
(1970) 10 KL CK 0019

In the High Court Of Kerala

Case No : Original Petition No. 2460 of 1968

P.M. Parameswaran Nambudiripad

APPELLANT

Vs

Expenditure-tax Officer, A-Ward

RESPONDENT

Date of Decision : 06-10-1970

Acts Referred:

Expenditure Tax Act, 1957 — Section 19

Citation : (1972) 83 ITR 888

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

Bench : Single Bench

Advocate : V.K.K. Menon, for the Appellant; P.K. Krishnan Kutty Menon, for the Respondent

Judgement

Isaac, J.—The petitioner was a karnavan of a Namboodiri Illom known as Poomulli Mana governed by the Madras Nambudiri Act. The petitioner alleges that there was a partition in his illom on March 30, 1958, into 29 shares, and that the petitioner has, thereafter ceased to be the karnavan or manager of the illom. On July 21, 1958, the respondent, the Expenditure-tax Officer, A-Ward, Palghat, issued a notice to the petitioner u/s 13(2) of the Expenditure-tax Act, 1957 (hereinafter, referred to as " the Act "), calling upon the petitioner to file a return of expenditure of the illom in respect of the assessment year 1958-59. The petitioner replied by his letter dated August 11, 1958, that the Act did not apply to his illom, as the illom ceased to exist consequent on the partition effected on March 30, 1958, and the Act came into force only on April 1, 1958. The petitioner also objected to the notice stating that he was not the karuavan of the illom. Some correspondence followed between the petitioner and the respondent; and it finally ended in a best judgment assessment made by the respondent on April 20, 1959. The respondent also issued a notice on the petitioner to show cause why a penalty should not be imposed on him for not filing a return as required by the Act. Thereupon the petitioner filed two writ petitions in this court; one was O. P. No, 645 of 1959 to quash the order of assessment and the other was O. P. No. 646 of 1959 to quash the notice for imposing penalty. The petitioner had also

filed an appeal from the order of assessment. In the meanwhile the petitioner seems to have made representations to the Commissioner of Income Tax and Expenditure-tax against the alleged irregularities occurred in making the best judgment assessment and also in issuing the penalty notice to him. In the light of the discussions which the petitioner's representative had with the Commissioner, the petitioner withdrew O. P. No. 645 of 1959 ; and it was accordingly dismissed on December 22, 1959. The Commissioner then wrote exhibit P-2, dated February 17, 1960, to the petitioner stating that he was instructing the Expenditure-tax Officer to cancel the penalty notice as soon as the original assessment was set aside and asking the petitioner to withdraw the other writ petition also. Accordingly, O. P. No, 646 of 1959 was withdrawn, and that was also dismissed. On January 6, 1961, the Appellate Assistant Commissioner passed an order, exhibit P-3, allowing the petitioner's appeal from the best judgment assessment. Exhibit P-3, states that the assessing authority wrote to the Appellate Assistant Commissioner stating that the various defects pointed out by the petitioner had to be examined afresh and the assessment has to be set aside for disposal de novo. Exhibit P-3 was passed on that basis and for the above purpose. Accordingly the respondent took proceedings against the petitioner for fresh assessment; but the petitioner does not seem to have properly responded. Finally, the respondent issued a notice on August 5, 1966, to the petitioner giving him a further opportunity to file his return and produce his books of accounts, etc., and also to file his objections, if any, to the quantum of expenditure being fixed at Rs. 2 lakhs for the reasons stated in the said notice. The case was posted for hearing on August 17, 1966, The petitioner did not comply with the above notice also ; but he applied for time. Finally he filed an objection, exhibit P-5, dated September 15, 1966, to the proposed assessment proceedings. He did not still file any return, not did he produce any evidence. In these circumstances, the respondent, relying on the records of the Income Tax assessment of the petitioner, assessed him by the order, exhibit P-1, as karta of a Hindu undivided family on a net taxable expenditure of Rs. one lakh, which he fixed to the best of his judgment. This writ petition has been filed to quash the abotfe assessment order.

