(1967) 04 MAD CK 0007

In the Madras High Court

Case No : Writ Petition No''s. 1129 to 1131 of 1963

M. Ct. Muthuraman APPELLANT

Vs

The Second Income Tax Officer RESPONDENT

Date of Decision : 29-04-1967

Acts Referred:

Constitution of India, 1950 — Article 14, 226
Income Tax Act, 1922 — Section 14, 22, 23(2), 31, 33

Citation : (1968) ILR (Mad) 450

Hon'ble Judges : Veeraswami, J;Ramaprasada Rao, J

Bench : Division Bench

Advocate : K. Narayanaswami, for the Appellant; V. Balasubramaniam, for the Respondent

Final Decision : Dismissed

Judgement

Ramaprasada Rao, J.—A Hindu undivided family consisting of the Assessee and his son as one branch and his uncle Meyyappa on the

other suffered a partition of December 29, 1948, by which one of the assets of the joint family, namely, 15/21 share in a partner ship at Ipoh with

the Vilasam M.S.S. was divided. ft For the years following the partial partition as above, each branch filed their individual returns of income. In

particular, the Assessee filed voluntarily such returns apparently u/s 22 of the Indian income tax Act for the three years 1950-51, 1951-52 and

1952-53. Such returns were respectively filed on September 5, 1950, February 12, 1952 and September 24, 1952. The Revenue did not

consider the returns so filed but initiated proceedings against the Assessee u/s 34(1) (a) of the Act and assessed the Assessee accordingly. In the

first instance, the income tax officer rejected the contentions of the Assessee that Section 34 (1) (a) could not be invoked, when no orders were made on his voluntary returns. The appeals that the Assessee filed before the Appellate Assistant Commissioner and the Tribunal having failed a

reference was made by the Tribunal to this Court u/s 66(1) of the Act and the question referred was whether the re-assessment u/s 34 for all the

assessment years 1950-51 to 1952-53 was invalid. Rajagopalan and Srinivasan JJ., held on such a reference in Tax Case No. 150 of 1960, that

the purported re-assessment for 1950-51, 1951-52 and 1952-53 u/s 34 of the Act was invalid. As regards the second proviso to Section 34(3)

of the Act, the learned Judges felt that it was not necessary for them to pronounce on its constitutional validity or otherwise. The question whether

the Revenue had jurisdiction to complete the assessments for the years 1950-51, 1951-52 and 1952-53, based on the voluntary returns filed by

the Assessee, was also left open. With due deference to the decision of this Court, the Tribunal cancelled the assessments or the years in question.

2. After such cancellation of the assessment orders in the circumstances stated above, the Respondent issued a notice, dated July 24, 1962 reading

as under:

Your attention is invited to the judgment of the High Court referred to above, especially to pages 9 and 11 of the said order. Though the re-

assessment proceedings for the assessment years 1950-51, 1951-52 and 1952-53 have been held to be null and void, the original assessment

proceedings which came into being with the submission of the voluntary returns on 5th September 1950, 15th February 1952 and 24th September

1952 for 1950 51, 1951-52 and 1952-53 respectively are still alive by virtue of the second proviso to Section 34 (3) of the income tax Act,

1922. For the purpose of concluding these assessments, I am enclosing a notice u/s 23(2) fixing the hearing for 20th August 1962.

3. The Assessee inter alia contended that the assumption of jurisdiction by the Respondent under the second proviso to Section 34(3), hereinafter

referred to as the proviso, was illegal as the proviso itself is unconstitutional and the proposed proceedings were beyond the prescribed time. But

as the Respondent intended and expressed his desire to proceed with the enquiry concerning the income tax assessments for the three years in

question, and issued letters, dated September 24, 1963 and September 30, 1963, asking the Assessee to appear for furnishing some more particulars regarding the returns filed earlier and for completion of the enquiry connected thereto, the Assessee has filed these writ petitions,

praying for the issue of a writ of prohibition or other appropriate writ under Article 226 of the Constitution of India restraining the Respondent from

proceeding with the assessments in question for the assessment years 1950-51, 1951-52 and 1952-53. In the affidavit in support of the petition,

the Assessee, amongst other things, reiterates that there is total absence of jurisdiction in the Respondent to initiate and continue the assessment

proceedings under the proviso and that the same offends Article 14 of the Constitution and is, therefore, ultra vires. The Revenue in its counter,

however, contends that the Respondent has jurisdiction and the proviso is constitutionally sustainable and operates within the constitutional

limitations.

4. At the time of hearing of these writ petitions, learned Counsel for the Petitioner contended as follows:

(i) The assessment proceedings now initiated for the assessment years 1950-51, 1951-52 and 1952-53 are time-barred in law and the

Respondent has now no jurisdiction to complete the same.

