

(1962) 01 CAL CK 0013

In the Calcutta High Court

Case No : Appeal from Original Order No. 153 of 1959

SHIVRAM PODDAR

APPELLANT

Vs

Income Tax OFFICER, CENTRAL CIRCLE II, CALCUTTA, AND
ANOTHER.

RESPONDENT

Date of Decision : 11-01-1962

Acts Referred:

Constitution of India, 1950 — Article 226
Income Tax Act, 1922 — Section 44
Income Tax Act, 1940 — Section 34
Partnership Act, 1932 — Section 4

Citation : (1962) 46 ITR 1076

Hon'ble Judges : Bose, C.J.;Debabrata Mookerjee, J

Bench : Full Bench

Judgement

BOSE C.J. - This is an appeal against an order Sinha J. dated the 27th April, 1959, dismissing a writ application for quashing a notice issued u/s 34 of the Indian Income Tax Act.

A firm of the name of Balmukund Radheshyam carried on business as commission agents in cotton, sale and purchase of cotton and piece goods and speculation in cotton and silver at Ratlam and Indore, since 22nd December, 1947, until it was dissolved on the 24th February, 1950. On 20th August, 1952, one of the ex-partners of the said firm filed a return of the income of the said firm before the Income Tax Officer, Special Survey Circle III, Calcutta, showing a sum of Rs. 18,737-5-9 as net profits for the accounting period of the firms first year of business, that is for the assessment year 1949-50. An order of the assessment was made on the 28th October, 1952, and the sum assessed to Income Tax was duly paid. It is alleged that sometime in March, 1953, the notice of dissolution of the said firm was duly given to the Income Tax Officer, Special Survey Circle III, Calcutta, though this fact is denied on behalf of the Income Tax department. By an order dated the 3rd August, 1955, the Central Board of Revenue, in exercise of its powers under sub-section (7A) of section 5 of the

Indian Income Tax Act, transferred the Income Tax cases of the said firm pending in the office of the Second Income Tax Officer, Bombay to the Income Tax Officer, Central Circle II, Calcutta. By a letter dated the 29th September, 1955, the then Income Tax Officer, Central Circle II, Calcutta, informed the said firm at 357, Kalbadevi Road, Bombay, that the case of the said firm has been assigned by the Central Board of Revenue to him. By a letter dated the 13th October, 1955, the Income Tax Officer, Central Circle II, Calcutta, called upon the ex-partners of the said firm to produce the books of the firm for the year 2004-05 and particularly all documents of speculation in cotton and silver on November 10, 1955. On October 22, 1955, the said Income Tax Officer issued a notice u/s 34 addressed to Shivram Poddar (partner) for and on behalf of M/s. Balmukund Radheshyam, 138, Cross Street, Calcutta. In this notice it was, inter alia, stated as follows :

"I have reason to believe that your income assessable to Income Tax for the year ending 31st March, 1950, has been under-assessed.

I, therefore, propose to re-assess the said income that has been under-assessed.

I should request you to deliver to me within 35 days of the receipt of this notice, a return in the attached form of your total income and total world income assessable for the said year ending 31st March, 1950.

This notice is being issued after obtaining the necessary satisfaction of the Commissioner of Income Tax, Central, Calcutta.

(Sd.) A. BAKSI,

income tax Officer,

Central Circle II, Calcutta."

Thereafter, certain correspondence followed. An objection to the jurisdiction of the Income Tax Officer was taken with regard to the proceedings proposed to be taken u/s 34 of the Indian Income Tax Act. But as no heed was paid to it, an application was moved before this court on or about 14th December, 1955, under article 226 of the Constitution of India and this court was pleased to issue a rule nisi on 16th December, 1955. This rule was subsequently made absolute by Sinha J. by an order dated the 3rd January, 1957. An appeal was preferred against the order of Sinha J. dated the 3rd January, 1957, but the same was dismissed. In the meantime, on 28th March, 1958, the Income Tax Officer issued another notice u/s 34 read with section 22(2) of the Act to the petitioner-appellant "as partner of the firm of M/s. Balmukund Radheshyam at the time of its dissolution". The relevant portion of the notice may be set out hereunder :

"To Shri Shivram Poddar, Partner of the firm of Messrs. Balmukund Radheshyam at the time of its dissolution, C/o M/s. Anandram Gajadhar, 33, Netaji Subhas Road, Calcutta.

