Privy Council Appeal No. 43 of 1936

The Commissioner of Income Tax, United and Central Provinces - - - - - - - - *Appellant*

v.

Badridas Ramrai Shop, Akola, owner Laxminarayan Badridas Shrawagi of Akola - - - - - - - *Respondent*

FROM

THE COURT OF THE JUDICIAL COMMISSIONER, CENTRAL PROVINCES

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 19TH FEBRUARY, 1937.

Present at the Hearing:

LORD RUSSELL OF KILLOWEN.
LORD MACMILLAN.
SIR JOHN WALLIS.

[*Delivered by* LORD RUSSELL OF KILLOWEN.]

In this case the Commissioner of Income Tax for the United and Central Provinces appeals from a judgment of the Court of the Judicial Commissioner, Central Provinces, on a reference under section 66 (2) of the Indian Income-tax Act (XI of 1922). The respondent taxpayer did not appear on the hearing of the appeal.

The case relates to an assessment made by the Income-tax Officer under section 23 (4) of the Act, subsequently to an alleged failure by the taxpayer to comply with all the terms of a notice issued under section 22 (4) of the Act. It will be convenient before stating the facts of the case to set out the provisions of the Act (as amended by the Indian Income-tax (Amendment) Act, 1930, and the Indian Income-tax (Second Amendment) Act, 1930), which are relevant, and under which the various steps in the case, leading up to the reference, were taken. They are the following:—

> "22.—(1) . . .
>
> "(2) In the case of any person other than a company whose total income is, in the Income-tax Officer's opinion, of such an amount as to render such person liable to income-tax, the Income-tax Officer shall serve a notice upon him requiring him to furnish, within such period, not being less than thirty days as may be specified in the notice, a return in the prescribed form and verified in the prescribed manner setting forth (along with such other particulars as may be provided for in the notice) his total income during the previous year.

" (3) If any person has not furnished a return within the time allowed by or under sub-section (1) or sub-section (2), or having furnished a return under either of those sub-sections, discovers any omission or wrong statement therein, he may furnish a return or a revised return, as the case may be, at any time before the assessment is made, and any return so made shall be deemed to be a return made, in due time under this section.

" (4) The Income-tax Officer may serve on the principal officer of any company or on any person upon whom a notice has been served under sub-section (2) a notice requiring him, on a date to be therein specified, to produce, or cause to be produced, such accounts or documents as the Income-tax Officer may require:

" Provided that the Income-tax Officer shall not require the production of any accounts relating to a period more than three years prior to the previous year.

" 23.—(1) If the Income-tax Officer is satisfied that a return made under section 22 is correct and complete, he shall assess the total income of the assessee, and shall determine the sum payable by him on the basis of such return.

" (2) If the Income-tax Officer has reason to believe that a return made under section 22 is incorrect or incomplete, he shall serve on the person who made the return a notice requiring him, on a date to be therein specified, either to attend at the Income-tax Officer's office or to produce, or cause to be there produced, any evidence on which such person may rely in support of the return.

" (3) On the day specified in the notice issued under sub-section (2), or as soon afterwards as may be, the Income-tax Officer, after hearing such evidence as such person may produce and such other evidence as the Income-tax Officer may require, on specified points, shall, by an order in writing, assess the total income of the assessee, and determine the sum payable by him on the basis of such assessment.

" (4) If the principal officer of any company or any other person fails to make a return under sub-section (1) or sub-section (2) of section 22, as the case may be, or fails to comply with all the terms of a notice issued under sub-section 4 of the same section or, having made a return, fails to comply with all the terms of a notice issued under sub-section (2) of this section, the Income-tax Officer shall make the assessment to the best of his judgment and, in the case of a registered firm, may cancel its registration:

" Provided . . .

" 27. Where an assessee or, in the case of a company, the principal officer thereof, within one month from the service of a notice of demand issued as hereinafter provided, satisfies the Income-tax Officer that he was prevented by sufficient cause from making the return required by section 22, or that he did not receive the notice issued under sub-section (4) of section 22, or sub-section (2) of section 23, or that he had not a reasonable opportunity to comply, or was prevented by sufficient cause from complying, with the terms of the last-mentioned notices, the Income-tax Officer shall cancel the assessment and proceed to make a fresh assessment in accordance with the provisions of section 23.

