
(1976) 06 CAL CK 0003

Calcutta High Court

Case No: A.O.D. No. 282 of 1963

Gopal Chand Sen

APPELLANT

Vs

Income Tax Officer and
Others

RESPONDENT

Date of Decision: June 8, 1976

Acts Referred:

- Income Tax Act, 1922 - Section 14(2), 16(1), 41(1)

Citation: (1976) 1 CALLT 1 : 81 CWN 253 : 80 CWN 733 : (1977) 109 ITR 820

Hon'ble Judges: M.N. Roy, J; A.K. Sen, J

Bench: Division Bench

Advocate: Samarendra Nath Dutta, for the Appellant; Suhas Sen and Samar Banerjee, for the Respondent

Judgement

Anil K. Sen, J.

This appeal under Clause 15 of the Letters Patent involves a short question as to whether the assessee's share of income from a firm, the business whereof was being carried on by the receivers appointed by a court and the income whereof had been assessed in the hands of the receivers, can be added to the assessee's personal income for computation of his total income u/s 16(l)(a) of the Indian Income Tax Act, 1922, for the purpose of determining the rate of taxation. The appeal is directed against the judgment and order dated February 20, 1963, passed by D. Basu J. in Civil Rule No. 3690 of 1960 [[GOPAL CHANDRA SEN Vs. Income Tax OFFICER, DISTRICT III\(2\), CALCUTTA, AND OTHERS.](#)] dismissing the writ petition preferred by the appellant. It would be necessary to refer to the facts in brief which are set out hereunder.

2. Three persons, Manmatha Nath Sen, Bholanath Sen and Pramatha Nath Sen, carried on a business in the name and style of " Sen Brothers and Company". Admittedly, each one of them had 1/3rd share in such business. Disputes and differences having arisen, a suit was instituted and receivers were appointed by the court in respect of the said

business. For the different assessment years 1950-51 to 1955-56, the income arising out of the said business was assessed in the hands of the receivers. The assessment order for 1950-51, made annexure "B" to the writ petition, goes to show that the assessees were the receivers, Balai Lal Sen and Bibhuti Bhusan Sen, of Messrs. Sen Brothers and Company and the assessment was made taking the status of the assessees to be that of an association of persons. Such assessment is now final.

3. It is not in dispute that the Income Tax Officer in assessing Manmatha Nath Sen on his personal income for the aforesaid assessment years 1950-51 to 1955-56 computed his total income by adding his 1/3rd share in the income of the firm, Sen Brothers and Company, u/s 16(l)(a) for the purpose of determining the rate of taxation. It is, however, not in dispute that that part of his income from the business was exempted from taxation u/s 14(2) of the said Act.

4. Manmatha Nath Sen preferred appeals against such assessments on his personal income limited to the plea that his share in the business income carried on by the receivers could not be added to his personal income for computation of his total personal income u/s 16(l)(a). It was claimed on his behalf that the income from the business carried on by the receivers was assessed in the hands of the receivers as the persons carrying on the business and such receivers were the members of the association of persons assessed under such assessment. He himself not being the assessee his share in the income of the business cannot be added to the computation of his total income for the purpose of determination of the rate u/s 16(l)(a). The Appellate Assistant Commissioner hearing those appeals overruled such a plea. According to the Appellate Assistant Commissioner, the receivers were carrying on the business on behalf of the assessees, that is, the appellant and his other two co-sharers. Though the assessment was made in the hands of the receivers, the real assessees were the appellant and his co-sharers constituting the association of persons who were given the exemption u/s 14(2)(b), and, as such, their share is liable to be added to their personal income for computation of the total income for the limited purpose of determining the rate of taxation. Manmatha Nath Sen died and the present appellant as his heir and legal representative preferred a review, application u/s 33A(2) of the Act before the Commissioner of Income Tax, The Commissioner of Income Tax affirmed the view taken by the Appellate Assistant Commissioner and dismissed the review petition by an order dated February 5, 1960. In doing so, it is, however, not in dispute that the Commissioner of Income Tax did not hear the appellant or give the appellant any other opportunity to put forward his case except as made out in the application for review itself.

