

E. Alfred Vs. First Additional Income-tax Officer, Salem.

E. Alfred Vs. First Additional Income-tax Officer, Salem.

SooperKanoon Citation : sooperkanoon.com/820356

Court : Chennai

Decided On : Apr-29-1957

Reported in : [1957]32ITR401(Mad)

Appeal No. : Writ Petition No. 437 of 1954

Appellant : E. Alfred

Respondent : First Additional Income-tax Officer, Salem.

Judgement :

RAJAGOPALAN, J. - Ebenezer, the father of the petitioner Alfred, was an income-tax assessee. Ebenezer had income from the money-lending and abkari businesses that he carried on in addition to income from immoveable properties. He adopted the official financial year ending with 31st March, as his year of account. The assessment of his income for the assessment year 1944-45 was completed during his lifetime.

Ebenezer died intestate on 22nd November, 1945. His heirs and legal representatives were his son and eight daughters, four of whom were minors. Six of the daughters filed O.S. No. 121 of 1948 on the file of the Sub-Court, Salem, for the administration of the estate of the deceased Ebenezer, and for partition of the properties between his nine co-heirs. On 27th October, 1949, the Sub-Court appointed Mr. Lakshman, an advocate, as the receiver of the properties of Ebenezer. The receiver appears to have taken charge of most of the immoveable

properties and to have realised the income therefrom till he was discharged on 15th January, 1953. He filed his accounts into Court on 4th November, 1950, 4th June, 1951, and 2nd February, 1952, and 4th November, 1952. On 29th September, 1950, there was a preliminary decree for partition. Three of the minor daughters had been represented in the litigation by one Chelladorai as their guardian ad-litem. On 25th March, 1953, one T.S. Tatachari was appointed the guardian of their properties under the Guardians and Wards Act. On 30th September, 1953, a Commissioner was ordered to be appointed to divide the properties in accordance with the directions given in the preliminary decree.

As we noted above, the assessment for the assessment year 1944-45, for the corresponding year of account ending with 31st March, 1944, was completed during the lifetime of Ebenezer. The assessment for the year 1945-46 was made after the death of Ebenezer but on the return filed by Ebenezer during his lifetime. For the assessment year 1946-47 the return was filed by the petitioner Alfred. In the course of these assessment proceedings, he filed an inventory of all the properties left by the deceased Ebenezer. The Income-tax Officer did not accept that return as correct and he ordered the addition of a sum of Rs. 1,30,000, which in his view represented the Income that had been concealed. Alfred appealed, and eventually on 14th November, 1953, the Tribunal reduced the amount to Rs. 45,000, which alone in its opinion could be viewed as income that had accrued to Ebenezer in the relevant year of account ending with 31st March, 1946.

During the pendency of these proceedings before the Appellate Tribunal, the Income-tax Officer issued notices to the petitioner under section 34 of the Income-tax Act to reopen the assessments for the years 1944-45 and 1945-46. Those notices were served on the petitioner, Alfred, on 30th June, 1953. That that was the correct date of service was accepted by the petitioner in his supplemental affidavit though earlier he had pleaded that it was on 6th March, 1953, that the notices had been served.

Sometime after the disposal of the appeal on 14th November, 1953, in relation to the assessment for 1946-47, the Income-tax Officer called upon the petitioner to produce the accounts on 26th March, 1954. The Income-tax Officer overruled the

contention of the petitioner reiterated at that stage that he was not the only legal representative of the deceased Ebenezer and the further plea that the proceedings under section 34 were barred by limitation, and the Income-tax Officer completed the assessment for 1944-45 under section 34 by his order dated 26th March, 1954. At one stage there was a fair amount of controversy on the question whether the assessment order was passed on 31st March, 1954, as contended by the petitioner, or on 26th March, 1954, which was the plea of the Department. We were satisfied from the records that the contention of the Department was correct, and that the order of assessment was passed on 26th March, 1954. A sum of Rs. 55,000 was added to the income that had been returned by Ebenezer for 1944-45. We are not concerned in these proceedings with the assessment under section 34 for 1945-46.