" 30.—(1) Any assessee objecting to the amount or rate at which he is assessed under section 23 or section 27, or denying his liability to be assessed under this Act, or objecting to a refusal of an Income-tax Officer to make a fresh assessment under section 27, or to any order against him under sub-section (2) of section 25 or section 25A or section 28, made by an Income-tax Officer, may appeal to the Assistant Commissioner against the assessment or against such refusal or order:

" Provided that no appeal shall lie in respect of an assessment made under sub-section (4) of section 23, or under that sub-section read with section 27.

" (2) . . .

" (3) . . ."

" 31.—(1) . . .

" (2) The Assistant Commissioner may, before disposing of any appeal, make such further inquiry as he thinks fit, or cause further inquiry to be made by the Income-tax Officer.

" (3) In disposing of an appeal the Assistant Commissioner may, in the case of an order of assessment,—

" (*a*) confirm, reduce, enhance or annul the assessment, or

" (*b*) set aside the assessment and direct the Income-tax Officer to make a fresh assessment after making such further inquiry as the Income-tax Officer thinks fit or the Assistant Commissioner may direct, and the Income-tax Officer shall thereupon proceed to make such fresh assessment. . . .

" (*c*) . . .

" (*d*) . . .

" Provided . . ."

" 33.—(1) The Commissioner may of his own motion call for the record of any proceeding under this Act which has been taken by any authority subordinate to him or by himself when exercising the power of an Assistant Commissioner under sub-section (4) of section 5.

" (2) On receipt of the record the Commissioner may make such enquiry or cause such enquiry to be made, and, subject to the provisions of this Act, may pass such orders thereon as he thinks fit:

" Provided that he shall not pass any order prejudicial to an assessee without hearing him or giving him a reasonable opportunity of being heard."

The respondent having been served on the 29th April, 1931, with a notice under section 22 (2), furnished a return, dated the 27th July, 1931, which consisted of a printed return form, and contained but two statements only, viz. (*a*) opposite the paragraph relating to business the words and figures " Rs.1,700. Approximate amount of loss " and (*b*) in the place where should appear the total amount of profit and gains or income, the same words and figures.

A return in such a form was obviously unsatisfactory and incomplete. The officer thereupon served upon the respondent on the 8th September, 1931, a combined notice requiring the respondent (under section 22 (4)) to " produce or cause to be produced at my office " his accounts for three years, and (under section 23 (2)) either to attend or to produce or cause to be produced any evidence on which he might rely in support of his return. The date specified was the 14th September, 1931. On the 12th September, 1931, he applied for and obtained an adjournment until the 19th October, 1931, for which date a fresh combined notice was issued and served on the 23rd September, 1931.

On the 19th October, 1931, the respondent applied in writing for a further adjournment, alleging that he had been ill for the last month and could do no work; and that his agent, who had been away, had returned. With this application he seems to have sent a medical certificate, which, however, merely stated that the respondent "was suffering from influenza some fifteen days ago," that he had gone very weak since that time and that he was still weak and suffering from a cough.

Their Lordships are not surprised that the officer was unable to accept such a certificate, and refused to grant any further adjournment. There would appear to be ample ground for his view that the application, backed by such a certificate, was merely a device to obtain a postponement. No accounts were produced or caused to be produced by the respondent, and the officer proceeded as enjoined to do by section 23 (4) to make the assessment to the best of his judgment. No accounts being available he took into consideration the local repute that the respondent's money-lending business was extensive, and included the purchasing of debts at large profit to himself, and that he was easily the richest man in the district. Further, as stated in the assessment note, "local inquiries" had shown that his fluid resources amounted to ten lacs. The officer estimated the respondent's income at one lac.

From an assessment made under section 23 (4) there is no appeal; but the assessee may endeavour to satisfy the officer as to the relevant question of fact specified in section 27, and if he succeeds the officer must cancel the assessment and make a fresh assessment in accordance with the provisions of section 23. The respondent applied for cancellation under section 23. His application was heard (with witnesses) in December, 1931, by the Income-tax Officer then in office. He refused the application. The only excuse alleged by the respondent for his failure to comply with the notice relating to the production of accounts was that he could not attend to produce them in person. As he could have caused them to be produced by sending them by messenger, he failed to satisfy the officer as required by section 27.

From this refusal the respondent (as entitled under section 30) appealed to the Assistant Commissioner. His appeal was heard on the 27th February, 1932, and was rejected on the ground that he had not been able to show that he had sufficient cause for withholding the accounts on the 19th October, 1931. The assessment was accordingly confirmed by order made under section 31.

