

(1979) 09 MAD CK 0011

In the Madras High Court

Case No : Writ Petition No's. 493 and 495 of 1977

Sri Ramaswami Mudaliar Kudumba Dharma Trust and
Ramaswami Mudaliar Samaya Improvement Trust (by Trustee
S. Chidambaranatha Mudaliar) and Sri Ramaswami Mudaliar
Samaya Improvement Trust (by Trustee R. Sambandamurthi
Mudaliar)

APPELLANT

Vs

Agricultural Income Tax Officer and Others

RESPONDENT

Date of Decision : 24-09-1979

Acts Referred:

Tamil Nadu Agricultural Income Tax Act, 1955 — Section 16(2), 35

Citation : (1983) 139 ITR 990

Hon'ble Judges : Varadarajan, J

Bench : Single Bench

Judgement

Varadarajan, J.—Writ Petition NO. 493 of 1977, has been filed by Ramaswami Mudaliar Kudumba Dharma Trust and Ramaswami Mudaliar Samaya Improvement Trust, Manjakollai Village, Nagapattinam Taluk, Thanjavur District, represented by S. Chidambaranatha Mudaliar, Trustee in charge, under Article 226 of the Constitution of India for the issue of a writ of certiorari calling for the records of the second respondent, the Commissioner of Agrl I.T., Madras, dated November 8, 1976, made in Revision Petition No. 257 of 1976, confirming the order of the Agrl. ITO, Nagapattinam, the first respondent, dated March 30, in GIR Nos. 271 and 272-R in respect of the assessment years 1972-73 to 1974-75. Writ Petition No. 495 of 1977, has been filed by Ramaswami Mudaliar Samaya Improvement Trust, Manjakollai, Nagapattinam Taluk, Thanjavur District, represented by its trustee R. Sambandamurthi Mudaliar for the issue of a writ of certiorari calling for the records of the Commr. of Agrl. I.T., Madras, the second respondent, relating to the order, dated November 8, 1976, made in Revision Petition No. 279 of 1976, confirming the order of the Agrl. ITO, Nagapattinam, the first respondent, dated January 4, 1975, made in GIR No. 272-R relating to the assessment year 1974-75. The petitioners-trusts, Ramaswami Mudaliar

Kudumba Dharma Trust and Ramaswami Mudaliar Samaya Improvement Trust, are two different trusts and they have been given two GIR Nos. 271 and 272-R. We are concerned in these writ petitions with two extents of lands in S. No. 104, Keelakudi village, Nagapattinam Taluk, namely. 28.14 acres said to belong to Ramaswami Mudaliar Kudumba Trust (hereinafter referred to as Kudumba Trust) and 29.41 acres said to belong to Ramaswami Mudaliar Samaya Improvement Trust (hereinafter referred to as Samaya Improvement Trust). u/s 4(b) of the T.N. Agrl. I.T. Act, 1955, as it originally stood, any agricultural income derived from property held under trust or other legal obligation wholly for religious or charitable purposes, and in the case of property so held in part only for such purposes, the income applied thereto was exempt from agricultural Income Tax. But by Amendment Act 4 of 1973, the following clause was substituted for Clause (b) of Section 4 of the principal Act.

" any agricultural income derived from property held under trust, wholly or partly for charitable or religious purposes, to the same extent to which income derived from property held under trust wholly or partly for charitable or religious purposes, is not included in the total income for purposes of the Income Tax Act, 1961 (Central Act XLIII of 1961). "

2. The Explanation to Section 4 of the Act was omitted by the Amendment Act. After the amendment of Section 4(b) notices were issued u/s 16(2) of the Agrl. I.T. Act, 1955 (hereinafter referred to as the Act), in respect of the assessment year 1972-73, to Sambandamurthi Mudaliar as trustee in respect of both the trusts. u/s 16(2) of the Act " in the case of any person whose holding is, in the opinion of the Agrl. ITO, of such extent as to render such person liable to payment of agricultural Income Tax in any financial year, he may serve in that year a notice in the prescribed form requiring such person to furnish within such period, not being less than thirty days, as may be specified in the notice, a return in the prescribed manner setting forth along with such other particulars, as may be provided for in the notice, his total agricultural income during the previous year". The return to be submitted in response to the notice u/s 16(2) of the Act is in Form No. 2 per r. 14 of the Rules.

3. But, according to the petitioners, due to certain difficulties in the family, Sambandamurthi Mudaliar did not send the return called for by that notice. Consequently, the best judgment assessment method was resorted to in respect of both the trusts and an order of assessment was passed. Similar thing happened in respect of the subsequent assessment years 1973-74 and 1974-75 and there were best judgment assessments even in respect of these two years. The agricultural Income Tax levied accordingly for those three years was paid by the trusts.

