
(1953) 04 CAL CK 0021

Calcutta High Court

Case No: None

Issac Manasseh Meyer

APPELLANT

Vs

C. Subba Rao and Others

RESPONDENT

Date of Decision: April 16, 1953

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 26 Rule 5, 77
- Income Tax Act, 1961 - Section 23(3), 33A, 33A(2), 34(3), 37

Citation: 57 CWN 605

Hon'ble Judges: Sinha, J

Bench: Single Bench

Advocate: Ranadeb Chaudhuri, A.K. Das Gupta and P.K. Sen, for the Appellant; Sankar Banerji, Standing Counsel and B.L. Pal, for the Respondent

Judgement

Sinha, J.

This is. a rule issued upon the income tax Officer, District IIIA, Calcutta, and the Union of India, to show cause why a writ in the nature of mandamus, certiorari or prohibition should not be issued directing a commission to be issued for the examination of witnesses and documents at Singapore. The facts are briefly as follows. Sir Manaseeh Meyer, deceased of Singapore, died in the year 1930, leaving a will and a codicil. He left three sons, Jacob, Reuben and the petitioner Issac. By his last will and codicil, after making various bequests, he left the rest and residue of his estate to his three sons in equal shares. After his death, Jacob and Reuben took out probate of the will and codicil from the Supreme Court, Singapore. Jacob died in 1934. In 1942, the petitioner instituted a suit in this Court, being Suit No. 1302 of 1942 (Issac Manasseb Meyer v. Reuben Manasseh Meyer & ors.) for administration of the estate of the said testator, for partition and other reliefs. In 1946, Rebecca Meyer and Stanley Abbett, as the legal representatives of Jacob Meyer, deceased, took out an originating summons in the Supreme Court at Singapore, and obtained an order for the administration of the estate of Sir Manasseh Meyer. After various

proceedings the parties ultimately entered into an agreement of compromise, dated the 18th July, 1947. Briefly speaking, the effect of it was to have the Calcutta Suit stayed perpetually and to allow the administration by the Singapore Court to continue.

2. The estate of Sir Manasseh Meyer inter alia consisted of two hotels at Singapore, namely, the New-Adelphi Hotel and the Sea-view Hotel. It was provided in the agreement, dated the 18th July, 1947, that these two Hotels would be incorporated into public limited companies. Actually, however, they were incorporated into two private limited companies. A series of litigations broke out over the shares and directorship of these hotels and on or about 9th June, 1950, a further agreement was entered into settling the said disputes. Among, other things it was agreed that the companies having been formed for the benefit of the residuary legatees, would be run for their benefit.

Reuben died sometime in 1951.

3. The petitioner received fairly large sums as dividends in respect of shares of the said two Hotels, of which he is a registered holder. On the 25th November, 1950, the petitioner filed his return for the years 1948-49, 1949-50. In these returns he showed these dividends as his own income. On the 19th June, 1951, the petitioner wrote a letter to the income tax Officer stating that the amount received from these two hotels either as income or dividends should be treated as income of the estate of Sir Manasseh Meyer, deceased, which was still unadministered, and income tax thereon had been paid by the executor at Singapore. He prayed that the Return might be amended. On the 21st June, 1951, the income tax Officer served a requisition upon the petitioner asking for various particulars about the dividends, such as the name of the payee in the dividend warrant, place where dividends were declared, whether the payee was different from the registered shareholder, dates of remittances to Calcutta, etc. On the 28th July, 1951, the petitioner made an application before the income tax Officer. Referring to the said requisitions, he stated that the particulars were to be found from the books of accounts and documents of the Estate of Sir Manasseh Meyer, deceased, kept at Singapore and also from the books of Messrs. Allen & Gledhill, Solicitors, Singapore. He prayed that a writ of commission be issued to the proper authorities at Singapore for the purpose of-

(1) Examination of the said Isaac Brooke Abbett with reference to the books of accounts and documents of the estate of Sir Manasseh Meyer, deceased, at Singapore and of the two Hotel Companies.

(2) Taking necessary extracts and copies from the documents and accounts of the estate of Sir Manasseh Meyer, deceased, and of the two Hotel Companies.

(3) Examination of Mr. Baldwin Lowick, Senior partner of Messrs. Rennie Lowick & Co., Accountants of the Estate of Sir Manasseh Meyer, deceased, and also

secretaries of two Hotel businesses.

On the 7th August, 1951, the respondent No. 1 wrote to the petitioner as follows:

Subject-Assessments for the years 1948-49, 1949-50 and 1950-51.