Down to this point in the history of this matter it appears to their Lordships that the provisions of the Act had been strictly complied with by the income-tax officials. No further appeal lay open to the respondent, but it was no doubt open to the Commissioner to exercise the powers of revision or review contained in section 33.

The respondent, however, applied to the Commissioner for a reference under section 66 (2) of the Act. The relevant provision of that subsection runs thus:—

> " Within sixty days of the date on which he is served with notice of an order under section 31 . . . the assessee . . . may . . . require the Commissioner to refer to the High Court any question of law arising out of such order . . . and the Commissioner shall . . . draw up a statement of the case and refer it with his own opinion thereon to the High Court." '

The Commissioner, however, may (subsection 3) refuse to state the case on the ground that no question of law arises.

The respondent asked to have referred seven alleged points of law. They were formulated thus:—

> (i) Whether the Income-tax Officer was justified in assuming jurisdiction to proceed under section 23 (4) of the Income-tax Act and making *ex parte* assessment in this case when there is no legal evidence to show that the assessee deliberately derived non-compliance or failed to comply with the notice issued under section 22 (4) of the Income-tax Act.
>
> (ii) Whether the circumstances alleged and proved by the assessee could not in law be deemed to be " sufficient cause " under section 27 of the Income-tax Act.
>
> (iii) In view of the wording of the notice under section 22 (*a*)* of the Act and the undisputed fact that the assessee was too ill to attend the Court and the further admitted fact that the Income-tax Officer did not, pass or communicate to the assessee's servant or to the assessee any order for immediate production of account books or any other fair order, could not the assessee under law claim cancellation of the *ex parte* assessment order, dated the 19th October 1931.
>
> (iv) Whether procedure adopted by the Income-tax Officer in causing notices to be served under sections 23 (2) and 22 (4) of the Income-tax Act was legal and proper and whether the Income-tax Officer could under the circumstances proceed under section 23 (4) and make *ex parte* assessment.
>
> (v) Is there evidence to substantiate the Income-tax Officer's reasoning in the last paragraph of the order saying that legal enquiries prove that the assessee made in the account year taxable income of a *lakh* of rupees.
>
> (vi) Is not the judgment of the Income-tax Officer vitiated by imaginary assumptions or irregular enquiries and hearsay evidence which the assessee has no chance to meet and which are not borne out by his account books which the Income-tax Officer could have called for.
>
> (vii) Is the order of assessment passed by the Income-tax Officer to the best of his Judgment in view of the arbitrary reasons he has given and despite the notorious trade depression and financial strain all along.

The Commissioner in the case which he stated, stated his opinion upon the seven points as follows:—As to (i) the assessee on the evidence could have sent the accounts even if (which the medical evidence did not establish) he could not bring them himself. He had not therefore complied with the terms of the notice under section 22 (4); and the point should be answered against the assessee. As to (ii) the question was one of fact and not of law, and could not be referred to the High Court. As to (iii) the reference to section 22 (*a*) was admitted to be intended as a reference to section 22 (4), and as the accounts could have been

produced by someone on the assessees behalf, that point should be answered against the respondent. As to (iv) if it meant that because a notice was served under section 23 (2) a notice under section 22 (4) was illegal, and that non-compliance with an illegal notice would not authorise an assessment under section 23 (4), the point was covered by a recent decision by the Full Bench of the Lahore High Court which was adverse to the respondent's contention. As to (v) no evidence was necessary. The officer had merely to estimate as best he might the income for purposes of assessment. If any reasons were given, as in the present case, it was merely to show that the estimate was not arbitrary. As to (vi) and (vii) in view of his opinion as to (v) there was no occasion to answer these.

