
(1960) 08 CAL CK 0021

In the Calcutta High Court

Case No : Appeal from Original Decree No. 29 of 1956

SATYA NARAYAN KHAN

APPELLANT

Vs

Income Tax OFFICER, CALCUTTA, AND OTHERS.

RESPONDENT

Date of Decision : 24-08-1960

Acts Referred:

Income Tax Act, 1961 — Section 26(2), 44

Citation : (1962) 46 ITR 920

Hon'ble Judges : Renupada Mukherjee, J;N.K. Sen, J

Bench : Full Bench

Judgement

RENUPADA MUKHERJEE J. - This appeal arises out of a suit instituted by the appellant, Satya Narayan Khan, in the trial court for several reliefs. The principal relief prayed for by the plaintiff was for a declaration that a certificate filed by the Certificate Officer of Alipore, 24-Parganas, in Certificate Case No. 2069 I.T. -51-52 is invalid, in-operative and not binding upon the plaintiff. Some other reliefs were also prayed for, which are incidental to the main relief. There was also a prayer for a declaration that the assessment made on the dissolved firm is illegal and ultra vires. This last prayer was not pressed in this appeal.

The suit was contested in the trial court by defendants Nos. 3 and 4, namely, the Income Tax Officer, District I, Calcutta, and the Union of India. The grounds of contest will appear from the body of the judgment. The suit was dismissed by the trial court which refused all the prayers asked for by the plaintiff. So this appeal was preferred by the plaintiff. The appeal was resisted by respondents Nos. 3 and 4, who also contested the suit in the trial court.

Some broad facts of the case are admitted. They may be set out below :

There was an unregistered firm bearing the name and style of "Satya Narayan Khan Kali Charan Sadhukhan Bepin Behary Tat", which carried on business in various kinds of oil, in premises No. 49, Strand Road, Calcutta. The partnership firm was dissolved in Baishak 1354 B.S., corresponding to sometime in April,

1947. After the dissolution of the firm the Income Tax Officer made an assessment on the firm for the Income Tax year 1946-47 u/s 23(4) of the Indian Income Tax Act. This assessment was completed, on 28th February, 1951, and a sum of Rs. 31,000 was assessed as being payable by the firm. A demand notice to that effect was issued on the firm on 21st March, 1957 (vide demand notice, exhibit "B-1").

The amount stated in the demand notice was not paid up by the firm or by its partners. Thereafter the Income Tax Officer passed an order on 28th March, 1952, directing that the amount should be realised from the plaintiff u/s 26(2) treating him as a successor to the firm. A certificate u/s 46(2) of the Income Tax Act was prepared by the Income Tax Officer and forwarded to the Collector of 24-Parganas for realisation of the amount as an arrear of land revenue (vide exhibit "D-2").

After the above requisition was received from the Income Tax Officer, the Certificate Officer of 24-Parganas prepared and filed a certificate on 31st March, 1952 (vide exhibit "A"). Notice was issued to the certificate debtor who was described in the certificate of public demand in the following terms :

"Satya Narayan Khan and others. Now succeeded by Satya Narayan Khan, 49, Strand Road, Calcutta."

After having issued the notice the Certificate Officer proceeded to recover the amount in accordance with the procedure prescribed by the Public Demands Recovery Act. An objection was thereafter filed by the present appellant contending that he was not liable for the amount in question. This objection was rejected on 30th August, 1952, by the Certificate Officer and so the present suit was instituted by the plaintiff for the reliefs which we have already mentioned. The suit was dismissed by the trial court and so this appeal had been filed by the plaintiff.

Dr. Gupta, appearing on behalf of the appellant, contended before us that if anybody was liable on account of tax based upon the assessment already mentioned, it was the firm, Satya Narayan Khan Kali Charan Sadhukhan Bepin Behary Tat, and not the plaintiff who was not a successor to the business carried on by the firm. Dr. Gupta did not question the legality of the assessment which had been made by the Income Tax Officer on the dissolved firm mentioned above. His contention was that the Income Tax Officer erroneously held that Satya Narayan Khan had succeeded to the business carried on by the firm. Dr. Gupta submitted that the business which had been carried on by the unregistered firm was discontinued by the dissolution of the firm in April, 1947, and the plaintiff appellant began to carrying on a separate and independent business unconnected with the previous business of the unregistered firm and so he should not be regarded as a successor to the partnership firm.

In the above connection we may refer to an order passed by Income Tax Officer on 28th March, 1952, in connection with the assessment case which runs as

follows :

"On inquiry it is learnt that Satya Narayan Khan, one of the partners, succeeded to the business of the firm when the firm was discontinued early in 1354 B.S."

