

(1961) 02 MAD CK 0016

In the Madras High Court

Case No : Writ Petitions No"s. 1011 of 1958, 1268 to 1270 of 1960 and C.M.P. No. 4306 of 1960

S. Santosha Nadar

APPELLANT

Vs

First Additional Income Tax Officer, Tuticorin, and Another

RESPONDENT

Date of Decision : 07-02-1961

Acts Referred:

Constitution of India, 1950 — Article 226

Income Tax Act, 1961 — Section 22(1), 22(2), 22(3), 34, 34(1)

Citation : (1961) 42 ITR 715

Hon'ble Judges : Rajagopalan, O.C.J.

Bench : Single Bench

Judgement

Rajagopalan, Offg. C.J.

1. The petitioner who was a resident of Tirunelveli District carried on business in Ceylon. The petitioner did not file any returns of his income in the assessment years 1945-46, 1946-47 and 1947-48 in response to the general notice published u/s 22(1) of the Income Tax Act. But he voluntarily filed returns for all the three years on March 20, 1954. With reference to the assessment year 1945-46, the Income Tax Officer initiated proceedings u/s 34 of the Act with a notice dated March 25, 1954, which was served on the petitioner on March 29, 1954. The assessment for 1945-46 was completed by the Income Tax Officer on March 5, 1955, u/s 34 read with section 23(4). The assessments for 1946-47 and 1947-48 were without recourse to section 34. The assessment for 1946-47 was completed u/s 23(3) on March 5, 1955. The assessment for 1947-48, which was u/s 23(4), was completed on March 26, 1956.

2. Against these assessment orders the petitioner preferred appeals successively to the Appellate Assistant Commissioner and to the Tribunal. The main plea of the petitioner in those appeals was that the remittances from Ceylon in the relevant years which stood in his name did not represent his monies. The plea was rejected. The quantum of tax imposed by the Department was, however,

reduced to some extent by the Tribunal. Not satisfied with that, the petitioner asked for a reference u/s 66(1). Those applications were rejected by the Tribunal. The petitions filed by the petitioner u/s 66(2) of the Act are still pending disposal in this court. In due course the Income Tax Officer issued certificates u/s 46(2) of the Act to the Collector to recover the arrears of the assessed tax not only for these three years but also for the assessment year 1951-52. The total shown in these certificates was Rs. 1,01,081. The Collector took proceedings under the Revenue Recovery Act and had the sale of the petitioners land proclaimed in the District Gazette dated October 18, 1958, to recover that sum of Rs. 1,01,081 as if it were an arrear of land revenue. It was common ground that that was not the sum due on that date. The respondents conceded that even on September 25, 1958, it was only a sum of Rs. 64,994 that was due from the petitioner. The respondents admitted that though the reduction of the taxes under the orders of the Tribunal was in due course notified to the Collector, he did not take either that reduction or the collection of Rs. 10,000 into account when he notified in the Gazette that a sum Rs. 1,01,081 was still due. The sale was held and the attached properties of the petitioner fetched Rs. 24,495. The sale, however, has not yet been confirmed, and the objections preferred by the petitioner to the Collector under the provisions of the Revenue Recovery Act have yet to be disposed of.

3. The petitioner preferred W.P. No. 1011 of 1958 for the issue of a writ of prohibition to restrain the proceedings to recover the arrears of tax claimed from him and eventually obtained a rule nisi on March 12, 1959. On June 22, 1960, the petitioner filed C.M.P. No. 4306 of 1960 seeking permission to raise additional grounds to sustain the relief asked for in W.P. No. 1011 of 1958. It was at this stage that the validity of the assessments themselves for the three assessment years 1945-46, 1946-47 and 1947-48 was challenged, mainly on the ground that they were barred by limitation on the respective dates of assessment, March 5, 1955 and March 26, 1956. The petitioner followed that up by presenting W.P. Nos. 1268 to 1270 of 1960 in which he asked for the issue of writs of certiorari to set aside the orders of assessments themselves in each of the three years. Rule nisi was issued in each of these petitions only on January 25, 1961, but since the affidavits and counter affidavits on which the parties relied were all on record in W.P. No. 1011 of 1958, the hearing was proceeded with with the consent of both parties, and all the petitions were heard together. The further grounds raised in C.M.P. No. 4306 of 1960 were allowed to be argued. That petition will stand allowed.

