

Md. Bashir Vs. Income-tax Officer, Calcutta, and Others.

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Court : Kolkata

Decided On : Mar-07-1961

Reported in : [1962]46ITR827(Cal)

Appeal No. : Matter No. 211 of 1960

Appellant : Md. Bashir

Respondent : income-tax Officer, Calcutta, and Others.

Judgement :

The facts in this case are shortly as follows : One Hazi Poonoomiah, since deceased, was a wealthy Muslim inhabitant of Gazipur in U.P. He had a son, Hazi Saffiullah. Saffiullah had seven sons, Md. Shamsul Haque, Md. Ibrahim, Md. Jalil, Md. Sagir (since deceased), Md. Vakil, Md. Khalil and Md. Bashir, the petitioner in this case. The other applications are by some of the persons above mentioned. The Matter No. 210 of 1960 is by Md. Vakil. The Matter No. 213 of 1960 is by Md. Khalil and the Matter No. 214 of 1960 is by Md. Jalil. The facts and the law involved in these applications are similar and they have been heard together. The brothers carried on and still carry on business in partnership under the name and style of Messrs. Shamsul Haque & Bros. For the assessment year 1946-47 the firm of M/s. Shamsul Haque & Bros., Bander bazar, Sylhet, described as an unregistered firm, was assessed by the Income-tax Officer, Sylhet, in Pakistan, on or about 29th February, 1948. There was a similar assessment for the assessment year 1947-48. For the year 1947-48 the firm of Shamsul Haque & Bros., P. 31,

Ganesh Chandra Avenue, Calcutta, described as an unregistered firm was assessed by the Income-tax Officer, Calcutta, District III(I) on or about 18th April 1949. There was a similar assessment for the year 1948-49, on the year 19th February 1948. The assessment order at Calcutta for the year 1947-48 states that the firm had so long been assessed by the Income-tax Officer, Sylhet, but since the assessment for the year 1947-48 was not made prior to the date of partition, i.e., 15th August, 1947, the firm should have been assessed in India with regard to the income from the properties situated in India. A notice under section 34 was, therefore, issued and thereafter return was filed and assessment made. It is mentioned in the assessment order that the firm had a stationery shop (wholesale and retail) at Sylhet. The income of the Sylhet business was assessed by estimation for rate purposes. A similar assessment was made for the year 1948-49. In January, 1946, the petitioner encashed in Calcutta, through the Habib Bank, a sum of Rs. 1,10,000 in high denomination notes, presumably under the Denomination Ordinance, under which high denomination notes were abolished and they could be encashed only within a specified time. Similarly, Md. Vakil encashed notes for Rs. 95,000, Md. Khalil encashed notes for Rs. 3,10,000 and Md. Jalil encashed notes for Rs. 1,18,000. In the declaration form necessary for encashment, it was stated that the money represented the lifes saving of the brothers. In March, 1951, a notice was issued under section 34 of the Indian Income-tax Act upon the petitioner by the Income-tax Officer, District III(I), Calcutta, asking the petitioner to submit a return for the assessment year 1946-47. It must be remembered that this notice was served and the assessment sought to be made, not of the firm, but of the petitioner individually. Similar notices were served on the petitioners in the other cases. The assesseees refused to file a return on the ground that the notice was invalid. Although they filed no return, some of them attended at the hearing and on the 20th March, 1952, an assessment was made by which this sum of Rs. 1,10,000 encashed by the petitioner was held to be his income from an undisclosed source. From this order of assessment the petitioner preferred an appeal on the 8th April, 1952, before the Appellate Assistant Commissioner. By his order dated 24th January, 1956, the Appellate Assistant Commissioner rejected the contention that the Income-tax Officer, District (III) (I) had no jurisdiction to issue the notice under section 34 or to make

the assessment. The Appellate Assistant Commissioner, however, considered certain facts that should be investigated and he remanded the case to the Income-tax Officer to report his finding within three months from the date of the receipt of the order. The facts are the same in the other cases, where also the notes encashed have been held to be income of the brothers from undisclosed sources and assessments made accordingly.