(ii) The Respondent''s purported attempt to justify the same with reference to the provisions of the second proviso to Section 34(3) is also illegal

and without jurisdiction, inasmuch as the said provisions of the second proviso to Section 34 (3) has been held to be ultra vires and void by the

Supreme court, in circumstances and facts similar to the Petitioner''s case.

(iii) The provisions of Section 34 (3) second proviso cannot apply to the facts and circumstances of the Petitioner''s case, inasmuch as the

purported finding or direction were only given in the appellate orders on the Hindu undivided family of Meyyappa Chettiar in which the Petitioner

was not a party to the proceedings.

5. The Respondent on the other hand states that:

(i) The assessments are not time-barred since they are saved by the second proviso to Section 34 (3) of the Indian income tax Act, 1922.

(ii) It is not necessary for the application of the said second proviso that the Petitioner should have been ec nomine a party to the proceedings in

the appeal before the Appellate Tribunal in I.T.A. No. 4469 of 1955 56 in regard to the assessment year 1950-51 and in the appeals before the

Appellate Assistant Commissioner in regard to the assessment years 1951-52 and 1952-53 in I.T.A. Nos. 470 of 1954-55 and 471 of 1954-55

respectively. There was sufficient nexus between the Hindu undivided family and the Petitioner and their respective assessments for the second

proviso to Section 34 to be invoked in the Petitioner''s assessments. In the first place the Petitioner was a member of the Hindu undivided family,

and hence a person intimately connected with the proceedings for assessment and appeal in which the Hindu undivided family was concerned-

secondly the Petitioner was liable to be assessed in respect of a part of the income that had already"" been assessed, albeit mistakenly, in the hands

of the Hindu undivided family; thirdly, the Petitioner''s Assessments depended on the assessments of the Hindu undivided family u/s 14 of the Act.

(iii) The second proviso to Section 34(3) of the Act is not an unconstitutional piece of legislation. Properly construed, the proviso operates within

the constitutional limitations. It is not correct to assert that the Supreme Court had held the proviso to be ultra vires and void in the circumstances

and on the facts similar to the present case.

6. We shall now take up for consideration whether in the facts and circumstances of the case the assessment can be made under the proviso, on

the Assessee

in consequence of or to give effect to any finding or direction in an order u/s 31, Section 33 Section 33-A, Section 33-B, Section 66 or Section

66-A.

7. It is the admitted case of the parties that initially the partial partition between the Assessee''s branch and his uncle did not find favour with the

income tax officer. The Appellate Assistant Commissioner, however, held a contrary view. Even so, the Tribunal. In all these proceedings, the

uncle was representing the alleged joint family. The Assessee was eo nomine not a party thereto. It has to be, therefore, considered whether the

representation by the uncle is sufficient so that any finding in such proceedings can be taken to be one given within the meaning of the proviso. The

Revenue contends, on our opinion rightly, that the appeal by the uncle as representing the Hindu undivided family created a sufficient nexus

resulting in the Assessee being deemed as a person who shall be bound by any finding in such proceedings. It cannot be said that the uncle''s action at the earlier stages did not have anything to do with the Assessee or his rights. There is, therefore, sufficient nexus between the earlier proceedings

in which the uncle of the Assessee was representing the Hindu undivided family and the Assessee himself. In those proceedings which, of course,

ultimately went against the Assessee certain findings were given. But the finding given is such that it was apposite in the circumstances then

confronting the parties. As pointed out by the Supreme Court in Income Tax Officer, A-Ward, Sitapur Vs. Murlidhar Bhagwandas, Lakhimpur

Kheri, :

The expression ""direction"" in the proviso could only refer to the directions which the Appellate Assistant Commissioner or other tribunals can issue

under the powers conferred on him, or them under the respective sections. Therefore, the expression "" finding "" as well as the expression

direction "" can be given full meaning, namely, that the finding is a finding necessary for giving relief in respect of the assessment of the year in

question and the direction is a direction which the appellate or revisional authority as the case may be, is empowered to give under the sections

mentioned therein. The words "" in consequence of or to give effect to "" do not create any difficulty, for they have to be collated with, and cannot

enlarge, the scope of the finding or direction under the proviso. If the scope is limited as aforesaid, the said words also must be related to the

scope of the findings and directions.

8. Such a finding or direction should obviously be necessary for the disposal of the earlier proceedings.

9. In the decision cited above, the Supreme Court had to consider the meaning of the word person appearing in the proviso. Their Lordships say

at page 346:

The words "" any person "", it is said, concluded the matter in favour of the department. The expression ""any person"" in its widest connotation may

take in any person, whether connected or not with the Assessee, whose income for any year has escaped assessment; but this construction cannot

be accepted, for the said expression is necessarily circumscribed by the scope of the subject-matter of the appeal or revision, as the case may be.