Sir,

With reference to your application dated the 28th July, 1951, I regret that I cannot accede to your request to send a commission from Calcutta to Singapore to take down evidence. Such Commissioner will have no powers to enforce attendance of witnesses or production of books. In view of what you have stated in paragraph four of your petition, it would be useless, therefore, to issue the admission u/s 37 of the Indian income tax Act.

This letter was addressed to the petitioner, care of his Calcutta attorneys. The letter came back endorsed "Left".

4. On the 29th August, 1951, the respondent No. 1 wrote a letter to the principal officer of the two Hotels asking for certain particulars. A copy of this letter is annexed to the affidavit in opposition.

5. On the 3rd September, 1951, the Secretaries of the two Hotels replied, stating that although they were not within the jurisdiction of the respondent No. 1, they had no objection to answering the queries, provided the petitioner had no objection. They also intimated the fact that they had written to the local solicitors of the petitioner.

6. On the 27th September, 1951, the petitioner filed a revised return for the years 1948-49, 1950-51 and also filed his return for 1951-52. In these returns he specifically claimed the dividends to be a part of the still unadministered estate of Sir Manasseh Meyer, deceased, and as such not taxable in his hands.

On the 28th September, 1951, the petitioner filed a second petition, dated the 26th September, 1951, styling it as "Further to my petition dated 28th July, 1951. for issue of commission u/s 37 of the income tax Act".

In this petition he categorically stated that the limited companies (namely, the two Hotels) were only benamdars of the Estate of Sir Manasseh Meyer, deceased. He then gave a list of particulars which must be enquired into in order to determine this point, viz., as to how the consideration money was paid for the acquisition of the shans, whether the business was carried on in the interests of the residuary legatees of the estate, and so forth.

No specific order has been passed upon this petition. The original rule was obtained in November, 1951, and an interim stay obtained upon an indemnity given by the petitioner to compensate the respondents against any damages suffered as a reason thereof. On the 12th June, 1952, the proceedings were adjourned sine die by

Bose, J., at the prayer of the parties. It was mentioned before me by the respondents shortly before the expiry of March, 1953, that the assessment for the year 1948-49 would be barred on the 31st March, 1953, u/s 34(3) of the income tax Act. I therefore gave priority to the hearing of this application. At the first hearing, I found that the entire matter could not be disposed of before 31st March, 1953. I had therefore to vacate the interim order so far as the assessment for the year 1948-49 was concerned.

7. The following points have been taken by the learned Standing Counsel:

(1) That the application was premature inasmuch as the respondent No. 1 had not given his decision upon the petition dated the

(2) That no order for the issue of a commission to Singapore could be made, (sic) Singapore was a foreign territory.

(3) That even if it was permissible to issue a "Letter of request" to the Supreme Court at Singapore, the income tax Act had conferred no power upon the income tax officer to issue such a "letter of request", although he had the power to issue a commission u/s 37 of the Act.

(4) That the income tax authorities were not entitled to go into the question of the "benami" nature of shares standing in the name of the petitioner himself.

(5) That on the facts of this case no commission should issue.

(6) That the petitioner has an alternative remedy which is equally adequate.

8. As regards the first point, the learned Standing Counsel argues that the petitioner should have waited until the income tax officer had passed orders upon the second petition. I cannot however overlook the fact that the income tax officer has already decided that a commission issued to Singapore would be infructuous. In his affidavit in opposition the respondent No. 1 has denied that it was his duty to issue a commission. Apart from the fact that he has annexed a copy of his order dated the 7th August, 1951, to his affidavit, he has stated that the secretaries of the two Hotels had offered to answer his requisitions and that the petitioner had no difficulty in getting copies of the books of account and produce the same before him. From this I conclude that he does not think it a fit case to issue a commission.

9. The learned Standing Counsel appearing on behalf of the respondents has taken the definite stand before me that no order for a commission or even the issue of a letter of request was possible. In my opinion, it is not necessary to wait for any further order by the income tax officer. He has already served a number of requisitions upon the petitioner. It follows that at the hearing of the assessment, the petitioner will be called upon to produce evidence to establish all these points. It may be that these requisitions are not expressly directed towards the investigation of the benami nature of the shares, but it would be difficult to say at this stage that

they are wholly irrelevant upon that issue. The petitioner is not asking for the examination of any new witnesses on the question of benami. If a commission has to be issued upon the questions raised by the requisitions, it had better be issued now rather than waste further time. All the witnesses cannot be examined twice, once upon the requisitions made and a second time upon the question of benami. If, therefore, I come to the conclusion that a commission should be ordered or a letter of request issued, I do not think that any purpose would be served by waiting any further. Any answer given by the secretaries will not serve the petitioner's purpose, because the Petitioner is carrying on litigation with the Hotels, and any answer given cannot be tested by cross-examination.

