

(1964) 03 BOM CK 0014

In the Bombay High Court

Case No : Miscellaneous Petition No. 310 of 1963

Y.N. Killedar

APPELLANT

Vs

S.S. Malpathak and Others

RESPONDENT

Date of Decision : 23-03-1964

Acts Referred:

Income Tax Act, 1922 — Section 44

Citation : (1964) 54 ITR 1

Hon'ble Judges : Y.S. Tambe, J;S.P. Kotwal, J

Bench : Division Bench

Advocate : Mehta, for the Appellant; Joshi, for the Respondent

Judgement

Tambe, J.—By this petition the petitioner seeks to get quashed various notices and others of attachment issued by the respondents. The first respondent is the Additional Collector of Bombay & B.S.D., who had made orders regarding recovery of tax. Respondents Nos. 2 to 4 are all Income Tax Officers and the fifth respondent is the Tax Recovery Officer in the Collectorate of Thana.

2. In this case the question that falls for determination is whether the Income Tax assessee and determined on a partner of a registered firm in respect of his share of profits in the firm could not be recovered from another partner in the events the revenue is unable to recover the tax payable by that partner. Facts that give rise to this petition in brief are as follows : The assessee firm was doing business in Bombay under the name and style of Messrs. Moosa Haji Mohamed Killedar and Brothers, its partners being M. M. Killedar, Y. N. Killedar, who is the petitioner before us, and Shri Haji Ahmed Noor Mohamed Killedar. The firm was assessee to the tax liability of Rs. 1,80,507.86 nP. for the assessment years 1948-49 and 1949-50. We are informed that in those years the firm was not treated as a registered firm. For the purposes of this case, however, we are not concerned with those years. At all material times, the assessee firm was registered u/s 26A of the Indian Income Tax Act. The tax liability determined was in respect of the Income Tax as also the excess profits tax. The tax liability of Mr.

M. M. Killedar in his individual capacity determined for the assessment years 1943-44 to 1948-49 amounted to Rs. 59,967.48. The tax liability of the petitioner in his individual capacity for the assessment years 1947-48 and 1952-53 amounted to Rs. 2,964.61 nP and the tax liability of Shri Haji Ahmed Noor Mohamed Killedar for the assessment years 1945-46 and 1946-47 in his individual capacity amounted to Rs. 3,097.18 nP. On April 24, 1954, a notice was served on the petitioner to pay the entire aforesaid liability aggregating to Rs. 2,46,537.13 nP. On 6th July, 1961, the petitioner paid Rs. 1,80,507.86 nP. being the tax liability of the firm in respect of the Income Tax and excess profits tax and Rs. 2,964.61 nP. being his individual tax liability. On the petitioners making these two payments, the Additional Collector of Bombay made an order withdrawing the attachment of the petitioner's property which at that time had been attached for the recovery of the aforesaid amounts. On the 29th of August, 1961, the 8th Income Tax Officer, Bombay, the second respondent hereto, served a notice on the petitioner calling upon him to pay the taxes outstanding against the other partners, namely, M. M. Killedar and Haji Ahmed Noor Mohamed, amounting to Rs. 59,967.48 nP. and Rs. 3,097.18 nP. respectively. It appears that the aforesaid tax liability of these two partners was not in its entirety their liability in respect to their share of profits in the aforesaid firm, but also included the tax liability of their other income. After considerable correspondence between the Income Tax authorities and the petitioner, the claim was reduced to Rs. 29,149.47 nP. being the tax liability of these two partners in respect of their share of profits in the said firm received by them in the aforesaid assessment years. On the 8th of August, 1963, the Additional Collector of Bombay, the first respondent, issued a notice to the petitioner calling upon the petitioner to pay the said amount of Rs. 29,149.47 nP. On the 14th of August, 1963, the Tax Recovery Officer, the fifth respondent hereto, issued an order of attachment of immovable property of the petitioner for the recovery of the aforesaid amount of Rs. 29,149.47 nP. (erroneously mentioned as Rs. 63,064.66 nP. in the said order) It is these various notices and the order of attachment issued by the respondents which the petitioner is seeking to get quashed.

3. Mr. Mehta on behalf of the petitioner-assessee contends that the aforesaid partnership firm was a registered partnership firm during the relevant assessment years and, therefore, under the provisions of sub-section (5) of section 23 of the Indian Income Tax Act as it then stood prior to its amendment by the Finance Act of 1956, on Income Tax was payable by the firm, nor was any tax payable by the firm itself, but on the other hand in the individual assessment of the aforesaid three partners, their share of income, profits and gains in the partnership were included and the tax payable by each partner in respect of their share and their other income was separately determined. In the circumstances, even though the stood dissolved on March 31, 1949, there was no provision in law entitling the respondents to recover from the petitioner-assessee the outstanding tax liability of the other partners in respect of their share of profits in the partnership firm.

4. On the other hand, Mr. Joshi the learned counsel appearing for the revenue, relies on the provisions of section 44 of the Indian Income Tax Act as it then stood, which, according to him, entitles the respondents to recover the said tax liability of the two partners from the petitioner. The relevant provisions of section 44 as it stood at the material time reads as under :

"44. Where any business, profession or vocation carried on by a firm... has been discontinued... every person who was at the time of such discontinuance or dissolution a partner of such firm... shall, in respect of the income, profits and gains of the firm... 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."

