

A.C. Patel and anr. Vs. N.N. Majmudar, Income-tax Officer, Ward-b (Assistant) and ors.

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Court : Gujarat

Decided On : Feb-21-1978

Reported in : [1978]114ITR1(Guj)

Judge : B.J. Diwan, C.J. and; P.D. Desai, J.

Acts : [Income Tax Act, 1922](#) - Sections 16(2)

Appeal No. : Special Civil Application Nos. 1390 and 1391 of 1976

Appellant : A.C. Patel and anr.

Respondent : N.N. Majmudar, Income-tax Officer, Ward-b (Assistant) and ors.

Advocate for Def. : N.U. Raval, Adv.

Advocate for Pet/Ap. : Dilip H. Dwarkadas, Adv.

Judgement :

Divan, C.J.

1. The first petitioner in each of these two special civil applications is a different individual but the second petitioner in both these matters is the same firm, namely, Messrs. Modern Trading Company. The first petitioner in each of these two special civil applications was partner of the second petitioner-firm and the two partners

were the only partners in this firm. The two partners had equal shares. The firm and the two partners were being assessed to income-tax under the Indian Income-tax Act, 1922, till 1961, and thereafter, under the Income-tax Act 1961. The first respondent is the Income-tax Officer having jurisdiction to assess the said firm and the second respondent is the Tax Recovery Officer having jurisdiction over the area. The third respondent is the Commissioner of Income-tax having jurisdiction over the petitioners in these cases. He has also jurisdiction over the recovery proceedings as against the petitioners.

2. The second petitioner-firm (hereinafter referred to as 'the partnership-firm') had income from various sources, namely, business, immovable property, dividends interest on securities, etc. The partnership firm had purchased 44,000 shares of Rs. 10 each of Renwick & Company Private Ltd. 17,000 out of these 44,000 shares stood in the name of the first petitioner in Special Civil Application No. 1390 of 1976 and the remaining 27,000 shares in the name of the first petitioner in Special Civil Application No 1391 of 1976. The total price paid for these 44,000 shares was Rs. 14 lakhs. The dividend from the said shares was taxed in the hands of the partnership firm was allocated to the partners, the dividend income from these 44,000 shares would be reflected in the income of the two partners.

3. On December 22, 1956, the company declared dividend which should have been received by the partnership firm in its year of account, samvat year 2013, which was the previous year for assessment year 1958-59 and an amount of Rs. 88,000 should have come to the partnership firm in respect of its shareholding. Similarly, for samvat year 2014, the relevant date of declaration of dividend was December 30, 1957, and an amount of Rs. 73,040 was the dividend amount receivable by the partnership firm. For Samvat year 2015, the date of declaration of dividend was December 23, 1958, and the amount of dividend receivable by the Partnership firm was Rs. 73,040. When the company declared the dividend, a resolution was passed that the dividend out of the profit for the year ended 31st March, 1957, for example, be declared at 16-2/3 per cent. On the paid up capital of the company and the same be paid when the amount of profit is transferred from Pakistan to India. In each of the three years with which we are concerned, namely, previous years relevant to the assessment years 1958-59, 1959-60 and

1960-61, the dividend was declared by the company, Renwick & Company Private Ltd. at Calcutta, with this condition that, though the dividend was declared, it was going to be paid when the amount of profit was transferred from Pakistan to India. Though the registered office of the company was at Calcutta, the factory owned by the company and the main business of the company was situated at Kushtia which formed part of the then East Pakistan.

