
(1963) 02 AHC CK 0001

In the Allahabad High Court

Case No : Civil Miscellaneous Writ No. 3243 of 1962

RADHA KISHAN

APPELLANT

Vs

Income Tax OFFICER, "B" WARD, AGRA.

RESPONDENT

Date of Decision : 01-02-1963

Acts Referred:

Constitution of India, 1950 — Article 226
Income Tax Act, 1961 — Section 23, 28

Citation : (1963) 02 AHC CK 0001

Judgement

This is a writ petition under article 226 of the Constitution, directed against the notices of demand dated 24th August, 1962 (annexure "D-1" to "D-4"), and the notices dated 12th October, 1962 (annexure "G-1" to "G-4", issued under sections 29 and 46(5A) respectively of the Income Tax Act, 1922 (hereinafter to as the Act).

The facts lending up to this petition are these. The petitioner, Radha Kishan, was one of the four partners in the firm which carried on business in the name and style of Messrs. Jawahar Tent Factory at Agra. Jawaharlal, the karta, representing the Hindu undivided family of Raja Ram Das had 0-8-0 share, whereas the petitioner and the petitioner and the other remaining two partners had 0-8-0 share in the firm of Messrs. Jawahar Tent Factory, Agra. The said Jawaharlal was the financing partner while the remaining partners including the petitioner were only working partners. The said firm remained in existence from 1940 to 31st March, 1946. The four relevant years of assessment are 1944-45, 1945-46 and 1946-47 and 1947-48.

The firm of Jawahar Tent Factory was registered u/s 26A of the Income Tax Act and assessment thereon was made under the provisions of section 23(5) (a) of the Act. In accordance therewith the income was computed as of the fit but it was allocated and the tax payable thereon was determined in the individual assessment of its respective partners, in accordance with the rate applicable to their respective total incomes. The petitioner, for the relevant assessment years, was duly assessed on his share income from the said registered firm at the rate

applicable to his total income. The tax so assessed was in due course duly paid by him in respect of his share of promote from the said firm. The petitioner, at the time when this petition was filed, had also 0-4-0 share in Messrs. Bhagwan Ice Factory, Allahabad, 0-8-0 share in Agarwal Brothers, Allahabad, and 0-8-0 share in the firm of Messrs. Shree Rameshwar Oil Mills, Allahabad, up to July, 1961, where after he ceased to be a partner in the last mentioned firm.

There was an outstanding demand of Rs. 79,296.25 against the said financing partner, Jawahar Lal (karta of the Hindu undivided family of Raja Ram Narain Das, Agra), on account of Income Tax and/or the penalty in respect of his share income from Jawahar Tent Factory. The tax liability of the partner, Jawaharlal, was made up as follows :

Share income income of Jawaharlal Rs.

Tax liability unpaid Rs. nP.

1944-45

47,717

8,623.56

1945-46

53,864

39,416.23

1946-47

35,167

16,092.59

1947-48

19,466

15,163.87

79,269.25

The aforesaid tax liability of Jawaharlal was sought to be recovered by the issue of a demand notice u/s 29 (annexure "D-1" to "D-4") dated 24th August, 1962, from the petitioner by invoking the provisions of section and several. Notices u/s 46(5A) of the Act were also issued on the same day to the said Messrs. Bhagwan Ice Factory, Agarwal Brothers and Shree Rameshwar Oil Mills, Allahabad. It is common ground that these notices were issued nearly 14 years after the firm, Messrs. Jawahar Tent Factory had been dissolved. It is also common ground that the petitioner in respect his share income from the said firm was assessed prior of the dissolution of the firm.

The question that falls for determination in the petition is whether one of the partners of a dissolved registered firm can be held liable for the tax due from another partner under the provisions of section 44 read with section 23(5) (a) of the Act ? The relevant provisions of section 23(5) (a), as it stood before its amendment by section 14 of the Finance Act of 1956, were as follows :

"23. (5) Notwithstanding anything contained in the foregoing sub-sections, when the assessee is a firm and the total income of the firm has been assessed under sub-section (1), sub-section (3), or sub-section (4), as the case may be, -

(a) in the case of a registered firm, the sum payable by the firm itself shall not be determined but the total income of each partner of the firm, including therein his share of its income, profits and gains of the previous year, shall be assessed and the sum payable by him on the basis of such assessment shall be determine."