Whereas I have reason to believe that M/s. Balmukund Radheshyam (name of

the firm) was dissolved on or about 24th February, 1950;

And whereas the income of the said firm assessable to Income Tax for the assessment year 1949-50 has been under-assessed;

And whereas I propose to re-assess the said income;

And whereas u/s 44 of the Indian Income Tax Act, 1922, you the said Shivram Poddar and Ramnarain Ojha (decd.), 33, Netaji Subhas Road, Calcutta, who were partners of the said firm of M/s. Balmukund Radheshyam at the time of its dissolution, are jointly and severally liable to assessment in respect of the income, profits and gains of the said firm before its dissolution and for the amount of tax payable thereon;

Now therefore u/s 34 read with section 22(2) of the said Act, I require you the said Shivram Poddar to deliver to me within 35 days of the receipt of this notice a return in the attached form, of the total income and the total world income of the said firm assessable for the year ending 31st March, 1950.

This notice is issued after the Commissioner of Income Tax (Central), Calcutta, is satisfied that this is a fit case for the issue of this notice.

income tax Officer (Central) Circle II, Calcutta."

On the 17th April, 1958, the appellant addressed a letter to the Income Tax Officer challenging, inter alia, the jurisdiction of the Income Tax Officer and the validity of the said notice issued u/s 34 and also asking for certain particulars specified therein. By a letter dated the 23rd July, 1958, the Income Tax Officer insisted on compliance with the notice issued u/s 34 and called upon the appellant to file a return by 7th August, 1958. By a letter dated the 6th August, 1958, the petitioner again protested against the validity of the notice and proceedings and thereafter moved this court under article 226 of the Constitution and a rule nisi was issued on the 18th September, 1958. This rule came up for hearing before Sinha J. and was discharged by a judgment and order dated the 27th April, 1959. It is against this order that the present appeal has been preferred.

The sole question which arises for determination in this appeal is whether u/s 44 of the Indian Income Tax Act, as it stood before it was amended by the Finance Act (XI Of 1958), a partner of a dissolved firm could be assessed to Income Tax and made liable for payment of such tax. It will be convenient at this stage to set out section 44 as it existed prior to the amendment of 1958 and after it.

Original section 44

"Where any business, profession or vocation carried on by a firm or association of persons had 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 the 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 new section 44 which was introduced with effect from 28th April, 1958, is as follows :

New section 44

"Liability in case of firm or association discontinued or dissolved. - Where any business, profession or vocation carried on by a firm or other association of persons had been discontinued or where a firm or other association of persons is dissolved, the Income Tax Officer shall made an assessment of the total income of the firm or other association of persons as such as if no such discontinuance or dissolution had taken place.....

(3) Every person who was at time of such discontinuance or dissolution a partner of the firm or a member of the association, as the case may be, shall be jointly and severally liable for the amount of tax or penalty payable, and all the provisions of Chapter IV, so far as may be, shall apply to any such assessment or imposition of penalty."

The most glaring difference between the two sections is the absence of the word "firm" in the first part of the old section 44 after the words "discontinued or where and the introduction of the word "firm" into the section by the amending Act of 1958 and so the argument of the learned counsel for the appellant is that a dissolved firm or a partner of a dissolved firm was not in any case intended to be covered by the original section 44.

Now it is well known that to constitute a partnership the parties must have agreed to carry on business and to share profits in some way in common. This is the concept underlying the definition of partnership as given in section 4 of the Indian Partnership Act, 1932. Section 4 reads as follows :

"Partnership is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all.