4. The income-tax Officer concerned, while making the assessment of the partnership and consequently of the partners for the assessment years under consideration before us, included the amount of dividend on the said 44,000 shares of Renwick & Company Private Ltd. in the income of the firm. The tax payable on the said dividend income was also computed and a notice of demand was issued in respect thereof. However, since the said dividend was not received by the partnership firm or the partners, the Income-tax Officer was requested to keep the same in abeyance till the dividend was received. The Income-tax Officer agreed with the contention and kept the recovery of tax in abeyance. It is the case of the petitioners that the dividend was not received either by the partnership firm or by the partners because the remittance from Pakistan to India was not permitted. After waiting for some time, the Income-tax Officer started pressing for the payment of tax on the said dividend income. The partners approached the department to rectify the the assessment orders and to delete the said dividend income which was erroneously taxed since the amount of dividend was neither received nor was likely to be received. This application for rectification was rejected. In *Ramesh R. Saraiya v. Commissioner of Income-tax* : [1965]55ITR699(SC) decided by the Supreme Court on September 22, 1964, the contention of the department on similar facts was rejected and it was held that the dividend which was declared subject to remittance was not taxable in the hands of the shareholders. The partners of the firm and the partnership firm itself applied to the Commissioner of Income-tax in revision under section 264 of the Income-tax Act, 1961 to delete the addition of dividend income from the dividends paid on the shares of Renwick & Company Private Ltd. These application for revision were rejected on the ground that they were time barred and it is the contention of the petitioners that the ground of rejection of the revision applications was erroneous and the decision of the Commissioner was erroneous.

5. It is further the case of the petitioner that by a circular bearing No. 25 dated July 25, 1969 the Central Board of Direct Taxes, inter alia, stated that the tax on the dividend income which would not be remitted to India should not be recovered at all from the assesseees. The petitioners relied upon the said notification and again approached the Income-tax Officer not to insist on the payment of the tax on the said dividend income.

6. It is the case of the petitioners that in 1962, the partnership firm sold the shares of Renwick & Company Private Ltd. but the partnership firm continued to show the amount of dividend as recoverable from Renwick and Company Private Ltd. so far as the years prior to the date of sale were concerned. It is further the case of the petitioners that the department purported to recover this outstanding tax including the taxes for assessment years 1958-59, 1959-60 and 1960-61 from the partners by the adjustments of refunds due to the partnership firm and or partners in respect of their income other than income from Renwick & Company Private Ltd. and the adjustment of refunds was shown in the statement given to the partnership firm and the partners from time to time by the income-tax department. It is further the case of the petitioners that in December, 1971, after the liberation of Bangla Desh (former territory of East Pakistan), the petitioners and the other shareholders made inquiries about the Renwick & Company Private Ltd. and learnt that, due to conflict, the factory of the company was extensively damaged and destroyed and the persons who had purchased the shares were traceable. There was no news about the affairs of Renwick & Company Private Ltd. and the petitioners neither recovered the said dividend amount from the company nor did the company remit the amount from Bangla Desh to India to pay to the said firm. Under these circumstances which prevailed after December, 1971, the petitioner again requested the Income-tax Officer not to take recovery proceedings in respect of the said dividend erroneously taxed in the hands of the partnership firm and or the partners. The Income-tax Officer did not accede to the request of the petitioners and purported to set off the refunds due to the petitions against the liability of the petitioners in respect of the income from the dividends for the years under consideration. It was the contention of petitioner that in view of the provisions of section 220(7) of the Income-tax Act, 1961, the tax on the dividend income should not be recovered and the relevant facts bearing on this request were pointed out.

The petitioners requested the Commissioner of Income-tax, third respondent herein, to intervene in the matter and direct the recovery officer not to take recovery proceedings in respect of the dividend amount declared by Renwick & Co. Pvt. Ltd. and by a letter dated February 12, 1976, the first petitioner in Special Civil Application No. 1390 of 1976 was informed by the third respondent that the partners request for stay of demand and refund of adjustable taxes could not be acceded to because the non-receipt of dividends did not arise out of laws in Bangla Desh prohibiting or restricting remittances and it appeared that the outstanding dividends might have been recovered in getting the price in 1962 when the shares were sold. By a letter dated February 19, 1976, the first petitioner in Special Civil Application No. 1390 of 1976 requested for a personal hearing from the Commissioner, the third respondent herein, since the application of the first petitioner was rejected without a personal hearing. A personal hearing was given on 13/17th April, 1976, and by the letter dated April 20, 1976, the partners were informed that the stay applied for had not been granted and thereafter these two special civil applications have been preferred by the two partners and by the partnership firm, the common petitioner in both these proceedings. The petitioners have the prayed that a writ of certiorari or a writ in the nature of certiorari or other appropriate writ, direction of order under article 226 of the Constitution may be issued relating to the recovery proceedings for assessment years 1958-1959 to 1960-61 and have prayed that the order dated February 12, 1976, exhibit I to the petition, should be quashed and set aside and the proceedings pursuant thereto or the assessment orders for assessment year 1958-59 to 1960-61, to the extent that they purport to include the dividend income from Renwick & Company Private Ltd., should be quashed and set aside. They have also prayed for other consequential and incidental reliefs.