5. Being aggrieved by such assessment and the orders of the Appellate Assistant Commissioner and the Commissioner of Income Tax, the appellant moved this court with a writ petition raising the same dispute, namely, the Income Tax Officer acted illegally and without jurisdiction in computing Manmatha Nath Sen's total personal income by adding his 1/3rd share in the business income u/s 16(l)(a) for the purpose of determination of the rate of taxation. This rule was discharged by D. Basu J. on two-fold grounds. In the first

place, the learned judge in the trial court held that after amendment in 1941, the order contemplated by Section 33A(2) must be held to be an administrative order which called for no application of the principles of natural justice. Moreover, it was held that the decision of the subordinate authorities having merged in the administrative order of the Commissioner made u/s 33A(2) of the Act no writ of certiorari as prayed for was maintainable. Secondly, on the merits, the learned judge held that the authorities were right in their view that the income assessed in the hands of the receivers was the income of Manmatha Nath Sen and his co-sharers carrying on the business through the receivers and such income being separately taxed in the hands of the receivers was exempted from further taxation in the hands of Manmatha Nath Sen u/s 14(2) but none the less his share in the said income being his income was rightly added u/s 16(l)(a) to the total personal income of Manmatha Nath Sen for the purpose of determining the rate of taxation. This decision of the learned judge in the trial court is being challenged before us in this appeal.

6. Mr. Dutt, the learned counsel for the appellant, has assailed the correctness of both the reasons assigned by the learned judge in the trial court in dismissing the writ petition. According to him, the adjudication contemplated by Section 33A(2) is judicial in nature so that a writ of certiorari as prayed for for quashing such an order is maintainable in law if and when an appropriate case for such quashing is made out. According to Mr. Dutt when the Commissioner of Income Tax disposed of the appellant's review application without giving the appellant any opportunity of hearing or to put forward his case in an appropriate manner before the Commissioner, the ex parte order of rejection is not in accordance with law being violative of the principles of natural justice. On the other point, Mr. Dutt has reiterated the assessee's claim that the income from the business having been taxed in the hands of the receivers, Manmatha Nath Sen's 1/3rd share therein could not in law be added to Manmatha Nath Sen's total personal income u/s 16(l)(a). According to Mr. Dutt the business was not carried on by the co-sharer owners since the receivers were appointed by the court and it is they who, subject to the control of the court, had been carrying on the business. Strong reliance is placed by Mr. Dutt on the assessment order in respect of the income from the business in the hands of the receivers to support his contention that it was the receivers who were so assessed in the status of association of persons and the original co-sharer owners are in no way the assessees so that Section 16(l)(a) can have no application for adding Manmatha's share in the income of the said business to his personal income. Strong reliance is placed by Mr. Dutt on a decision of the Bombay High Court in the case of [Saifudin Alimohamed and Another Vs. Commissioner of Income Tax, Bombay City](#).

7. Mr. Sen, the learned counsel for the revenue, in his fairness, has not disputed the contention of Mr. Dutt that the order contemplated by Section 33A(2) of the Act is a judicial order so that in an appropriate case a writ of certiorari to quash such an order is maintainable in law. This, Mr. Sen conceded, notwithstanding the decision of the learned judge in the trial court to the contrary, in view of the decision of the Supreme Court in the

case of [Dwarka Nath Vs. Income Tax Officer, Special Circle D-ward, Kanpur and Another,](#) . As a matter of fact, the Supreme Court expressly overruled the earlier decisions relied on by the learned judge in the trial court in support of his view that the order contemplated by Section 33A(2) is an administrative order and the doctrine of natural justice cannot be imported because there is no obligation to hear either expressly or impliedly and further that such an order is not amenable to any writ of certiorari. Mr. Sen has none the less contended that it is not always obligatory for the Commissioner to hear the party who had preferred a review application u/s 33A(2) inasmuch as an oral hearing is not a mandatory pre-requisite. Reliance is placed by him on the Bench decision of the Allahabad High Court in, the case of [Babu Lal Kedia Vs. Income Tax Officer and Another,](#) . On the second point raised by Mr. Dutt on the merits, Mr. Sen has contended that both the learned judge in the trial court as also the assessing authorities were right in their conclusion that it was Manmatha Nath Sen and his co-sharers who were the real assesseees in the assessment of the business income in the hands of the receivers so that their respective shares are liable to exemption u/s 14(2)(b) and, as such, is liable to be added to the co-sharers' respective total personal income u/s 16(l)(a) of the Act as has been done. According to Mr. Sen, Manmatha Nath Sen's 1/3rd share in the business is not in dispute and it is also not in dispute that as such, a co-sharer he has received 1/3rd share out of the income from the said business though carried on by the receivers. In so receiving, he has enjoyed the benefit u/s 14(2)(b) in respect of that part of his income and having received the said benefit he cannot avoid the obligation u/s 16(l)(a).