Thereafter, certificate proceedings were taken and this rule was issued on the 6th September, 1960, upon the respondents to show causes why a writ in the nature of certiorari should not be issued quashing and/or setting aside the assessment order dated 20th March, 1952, and the order of the Appellate Assistant Commissioner dated 24th January, 1956, and why a writ in the nature of mandamus should not be issued restraining the respondents from taking any further steps in the said income-tax proceedings or for the recovery of the said tax. Similar rules have been issued in the other applications.

In order to understand the order of remand, it is necessary to go into certain facts. Although no return was filed and the assessment was a best judgment assessment, the petitioner attended the assessment proceedings. Apart from the question of jurisdiction, the explanation that he purported to give was as follows : He said that his grandfather, Hazi Poonoomiah, was a wealthy Muslim inhabitant of Gazipur in U.P. On or about 4th January, 1930, he executed a Wasiatnama whereby he gave to his grandsons 2,630 tolas of gold, 4,675 sovereigns, 2,425 gold mohurs, gold ornaments weighing 1107.15 tolas and notes and cash worth Rs. 47,890. This was handed over to their father, Hazi Safiullah in trust. It was, however, not distributed by Hazi Safiullah for thirteen years. In 1943, these movables were handed over to the sons by their father. After that, a joint account was kept and various properties in Calcutta were purchased. It is stated that this encashment of high denomination notes for Rs. 1,10,000 and the other amounts were out of the said wealth left by their grandfather, which was transformed into high denomination notes. The Income-tax Officer went into this aspect of the matter and, for several reasons given in his assessment order, held that the story of the Wasiatnama and the source of the high denomination notes should not be believed. The reasons are set out in the assessment order and summarised in the

order of the Appellate Assistant Commissioner. The following are some of the conclusions reached by the Income-tax Officer :

Firstly, he noticed that the Wasiatnama was not a registered document and, therefore, the date of execution could not be precisely fixed. The stamp affixed to the deed was not purchased by the person writing the deed. It was then pointed out, by giving a summary of the income of Hazi Poonoomiah from 1934 to 1935, of which there is record with the Income-tax Officer, that the income made by him could not possibly account for such large accumulation of wealth. Next he noticed that although the alleged gift is said to have been made in 1930, it was not distributed until 1943. There was nothing to show how the beneficiaries maintained themselves for these many years. Then again, the brothers made contradictory statements as to the place where the alleged wealth was kept and with whom it was kept. When it came to the declaration required for the encashment of the high denomination notes, nothing was mentioned about the Wasiatnama. It was stated that the notes constituted the brothers' life savings. The Appellate Assistant Commissioner considered these points and rightly thought that these disputed questions of fact should be further investigated. He, therefore, directed that, before arriving at a finding, certain facts should be further investigated. For example, the authenticity or otherwise of an alleged endorsement by the Collector dated December 16, 1922, on the Wasiatnama should be inquired into and Md. Hanif, who had purchased the stamp paper on which the Wasiatnama is executed, should be examined. Hazi Saffiullah should also be examined, particularly on the question as to why the money received by him in 1930 was not disbursed until 1943. Further investigation was also directed upon the question as to where the wealth was kept and in whose custody it was kept. Before this enquiry could be completed, these applications were made and the rules taken out on the 6th September, 1960, calling upon the respondents to show cause why a writ in the nature of certiorari should not be issued quashing, cancelling or setting aside the assessment order dated March 20, 1952, against the petitioner and the order of the Appellate Assistant Commissioner dated January 24, 1956, and why a writ in the nature of mandamus should not be issued restraining them from taking any further steps in the income-tax proceedings or for the recovery thereof. There was an interim stay order so that the certificate proceedings have been stayed. Similar

rules have been issued in the other applications.

