
(1972) 03 CAL CK 0005
In the Calcutta High Court
Case No : Appeal No. 50 of 1971

Probodh Chandra Sett

APPELLANT

Vs

Income Tax Officer, "C" Ward and Others

RESPONDENT

Date of Decision : 16-03-1972

Acts Referred:

Constitution of India, 1950 — Article 226
Income Tax Act, 1961 — Section 143(3), 297(2)

Citation : AIR 1972 Cal 417 : (1975) 98 ITR 273

Hon'ble Judges : P.B. Mukharji, C.J;B.C. Mitra, J

Bench : Division Bench

Advocate : T.P. Mukherjee and Sailendra Nath Datta, for the Appellant; Dipankar Gupta and Ajoy Mitra, for the Respondent

Judgement

P.B. Mukharh, C.J.—The appellant made an application under Article 226 of the Constitution raising a question of interpretation of Section 297(2)(a) of the Income Tax Act of 1961.

2. For the assessment year 1961-62 the appellant filed his return voluntarily on December 1, 1961. On February 1, 1963, a notice u/s 23 (2) of the Indian Income Tax Act, 1922 was issued and served on the appellant. On March 17, 1966, a further notice u/s 23 (2) of the Indian Income Tax Act, 1922 was issued calling upon the appellant to attend on March 22, 1966 for completion of the assessment. On March 23, 1966 the appellant informed the Income Tax Officer that as the aforesaid notice was served on the appellant after 1 P.M. it was not possible for him to comply with it. Thereafter on December 31, 1966, a notice u/s 221 of the Income Tax Act, 1961 was issued by the respondent Income Tax Officer on the appellant to show cause why a penalty should not be imposed upon him for not paying the tax assessed. On January 11, 1957 another notice u/s 154/155 of the 1961 Act was issued by the respondent Income Tax Officer for rectification of the purported assessment made u/s 144 of that Act. On January 21, 1967, two applications were presented by the appellant to the Income Tax

Officer. In the first application, the petitioner contended that the assessment was ultra vires as it was made under the 1961 Act and not under the 1922 Act and therefore no question of penalty could arise. In the second petition, objection was taken by the appellant to the competency of the notice for reduction of the order of assessment already made. On February 16, 1967, a notice of demand and the corresponding challan and assessment order u/s 144 of 1961 Act relating to the assessment year 1961-62 were served on the assessee and on the same date the assessee made an application to the respondent Income Tax Officer requesting him to cancel the assessment and make a fresh assessment as he was not given reasonable opportunity to comply with the notice dated March 17, 1966. The appellant's aforesaid application was accepted and the respondent Income Tax Officer cancelled the assessment and made a fresh assessment for the year u/s 143(3)/ 146 of 1961 Act on September 6, 1967.

3. The appellant thereafter took an appeal from the aforesaid order of assessment before the Appellate Assistant Commissioner. In the grounds of appeal, objections were taken to the inclusion of certain amount in the total income and there was an omnibus ground at the end viz. the assessment was otherwise bad in law and in the facts and circumstances of the case. But before the Appellate Assistant Commissioner no argument was advanced that the assessment was bad because it was made under the provisions of 1961 Act and the Appellate Assistant Commissioner gave the appellant certain reliefs by way of deductions which were given effect to by the respondent Income Tax Officer u/s 250 of 1961 Act in the order of assessment. No further appeals were taken by the petitioner to the Tribunal.

4. On June 28, 1968, a challan was issued for realisation of the tax on the basis of the modified assessment and on July 18, 1969 the respondent Income Tax Officer issued a notice u/s 221 of 1961 Act on the appellant to show cause why a penalty should not be imposed for failure to pay the tax assessed and demanded within the time allowed by the Act.

5. Thereupon the Rule was obtained by the appellant on August 20, 1968 calling upon the respondents to show cause why the aforesaid order of assessment, the demand for tax, the notice for showing cause why penalty should not be imposed as well as the appellate order of the Appellate Assistant Commissioner should not be quashed.

6. That sets out the bare facts of this case. The learned Judge who heard the Rule discharged it. He came to the following finding of facts:

7. The respondent Income Tax Officer had abundant authority to make the assessment under the corresponding provisions of 1922 Act which are more or less in pari materia with the assessment Sections of 1961 Act. Therefore, according to the learned Judge, the order of assessment and the consequential orders and notices thereto cannot be considered void ab initio and without jurisdiction. The proper thing for the authorities would have been to rectify the

order and make it in consonance with the provisions of the repealed Act of 1922.