That is to say, that person must be one who would be liable to be assessed for the whole or a part of the income that went into the assessment of the year under appeal or revision.

10. Thus, in the instant case, the uncle was indeed concerned with a matter with which the Assessee was intimately connected. We are of the view

that the finding in the earlier proceedings can form the basis for re-assessment of the Assessee as a person and are, therefore, unable to accept the

contention of the Assessee that the finding given by the Tribunal and other authorities on the Hindu undivided family of Meyyappa cannot be

deemed to relate to him, as he is not a party thereto.

11. Having thus held that the Petitioner was indeed connected with the earlier proceedings in which the finding or direction was given affecting the

Assessee, we shall now consider the question whether the proviso is unconstitutional as offending Article 14. In S.C. Prashar, Income Tax Officer,

Market Ward, Bombay and Another Vs. Vasantsen Dwarkadas and Others, , Commissioner of Income Tax Vs. Sardar Lakhmir Singh, and P.V.

Godbole Vs. Jagannath Fakirchand, the majority of the learned Judges of the Supreme Court were considering the question whether the proviso

should be struck down as unconstitutional as it is not supported by the well known theory of reasonable classification. It is, however, to be

remembered that in S.C. Prashar, Income Tax Officer, Market Ward, Bombay and Another Vs. Vasantsen Dwarkadas and Others, the majority

were mainly concerned in applying the principle and text of the proviso to any person, meaning thereby an utter stranger to the earlier appeal or

revisional proceedings. In that context it was held that the provisions of the second proviso to Section 34 (3) in so far as they authorised the

assessment or re-assessment of any person other than the Assessee beyond the period of limitation specified in Section 34 in consequence of or to

give effect to a finding or direction given in an appeal, revision or reference arising out of proceedings in relation to the Assessee, violated the

provisions of Article 14 of the Constitution of India and were invalid to that extent. As already stated by us, the ratio in the series of cases reported

in 49 ITR concerned itself to the consideration of the question whether an utter stranger in the sense an Assessee who had no connection

whatsoever with the earlier appeal or revisional proceedings, could be got in the net of taxation on the only ground that the expression used in the

proviso is any person. As will be seen hereafter, the real intent of the law as laid down by the Supreme Court was considered later by a catena of

decisions, including the Supreme Court itself. These later cases do not countenance that the ratio in S.C. Prashar, Income Tax Officer, Market

Ward, Bombay and Another Vs. Vasantsen Dwarkadas and Others, lays down a totality of a ban on the jurisdiction of the Tribunal to re-open

assessments under the proviso, but it is restrictive in its scope and definitely applicable to Assessees who are connected with such earlier

proceedings.

12. It has, however, become necessary for us to advert to the scope of the decision of the majority of the Judges in S.C. Prashar, Income Tax

Officer, Market Ward, Bombay and Another Vs. Vasantsen Dwarkadas and Others, in juxtaposition to the law as expressed in the later decision

of the Supreme Court in Income Tax Officer, A-Ward, Sitapur Vs. Murlidhar Bhagwandas, Lakhimpur Kheri, . Though on a prima facie reading

of the ratio of the majority of the Judges in S.C. Prashar, Income Tax Officer, Market Ward, Bombay and Another Vs. Vasantsen Dwarkadas

and Others, the view appears to be that the proviso is unconstitutional and is, therefore invalid, yet the paramount intention of the Court appears to

us to be that the proviso is invalid in so far as it affected rights of persons, who are utter strangers to the earlier proceedings in which a finding or

direction is given. But there are indications in the said judgment to sustain the view that in so far as persons intimately and closely connected with

the earlier proceedings are concerned, the proviso would still be attracted. We are unable to subscribe to the view expressed by the Bombay High

Court in Mahendra Bhawanji Thakar Vs. S.P. Pande and Others, that the Supreme Court struck down the proviso as unconstitution a

unreservedly This judgment was rendered on March 5, 1963. But the Supreme Court''s ruling in Income Tax Officer, A-Ward, Sitapur Vs.

Murlidhar Bhagwandas, Lakhimpur Kheri, which in fact succinctly explained the decision in S.C. Prashar, Income Tax Officer, Market Ward,

Bombay and Another Vs. Vasantsen Dwarkadas and Others, was rendered on January 29, 1964. In the later decision in Income Tax Officer, A-

Ward, Sitapur Vs. Murlidhar Bhagwandas, Lakhimpur Kheri, the learned Judges observed at page 354 that

...it is sufficient to point out that the majority of the learned Judges have only struck down that part of the proviso which enables a notice to issue

to any person "" on the ground that it is violative of Articles 14. The precise question which we have before us does not appear to have been the

subject of decision in the case.