7. The principal question that we have to consider is, whether the Income-tax Officer had jurisdiction to include in the income of the partnership firm and consequently in the income of the two partners the dividend declared by Renwick & Company Private Ltd. for the 44,000 shares held by the partnership firm. It must be pointed out that in connection with the assessment years 1958-59 to 1960-61, the Act applicable was the Indian Income-tax Act, 1922. At the relevant time till April 1, 1960 the material part of section 16(2) of the Indian Income-tax Act, 1922

read :

'For the purposes of inclusion in the total income of an assessee any dividend shall be deemed to be income of the previous years in which it is paid, credited or distributed or deemed to have been paid, credited or distributed to him...'

section 16(2) was deleted by section 7 of the Finance Act, 1959, with effect from April 1, 1960. However, in relation to dividends declared or payable by a company on or before June 30, 1960, in respect of any previous year relevant to any assessment year prior to the assessment year 1960-61, the Income-tax Act was to have effect as if the sub-section had not been omitted; and in relation to dividends declared or payable by a company in respect of the previous year relevant to the assessment year 1960-61, the omission was to have effect on and from the 1st April, 1959. We have pointed out above that the dividend was declared even for the previous year relevant to the assessment year 1960-61, on December 23, 1958, and therefore, the provision of section 16(2) as it stood prior to its omission with effect from April 1, 1960 would govern the present case.

8. In *J. Dalmia v. Commissioner of Income-tax* : [1964]53ITR83(SC) the Supreme Court was concerned with the provisions of section 16(2) as it stood before its deletion and at page 89, Shah J., as he then was, speaking for the Supreme Court, observed :

'But whether dividend - interim or final - is income taxable in a particular year of assessment must be determined in the light of section 16(2) of the Indian Income-tax Act. The legislature had not made dividend income taxable in the year in which it becomes due : by express words of the statute, it is taxable only in which it is paid, credited or distributed or is deemed to be paid, credited or distributed. The legislature has made distinct provisions relating to the year in which different heads of income became taxable.... Chagla C.J. has himself in *Purshotamdas Thakurdas v. Commissioner of Income-tax* [1958] 34 ITR 204 expressed a different view. The learned Chief Justice, in delivering the judgment of the court, referred to *Laxmidas Mulraj Khatau's case* [1948] 16 ITR 248 and observed that the principle of that case applied only to those cases where in fact the dividend was paid to the shareholder and not to cases where a contingent liability was

undertaken and no payment was made. He observed :

'One thing is clear from the language used by the legislature that it did not intend to equate 'paid' with 'declared' in every case. Therefore, it is open to us to consider, notwithstanding the Khatau Mills' case [1948] 16 ITR 248 whether, on the facts of this case, it could be said that dividend has been paid, which although it may have been declared may never be payable and in fact has not been paid.'

If the mere declaration of dividend in general meeting of the company is not to be regarded as payment within the meaning of section 16(2), much less can it be said that a resolution declaring interim dividend - which is capable of being rescinded by directors - operates as payment before the company has actually parted with the amount of dividend or discharged its obligation by some other act.'

9. This interpretation of 16(2) in the context of payment was extended to the crediting of dividends to the account of the shareholders by the Supreme Court in Ramesh R. Saraiya v Commissioner of Income-tax : [1965]55ITR699(SC) . At page 706, after quoting from the decision of Shah J. in J. Dalmia v. Commissioner of Income-tax : [1964]53ITR83(SC) ,Sikri J., as he then was, speaking for the Supreme Court, observed :

'This condition must also be fulfilled in case a dividend is credited. In other words, the credit must be in such form that the dividend is unconditionally available to the member.'

