

Ladhuram Taparia Vs. B. K. Bagchi.

Ladhuram Taparia Vs. B. K. Bagchi.

SooperKanoon Citation : sooperkanoon.com/879426

Court : Kolkata

Decided On : Feb-26-1951

Reported in : [1951]20ITR51(Cal)

Appeal No. : Matter No. 52 of 1950

Appellant : Ladhuram Taparia

Respondent : B. K. Bagchi.

Judgement :

This is an application under Section 45 of the Specific Relief Act and also under Constitution of India for writs in the nature of mandamus, prohibition and certiorari for an order cancelling the notice of demand issued by the respondent under Section 29 of the Indian Income-tax Act and calling upon him to forbear from taking further steps in respect of the said notice of demand and for quashing of the assessment proceedings.

The petitioners started carrying on business in co-partnership under the name and style of Ladhuram Taparia on the 28th of February, 1941, and entered into a written agreement of partnership on the 16th of October, 1941. The firm of the petitioners was duly registered under the Indian Partnership Act on the 19th July, 1943. The petitioner Ladhuram had 8 as share and the petitioners Ganpat Rai and Bhairudan had 4 as share each in the said firm. The firm was first assessed to income-tax in respect of the year of assessment 1942-43 and for that purpose it was registered under Section 26A of the Indian Income-tax Act. For the years of assessment 1943-44 and 1944-45 registration under Section 26A of the Act was renewed and similar assessment were made. The last of such assessment was made by the respondent. But in making the assessment for the year 1945-46 the respondent refused to renew the registration of the said firm and assessed the said firm as an un-registered firm in its firm name. In so assessing, the respondent added to the total income of the firm as computed by him, the total income assessed by him of five other firms, viz. (1) Jagawarmal Hanuman Buz, (2) Jagannath Harnarain, (3) Ganpat Rai Jorawarmal, (4) Seth Ladhuram Taparia, and (5) Seth Ladhuram Taparia & Co. and the income-tax and super-tax were computed on the aggregate income so found. The assessment order was made on the 29th of March, 1950, and a notice of demand under Section 29 of the Act was served upon the petitioners firm. The notice was dated the 30th March, 1950, and required the petitioners to pay a sum of Rs. 8,67,239-10 on or before the 20th April 1950. It is stated in the petition that out of the above-named five firm four have been duly constituted under four registered deeds of partnership and the said firms have been registered under the Indian Partnership Act. It appears that the respondent has also made five several assessment orders on the 29th of March, 1950, in respect of the said five other firms for the same assessment year 1945-46 and has issued notices of demand in respect of such assessments calling upon the said firms to pay the amounts mentioned therein by the 20th of April, 1950. On the 19th of June 1950, the firm of the petitioners Messers. Ladhuram Taparia filed an appeal before the Appellate Assistant Commissioner under Section 30 of the Act against the assessment order made upon them and also against the order refusing to renew the registration under Section 26A. It is stated in the petition that the assessment is without the authority of law and is ultra vires the powers of the respondent. On the 20th April, 1950, the petitioners firm applied to the respondent for granting them sufficient time to consider the matter and for payment of

the legitimate tax but the respondent has not acceded to such request thereby denying justice to the petitioners. In the circumstances the petitioners have moved this court for the reliefs stated above.

Section 45 of the Indian Income-tax Act provides that any amount specified as payable in a notice of demand shall be paid within the time at the place and to the person mentioned in the notice or order and any assessee failing so to pay shall be deemed to be in default provided that when the assessee has presented an appeal under Section 30 the Income-tax Officer may in his discretion treat the assessee as not being in default as long as such appeal is undisposed of.

It is contended by Dr. Pal appearing for the petitioners that the character of an appeal under Section 30 of the Act is that the assessment is at once re-opened and it becomes contingent conferring on the Appellate authority power to make as it were a new assessment and it is pointed out that the moment an assessee files an appeal he loses all control over the matter and appeal once filed cannot be withdrawn. Dr. Pal points out that the corresponding sections of the English Income-tax Act namely Section 136 and Section 137 have similar effects. He relies on the decision of the House of Lord reported in *Rex v. Special Commissioners of Income-tax (ex parte Elmhirst)* and *Lord Simon - Income-Tax, Vol. 1, paragraph 309, page 201*. It is further pointed out by him that under Section 157 of the English Act which is the section corresponding to Section 45 of the Indian Act the payment of the assessed tax is stopped the moment an appeal is filed against the order or assessment and the matter is not left to the discretion of the officer issuing the notice of demand. It is submitted that the discretion conferred upon the Income-tax Officer under Section 45 of the Indian Act should be exercised in a reasonable and judicious manner and not arbitrarily. It is further submitted that the power or the discretion conferred upon the Income-tax Officer under Section 45 of the Act can under certain circumstances become coupled with a duty. Reliance is placed on the observations of Cairns, L. C., which are as follows :-

