Vimlaben Khimji and ors. Vs. H.S. Manvikar and anr.

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Court : Mumbai

Decided On : Apr-11-1963

Reported in : [1964]51ITR29(Bom)

Judge : R.M. Kantawala, J.

Acts : Income Tax Act, 1922 - Sections 46(2); Code of Civil Procedure (CPC), 1908 - Order 21, Rule 54

Appeal No. : Miscellaneous Petition No. 70 of 1962

Appellant : Vimlaben Khimji and ors.

Respondent : H.S. Manvikar and anr.

Advocate for Def. : R.J. Joshi, Adv.

Advocate for Pet/Ap. : M.P. Amin, Adv.

Judgement :

1. This is a petition for challenging the validity of a prohibitory order issued by the Additional Collector of Bombay on 22nd November, 1961, under Order 21, rule 54, of the Code of Civil Procedure against the Hindu undivided family of Shri Khimji Devji.

2. One Khimji Devji died in Bombay on 29th January, 1959. The first petitioner is the widow of the said Khimji and the second, third and the fourth petitioners are

the sons of the said petitioner. It is alleged that the said Khimji died leaving a will dated 1st February, 1958. Under this will, the first, second and the third petitioners are appointed executors and the petitioners are the sole beneficiaries thereunder. The Hindu undivided family consisting of the said Khimji and sons owned certain immovable properties. The said Khimji also derived income from businesses that were carried on in partnership in the name of Messrs. Teju Kaya and Company and other businesses in sub-partnership. From and after the assessment year 1935-36, the income derived from the immovable properties belonging to the joint family and also the income coming to the share of the said Khimji from the partnership of Messrs. Teju Kaya and Co. and other sub-partnership was assessed in the hands of the said Khimji in the status of a Hindu undivided family. The said Khimji accepted the position adopted by the income-tax department up to the year 1943-44. For the assessment years 1944-45, 1945-46, 1946-47 and 1947-48 the said Khimji was assessed in the status of a Hindu undivided family and the income from the immovable properties as well as the income from the partnership of Messrs. Teju Kaya and Co., and other sub-partnerships was taxed in the hands of the said Khimji in the status of a Hindu undivided family. By an order dated 28th March, 1949, assessment was made for the year 1944-45. On 17th May, 1949, recovery certificate was issued under section 46 (2) of the Income-tax Act for recovering the amount that was due by the assessee for the year 1944-45. In the year 1949 an attachment was levied upon the immovable properties belonging to the Hindu undivided family for the sum of Rs. 3,78,437.00 nP. On 17th December, 1949, assessment orders were passed against the assessee for the assessment years 1946-47, 1947-48, and 1948-49. Being aggrieved by the assessment orders for the years 1944-45 to 1947-48, the Hindu undivided family preferred appeals to the Appellate Assistant Commissioner and the said appeals are still pending. Pending the said appeals, the cases of the various firms of Messrs. Teju Kaya and Co. were referred to the Income-tax Investigation Commission under section 5 (1) of the Income-tax Investigation Commission Act. It appears that thereafter the Income-tax Officer made fresh assessment orders for the eight years from the year 1942-43 to 1949-50 against the Hindu undivided family of the said Khimji. It is alleged by the petitioners that on 29th December, 1959, the Fourth Income-tax Officer, E-Ward, by his order of the same day treated the original assessment orders passed by the Income-tax Officer for the assessment years 1944-45 to 1947-48 as set aside and reassessed the said Khimji in the status of the Hindu undivided family. In the said assessment, he included in the income of the said Hindu undivided family the income from the said partnership and the income from the sub-partnership and also the income from the immovable properties. As per these assessment orders for the years 1944-45 to 1947-48, a total sum of Rs. 10,20,874 was payable by the deceased in the status of the Hindu undivided family. The Hindu undivided family preferred appeals against the said assessment orders to the Appellate Assistant Commissioner. The said appeals are not so far disposed of. Thereafter, on 12th October, 1956, the Income-tax Officer issued recovery certificate for eight years from 1942-43 to 1949-50 under section 46 (2) of the Act. Thereafter, on 22nd November, 1961, the Additional Collector of Bombay issued prohibitory order against the Hindu undivided family of the said Khimji. It is stated in this order that the Hindu undivided family has failed to satisfy the demand for income-tax and penalty for the assessment years 1944-45, 1945-46, 1946-47 and 1947-48 for Rs. 11,50,252.87 nP. and that the Fourth Income-tax Officer, E-Ward, Bombay, issued to the Collector of Bombay certificate under section 46 (2) of the Act in respect of the aforesaid amount. Pursuant to this order, attachment has been denied upon the immovable properties belonging to the Hindu undivided family mentioned in this prohibitory order. It is this prohibitory order that is challenged by the petitioners in this petition.