It was admitted that Alfred appealed to the Appellate Assistant Commissioner against the order of the Income-tax Officer directing the addition of Rs. 55,000 to the assessable income of Ebenezer for the year of account ending with 31st March, 1944. Paragraph 5 of the memorandum of appeal ra :

'The assessment is illegal and wholly arbitrary since it is not made on all the legal representatives of the deceased.'

Independent of the appeal, the petitioner applied under article 226 of the Constitution for the issue of a writ of certiorari to set aside the revised assessment ordered by the Income-tax Officer under section 34 of the Act.

After the petition had been heard in part we found it necessary to send for the relevant papers in the administration suit O.S. No. 121 of 1948 to verify among others whether the position taken up by the Department, that the petitioner Alfred was all along in possession of the assets of Ebenezer was correct. Subsequent to that the petitioner was allowed to file a further affidavit which he did on 29th November, 1956. The Department filed a further counter affidavit on 12th December, 1956.

One of the grounds on which the validity of the assessment under section 34 for the assessment year 1944-45 was attacked was that it was barred by limitation. As

we said, at the initial stage the petitioner asserted that the order of assessment was passed on 31st March, 1953. That contention is no longer tenable. A further contention was that it was the four year period of section 34(1)(a) that applied and not the provisions of section 34(1)(b). The learned counsel urged that the legal representative of the assessee was not himself the assessee within the meaning of section 34(1)(b) of the Act, and he relied on Alfred v. Additional Income-tax Officer. This is one of the questions that will arise for determination in the appeal that the petitioner has preferred and we prefer not to discuss or decide that question in these proceedings.

We shall, however, indicate our views on the plea of the learned counsel for the petitioner that the exercise of the jurisdiction the Income-tax Officer had under section 34 of the Act was vitiated in the circumstances of this case by his insistence, that the petitioner Alfred was the legal representative of the deceased Ebenezer, while the petitioner was only one of the nine co-heirs and legal representatives of the deceased, though this is also a point that arises for determination in the appeal that Alfred has preferred against the assessment. We have already extracted ground No. 5 from the memorandum of appeal preferred by Alfred.

As the assessee Ebenezer was dead before the issue of the notice under section 34, it was under the provisions of section 24B(2) of the Act that the assessment could be completed. It cannot be doubted that the liability imposed by section 24B(2) on the legal representative of a deceased attaches itself to all the legal representatives of the deceased on whom notices are served. It should also be clear that all such legal representatives are liable to be served with notices under section 24B(2). Section 13(2) of the General Clauses Act (10 of 1897), directs that words in singular shall include the plural. The question before us, however, is whether where there is plurality of legal representatives and that fact is known to the Income-tax Officer, does section 24B(2) enable him to choose one of those legal representatives for completing the assessment of a deceased assessee. Another aspect of that question is, whether the legal representative so selected for service of notice whose objection that the other legal representatives also should be brought on record before the assessment is completed is overruled or ignored

by the Income-tax Officer, can subsequently assail the validity of the assessment. No reported case has been brought to our notice in which either of these questions was discussed or decided. That was why we decided in favour of examining these questions in these proceedings initiated under article 226 of the Constitution.