4. For the assessment year 1973-74, against the assessment made in respect of the Samaya Improvement Trust represented by Sambandamurthi Mudaliar, u/s 34 of the Act, a revision was filed before the Commr. of Agrl. I.T. in R. P. No. 258 of 1976, and it was rejected by an order dated November 8, 1976. That order in

so far as it relates to Samaya Improvement Trust for the assessment year 1973-74, had become final and has not been questioned in any of these two writ petitions. For the assessment year 1974-75, against the best judgment assessment order dated January 4, 1975, relating to Samaya Improvement Trust, Sambandamurthi Mudaliar filed a revision petition u/s 34 of the Act in R. P. No. 259 of 1976, before the Commr. of Agrl. I.T. and it was dismissed by an order dated November 8, 1976, and W. P. No. 495 of 1977, has been filed to quash that order.

5. Section 35 of the Act reads thus :

" Income escaping assessment,--If for any reason agricultural income chargeable to tax under this Act has escaped assessment in any financial year or has been assessed at too low a rate or has been under-assessed the Agricultural Income Tax Officer may, at any time, within five years of the end of that year serve on the person liable to pay the tax or, in the case of a company on the principal officer thereof a notice containing all or any of the requirements which may be included in a notice under Sub-section (2) of Section 16 and may proceed to assess or reassess such ; income, and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section :

Provided that the tax shall be charged at the rate at which it would have been charged if such income had not escaped assessment, or full assessment, as the case may be. "

6. In May, 1975, a single notice u/s 35 of the Act was issued for reopening the best judgment assessment for all the assessment years 1972-73 to 1974-75, in respect of both the trusts on the ground that there was an escapement of assessment. That notice was addressed to Sambanda-murthi Mudaliar's son, Chidambaranathan, who is stated to be a permanent employee of the Neyveli Lignite Corporation, and a resident of Ney-veli Township, and the notice was affixed on the outer door of Sambanda-murthi Mudaliar's house in Manjakollai village, Nagapattinam taluk. The petitioner's case is that since no service on the proper person, namely, Sambandamurthi Mudaliar, was made, no representation was made in response to that notice and the first respondent passed the impugned order on June 30, 1976, holding that both the trust must be clubbed together for the purpose of assessment and passed a fresh order of assessment, for the three assessment years 1972-73 to 1974-75. That impugned order of assessment dated March 30, 1976, had been passed against Kudumba Dharma Trust and Samaya Improvement Trust as though both were represented by Chidambaranathan. Chidambaranathan filed R.P. No. 257 of 1976, against that order and it was dismissed by the Commr. of Agrl. I.T. on November 8, 1976. As stated earlier W.P. No. 493 of 1977, has been filed to quash that order.

7. The grounds urged in the writ petitions are :

(1) the notice under s, 35 of the Act is invalid on the ground that it is addressed

to Chidambaranathan who is incompetent to represent the trust and, therefore, no notice at all was served on the trust of which Sambandamurthi alone is the sole trustee; (2) the reassessment had been made against the trusts as though they were represented by Chidambaranatha Mudaliar who is not competent to represent the trusts and, therefore, the impugned order dated March 30, 1976 and November 8, 1976, are invalid in law; (3) there should have been a separate notice for each of the three assessment years in respect of each of the two trusts and a single notice issued u/s 35 of the Act in respect of both the trusts is invalid in law; (This ground has been raised only in the additional ground allowed to be raised in W.M.P. No. 5803 of 1979 dated September 18, 1979); (4) all the materials now relied upon in the impugned orders were already available to the assessing authority and a mere change of opinion is not a valid ground to reopen the assessment; and (5) the amendment of Section 4(b) of the Act is invalid in law.

8. It may be stated that ground Nos. 4 and 5 were not pressed by the learned counsel for the petitioners in the course of the argument.

9. In the counter-affidavit it is contended that the service of notice is valid having regard to the provisions of Section 58 of the Act which lays down the manner of service of notice and says " (1) A notice or requisition under this Act may be served on the person therein named either by post or, as if it were a summons issued by a court under the Code of Civil Procedure, 1908; (2) Any such notice or requisition may, in the case of a firm, Hindu undivided family, an Aliyasanthana family or branch of a Maruma-kkattayam, tarwad or tavazhi be addressed to any member of the firm or to the manager, yajaman or karnavan, or any adult member of the family, branch tarwad or tavazhi and, in the case of any other association of persons, be addressed to the principal officer thereof." It is further contended in the counter-affidavit that there is no regular appointment of trustee to the trusts and that Chidambaranatha Mudaliar was filing affidavits for getting exemption from agricultural Income Tax in the earlier years. Section 35 of the Act does not contemplate the issue of a notice for each of the years. It is also contended in the counter-affidavit that the will contemplates creation of only one trust and there can be no two trusts.