The partner, Satya Narayan Khan, who was summoned u/s 37, himself admitted as such before me. Since the partners are jointly and severally liable for the tax of the firm the amount may be recovered from this partner u/s 26(2) treating him as successor to the firm. Hence, a certificate may be issued in the name of the firm, Satya Narayan Khan & others, represented by partner, Satya Narayan Khan, successor to the firm.

The order shows that the Income Tax Officer treated the appellant, Satya Narayan Khan, as a successor to the firm after having made some inquiry and also on the basis of some admission made by Satya Narayan himself. We do not know that information was obtained by the Income Tax officer on the strength of any enquiry. The so-called admission of Satya Narayan is contained in a letter filed by him before the Income Tax Officer on the same date, namely, 28th March, 1952. The relevant portion of the letter runs as follows :

"I, Satya Narayan Khan started a new business on the same premises in my individual capacity during Jaistha, 1354 B.S. and took over the existing stock and succeeded to the old business."

Dr. Gupta submitted before us that the so-called admission of Satya Narayan must be taken as a whole and if that is done, then it would be clear that after the discontinuance of the partnership business Satya Narayan started a new business on his own account and that business had no relation to the old business of the unregistered firm. In this connection, Dr. Gupta also referred us to oral testimony of Satya Narayan given in the court below wherein he said that the business carried on by him after the dissolution of the partnership was his own separate business and it had no connection or concern with the joint partnership business. After having carefully considered all the evidence we are of opinion that the contention of the appellant that he was not a successor to the old firm has not been established. In order that a person can be made liable as a successor to an old business by the operation of section 26(2) of the Income Tax Act there must be substantial identity or similarity in the nature and extent of the business carried on by the previous firm and the succeeding person : *Jittanram Nirmalram v. Commissioner of Income Tax*.

Dr. Gupta submitted before us that by the dissolution of the unregistered firm there had been a complete cessation of the old business and thereafter the plaintiff began to carry on business in the same premises on his own account and so he should not be regarded as a successor to the old firm. This contention of Dr. Gupta is negatived by several salient facts. The plaintiff-appellant had himself been a partner of the old business. That partnership was dissolved in April, 1947, corresponding to Baisakh 1354 B.S. The partnership firm carried on business in various kinds of oil in premises No. 49, Strand Road, Calcutta. According to his

own admission the appellant also began to carry on business in the same commodities and in the same premises and he had also taken over the entire stock-in-trade of the old business. In view of the letter written by the appellant to the Income Tax Officer to which we had already referred containing an admission that he had succeeded to the old business and in view of the order passed by the Income Tax Officer the onus lay upon the appellant to show that there was a complete cessation of the old business and the new business of the appellant had no connection with or relation to the old business. This fact could have been proved by the appellant by production of his account papers. The account papers have not been produced. In these circumstances an adverse inference should be made against the appellant. After considering all these facts and circumstances we are of opinion that the finding of the court below that the appellant had succeeded to the old business of the unregistered firm is a correct finding.

In the above connection Dr. Gupta submitted that even if it be held that the appellant had succeeded to the old business, no Income Tax can be recovered from him for the period during which the firm had carried on business without making any assessment upon the appellant himself as a successor to the old business. Reliance was placed by Dr. Gupta upon section 26(2) of the Income Tax Act. That sub-section, together with the proviso, runs in the following terms :

"Where a person carrying on any business, profession or vocation has been succeeded in such capacity by another person, such person and such other person shall, subject to the provisions of sub-section (4) of section 25, each be assessed in respect of his actual share, if any, of the income, profits and gains, of the previous year :

Provided that, when the person succeeded in the business, profession or vocation cannot be found, the assessment of the profits of the year in which the succession took place up to the date of succession, and for the year preceding that year shall be made on the person succeeding him in like manner and to the same amount as it would have been made on the person succeeded or when the tax in respect of the assessment made for either of such years assessed on the person succeeded cannot be recovered from him, it shall be payable by and recoverable from the person succeeding, and such person shall be entitled to recover from the person succeeded the amount of any tax so paid."

We have carefully gone through the section and we are unable to put the interpretation put upon it by Dr. Gupta. It is no doubt true that the main portion of sub-section (2) requires that an assessment should be made upon the person who has succeeded to a business upon the discontinuance or dissolution of the previous business. The proviso to the sub-section consists of two parts. The first part lays down that when a person who has been succeeded in a business, profession or vocation cannot be found the assessment must be made upon the persons succeeding him. The second portion of the proviso which begins with the words "or when the tax in respect of the assessment made" has no relation to

the assessment at all either on the person succeeded or on the person succeeding. This part of the proviso is independent of the first portion of the proviso of the main sub-section and it lays down the procedure for recovering Income Tax from the person succeeding when that tax cannot be recovered from the person succeeded. In the present case an assessment had been made upon the dissolved firm as contemplated in the second part of the proviso and it is found that the tax payable on the basis of that assessment cannot be recovered from that firm. So, according to the second part of the proviso, this tax can be recovered from Satya Narayan as a successor to the old business. The contention of Dr. Gupta that such tax cannot be recovered from him without fresh assessment is not sound and it must be negatived.