4. Despite the range of the affidavits and counter affidavits, the scope of the arguments was comparatively limited, and we shall confine our-selves to the points specifically pressed for adjudication during the arguments at the final hearing.

5. The learned counsel for the Department urged that the validity of the assessments should not be investigated in these proceedings under article 226 of

the constitution. He pointed out that the petitioner had availed himself of the remedies open to him under the Income Tax Act, and the proceedings u/s 66(2) were pending disposal even now in this court itself. It was common ground that the plea of limitation, which is now the main basis for the challenge to the validity of the assessments made by the Income Tax Officer, was never put forward at any stage of the assessment proceedings and that there was no adjudication of that question by the Tribunal. The learned counsel submitted that even if a reference was ordered u/s 66(2) the question of limitation could not arise as a question of law on the orders of the Tribunal. The further submission was that the failure of the petitioner to take this plea in the statutory proceedings open to him and availed of by him from seeking adjudication of that issue in these proceedings under article 226 of the Constitution.

6. It is true that a writ of Certiorari is a discretionary relief and normally a writ of certiorari will not be viewed by this court as a parallel remedy which an assessee can seek simultaneously with the statutory remedies open to him under the Income Tax Act. That the petitioner as an assessee failed to take a plea open to him in the assessment proceedings and in the appeals that he preferred, cannot, under normal circumstances, place him in a better position to seek the discretionary relief of a writ of certiorari. In the present case the petitioner asked also for a writ of prohibition W.P. No. 1011 of 195(8). If any order of assessment was without jurisdiction and if any portion of that order is still operative in the sense that anything is sought to be recovered from the petitioner under such an order of assessment passed wholly without jurisdiction or in excess of the jurisdiction vested in the Income Tax Officer, the issue of a writ of prohibition would not be a matter of discretion, and in that respect it differs from the discretionary relief of a writ of certiorari. In the circumstances of this case we are of opinion that we should not refuse to investigate the question whether the assessments for all or any of the three years in question were invalid.

7. Section 34(3) which prescribed the period within which the assessment should be completed by the Income Tax Officer directs :

No order of assessment or reassessment, other than an order of assessment u/s 23 to which clause (c) of sub-section (1) of section 28 applies or an order of assessment or reassessment in cases falling within clause (a) of sub-section (1) or sub-section (1A) of this section shall be made after the expiry of four years from the end of the year in which the income, profits or gains were first assessable... (We shall omit the provisos).

8. With reference to the assessment for 1945-46 the position, it should be remembered, was that the Income Tax Officer ignored the return filed by the petitioner on March 20, 1954, and issued a notice u/s 34(1) on March 26, 1954. If the initiation of assessment proceedings u/s 34 was valid, it could not be denied that the completion of the assessment on March 5, 1955, within one year of the notice served on March 29, 1954, which itself was within the period of eight years allowed by section 34(3), was not barred by limitation. The

contention of the petitioner was that the initiation of proceedings u/s 34(1) was not valid, and that, therefore, only the four year period of limitation applied.

9. It should be taken as well settled now that where an assessee has filed his return before the completion of assessment within the period of limitation allowed by law, proceedings cannot be commenced by the assessing authority u/s 34 of the Act - see *Muthiah Thevar v. Commissioner of Income Tax*, where the law laid down by the Supreme Court in *Commissioner of Income Tax v. Ranchhoddas Karsondas* was applied. Section 22(3), it should be remembered, permits a return to be filed at any time before the assessment is made, even if no return was filed in response either to the general notice u/s 22(1), or any individual notice u/s 22(2). The learned counsel for the Department urged that section 22(3) carried its own limitation. In our opinion his submission was correct, that what section 22(3) permitted the assessee was to file his return at any time before the assessment could be lawfully made. The normal period of limitation, barring the exceptions for which section 34(3) provides, for making an assessment being four years, the contention of the learned counsel for the Department was that the return filed after a period of four years could not lead to any lawful assessment, and it should, therefore, be treated as non est in law. We agree that the principle laid down in *Commissioner of Income Tax v. Ranchhoddas Karsondas* and applied by this court in *Muthiah Thevar v. Commissioner of Income Tax* cannot be extended to this case, where the return for 1945-46 was filed by the assessee, the petitioner, after the expiry of the period of four years. No assessment could have been validly made on the return filed on March 20, 1954. After the expiry of four years from the end of the assessment year 1945-46 no assessment could have been made on the petitioner without recourse to section 34(1) and recourse could be had to section 34(1) only on ground that no return had been filed, that is, that no return had been filed before the assessment could be lawfully completed without recourse to section 34(1). The return filed by the petitioner on March 20, 1954, did not, in the circumstances of this case, vitiate the notice u/s 34(1) on March 26, 1954. We uphold the contention of the learned counsel for the Department, that the initiation and completion of the assessment proceedings for 1945-46 u/s 34 were valid.