The reference was heard in the Court of the Judicial Commissioner, Central Provinces (which was a High Court for the purposes of section 66) by a Judicial Commissioner and an Assistant Judicial Commissioner. They held, in reference to points (i) and (iv), that the notice was legal and that the officer had jurisdiction to make the summary assessment under section 23 (4); but they thought that the omission to make and communicate to the respondent a definite order refusing an adjournment did " considerably detract from the technical legality of the summary assessment order." They answered these points in the affirmative, i.e., against the respondent. In regard to points (ii) and (iii) they considered whether the findings of the officer and the Assistant Commissioner that the respondent " had not shown sufficient cause for re-opening the *ex parte* assessment satisfies the test that it was arrived at after the exercise of judicial discretion." They held that several relevant facts had been left out of consideration, viz: (1) that if the respondent's Court agent had been informed that no adjournment would be granted because the account books should have been sent with the *Munim*, it was possible that the notice for production might have been complied with; (2) that the failure by the officer in observing " this elementary rule " had contributed to the non-compliance with the terms of the notice; and (3) that the respondent desired to testify in person to the accuracy of the account books. On the finding that the respondent could not by reason of illness himself attend the Court on the appointed day, they were of opinion that the only reasonable finding which should have been recorded was that the respondent had shown sufficient cause for non-compliance with the terms of the notice under section 23 (2) [i.e., the notice as to evidence, not the notice as to producing accounts], and that it followed that he had clearly made out sufficient cause for reopening the assessment, and that the officer and Assistant Commissioner had failed to exercise their discretion on reasonable and proper grounds.

They then proceeded to consider points (v), (vi) and (vii); and held as a result of an examination of certain authorities that no assessment would be an assessment by

the officer " to the best of his judgment " within the meaning of section 23 (4) unless (1) a local inquiry to ascertain the income for the previous year of the proposed assessee was first held, and (2) the officer placed " on the record a note of the details and results of his inquiry." They held that the present assessment rested merely on the caprice of the officer and was not made " to the best of his judgment " within the meaning of section 23 (4). They answered point (v) in the negative, point (vi) in the affirmative, and point (vii) in the negative.

Their Lordships find themselves in disagreement with this decision, except in so far as it answered points (i) and (iv) in the affirmative, and decided that the officer was in the events which had happened entitled to proceed to make an *ex parte* assessment under section 23 (4). If the assessment in this case was made by the officer to the best of his judgment, it must stand unless the assessee succeeded in satisfying the officer that he had not a reasonable opportunity to comply or was prevented by sufficient cause from complying with the terms of the notice under section 22 (4) requiring him to produce or cause to be produced his accounts for three years. This he failed to do, and upon the undisputed and indisputable facts of the case he necessarily so failed. His application under section 27 for cancellation of the assessment was doomed to failure, and his appeal to the Assistant Commissioner under section 30, was equally incapable of success. There the matter should have ended, unless the Commissioner chose to proceed under section 33. The questions involved were purely questions of fact, indeed one might say of self-evident fact, and no reference in regard thereto should have been made under section 66 (2). No question of law was involved; nor is it possible to turn a mere question of fact into a question of law by asking whether as a matter of law the officer came to a correct conclusion upon a matter of fact. The Judicial Commissioners have treated the matter as a wrongful exercise of a judicial discretion, the foundation for the allegation of wrongful conduct being the facts that (1) no previous intimation had been given of the intention of the officer to refuse a further adjournment on the 19th October, 1931, which they characterised as a failure to observe an elementary rule; and (2) that the respondent had shown sufficient cause for not complying with the notice under section 23 (2).

Their Lordships are unable to appreciate this reasoning. This does not appear to be a case of exercising a discretion. Under section 23 (4) the fact of failure to comply with the notice under section 22 (4) made it compulsory on the officer to make an assessment; and under section 27 unless the officer is satisfied (and he was not, nor on the facts of this case, could he have been) that the respondent had not a reasonable opportunity to comply or was prevented by sufficient cause from complying with that notice, the assessment must stand. That he had sufficient cause for not complying with another notice is irrelevant. And their Lord-

ships are unaware of any rule by which the officer was bound or ought to announce beforehand how he proposes to deal with an application for an adjournment. The respondent had already obtained one adjournment from the 14th September, 1931, until the 19th October, 1931. It was his duty if he desired a further adjournment to apply at a date sufficiently early to enable him, in the case of a refusal, to be prepared to proceed on the appointed day. In fact the respondent delayed his application for a further adjournment until the very day appointed for compliance with the order. Even if this could be said to be a case of exercising a judicial discretion, their Lordships can see no ground on the facts of this case for suggesting that it was wrongfully exercised.

There remains for consideration the point whether the assessment can be attacked on the ground that it was not made by the officer to the best of his judgment within the meaning of section 27. The Judicial Commissioners have laid down two rules which impose upon the officer the duty of (i) conducting some kind of local inquiry before making the assessment under section 23 (4) and (ii) recording a note of the details and results of such inquiry.