10. Ground Nos. 1 to 3 urged by the learned counsel for the petitioners may be considered together. The learned counsel for the petitioners submits that Chidambaranatha Mudaliar was not competent to represent the trusts and that the notice u/s 35 of the Act addressed to him has not been validly addressed to the trusts. In support of his contention, the learned counsel for the petitioners invited my attention to the will dated April 21, 1940, executed by Ramaswami Mudaliar. That document says that the A schedule charities mentioned therein are to be performed by the testator as hitherto and the B schedule charities will thereafter be performed by the testator, that the charities shall be performed from the income of the agricultural lands to be acquired by the testator for a sum of Rs. 25,000 set apart for that purpose, that until the lands are acquired the

charities shall be performed with the interest on the said sum of Rs. 25,000 at six annas per cent, per mensem, and that the lands to be acquired and the income therefrom should not be alienated or used for any other purpose. The document has not earmarked the lands to be purchased separately for each of the trusts or state how much the income from the lands or the interest on the sum of Rs. 25,000 until the lands are purchased should be spent for each of the two charities. A reading of the document shows that there are two separate charities without earmarking the properties to be purchased to each of the charities separately. Under the document, the testator's first son, Sambandamurthi, should administer the trusts after the lifetime of the testator, Ramaswami Mudaliar, and after him the testator's 2nd son, Thirunavukkarasu, and after him the testator's 3rd son, Manikkam, and after him the testator's grandson, Chidambaranatha Mudaliar, and after him the eldest male member in the families of all the three sons of the testator should administer the trust. No other document has been produced to show that any change in the trusteeship has been effected to enable Chidambaranatha Mudaliar to function as the trustee for any of the two trusts even during the lifetime of his father, Sambandamoorthi. Therefore, the trustee for both the trusts, so long as Sambandamoorthi is alive, is Sambandamoorthi, by virtue of the terms of the will and Section 2(q) of the Act which defines " person " and says that it shall include a trustee holding or owning property by himself or for any other or partly for his own benefit and partly for another and by virtue of Section 2(e) of the Act which defines an " assessee ". No doubt, for the assessment years 1961-62, 1962-63, 1964-65, 1965-66, 1966-67 and 1967-68, Chidam, baranatha Mudaliar had filed affidavits before the Agrl. ITO saying that he is the trustee of Kudumba Dharma Trust. But in 1968-69, Sambanda-murthi has filed an affidavit saying that he is the trustee of the Kudumba Dharma Trust and on December 3, 1978, exemption had been granted to him by the Agrl. ITO, Nagapattinam. It is not known how without making any enquiry the Agrl. ITO, had proceeded to issue the impugned notice to Chidambaranatha Mudaliar without making any enquiry as to who could be the trustee under the document constituting the trusts. The Agrl. ITO had been accepting affidavits from Chidambaranatha Mudaliar as trustee of the Kudumba Dharma Trust and acting thereon in the matter of granting exemptions u/s 4(b) of the Act. So far as the three years in these writ petitions, namely, 1972-73 to 1974-75 are concerned, I am of the opinion, that the Agrl. ITO, should not have proceeded against the trusts as though they were represented by Chidambaranatha Mudaliar without making any enquiry in that regard, especially having regard to the fact that in the subsequent year 1968-69 Sambandamurthi had filed an affidavit saying that he is the trustee of the Kudumba Dharma Turst and on December 3, 1968, exemption had been granted to the Kudumba Dharma Trust accepting Sambandamurthi as the trustee.

11. As stated earlier, there were only best judgment assessments for these three years 1972-73 to 1974-75, since no returns had been submitted on behalf of the trusts in spite of the Agrl. ITO calling upon the trusts to submit returns after the

amendment of Section 4(b) of the Act. Therefore, these are not cases where, in the notice issued u/s 35 of the Act, only some of the requirements which may be included in the notice u/s 16(2) of the Act should have been asked for to be submitted by the trusts. Section 16(2) would apply and the trusts should have been called upon to submit returns in the prescribed form and verified in the prescribed manner setting forth, along with such other particulars as may be provided for in the notice, therein the total agricultural income during the previous year. According to Rule 14 of the Agrl. I.T. Rules, the return of total income referred in Sub-sections (1) and (2) of Section 16 shall be in Form No. II and shall be verified in the manner indicated therein. A perusal of Part I of Form II would show that the return in that form should be submitted in respect of the total agricultural income during the previous year, for, the opening words of Part I in that form are " Statement of total agricultural income during the previous year ended....." . I, therefore, agree with the learned counsel for the petitioners that notice should have been issued calling upon the trusts to submit returns in Form No. II, separately for each of the three assessment years. Separate returns were in fact submitted in respect of the two trusts in the previous years. The notice issued u/s 35 of the Act is for clubbing together the income of both the trusts. That is another reason why separate notices should have been sent to each of the trusts.