The first point taken is that the notice under section 34 and the assessment made thereunder against the petitioners were incompetent because there never had been an assessment against the petitioners for the assessment year 1946-47; so there could not be a reassessment. Reliance is placed on a decision of Rankin C.J. in *In re Lachhiram Basantlal*. The learned Chief Justice stated as follows :

'In my opinion, the assessment is valid. Section 34 deals with income which has escaped assessment and it may be, though it is not necessary for the present purpose to decide it, that that income cannot be said to have escaped assessment except in the case where an assessment has been made which does not include the income. I do not proceed upon that footing, because it is unnecessary for the purpose of the present case. At all events, income has not escaped assessment if there are pending at the time proceedings for the assessment of the assessee's income which have not yet terminated in a final assessment thereof.'

This observation is obviously an obiter. But although obiter, this opinion of the learned Chief Justice was approved by the Privy Council and by the Supreme Court in *Maharaj Kumar Kamal Singh v. Commissioner of Income-tax*. Gajendragadkar J. stated as follows :

'In this connection it may be relevant to refer to the decision of the Calcutta High Court in *In re Lachhiram Basantlal* because, as we have already pointed out, the statement of the law made by Chief Justice Rankin in regard to the effect of section 34 of the Act in this case has been expressly approved by the Privy Council in the case of *Rajendranath Mukherjee v. Commissioner of Income-tax*. While dealing with the assessee's argument that the order of assessment was invalid since it had been passed more than one year after the expiry of the relevant financial year and that the Income-tax Officer might have acted under section 34, Chief Justice Rankin stated that income cannot be said to have escaped assessment except in the case where an assessment had been made which does not include the income. It is true that this observation is obiter but it is fully consistent with the subsequent statement of the law made by the learned Chief Justice which has received the approval of the Privy Council.'

It is argued that Rankin C.J. has definitely laid down the law, namely, that no reassessment under section 34 may be done unless there has been a prior assessment in the normal way and that this view has been accepted by the Privy Council and the Supreme Court. In my opinion, this is an over-simplification of the legal position, which will have to be further investigated. The first thing to be remembered is that the decision of Rankin C.J., which has certainly found support from the Privy Council and the Supreme Court, was made under section 34 as it stood before the amendment of 1939 and 1948. Before the amending Act of 1948, section 34 did not contain the equivalent of section 34(1)(a). Section 34 as it stood before the amendment of 1939 was as follows :

'34. If for any reason, income, profits or gains chargeable to income-tax has escaped assessment in any year or has been assessed at too low a rate the Income-tax Officer may, at any time within one year of the end of that year, serve on the person liable to pay tax on such income, profits or gains, or, in the case of a company, on the principal officer thereof, a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of section 22, and may proceed to assess or reassess such income, profits or gains, and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section...'

The section as it stands now was substituted by the Income-tax and Business Profits Tax (Amendment) Act, 1948. Clause (a) of sub-section (1) of section 34 speaks about the situation when, by reason of the omission or failure on the part of an assessee to make a return of his income or to disclose fully or truly all material facts necessary for the assessment for that year, income, profits or gains chargeable to income-tax have escaped assessment or have been under-assessed or assessed at too low a rate, etc. Clause (b) however, applies, where there is no omission or failure as mentioned in clause (a) on the part of an assessee, and yet the Income-tax Officer has, in consequence of information in his possession, reason to believe that such income, etc., has escaped assessment or have been under-assessed or assessed at too low a rate, etc., Chief Justice Rankin's observation was under section 34, when it did not contain clause (a) of sub-section (1). It is, therefore, understandable, that if the only contingency

contemplated is escape of assessment, then it might well be said that the assessment cannot be said to have 'escaped' assessment if there has not been a prior assessment. Now, however, the escape of assessment for omission or failure to make a return or disclose the correct income is a contingency which has been expressly included within the scope of section 34. It can therefore no longer be said that there cannot be a reassessment without a prior assessment. This position seems to have been clearly understood in the Supreme Court case mentioned above. Gajendragadkar J. stated as follows :

'Section 34 of the Act has been amended in 1939 and in 1948. It was conceded by Mr. Viswanatha Sastri for the appellant, that the present case is governed by the section as it was amended in 1948. This amended section 34, subsection (1), deals with case of income escaping assessment in two clauses. Clause (a) covers cases where income has escaped assessment by reason of the omission or failure on the part of the assessee to make a return of his income under section 22. We are not concerned with this clause.'