10. The facts of the case in Ramesh R. Saraiya : [1965]55ITR699(SC) are very much similar to the facts of the present case. The late Shri Purshottamdass Thakurdass was a shareholder in Narandas Rajaram Ltd. On October 14, 1952, the following resolution was adopted at the ordinary general meeting of Narandas Rajaram & Co. Ltd. :

'Dividends, as mentioned below, be and are hereby declared out of the profits of the company :

(a) A dividend of 4 per cent. on 'A' preference shares and 4 per cent. on 'B' preference shares.

(b) a dividend of 32 percent. free of income-tax on the ordinary shares and a consequential additional dividend at the rate of 13 per cent. free of income-tax on 'B' preference shares.

(c) A moiety of the amount of the dividend be paid to the shareholders on or after 16th October, 1952, whose names appear on the register of the company as on 6th October, 1952, and the other moiety be postponed for payment within two months from the date on which remittances from Pakistan become free and the moneys are actually received.'

11. It was pointed out by the Supreme Court in Ramesh R. Saraiya's case : [1965]55ITR699(SC) that Narandas Rajaram Ltd. carried on business both in India and Pakistan and profits accrued to it both in India and Pakistan. The Company declared dividend out of the above profits and the company in clause (c) in its resolution dated October 14, 1952, provided that one-half of the dividends payable to the shareholders should be postponed for payment within two months from the date on which remittances from Pakistan became free and the moneys were actually received. In connection with this dividend from Narandas Rajaram & Co. Ltd., the question which was referred to the High Court was :

'Whether the other moiety of the dividend of Rs. 1,71,992 declared by the company on October 14, 1952, is properly includible in the total income of the assessee of the previous year S.Y. 2008 for the assessment year 1953-54 ?'

12. On these facts, ultimately, the Supreme Court held at page 706 of the report :

'It will be noticed that the dividend due to the assessee has not been credited to any separate account of the assessee, so that he could, if he wished, draw it. Before the High Court it was never suggested that the dividend was credited or distributed. Accordingly we hold that the Pakistan portion of the dividend has not been credited or paid within the meaning of section 16(2) of the Income-tax Act. The answer to the question is, therefore, in the negative.'

13. Therefore, the Supreme court held that the moiety of the dividend was not properly includible in the total income of the assessee for Samvat Year 2008. In

view of this decision in Ramesh R. Saraiya's case : [1965]55ITR699(SC) and in the light of the provisions of section 16(2) as interpreted in the two decisions of the Supreme Court in J. Dalmia's case : [1964]53ITR83(SC) and Ramesh R. Saraiya's case : [1965]55ITR699(SC) , it is clear that, so far as section 16(2) of the Indian Income-tax Act, 1922, was concerned, only dividend which was paid, distributed or credited or deemed to have been paid, distributed or credited could be includible in the income of the assessee and could be brought to tax. It is nobody's case before us that, in the instant case, the dividend from Renwick & company Pvt. Ltd. was ever paid to the partnership before us or to its two partners. It was never distributed either, because the money, according to the petitioners and which fact is not challenged by the other side, was not distributed. As regards the credit it is not shown before us that there was credit in such form that the dividend was unconditionally available either to the partnership firm or to its two partners. Nor is it shown to that by virtue of any statutory provision the dividend must be deemed to have been paid, distributed or credited to them. Under these circumstances, in the light of the decision in Ramesh R. Saraiya's case : [1965]55ITR699(SC) , it is clear that the dividend from Renwick & Company Private Ltd., which was neither paid nor distributed nor credited in the sense explained by the Supreme Court nor deemed to have been paid, credited or distributed, could not be includible in the light of the provisions of section 16(2) in the income of the previous year relevant to the assessment year 1958-59 to 1960-61. The result was that, under section 3 of the Indian Income-tax Act 1922, which was the charging section, no charge was created in respect of the dividend income of getting created (sic) section 3 as it stood at the relevant time provided :

'Where any Central Act enacts that income-tax shall 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 an subject to the provisions of, this Act in respect of the total income of the previous year of every individual Hindu undivided family, company and local authority, and of every firm and other association of persons or the partners of the firm or the members of the association individually.'