8. So far as the first point raised by Mr. Dutt is concerned, it must be held that the view taken by the learned judge in the trial court that the order contemplated by Section 33A(2) is an administrative order and that the doctrine of natural justice cannot be imported or that such an order is not amenable to a writ in the nature of certiorari, stands expressly overruled by the Supreme Court in the case of [Dwarka Nath Vs. Income Tax Officer, Special Circle D-ward, Kanpur and Another,](#) referred to hereinbefore. The Supreme Court observed (page 358) :

"Prima facie, the jurisdiction conferred u/s 33A(2) of the Act is a judicial one. The order that is brought before the Commissioner affects the right of the assessee. It is implicit in revisional jurisdiction that the revising authority shall give an opportunity to the parties affected to put forward their case in the manner prescribed. The nature of the jurisdiction and the rights decided carry with them necessarily the duty to act judicially in disposing of the revision."

9. This, therefore, leads us to consider whether in the facts of the present case the Commissioner had rightly rejected the appellant's application for review u/s 33A(2). According to Mr. Dutt it was not so as there was clear breach of the principles of natural justice when the appellant was neither heard by the Commissioner nor given any other opportunity to substantiate his case before the Commissioner. According to Mr. Dutt the issue raised was an important issue of law and it was, therefore, necessary that the appellant should have been heard through his lawyer before the Commissioner could

dispose of the application by rejecting the same. Mr. Sen, on the other hand, has contended that an oral hearing is not a mandatory pre-requisite. On facts he has further contended that the review application raised no such dispute as could require either any oral hearing or any other opportunity to the appellant to substantiate his case fully made out in his application for review itself. The question of law raised, according to Mr. Sen, was of such a nature as could be well disposed of on the terms of the statute and if the Commissioner did not consider it necessary to hear the parties on the point, it cannot be said that he was in any way wrong. In our opinion, however, the dispute as to whether the Commissioner could have lawfully disposed of the review application without hearing the appellant or without affording him any other opportunity to support his case made in the application for review is of little importance when admittedly the issue involved is a question of law which had been fully argued both before the learned judge in the trial court and before us and when we are of the view that the learned judge in the trial court was right in upholding the view taken by the assessing authorities. When the appellant's case on merits of his claim is not sustainable in law we do not think it would be worthwhile to send back the review application for reconsideration by the Commissioner even if we uphold Mr. Dutt's first contention that the Commissioner had not lawfully disposed of the review application when he rejected the same without hearing the appellant or without affording him any further opportunity to support his case as made out in the review application.

10. We now proceed to give our reasons as to why we concur with the views of the learned judge in the trial court in overruling the plea of the appellant that Manmatha Nath Sen's share in the business income could not have been added to Manmatha Nath's total personal income for the purpose of Section 16(l)(a). Facts on the point are not in dispute. The assessee, Manmatha Nath Sen, had 1/3rd share in the business which at the relevant period was being carried on by the receivers appointed by the court. The income from the business was separately assessed to Income Tax, the assessee being the receivers of the firm assessed in the status of an association of persons. Whether such assessment was rightly made or not it is not for us to consider in this proceeding collaterally. The question is what is the consequence that follows from such assessment. Can it be said that by such assessment Manmatha Nath Sen and his co-sharers were thereby assessed as members of an association deriving the income from the business which would come within the exemption u/s 14(2)(b) and consequently would be added in appropriate shares to the personal income of co-sharers for computing their total income for the purpose of Section 16(1)(a)? It cannot be disputed that if it once comes u/s 14(2) it would automatically come u/s 16(l)(a). According to Mr. Dutt, however, in the assessment of the business income the assessee is not the co-sharer owner. It was the receivers who were carrying on the business and earning the income, and as such under the charging section it was they who were liable to pay the tax and assessed as such. As pointed out hereinbefore, to support this contention strong reliance is placed by Mr. Dutt on the decision of the Bombay High Court in the case of [Saifudin Alimohamed and Another Vs. Commissioner of Income Tax, Bombay City](#), and [COMMISSIONER OF](#)