10. The assessment for 1946-47 was u/s 23(3) and without recourse to section 34. The order of assessment did not show that the conduct of the assessee attracted the penal provisions of section 28(1)(c). No action was taken against the assessee u/s 28(1)(c) before or after the assessment was completed on March 5, 1955. The limitation of four years prescribed by section 34(3) is abrogated if (1) in an assessment u/s 23, the provisions of section 28(1)(c) applied, or (2) the assessment is in a case falling within section 34(1)(a). We can leave out of account the third category for which section 34(3) provided, cases falling under sub-section (1A) of section 34. The petitioners was not such a case. We have said that the assessment in the case of the petitioner was u/s 23 but that it was not one which attracted section 28(1)(c). Factually no action was

taken u/s 34 and it was not a case of assessment or reassessment u/s 34. The learned counsel for the Department urged that the Income Tax Officer would have been entitled to treat the return filed by the petitioner on March 20, 1954, as non est in law and to issue a notice u/s 34(1)(a) on the ground, that the petitioner had not filed any valid return for the assessment year 1946-47. His further submission was that the satisfied the requirement of section 34(3), and that it was a case falling within section 34(1)(a) as that expression has been u/s 34(3), though factually the provisions of section 34(1)(a) were never applied and the prescribed notices were never issued. In our opinion the statutory expression "an order of assessment in case falling u/s 34(1)(a)" cannot be construed to mean an order of assessment in a case which could have been dealt with u/s 34(1)(a) but which was not so dealt with. It is well settled that the issue of the prescribed notice is a condition precedent to the assumption of jurisdiction vested by section 34(1), and where such notice was never issued, it cannot be viewed as a "case falling within section 34(1)(a) ," within the scope of section 34(3). Since the petitioners case did not come within the scope of either of the exceptions for which section 34(3) provided - it was not a case to which section 28(1)(c) applied, and it was not a case falling within section 34(1)(a) - the four year period of limitation alone applied. The Income Tax Officer had no jurisdiction to assess the petitioner after the expiry of the four year period. The order of assessment made on March 5, 1955, was wholly without jurisdiction and was, thereof, invalid.

11. The assessment order of the Income Tax Officer for 1947-48 in express terms recorded that proceedings u/s 28(1)(c) were initiated with a notice issued to the petitioner. There was an express finding in the order of assessment itself, that there had been a concealment of the income, and concealment of income is conduct which attracts the application of section 28(1)(c). What section 34(3) exempts is an order of assessment u/s 23 to which section 28(1)(c) applies. That requirement would appear to be satisfied in this case. The learned counsel for the petitioner relied on *Mir Subha Hari Bhakta v. Income Tax Officer* and contended that the order of assessment itself should record in express terms that the requirements of section 34(3) were satisfied, and that it was a case of assessment to which section 28(1)(c) applied, and in the absence of such an express finding the bar of limitation prescribed by section 34(3) should apply. The observations at pages 622 and 623 of the report were with reference to the order of assessment in that case where the Income Tax Officer recorded an express finding that the order was one to which the provisions of section 28(1)(c) did apply. The learned judges pointed out at page 623 that it was a finding which he had jurisdiction to record. We are unable to look upon that as authority that unless there was such an express finding the extended period of limitation for which section 34(3) provided would not come into play. Section 34(3) does not require that proceedings u/s 28(1)(c) should have been finalised and a penalty imposed as a condition precedent to assessment being completed beyond the period of four years. Obviously, that would be impossible, because

proceedings u/s 28(1)(c) initiated no doubt before the assessment is completed can themselves be completed only after the assessment has been finalised. The normal practice also is not to rush into an order u/s 28(1)(c) on the completion of the proceedings of assessment by the Income Tax Officer himself, but after the issue of notice u/s 28(1)(c) to wait until the assessment becomes final after the appeal, if any. If, as in this case, there was an express finding, that there was concealment of income, that would appear to satisfy the requirements of section 34(3) that it is a case of assessment u/s 23 to which section 28(1)(c) would apply. As we said, in this case was the additional factor, that a notice u/s 28(1)(c) was issued to the petitioner antecedent to the completion of the assessment proceedings by the Income Tax Officer.

