A

INCOME-TAX OFFICER, AGRA

v.

RADHA KRISHAN

April 27, 1967

B [J. C. SHAH AND V. RAMASWAMI, JJ.]

Indian Income-tax Act, 1922, *s.* 23(5)(*a*), 26*A and* 44—*Registered firm—Partners taxed individually on their shares—One partner defaulting in payment of tax on his share—Tax so due whether can be recovered from other partners.*

C The respondent was one of the partners in a partnership firm registered under s. 26A of the Indian Income-tax Act, 1922. The Income-tax Officer in making assessments for the assessment years 1944-45, 1945-46, and 1946-47 and 1947-48 determined the shares of each of the partners and taxed them according to the provisions of s. 25(3)(a) of the Indian Income-tax Act, 1922. One of the partners defaulted in the payment of tax and the Income-tax Officer sought to recover the unpaid tax attributable to the share of the defaulting partner in the firm from the respondent. The respondent's petition under Art. 226 challenging the attempted recovery was allowed by the single Judge whose order was confirmed by the Division Bench. The Revenue by special came to this Court.

D

It was urged on behalf of the Revenue that even though by s. 23(5)(a) the total income of each member of a registered firm is taxed it is the firm which is assessed to tax so that the tax attributable to the share of one partner can be recovered from another, the responsibility of all being E joint and several. Reliance was also placed on s. 44 of the Act.

HELD : (i) Undoubtedly contractual obligations of a firm are enforceable jointly and severally against the partners. But the liability to pay income-tax is statutory; it does not arise out of any contract, and its incidence must be determined by the statute. If the statute which imposes the liability has not made it enforceable jointly and severally against the partners, no such implication can arise merely because contractual liabilities F of a firm may be jointly and severally imposed against the partners. [825E-F]

(ii) There is nothing in s. 44 of the Act which supports the contention that for payment of tax assessed against a partner of a registered firm individually under s. 23(5)(a) of the Act, another partner becomes liable jointly and severally with the first partner to pay tax. [825C]

G The entire scheme of taxing the income of a registered firm in the hands of the individual partner is inconsistent with any assumption that for payment of tax assessed against a partner, other partners are liable. The tax assessed against a partner of a registered firm is assessed on his total income inclusive of the share in the firm's income and the rate applicable is determined by the quantum of the total income of the partner. [825D-E]

Commissioner of Income-tax, Madras v. *S. V. Angidi Chettiar,* 44 I.T.R. 739, *Commissioner of Income-tax, Bombay* v. *Amritlal Bhogilal & Company,* 34 I.T.R. 130 and *Shivram Poddar* v. *Income-tax Officer, Central Circle II, Calcutta,* 51 I.T.R. 823, distinguished.

H

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1413 of 1966.

Appeal by special leave from the judgment and order dated July 31, 1963, of the Allahabad High Court in Special Appeal No. 205 of 1963.

B. Sen, S. K. Aiyar and *R. N. Sachthey*, for the appellant.

A. K. Sen, J. P. Goyal and *G. C. Sharma*, for the respondent.

The Judgment of the Court was delivered by

Shah, J. A business of manufacture and sale of tents was commenced in 1940 in the name and style of Messrs Jawahar Tent Factory, Agra, in partnership. There were four partners in the firm—Jawahar Lal, Shiam Lal, Radha Raman and Radha Krishan. Jawahar Lal represented his Hindu undivided family and his share in the profit & loss was -/8/- (eight annas) in a rupee. The share of other partners was -/2/8 (two annas eight pies) each. The firm was registered under s. 26A of the Indian Income-tax Act, 1922, and tax was assessed on the income of the firm in accordance with s. 23 (5)(a) of the Act. The partnership was, according to the Income-tax Officer, dissolved on October 23, 1946.

This appeal relates to the tax liability of Jawahar Lal in respect of the income from the firm for the assessment years 1944-45, 1945-46, 1946-47 and 1947-48. The tax attributable to the share of Jawahar Lal, which it is claimed could not be recovered from him, is sought to be recovered from his erstwhile partner Radha Krishan. The following table sets out the share of the income of Jawahar Lal and the tax liability not satisfied by him in respect of the four years of assessment :

Year of assessment	Share of income of Jawahar Lal from the firm	Tax liability not satisfied
1944-45	47,717	8,623-56
1945-46	53,864	39,416-23
1946-47	35,167	16,[illegible]92-59
1947-48	19,466	15,163-87
		79,296-25

The manner in which the tax liability is determined requires some elucidation. The Hindu undivided family of Jawahar Lal had considerable other income. In accordance with the provisions of s. 25(3) (a) of the Indian Income-tax Act, the share of Jawahar Lal from the income of the partnership was added to the other income of the family, and the family was assessed to tax on the total income. For the purpose of computing "the tax liability not satisfied" as shown in the last column of the statement set out herein-before, the Income-tax Officer determined the average rate of tax on the total income of the Hindu undivided family and then applied that rate to the share of Jawahar Lal from the firm to determine the tax liability attributable to that share. Tax collected from Jawahar Lal was credited proportionately to the

A income under the two heads towards the tax liability so determined, and the tax liability of Jawahar Lal attributable to his share in the income was computed.

