

(1952) 01 MAD CK 0018

In the Madras High Court

Case No : Civil Miscellaneous Petition No. 4299 of 1951

M.M. Muthuwappa

APPELLANT

Vs

The First Additional Income Tax Officer, Tuticorin and Another

RESPONDENT

Date of Decision : 29-01-1952

Acts Referred:

Income Tax Act, 1922 — Section 45

Citation : AIR 1952 Mad 861 : (1952) 21 ITR 344 : (1952) 65 LW 348 : (1952) 2 MLJ 50

Hon'ble Judges : Subba Rao, J

Bench : Single Bench

Advocate : K.R.M. Abdul Karim, for the Appellant; Govt. Pleader and C.S. Rama Rao Sahib, for the Respondent

Final Decision : Allowed

Judgement

Subba Rao, J.—This is an application for issuing a Writ of Prohibition against the respondents, prohibiting them from taking proceedings u/s 46 of the Indian Income Tax Act or under the Madras Revenue Recovery Act, against the petitioner for the recovery of arrears of Income Tax.

2. The petitioner is a merchant carrying on business at No. 79, Keyzer Street, Colombo and is now residing at Madras. On 30-12-1948, for the year of assessment 1948-19, the First Additional Income Tax Officer, Tuticorin made an order assessing him to a tax of Rs. 28,575-10-0. By the said order, his total income was fixed at the sum of Rs. 71484 which included his total foreign income of Rs. 69569. The foreign income was held to have been earned by him in Ceylon. The petitioner paid from time to time sums totalling Rs. 13000 towards the tax and penalty imposed for non-payment of the tax and the balance due from him is Rs. 15,153-5-0 For the assessment year 1949-50, he was again assessed to a large amount. In February 1949, the Income Tax Officer made a demand on the assessee for payment of the tax assessed.

As the amount was not paid, the first respondent, holding that the petitioner had committed default, forwarded to the Collector a certificate specifying the amount of arrears due from the petitioner, for collecting the same, as if it were an arrear of land revenue. The Deputy Tahsildar issued a notice to the petitioner dated 5-3-1951 u/s 25 of the Madras Revenue Recovery Act, demanding payment of the tax of Rs. 15,153-5-3 for the year of assessment 1948-49 within ten days of the receipt thereof, failing

which, restraint and seizure proceedings would be taken against his properties. 3. The Government of Ceylon by their notification published in the Ceylon Government Gazette Extraordinary Part I at page 630 introduced prohibitions and restrictions with regard to transmitting any monies outside the territories of Ceylon from the said date. By the said notification, a person intending to transmit any monies out of Ceylon exceeding Rs. 140 per month, should obtain a permit from the Department of Exchange Control, Ceylon. In February 1951, the petitioner applied to the Controller of Exchange, Ceylon, for necessary permit to transmit monies to India for payment of Indian Income Tax. He also approached the Controller of Exchange, Ceylon through his proctors and notaries for obtaining the necessary permit. The petitioner received through his proctors a letter Ref. No. GTX/639/M21, Department of Exchange Control) Colombo dated 23-2-51 as follows:

"Reference your letter dated 21st February 1951 and the interview you had with me today, I regret to inform you that exchange cannot be released for the above purpose in view of the fact that tax due for payment is much in excess of the Ceylon income. However, I am prepared to reconsider the application on production of the final order issued in respect of the appeal filed by your client."

4. On 7-12-1951, I again directed the petitioner to apply to the authorities concerned in Ceylon for a permit to transmit his income or part of it to India for the purpose of discharging the arrears of Income Tax. It is represented to me that though a petition was filed, the authorities refused to issue the permit. In the circumstances, the petitioner states that he cannot be deemed to be a defaulter u/s 45 of the Act in respect of that part of the tax, which is due in respect of his income in Ceylon and, therefore, neither the Income Tax Officer nor the 2nd respondent can initiate proceedings for recovery of the amount u/s 46 of the Act.