12. The learned counsel for the petitioner urged that the mere issue of a notice was not enough, and that the requirement of section 28(3) should be satisfied before section 34(3) was brought into play. We are unable to accept this contention. Section 28(3) comes into play where an order of penalty has to be passed u/s 28(1). That stage is yet to come. We have already pointed out that section 34(3) does not and cannot possibly require an order of penalty being passed u/s 28(1)(c) before an order of assessment is made. The further contention of the learned counsel for the petitioner was that the Income Tax Officer could not assume or exercise the power to make an assessment after the expiry of four years even under the enabling provisions of section 34(3), in the absence of a specific notice issued to the assessee to show cause why the assessment should not be made after the period of four years on any of the grounds mentioned in section 34(3).

13. We are unable to see any scope in the language of section 34(3) for such a contention. In the assessment proceedings the assessee should certainly be given an opportunity to show cause why the assessment should not be made. If, for instance, concealment of income is one of the findings in the year of assessment, the assessee is entitled to an opportunity to show that there had been no concealment of income. If such concealment of income is established, that would attract the application of section 28(1)(c) though the order of penalty itself would be in proceedings independent of the order of assessment. Before a penalty is imposed the assessee is entitled to a notice, and he is also entitled to an opportunity to show cause why the penalty should not be imposed. But we are unable to see any basis, statutory or otherwise, for the contention, that before section 34(3) is invoked to abrogate the normal rule of limitation of four years, the assessee should be given a notice in express terms asking him to show cause why the assessment should not be made beyond the period of four years. That the assessee in this case had availed himself of the opportunity of convincing the Income Tax Officer that the assessee did not conceal any income did not admit of any doubt. No principle of natural justice was violated when the Income Tax Officer recorded his finding that there had been a concealment of income. Once that finding was there the legal consequences followed, one of them being that it would attract the provisions of section 28(1)(c).

14. We hold that with reference to the assessment for 1947-48 the petitioners plea, that it was barred by limitation, fails. The jurisdiction of the Income Tax Officer and the validity of the order for 1947-48 were not challenged on any other ground.

15. We shall next consider the question whether apart from the validity of the assessment orders, the recovery proceedings were in any way vitiated, and whether on that ground alone the petitioner is entitled to a writ of prohibition in W.P. No. 1011 of 1958.

16. We have already pointed out that while the amount of arrear actually due was only Rs. 64,994, proceedings were taken by the Collector under the Revenue Recovery Act to recover a sum of Rs. 1,01,081 by the sale of the petitioners lands. No doubt the certificates issued u/s 46(2) showed Rs. 1,01,081 as due. The fact that subsequently the arrears were reduced below that figure did not vitiate the certificates themselves. But obviously the Collector has jurisdiction even on the basis of these certificates to recover only the amount actually due. That was the view taken by one of us in *George v. Income Tax Officer*. Section 27 of the Revenue Recovery Act 2 of 186(4) requires that the notice of attachment should specify the arrears due. That is what gives jurisdiction to the Collector to bring the attached property subsequently to sale u/s 36. If the attachment was vitiated, the subsequent sale also would be vitiated. It should be needless to point out that under the Revenue Recovery Act the Collector had no jurisdiction either to attach or to bring to sale properties to recover a sum higher than what was legally due on the date of the notice of attachment; and in this case the notification in the Gazette obviously proceeded on the basis that Rs. 1,01,081 was still due when it was not. That vitiated the subsequent sale.

17. The learned counsel for the Department could not challenge the position, that the sale in this case was vitiated but he urged that the sale could be set aside by the Collector himself in proceedings under the Revenue Recovery Act, and he pointed out that the petitioner had availed himself of the remedy provided by section 38 of that Act and had applied to the Collector to set aside the sale. That application is still pending.