10. With reference to the second point, the order of the income tax officer dated the 7th August, 1951, shows that he did not come to the conclusion that he could not issue a commission, but that the order if made would be infructuous since the Commissioner could not enforce the attendance of witnesses or the production of books. The Income Officer was evidently thinking of a kind of commission issued in the case of *Kadumbiny Dassi v. Kumudini Dassi (I)* (7 C. W. N. 806), under section 387 of the old Code of Civil Procedure. There a commission was issued to examine a witness in Chandernagore, which was outside British India. The order was what I may term as a "Straight commission", that is to say, a Commissioner was appointed by this Court to go into foreign territory and examine a foreigner. Since then however the Code has been amended and now such things are done by the issue of a letter of request addressed to the presiding officer of the Court within whose jurisdiction the witness resides, requesting him to have a Commissioner appointed and to have the witness examined before such a Commissioner and forward the evidence to this Court, duly authenticated. This is provided for in Order 26, rule 5 of the CPC and the form of the letter of request is in the form set out in App. H, Form No. 8, which contains a note as follows;

Note-If the request is directed to a foreign court, the words "through the Ministry of External Affairs of the Government of India for transmission" should be inserted after the words "other witnesses" in the last line of this form.

Section 77 of the Code empowers a Court to issue a letter of request in lieu of a Commission.

While India formed part of the British Empire, there was no difficulty in issuing a commission to Singapore [See Evidence by Commission Act, 1859 and 1885 (22 Vict. C20 and 48 and 49 Vict. C74)] At present, Singapore forms a part of the "Colony of Singapore" consisting of Singapore island, Coco Isles and Christmas Island and is a part of the British Empire: India has ceased to be a part of the British Empire, but is still a part of the British Commonwealth of Nations. My attention was drawn to Order 35 rule 35 of the Singapore "Civil Procedure Rules" of the Supreme Court of Singapore, 1934, and I find that there is express provision for executing a letter of request from a foreign country. Hence there seems to be no impediment to the

issue of a letter of request, forwarded to the Supreme Court of Singapore, through the ministry of foreign affairs of the Government of India. It is true that the petitioner did not in his application mention a "letter of request", but mentioned the word "Commission". He however stated as follows : "It is necessary that a writ of commission should be issued to the proper authorities at Singapore." It is clear therefore that he did not intend to ask for a straight commission, but a letter of request to the Supreme Court of Singapore, which has jurisdiction over the proposed witnesses.

11. In my opinion, there is no substance in point No. 3. Section 37 grants the same powers to the Income-tax Officer as are vested in the court under the Code of Civil Procedure, when trying a suit. This naturally attracts the provisions of Order 26, rule 5 and section 77 of the Code and confers the power upon the income tax Officer to issue a letter of request in lieu of a commission.

12. I shall now deal with the fourth and the fifth points. With regard to the assessments for the years 1941-42, 1942-43, of the petitioner, the income tax Officer had assessed the income received by him from the yet unadministered estate of Sir Manasseh Meyer, deceased, but all such assessments have been set aside on appeal (Order dated 2nd December, 1950, of the Appellate Assistant Commissioner of income tax, Order dated 27th June, 1949, of the income tax Appellate Tribunal and Order dated 23rd November, 1949, of the Appellate Assistant Commissioner) following the well-known principle laid down in the leading case of *Rex v. Special Commissioners (a)* (7 T.C. 646) that though there may be a residuary legatee, the income from the residue is income of the executor and taxable in his hands so long as the estate was not fully administered.

13. According to the petitioner, the shares of the two hotels although standing in his name, belong to the estate of the deceased whose estate is still unadministered. He says that the dividends thereon were received in Singapore and the executor has paid the tax thereon, and they are not taxable in his hands. u/s 23(3) of the income tax Act, the assessee is entitled to adduce evidence, and the income tax Officer is bound to hear it. But how can the assessee produce evidence (both on the points upon which the income tax Officer has made requisition as well as the question of Benami) which is in Singapore, unless he is given the facility to get the witnesses examined on commission ? The learned Standing Counsel says that the question of Benami cannot arise in the case of shares in a limited company and that so far as the income tax authorities are concerned, they must take things as they find them and not look into the real nature of the transaction. He has cited a Privy Council decision, *Bank of Chettinad Ltd. v. Commissioner of income tax, Madras* (3) (L.R. 67 IndAp 394). I regret to say however that neither of these propositions are correct and the Privy Council decision is not applicable to the facts of this case. The income tax authorities are clearly entitled to go into the question of the Benami nature of a transaction : *Sinclair v. I. T. R.* (4) (24 T. C. 432); *Dal Chand & Sons v. C. I. T.* (5) [(1944)

ITR 458]; (see the commentaries on the income tax Act, Kanga & Palkhivalla (1950) Edn., p. 403 and Iyenger p. 635).