14. Therefore, if on a true interpretation of section 16(2) of the Act of 1922 the amount was not, or was not to be deemed to be, the income of the previous year

in which it was either paid or distributed or credited, it must follow that no charge was created in respect of this income-tax and, therefore, it was not within the jurisdiction of the Income-tax Officer concerned to include this amount of dividend in the income of the relevant assessment years and to seek to bring it to tax for the relevant assessment years. Thus, the action of the Income-tax Officer in seeking to levy income-tax on this dividend income was wholly and completely without jurisdiction.

15. In *Bhopal Sugar Industries v sales Tax Officer* : [1964]1SCR481 , it was held that the High Court did not exercise the writ jurisdiction under article 226 by entertaining petitions against the order of taxing authorities, when the statute under which tax is sought to be levied provides a remedy by way of an appeal or other proceeding to a party aggrieved, and thereby bypass the statutory machinery. That was not to say that the High Court would never entertain a petition against the order of the taxing officer. The High Court had undoubtedly jurisdiction to decide whether a statute under which a tax was sought to be levied was within the legislative competence of the legislature enacting it or whether the statute defined constitutional restrictions or infringed any fundamental rights, or whether the taxing authority had arrogated to himself power which he did not possess, or has committed a serious error of procedure which affected the validity of his conclusion or even where the taxing authority threatened to recover tax on an interpretation of the statute which was erroneous. Apart from the question whether the matter could have been taken in appeal or not, since the Commissioner has rejected the plea of the petitioner and against the decision of the Commissioner there is no further appeal or remedy, it is obvious that this High Court has jurisdiction to give the relief to the petitioner in a case where the Income-tax Officer has arrogated to himself power which he does not possess in view of section 3 of the Indian Income-tax Act, 1922, read with section 16(2) of that Act.

16. It was sought to be urged that there was delay on the part of petitioners in approaching the court. This question of the delay has been considered by a Division Bench of this High Court in *Ramanlal Keshavlal Soni v. State of Gujarat* AIR 1977 Guj 76 of the report in paragraph 39, it has been pointed out :

'In R. S. Deodhar v. State of Maharashtra : (1974)ILLJ221SC , the question as to what were the relevant considerations in determining whether delay or laches could defeat a petition under article 32 fell for consideration of the Supreme Court. It was there pointed out that the relevant considerations which should be borne in mind were, (1) that the rule which says that a court may not inquire into belated or stale claims is not a rule of law but a rule of practice based on sound and proper exercise of discretion, and there is no inviolable rule that whenever there is delay the court must necessarily refuse to entertain the petition and each case must depend on its own facts; (2) that when the challenge based on violation of the equal opportunity clause is not directed against a thing of the past, but is a vital issue still affecting the petitioners, it is but desirable that the challenge should be examined and adjudged when the matter has come before the court at the instance of the parties properly aggrieved; (3) that the principle on which the court proceeds in refusing relief to the petitioner on the ground of laches or delay is that the rights which have accrued to others by reason of the delay in filing the petition should not be allowed to be disturbed unless there is reasonable explanation for the delay, for, the action of courts cannot harm innocent parties if their rights emerge by reason of delay on the part of the person moving the court; and (4) that the claim for enforcement of the fundamental right of equal opportunity is itself a fundamental right and that, in such a case, the court cannot easily allow itself to be persuaded to refuse relief solely on the jejune ground of laches, delay or the like.'

17. These principles enunciated by the Supreme Court in the context of article 32 would apply in the case of the High Court exercising jurisdiction under article 226 and the context of the facts and circumstances of each case have to be examined by the High Court.