Thus, it was clearly stated that the decision was not concerned with the contingency contemplated under clause (a) of sub section (1). In the present case, we are concerned with clause (a) of sub-section (1) of section 34. Therefore, the observation of Rankin C.J. does not stand in the way.

Therefore, the first thing that we must decide is as to whether, upon the facts and circumstances of the present case, the matter comes within the scope of section 34(1)(a). The first branch of enquiry will be as to whether there was any 'failure' on the part of the assessee to make a return of his income under section 22 for the relevant year. In this particular case, the general notice under section 22(1) had been issued, but for that particular year, viz., 1946-47, no special notice under section 22(2) was issued upon the petitioners in their individual capacity and the petitioners never filed a return. The question is as to whether it could be said that there was any 'failure' on their part to make a return of income under section 22. This point is covered by a judgment of the Supreme Court - Pannalal Nandlal Bhandari v. Commissioner of Income-tax. It has been held there that, once a notice is given by publication in the press and in the prescribed manner under

section 22(1), every person whose income exceeds the maximum amount exempt from tax is obliged to submit a return, and if he does not do so, it will be deemed that there was omission on his part to make a return within the meaning of section 34(1)(a). Under sub section (2) of section 22 it is open to the Income-tax Officer to serve a special notice upon any person requiring him to furnish a return in the prescribed form, but that provision does not derogate from the liability arising under sub-section (1) to submit a return. In this case, therefore, these observations are apposite. The petitioners did not file their returns in spite of the general notice under section 22(1). It is now found that as a result their income had escaped assessment. Therefore, under section 34(1)(a) proceedings are competent.

The next point taken is that in these cases there has been double taxation. Firstly, it is pointed out that for the same assessment year 1946-47 the firm had been assessed in Sylhet. Before the Income-tax Officer, Sylhet, the Wasiatnama was produced and it is stated that the income-tax authorities were quite satisfied about the source of the purchase of the Calcutta properties. It is argued that, for the same assessment year, there cannot be an assessment again in India. This is based on an agreement that has been entered into between India and Pakistan, called an 'Agreement for avoidance of double taxation in India and Pakistan', dated 10th December, 1947, declared by the Central Government in exercise of the powers conferred by section 49AA of the Indian Income-tax Act, 1922, section 11A of the Excess Profits Tax Act and section 18A of the Business Profits Tax Act. The relevant article in the agreement is article III which runs as follows :

'Article III. - Save under the provisions of section 34 of the Income-tax Act, 1922, and section 15 of the Excess Profits Tax Act, 1940, as adapted neither Dominion shall charge to tax any income of a person whose assessment (whether regular or provisional) including such income had been completed before the 15th day of August, 1947, or the 1st day of April, 1948, as the case may be, by an Income-tax Officer or Excess Profits Tax Officer functioning respectively under the Indian Income-tax Act, 1922, or the Excess Profits Tax Act, 1940, or under those Acts as adapted and applied to any Areas or to either Dominion.'

What it states is that the assessment for the year 1946-47 of the firm had been completed in Pakistan on the 29th February, 1948, and, therefore, an assessment of the petitioner in India for the same period is excluded by article III of the above-mentioned agreement.