13. In fact, in this case, the classification which according to the learned Judges, is indeed a sub-classification, envisaged in the proviso is rational

and permissible. The learned Judges also referred to the earlier decisions of that Court in A. Thangal Kunju Musaliar Vs. M. Venkitachalam Potti

and Another, and Balaji Vs. Income Tax Officer, Special Investigation Circle, and expressed positively their view that the proviso cannot in toto be

struck down as offending Article 14. Though, no doubt, this view was expressed by the minority in Income Tax Officer, A-Ward, Sitapur Vs.

Murlidhar Bhagwandas, Lakhimpur Kheri, , yet it has a special signification in that the learned Judges of the Supreme Court were indeed

interpreting what was the purport and scope of the decision in Commissioner of Income Tax, Madhya Pradesh, Nagpur and Bhandara Vs.

D''costa Brothers, . That there has not been a striking down of the proviso unreservedly and without any limitation is also seen from the judgments

of this Court which had occasion to consider the effect of the ratio in Commissioner of Income Tax, Madhya Pradesh, Nagpur and Bhandara Vs.

D''costa Brothers, and Income Tax Officer, A-Ward, Sitapur Vs. Murlidhar Bhagwandas, Lakhimpur Kheri, . A reconciliation has been made and

there are now clear pronouncements of this Court, which we will advert to presently, to the effect that the proviso is applicable to a case where the

Assessee is intimately connected with the finding or direction given in the earlier proceedings. If, however, the Assessee is not in any way

concerned with the said finding or direction, then it would squarely come within the rule laid down in Commissioner of Income Tax, Madhya

Pradesh, Nagpur and Bhandara Vs. D''costa Brothers, and any proceedings against such an Assessee purporting to be in the exercise of

jurisdiction under the proviso would be invalid.

14. The first of the decisions of this Court is reported in Muthukaruppan v. Commissioner of income tax ILR (1965) 2 Mad. 240. The learned

Judges held that the effect of the decision in Commissioner of Income Tax, Madhya Pradesh, Nagpur and Bhandara Vs. D''costa Brothers, and the later decisions of the Supreme Court was that in so far as the proviso authorises the assessment or re-assessment of any person other than the

Assessee beyond the period of limitation specified in Section 34 it violates the provisions of Article 14 of the Constitution and is invalid but the

proviso was valid to the extent of its operation against the Assessees who are parties to the proceedings. This judgment was rendered on

September 16, 1964. The next ease in sequence was rendered by the same division Bench of this Court wherein the learned Judges reiterate that

the proviso was ultra vires only in so far as it applied to the persons other than the actual Assessee and those represented by him in whose appeal

the appellate authority had given a funding or direction which necessitated the subsequent re-opening of the assessment. This judgment was

rendered on September 18, 1964. In the latest case of this Court in Aruna Devi v. Commissioner of income tax ILR (1966) 2 Mad. 357, 369,

371 to which one of us was a party, considering the scope of the proviso, it was observed as follows, after referring to the decision of the Supreme

Court in S.C. Prashar, Income Tax Officer, Market Ward, Bombay and Another Vs. Vasantsen Dwarkadas and Others, . Commissioner of

Income Tax Vs. Sardar Lakhmir Singh, and P.V. Godbole Vs. Jagannath Fakirchand, :

In the three cases decided by the Supreme Court, which we just now referred to, it was held that the second proviso in so far as it affected any

person meaning a third party or a stranger to the appeal or, revision or a person who is not the Assessee and who is not the Appellant or the

revision Petitioner, offended Article 14 and would, therefore, to that extent, be void.

....

... We would, therefore, hold that the expression any person in the setting in which it appears must be confined to a person intimately connected in

the aforesaid sense with the assessments of -the year under appeal

(Italics ours).

15. We are, therefore, of the opinion that, having regard to the decisions of this Court and the view expressed by the Supreme Court itself in the

later decisions, it cannot be said that the proviso has been struck down by the Supreme Court without any reservation or limitation whatsoever. On the other hand, the dicta referred to by us earlier and the interpretation placed upon the decisions in the series of cases reported in 49 ITR lends

support to the view that the application of the proviso is linked only to persons who are intimately connected with the proceedings.

16. We have already held that the Petitioner in this case is a person who cannot be characterised as an utter stranger to the earlier proceedings

prosecuted by his uncle Meyyappa ; on the other hand, his uncle did have the capacity at that time to represent him, and therefore, such

proceedings do have a nexus to the affairs of the Assessee and such intimate connection thus established would enable the Revenue to exercise

jurisdiction under the proviso. We are, therefore, unable to accept the contention of the learned Counsel for the Petitioner that the proviso is

violative of Article 14 and that this is the law as laid down by the Supreme Court in Commissioner of Income Tax, Madhya Pradesh, Nagpur and

Bhandara Vs. D''costa Brothers, .

17. In this view, the writ petitions are dismissed with costs, one set.