[Income Tax Vs. ASIT KUMAR GHOSH.](#), . Though the decision of the Bombay High Court may somewhat help Mr. Dutt in supporting his contention now put forward before us, the decision of this court in [COMMISSIONER OF Income Tax Vs. ASIT KUMAR GHOSH.](#), would be of no assistance to Mr. Dutt. There, the assessee was the executor not earning the income on others behalf but on his own behalf. This court expressly found that the provision of Section 13(b) of the Agricultural Income Tax Act which corresponds to Sections 40 and 41 of the Income Tax Act had no application to the executors. So far as, however, the receivers are concerned, the point in our opinion has been set at rest by the Supreme Court by several decisions. Assessment of the business income in the hands of the receivers cannot but be an assessment in terms of Section 41(1) of the Act. On the scheme of Section 41 where the income comes in the hands of a receiver, Section 41 enables the assessing authority to levy the Income Tax payable on such income and recover the same either from the receiver u/s 41(1) or from the real owner who earns the income from the receiver by a direct assessment on them u/s 41(2). In the present case, the assessment had obviously been made u/s 41(1). By that assessment though the receivers are the notional assesseees the real assesseees were Manmatha Nath Sen and his co-sharers. In such assessment, the receivers are never assessed as independent earner of the income liable to pay the tax as such. The income in the hands of the receiver is assessed in the like manner and to the same amount as it would have been assessed on the real, owner, i.e., Manmatha Nath Sen and his co-sharers in the present case. In [Mohamed Noorullah, Representing The Estate of Late Khan Sahib Mohd. Omer Sahib Vs. The Commissioner of Income Tax, Madras.](#), the Supreme Court was considering a question of similar nature. There, on the death of a businessman, his several heirs and legal representatives inherited the business. In a suit over the said business, receivers were appointed. Such receivers while they continued in charge of the business earned profits and the Income Tax Officer assessed the profits in the hands of the receivers as the income of an association of persons consisting of the heirs of the deceased businessman. Such an assessment was disputed but having been upheld up to the High Court in a reference u/s 66(1) an appeal was taken to the Supreme Court. The Supreme Court upheld the view taken by the High Court that the income in the hands of the receivers" was liable to be so taxed as the income of the real owners carrying on the business as an association of persons.

11. The point raised by Mr. Dutt before us stands, in our opinion, expressly overruled by the Supreme Court in the case of [N.V. Shanmugam and Co. Vs. The Commissioner of Income Tax, Madras.](#) . A plea specifically of the same nature as now raised by Mr. Dutt was raised in the said case before the Supreme Court where the business income of a firm in the hands of a receiver was assessed as the income of an association of persons. It was contended before the Supreme Court that by such association of persons is meant the receivers and not the real owners. The Supreme Court overruled the plea. The Supreme Court observed (page 315):

" We are unable to accede to the contentions of the learned counsel for the assessee. It is not denied that the business was carried on by the receivers on behalf of the erstwhile partners of the firm and that considerable profits were earned from the business. The control and the management of the business was in the hands of the receivers. That control and management was a unified one. The receivers had joined in a common purpose and they acted jointly. When they did so they acted on behalf of the persons who were the owners of the business. The receivers did not and could not have represented the individual interests of the various owners of the business. If they had done so there would have been chaos in the business. The profits to which those owners lay claim and which they were not averse to pocket, were earned on behalf of an "association of persons". The profits were earned on behalf of the persons who had a common interest created by the order of the court and were on that account an " association of persons "."

12. Similar was the view taken by the Supreme Court in the case of [Commissioner of Income Tax, Madras Vs. Managing Trustees, Nagore Durgha, Nagore, .](#)

13. On the decision of the Supreme Court as above it must now be held that the assessing authorities in assessing the income of the business carried on by the receivers in the name of Sen Brothers and Company were really assessing the true owners, namely, Manmatha Nath Sen and his co-sharers. Though the assessment was being made in the hands of the receivers, Manmatha Nath Sen and his co-sharers being the assessee in such assessment they were as such entitled to the benefit of exemption u/s 14(2) of the Act as to the obligation u/s 16(l)(a) to the effect that part of their income derived from the business which is exempted from tax u/s 14(2) would still count for the computation of the total income for the purpose of determining the rate in. terms of Section 16(1)(a). This being the position in law, the foundation of the claim laid by the assessee, Manmatha Nath Sen, and, pursued by his successor, namely, the present appellant, must fail.

14. On the conclusions as above, the appeal fails and is dismissed. There will be no order as to costs.

M.N. Roy, J.

15. I agree.

16. By consent we further direct that the impugned assessments being upheld by the judgment and order passed this day by this court the respondents will be at liberty to realise the Income Tax assessed on Manmatha Nath Sen but in doing so they would adjust all amounts already realised for the relevant period from the said Manmatha Nath Sen by way of advance tax, if any, and all other payments made towards discharge of such Income Tax liability. If on such adjustment any amount be found refundable, the respondents will refund the said amount as early as possible.