Dhirendra Nath Banerjee Vs Additional Member, Board of Revenue

Matter N. 477 of 1963

Court: Calcutta High Court

Date of Decision: Jan. 7, 1965

Acts Referred:
Constitution of India, 1950 â€" Article 226#General Clauses Act, 1897 â€" Section 3(42)#Income Tax Act, 1922 â€" Section 22, 23, 23(3), 23(4), 23(5)#Public Demands Recovery Act â€" Section 2, 2(2), 37, 4, 7#Public Demands Recovery Rules â€" Rule 39

Citation: (1967) 1 ILR (Cal) 42

Hon'ble Judges: Banerjee, J

Bench: Single Bench

Advocate: N.K. Mukherjee, for the Appellant;

Judgement

Banerjee, J.
The Petitioner and four other persons of the names of K.C. Chatterjee, G.D. Chatterjee, P.C. Biswas and S.K. Bose were

partners of a firm known as ""Messrs. Popular Transport Service"", The Petitioner had 1/30th share in the partnership business. The partnership was

engaged in transportation business. On or about July 21, 1952, the partners of the Petitioner sold their shares in the business of the partnership to

certain outsiders for a consideration of Rs. 1,45,000. The Petitioner also sold his 1 /30th share in the business of the partnership to the same

outsiders on the same date. The Petitioner, however, says that he did not actually retire from the partnership until October 30, 1952. The outside

purchasers, it is said by the Petitioner, discontinued the transportation business on or about November 11, 1963 and the firm stood dissolved

thereafter.

2. After the discontinuance of the firm, the Respondent No. 4, income tax Officer, assessed the discontinued partnership to income tax for the

assessment year 1946-47, u/s 23(4) read with Section 34(1)(a) of the income tax Act, 1922, on an income of Rs. 1,43,300 and determined the

tax payable by it at Rs. 86,533-2-0. Also for the assessment year 1951-52, the dissolved partnership was assessed income tax u/s 23(4) of the

income tax Act, 1922, on an income of Rs. 48,000 and the tax payable was determined at Rs. 19,735-12-0. Notices of demand u/s 29 of the

income tax Act, 1922, in respect of both the sums assessed, were issued in the name of the partnership, which stood discontinued and dissolved at

the material time and were served upon the firm by affixation (vide para. 12 of the affidavit-in-opposition by the Respondent No. 6).

3. For non-payment of the tax assessed, the income tax Officer took steps u/s 46(2) of the income tax Act, 1922 and forwarded two certificates,

dated March 25, 1957, to the Collector, 24-Parganas, for recovery of the two demands. A Certificate Officer, thereafter, started two recovery

proceedings against the dissolved firm under the provisions of the Public Demands Recovery Act. About two years after the institution of the

recovery proceedings, on November 11, 1957, the Respondent No. 5, income tax Officer, who had in the meantime come to be in charge of the

assessment of the firm, intimated to the Certificate Officer, the names of the quondam partners of the dissolved firm including that of the Petitioner,

with a request to the Certificate Officer for recovery of the certificate debts from the said named persons. Thereupon, the Respondent Certificate

Officer amended the certificate by insertion of the names of the said partners and on July 5, 1960, sent two notices, u/s 7 of the Public Demands

Recovery Act, calling upon the Petitioner to show cause why he should not pay the two certificate debts.

4. The Petitioner filed objection, u/s 9 of the Public Demands Recovery Act, denying his liability to pay the debts, inter alia, on the grounds:

(1) that the income tax Officer, District III(1) had no jurisdiction to make the assessment and to issue the requisition u/s 46(2) of the income tax

Act;

(2) that the transferees of the assets of the dissolved and discontinued partnership were liable to pay the tax;

(3) that the partnership having been discontinued and dissolved with effect from November 11, 1963, the income tax Officer had no jurisdiction to

assess the firm under the unamended Section 44 of the income tax Act, 1922;

(4) that there was no notice of demand served upon the Petitioner and the other partners and as such, they were not liable to pay.

The Respondent Certificate Officer over-ruled the grounds and rejected the petition of objection, on October 10, 1961. The Petitioner moved

against the order before the Commissioner of the Presidency Division but failed in his attempt. A motion against the order of the Commissioner of

the Presidency Division was also rejected by the Board of Revenue on April 11, 1962.

