceased daughter. The will had made numerous bequests. After the death of the assessee, the Income Tax Officer issued notices to his eldest son as legal representative of the assessee for assessing his income alleged to have escaped assessment in respect of a number of years; and re-assessments were made against him in that capacity. Subsequently proceedings were taken to recover the tax so assessed, when the widow of the deceased objected to the proceedings on the ground that the re-assessment orders were bad under law, since they had been made without any notice to her. Dealing with the above question, the court said

Under S. 13(2) of the General Clauses Act (Central Act X of 1897), words in singular will Include their plural also. The expression "legal representative" in S. 24B of the Act takes in plurality of legal representatives. As pointed out by Mahajan J., as he then was, in AIR 1949 195 (Federal Court) , if there are two or more legal representatives of the deceased person, all must be impleaded to make the representation of the estate complete. The same principle was applied to co-executors; see *Muniyammal, Proprietrix, Salem Vs. Third Additional Income Tax Officer, Salem and Another*, and *Vedakannu Nadar v. Nanguneri Taluk Singikulam Annadana Chatram* (AIR. 1938. Mad. 982). The result is that if a person dies executing a will appointing more than one executor or dies intestate leaving behind him more than one heir, the Income tax Officer shall proceed to assess the total income of the deceased against all the executors or the legal representatives, as the case may be.

The court also dealt in the above case with the question of substantive representation of an estate, and quoted with approval the following passage from its earlier decision in *Daya Ram and Others Vs. Shyam Sundari*,

When this provision speaks of "legal representatives" is it the intention of the legislature that unless each and every one of the legal representatives of the deceased defendants, where there are several, is brought on record there is no proper constitution of the suit or appeal, with the result that the suit or appeal would abate? The almost universal consensus of opinion of all the High Courts is that where a plaintiff or an appellant after diligent and bona fide enquiry

ascertains who the legal representatives of a deceased defendant or respondent are and brings them on record within the limit limited by law, there is no abatement of the suit or appeal, that the impleaded legal representatives sufficiently represent the estate of the deceased and that a decision obtained with them on record will bind not merely those impleaded but the entire estate including those not brought on record.

Then the court proceeded to state that the above principle, though laid down in the context of suits and appeals, it was one of general application, and that there was no reason why it should not be invoked in the case of assessment proceedings. Ultimately the judgment under appeal was set aside, and the case was remitted to the High Court for fresh disposal after considering the points enumerated therein with the following observation;

We may make it clear that we have not finally expressed any opinion on questions of law or fact that arise in the case. Any observations that we have made on any point are not intended to be our final decision thereon, but only to afford a guide to the High Court to come to its own conclusion thereon. The High Court has liberty to consider all the contentions of the parties without being in any way hampered by our observations.

Suseela Sadanandan's case was again heard and disposed of by a Division Bench of this Court by judgment dated 18-11-1969. One of the questions considered by the Division Bench was whether, in the case of joint executors, an assessment made without notice to all of them is valid under law. The Court held that such an assessment would be void, ineffective and without jurisdiction, as the estate cannot be represented by some of them alone. It also held that, if the Income Tax Officer bona fide believed that one of them was the only executor, served notice on him and made an assessment, it would be binding on all the executors and the assessment would be valid. Another question considered by the Division Bench was the validity of assessment without notice to all the legal representatives in the case of intestate succession. In that case also, the court held that the assessment would be invalid, if it was done without notice to all the legal representatives, including an intermeddler with any part of the estate, who under law is a legal representative. At the same time, it held that, if the Income Tax Officer bonafide believed that there was only one legal representative and made an assessment after notice to him alone, the assessment would be binding on the whole estate and all the legal representatives, however numerous they may be.

4. The decision of the Supreme Court in Suseela Sadanandan's case has been followed by that Court in Income Tax Officer, Gudur and Another Vs. Maramreddy Sulochanamma, . That was a case where the deceased assessee left a will, appointing two persons as his executors. The genuineness of that will was in dispute, and the Court remitted the case for deciding the question whether the estate had been properly represented in the assessment proceedings, which depended on the genuineness of the will.