The position that obtained, therefore, in the relevant years of account was - and that is what the Income Tax Officer in fact did - that as the said firm was a registered one, the firm itself was not to pay tax and therefore the tax payable by the firm was not determined. Each partners share in the firms profit, however, was allocated in accordance with the shares specified in the deed of partnership and such share was taken to the individual assessment of each partner and the tax payable by each partner on the basis of his total income inclusive of the share of the sums profits was determined and the demand or levy was also made on the partners individually. The tax not having been determined in the hands of the firm itself, no tax could be demanded from the firm as such. Prima facie, therefore, u/s 23(5) (a), in the case of a registered firm, the tax not having been determined, there was no liability to pay the tax by the firm. The tax was payable by each partner on his share income at the rate applicable to his total income. Therefore, even if each of the four partners had equal shares, but who allocated and bought to assessment in their individual assessment, the tax payable on such share income might well have been very different, depending on the rate applicable to the total income of each partner. That is the reason why the tax liability of Jawaharlal, reproduced hereinabove, which is sought to be recovered from the petitioner, fluctuates violently in the relevant four years of assessment, according to the total income as determined in Jawaharlals individual assessments. In the years when Jawaharlals total income was less, the tax on the share income was also smaller, depending upon the rate applicable to his total income. Prima facie, therefore, the tax due from Jawaharlal on his share income from the registered firm is not the same as the tax liability of the registered firm, if such liability could have been possibly determined. This could only have been determined if there was some provision in the Act for treating such registered firm as an unregistered firm then the tax payable would have been on the total income of the firm, but, in the present case, the tax payable on the share income of Jawaharlal is at a rate which has no relevance to the rate applicable even to the firm if it could have been treated as unregistered but is at a rate which is dependent on the total income of Jawaharlal including the shares

income from the firm. This is an aspect which cannot be ignored when considering whether section 44 of the Income Tax Act can at all come to the rescue of the department in a case such as the present which is a case of a registered firm.

Section 44 of the Act, as it stood before its amendment by section 11 of the Finance Act of 1958, runs as follows :

"44. Where any business, profession or vocation carried on by a firm or association of persons has been discontinued, or where an association of persons is dissolved, every person who was at the time of such discontinuance or dissolution a partner of such firm or a member of such association shall, in respect of the income, profits and gains of the firm or association, be jointly and severally liable to assessment under Chapter IV and for the amount of tax payable and all the provisions of Chapter IV shall, so far as may be, apply to any such assessment."

The object clearly of this section was to prevent loss of revenue by the mere expedient of dissolving a firm, either before assessment was made on it or afterwards. This section makes no distinction between a registered and an unregistered firm. The difficulty, however, is in determining the amount of tax that will be payable by one partner of a registered firm in respect of the tax due from another partner who has defaulted. This section makes no provisions for such a contingency. The liability may be joint and several but the question is what is the amount of that liability and how is that liability to be determined and that liability must be capable of being determined before it can be said that one partner is liable for the tax due from another partner of a registered firm. The liability u/s 44 is joint and several not only for the assessment but also "for the amount of tax payable." The amount of tax payable is determined under the provision of section 23 or section 34 of the Act and under that provision as already observed, in the case of a registered firm the tax in the hands of the firm has not been determined. If the tax cannot be determined, a fortiori no amount of tax can be said to be payable by the firm. If no amount of tax is payable by the firm then it is difficult, if not impossible, to say for what amount the joint and several responsibility arises, if at all. Assessment has to be made on a quantified amount; it must be a quantified liability. Not only must the assessment, in the shape of computation of income, have been made, but that computation must further be subjected to the process of determination of the tax payable according to the rate applicable by the Finance Act of relevant year. When, u/s 23(5) (a), as it stood in the relevant years of account, there was a specific prohibition that the tax shall not be determined in the case of a registered firm, it follows that such tax could not have been determined or quantified in the hands of the registered firm. The tax payable on the share income from the registered firm had to be determined only in the hands of the individual partners in their hands at the rate applicable to their respective total incomes. Therefore, even if there is joint and several liability of the partners in their hands at the rate applicable to

their respective total incomes. Therefore, even if there is joint and several liability of the partners in the case of a dissolved registered firm u/s 44, it could not have been given effect to against one of its partners, particularly, in the matter of recovery of tax determined and due from one partner from another partner, because the amount of tax payable itself would be indeterminate and indeterminable. It would, therefore, not be possible to recover from another partner tax determined on the share income at a rate which had no connection with the rate which would have been applicable to the firm as such. In my judgment before one partner can be made liable for the tax due on the share income of another partner of a registered firm, it is necessary that there should be some provision in the Act for determining the tax liability of the registered firm. Once that tax liability is determined then each partner could be made liable even for the payment of the entire amount due from the firm. But until such liability of the firm has been determined, it is not possible to recover the amount due from one partner from another.