5. Thereafter, in execution of the demand, the Certificate Officer issued a notice of attachment addressed to the Petitioner''s employers, the Ganges

Manufacturing Co. Ltd., requiring the said employers to deduct and remit, every month, 50% of the total emoluments payable to the Petitioner,

above Rs. 100, towards satisfaction of the certificate debts. The Petitioner objected to the attachment, inter alia, on the following grounds:

That the income tax Act is a special Act and income tax is a statutory liability. It is a tax leviable on an assessable unit in relation to his or its income

and receivable from such unit.

That the Petitioner is not personally liable for the payment of the demand due from the said dissolved firm inasmuch as the said unregistered firm is

a distinct assessable entity under the Indian income tax Act, 1922 and the demand is recoverable only from the assets of the firm, if there be any.

That the Petitioner''s salary is not liable to attachment in pursuance of the execution of the certificate against the unregistered dissolved firm.

That the provisions of general law have no application in the levy and collection of income tax due from a firm because it is neither a contractual

debt nor a common law liability.

That the provisions of the CPC so far as they are inconsistent with and repugnant to the provisions of the Special Act, that is, Indian income tax

Act, are not applicable at all.

The objections failed, because the Certificate Officer was of the opinion that the Petitioner was not entitled to object under Rule 39 of the Public

Demands Recovery Act. Nevertheless, the Petitioner salvaged the situation by filing an objection u/s 37 of the Public Demands Recovery Act, on

the day when his objection under Rule 39 was taken up for hearing. The application was dismissed by the Certificate Officer with the following

observations:

As I have already discussed fully in my order dated 10-10-61 in this case that C.D. is liable for payment of the certificate debts as a partner of the

dissolved firm u/s 44 of the I.T. Act. u/s 44 of the I.T. Act the partners of a dissolved firm are jointly and severally liable for the tax payable. I do

not therefore understand why the personal properties of a partner of the dissolved firm cannot be attached or sold in execution of the certificate.

The main issue in Satyanarayin Khan''s case, referred to in my said order, was whether the personal goods of the Plaintiff Respondent were liable

to attachment in execution of a certificate against an unregistered and dissolved firm of which the Respondent was one of the admitted partners

during the relevant period.

It was held that the debts in question were recoverable from the Plaintiff Respondent after amendment of the certificate by addition of the

Respondent''s name as a Certificate debtor and service of notices u/s 7 on him. In this case the partners of the dissolved firm including the C.D.(s)

named above have been duly impleaded as certificate debtors and notices u/s 7 have been served on them. The certificates are now being

proceeded against these partners. There was an appeal against my order quoted above and the same had been dismissed. The same points cannot

therefore be agitated again during execution of the certificate.

The Petitioner appealed against the order before the Commissioner of Presidency Division but failed. His application for revision was also rejected

by the Board of Revenue.

6. In these circumstances the Petitioner moved this Court, under Article 226 of the Constitution, praying for the quashing of the order of the

Certificate Officer as affirmed by the Commissioner of Presidency Division and the Board of Revenue and for a writ of mandamus upon the

Certificate Officer directing him to cancel or withdraw the notice, dated August 16, 1962 and obtained this Rule.

7. Mr. N. Mukherjee, learned Advocate for the Petitioner, argued in great detail and with great devotion to the cause. He relied, in the first place,

on the language of Section 4, the charging section under the Indian income tax Act, 1922 and contended that a firm was a distinct assessable unit

or an Assessee distinct from the partners. He drew my attention to Sections 22, 23, 29 and 46(1) and (2) of the income tax Act, 1922 and argued

that under the provisions of those sections, if a firm was the Assessee, it was the firm which was liable to file the return of income and to produce

evidence in support of the return and that the notice of demand for tax was to be served upon the firm. If the Assessee firm defaulted in payment of

the tax demanded, he contended, the firm may be penalised and steps may be taken against the firm for recovery of the tax under the Public

Demands Recovery Act. In support of his contention that a firm was distinct assessable entity. Mr. Mukherjee relied on the decision of the

Supreme Court in Commissioner of Income Tax, West Bengal Vs. A.W. Figgies and Co. and Others, , in which Mahajan J. (as he then was)

observed as follows:

A firm can be charged as a distinct assessable entity as distinct from its partners who can also be assessed individually.... The partners of the firm

are distinct assessable entities, while the firm as such is a separate and distinct unit for the purpose of assessment.

