
(1957) 01 PAT CK 0036

In the Patna High Court

Case No : Misc. Judicial Case No. 451 of 1955

Muhammad Hanif and Others

APPELLANT

Vs

Custodian of Evacuee Property and Another

RESPONDENT

Date of Decision : 07-01-1957

Acts Referred:

Administration of Evacuee Property Act, 1950 — Section 1(2), 2, 7, 7A
Civil Procedure Code, 1908 (CPC) — Section 16
Companies Act, 1913 — Section 3

Citation : AIR 1957 Patna 312 : (1957) 5 BLJR 249

Hon'ble Judges : Ramaswami, C.J.; Raj Kishore Prasad, J

Bench : Division Bench

Advocate : P.R. Das, Baldeva Sahai, M. Ayub Hameed Hasan and Naseem Ahmad, for the Appellant; Govt. Advocate, for the Respondent

Judgement

Ramaswami, C.J.—In this case the petitioners, Muhammad Hanif and others, have obtained a rule from the High Court calling upon the respondents to show cause why a writ in the nature of certiorari should not be issued to quash the proceedings taken by the Custodian of Evacuee Property on the 4th of April, 1955, u/s 7 of the Administration of Evacuee Property Act, 1950, as subsequently amended. Cause has been shown by the learned Government Advocate on behalf of the State of Bihar and the Custodian of Evacuee Property.

2. The petitioners are residents of Calcutta, where they carry on business. They hold 600 shares out of 1500 shares in Sugauli Sugar Works, Ltd., which is a private limited company registered under the Indian Companies Act. On the 24th of January, 1954, a proceeding was started by the Assistant Custodian u/s 7 of Act 31 of 1950 against the petitioners, asking them to show cause why their shares in the Company should not be declared as evacuee property. The proceedings were subsequently transferred to the Deputy Custodian of Evacuee Property; Motihari, and on the 26th of February, 1954, the Deputy Custodian held that the petitioners were not evacuees and dropped the proceedings.

On the 8th of October, 1954, Act 42 of 1954 came into force. u/s 4 of this Act a new Section 7A was inserted in Act 31 of 1950. The effect of the section was that no property was to be declared evacuee property on or after the 7th of May, 1954, except under Certain circumstances. On the 4th of April, 1955, the Custodian, Evacuee Property, issued a fresh notice upon the petitioners. This notice is annexure E to the application and it is necessary to quote it in full:

"To

Shri Md. Zahir | | } | | Sons of Haji Sk. Md. Hussain

Shri Md. Hanif

Shri Anwar Ali

Shri Abdul Hussan

Director of Sugauli Sugar Works, Sugauli (Champaran).

Whereas there is credible information in possession of the Custodian that you are an evacuee u/s 2(d)(i) of the Administration of Evacuee Property Act 1950 on account of the grounds mentioned below:

And whereas it is desirable to hear you in person:

Now, therefore, you are hereby called upon, to show cause (with all material evidence on which you wish to rely) why orders should not be passed declaring you an evacuee and all your property (vide lists attached) as Evacuee property under the provision of the said Act.

The hearing of your case is fixed before the undersigned in his office room in Secretariat on 7-5-55 at 10-30 A.M.

Grounds : ?

That you left for Pakistan after 1-3-47 due to partition of the country and started a firm known as "Zahir Bros. Importer & Exporters" In Pakistan with an Intention to settle down there permanently.

Sd. Illegible,

Custodian of Evacuee Property, Bihar.

List of Property.

Share in Sugauli Sugar Works, Ltd., P. O. Sugauli, District Champaran, and all other interest connected therewith in which Mohammad Zahir and other may have their share."

The contention of the petitioners is that the Custodian had no jurisdiction to issue notice as the situs of the shares was at Calcutta where the registered office of the Company is situated. It was pointed out that Central Act 31 of 1950 and amending Acts did not extend to the State of West Bengal, as provided u/s 1(2)

of the Act. It was also argued that the notice in question was barred by limitation, since the notice was not issued within six months from the 7th of May, 1954, which was the material date. It was also argued that the proceedings taken against the petitioners are barred by the general principle of *res judicata*.