2. Four grounds have been pressed by counsel for the petitioner :

" (i) The notice dated August 5, 1966, issued by the respondent to the petitioner calling upon him to file the return and produce his books of accounts is illegal in so far as it did not give to the petitioner the time fixed u/s 13(2) of the Act for filing a return, and the question of producing accounts arises only if such a return was not filed or, if such a return was filed, and it was found not acceptable;

(ii) The respondent was bound to pass an order as required by Section 19 of the Act on the claim of the petitioner that his illom had been partitioned on March 30, 1958, and the order of assessment is, therefore, bad;

(iii) The petitioner ceased to be the karta of the illom consequent on the partition, and the assessment proceedings should have, therefore, been taken

against all the members of the illom; and

(iv) The illom is entitled to the allowance provided in Section 6(I)(h) of the Act as it stood before that, provision was deleted by the Expenditure-tax (Amendment) Act 12 of 1959. "

3. The assessment proceedings have been pending against the petitioner from July 21, 1958, Even after the best judgment assessment was set aside by the order, exhibit P-3, dated January 6, 1961, the petitioner had sufficient opportunity to file the return and produce the accounts. The respondent started proceedings pursuant to exhibit P-3 in 1962 ; and the impugned assessment order was passed only on March 29, 1968, The petitioner's case throughout was that the illom was not liable to assessment as it ceased to exist before the Act came into force, and that he was not liable to any proceedings as karta as he ceased to be one, consequent on the partition. It was consistent with the above contentions that he refused to file a return or respond to the notices issued by the respondent for production of books of account and for other purposes. The petitioner has not also taken a specific ground in this writ petition that the assessment order is vitiated for want of a notice as required by Section 13(2) of the Act. The first point raised by the petitioner cannot, therefore, succeed.

4. I shall now consider the second point. The impugned order, exhibit P-1, shows that the petitioner put forward a claim u/s 19 of the Act, and that, the respondent did not entertain it, as the partition took place after the end of the accounting year. He stated as follows in exhibit P-1 :

" The accounting year of the assessee ended on September 16, 1957. The partition deed evidencing partition among the members of the family was drawn up on March 30, 1958, and the same was registered on July 25, 1958. That being so, the family did not disrupt in the accounting year, but much later. The correct status will, therefore, be that of a Hindu undivided family. The contention that the family disrupted cannot be accepted in view of the facts stated above."

5. Section 19 of the Act reads:

" 19. (1) Where, at the time of making an assessment, it is brought to the notice, of the Expenditure-tax Officer that a partition has taken place among the members of a Hindu undivided family, and the Expenditure-tax Officer, after inquiry, is satisfied that the joint family property has been partitioned as a whole among the various members or groups of members in definite portions, he shall record an order to that effect, and make assessments on the expenditure of the undivided family as such for the assessment year or years including the year relevant to the previous year in which the partition has taken place, and each member or group of members shall be liable jointly and severally for the tax assessed on the expenditure of the joint family as such.

(2) Where the Expenditure-tax Officer is not so satisfied, he may, by order, declare that such family shall be deemed for the purposes of this Act to continue

to be a Hindu undivided family liable to be assessed as such."

6. On a mere reading of the section, I was inclined to think that the respondent was right in holding that the section has no application to a case where the partition took place subsequent to the previous year relevant to the assessment year. Section 19(1) contemplates two things, namely, recording of an order that a partition in the manner mentioned therein has taken place, and then making assessments on the expenditure of the undivided family as such for the assessment year or years including the year relevant to the previous year in which the partition has taken place. The assessments which would be affected consequent on the order of recording a partition would be only the assessment for the year relevant to the previous year in which the partition took place and the assessments for all subsequent assessment years. Therefore, it appeared to me that Section 19 can apply only to a case where the partition took place in the previous year. Counsel for the petitioner invited my attention to a decision of the Punjab High Court in *Rajmal Paharchand v. Commissioner of Income Tax* 18 I.T.R. [1950] 12 wherein an opposite view has been taken. Dealing with Section 25A of the Indian Income Tax Act, 1922, which is similar in terms to Section 19 of the Act, the court said :

" Now, the expression " at the time of making an assessment" stated in Section 25A means in the course of the process of assessment. It is not restricted to the time of making the final order determining the assessment. The power of the Income Tax Officer to pass an order under subsection (1), therefore, arises when at the time of making an assessment u/s 23, a claim is made by a member that a partition has taken place but not necessarily during the accounting year. Clearly, a partition after the close of the accounting year may be put forward and is bound to be enquired into by the Income Tax Officer. All that is necessary is that the claim of a partition having taken place is put forth at the time of making the assessment."

7. The same view seems to have been expressed in the Full Bench decision of this court in *Khan Bahadur Chowakkaran Keloth Mammad Keyi Vs. Wealth Tax Officer, Calicut*, Dealing with Section 20 of the Wealth-tax Act, which is similar in terms to Section 19 of the Act, Velu Pillai J. stated :

"What is relevant to consider u/s 20(1) is whether there has been a partition before the making of the assessment. Even if the partition was on the 25th July, 1958, and not earlier, as contended, Section 20(1) would still apply. This section corresponds to Section 25A of the Indian Income Tax Act, 1922.

8. 25th July, 1958, mentioned in the above passage, is a date much after the end of the previous year concerned in that case.