The Income-tax Officer served Radha Krishan respondent in this appeal—on October 3, 1962 with demand notices for the tax remaining unpaid by Jawahar Lal. Radha Krishan thereupon
B moved the High Court of Judicature at Allahabad for a writ of *certiorari* quashing the notices of demand and for an order directing the Income-tax Officer to withdraw the notices. Manchanda, J., allowed the petition filed by Radha Krishan and the order passed by Manchanda, J., was confirmed in appeal by a Division Bench of the High Court. With special leave, the Income-tax
C Officer, Agra has appealed to this Court.

Section 23(5) of the Income-tax Act, as it stood at the material time, read as follows :

> "(5) Notwithstanding anything contained in the foregoing sub-sections, when the assessee is a firm and the total income of the firm has been assessed under sub-sec-
D tion (1), sub-section (3), or sub-section (4) as the case may be.—
>
> (a) in the case of a registered firm, the sum payable by the firm itself shall not be determined but the total income of each partner of the firm, including therein his share of its income, profits and gains of the pre-
E vious year, shall be assessed and the sum payable by him on the basis of such assessment shall be determined :
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> Provided . . . . .
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> Provided further . . . . .
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F Provided also . . . . .
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> (b) in the case of an unregistered firm, the Income-tax Officer may instead of determining the sum payable by the firm itself proceed in the manner laid down in clause (a) applicable to a registered firm, if in his opinion, the aggregate amount of the tax including
G super-tax, if any, payable by the partners under such procedure would be greater than the aggregate amount which would be payable by the firm and the partners individually if the firm were assessed as an unregistered firm.

H The machinery for assessment to tax the income of a firm in the relevant years of assessment may be noticed. A firm under the Income-tax Act is a unit of assessment; and the income of the firm is computed as that of the unit irrespective of whether the

firm is registered or unregistered, after the income of the firm is computed if the firm is registered under s. 26A the share of each partner in the income of the firm is determined and is added to his other income and the total income so computed is brought to tax. If the firm is unregistered, the tax payable by the firm is, except when the Income-tax Officer otherwise directs in the interests of revenue, determined as in the case of any other entity, and demand for tax is made on the firm itself. The result is that if the firm is registered tax is collected from the partners individually and there is no levy of tax against the firm. If the firm is unregistered, the tax may, unless other wise directed, be levied against the firm. In either case, the machinery set up by s. 23 (5) is for assessment of tax payable on the income of the firm. The income of the firm is computed, but tax is assessed on that income on the partners or the firm, according as the income is of a firm registered or unregistered. Counsel for the Income-tax Officer contended that even though by s. 23(5) (a) a provision was made for assessment to tax of the total income of each member of a registered firm by adding to his separate income the share of the profits of the firm, it is the firm which is assessed to tax, and if the tax attributable to the share in the income of the firm of a partner cannot be recovered from him, it may be recovered from his other partners.

Counsel for the Income-tax Officer says that this is so because the liability of the partners of a firm in respect of all its obligations including the liability to pay tax is joint and several. Undoubtedly contractual obligations of a firm are enforceable jointly and severally against the partners. But the liability to pay income-tax is statutory: it does not arise out of any contract, and its incidence must be determined by the statute. If the statute which imposes liability has not made it enforceable jointly and severally against the partners, no such implication can arise merely because contractual liabilities of a firm may be jointly and sevarally enforced against the partners.

Counsel also relied upon s. 44 of the Income-tax Act, which, as it stood at the relevant time, read as follows :

> "Where any business, profession or vocation carried on by a firm or association of persons has been discontinued, or where an association of persons is dissolved, every person who was at the time of such discontinuance or dissolution a partner of such firm or a member of such association shall, in respect of the income-profits and gains of the firm or association, be jointly and severally liable to assessment under Chapter IV and for the amount of tax payable and all the provisions of Chapter IV shall, so far as may be, apply to any such assessment."

A Section 44 is enacted with a view to prevent evasion of tax by discontinuance of the business of a firm or dissolution of an association of persons. On discontinuance of the business of a firm or dissolution of the association of persons, it is declared that every person who was, at the time of such discontinuance or dissolution, a partner of such firm or a member of such association B shall, in respect of the income, profits and gains of the firm or association be jointly and severally liable to assessment and for the amount of tax payable.