'They confer a faculty or power and they do not of themselves do more than confer a faculty or power. But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person in whom the power is reposed, to exercise that power when called upon to do so' : *Julius v. Bishop of Oxford*. The principle so stated in the case of *Julius v. Bishop of Oxford* was quoted with approval and applied by the Judicial committee in the case of *Alcock Ashdown & Co. v. Chief Revenue Authority, Bombay*. In this case the Chief Revenue Authority came to the conclusion that the application made before him to state a case and refer it to the High Court was absolutely frivolous and he was of opinion that any reference was unnecessary. Even then the Privy Council observed that inasmuch as a serious question of law was involved it was the duty of the Chief Revenue Authority to state a case and refer it to the High court in the facts and circumstances of this case. In this case also a discretion was conferred on the Revenue Authority but it was pointed out that if in a proper case he did not exercise that power he could be compelled to do so by an order under Section 45 of the Specific Relief Act.

In the present case the petitioners firm submitted a return for 'Rs. 33,105 but they were assessed at a sum of Rs. 8,67,239 which is undoubtedly an unusually heavy sum. There was a substantial question of fact as to the constitution of the petitioners firm and the five other aforesaid firm involved in the matter. The Income-tax Officer has also made protective assessments in respect of the five other firms in order to avoid any question of limitation in case the main assessment made by him was set aside by the appellate authority. The interest of the revenue of the Government had been fully safeguarded by such protective assessments. There was also a serious question of law involved as to whether the Income-tax Officer had jurisdiction or authority to assess an assessee and imaginary firm without a proper return being submitted by such firm and without properly initiating proceedings for assessment under the Act in respect of such firm. Moreover payment of such a heavy sum within the time fixed by the notice of demand was not an easy matter and might have the effect of completely ruining the business of the petitioners firm and of those five other firms. It cannot be said with any definiteness that there is no substance in the appeal or that the appeal is bound to fail. The respondent himself was satisfied in the past with the constitution of these firms and treated these as separate entities

and made assessments on the basis that all the six alleged firms are but one firm will be upheld by the appellate authority and so he has taken care to make alternative protective assessments. In the circumstances it appears to me that there is a duty on the respondent to refrain from enforcing payment of the tax under the notice of demand and to grant extension of time stay their hands till the appeal is disposed of by the appellate authority.

It was contended by the learned Advocate-General that the words in Section 45 are not merely 'may' but 'may in his discretion' and therefore such a discretionary power cannot be under any circumstances converted into a duty. I do not think that there is any force in this contention. No authority in support of this contention has been cited by the Advocate-General. On the other hand, words such as 'may, if they think fit' have been held to have compulsory force.

It was also contended by the Advocate-General that the Court has not power to interfere with the exercise of discretion by public officers in pursuance of a discretionary power vested in them unless such discretion is exercised mala fide. There can be no doubt about the soundness of this proposition. It is however equally clear that an arbitrary or capricious exercise of a discretion would be no exercise at all : (See Queen v. Bishop Of London). Apart from that in the facts of this case the discretion has become coupled with a duty.

It was also contended on behalf of the respondent that there was no distinct demand upon the respondent not to treat the petitioners as defaulters as a result of their not complying with the notice of demand within the time fixed by the notice, and as such the present application is not maintainable. I am unable to accept this contention, paragraph 11 of the petitioner and the letter of Mr. Gupta, the pleader for the assessee, to the Income-tax Officer dated the 20th April, 1950, annexed to the affidavit of the respondent affirmed on the 21st August, 1950, show that there was a sufficient demand on the part of the petitioners but the respondent took no notice of it. Under Section 45 of the Income-tax Act if no extension of time is granted the assessee on the expiry of the time fixed becomes a defaulter. It is now stated in the affidavit of the respondent that in respect of the protective assessments it was not intended that they would be enforced until the appeal was disposed of an if necessary extension of time for payment of the tax dues would have been granted. But the fact remains that the respondent did not care to reply to the assessee's letter dated the 20th April, 1950, asking for extension of time and has thus denied justice to the petitioners firm. No grounds for not granting any extension of time as asked for are forthcoming and in fact there was no express order refusing extension and so the petitioner could not even have the opportunity of taking recourse to Section 33A of the Act and ask the Commissioner to exercise his power of revision : (See Moti Lal v. Uttar Pradesh Government where the alternative remedy of appeal could not be availed of because no grounds of the order were forthcoming).

In my view this petition should succeed in part and this Rule is made absolute to the extent that the respondent is directed to forbear from taking any steps or further steps for enforcing the notice of demand dated the 30th March, 1950, issued under Section 29 of the Act until the disposal of the appeal. The petitioners are entitled to costs of the present proceedings.

Petition allowed.

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