Persons who have entered into partnership with one another are called individually partners and collectively a firm, and the name under which their business is carried on is called the firm name."

So three elements are necessary to establish a partnership :

- (1) There must be an agreement entered into between all the parties.
- (2) The agreement must be to share the profits of a business.
- (3) The business must be carried on by all or any of them acting for all.

The modes in which the dissolution of a partnership firm takes place are dealt with in Chapter VI of the Partnership Act. Sections 39 to 55 deal with the subject

of dissolution, of its incidents and the rights and liabilities arising upon dissolution. It is clear from a perusal of the various sections of the Act that a dissolution does not necessarily follow because the partnership has ceased to do business. But there can be no question that if a partnership is dissolved it cannot enter into any fresh transaction unless it is otherwise agreed or provided for. A dissolved firm has normally to discontinue its business once for all. So dissolution ordinarily involved the idea of permanent discontinuance of the business. Now it is admitted in several paragraphs of the petition under articles 226 that the firm of Balmukund Radheshyam had been dissolved in February, 1950. The effect therefore is that the business of the firm had been discontinued. That being the position the present case falls within the first part of the old section 44, namely, "where any business.... carried on by a firm... has been discontinued". But as against this, the argument of the learned counsel for the appellant has been that if a case of a dissolved firm was intended to be covered by the word "discontinuance" resulting from dissolution, there could be no point in the legislature providing specifically by way of amendment in 1958 for the case of a dissolved firm in addition to the case of a dissolved association of persons as it was there in the original section. But it is not altogether improbable that, one of the reasons for the amendment made in 1958 was to clarify the position and to free rid of the effect of the judicial decisions which held that a case of a dissolved firm was altogether outside the ambit of section 44 of the Act. It may be pointed out that in the case of *Manindra Lal Goswami v. Income Tax Officer, Sinha J.* had held that under the circumstances prevailing in that case there could not be any assessment or re-assessment of a dissolved firm as such. This decision of Sinha J. had been upheld by the appeal court in the case of *R.N. Bose v. Manindra Lal Goswami*. Chakravarti C.J., who delivered the judgment of the court of appeal, made, inter alia, the following observations :

"The question, as presented to us, turns on the true construction of section 44 of the Indian Income Tax Act. That section speaks of a case where any business, profession or vocation carried on by a firm or association of persons has been discontinued and a case where an association of persons is dissolved. It does not speak of a case, at least expressly, where a firm has been dissolved. It will be noticed that when speaking of the discontinuance of a business, profession or vocation, the section speaks of both a firm and an association of persons, but when speaking of dissolution, it drops the firm. It is, therefore, arguable that the dissolution of a firm is not within the contemplation of section 44 at all and, therefore, the department cannot invoke its aid for the purpose of assessing the income of a dissolved firm. Mr. Meyer agreed that if the department could not rely on section 44, there was no other section in the Act which would authorities it to assess the income of a dissolved firm, but he contended that discontinuance included dissolution. I am unable to accept that contention because although the dissolution of a firm must involve discontinuance of its business, the converse need not necessarily be true and a firm may conceivably continue to exist after deciding to discontinue its business as firms very often do for various purposes,

such as collecting their debts. Why the section should have dropped the firm when speaking of dissolution it is difficult to understand, but I need not pause to speculate about the reasons. The parties have throughout proceeded on the footing that section 44 applied to the case of a dissolved firm and, for the purpose of this case, I shall proceed on the assumption that section 44 applies."

These observations made it clear that a doubt was cast by the learned Chief justice on the point whether a case of dissolution of a firm was at all within the ambit of the original section 44 as it stood before the amendment and so the legislature intervened by way of amendment in 1958 in order to clarify the position and place the matter beyond the pale of any doubt.

