(1960) 11 KL CK 0038

High Court Of Kerala

Case No: O. P. No. 1132 of 1959

Subramonia Iyer		APPELLANT
	Vs	
Income Tax Officer, New Delhi and Others		RESPONDENT

Date of Decision: Nov. 4, 1960

Acts Referred:

- Constitution of India, 1950 - Article 226

Citation: (1961) KLJ 948

Hon'ble Judges: C.A. Vaidialingam, J

Bench: Single Bench

Advocate: T.N. Subramonia Iyer, S. Neelakanta Iyer, S. Bhagavathilekshmi Ammal and K.S. Paripoornan, for the Appellant; G. Rama Iyer for Respondents 1 and Government Pleader for Respondents 2 and 3, for the Respondent

Judgement

Vaidialingam, J.

In these proceedings under Art. 226 of the Constitution, Mr. T. N. Subramonia Iyer, learned counsel for the petitioner wants the order, Ext. P. 1 of the income tax Officer, New Delhi, the first respondent, to be quashed and he also prays for an order prohibiting the respondents 2 and 3 namely, the District Collector, Trivandrum and the Tahsildar, Trivandrum, from taking any proceedings under the Revenue Recovery Act on the basis of the assessment stated to have been made in pursuance of Ext. P. 1. According to the learned counsel, any assessment stated to have been made by the first respondent namely, the Officer at New Delhi in pursuance of the notice issued under Ext. P. 1 is absolutely null and void, because the income tax Officer at the relevant time, who was functioning in British India, has no jurisdiction to assess parties who are residents in the then Sovereign State of Travancore and who are also having business exclusively in Travancore.

2. The learned counsel, in particular, attacks the grounds given in Ext. P. 1 for directing the parties to furnish a return of income for the relevant year namely,

assessment year 1943-44 corresponding to accounting period 1942-43. So far as this is concerned, it is also the further case of the petitioner that under the relevant provisions of the income tax Act then prevalent in the State of Travancore, the State Authorities had duly assessed the petitioner in respect of the said income and that those orders are evidenced by Ext. P. 2 dated 3-12-1118 and that the necessary payments have already been made to the State Authorities as evidenced by Exts. P. 3 and P. 4.

3. Therefore, basing his contention that the proceedings of the Officer at New Delhi namely, the first respondent, are themselves null and void, the further contention of Mr. T. N. Subramonia Iyer, learned counsel for the petitioner, is that in any event, the respondents 2 and 3 are not bound to give any assistance to the first respondent in the matter of collection of tax. This attack is based upon 2 grounds namely,

(a) on the ground that the order of assessment, if any, that has been made by the first respondent is itself null and void; and

(b) even assuming that the assessment has been properly made, no proceedings for recovery of tax can be taken in view of section 46(7) of the income tax Act, beyond the time stated therein and therefore, in view of the fact that the assessment order, if any, is stated to have been passed by about 20-2-1948, the income tax Department has no right to take any further steps for collection of the tax. According to Mr. T. N. Subramonia Iyer, respondents 2 and 3, who are situated within the territorial jurisdiction of this court, have no duty or right to assist the first respondent in the matter of such illegal collection and therefore, they should be prohibited from enforcing the provisions of the Revenue Recovery Act as against the petitioner for the purpose of making the collections on behalf of the first respondent.

4. I will go to the details of the contentions a little later.

5. On behalf of the respondents, Mr. G. Rama Iyer, learned counsel for the Revenue, has contended that the petitioner is not entitled, in these proceedings before this court, to challenge the order of assessment that has already been made by the first respondent as early as 20-2-48. His argument is that in view of the various decisions of the Supreme Court, as well as the other High Courts, including this court, the position is now well-established that this court has no jurisdiction to consider in proceedings under Art. 226 of the Constitution the correctness or otherwise of orders passed by authorities situated beyond its territorial jurisdiction. In this case admittedly, the notice that is sought to be quashed in the first instance, Ext. P. 1 has been issued by the income tax Officer, New Delhi and therefore, this court cannot grant the relief.

6. Mr. G. Rama Iyer also contended that in any event, Ext. P. 1 is only a notice requiring the parties to furnish a statement of income and that stage has already

passed and an assessment as such has already been made on 20-2-48. Therefore, there is no question of the notice, Ext. P. 1 being quashed when an assessment itself has been made on the petitioner. In this connection, Mr. G. Rama Iyer, learned counsel for the 1st respondent, also relied upon a Division Bench ruling of this court of Joseph and Varadaraja Iyengar JJ. in O. P. 17/1955 given on 15-7-57. That judgment is Ext. VI in these proceedings. This question about the illegality or void nature of the order of the first respondent was directly placed before the learned Judges and the learned Judges have observed that that question cannot be gone into by this court. Therefore, Mr. G. Rama Iyer contends that this contention is not available to the petitioner in these proceedings again.