He further relied on another decision of the Supreme Court in Ravula Subba Rao and Another Vs. The Commissioner of Income Tax, Madras, in

which Venkatarama Ayyar J. observed:

Under the common law of England, a firm is not a juristic person, the firm name being only a compendious expression to designate the various

partners constituting it. But, as pointed out by this Court in Dulichand Lakshminarayan Vs. The Commissioner of Income Tax, Nagpur, , inroads

have been made by statutes into this conception and firms have been regarded as distinct entities for the purpose of those statutes. One of those

statutes is the Indian income tax Act, which treats the firm as a unit for the purpose of taxation.

He also relied on a third decision of the Supreme Court in Y. Narayana Chetty and Another Vs. The Income Tax Officer, Nellore and Others, , in

which Gajendragadkar J. (as he then was) observed as follows:

Section 3 of the Act which is the charging section provides inter alia that "where any Central Act enacts that income tax can be charged for any

year at any rate or rates, tax at that rate or those rates shall be charged for that year in accordance with and subject to the provisions of this Act in

respect of the total income of the previous year of every firm", in other words, a firm is specifically treated as an Assessee by Section 3. Besides,

the word "person" used by Section 2, Sub-section (2) of the Act while defining the Assessee, would obviously include a firm u/s 3(42) of the

General Clauses Act since it provides that a person includes "any company or association or body of individuals whether incorporated or not".

Therefore, it would not be correct to say that an Assessee u/s 2, Sub-section (2) of the Act necessarily means an individual partner and does not

include a firm. The argument based upon the relevant provisions of Section 23(5) is also not valid because it is obvious that for the purposes of

assessment at all relevant and material stages under Sections 22 and 23 it is the firm that is treated as an Assessee.

8. Using the contention that a firm is an assessable unit under the income tax Act as a spring board, a contention which in my opinion admits a little

doubt, Mr. Mukherjee further contended that income tax is not imposed on income generally but is imposed on the income of a person, natural or

artificial, as denned in Section 3 of the income tax Act, 1922 and that assessment had to be made against a person and the tax collected from the

Assessee. In support of this contention he relied upon the observations of Beaumont, C.J. in the case of THE PATIALA STATE BANK, IN RE.,

. Since the Assessee, in the instant case, was a firm, Mr. Mukherjee contended, tax could only be recovered from the firm or the assets of the firm

in the hands of the partners and not from partners personally. Alternatively, he contended that income tax authorities had a choice either to tax the

income in the hands of the firm or to tax it in the hands of the partners in accordance with their respective shares, but once the choice had been

made to tax either the firm or the partners it was no more open to go behind and claim to assess the other. In support of this contention Mr.

Mukherjee relied on a decision of the Bombay High Court in Commissioner of Income Tax, Bombay South Vs. Murlidhar Jhawar and Purna

Ginning and Pressing Factory, and argued that since in this case the income tax authorities had elected to assess the firm they could not thereafter

chase the partners personally for recovery of the tax assessed on the firm.

9. The argument advanced by Mr. Mukherjee ignores the provisions of Section 44(1) of the income tax Act, 1922, as it stood before the

amendment of 1958, which used to read as follows:

Where any business, profession or vocation carried on by a firm or association of persons has 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 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.

Section 44(1) as it stood prior to the amendment of 1958 has recently been twice interpreted by the Supreme Court. The first decision of the

Supreme Court, to which I need refer is the case of the Commissioner of Income Tax, Hyderabad Vs. Sri Rajareddy Mallaram, in which their

Lordships considered the section with reference to a dissolved association of persons and observed:

If by Section 44 the continuity of the firm or association is for the purpose of assessment ensured, no question of assessing the individual members

of the association can arise. Under Ch. IV of the income tax Act an association of persons may be assessed as a unit of assessment, or the

individual members may be assessed separately in respect of their respective shares of the income, but the Act contains no machinery for assessing

the income received by an association, in the hands of its members collectively. The unit of assessment in respect of the income earned by the

association is either the association or each individual member in respect of his share in the income. This is so when the association is existing and

after it is dissolved as well. There can be no partial assessment of the income of an association, limited to the share of the member who is served

with notice of assessment. For the purpose of assessment the income tax Act invests an association with a personality apart from the members

constituting it and if that personality is for the purposes of Ch. IV, in so far as it relates to assessment, continued, the theory of assessment binding

only upon members who were served with the notice of assessment can have no validity. This view is supported by the use of expression ''tax

payable'' in Section 44 which in the context in which it occurs can only mean tax which the association but for dissolution, or discontinuance of its

business would have been assessed to pay. Since the primary purpose of Section 44 is to bring to tax the income of the association after it is

dissolved or its business is discontinued, assessment of an aliquot share of that income is not contemplated by Section 44 of the income tax Act.