Both Sinha J. and Chakravartti C.J. construed section 44, as it stood prior to its amendment, to mean that a firm could no longer be assessed as a firm after its dissolution for its pre-dissolution income and that the assessment could only be made on the partners jointly and severally. At page 447 the learned Chief Justice recorded the following conclusion :

"The conclusions for which I have endeavoured to give my reasons at some length are : (1) that, on the notice u/s 34 as issued on the respondent in the present case and issued also on another partner, there could not possibly be an assessment of the firm or of the firms income; and (2) that hence, after the dissolution of a firm, an assessment to Income Tax of its pre-dissolution income can only be made, assuming section 44 applies, on the persons who were partners of the firm at the time of the dissolution jointly and severally and it cannot be made on the firm, as a firm, and this whether the firm was a registered or an unregistered one."

The decision of Sinha J. was given on the 19th December, 1955, and the decision of the court of appeal was given on 6th March, 1957. The amendment was, as I have indicated already, made in 1958, with effect from 28th April, 1958.

In the case of C.A. Abraham v. Income Tax Officer, Kottayam, certain observations were made in relation to the provision embodied in section 44 which throw some light on the question before us. In that case Abraham and Thomas were partners of the firm of M.P. Thomas & Co. carrying on business in foodgrains at Kottayam. Thomas died on 11th October, 1949. Abraham, as partner of the said firm, had submitted returns in the years August, 1947, July, 1948, August, 1948, July, 1949 and August, 1949, July, 1950, as returns of the income of the unregistered firm. It was discovered that the firm had not disclosed other incomes earned in fictitious names and so on 29th November, 1954, the Income Tax Officer assessed the suppressed income and after issuing notice for imposition of penalty u/s 28 of the Income Tax Act imposed penalty of the total sum of Rs. 29,000 in respect of the three years. After the appeal to the Appellate Assistant Commissioner was dismissed, Abraham applied for a writ under article 226 for quashing the orders of assessment and the orders of imposition of penalty. It was contended on behalf of Abraham that after

dissolution of the firm by the death of Thomas in October, 1949, no order of imposition of penalty could be passed against the firm. The High Court rejected the application and thereupon an appeal was preferred to the Supreme Court. The Supreme Court, after quoting the old section 44, observed as follows :

"That the business of the firm was discontinued, because of the dissolution of the partnership is not disputed. It is urged, however, that a proceeding for imposition of penalty and a proceeding for assessment of Income Tax are matters distinct, and section 44 may be resorted to for assessing tax due and payable by a firm business whereof has been discontinued, but an order imposing penalty u/s 28 of the Act cannot by virtue of section 44 be passed. Section 44 sets up machinery for assessing the tax liability of firms which have discontinued their business and provides for three consequences, (1) that on the discontinuance of the business of a firm, every person who was at the time of its discontinuance a partner is liable in respect of income, profits and gains of the firm to be assessed jointly and severally, (2) each partner is liable to pay the amount of tax payable by the firm, and (3) that the provisions of Chapter IV, so far as may be, apply to such assessment."

Towards the end of paragraph 5 of the report the following material observations were made :

"In effect, the legislature has enacted by section 44 that the assessment proceedings may be commenced and continued against a firm of which business is discontinued as if discontinuance has not taken place. It is enacted manifestly with a view to ensure continuity in the application of the machinery provided for assessment and imposition of tax liability notwithstanding discontinuance of the business of firms. By a fiction, the firm is deemed to continue after discontinuance for the purpose of assessment under Chapter IV."

So this case is an authority for the proposition that discontinuance of the business of a partnership firm, as a result of dissolution of the firm, attracted the provisions of section 44 of the Income Tax Act.