In this respect, there is no distinction made in the case of shares of limited companies. In *re Sir Dinshaw Maneckjee Petit* (6) (I. L. R. 51 Bom. 372) was a case where the assessee owned all the shares in a private limited company except three, held by his subordinates. On the facts of the case it was held that the profits were income of the assessee and not of the company. The Privy Council case mentioned above has no application to the facts of this case. There the question rose as to whether certain transaction, I a Bank should be treated as loans. it was held that the well-established principle fiscal legislation was that a subject could be taxed only if he could be brought within the letter of the law and therefore it was essential to find out whether in law the transactions amounted to a loan and not whether they were in substance loans. That principle has no application here. It is no authority for saying that if shares stand registered in the name of a person the income tax authorities are powerless to investigate as to who really owns them, or that the assessee cannot himself make out a case that he is a mere Benamdar.

I now come to the last point, namely, as to whether the petitioner has an alternative remedy which is equally efficacious and adequate. The learned Stan Counsel argues that a revision lay u/s 33A(2) of the income tax Act. The very same point was considered by Das Gupta, J., in [Elbridge Watson Vs. R.K. Das](#), . The learned Judge said "In my opinion, the remedy provided by section 33A is not such a remedy which should disentitle if I am otherwise satisfied about this matter, from giving relief on this application Section 33A merely gives a discretion to the Commissioner which he may or may not exercise, to call for records and intervene in the matter. The petitioner cannot ask for such intervention as a matter of right". Although the Appeal Court upset the judgment, [see *Union of India v. Elbridge Watson* (8) (56 C.W.N. 234)], it did so upon another point and did not dissent from the above opinion; I respectfully agree with it. Unless a party has the right to have his case heard, it cannot be said that he has an adequate remedy at law.

Finally, I must point out that where a party has clearly established that the evidence of a witness is necessary but he is not within his control, or resident within the jurisdiction of the Court, he is entitled as of right to a commission. In such a case, the High Court will interfere even in interlocutory proceedings rather than permit a trial to go on in an illegal course. *Jagannath Sastry v. Sarathambal* (9) (I.L. R. 46 Mad. 574). A writ of mandamus has been issued where a Magistrate wrongfully refused to accept evidence which a party was entitled to adduce. It was held to be a refusal by him to exercise jurisdiction over a distinct branch of the enquiry. *Queen v. Marsham* (10) [(1891) 1 Q. B. 371]. Although here, there has not been a refusal to hear evidence, yet the inevitable result of refusing to issue a commission would be to exclude it.

14. Upon a consideration of all these facts and circumstances, I make this rule absolute and quash the order of respondent No. 1, dated the 7th August, 1951, and direct him or the respondent No 3, whoever is in seisin of the income tax assessments of the petitioner for the years 1949-50, 1950-51, 1951-52, to issue a letter of request to the Supreme Court of Singapore, in form analogous to the form prescribed in the Code of Civil Procedure, and cause it to be forwarded through the ministry for external affairs of the respondent No. 2, for the examination of (1) Issac Brooke Abbett, (2) Mr. Baldwin Lowick, Senior partner of Messrs Rennie Lowick & Co., (3) The Secretaries of the two Hotels, all of whom are mentioned in the petition, dated the 28th July, 1951, filed before the income tax Officer. It is not possible to make orders for taking extracts from documents and accounts at Singapore. If any documents are required to be produced for examination of the witnesses the petitioner must move the Commissioner appointed by the Supreme Court, Singapore, or that Court to cause the production thereof at the examination. Further proceedings before the income tax Officer are stayed until the return of the Commission duly authenticated by the Supreme Court at Singapore. If either the ministry for external affairs declines to forward such a letter or the Supreme Court of Singapore declines to issue a commission, liberty to mention in order to have the stay order modified. As regards the assessment of 1948-49, if it has already taken place, nothing in this order will affect such an assessment but, as I could not decide the rights of the petitioner when vacating the interim order, the petitioner will not be precluded from taking this point in his appeal against such assessment order. The rule is made absolute to this extent. There will be no order as to costs.