18. In the present case, on the contention of the petitioner, which, as pointed out above, we are prepared to accept, the order of the Income-tax Officer levying tax in respect of this income from Renwick & Company Private Ltd. was null and void as it was totally without jurisdiction and, moreover, in the instant case, rights of third parties are not going to be affected by our granting relief to the petitioners at this time and the proper exercise of discretion would require us to hold that this action of recovering tax which was sought to be levied was wholly without

jurisdiction should be stopped at the time when it was sought to be recovered from the parties concerned.

19. There is one further consideration which we must point out. In *Ahmedabad Cotton Mfg. Co. v. Union of India*, AIR 1977 Guj 113 a Bench of five judges of this court has approved the earlier decision of the Bombay High Court in *Abdullamiyan Abdulrehman v. Government of Bombay* AIR 1942 Bom 239; 44 Bom LR 577, which itself was a Full Bench decision. In that case, Beaumont C.J., speaking for the Full Bench, adopted the same approach on a similar question of bar under section 11 of the Bombay Revenue Jurisdiction Act, 1876, which barred the entertainment of a civil suit unless the plaintiff proved that he had presented all such appeals allowed by the law for the time being in force as, within the period of limitation allowed for bringing such suit, it was possible to present. The Full Bench of the Bombay High Court held that it was an established principle that where an authority which purports to pass an order is acting without jurisdiction, the purported order is a mere nullity, as Sir Lawrence Jenkins puts it, it is mere 'waste paper' and it is not necessary for anybody, who objects to that order, to apply to set it aside. He can rely on its invalidity when it is against him, although he has not taken steps to set it aside. Such an order without jurisdiction is a nullity and it cannot give rise to any right whatever, not even to a right of appeal. Such an invalid purported order does not, therefore, create a bar under section 11 of the Bombay Revenue Jurisdiction Act.

20. Same reasoning would also apply to the facts of the case before us. The order of the Income-tax Officer in respect of this dividend income from Renwick and Company Private Ltd. was wholly without jurisdiction as that income could not be brought to charge and so long as it did not hurt the partners or the partnership firm, they were not bound to seek relief from any court. When ultimately, in spite of repeated requests, the Commissioner of Income-tax turned down their application for relieving them against the order of the Income-tax Officer and when their application for stay of the recovery proceedings against them was turned down and adjustment of this tax against the refunds due and payable to the partners was being made, it was open to the petitioners to approach this court for relief. Hence there is no question of any want of jurisdiction under article 226 nor is there

any question of delay or laches.

21. Mr. Raval, on behalf of the respondents in these two special civil applications, had urged that because of delay or laches the petitioners should not be granted any relief and, in the alternative, he had contended that because of the alternative remedy available to the petitioner under the provisions of the scheme of the Indian Income-tax Act, 1922, or the Income-tax Act, 1961, no relief should be given to the petitioners under the article 226. In the light of what we have stated above, neither on the ground of delay and laches nor on the ground of powers of the High Court under article 226, can relief sought for by the petitioners in these two special civil application be denied to them. The further contention on behalf of the respondents was that the Income-tax Officer had jurisdiction to pass the order and that even though it may an erroneous order in the exercise of that jurisdiction, the order would not be a nullity. This argument is untenable because once the order is found to be totally and completely without jurisdiction, there is no question of any order being passed in the exercise of jurisdiction. The Income-tax Officer had no power to pass the order under section 3 of the Act of 1922, read with section 16(2) of the Act. Under these circumstances, this contention urged on behalf of the respondents has been rejected by us.

22. Under these circumstances, we allow both these special civil applications and quash and set aside the demand notices issued by the Income-tax Officer in so far as the said demand notices relate to the dividend income received by the partnership firm from Renwick & Company Pvt. Ltd., and reflected in the allocation of profits of the partnership firm to the two partners. All recovery proceedings in respect of this income and the adjustment of the tax sought to be recovered in respect of this dividend income are also quashed and set aside. The rule is made absolute accordingly in both these special civil applications. The respondents will pay to the petitioners the costs in each of these two matters.