Our attention has also been drawn by the learned counsel for the respondent to a decision of the Bombay High Court in *Ramniwas Hanumanbux Somani v. Venkataraman*, Income Tax Officer, Bombay. In this case the appellant, Somani, was one of the four partners of a firm of the name of *Motilal Somani & Co.*, which was formed in the year 1940. One of the partners of that firm died in 1946 and the new partnership was formed in 1947 in the same name by taking a new fourth partner. This second partnership was dissolved in 1948 and another partnership was formed in the same name with the appellant and another person as partners. This third partnership was finally dissolved in 1955. In spite of these changes in the constitution of the firm the same business was carried on all throughout and it was taken over by the appellant as a proprietary concern and carried on in the same name and at the same place. On the 15th December, 1955, the appellant informed the Income Tax Officer that the firm was dissolved

on November 14, 1955, and that the business had become his proprietary concern. On 25th March, 1958, the Income Tax Officer issued a notice u/s 34(1) in the name of Motilal Somani & Co. initiating reassessment proceedings against the firm for the assessment year, 1949-50, on the ground that certain income had escaped assessment. Tambe J., who delivered the judgment of the Division Bench, after referring to some observations made in relation to section 44 in Abrahams case, proceeded to make the following observation (at page 158 of the report) :

"These observations of their Lordships relate to section 44 as it stood prior to its amendment in the year 1958, which came into effect on April 1, 1958. Mr. Dwarkadas, who gave a reply on behalf Mr. Palkhivala in this case, tried to distinguish this decision on the ground that the observations made by their Lordships were made on a concession made by the other side. It is difficult to accept the submission. On the other hand, reading the judgement as a whole it is clear that after considering the various provisions of the Act, their Lordships recorded their conclusions as reproduced above. It appears that what was implicit in section 44 prior to its amendment in 1958 has not been made explicit by the amendment."

The learned judge of the Bombay High Court went so far as to hold in that case that a notice issued u/s 34(1) of the Act in the name of the dissolved firm in respect of its pre-dissolution income was a valid notice, both in view of the terms of the provisions of the old section 44 and also in view of the wordings of section 34 of the Act to the effect, "provisions of this Act shall, so far as may be, apply accordingly as if the notice was a notice issued under that sub-section". The learned judge held that these wordings in section 34 indicate that by a fiction of law a notice issued u/s 34 is treated as if it is notice originally issued under sub-section (2) of section 22 of the Act.

It is not necessary for us in this case to go to the length of holding that even if a notice section 34 in this case held been issued in the name of the dissolved firm such a notice would be a valid notice. In fact a Division Bench of this court has already held that a previous notice issued by the Income Tax Officer u/s 34 of the Act in the name of the very same dissolved firm and in respect of the very same year with which we are concerned in this case was an invalid notice. The notice which is the subject-matter of the present proceeding and dated the 28th March, 1958, is addressed to the appellant "as partner of the firm of Messrs. Balmukund Radheshyam at the time of its dissolution" and, having regard to the various authorities to which I have made a reference, I am inclined to hold that the notice issued is a valid notice and the order made by Sinha J. must be upheld.

The learned counsel appearing for the respondent also raised the point that as the Income Tax Act provides a complete machinery for assessment of tax and for obtaining relief in the case of an improper order passed by the Income Tax authorities a person aggrieved cannot be permitted to abandon resort to that machinery and to invoke the jurisdiction of the High Court under article article

226 of the Constitution. In other words his argument is that the alternative remedy provided by the Income Tax Act bars resort to article 226 of the Constitution. Reference was made by the counsel for the parties to the cases of C.A. Abraham v. Income Tax Officer, Kottayam; Carl Still G. m. b. H. v. State of Bihar and Venkateswaran v. Ramchand Sobhraj Wadhwani, and to the cases of Calcutta Discount Co. v. Income Tax Officer, Calcutta, and Bidi Supply Co. v. Union of India. But I do not think it is necessary to deal with these cases at length or to express any opinion on this point. Our attention was also drawn to the cases of B.M. Desai v. Ramamurthy, Income Tax Officer, Bombay; Haramohan Poddar v. Sudarson Poddar and to two English cases, Attorney-General v. Partington and Cape Brandy Syndicate v. Inland Revenue Commissioners. But these cases also need not be dealt with at any length.

In my view this appeal must fail and it is accordingly dismissed with costs. Certified for two counsel.

DEBABRATA MOOKERJEE J. - I agree.

Appeal dismissed.