3. The main argument put forward on behalf of the petitioners is that the Custodian had no jurisdiction to declare the shares of the petitioners as evacuee property as the registered office of the Company was at Calcutta and the Administration of Evacuee Property Act did not extend to West Bengal. In this connection Mr. P.R. Das, Counsel for the petitioners, referred to Clause 2 of the Memorandum of Association, which is Annexure A. Clause 2 states :

"2. The Registered Office of the Company will be situated in Bengal, and branch office or offices and factories will be established, at such place or places in India as the Directors shall from time to time determine."

Counsel also referred to the Articles of Association (Annexure B), in particular Articles 1 and 10. Article 1 provides that subject to certain exceptions the regulations contained in Table A of the first Schedule to the Indian Companies Act, 1913, shall apply to the Company. Article 10 is important and it is necessary to quote it in full:

"10. Subject to the restrictions of these articles, shares shall be transferable but every transfer must be in writing in the usual common form or in such other form as the Board of Directors shall from time to time approve and must be left at the office accompanied by the Certificate of the shares to be transferred and such other evidence (if any) as the Board of Directors may require to prove the title of the indenting transferor,"

It is also important in this connection to refer to Regulations 18, 22 and 23 of Table A of the first Schedule to the Indian Companies Act, 1913. Regulation 18 states :

"18. The instrument of transfer of any share in the company shall be executed both by the transferor and transferee, and the transferor, shall be deemed to remain holder of the share until the name of the transferee is entered in the register of members in respect thereof."

Regulation 22 is in the following terms:

"22. Any person becoming entitled to a share in consequence of the death or insolvency of a member shall, upon such evidence being produced as may from time to time be required by the directors, have the right, either to be registered as a member in respect of the share or, instead of being registered himself, to make such transfer of the share as the deceased or insolvent person could have made; but the directors shall, in either case, have the same right to decline or suspend registration as they would have had in the case of a transfer of the share by the deceased or insolvent person before the death or insolvency."

In these circumstances the question for determination is what is the situs or local habitation of the shares of the petitioners in Sugauli Sugar Works Limited? It is manifest that the situs of the shares is at Calcutta; the reason is that the shares could be effectively dealt with only at Calcutta. Moreover, the evidence of title to the shares is the register of share-holders and the location of the register is also at Calcutta. Article 10 of the Articles of Association of the Company in question also provides that every transfer of shares must be in writing and must be left at the registered office of the Company accompanied by the certificates of the shares and such other evidence as the Board of Directors may require to prove the title of the indenting transferor.

The essential test in determining the situs of intangible moveables for the purpose of jurisdiction is to ask where the subject-matter could be effectively dealt with for the purpose of transfer or transmission? This view is borne out by the decision of the Privy Council in *Brassard v. Smith* 1925 AC 371 (A). In that case a banking company, the head office of which was at Montreal in the Province of Quebec, had power by statute to maintain in any Province a registry office at which alone shares held by residents in that Province were to be registered and could validly be transferred.

A person who was resident and domiciled at Halifax in the Province of Nova Scotia, died there owning shares in the bank, the shares being registered at an office maintained by the company at Halifax under the above statutory power. Succession duty in respect of the shares was claimed under the Quebec Succession Duty Act by the Collector Of Succession Duty. The claim was rejected by the Judicial Committee of the Privy Council on the ground that as the ownership of the shares could be effectively dealt with only in Nova Scotia, they were not property situate in Quebec, and the claim could not be maintained.

The same view was reiterated by the Judicial Committee in *Erie Beach Co. Ltd. v. Attorney-General for Ontario* 1930 AC 161: AIR 1930 PC 10) (B). In that case the appellant company was incorporated under the Ontario Companies Act, and had its chief office in that Province, All its meetings, whether of share-holders or directors, were held at Buffalo, U. S. A.; the company's business was conducted from its office there; its books and records were kept, shares issued, and transfers made and recorded, at the office in Buffalo.

By the Ontario Companies Act, Sections 56, 57, 60, 118 and 119, the shares were transferable only in the book containing the names of the share-holders, which book had to be kept at the head office at Ontario. It was held by the Judicial Committee that as by these provisions of the Ontario Companies Act the shares of the company could be effectually dealt with only in Ontario, shares of which a deceased person resident in the United States was the registered holder, were property situated in Ontario and liable to duty u/s 7 of the Succession Duty Act. At page 167 of (AC): (at pp. 11-12 of AIR) of the report Lord Merrivale states :

"The appellants contended that shares in a joint stock company have no local situation, that, like debts and other choses in action and rights arising ex contractu, they constitute property of which the value --applying the maxim "*Mobilia sequuntur personam*"-- is taxable at the place of domicile of the deceased possessor. This view was adopted by Logie, J. at the trial of the action.