7. Regarding the contention that the Revenue has no jurisdiction to proceed by way of recovery of collection of tax on the basis of section 46(7) of the Act, Mr. G. Rama Iyer, learned counsel for the Revenue in turn, relies upon the proviso to section 42 of the Act and according to him, there is no bar of limitation in view of the said proviso as the assessment in this case being on the non-resident, within the meaning of that expression as contained in the Act. The relevant provisions of the enactment will be considered when I advert to the more serious contention raised by Mr. T. N. Subramonia Iyer, learned counsel for the petitioner.

8. So far as the contention of Mr. T. N. Subramonia Iyer namely, based upon the notice Ext. P. 1 or the subsequent assessment that has been made by the officer at New Delhi in pursuance of Ext. P. 1 is concerned, I have not heard arguments from Mr. T. N. Subramonia Iyer on this point. I am satisfied that, whatever may be the merits in the contention of the learned counsel about the correctness or otherwise of the reasons given by that officer for proceeding to assess the non-resident at the relevant time, those aspects cannot be considered by this court, because, as rightly pointed out by Mr. G. Rama Iyer, learned counsel for the Revenue, this court cannot in these proceedings consider the validity or otherwise of an order passed by an authority situated outside the territorial jurisdiction of this court.

9. On an alternative basis also, it is not open, in my opinion, to the learned counsel to raise this contention over again before this court. It will be seen from the judgment of my learned brothers Joseph and Varadaraja Iyengar JJ. given in O. P. 17/1955 that this point was directly raised before the learned Judges by the then counsel appearing for the present petitioner.

10. The contention that was raised, was that the assessment and demand made by the first respondent, is absolutely illegal and without jurisdiction and therefore, the assessment will have to be quashed. But the learned Judges over-ruled this contention and observed as follow:

We are unable to grant this prayer. The first respondent who made the order of assessment, is outside the territorial jurisdiction of this court and Shri Ramakrishna Iyer conceded that in view of the decisions of the Supreme Court, this court had no

jurisdiction to issue a writ quashing the order of assessment. However, he wanted us to express an opinion on the validity of the assessment. We do not consider it proper to express any opinion regarding the order of assessment which was made before the Constitution of India was passed.

Therefore, in view of all these circumstances, in my opinion, this court has no further jurisdiction to entertain the objection raised on behalf of the petitioner that the notice, Ext. P. 1 and the further order of assessment passed upon the notice Ext. P. 1 are both illegal and without jurisdiction. Therefore, in this view, I have declined to hear arguments on this point from Mr. T. N. Subramonia Iyer.

11. The more serious attack that is made by Mr. T. N. Subramonia Iyer, learned counsel, is one based upon the provisions of section 46(7) of the Act. According to Mr. T. N. Subramonia Iyer, the time limit fixed under the provisions of sub-section (7) of section 46 of the Act is admittedly over and therefore, the first respondent has no further right or jurisdiction to take any proceedings by way of collection of tax and in consequence, the respondents 2 and 3 have no duty, or cannot be required to give any assistance to the first respondent in the matter of collection of a tax which has become barred under the provisions of sub-section (7) of section 46 of the Act. Section 46 is found in Chapter VI entitled "Recovery of Tax and Penalties.

Section 45 deals with the time when the tax is payable.

Section 46 deals with the ''mode and time of recovery''. It is not necessary for me to advert to the various sub-sections contained in section 46 except sub-section (7) of the said section. Sub-section (7) of section 46, in so far as it is material for the present purpose, is as follows:

Save in accordance with the provisions of sub-section (1) of section 42, or of the proviso to section 45, no proceedings for the recovery of any sum payable under this Act shall be commenced after the expiration of one year from the last day of the financial year in which any demand is made under this Act.

I am omitting the proviso which is not necessary. There is an Explanation to the section which deals with when exactly a proceeding for recovery of sum is to be deemed to have been commenced within the meaning of the section. It is not even necessary for me to advert to that because the learned counsel for Revenue, was prepared to proceed on the basis that if the provisions of the proviso to section 42 do not assist the department, the latter will not be entitled to take any further step for recovery of the tax in this case. Therefore, I am leaving all the other parts of sub-section (7) of section 46.