Their Lordships find it impossible to extract these requirements from the language of the Act, which after all is, in such matters, the primary and safest guide. The officer is to make an assessment to the best of his judgment against a person who is in default as regards supplying information. He must not act dishonestly, or vindictively or capriciously because he must exercise judgment in the matter. He must make what he honestly believes to be a fair estimate of the proper figure of assessment, and for this purpose he must, their Lordships think, be able to take into consideration local knowledge and repute in regard to the assessee's circumstances, and his own knowledge of previous returns by and assessments of the assessee, and all other matters which he thinks will assist him in arriving at a fair and proper estimate: and though there must necessarily be guess-work in the matter, it must be honest guess-work. In that sense too the assessment must be to some extent arbitrary. Their Lordships think that the section places the officer in the position of a person whose decision as to amount is final and subject to no appeal; but whose decision if it can be shown to have been arrived at without an honest exercise of judgment, may be revised or reviewed by the Commissioner under the powers conferred upon that official by section 33.

Their Lordships can find no justification in the language of the Act for holding that an assessment made by an officer under section 23 (4) without conducting a local inquiry and without recording the details and results of that inquiry cannot have been made to the best of his judgment within the meaning of the section. Nor can they find any such justification in the authorities upon which the Judicial Commissioners appear to have relied.

The case of *Krishna Kumar* v. *The Commissioner* (5 I.T.C. 295) seems to be the foundation of their two "rules." The question referred for decision in that case was in the following words:—"The Income Tax Officer simply puts 'Business. Rs.30,000.' No basis or details are apparent. Can this be an assessment to the best of one's judgment?" The Court simply answered "yes." This, as a decision, does not seem to afford any basis for the rules. But the Judicial Commissioners refer to the fact that the Commissioner stated in his case that the officer had made a local inquiry and had recorded a note of the details and results of his inquiry, and say that "it is apparent that the answer would have been in the negative if the Income-tax Officer had made no local inquiry and not placed a detailed note thereof on the record in support of the assessment."

Their Lordships can find no justification for attributing this view to the High Court in that case. Indeed the Judicial Commissioners in the present case seem to treat the matter as decided not by the view of the High Court but rather by the opinion of the Commissioner for Income Tax; for they use the following language :—

> While the aforesaid remarks of the Commissioner of Income-tax, Bengal, impliedly concede that "local enquiry" and the placing on record of a note of the results of such enquiry are essential in law to sustain an *ex parte* assessment the learned Commissioner of Income-tax of these provinces thinks otherwise, presumably on certain observations in Abdul Bari Chowdhury's case (I.L.R. 9 Rang. 281) which go so far as to lay down that an *ex parte* assessment may as well be made on "mere guess" of the Income-tax Officer who is "the *persona designata* to make the assessment" and against whose order "no appeal lies". With due deference we hesitate to subscribe to such a widely stated proposition, as it is extremely likely to lead to certain abuse of the powers by the Income-tax Officers in the discharge of their duties which must be performed throughout in conformity with the rules of justice, equity and good conscience.

The other authorities cited by the Judicial Commissioners do no more, their Lordships think, than affirm that the officer must exercise judgment and must not act on mere caprice, or in any other way inconsistent with the exercise of judgment.

Their Lordships find themselves in agreement with the views expressed by the High Court at Rangoon in the case of *Abdul Bari Chowdury* v. *Commissioner of Income Tax, Burma* (I.L.R. 9, Rangoon 281).

Their Lordships are of opinion that the assessment must stand and that on the reference points (ii), (iii) and (vi) should (if answered at all) have been answered in the negative and points (v) and (vii) should (if answered at all) have been answered in the affirmative, and the respondent should have been ordered to pay the costs of the reference. This appeal should succeed and the order under appeal should be amended as indicated above and their Lordships will humbly advise His Majesty accordingly. The respondent will pay the costs of the appeal.

(10518—3A) Wt. 8136 -2 190 3/37 P. St. G. 338

In the Privy Council

THE COMMISSIONER OF INCOME TAX,
UNITED AND CENTRAL PROVINCES

v.

BADRIDAS RAMRAI SHOP, AKOLA,
OWNER LAXMINARAYAN BADRIDAS
SHRAWAGI OF AKOLA

DELIVERED BY LORD RUSSELL OF
KILLOWEN

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