There is nothing in section 44 or any other section of the Act whereunder, upon the discontinuance or dissolution of a registered firm, the liability to tax of the partners of such firm determined u/s 23 (5) (a) becomes the tax liability of the firm. The second and the third provision to section 23(5) (a) of the Act give a clear indication of the mind of the legislature. The legislature was obviously conscious of the serious implications to the revenue of the provision that in the case of a registered firm the tax shall not be determined. The second and third provisos, therefore, had to be enacted as exceptions to the general rule, that tax in the case of a registered firm shall not be determined. The first exception was in the case of a non-resident and it was provided that in the case of a non-resident partner "his share of income, profits and gains of the firm shall be assessed on the firm at the rates which would be applicable if it were assessed on him personally, and the sum so determined as payable shall be paid by the firm." The second exception was in the case of a partner of a registered firm who is residing in Pakistan and in the case of such a partner his "share of the income, profits and gains of the firm shall be assessed on the firm in the manner laid down in the preceding proviso and the sum so determined as payable shall be paid by the firm." Therefore, in respect of these two exceptions created by statute, a definite method for determining the tax liability of such a partner was provided. This only means that in all other cases no provision or machinery existed for determining the tax liability of a registered firm.

It was also quite open to the legislature to enact a legal fiction such as was enacted by it by the amending Act 40 of 1940 which added proviso (d) to section 28(1) of the Act. By this proviso, the lacuna in the Act, which hitherto existed for determining the quantum of penalty which could be levied on a registered firm for defaults committed u/s 28(1) of the Act was removed. The relevant portion of this proviso (d) runs :

"When the person liable to penalty is a registered firm, or an unregistered firm

which has been assessed under clause (b) of sub-section (5) of section 23 then notwithstanding anything contained in the other provisions of this Act, the amount of Income Tax and super-tax payable by the firm itself shall be taken to be an amount equal to the tax which would have been payable by an unregistered firm on an income equal to the firms total income....."

It became necessary to add this proviso as though a registered firm was a "person" and an "assessee" for purposes of assessment and penalty could be validly imposed on the registered firm but since no tax was payable by a registered firm it became impossible to determine the quantum of penalty leviable on a registered firm, and therefore the legal fiction had to be created by the said proviso that though the firm was a registered one but for purposes of determining the quantum of the penalty leviable, the firm was to be treated as an unregistered firm and the Income Tax and super-tax payable by the firm was deemed to be an amount equal to the tax which would have been payable by an unregistered firm. In section 44 or u/s 23(5) (a) such a fiction could very well have been introduced by the legislature, by providing that in the case of a dissolved or discontinued registered firm the allocation u/s 23(5) (a) already made would, upon the default of one partner to pay his tax due on the share income, be set at naught and the firm shall be treated as an unregistered firm for all purposes and the tax payable by the firm determined on that basis. In that event only would it have been possible to make one partner liable for the tax liability of the firm. It is also significant that though there is a proviso to section 23(5) (b) for an unregistered firm to be treated as a registered firm, if the interest of the revenue so demand, but there is no provision whatsoever for treating a registered firm as an unregistered firm even though the interest of the revenue may so require except in the two exceptions provided for specifically in the said proviso to section 23(5) (a) of the Act. If there is no method at all provided for determining the tax liability of the registered firm, then obviously no question of making a demand from one partner of the tax due from another partner or for the entire tax payable by the firm can possibly arise. The demand can only be made against one partner for the tax liability of the firm when the Act provides a machinery for determining the tax liability of a registered firm but when in fact, prior to 1956, there was an express prohibition against making any such determination, it becomes impossible to determine and much less to quantify the tax that is payable by such firm. Unless that step of determining the tax liability is first completed no demand can possibly be made against a partner of that firm. It seems fairly clear from the scheme of section 26A read with section 23(5) (a), as it stood prior to the amendment in 1956, that the liability of a partner of registered firm was co-terminus with his share income but at the rate applicable to his total income. In other words, so to speak one of the advantages of obtaining registration for a firm was to make the liability of each partner a limited liability, in the sense that he was no longer jointly and severally responsible for the defaults in payment of tax in respect of the share income of the other partners derived from such registered firm. The view that I have taken

finds some support from the decisions of the Madras and Kerala High Courts in the cases of Subramaniam Chettiar v. Special Deputy Tahsildar and Vedu Gopalan v. Income Tax Officer.