A series of judicial decisions extending from *Attorney-General v. Higgins*, (1857) 2 H & N 339 (C), in the Court of Exchequer in 1857, to 1925 AC 371 (A), before this Board in 1924, have ascertained beyond possible doubt the test which must be applied to determine the local situation of the shares of a joint stock company when that fact has to be determined in order to decide as to liability to or immunity from local taxation. *Cotton v. R* 1914 AC 176 (D) and *Burland v. The King* 1922 1 AC 215: (AIR 1921 PC 163) (E), which were much discussed in the argument here, show the working of the rule, but do not qualify it as previously laid down.

In (1857) 2 H 339 (C), as in 1925 AC 371 (A), duty upon shares was in question. In (1857) 2 H N 339 (C), Baron Martin held that when transfer of shares in a company must be effected by a change in the register, the place where the register is required by law to be kept determines the locality of the shares. Lord Dunedin, in delivering the judgment of this Board in *Brassard v. Smith* (A), epitomized the crucial inquiry in a sentence where could the shares be effectually dealt with?

"The circumstances relied upon by the appellants which show the prediction of the members of the plaintiff company for transacting its business in Buffalo -- so far as they might -- have, in their Lordships' opinion, no material weight. The shares in question can be effectually dealt with in Ontario only. They are therefore property situate in Ontario and subject to succession duty there."

4. On behalf of the respondents the learned Government Advocate made the submission that the situs of the shares may be in Calcutta, but the asset of the company, namely, the Sugauli Sugar Factory, was located in Champaran district within the territorial limits of Bihar. It was argued that the petitioners had interest in company's asset, namely the Sugauli Sugar Factory as shareholders and that was the basis of the jurisdiction of the Custodian. It was admitted by the Government Advocate that the Custodian cannot take charge of the shares, but it was contended that the Custodian can take charge of the "interest" of the petitioners in the Sugauli Sugar Factory.

In this connection the learned Government Advocate referred to Section 2(f) which defines "evacuee property" to mean "any property of an evacuee (whether held by him as owner or as a trustee or as a beneficiary or as a tenant or in any other capacity and includes any property which has been obtained by any person from an evacuee after the 14th day of August, 1947, by any mode of transfer which is not effective by reason of the provisions contained in Section 40." It was submitted on behalf of the respondents that the sugar factory may be the

property of the company in the eye of law, but the scope of the expression "evacuee property" as defined in Section 2(f) must be determined on practical grounds and the veil of corporate entity should be ignored as unrealistic.

5. I am unable to accept the argument of the learned Government Advocate as correct. It is a well established proposition that the assets of a company belong to the company and not to the individual shareholders. It is also well established that a share-holder has no right to any item of property owned by the company, for he has no legal or equitable interest in it. It is true that a shareholder is entitled to a share in the profits while the company continues to carry on the business and also to a share in the distribution of the surplus assets when the company is wound up. But that does not mean that the share-holder has any legal or equitable interest in the properties owned by the company.

The juristic nature of a share has been dealt with by Farewell, J. in *Borland's Trustee v. Steel Brothers & Co. Ltd.*, (1901) 1 Ch 279 at p. 288 (F), as follows : .

"A share is the interest of a share-holder in the company measured by a sum of money, for the purpose of liability in the first place, and of interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders inter se in accordance with Section 16 of the Companies Act, 1862. The contract contained in the articles of association is one of the original incidents of the share. A share is not a sum of money settled in the way suggested, but is an interest measured by a sum of money and made up of various rights contained in the contract, including the right to a sum of money of a more or less amount."

This passage was quoted with approval by Romer L. J. in a subsequent case, *Paulin In re; Crossman, In re* (1935) 1 KB 26 (G), at pp. 56 and 57 and Romer L. J. proceeded to say:

"It is impossible to treat a share as being an interest in the company's assets or an aliquot share in the company's capital and to regard the contract arising from and confined in the company's articles of association as a separate and independent thing. That contract and the rights and liabilities" that flow from it are of the very essence of the share; when, therefore, the owner of a share dies, what passes upon his death and what has to be valued for the purpose of estate duty is nothing more than the totality of his rights and liabilities as they exist under the provisions of the Companies Act and the constitution of the particular company."