5. There is a decision of the Gujarat High Court in *Chootharmal Wadhu ram v. Commissioner of Income Tax* (1971) 80 ITR. 360, which contains an instructive discussion on the question arising for decision in the instant case. There the contention was that the impugned assessments were bad under law, since they were made without notice to all the legal representatives. Bhagwati, C. J., who delivered the judgment of the court, relying on the decisions of the Supreme Court referred to above and other decisions, came to the conclusion that such an assessment would be bad. The Mysore High Court in *Commissioner of Income Tax, Mysore Vs. N.A. Mandagi*, , the Andhra Pradesh High Court in *Rangapalli Basamma Vs. Gift Tax Officer, Hindupur*, , and the Madras High Court in *Muniyammal v. Third Addl. income tax Officer* (1960) 38 ITR. 664 have taken the same view.

6. Reference has to be made to one more decision, which is of a learned Single Judge of this Court in *income tax Officer v. Miyya Pillai* (1965) 55 ITR. 84. In that case, the learned judge followed a Division Bench decision of this Court in *SUSEELA SADANANDAN Vs. ADDITIONAL Income Tax OFFICER, KOZHIKODE, AND ANOTHER.*, , and held that an assessment made without notice to all the legal representatives is illegal and void. But the latter decision has been reversed by the Supreme Court in *First Additional Income Tax Officer, Kozhikode Vs. Susheela Sadanandan and Another*, . Therefore, the decision of the learned Single Judge cannot be considered as a binding authority.

7. There is real distinction in the matter of representation of the estate of a deceased person between a case where it vests jointly in more than one person as in the case of joint executors or joint administrators, and one where it vests in several persons as tenants-in-common or in separate and definite parts. So long as the estate of a deceased person remains joint, or "it vests in more than one person jointly, it can be represented only by all of them jointly. There is no question of any one of them representing part of it, since none of them has any separate interest in it. But if it has vested in several persons in separate shares or parts, each one of them can represent that part of the estate which has so vested in him, and all of them together can represent the whole estate. This is clear from the decision of the Supreme Court in *The Andhra Bank Ltd. Vs. R. Srinivasan and Others*, . One of the contentions in that case was that persons who are in possession of different pieces of property belonging to a deceased person under his will cannot be said to be his legal representative. In rejecting that contention, the court stated:-

Besides, as a matter of construction, if different intermeddlers can represent the estate different legatees can likewise represent it. In regard to the intermeddlers they are said to represent the estate even though they are in possession of parcels of the estate of the deceased and so there should be no difficulty in holding that the clause "a person who in law represents the estate of a deceased person" must include different legatees under the will. There is no justification for holding that the "Estate" in the context must mean the whole of the estate.

The last sentence in the above passage shows that a person for being a legal representative need not necessarily represent the whole estate. Any person, who is in possession of part of the estate, would be a legal representative; and he would fully represent that part of the estate. The decisions of the Supreme Court in *First Additional income tax Officer v. Suseela Sadanandan* (1965) 57 ITR. 168. and *Income Tax Officer, Gudur and Another Vs. Maramreddy Sulochanamma*, . 1 referred to above related to cases, where under the will alleged to have been executed by the deceased, the estate vested in joint executors, and it was not, therefore, possible for one of the executors alone to represent the whole or any part of the estate. Speaking with great respect, the distinction that exists in the matter of representation of the estate of a deceased person between a case where his estate vests jointly in more than one legal representative and a case where it vests in them as tenants-in-common with separate interest has not been borne in mind in the aforesaid High Court decisions. In my view, the proposition that a legal proceeding, whether an income tax assessment or not, would be null and void, unless notice of the proceeding is given to all the legal representatives, irrespective of the question whether the estate has vested in them jointly or as tenants-in-common cannot hold good in the light of the statement of law which I have quoted above from the decision of the Supreme Court in *The Andhra Bank Ltd. Vs. R. Srinivasan and Others*, .