Mr. Gopal Behari, the learned counsel for the departmental, however has strenuously contended that the Supreme Court decision in Commissioner of Income Tax v. S. V. Angidi Chettiar lends support to the contention of the department that a partner of a registered firm is jointly and severally liable, notwithstanding section 23(5) (a) for the defaults committed in payment of tax by other partners in respect of their share incomes. This case, admittedly, has no direct bearing. It dealt with the question of the levy of penalty on a registered firm after its dissolution. It was held that u/s 28 of the Income Tax Act read with section 44 of the Act, an Income Tax Officer has power to make an order u/s 28 imposing a penalty on a firm even after the dissolution of a firm caused by the death of one of the partners. This principle was applicable not only to unregistered firms but also to registered firms as there was nothing in section 44 to indicate that section 44 did not apply to registered firms and the fact that u/s 23(5)(a) of the Income Tax Act no tax is payable by the registered firm would not prevent a penalty being imposed on the registered firm. It was pointed out by their Lordships of the Supreme Court that section 28, as it was originally enacted, was somewhat obscure but the amendment made in 1940, by adding proviso (d) to section 28(1), the registered firm was made liable to penalty despite the fact that it could not be charged to tax and was not in fact charged to Income Tax or super-tax. As already observed, there is no provision such as proviso (d) to section 28(1) inserted in section 23(5) or in section 44 of the Act. The Supreme Court decision, therefore, was not concerned, in any way, with the question which arises here. Mr. Gopal Behari, however, contended that the dicta of this case would be applicable to the present case and relied on certain observations made by their Lordships of the Supreme Court. It is no doubt true that even an obiter of the Supreme Court would be entitled to great respect and weight, provided however the observations could be said to be applicable to the facts of the case. He relied particularly on the penultimate paragraph at page 744, which reads as follows :

"In our view the learned Chief Justice (Chakravartti C.J.) was right in so enunciating the law. u/s 23(5) of the Indian Income Tax Act, before it was amended in 1956, in the case of a registered firm the tax payable by the firm itself was not required to be determined but the total income of each partner of the firm including therein the share of its income, profits and gains of the previous year was required to be assessed and the sum payable by him on the basis of such assessment was to be determined. But this was merely a method of collection of tax due from the firm."

These observations, manifestly, relate to the question which their Lordships were called upon to determine and that was whether a penalty could be levied on a registered firm after its dissolution. As already observed there was the specific

provision contained in proviso (d) to section 28(1) of the Act which made it possible, by the enacting of a legal fiction to treat the registered firm as unregistered for the purpose of determining the quantum of the tax which has escaped assessment and penalty leviable. In the absence of any such specific provision in section 23(5) (a) or section 44, it is not possible or permissible to extend the principle laid down by the supreme Court in *Angidi Chettiars* case to the facts of the present case. To extend the principle would be to legislate and not to interpret the law, which is the sole function of a court.

Reliance was next placed by Mr. Gopal Behari on a decision of this court in the case of *Iqtida Khan v. Income Tax Officer, A-Ward, Lucknow*. This was a case where A and B were partners of a firm having equal shares in the partnership. A having migrated to Pakistan was declared an evacuee and his half share in the firm vested in the Custodian of Evacuee Property. The competent officer passed an order directing the sale of the assets of the firm and division of the sale proceeds between the Custodian and the other partner B. B. later purchased the assets of the firm in the sale which was free of encumbrance for the Income Tax payable in respect of the business of the firm. In the meantime, assessment for the relevant year 1951-52 was made on the partners as it was a registered firm and demand notices were served. In the recovery proceedings B claimed that the assets of the firm in his possession could not be proceeded against and the amount of tax due from A was realisable from the Custodian. It was held that as the assessments were made while A was residing in Pakistan, As share of tax was payable by the firm under the third proviso to section 23(5) of the Act and, as the business was discontinued, B became liable u/s 44 to pay the amount of tax payable by A which was a liability of the firm under the third proviso to section 23(5) of the Act. This case, therefore, is clearly distinguishable and falls squarely within the express exception contained in the third proviso to section 23(5) (a) of the Act and as such cannot help or advance the departments case.

Lastly, it was contended by Mr. Gopal Behari that there was no patent error of jurisdiction and therefore no interference in the exercise of write jurisdiction was possible. This contention also cannot be acceded to as have come to the conclusion that there was a patent error of jurisdiction inasmuch as there was no provision in the Act for determining the tax liability of a registered firm. In the absence of such a provision, the aforesaid demand u/s 29 or u/s 46(5A) could not have been made by the respondent against the petitioner for the defaults committed in the payment of tax by one partner in respect of the share income of another. In this view of the matter the other grounds raised in the petition were not considered necessary to be gone into.

For these reasons the notices dated 24th August, 1962, and the notice u/s 46(5A) dated 12th October, 1962, are directed to be quashed as being without jurisdiction. The petition is accordingly allowed with costs.

Petition allowed.