This Court has in *Commissioner of Income-tax, Madras and Anr.* v. *S. V. Angidi Chettiar*(1) held that the provisions of s. 44 of the Income-tax Act apply both to registered and unregistered C firms. But there is nothing in s. 44 of the Act which supports the contention that for payment of tax assessed against a partner of a registered firm individually under s. 23(5)(a) of the Act. another partner becomes liable jointly and severally with that first partner to pay tax. The entire scheme of taxing the income of a registered firm in the hands of individual partners is D inconsistent with any assumption that for payment of tax assessed against a partner, other partners are liable. The tax assessed against a partner of a registered firm is assessed on his total income inclusive of the share in the firm's income and the rate applicable is determined by the quantum of the total income of the partner. Section 44 contemplates cases of joint and several assessment of income of the business of a firm which is discontiE nued. When such an assessment is made, each member of the firm may be liable to pay jointly and severally tax payable by the firm. But when under the scheme of the Act tax is assessed individually against each partner, and no tax is made payable by the firm, the principle of joint and several liability under s. 44 has no application.

F Counsel for the Commissioner said that this Court had, if not expressly tacitly, accepted the view that the liability of the partners of a firm to pay tax attributable to the share of each partner in the income of the firm is joint and several. Counsel relied upon the clause "determining the tax payable by registered and unregistered firms respectively" in the judgment of this Court in G *Commissioner of Income-tax., Bombay* v. *Amritlal Bhogilal & Company*(2) at p. 136;

> "It is true that the Income-tax Officer is empowered to follow the two methods specified in section 23(5) (a) and (b) *in determining the tax payable by registered and unregistered firms respectively* and making the H demand for the tax so found due; but this does not affect the computation of taxable income",

(1) 44 I.T.R. 739. (2) 34 I.T.R. 130.

and contended that the tax determined to be payable under s. 23(5) is payable by the firm, and hence by all the partners jointly and severally. But in *Amritlal Bhogilal's* case(1) the Court was called upon to determine whether the Commissioner of Income-tax in exercise of his revisional power may cancel registration of the firm granted under s. 26A and direct the Income-tax Officer to make fresh assessment of the firm as an unregistered firm. when an appeal is pending against the order of assessment before the Appellate Assistant Commissioner. In making the observations relied upon, the Court broadly examined the scheme of assessment of registered firms: it was not stated by the court expressly, nor can it be implied, that for tax attributable to the share of a partner in a registered firm, the other partners are liable, notwithstanding separate assessment under s. 23(5) (a).

Reliance was then placed upon the following observations made by this Court in *S. V. Angidi Chettiar's* case(2) at p. 744 :

> "Under section 23(5) of the Indian Income-tax Act, before it was amended in 1956, in the case of a registered firm the tax payable by the firm itself was not required to be determined but the total income of each partner of the firm including therein the share of its income, profits and gains of the previous year was required to be assessed and the sum payable by him on the basis of such assessment was to be determined. But this was merely a method of *collection of tax due from the firm.*"

In *S. V. Angidi Chettiar's* case(2) it was held that the Income-tax Officer has power to make an order under s. 28 imposing penalty on a firm even after dissolution of the firm. There is nothing in the observations relied upon which indicates that under s. 23(5) (a) when the income of a registered firm is computed, and the tax liability is imposed by the machinery provided thereunder, the tax is imposed upon the firm or is recoverable jointly and severally from the partners of the firm.

A recent case was also relied upon : *Shivram Poddar* v. *Income-tax Officer, Central Circle II, Calcutta and Anr.*(3). In that case it was held that the firm, by the discontinuance of its business, does not cease to be liable to pay tax on the income earned by it; nor can a procedure different from the, one prescribed under Ch. IV of the Income-tax Act, 1922 apply for assessment of the income of such a firm. The firm, after it has discontinued its business, whether it is dissolved or not, will be assessed either under s. 25(1) in the year of account in which it discontinues its business, or in the year of assessment. In both

(1) 34 I.T.R. 130. (2) 44 I.T.R. 739.

(3) 51 I.T.R. 823.

A cases the procedure for assessment is under s. 23(3) and (4) supplemented by s. 23(5). The principle of that judgment also has no application to the present case. Reliance was placed upon the observation made at p. 828.

> "On the discontinuance of the business of a firm, however, by section 44 a joint and several liability of all partners arises to pay tax due by the firm."

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But that obviously means that a joint and several liability arises when the income of a firm which has discontinued its business is assessed under s. 44. It does not mean that where the assessment is made under s. 23(5) (a) of a registered firm and the income C of each individual partner is assessed, the partners become jointly and severally liable to pay the aggregate amount of tax attributable to their various shares, in their individual assessments.

The cases relied upon by counsel for the Income Tax Officer do not support the claim made by the Income-tax Officer.

D The appeal fails and is dismissed with costs.

G.C. *Appeal dismissed.*