

Sahu Rajeshwar Nath vs Income-Tax Officer, C-Ward, Meerut And ... on 4 September, 1968

Equivalent citations: AIR1969SC667, [1969]72ITR617(SC), [1969]1SCR999, AIR 1969 SUPREME COURT 667

Bench: J.C. Shah, A.N. Grover

JUDGMENT

Ramaswami, J.

1. This appeal is brought by certificate from the judgment of the Allahabad High Court, dated April 28, 1964, in Special Appeal No. 627 of 1961 by which the Division Bench dismissed the appellant's appeal and confirmed the order of the single judge dismissing the appellant's writ petition No. 194 of 1959,

2. The appellant alleged that he was a partner of a firm named Regal Dehydrating Company, Meerut, in which he held 12/53 share. It was stated that on January 15, 1945, the appellant sold away his share in the partnership to one Ram Chander, son of Nathmal Das, The partnership firm was assessed to income-tax for the assessment year 1945-46, by the Income-tax Officer, C-Ward, Meerut, by the assessment order dated December 9, 1952, on a total income of Rs. 64,622. The case of the appellant was that he had ceased to be a partner at the time of the assessment and was not liable to pay the income-tax assessed upon the partnership firm. It was also stated that no notice of the assessment proceedings was given to the appellant, nor was any notice of demand issued under Section 29 of the Income-tax Act, 1922 (hereinafter called "the Act"). It appears that the Income-tax Officer forwarded a certificate to the Collector under Section 46(2) of the Act for recovery of the tax due and the case of the appellant is that he learnt of the proceedings for the first time in the third week of September, 1958, when the Naib Tehsildar (Collection), Nagina, asked him to deposit the amount of income-tax. The appellant thereafter moved the Allahabad High Court for the grant of a writ in the nature of mandamus restraining the respondents from proceeding with the recovery of income-tax from the appellant. It was stated in the counter-affidavit of the respondents that the return of income filed on behalf of the firm showed the appellant to be a partner at the relevant time and there was no illegality in the order of assessment or in the recovery proceedings taken against the appellant. The writ petition was dismissed by a single judge on October 10, 1961, on the ground that the liability of every partner in respect of the tax due from the firm was joint and several and hence it was open to the Income-tax Officer to proceed against any one of the partners alone. The appellant took the matter in appeal under the Letters Patent but the appeal was dismissed by the Division Bench on April 28, 1964. The Division Bench proceeded on the assumption that the appellant did transfer his interest in the partnership firm in favour of Ram Chander, though the

respondents dispute the genuineness of the alleged transfer. The Division Bench held that even if the appellant had transferred his interest in the partnership firm there was no change in the constitution of the firm and the transferee got only the rights in the profits in lieu of the transferring partner who did not cease to be a partner.

3. During the hearing of the present appeal, Mr. Karkhanis, appearing on behalf of the appellant, mentioned at the outset that he will not press the argument that the appellant was not a partner of the unregistered firm during the relevant accounting year or that the appellant would not be liable for paying the income-tax dues of the partnership. But the argument of learned counsel was that a separate notice under Section 29 of the Act was necessary and unless such a notice was given, proceedings could not be initiated against the appellant under section 46 for recovery of the income-tax. Mr. Karkhanis conceded that the accounting year corresponding to the assessment year 1945-46 was the Diwali year ending in October, 1944, and therefore even on the assumption that the appellant had sold his interest in the partnership on January 15, 1945, as he alleged, the liability to income-tax for the relevant accounting year cannot be disputed by the appellant.

4. The sole question presented for determination in the present appeal therefore is--when a firm not registered under the Act is assessed to income-tax and a notice of demand is issued against that firm, whether a separate notice of demand is necessary against a partner of the firm if the tax assessed against the firm is sought to be recovered from that partner. Section 2(2) of the Act, as it stood prior to the amendment by the Income-tax (Amendment) Act, 1953, reads as follows ;

" ' assessee ' means a person by whom income-tax is payable ". After the amendment the section reads :

" ' assessee' means a person by whom income-tax or any other sum of money is payable under this Act, and includes every person in respect of whom any proceeding under this Act has been taken for the assessment of income or of the loss sustained by him or of the amount of refund due to him."

5. Section 29 of the Act states :

" When any tax, penalty or interest is due in consequence of any order passed under or in pursuance of this Act, the Income-tax Officer shall serve upon the assessee or other person liable to pay such tax, penalty or interest a notice of demand in the prescribed form specifying the sum so payable."

6. Section 46 of the Act reads as follows :

"46. (1) When an assessee is in default in making a payment of income-tax, the Income-tax Officer may in his discretion direct that, in addition to the amount of the arrears, a sum not exceeding that amount shall be recovered from the assessee by way of penalty ...

(2) The Income-tax Officer may forward to the Collector a certificate under his signature specifying the amount of arrears due from an assessee, and the Collector, on receipt of such certificate, shall proceed to recover from such assessee the amount specified therein as if it were an arrear of land revenue :

Provided that without prejudice to any other powers of the Collector in this behalf, he shall, for the purpose of recovering the said amount, have the powers which under the Code of Civil Procedure, 1908 (V of 1908), a Civil Court has for the purpose of the recovery of an amount due under a decree..."

7. Section 25 of the Partnership Act, 1932 (IV of 1932), states :

" Every partner is liable, jointly with all the other partners and also severally, for all acts of the firm done while he is a partner."