8. But the learned Judge says that unfortunately the fact that under the provisions of Section 297(2)(a) the assessment should have been made under the provisions of the old Act was not brought to the attention of either the respondent Income Tax Officer or the respondent Appellate Assistant Commissioner. There, of course, the learned Judge was wrong. The attention of the Income Tax Officer in fact was drawn to the appellant's letter dated January 21, 1967 where it is stated:

"It now appears to me from your notice under Sections 154/155 of the Act of 1961 that the assessment order in question was passed u/s 144 of the new Act. As the return was filed under the old Act the assessment in question should have been made under the old Act and as such the assessment u/s 144 is ab initio void."

To the same effect it was repeated by the appellant in his letter dated January 21, 1967. Therefore, it is not quite correct to say that the Income Tax Officer's attention was not brought to the fact that the new Act not being applicable the old Act is applicable,

9. But the question did not rest there. The appellant took no point under this score. He appealed to the Appellate Assistant Commissioner. In his several grounds of appeal, he makes no special ground of this point and he does not state that his whole contention is that the old Act applied and the new Act did not apply. Mr. Mukherjee, who appeared for the appellant showed us his several grounds where it was stated that the assessment is otherwise bad in law and in fact. We do not, however, feel that that ground covers this point and we feel that it was incumbent upon the assessee appellant to put it forward as a ground in his ground of appeal before the Income Tax Officer and the Appellate Assistant Commissioner. Before the Appellate Assistant Commissioner, as we have already stated, the appellant did not argue the point at all that the old Act applied.

10. Now proceeding with the findings of the learned trial Judge, he says:

"Now possibly it is too late for anybody to make any rectification of the impugned orders and notices. For this state of affairs the petitioner has nobody but himself to blame. He should have filed an appeal to the Tribunal from the order of the Appellate Assistant Commissioner and pointed out that the order of assessment was erroneous as it was not made under the provisions of the 1922 Act and the Tribunal could have passed the necessary orders enabling the respondent Income Tax Officer to rectify the order of assessment. As I am satisfied that there was no initial lack of jurisdiction in the respondent Income Tax Officer in making the assessment, this Rule must be discharged."

I do not think that the learned Judge could have passed any other order. The returns in this case were filed on December 1, 1961 and the notice u/s 23 (2) of the Indian Income Tax Act, 1923 was issued on February 1, 1963.

11. Two points really arise in this appeal. First is, can the appellant having chosen his course of remedy change it in the mid-stream? Secondly, is the order of the learned trial Judge at all prejudicial to the assessee?

12. Regarding the point that the order should have been made under the old Indian Income Tax Act, 1922 it is quite clear that wrong reference to the power under which the order is made does not per se vitiate the order if there is some other power under which that order could lawfully be made. The validity of the impugned order has to be tested by reference to the basic question whether the Income Tax Officer had any power at all to make an order of that nature. If the power is otherwise established, the fact that the source of the power has been incorrectly described would not make the order invalid. The provisions of Section 23 (3) of the 1922 Act are in pari materia with the provisions of Section 143(3) of the 1961 Act and deal with the same subject-matter, that is, assessment. There is a slight difference in the language but the purport of the provisions in both the Acts is the same. Therefore, an order of the Income Tax Officer passed u/s 143(3) of the Act of 1961 could, therefore, be legitimately held to have been passed in exercise of the powers vested in the Income Tax Officer u/s 23 (3) of the 1922 Act. That was the decision of the Punjab and Haryana High Court in *Commissioner of Income Tax Vs. Hargopal Bhalla and Sons*, .

13. In *L. Hazari Mal Kuthiala Vs. The Income Tax Officer, Special Circle, Ambala Cantt.*, the Supreme Court tended to give the Same decision. There it was held that the Commissioner of Income Tax, purporting to act u/s 5(5) and (7-A) of the Indian Income Tax Act, made an order on November 4, 1953, that the assessment of the assessee firm would be done by the Income Tax Officer Special Circle, Ambala, and not by the Income Tax Officer, Patiala, who was the competent authority u/s 64 of the Act to assess the firm. In 1955 the Income Tax Officer, Special Circle, Ambala issued a notice u/s 34 of the Patiala Income Tax Act to reopen the firm's assessment for the accounting year 1945-46. The firm contended that the Officer at Ambala had no jurisdiction as the order of the Commissioner was ultra vires, since it was not issued under the Patiala Act. It was held by the Supreme Court that the exercise of a power would be referable to a jurisdiction Which conferred validity upon it and not to a jurisdiction under which it would be nugatory, and the order of the Commissioner was not invalid merely because it was not made under the Patiala Act.