18. Once again we have to emphasise the feature, that what has been asked for in W.P. No. 1011 of 1958 is a writ of prohibition. That an alternative remedy exists is by itself no bar to the assumption of jurisdiction by this court to issue a writ of prohibition, once an absence of jurisdiction or an excess of jurisdiction is established. In this case the Collector had jurisdiction to recover the actual amount of arrears due on the certificates issued u/s 46(1) of the Act. But his jurisdiction was limited to the realisation of the actual arrears by enforcing the provisions of the Revenue Recovery Act. When he specified a higher sum than was actually due as recoverable, the subsequent proceedings under the Revenue Recovery Act were really without jurisdiction and a writ of prohibition could issue. If, for instance, before the sale had taken place the petitioner had asked for a writ of prohibition it would have been issued. The mere fact that in this case the

sale has been held really does not affect the position. There is still something which the Collector has to do to confirm the sale held without jurisdiction. That can be prevented by the issue of a writ of prohibition despite the pendency of the application before him u/s 38 of the Revenue Recovery Act. There is one other feature. Though we have referred to Rs. 64,994 as due on the date of the attachment, the position that now emerges is that the assessed tax for 1946-47 cannot be recovered because the order of assessment itself was one passed without jurisdiction.

19. On the short ground that a higher sum was sought to be recovered under the Revenue Recovery Act than what was lawfully due, the petitioner would be entitled to a writ of prohibition restraining the Revenue authorities from continuing the recovery proceedings under the Revenue Recovery Act.

20. The learned counsel for the petitioner urged that the certificates issued u/s 46(2) had become inoperative, and that without the issue of fresh certificates u/s 46(2) the Collector would have no jurisdiction to recover anything from the assessee. It is not really for us to express any concluded opinion of ours on the question. We have already pointed out that in *George v. Income Tax Officer* one of us has taken a different view. The learned counsel for the petitioner relied on *Seghu Buchiah Setty v. Income Tax Officer*, where the learned judges relied upon *Metropolitan Structural Works Ltd. v. Union of India*. It is not necessary for us to express our dissent from the view taken by the learned judges of the Mysore High Court in *Seghu Buchiah Setty v. Income Tax Officer*, Kolar Circle. We shall permit ourselves to point out that neither *George v. Income Tax Officer* nor *Ladhuram Taparia v. D. K. Ghosh*, where the learned judges of the Calcutta High Court explained the scope of their earlier decision in *Metropolitan Structural Works Ltd. v. Union of India*, appears to have been brought to the notice of the learned judges of the Mysore High Court.

21. We have held that the order of assessment for 1946-47 was without jurisdiction. On that ground by itself the petitioner would be entitled to a writ of prohibition to restrain the recovery of any portion of the tax assessed for 1946-47. Where the recovery is impossible we cannot see any objection to the order of assessment itself being set aside by the issue of a writ of certiorari despite what we have referred to earlier, that a writ of certiorari is a discretionary relief. As has been repeatedly pointed out a writ of prohibition will lie when the proceedings are to any extent pending; and a writ of certiorari will lie for quashing the proceedings after they have terminated in a final decision - see the observation of Venkatarama Aiyar, J., in *Hari Vishnu Kamath v. Syed Ahmad Ishaque*. In this case as the petitioner is entitled to a writ of prohibition with reference to the tax assessed for 1946-47, we have decided to exercise our discretion in favour of granting a writ of certiorari as well.

22. We have upheld the validity of the assessments for the other two years 1945-46 and 1947-48. The rule nisi in W.P. Nos. 1268 and 1269 of 1960 will stand discharged and these petitions will be dismissed but without any order as

to costs.

23. The rule nisi in W.P. No. 1270 of 1960 will be confirmed and a writ of certiorari will issue to set aside the order of assessment passed by the Income Tax Officer for the assessment year 1946-47 and the subsequent orders of the appellate authorities.

24. A writ of prohibition will issue in W.P. No. 1011 of 1958 to restrain further proceedings under the Revenue Recovery Act on the basis, that all proceedings taken subsequent to the notification in the District Gazette on October 18, 1958, were in excess of the jurisdiction conferred on the revenue authorities by the Revenue Recovery Act.

25. Since neither side has wholly succeeded we direct that the parties bear their respective costs.

26. Before we completed the judgment, learned counsel for the Department brought to our notice the fact that the applications filed by the petitioner assessee u/s 66(2) of the Act, T.C.P. Nos. 12,13 and 14 of 1960, were disposed of on November 28, 1960, itself. In those cases the court refused to direct a reference on the question whether the assessments in any of the years was barred by limitation. This feature, however, that we stated earlier in the judgment that proceedings u/s 66(2) of the Act were still pending, would in no way affect the reasoning in our judgment and our conclusions. Reference answered accordingly.