The matter has been further clarified in the case of *Gramophone and Typewriter, Ltd. v. Stanley* (1908) 2 KB 89 at p. 95 (H), where Lord Cozens Hardy M. R. states as follows:

"That an individual by himself or his nominees holds practically all the shares in a company may give him the control of the company in the sense that it may enable him by exercising his voting powers to turn out the directors and to

enforce his own views as to policy, but it does not in any way diminish the rights or powers of the directors, or make the property or assets of the company his, as distinct from the corporation's. Nor does it make any difference if he acquires not practically the whole, but absolutely the whole, of the shares. The business of the company does not thereby become his business. He is still entitled to receive dividends on his shares, but no more."

The principle has been reiterated in another case, *Macaura v. Northern Assurance Co. Ltd.* 1925 AC 619 (I), where it was held that a share-holder of a company has no insurable interest in any particular asset of the company. The question has been dealt with by Lord Buckmaster at pages 626-27 as follows :

"Turning now to his position as share-holder, this must be independent of the extent of his share interest. If he were entitled to insure holding all the shares in the company, each share-holder would be equally entitled, if the shares were all in separate hands. Now, no share-holder has any right to any item of property owned by the company for he has no legal or equitable interest therein. He is entitled to a share in the profits while the company continues to carry on business and a share in the distribution of the surplus assets when the company is wound up.

If he were at liberty to effect an insurance against loss by fire of any item of the company's property, the extent of his insurable interest could only be measured by determining the extent to which his share in the ultimate distribution would be diminished by the loss of the asset a calculation almost impossible to make. There is no means by which such an interest can be definitely measured and no standard which can be fixed of the loss against which the contract of insurance could be regarded as an indemnity.

This difficulty was realised by counsel for the appellant, who really based his case upon the contention that such a claim was recognized by authority and depended upon the proper application of the definition of insurable interest given by Lawrence J. in *Lucena v. Graufurd*, (1806) 2 Bos PNR 269 at p. 302 (J). I agree with the comment of Andrews L. J. upon this case. I find equally with him a difficulty in understanding how a moral certainty can be so defined as to render it an essential part of a definite legal proposition.

In the present case, though it might be regarded as a moral certainty that the appellant would suffer loss if the timber which constituted the sole asset of the company were destroyed by the fire, this moral certainty becomes dissipated and lost if the asset be regarded as only one in an innumerable number of items in a company's assets and the share-holding interest be spread over a large number of individual share-holders."

The principle has been reiterated and applied by the Court of Appeal in a recent case in *Short v. Treasury Commissioners* 1948 1 KB 116 (K). In that case the Minister of Aircraft Production, as the "competent authority", made an order under Regulation 50 (4) of the Defence (General) Regulations, 1939, appointing

a Controller of Short Brothers (Rochester and Bedford), Ltd. On 22nd March, 1943, the competent authority made an order under Regulation 78 transferring all the shares in the company to named nominees. On 31st May, 1943, the respondents, namely, the Treasury Commissioners, made an order under Regulation 78 (5) of the Regulations of 1939, specifying the prices of the various classes of shares.

The claimants gave notices in writing under Regulation 78 (7) claiming that the prices specified in the order were less than their "value" as provided in paragraph (5) of the regulation. For the Treasury it was contended that the proper basis of the valuation was to assume that the Minister had acquired all the shares in individual blocks from individual share-holders on the date of transfer, and, on that assumption, to fix the value of all the shares on the basis of the price ruling on the Stock Exchange on that date.

For the claimants it was, however, argued that the transfer effected by the order of 22nd March, 1943, being a transfer of all the shares in the company it was improper to fix the value on the hypothesis of the purchase of individual blocks of shares from individual share-holders, and that the appropriate method would be, first to ascertain the value of the whole understanding and then to determine the proportionate value of the separate classes of shares.

This argument of the claimants was rejected by the Court of Appeal and it was held that the share-holders were not in the eye of law part owners of the undertaking and that the undertaking was something different from the totality of the share holdings.

6. Applying the above principle to the present case it is clear that the petitioners either as share-holders or as directors have no right or interest in the assets of the company, namely, the Sugauli Sugar Factory in the district of Champaran. In my opinion, the argument of the learned Government Advocate to the contrary is not right and the Custodian has no jurisdiction to take proceedings u/s 7 of Act 31 of 1950, as subsequently amended, against the petitioners with regard to the properties mentioned in Annexure E of the application.