14. The appellant contended that he has been prejudiced by the application of the new Act. The contention is that the penalty and prosecution are harsher in the new Act than under the old Act and there were alternative remedies under the old Act. Reference was made in support of this argument to Section 28, Sub-section (4) of the old Act and Section 275-A to Section 280 of the new Act of 1961. It was also pointed out that under the new Act of 1961 Section 139(1), Proviso (iii) there is also a penal rate of interest. Secondly, it was argued that the substantive procedure was also different and it was not a matter of adjective procedure. In support of that proposition Section 67 of the new Act of 1961 was

shown and argued that no such procedure under the old Act of 1922 was available. The argument on this point seems to me to be entirely misplaced. What we are dealing with in this appeal is not the question of penalty or prosecution. If and when the penalty and prosecution take place, the appellant has ample remedies and doors of this Court are open to take proceedings. But that is not the subject-matter of the present application.

15. Now regarding the point whether the appellant having chosen one particular remedy can in the mid-stream start a Writ Petition under Article 226 of the Constitution. The appellant was aware of the point at all material times. The appellant in fact took the point in two of his letters to the Income Tax Officer but the appellant did not press for it and allowed the Income Tax Officer to go into the merits. Then the appellant chose the remedy and followed that path by way of an appeal to the Appellate Assistant Commissioner. There he does not argue the point at all and allowed the Appellate Assistant Commissioner to come to a decision on the merits and in fact he reduced the assessment. Now the appellant thinks of a change of course. He could have appealed to the Appellate Tribunal and got his relief if his point was sound and the corrections made in the order of assessment. He did not do so. On the contrary he turned round and sought a Writ under Article 226 of the Constitution of India. As the appellant has already resorted to an alternative, and equally efficacious, legal remedy, it should be required to pursue that remedy and should not be allowed to invoke the special jurisdiction of the High Court under Article 226 of the Constitution. Specially it is so here where the matter on merits hardly deserves interference under the Writ in the discretionary jurisdiction. The appellant's fear of the penalty and prosecution being different under the new Act being made applicable to him is premature and if it comes then the appellant's remedy would be open under Article 226 of the Constitution.

16. In that view of the problem, I do not think that I should interfere with the decision of the learned Judge. I therefore, dismiss the appeal. There will be no order as to costs.

B.C. Mitra, J.

17. I agree with the order made by my Lord but I would like to add a few words of my own. The appellant preferred an appeal against the order of the Income Tax Officer and in the grounds of appeal, he stated that the Income Tax Officer had committed an error in holding the loans, amounting to Rupees 40,000/- as income from other sources. This point was agitated on behalf of the appellant before the Appellate Assistant Commissioner and in the Order made by the latter, it appears, he held that the appellant had discharged the onus that lay upon him in proving the genuineness of the loan of Rs. 5,000/-, taken from Kamal Kumar Dey. He also held that regarding the balance loan of Rs 35,000/-, stated to have been taken in 1961-62 and Rs. 50,000 taken in 1962-63 assessment years, the representative of the appellant gave up his argument that the amount represented borrowings. Finally the Appellate Assistant Commissioner held that

the total income of the appellant for 1961-62 and 1962-63 should be reduced by Rs. 10,762/- and Rs. 50,200/- respectively. It is quite clear to us that the appellant's grievances with regard to loans were removed by the Order of the Appellate Assistant Commissioner.

18. Another point to which I should like to refer is that the appellant had alternative remedy available to him. The existence of an alternative remedy is no bar to the issue of Writs by this Court under Article 226 of the Constitution of India. But where such alternative remedy exists, the Writ Court in exercise of its discretion should not grant relief to a petitioner unless the petitioner satisfies the Court that there are sufficient and/or adequate grounds as to why the alternative remedy will not be sufficient to meet his grievances. That is the view which has been taken by the Supreme Court in two decisions viz. in the case of C.A. Abraham, Uppotttil, Kottayam Vs. The Income Tax Officer, Kottayam and Another, and in the case of Shivram Poddar Vs. Income Tax Officer, Central Circle II, Calcutta, and Another, . In this case the appellant has made out no grounds in the Writ Petition as to why the alternative remedy available to him by way of a further appeal to the Tribunal would not have been adequate or sufficient for his purpose.

19. The only other matter to which I would like to refer is the provision in Section 297 of the Income Tax Act, 1961. That section deals with repeals and savings and provides for different circumstances where the Indian Income Tax Act, 1922 and Income Tax Act, 1961 are to be applied in assessment and also in penalty proceedings. Admittedly in this case, no penalty has yet been imposed upon the appellant. If and when such penalty is imposed upon the appellant for omission on his part to pay the assessment already made, the question as to under which Act, viz. the Indian Income Tax Act, 1922 or the Income Tax Act, 1961, penalty would be recovered, would have to be considered. It seems to us that a discussion on this question at this stage is premature,

20. For these reasons, I agree with the order made by my Lord.

21. Appeal is, therefore, dismissed.