The effect of Section 44 is, as we have stated, merely to ensure continuity in the application of the machinery provided in Ch. IV of the Act for

assessment and for imposition of tax liability notwithstanding discontinuance of the business of the association or its dissolution. By virtue of Section

44 the personality of the association is continued for the purpose of assessment and Ch. IV applies thereto. What can be assessed is the income of

the association received prior to its dissolution and the members of the association would be jointly and severally assessed thereto in their capacity

as members of the association. For the purpose of such assessment the procedure is that applicable for assessment of the income of the association

as if it had continued. A notice to the appropriate person u/s 63(2) would, therefore, be sufficient to enable the authority to assess to tax the

association.

10. The other decision to which reference need be made is the case of Shivram Poddar Vs. Income Tax Officer, Central Circle II, Calcutta, and

Another, , in which their Lordships considered the section with reference to a firm, which had discontinued its business and observed:

Section 44 operates in two classes of cases: where there is discontinuance of business, profession or vocation carried on by a firm or association

and where there is dissolution of an association. It follows that mere dissolution of a firm without discontinuance of the business will not attract the

application of Section 44 of the Act. It is only where there is discontinuance of business, whether as a result of dissolution or other cause, that the

liability to assessment in respect of the income of the firm u/s 44 arises.

... ...

A firm after it has discontinued its business whether it is dissolved or not, will therefore be assessed either u/s 25(1) prematurely, or in the year of

assessment, in both cases the procedure of assessment is as u/s 23(3) and (4) supplemented by Sub-section (5). Section 44 provides an added

incident that all persons who were partners at the time of discontinuance are jointly and severally liable to pay the tax payable by the firm. u/s 23(5)

by the second proviso to Clause (a) in the case of a registered firm the firm is liable to pay tax on the share of the income of a partner only in the

case of a partner who is non-resident. On the discontinuance of the business of a firm however by Section 44 a joint and several liability of all

arises to pay tax due by the firm. Except the general provisions relating to premature assessment u/s 25(1) and assessment on succession u/s 26(2)

there is, in the Act, no provision which imposes joint and several liability on members of an association of persons, on dissolution or discontinuance

of business and that is presumably the reason why Section 44 was enacted as it stood prior to its amendment in 1958. Absence of reference to

dissolution of a firm (not resulting in discontinuance) in Section 44 was therefore a logical sequel to the provisions relating to assessment of firms

contained in Ch. IV, especially Sections 23(5), 25(1), 26(1) and (2).

11. In the instant case, it is admitted that the firm discontinued the business on November 11, 1963. Even after the discontinuance of business the

firm may be assessed under the procedure for assessment u/s 23(3) and (4) of the income tax Act, 1922. Section 44 provides for an added

incident that all persons who were partners at the time of the discontinuance are jointly and severally to pay the tax payable by the discontinued

firm. The question for my consideration is whether the Petitioner was a partner of the firm at the time of the discontinuance of the business. In para.

12 of the petition, the Petitioner, no doubt, says that he retired from the partnership on October 30, 1952, earlier to the discontinuance. This,

however, is not admitted in para. 8 of the affidavit-in-opposition by the Respondent No. 6. In reply to that the Petitioner says nothing more in his

affidavit-in-reply but merely reiterates what he had stated in his petition. This makes it difficult for me to hold that the Petitioner was not a partner at

the time of the discontinuance of the business of the firm, although he might have sold his share in the business of the firm, on July 21, 1952.

Further, the Petitioner had on a previous occasion taken the point before the Certificate Officer that the real partners, after July 21, 1952, were the

transferees from the original partners. The Certificate Officer did not give effect to this contention (vide Ex. E to the petition at p. 44). The order of

the Certificate Officer was upheld by the Board of Revenue. At that time the Petitioner did not move this Court against the final order by the

Board. It is now too late for him to agitate the same point over again. I, therefore, hold that the Petitioner is liable for payment of the tax assessed

upon the firm.

12. I further hold that the name of the Petitioner has been duly added in the certificate, he being a person liable to satisfy the certificate debt. He is

now a certificate debtor to all intents and purposes. Notice u/s 7 of the Public Demands Recovery Act has also been served upon him. The

execution of the certificate may now proceed against him according to law. This is the view also expressed by Division Bench of this Court in

UNION OF INDIA Vs. SATYANARAYAN KHAN AND OTHERS., . In the view that I take, I discharge the Rule with costs. Hearing fee

assessed at 5 G.Ms.