8. The scheme of S. 24 of the Agricultural income tax Act, 1950 and the corresponding provision in the income tax Act 1961 is to assess the legal representative of the deceased person in respect of his income, and the liability of the legal representative is to pay the tax out of the estate of the deceased person to the extent it is capable of meeting the charge. So if an estate vests jointly in more than one person as legal representatives, an assessment against any one of them would be useless since he alone cannot represent the estate, or any part of it, and he cannot, therefore, be liable for the tax to any extent. On the other hand, if the estate vests in several persons as tenants-in-common or in definite shares, everyone of them can be assessed, as he is a legal representative, and he could be liable to the tax to the extent of the estate which he can represent; in other words to the extent of the assets come to his hands. As pointed out by the Supreme Court in *Suseela Sadanandan's* case, the term "legal representative" takes in plurality of legal representatives; and "if there are more than two, all must be impleaded to make the representation of the estate complete". But S. 24 of the Agricultural Income Tax Act, 1950, or the corresponding provision in the Income Tax Act, 1961 does not say that in such a case, the assessment must be against all the legal representatives, or that the whole estate must be represented in an assessment of the income of the deceased.

9. It was then argued that if an assessment can be validly, made in such a case against any one of the legal representatives, there would be as many assessments as there are legal representatives and that this would be totally opposed to the income tax law. I do not think that anything like that follows from

the fact that an assessment made against one of the legal representatives in whom part of the estate has vested would be valid. The assessment is always on the total income of the previous year of the deceased. There can be only one assessment in respect of that income. If that assessment was not made against all the legal representatives, those who are not made parties to it, would not be liable. On the other hand, if the correct legal position is that an assessment made without notice to everyone of the legal representative would be illegal and void, it would be difficult to make a valid assessment in several cases. Under law, every legatee is a legal representative, and every intermeddler is also a legal representative. Suppose in a case of intestate succession, the deceased has hundred legal representatives, including intermeddlers, the assessment would be invalid, if made without notice to every one of them in other words if notice was omitted to be sent even to one intermeddler.

10. It is then said that it is enough that the Income Tax Officer makes a bonafide enquiry as to who all are the legal representatives and makes the assessment after issuing notices only to those, who are to the best of his information the legal representatives of the deceased. I find it difficult to accept this position. Take for example a case where the estate has vested in separate shares in three persons, A, B and C. The Income Tax Officer makes an honest enquiry and gets the information that another person D is the sole legal representative of the deceased, and makes an assessment against D, after issuing all notices to him. I am unable to subscribe to the position that the assessment would be binding on A, B and C, or any one of them, or that any part of the estate can be proceeded against for the recovery of the tax payable under such an assessment. It is the fundamental principle of our legal system that no proceeding is binding on a person who is not a party to the proceeding either directly or through representation. A can represent B, only if A empowers B to represent him, or if the law treats B, as the representative of A. If the Income Tax Officer honestly thinks that D is the legal representative of the deceased, instead of A, B and C, D cannot thereby become the representative of A, B or C or of the estate of the deceased under law. An act done bona fide under a mistake may relieve the person who so acts from liability; but it cannot fasten a third party who has no responsibility for the act with liability. The validity of an assessment made in respect of the Income of a deceased person has to be determined solely on a true construction of the relevant statutory provision. In my view, there is no warranty for the proposition that, in a case where the estate of the deceased vests in several persons as tenants-in-common or in definite shares, an assessment made against some of those persons would be void and ineffective, on the ground that notice of the proceedings were not given to everyone of the legal representatives.

11. I am also of the opinion that the petitioner, who received notice of the assessment proceedings as legal representative of his deceased father, objected to the proposed assessment on the merits, and who did not point out that there were other legal representatives for the deceased person, nor object to the

validity of the assessment proceedings on such a ground, cannot be now allowed to question the validity of the assessment, firstly because he is a party to the assessment proceedings, and secondly because he is estopped by conduct from raising such an objection. The assessment is valid in so far as the petitioner is concerned; and he would be liable to pay the tax under the said assessment out of that part of the estate of the deceased person which has vested, in him or come to his possession. For the reasons herein stated, this Original Petition is dismissed. In the circumstances of the case, I make no order as to costs.