5. This section fastens a vicarious joint and several liability on the partners of a firm in respect of : (a) liability of the firm to ascertainment under Chapter IV; and (b) for the amount of tax payable by the firm. The fastening of this liability arises on the happening of the events, namely, either the discontinuance of the firm or dissolution of the firm. It is no doubt true that in the present case the firm stood dissolved on or about 31st March, 1949, prior to the aforesaid notices. But then what the respondents are claiming or enforcing against the petitioner is not the liability of the firm to be assessee under Chapter IV inasmuch as the assessment of the firm stood completed long time before the issuance of the notices. The respondents are also not enforcing against the petitioner recovery of the tax payable by the firm inasmuch as under the provisions of sub-section (5) of section 23, there was no determination of tax payable by a registered firm, nor has any tax payable by it been assessee on the firm in the present case. The claim of the revenue, therefore, in our opinion, cannot be sustained u/s 44 of the Indian Income Tax Act. What the respondents tried to do is recover from the petitioner the tax which has been assessee and determined as payable by the other two partners in respect of their respective incomes, profits and gains in the firm during the relevant assessment year. This claim of the respondent, in our opinion, cannot be sustained under the provisions of section 44 of the Indian Income Tax Act. The view taken by us finds support in a decision reported in Al. Sp. Pl. Subramaniam Chettiar v. Special Deputy Tahsildar, Income Tax Collection, Ramanathapuram District. Facts in that case were as follows : The petitioner in that case was a partner in a firm consisting of the petitioner and two other partners. The partnership was constituted under two instruments of 28th June, 1950, and 5th September, 1950. The firm was a registered firm u/s 26A of the Indian Income Tax Act. The total income of the firm was computed and determined at Rs. 92,252 and the share income of the three partners was also determined. The share income of the partners, including that of the petitioner, was taken into account and included in their individual assessment. The firm discontinued business on 30th June, 1955. The arrears of tax payable by the other partners was sought to be recovered from the petitioner. The petitioner approached the Madras High Court for getting quashed these notices. On behalf of the revenue provisions of section 44 of the Indian Income Tax Act were relied

upon. After examining the various provisions of the Act, a Bench of the Madras High Court held that it is an essential requisite of section 44 that there should be a liability on the firm which on its cessation is fastened on the members of the firm jointly and severally. The tax payable, in regard to which section 44 imposes a joint and several liability on the partners, must be one payable by the discontinued firm and not by the partners of that firm, who were assessee in their individual capacity on their total income including the income of the firm allocated to them in the ratio of their shares. It appears that an argument was also advanced on behalf of the revenue that on dissolution of the registered firm, the individual liability of the partners to pay tax is converted into the liability of the firm by reason of the provisions of section 44 of the Indian Income Tax Act rendering the partners jointly and severally liable for payment of the tax due on the total income of the firm. This contention of the revenue was negated and overruled by the Division Bench. The question raised in the case before us is identical. With respect, we agree with the decision given by the Division Bench of the Madras High Court.

6. Mr. Joshi also concedes that the aforesaid decision of the Madras High Court would be applicable to the facts of the present case and decision is against the revenue. But, according to him, the provisions of section 3, which is a charging section, have not been noticed in the decision. According to him, u/s 3 liability to pay tax is on the firm whether it is a registered firm or unregistered firm. Sub-section (5) of section 23 only relates to the recovery of the tax liability and provides that in case of a registered firm, the liability would be recovered from the partners individually to the extent of their respective share of income, profits and gains in the business of the firms. Eventually, the liability of the firm is recoverable when the firm discontinues its business u/s 44 of the Act. It is indeed true that in section 3, which is the charging section, the expression used is "every firm" and, to that extent, it is possible to say that the charging section does not make any distinction between a partnership firm which is registered under the provisions of the Indian Income Tax Act and the firm which is not entitled to be registered under the said provisions. But it must be kept in view that section 3 is only a charging section which declares the liability to pay tax by the various units of assessment mentioned in respect of their total income of the relevant previous year. The section has no concern with the manner in which these different units are to be assessee or with the determination of the amount of tax payable by them. Those things are done in accordance with the provisions of the Indian Income Tax Act. In order to attract the provisions of section 44 what must be shown is, not only that the firm is dissolved but that at that time there was an outstanding liability of the firm to be assessee under Chapter IV or that was an outstanding balance of the tax which has been determined as payable by the firm. Chargeability of tax does not get converted into payability of tax without determination of the amount of tax payable by a unit of assessment in accordance with the provisions of the Act. We have already shown that the assessment of the firm had already been completed long before the notices were

issued and there was no determination of any tax payable by the firm. Therefore, the provisions of section 3, in the circumstances, are hardly of any assistance to the revenue. The application, therefore, will have to be allowed.

7. In the result, we allow the application, quash and set aside the aforesaid notices of the respondents as also the order of attachment and restrain the respondents from recovering the said amount from the petitioner. The rule is made absolute with costs.

8. Petition allowed.