9. In the light of the view expressed in the above two decisions and having due regard to the principle that a statute like the Expenditure-tax Act, which has an all-India application, must, as far as possible, be given the same judicial interpretation, I am constrained to hold that Section 19 of the Act applies also to a

case where the claim relates to a partition which took place after the close of the accounting year.

10. The counter-affidavit filed by the respondent states that there was no partition of the illom on March 30, 1958, into 29 shares, and that vast extent of agricultural properties still remain to be divided. Counsel for the respondent also invited my attention to paragraph 3 of the affidavit filed in this case by the petitioner in support of C.M.P. No. 8604 of 1970, wherein it stated as follows :

" The entire partition by metes and bounds had been completed by March 28, 1970, and there is no jointness, legal or fictional, among the petitioner an other divided members now."

11. This statement is apparently contrary to the definite case which the petitioner put forward before the respondent in his objection, exhibit P-5, and which he has also put forward in the affidavit in support of the original petition. It is sufficient for me to say that, if the petitioner has put forward a claim based on the partition u/s 19 of the Act, the respondent is bound to make an enquiry into that claim, and, if he is satisfied that the family property has been partitioned in the manner stated therein, to record an order to that effect. If he is not so satisfied he has, by order, to declare that the said family shall be deemed for the purpose of this Act to continue to be a Hindu undivided family liable to be assessed as such. The provision is mandatory and the respondent has not complied with the above provision. The assessment order, exhibit P-1, has, therefore, to be quashed on this short ground.

12. Counsel for the respondent cited two decisions of the Supreme Court, *Kalwa Devadattam v. Union of India* I.T.R [1963] (B.C.) 165 : [1964] 3 S.C.C. 191 and *Additional Income Tax Officer, Cuddapah Vs. A. Thimmayya and Others*, and contended that the fact that the respondent did not pass an order as contemplated by Sub-section (1) or Sub-section (2) of Section 19 of the Act does not affect the jurisdiction of the respondent in passing the order of assessment, and that this court should not, therefore, interfere with the said order. The former case related to a suit which an assessee filed to set aside an assessment made by the Income Tax Officer alleging that it was made without passing an order on the claim of partition as required by Section 25A of the Indian Income Tax Act. As I read that decision, all that the Supreme Court held was that a suit to set aside an order of assessment is not maintainable, as the statute had provided adequate remedies for an aggrieved assessee. The court also stated that the fact that the Income Tax Officer did not pass an order u/s 25A of the Indian Income Tax Act did not affect his jurisdiction to pass an order of assessment. The latter case also arose out of a suit, which the assessee filed to set aside proceedings of recovery of tax due under the Indian Income Tax Act, on the ground that the order of assessment was illegal as it was passed without passing an order on his claim for partition as required by Section 25A of the Act. In that case also, their Lordships observed that the order of assessment was with jurisdiction, and the proper remedy of the assessee was to file an appeal and

that the said order was not liable to be attacked collaterally, by seeking to quash the proceedings for recovery of the tax payable thereunder. In my view, these decisions cannot help the respondent, as the contention raised in this case is not that the impugned order of assessment was without jurisdiction but it was in violation of a mandatory provision of the Act. This is a proper ground to quash an order under Article 226 of the Constitution.

13. The third question raised by the petitioner, namely, whether he can be assessed as karta of the illom depends on the finding whether there has been a partition as claimed by him. If there is a partition, he ceased to be a karta, with the result he is not, thereafter, competent to represent the illom or the members thereof. In that event, the assessment proceedings have to be taken against all the members of the illom and the assessment has to be made accordingly. The Full Bench decision of this court in Parameswaran Nambudiripad Vs. Inspecting Assistant Commissioner of Agricultural Income Tax, supports the above view.

14. The last point, that the petitioner was not given the basic allowance u/s 6(1) (h) of the Act, is one which has been raised by the petitioner by an additional affidavit at a late stage. The respondent has not filed any counter-affidavit with regard to that claim. Counsel for the respondent submits that what has been assessed by exhibit P-1 is the net taxable expenditure, and that it should, therefore, be taken that this allowance has been taken into consideration. A reading of the order does not show that such a claim was raised nor considered. The order does not make any reference to such a claim nor does it show that any amount was allowed on that account. At any rate, in view of the fact that I am setting aside the order of assessment, it is not necessary for me to express any opinion on this question. The respondent has to consider this claim if it is properly raised before him by the petitioner.

15. In the result, I quash the impugned order of assessment, exhibit P-1. The respondent will be at liberty to take up the assessment proceedings and proceed with the same in accordance with law and in the light of the observations herein contained. In the circumstances of the case, there will be no order as to costs.