12. Before I advert to the provisions of the proviso in section 42, it will be desirable to state the exact contention that has been taken by the petitioner in the affidavit filed in support of this application. In paragraph 7 of the affidavit, it has been stated that the first respondent has averred in a prior proceeding namely, O. P. 17/1955

that a demand was issued on 20-2-48. Whether the demand was issued on 20-2-48 or assessment was made on 20-2-48, at any rate, it will be clear that assessment must have been made on or before 20-2-48. It is again stated in clause (e) of paragraph 13 in the affidavit that the claim to recover tax by recourse to proceedings under Revenue Recovery law is belated. It is further stated that there has been no proceedings for recovery within the expiration of one year from the last day of the financial year in which a demand is alleged to be made under the Indian income tax Act, 1922. This contention raised on behalf of the petitioner is dealt with in paragraphs 7 and 9 of the counter-affidavit filed on behalf of the first respondent namely, the income tax Officer, New Delhi. Paragraph 7 of the counter-affidavit stated that the averments in paragraph 12 of the affidavit are denied and it further says that ''the grounds mentioned in clauses (a) to (e) of paragraph 13 are unsubstantial and I deny them.''

13. I have already mentioned that clause (e) of paragraph 13 of the affidavit dealt with the bar of limitation. Again paragraph 9 of the counter affidavit is to the effect that the recovery proceedings are not belated as alleged in the affidavit. It would have been very desirable on the part of the first respondent to have given a clearer indication as to how exactly the proceedings, which according to the petitioner are barred, can be sustained with particular reference to any provision of the statute. But anyhow, the plea that the proceedings are not barred by limitation, has been no doubt, taken in the counter-affidavit.

14. But Mr. G. Rama Iyer, learned counsel for the Revenue, particularly relied upon the proviso to section 42 of the Act. Section 42 of the Act deals with the ''income deemed to accrue or arise within the taxable territories.'' It is not necessary for me to quote that sub-section (1) of section 42 in extenso excepting to state that it provides for assessing the person entitled to the income, profits or gains if he is not a resident in the taxable territories to be made either in his name, or in the name of his agent. The first proviso to sub-section (1) of section 42 is as follows:

Provided that where the person entitled to the income, profits, or gains is not a resident in the taxable territories the income tax so chargeable may be recovered by deduction under any of the provisions of section 18 and that any arrears of tax may be recovered also in accordance with the provisions of this Act from any assets of the non-resident person, which are, or may at any time come within the taxable territories

There is very acute controversy as between the learned counsel on both sides regarding the correct and proper interpretation to be placed upon this proviso. I will indicate their contentions and I may also state that the construction of the proviso is not free from difficulty.

15. According to Mr. T. N. Subramonia Iyer, learned counsel for the petitioner, this proviso must be considered to be more or less an exception to section 46(7). That is,

it gives an enlarged period of limitation in respect of the particular types of assessments mentioned therein. In this case, at the time when the assessment was made, the petitioner was not a resident in British India (as it was then called) but was a resident of the Sovereign State of Travancore. He had no assets at that time in the then British India. No doubt, the present expression that is used is "Taxable territories" and the expression ""Taxable territories" is again defined in section 2(14A) of the Act.

16. It is the contention of Mr. T. N. Subramonia Iyer that in order to enable the Revenue to have a larger period of limitation under that proviso it is necessary that when the assets of the non-resident come into the taxable territory, the assessee must continue to be a non-resident at that time also. It is only under those circumstances the Revenue will get an extended period in regard to the assessments referred to therein for the purpose of collection of tax. In this case, according to Mr. T. N. Subramonia Iyer, when the Sovereign State of Travancore formed part of the Taxable territories, in view of the Constitutional changes that happened in India, along with the assets, which passed into the taxable territory, the assessee also ceased to be a non-resident. Therefore, in such cases, when the assessee ceased to be a non-resident and he passes into the taxable territory along with his assets, according to Mr. T. N. Subramonia Iyer, the Revenue is not entitled to take advantage of the provisions contained in this proviso.

17. On the other hand, the contention of Mr. G. Rama Iyer, learned counsel for the Revenue, is that the only requirement that is contemplated under the proviso is that the assessment must have been made upon a person who at the time of assessment is a non-resident. At any subsequent period if the said nonresident''s assets come into the taxable territories, it is open to the Revenue to proceed against those properties for the purpose of recovering of the tax. According to Mr. G. Rama Iyer, the requirement, according to Mr. T. N. Subramonia Iyer, even at the time when the assets come into the taxable territories, the assessee must continue to be a non-resident does not at all follow, in view of the specific provisions in section 42(1) of the Act. The more reasonable construction, according to Mr. G. Rama Iyer is that the original non-resident who was assessed and who gets any profits in any of his assets in the taxable territories subsequently notwithstanding that the assessee, who was a non-resident in the first instance, has also become a resident later on, will not in any way, disentitle the Revenue from taking advantage of this provision. This, according to the learned counsel for the Revenue, is the more reasonable construction that has to be placed consistent with the scheme of the Act.