The foregoing finding that Satya Narayan was a successor to the unregistered firm and that the tax levied on the firm is realisable from Satya Narayan by the operation of the second part of the proviso to sub-section (2) of section 26 of the Income Tax Act is sufficient for the purpose of the disposal of this appeal.

Mr. Meyer, however, contended on behalf of the contesting respondents that the tax in question is recoverable from the appellant not only by the operation of section 26(2) of the Income Tax Act but also by virtue of section 44 of that Act. That section runs in the following terms :

"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."

In support of his contention Mr. Meyer referred us to a case of the Orissa High Court, *Bajranglal Chowkhani v. Income Tax Officer, Cuttack*. After having gone through this case we are unable to agree with the view of the learned judges regarding the scope and applicability of section 44 of the Income Tax Act. That section lays down that after the discontinuance or dissolution of a firm or association of persons a previous partner of such firm or a member of such association shall be jointly and severally liable to assessment under Chapter IV of the Act for the profits and gains of the firm or association and for the amount of tax payable. In order that the Income Tax department may avail itself of the benefits of this section by proceeding against a partner of a dissolved firm, there must, first of all, be an assessment upon that partner and only the tax payable on the basis of that assessment can be recovered from that partner. In the present case there was no assessment on Satya Narayan as a partner. The assessment was upon the firm after its dissolution. That being the case, section 44 of the Income Tax Act has no application to the present case.

Although the tax levied on the unregistered firm cannot be recovered from the appellant by the operation of section 44 of the Income Tax Act, we are of opinion that the tax in question can be recovered from him on general principles. This question was considered in an unreported decision given in *Union of India v. Satyanarayan Khan* in which the judgment had been delivered by myself. Sitting with Mr. Justice Kamalesh Chandra Sen, I held in that case that after the dissolution of a firm the tax levied upon that firm can be realised from an ex-partner. It has been laid down by their Lordships of the Judicial Committee in *Doorga Prosad v. Secretary of State*, that when demand of Income Tax is made u/s 29 and section 45 of the Income Tax Act, it becomes a debt due to the Crown whose place has now been taken by the Union of India. When a certificate is prepared for realisation of such a debt, it acquires the characteristics of a civil court decree. Section 46(2) of the Income Tax Act, including the proviso, runs in the following terms :

"The Income Tax Officer may forward to the Collector a certificate under his signature specifying the amount of arrears due from an assessee, and the Collector, on receipt of such certificate, shall proceed to recover from such assessee the amount specified therein as if it were an arrear of land revenue :

Provided that without prejudice to any other powers of the Collector in this behalf, he shall for the purpose of recovering the said amount have the powers which under the Code of Civil Procedure, 1908 (V of 1908), a civil court has for the purpose of the recovery of an amount due under a decree."

The proviso is important for our purpose. It lays down that for the purpose of recovering an unpaid Income Tax, the Collector shall have the powers which under the CPC a civil court has for the purpose of recovering an amount due under a decree. Now under clause (b), sub-rule (1) of rule 50 of Order XXI of the CPC execution may be granted by a court against any person who has been a partner of a firm where a decree has been passed against that firm. In the present case the certificate may be regarded as a decree against the unregistered firm. So the Collector has got the power to realise the decretal amount from a person who has been a partner of that firm, namely, the appellant, Satya Narayan Khan.

In the above connection Dr. Gupta argued that the certificate of public demand itself will show that the appellant was proceeded against by the Income Tax Officer as well as by the Certificate Officer as a successor to the firm and not as an ex-partner of it. It is no doubt true that in the certificate prepared by the Certificate Officer it was not mentioned that Satya Narayan was a partner. This was, however, mentioned in the order of the Income Tax Officer dated 28th March, 1952, to which we have already referred. If Satya Narayan was not a successor to the firm as was contended by Dr. Gupta, then his description as a successor to the old firm must be regarded as a surplusage. The Income Tax department never absolved him of his liability as a partner. That is personal liability, pure and simple. The name of Satya Narayan appears in the certificate of

public demand. That being the position, we are of opinion that the tax in question is recoverable from him.

A question was also raised on behalf of the contesting respondents whether the suit of the appellant was maintainable in the trial court. In the present appeal we do not find any necessity to go into that question, because, in our opinion, the suit of the appellant is liable to be dismissed for reasons which we have already given.

In view of our foregoing findings, we dismiss the appeal with costs to the contesting respondents.

N.K. SEN J. - I agree.

Appeal dismissed.