3. Mr. Amin who appears on behalf of the petitioners has contended that, on the face of it, the prohibitory order is illegal as it states that the petitioners have failed to satisfy the demand for income-tax and penalty for the assessment years 1944-45 to 1947-48 for Rs. 11,50,252.87 nP. He contends that even if the figures given by the respondents are accepted as correct, the petitioners are not liable to pay the sum of Rs. 11,50,252.87 nP. in respect of the said four assessment years and this prohibitory order is therefore illegal and void on the face of it.

4. On behalf of the respondent in the affidavit in reply filed by the Fourth Income-tax Officer on 12th June, 1962, he has stated that the attachment was levied by the Collector on 22nd November, 1961, in pursuance of the certificate already

issued to him in 1949 and in 1956 and the attachment that was levied in November, 1961, was an additional attachment. He has further stated that on the said date when the Collector issued the said attachment order dated 22nd November, 1961, a sum of Rs. 7,74,335 was due from the Hindu undivided family of the said Khimji. It is further stated that the said Collector had included a sum of Rs. 3,74,914.14 nP. in the said prohibitory order as that amount is due from the legal heirs and representatives of the deceased Khimji. This amount of Rs. 3,74,914.14 nP. was payable individually by the said deceased Khimji and that was not the liability of the Hindu undivided family. This position has, however, been not adopted in the affidavit that has been filed on behalf of the respondents in sur-rejoinder on 27th February, 1963. It is pointed out in this affidavit that an intimation was given by the Fourth Income-tax Officer to the Collector in October or November, 1961, that on 12th October, 1950, as per the recovery certificate sent under section 46 (2) of the Income-tax Act, the demand for the assessment years 1944-45 to 1947-48 came to Rs. 8,86,889.30 nP. against the said Khimji. After the receipt of the certificate, some payments have been made by and on behalf of the said Hindu undivided family. The two payments are referred to in the supplementary affidavit. One payment is of Rs. 1,62,071 being the amount of the sale proceeds of the two properties referred to in the affidavit in rejoinder and the second payment is of Rs. 7,945.82 nP. It is further stated that after giving credit for the said two amounts, the net amount due from the said Hindu undivided family for the years 1944-45 to 1947-48 is Rs. 7,16,872.48 nP.

5. It is not necessary for the purpose of this petition to ascertain what is the actual amount due and payable by the Hindu undivided family for the assessment years 1944-45 to 1947-48. The prohibitory order dated 22nd November, 1961, is issued on the footing that for the said four assessment years a sum of Rs. 11,50,252.87 nP. was due and payable by the Hindu undivided family of the said Khimji. On the affidavits filed on behalf of the respondents, it is beyond doubt that this was not the amount due and payable by the Hindu undivided family for the said years and by this prohibitory order, steps were taken for the recovery of an amount, which was in excess of the correct liability of the Hindu undivided family for the said years and on the face of it the prohibitory order is illegal and liable to be set aside.

6. Mr. Joshi on behalf of the respondents has however contended that according to the income-tax department, there is a substantial liability at least in respect of the amount payable for the assessment years 1944-45 to 1947-48 and that liability has not so far been discharged, and so this prohibitory order should both be set aside in view of the undischarged liability. I am unable to accept this contention. The sole object of this prohibitory order was to make recovery on the footing that the Hindu undivided family was liable to pay the sum of Rs. 11,50,252.87 nP. for the said assessment years, and that was the entire basis for the issue of the prohibitory order. As this basis is entirely erroneous the prohibitory order cannot stand. He also contended that while issuing the prohibitory order, the Collector included the sum of Rs. 3,74,914.14 nP. which was the liability of the said Khimji in his individual capacity and which liability after his death had to be discharged by the legal heirs and representatives of the said Khimji. The prohibitory order is not issued against any of the petitioners in their capacity as legal heirs and representatives of the said Khimji. It is issued against the Hindu undivided family of the said Khimji in respect of the Hindu undivided family's liability for the said four years. On the face of it, there is nothing to indicate that it was sought to be issued against the legal representatives of the said Khimji in respect of the individual assessment against him and the prohibitory order therefore cannot be justified on this ground.

7. As I am holding that on the face of it the prohibitory order is bad and liable to be set aside as the amount sought to be recovered by the said prohibitory order is in excess of the liability of the Hindu undivided family in respect of the four assessment years, I have not heard Mr. Amin on behalf of the petitioners as regards the other contentions raised in the petition.

8. The result is that the prohibitory order dated 22nd November, 1961, is set aside and the rule is made absolute to that extent. The respondents to pay the cost of this petition.

9. Mr. Joshi on behalf of the respondent states that the respondents are not enforcing the notice dated 12th February, 1962, for appointment of a receiver as they have issued a fresh notice on 7th March, 1962, for the appointment of a

receiver. The respondent will not take any action pursuant to the notice dated 12th February, 1962.