12. The learned counsel for the petitioner submitted that a valid notice u/s 35 of the Act is a condition precedent to the reopening of the assessment for each of the years. In *Y. Narayana Chetty and Another Vs. The Income Tax Officer, Nellore and Others*, , the Supreme Court held that the notice prescribed by Section 34 of the Indian I.T. Act, 1922, for the purpose of initiating reassessment proceedings is not a mere procedural requirement, that the service of the prescribed notice on the assesses is a condition precedent to the validity of any reassessment made u/s 34 and that if no notice is issued or if the notice issued is shown to be invalid then the proceedings taken by the ITO, without a notice or in pursuance of an invalid notice, would be illegal and void. In *Commissioner of Income Tax Andhra Pradesh Vs. K. Adinarayan Murty*, , the Supreme Court held that since the correct status of the respondent was that of a " Hindu undivided family ", the first notice issued in the status of an individual was illegal and without jurisdiction and the ITO could not have validly acted on the return filed by the respondent pursuant to that notice, notwithstanding that it was made in the status of an HUF and any assessment made on such a return would have been invalid and the ITO was entitled to ignore that return as non est in law. A Division Bench of this court has held in *Thangam Textiles Vs. First Income Tax Officer*, , that a valid notice u/s 148 of the I.T. Act, 1961, is the foundation for the initiation of reassessment proceedings and a condition precedent for the validity of any reassessment. Another Division Bench of this court has observed in an unreported decision rendered on July 3, 1978 in T.C. No. 347 of 1974 thus:

" It has been held in *Nagary Rasappa Setai v. Namburi Venkataratnam* [1913] MWN 1028, that where the summons has not been personally served on the

party but was served on his gumastha, it must be shown that the requirements of Order 5, rule 12 or rule 13 have been complied with and that it cannot be assumed without further enquiry, that service on gumastha was sufficient. In *Rajah Papamma Rao Garu, being dead M.R. Ry. Gopiseti Narayanasami Naidu Garu, Reciever and Others Vs. Revenue Divisional Officer, , a Division Bench* of this court while dealing with the manner of service contemplated by section 45(2) of the Land Acquisition Act, which also attracts the provisions of the CPC in the matter of service of notices, expressed the view that unless a person is appointed as agent to accept service of processes by an instrument in writing signed by the principal, the service on him cannot be said to be valid. The view taken in that case was that an oral authority is not sufficient but there should be a written authority."

13. In the case before the learned judges, notice to reopen the assessment in respect of a firm was served by the notice-server of the Department on March 27, 1967, on one Balakrishna Pillai who acknowledged the same describing himself as the manager of the firm, and Balakrishna Pillai had written to the ITO on April 26, 1967, stating that the managing partner who had gone to Madras had not returned and that it would take some more weeks for him to return and prayed for time for filing the return of income till May 31, 1967. It has been found, in that case, that Balakrishna Pillai had no written authority to receive the notice and that there was no proper service of the notice under, Section 148 of the I.T. Act, 1961, and the reassessment made u/s 147 of the Act could not be held to be valid.

14. The notice u/s 35 of the Act in these cases is not valid on the ground that it had been addressed to Chidambaranathan and not tb" Sambandamoorthi who alone could be the trustee of both the trusts having regard to the provisions of the Will under which the trusts were constituted. The notice is invalid in law having regard to the fact that the assessee had not been called upon to submit the returns in Form No. II as required by Section 16(2) of the Act. The notice is invalid also on the ground that a single notice had been issued in respect of both the trusts and in respect of the three assessment years though the trusts had been treated as separate entities in the previous years and two separate GIR numbers had been allotted to them. Since there was no valid notice u/s 35 of the Act, the order of reassessment made by the Agrl. ITO and confirmed by the Commr. of Agrl. I.T. was invalid in law.

15. For the aforesaid reasons, W.P. No. 493 of 1977 is allowed with costs. Advocate's fees Rs. 150.

16. W.P. No. 495 of 1977 has been filed, as stated already against the best judgment assessment dated January 4, 1975, in respect of the Samaya Improvement Trust, as confirmed by the Commr. of Agrl. I.T. in R. P. No, 279 of 1976 which was dismissed on November, 1976. Since no return had, admittedly, been filed for that assessment year, in spite of notice having been issued calling upon the trust as represented by Sam-bandamurthi, the Agrl. ITO, was obliged

to resort to best judgment method of assessment and it is not open to the petitioner in W.P. No. 495 of 1977 to question that order. It may be stated that there was no petition for an extension of time to submit the return, which Sambandamurthi was required to submit. W.P. No. 495 of 1977 is, therefore, dismissed with costs. Advocate's fee Rs. 75.