We can see no reason why the principle of representation explained in *Chaturbujadoss Kushaldoss and Sons. v. Rajamanicka Mudali* and approved of by Varadachariar, J., as a member of a Full Bench in *Kanchamalai Pathar v. Shahaji Rajah Sahib* should not apply to proceedings under section 24B(2) of the Income-tax Act. If for example

(1) the Income-tax Officer bona fide believed and acted on that belief that Alfred was the only legal representative of Ebenezer,

(2) Alfred did not bring to the notice of the Income-tax Officer that there were other legal representatives who should be brought on record and assessment completed in their presence as well,

(3) Alfred represented the estate of the deceased Ebenezer in the assessment proceedings, and

(4) there was no fraud or collusion, it could well be that the entire body of legal representatives including Alfred would be bound by the adjudication, that is, the assessment made by the Income-tax Officer. The first three factors were certainly absent in this case. Alfred declined to represent the estate in the assessment proceedings under section 34 of the Act. He specifically required the Income-tax Officer to issue notice to the other legal representatives whom he did not represent and whom he could not represent after the institution of O. S. No. 121 of 1948. On 26th March, 1953, and long before it, even in May, 1951, Alfred brought to the notice of the Income-tax Officer the existence of the other legal representatives and the pendency of O. S. No. 121 of 1948 was pending in the Sub-Court. Copies of the letters that passed between the Income-tax Officer and some of the daughters of Ebenezer in 1951 and 1952 in relation to the assessment for the assessment year 1946-47 were placed before us, principally to prove that the Income-tax Officer acted in good faith in treating Alfred alone as the legal

representative of Ebenezer for the assessment under section 34 for the assessment year 1944-45. That the Income-tax Officer knew that there were other legal representatives of Ebenezer was thus never in doubt.

In our opinion it should be difficult to sustain the plea that the Income-tax Officer acted in good faith though that is far from saying that he acted mala fide. Good faith necessitates due enquiry. In the supplemental counter affidavit that was filed by the Department in December, 1956, considerable reliance was placed on the plea that the Income-tax Officer bona fide believed that Alfred was in possession of the entire estate of the deceased Ebenezer and that Alfred was entitled to represent the estate of the deceased. In the correspondence that passed between the Income-tax Officer and some of the daughters of Ebenezer in 1951-52, to which we have already referred, they contended that none of them was in possession of any portion of the estate, and that on the other hand Alfred was in possession. Alfred all along disclaimed exclusive possession of the assets of Ebenezer. With such conflicting claims, it was the duty of the Income-tax Officer to make further enquiries to verify if Alfred was really in possession of the entire assets of the deceased Ebenezer. As we pointed out, the Income-tax Officer was certainly aware of the pendency of O. S. No. 121 of 1948. An enquiry would have revealed that Alfred was not in possession of the entire estate. There was a receiver appointed by the Court and he was in possession of many of the items of immovable properties, and he was realising the income therefrom. We do not want to be understood as laying down that possession of the entire assets would have sufficed to establish that Alfred could, in the opinion of the Income-tax Officer, represent the estate of the deceased. All we desire to point out is that even the plea of the Income-tax Officer, that he bona fide believed that Alfred was in such possession, could not be sustained. There was no indication even in the supplemental counter affidavit that the Income-tax Officer made any independent enquiries with reference, for example, to the records of the Court in O. S. No. 121 of 1948. That would have revealed to him among other things that the receiver was in charge for sometime, and for the properties of three of the minor heirs of Ebenezer a separate guardian had been appointed under the Guardians and Wards Act. Even if the exclusive possession of the assets of the deceased Ebenezer could justify the plea that the assessee could represent the estate of the

deceased - and we express no opinion on that contention -there was really no basis for holding that Alfred was in such exclusive possession.

The learned counsel for the Department urged that when one of the legal representatives of the deceased Ebenezer was known to be in possession of the entire assets of the deceased and when the other legal representatives of Ebenezer regarded Alfred as the only person bound to answer the questions of the Income-tax Officer and also bound to pay the assessed tax Officer on that basis, it was not open to Alfred to object to the validity of the assessment. The basis even for this argument should be that Alfred was known to be in possession of the entire assets of the deceased Ebenezer. It was not enough to show that the other legal representatives of Ebenezer disclaimed possession of any of the assets. As we pointed out, there was enough material placed before the Income-tax Officer to necessitate an enquiry, whether in fact Alfred was in possession of all the assets of the late Ebenezer. That enquiry the Income-tax Officer did not undertake. He could not, in our opinion, be heard to plead that in good faith he believed that Alfred was in possession of all the assets and was bound to represent the estate of Ebenezer.