7. In the course of his argument the learned Government Advocate referred to the decision in the AIR 1944 51 (Federal Court) . One of the questions debated in that case was the source of the dividends paid to the Raleigh Investment Co. Ltd., by the sterling companies. The Raleigh Investment Company, a company incorporated and having its registered office in England, held the bulk of the shares in nine sterling companies which were also incorporated in England and had their registered offices in England and were controlled from London but carried on business in British India.

These sterling companies declared and paid their dividends in England. The Raleigh Investment Co. Ltd, was assessed as a person non-resident in British India to Income Tax and super-tax in British India in respect of the dividends which it had received in England from the sterling companies. The assessment

was made u/s 4 (1) (c) and Explanation 3 to Section 4 (1) of the Indian Income Tax Act, 1922, as amended in 1939. The Raleigh Investment Company instituted a suit in the Calcutta High Court for a declaration that these provisions of the Indian Income Tax Act were ultra vires the Indian Legislature and for refund of the tax recovered from it.

It was held in these circumstances by the Federal Court that the source of the dividends paid to the Raleigh Investment Co. Ltd by the sterling companies was British India, and in making the dividends liable to Income Tax and super-tax on that basis the Indian Legislature was not giving its law any extraterritorial operation. In discussing the question Spens, C. J. observed that the question of the source of the Shareholder's income was a question of fact to be determined on practical grounds and though no individual corporator could lay claim to any portion of the profits made by the company, every corporator had an interest in them.

It was also observed by the learned Chief Justice that the profits of a company may not materialise into a dividend for the share-holder till a dividend is declared, but that is different from saying that when the dividend is declared the "source" of the dividend is not the same as the source of the profits made by the company.

I do not think that the decision of this case has any bearing on the question presented for determination in the present case. The question at issue there was whether Section 4 (1) (c), and Explanation 3 to Section 4(1) of the Indian Income Tax Act, 1922, as amended in 1939, were extra-territorial in operation and therefore, ultra vires the Government of India Act, 1935. The question at issue was a question of Legislative jurisdiction and it was held by the Federal Court that there was sufficient nexus between the taxing State and the income which was sought to be taxed. The source of the income was, therefore, examined by the Federal Court from this point of view and it was held that there was sufficient nexus and the Indian Legislature was clothed with jurisdiction to impose the tax. The observations of Spens, C. J. at page 249 (of FCR): (at p. 60 of AIR) were, therefore, made in a different context and the decision of that case has really no bearing on the question arising for determination in the present case.

Counsel for the respondents also placed reliance on the decision of a Full Bench of the Allahabad High Court in Asiatic Engineering Co. Vs. Achhru Ram and Others, , at pages 764 and 765 (M). It is true that Malik, C. J. observed in that case that a shareholder has a "right or interest" in the assets of the Company within the meaning of Section 2(f) of Act 31 of 1950. I respectfully differ from the view expressed by Malik, C. J. for the reasons which I have already fully stated, But the actual decision of the Full Bench may be explained on the ground that the application of the petitioner in that case contained certain misrepresentations and misleading statements and there was material suppression of fact. It was on this ground also that the application of the

petitioner was dismissed in that case, and I think that it is the principle lying behind the decision of the Allahabad Full Bench.

8. Counsel for the petitioners also raised two other questions, namely, the question of limitation of time for issuing notice u/s 7A and also the question of constructive res judicata. I do not wish to express any opinion on these questions because I hold that the petitioners must succeed on the ground that the situs of the shares was in Calcutta and the petitioners had no right or interest in the company's assets namely Sugauli Sugar Factory within the meaning of Section 2(f) of Central Act 31 of 1950, as it stands amended.

9. For the reasons already expressed, I hold that the Custodian had no jurisdiction to issue notice u/s 7, dated 4th of April, 1955, or take proceedings for declaring the shares of the petitioners as evacuee property. In my opinion, a writ in the nature of certiorari under Article 226 of the Constitution should be issued to quash the notice dated 4th of April, 1955 (Annexure E) and also to quash the proceedings taken against the petitioners u/s 7 of the Act in that date. I would accordingly allow the application with costs. Hearing fee Rs. 250/-.

Raj Kishore Prasad, J.

10. I agree.