8. It was contended by Mr. Karkhanis that a notice of demand should have been issued against the appellant under Section 29 of the Act before any recovery proceeding was initiated against him. It was conceded that the unregistered partnership firm was the assessee and the appellant was not the assessee. But the argument was stressed that the appellant was "other person liable to pay such tax" within the meaning of the language of Section 29 of the Act. In our opinion, there is no warrant or justification for this argument. The phrase "other person liable to pay" in Section 29 should be construed as " other person liable to pay under the Income-tax Act" and the liability cannot therefore be construed with reference to the Partnership Act or any other statute. In the Income-tax Act itself the liability is imposed on other persons to pay the tax apart from the assessee by several sections. For example " the other person apart from the assessee" in the language of Section 29 of the Act would include: (1) a member of a divided family being liable for the assessment of the joint Hindu family (Section 25A), (2) a firm being liable for the partners' tax [second proviso to Section 26(1)], (3) the executor, administrator, or other legal representative being liable in respect of the tax payable by a deceased person (Section 24B), (4) a company in respect of the tax levied upon a shareholder [Section 23 A(3)] and (5) a person failing to deduct tax at source under Section 18 [Section 18(7)]. It is true that under the Partnership Act the liability of the partners of a firm is joint and several and it is open to a creditor of the firm to recover the debt of the firm from any one or more of the partners. But a partner of an unregistered firm does not fall within the language of Section 29 of the Act, for the liability of the partner is not imposed on account of any provision of the Income-tax Act itself. We are, therefore, of the opinion that a notice under Section 29 of the Act is not necessary to be served upon the partner of an unregistered firm before proceedings are taken for recovery of the tax under Section 46(2) of the Act. We accordingly hold that Mr. Karkhanis is unable to make good his argument on this aspect of the case.

9. Mr. Karkhanis then put forward the argument that it was not open to the Collector on receipt of a certificate under Section 46(2) of the Act to recover from the appellant the amount of tax due from the unregistered partnership. It was pointed out that the certificate only mentioned the amount of arrears of tax due from the assessee, i.e., the unregistered partnership and the Collector was empowered under that section to recover the amount specified in the certificate " from such assessee

". It was, however, conceded by Mr. Karkhanis that under Section 25 of the Partnership Act the partners are liable jointly and severally for satisfying all liabilities of the partnership firm and the appellant would have been liable for the income-tax dues of the partnership if proper proceedings, for instance a suit, had been brought in a civil court against him by the income-tax authorities. The point taken by Mr. Karkhanis is that it was not open to the Collector in a proceeding under Section 46(2) of the Act to recover from the appellant the income-tax dues from the partnership. We are unable to accede to this argument. The proviso to Section 46(2) of the Act states that the Collector shall, without prejudice to any other powers in that behalf "for the purpose of recovering the said amount, have the powers which under the Code of Civil Procedure, 1908 (V of 1908), a civil court has for the purpose of the recovery of an amount due under a decree."

10. Reference should be made in this context to Order XXI, Rule 50, of the Civil Procedure Code which states:

"50. (1) Where a decree has been passed against a firm, execution may be granted-

(a) against any property of the partnership;

(b) against any person who has appeared in his own name under Rule 6 or Rule 7 of Order XXX or who has admitted on the pleadings that he is, or who has been adjudged to be, a partner;

(c) against any person who has been individually served as a partner with a summons and has failed to appear :

Provided that nothing in this Sub-rule shall be deemed to limit or otherwise affect the provisions of Section 247 of the Indian Contract Act, 1872.

(2) Where the decree-holder claims to be entitled to cause the decree to be executed against any person other than such a person as is referred to in Sub-rule (1), Clauses (b) and (c), as being a partner in the firm, he may apply to the court which passed the decree for leave, and where the liability is not disputed, such court may grant such leave, or, where such liability is disputed, may order that the liability of such person be tried and determined in any manner in which any issue in a suit may be tried and determined..."

11. In the 'present case we see no reason 'why the Collector should not execute the certificate for demand of income-tax against the appellant who admits that he was a partner of the unregistered firm for the relevant accounting year. In the return filed by the unregistered firm on January 19, 1945, at page 33 of the paper book also the appellant is shown as one of the partners. It is manifest that the provisions of Order XXI, Rule 50(2), apply to the present case mutatis mutandis and since the appellant does not dispute that he was a partner of the unregistered firm for the relevant accounting year, the Collector could lawfully proceed to execute the certificate under Section 46(2) of the Act against the appellant and recover the income-tax arrears from him. It follows, therefore,

that the proceedings taken for recovery of the tax by the respondents against the appellant were legally valid and the appellant is not entitled to the grant of a writ under Article 226 of the Constitution.

12. The view that we have expressed is borne out by the decisions of the Calcutta High Court in *Union of India v. Satyanarayan Khan* and in *Ramgopal Khemka v. Union of India* . A contrary view has been taken by the Mysore High Court in *T. Govindaswamy v. Income-tax Officer, Special Survey Circle, Bangalore* and by the Allahabad High Court in *Moti Lal Purshottain Das v. Income-tax Officer, Dist, II(iii), Kanpur* . But, for the reasons already stated, we hold that the latter two decisions do not correctly state the law on the point.

13. We accordingly hold that this appeal fails and must be dismissed with costs.