Further support for the plea of good faith was sought on the basis, that the other legal representatives of Ebenezer agreed that Alfred should represent the estate of Ebenezer in the assessment proceedings. That they disclaimed liability is not proof by itself that they agreed that Alfred should represent them. Besides Alfred did not agree to represent them or to represent the estate of Ebenezer.

Whether any of the daughter of Ebenezer had by her conduct disabled herself from attacking the validity of the assessment for 1944-45 under section 34 does not arise for consideration now. The question is, can Alfred impeach the validity of that assessment completed without notice to the other legal representatives of Ebenezer. Nothing that Alfred did estopped him from challenging the validity of the assessment. The learned counsel for the Department relied on the observations of Varadachariar, J., in Venkatanarasimha Raju v. Sidha Chetty, where with reference to the provisions of the Estates Land Act the learned Judge observe :

'The result is that if the landlord finding a person in possession bona fide believed that person to be legally in possession as heir and that person further happens to be entitled to an undivided share in the holding it will be scarcely fair to permit other persons entitled to the remaining undivided shares to treat the proceedings taken against the registered holder as a nullity so far as they are concerned, when with the knowledge of the landlords conduct they have chosen to stand by.'

But then the facts and questions at issue in the case before us are in no way identical. As we pointed out the question is not whether any of the petitioners co-heirs could attack the validity of the assessment. The question is, can the petitioner in whose presence the assessment was completed challenge the validity of the assessment. We have also pointed out that there was no basis for the plea that the Income-tax Officer in good faith believed that Alfred was in possession of the entire assets of the deceased Ebenezer.

The plea of good faith fails. In fact Alfred did not represent the estate of the deceased Ebenezer. He declined to do it, and he was entitled to decline. What then should the Income-tax Officer have done That question we answer in the words of Mahajan, J., as he then was, in *Tirtha Lal Dey v. Srimathi Bhusan Moyee Dasi and Other* :

'Ordinarily if there are two or more legal representatives of a deceased person, all must be impleaded to make the representation of the estate complete, otherwise the suit or appeal abates. The expression legal representative must when there are two or more legal representatives be read in the plural. All legal representatives must be brought on the record and if someone refuses to join as plaintiff, he should be joined as a defendant. As pointed out by Sir Shadi Lal, C.J., in *Md.* In other words, the expression legal representative means and includes one person as well as several persons according as they represent the whole interest of the deceased person. Their Lordships of the Privy Council in *Khiraajmal v. Daim* Ordinarily, therefore, it is necessary to implead all the legal representatives of a deceased person on the record and a few of them do not represent the whole interest of the deceased and if all are not made parties to the suit or appeal, it results in an abatement of those proceedings. On similar principles, before an

arbitrator can proceed further with the reference and give a binding award he should give notice to all the legal representatives of the deceased party and attempt to make them parties to the reference by notice though he may not be bound to follow the strict procedure of law required for substitution of parties under Order XXII, Civil Procedure Code.'

In our opinion the assessment under section 34 for the assessment year 1944-45 was vitiated by the failure of the Income-tax Officer to issue notices to the other legal representatives of Ebenezer, whom the petitioner Alfred did not and could not represent.

We, however, agree with the learned counsel for the Department, that no relief need be granted to the petitioner in these proceedings under article 226 of the Constitution, as he has availed himself of an alternative remedy; he has appealed against the assessment and that appeal has yet to be disposed of. If the assessment is set aside by the appellate authority, other proceedings may be open to the Department, the scope of which we are not called upon to determine now. It is only on that basis that we direct that the rule be discharged and the petition be dismissed. There will be no order as to costs.

Rule discharged.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com