In my opinion, this argument about double taxation is completely misconceived. The assessment made in Pakistan by the Income-tax Officer, Sylhet, of the year 1946-47 was of the firm, namely, the unregistered firm of M/s. Shamsul Haque & Bros., Banderbazar, Sylhet. The assessment which is now being sought to be made for the year 1946- 47 in Calcutta is of the petitioners in their individual capacity. Thus, there is no double taxation at all. Article III talks about the assessment of tax. As has been pointed out by Kanga in his book (volume I, fourth edition, at page 30) six categories of assessee are contemplated under the Income-tax Act, viz., (a) individual, (b) Hindu undivided family (c) local authority, (d) company, (e) firm and (f) other association of person. In this particular case, it may well be that the sum of Rs. 1,10,000 or the other amounts did not form any part of the income of the firm at Sylhet. That does not mean that they cannot form a part of the income of the petitioners in their individual capacity in India. There is nothing to show, on the fact of the assessment order of the Income-tax Officer, Sylhet, that the precise sum of Rs. 1,10,000 or the other sums were taken into account. Assuming that they were taken into account, it can only mean that the Income-tax Officer, Sylhet, was satisfied that they did not form any part of the income of the firm at Sylhet. It would be remembered, however, that the petitioners encashed the said notes in Calcutta. While encasing the same, they filed a declaration form showing that they constituted, or was a part of, the lifes savings of the brothers. It was not stated that it was any part of the income of the firm. In fact, it is nobodys case that the grandfather made any gift to the firm. Whether the money was brought into the till of the firm is a question of fact. It was open to the petitioners to establish by evidence in their assessment proceedings under section 34, that the monies did not belong to them but et the firm. The facts of this case are very similar to a Bombay decision, *Narayandas Kedarnath v. Commissioner of Income-tax*. The facts in that case were as follows : The assessee there was a firm. The firm incurred a huge loss for the year 1940-41. In order to meet those losses, the partners brought in large sums from their native place by bank drafts.

They were, however, unable to explain how this money was available to them at their native place. The income-tax authorities and the Appellate Tribunal treated the credit as undisclosed profit of the firm. The Bombay High Court held that there was no material on which this could be done. If the department was not satisfied with the explanation given by the partners, then it was legitimate of the department to draw an inference that the amounts represented individual capacity. In this case, we have the converse of what happened in the Bombay case. There were certain moneys which came into the hands of the individual partners, which it is sought to be included in the income of the firm. There is no sufficient evidence to show that they constituted the income of the firm, and the money being detected in the hands of the partners individually, no satisfactory explanation has been given of their source. Thus, the authorities were entitled to treat them as an undisclosed source of income of the partners individually. Thus, there is not question of double taxation at all. So far as the story about the source of the money is concerned, that is a disputed question of fact, and I cannot settle it in this jurisdiction. I think that the best course that could be adopted in the circumstances has been ordered by the Appellate Assistant Commissioner. In view of the contradictory statement made, and the lacunae in the evidence on record, the most that can be done is to make a through investigation of the facts. It seems that the petitioners in this case are not at all happy with the prospect of such an investigation, as the onus will be upon them to satisfy the Income-tax Officer on the disputed points. Apart from this, article III itself excludes proceedings under section 34. In other words, a double taxation is not permissible if the matter comes within the ambit of article III. Still, where income has escaped assessment, there does not seem to be any bar in reopening the matter under section 34. However, as I have stated above, the question of double taxation does not at all arise in these cases. I must mention here that Mr. Pal, on behalf of the respondents, has also taken a point that this application under article 226 is incompetent, because against the order of the Appellate Assistant Commissioner, an appeal lay to the Appellate Tribunal and the petitioner did not prefer such an appeal and came up straight to this court. I do not think it necessary to deal with this preliminary point, as I have gone into the merits.

For the reasons aforesaid, this application is dismissed and the rule is discharged. Interim orders, if any, are vacated. There will be no order as to costs. I make it

clear that his will not prevent the petitioner from making a proper application before the appropriate authority for stay of the certificate proceedings or for realisation of the amount due.

Application dismissed.

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