18. In this connection, Mr. G. Rama Iyer referred me to certain observations contained in the judgment of the Bombay High Court reported in Commissioner of Income Tax, Bombay North Vs. Kishoresinh Kalyansinh Solanki, . The particular observations relied upon by Mr. G. Rama Iyer, are those contained in page 532 to the following effect:

Of course, a fiscal enactment should be construed strictly and in favor of the subject. Of course, again as a general rule, interpretation must depend on the language of the section and not upon the consequence that may follow upon it. But this rule of interpretation of literal construction cannot be rigidly adhered to if it leads to manifest absurdity. In such a case, as it has so often been said, the court acts under the influence of an irresistible conclusion that the Legislature could not possibly have intended what its words may signify. The cardinal rule of literal construction and linguistic clearness-it does not require to be stressed-roust not be pushed so far as to result in irrational or absured conclusions..... Of course, this has to be read only as a general observation and we must do so without being forgetful of other fundamental principles of interpretation.

19. In my opinion, having due regard to the observations referred to above, the proper interpretation to be placed upon the proviso to section 42 is that in order to enable the Revenue to take advantage of the proviso, the assets that are sought to be proceeded with, should have come into the taxable territories, when the assessee still continues to be a non-resident. That in my opinion, is the more reasonable interpretation even adopting the line of approach that Mr. G. Rama Iyer suggested. No doubt, it may be that the Revenue is not able to have the full effect of the said proviso for proceeding against the assets of non-resident persons, who also become resident persons along with the passing of the assets into the taxable territories.

19-A. The proviso, in my opinion, gives three modes of recovery to the Revenue in respect of the tax due from non-residents:

(1) The tax may be recovered by deduction under the provisions of Section 18;

(2) Any arrears of tax may be recovered, in accordance with the provisions of the Act from any assets of the non-resident person which are in the taxable territories; and

(3) The arrears of tax may be recovered in accordance with the provisions of the Act from any assets of the non-resident that may come at any future time within the taxable territories.

Therefore, this shows that the assets that come into the taxable territories, must be that of a non-resident.

20. The latter part of the proviso, in my opinion, gives a clear indication that at the time when the assets come sometime later into the taxable territories, the essential condition precedent for the Revenue to proceed against it under this proviso is that those assets must be of a non-resident person even at that time. If the object is not what I have indicated above, it will be absolutely redundant for the use of the expression "non-rodent person" both at the beginning of the proviso when it refers to the income, profits, or gains of a person not resident in the taxable territories and when again the same expression "nonresident person" is referred to at the

concluding part of the proviso when it deals with "any assets of the non-resident person which are, or may at any time come within the taxable territories". There cannot be any, dispute that the assets of the non-resident person which are in the taxable territories at the time of assessment, can be proceeded with and at that relevant time surely those assets must be of a non-resident person. I cannot accept Mr. G. Rama Iyer''s contention that when we come to the last part of the proviso, which deals with an asset coming on to the taxable territory at a subsequent time, the requirement of the assessee to continue to be as a non-resident is not contemplated. The expression ''"non-resident person" used in the concluding part of the proviso has relation to both (a) the assets which are at the time of the assessment of a nonresident person, and(b) those assets which come within the taxable territories of the non-resident person. If that is not so, it is not possible to visualize the circumstance of any "asset coming into the taxable territory"', because if an asset has already been in a taxable territory and there is the assesses resident person, there is no question of any asset of the non-resident person coming into the taxable territory; Therefore, the emphasis, in my opinion, is really about the assets that come in to the taxable territory belonging to the non-resident. The expressions "resident" and "ordinary resident" have also been defined in sections 4-A and 4-B of the Act; but it is not necessary for me to advert to those definitions.

21. Therefore, in my view, it will not be doing any violence to the language contained in the proviso, if it is held that at the time when the asset come into the taxable territory and the party still continues to be as also a resident of the taxable territory, the Revenue will not be entitled to take advantage of the proviso to section 42. Therefore, in this view, the petitioners are well-founded in their contention that the proceedings have become barred by virtue of the provision of Section 46(7) of the Act. It follows that irrespective of the fact that the order, as such, of the first respondent cannot be canvassed in these proceedings, the officers, who are situated within the State, are not bound to give any assistance whatsoever for recovery of dues which the Department is not entitled to recover by Virtue of the provisions of the Act. There is no question of fact involved in coming to the conclusion and a decision on this point could be arrived at purely on the basis of the construction to be placed on sub-section (7) of section 46 and the first proviso to section 42(1) of the Act. Therefore, the prayer for quashing the order, Ext. P. 1 and the assessments that are stated to have been made on the basis of Ext. P. 1, cannot be granted. But the application, in so far as it prays for prohibiting the respondents 2 and 3 from giving any aid to the first respondent in the matter of recovery of the income tax stated to be due in respect of the assessment years 1943-44, has to be granted. I may also state that there is no controversy in these proceedings that the father proceedings initiated by the first respondent, are in full compliance with the directions contained in O. P. 17/1955. Parties will bear their own costs.