5. The relevant provisions of the Indian Income Tax Act (1922) read as follows:

"45. Any amount specified as payable in a notice of demand under Sub-section (3) of Section 23-A or u/s 29 or an order u/s 31 or Section 33, shall be paid within the time, at the place and to the person mentioned in the notice or order, or if a time is not so mentioned, then on or before the first day of the second month following the date of the service of the notice or order, and 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:

Provided further that where an assessee has been assessed in respect of income arising outside the taxable territories in a country the laws of which prohibit or restrict the remittance of money to the taxable territories, the Income Tax Officer shall not treat the assessee as in default in respect of that part of the tax which is due in respect of that amount of his income, which by reason of such prohibition or restriction cannot be brought into the taxable territories and shall continue to treat the assessee as not in default in respect of such part of the tax until the prohibition or restriction is removed.

"Explanation: For the purposes of this section income shall be deemed to have been brought into the taxable territories if it has been utilised or could have been utilised for the purposes of any expenditure actually incurred by the assessee without the taxable territories or if the income whether capitalised or not has been brought into the taxable territories in any form.

"46 (1) When an assessee is in default in making a payment of Income Tax, the Income Tax Officer may in his discretion direct that, in addition to the amount of the arrears, a sum not exceeding that amount shall be recovered from the assessee by way of penalty.

(2) 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."

(6) The governing provision is the proviso to Section 45. The proviso applies, if three conditions are fulfilled:

(i) a part of the tax should be due in respect of an assessee's income in foreign territories.

(ii) that income could not be brought into the taxable territory and

(iii) the inability to bring into the taxable territory should have been by reason of a prohibition or restriction imposed by the laws of that foreign country.

If these conditions are fulfilled, in regard to that part of the tax which is due in respect of the said foreign income, the assessee cannot be treated as a defaulter. I cannot accept the contention of the learned counsel for the respondents that the proviso applies only to an absolute prohibition imposed by foreign authorities and not to permissive regulations. This argument is contrary to the express provisions of the proviso itself, for the proviso clearly speaks of prohibition as well as restriction of the remittance of money to the taxable territories. The dictionary meaning of the word "prohibit" is "forbid" or "debar" whereas "restrict" means "limit" or "confine".

If an income is prohibited from being remitted to another territory, the

prohibition is absolute. If the amount can be remitted only subject to certain conditions, such as permit etc., there is only a partial prohibition. When the legislature used the words "prohibit" or "restrict" and when those words have a definite connotation, it is impossible to construe those words to mean only prohibition or to efface the distinction between prohibition and restriction. Accepting the plain meaning of the words used, I must hold that the proviso applies to the income wholly prohibited or restricted, subject to conditions, from being remitted to the taxable territories.

7. I agree with the learned counsel for the inability to remit the income to the taxable territories should have been by reason of such prohibition or restriction. If an assessee by negligence, collusion or fraud does not get the permit and, therefore is not able to remit money to the taxable territory, it cannot be said that his in-ability to bring money into the said territory is by reason of such prohibition or restriction. It would be only by reason of his negligence, fraud or collusion. That is a fact to be established in each case.

8. The next question is whether, in the circumstances of the case, the petitioner is not a defaulter in respect of that part of the tax, which is due in respect of his foreign income. The aforesaid notification of the Government of Ceylon clearly imposes a restriction with regard to transmitting monies outside the territory of Ceylon. Though the petitioner made a belated application, it was rejected by the Controller of Exchange, Ceylon. There is no reason to assume that, if an application had been made earlier, he would have issued the permit. The petitioner's application for permit was rejected not on the ground that it was belated but for the reason that the tax due for payment was much in excess of the Ceylon income. When he filed another application for a permit, after I adjourned the matter on 7-12-1951, the Controller again rejected the application and refused to issue the permit.

9. It is true that the transfer of properties effected by the petitioner on 6-9-1950, 9-9-1950 and 21-9-1950 were made under suspicious circumstances and may have been made to prevent or obstruct recovery of the tax by proceeding against the said properties. But I should not be understood to have expressed any final opinion on the fraudulent character of those transactions as that could only be decided in appropriate proceedings. Be it as it may, having regard to the aforesaid facts, I must hold that the petitioner was not able to remit his foreign income by reason of the restrictions imposed by the Ceylon authorities and, therefore, he is not a defaulter in respect of that part of the tax, which is due in respect of that foreign income. If so, the respondents have no power to collect that part of the tax by proceeding under Sections 45 and 46 of the Act.

10. I, therefore, issue a writ of prohibition, prohibiting the respondents from taking coercive proceedings to recover that part of the tax assessed for the year 1948-49 due in respect of the income earned in Ceylon. The respondents will pay the costs of the petitioner. Advocate's fee Rs. 100.