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case, therefore, does not help the respondent's contention. As observed by the Supreme Court in that very decision a rule of service can certainly provide for automatic confirmation in certain contingencies, and, as I view the service rules governing the appellant, they do provide by making it impossible for the period of probation to be extended beyond three years that if the person concerned does continue to hold the same post and his services are not dispensed with at the end of three years and he is not reverted, then he must be taken to have been confirmed. It is clear that the appellant in fact continued to hold the post for more than two years after the maximum period of probation had expired and he must, therefore, be taken to have so continued in a substantive capacity. Mr. Pannu agrees that on that conclusion, that the appellant was in February, 1963, holding his post substantively, the termination of his services necessarily amounted to a punishment and must be deemed to be 'removal' from service, which of course, was not permissible without a proper enquiry. The conclusion must, therefore, be that the termination of the appellant's services was illegal. I would in the circumstances, allow this appeal and set aside the order terminating the appellant's services, dated the 11th Febuary, 1963, leaving the parties, however, to their own costs.

Pandit, J.

PREM CHAND PANDIT, J.—I agree.

R.S.

CIVIL MISCELLANEOUS

Before Mehar Singh and P. C. Pandit, JJ.

BAWA SATYA PAUL SINGH,—*Petitioner*

versus

INCOME-TAX OFFICER AND OTHERS,—*Respondents*

Civil Writ No. 724—D of 1963

1964

December, 16th.

Income-tax Act (XI of 1922)—S. 41— Receiver appointed of the business of the assessee—Income-tax levied on the assessee—Whether can be recovered from the Receiver only.

Held, that according to sub-section (1) of section 41 of the Indian Income-tax Act, 1922, where a Receiver has been appointed by a Court and he receives the profits on behalf of any person, then the tax shall be levied upon such Receiver and recovered from him in the same manner as it would be leviable upon and recovered from the person on whose behalf such profits were receivable. Sub-section (2), however, lays down that in spite of what has been stated in sub-section (1), the Department would not be precluded from making a direct assessment of the person on whose behalf the Receiver had been appointed or from recovering from him the tax payable in respect of such profits. The language of sub-section (2) is quite clear and gives the Department an option to assess the person on whose behalf the Receiver has been appointed or recover the tax from him, even though under sub-section (1) it could levy the tax upon the Receiver and recover the same from him. In other words, two courses are open to the Department. Under sub-section (1) it can assess the Receiver and recover the tax from him, while under sub-section (2) it can directly assess the person on whose behalf the Receiver has been appointed and realise the tax from him. The Department can also make the recovery from the person on whose behalf the Receiver has been appointed, even though the assessment has been made on the Receiver under sub-section (1). Since it is within the discretion of the Department to proceed either against the assessee or the Receiver, the action of the Department for the levy and collection of the income-tax from the assessee can be struck down only if it is shown that the same was *mala fide* or taken *solely* with the object of harassing the assessee and not realizing the income-tax from him.

Petition under Article 226 of the Constitution of India praying that this petition may be accepted, the impugned order of the respondents may be quashed and the respondents may be restrained and prohibited from enforcing the impugned orders or taking the threatened action or any other action in this connection against the petitioner. Such other or further relief may be granted to the petitioner in this respect as may appear to Your Lordships to be just, fit and proper in the circumstances of the case. All proceedings in pursuance of the impugned orders may be stayed during the pendency of the writ petition.

R. S. NARULA AND K. C. VOHRA, ADVOCATES, for the Petitioner.

HARDYAL *HARDY*, ADVOCATE, for the Respondent.

ORDER

Pandit, J.

PANDIT, J.—This is a petition filed by Bawa Satya Paul Singh, under Article 226 of he Constitution against the

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Income-Tax Officer, New Delhi, respondent No. 1, Commissioner of Income-Tax of Delhi and Rajasthan, Respondent No. 2, and Tax Recovery Officer, Delhi, respondent No. 3, challenging the order of Respondent No. 3 to effect recovery of the arrears of income-tax from him pesonally and not from the Receiver, who had been appointed in respect of his interest in the firm—Bawa Parduman Singh and Sons.

On 21st November, 1955, various disputes between the partners of the firm, Bawa Parduman Singh and Sons, were referred to the arbitration of Dr. Mehar Chand Mahajan, Ex-Chief Justice of the Supreme Court and by his award dated 4th April, 1956, this firm was reconstituted with effect from 1st January, 1956. In this reconstituted firm, the petitioner and his father, Bawa Maharaj Singh, were the only partners and they were allotted the business of arms and ammunition. This partnership was registered with the Income-Tax Authorities under Section 26-A and other relevant provisions of the Indian Income-Tax Act, 1922. In a civil suit filed by one Harbhajan Singh, for dissolution and rendition of accounts of the previous partnership against the petitioner and the other partners a Receiver was appointed on 24th October, 1958, of the business of the parties, which was being carried on in different names at Delhi. Subsequently, in an appeal (F.A.O. 67-B of 1960), filed in the High Court by the petitioner and his father, Bawa Maharaj Singh, the members of the reconstituted firm, the official Receiver was removed by Gosain J., on 16th September, 1960 and in his place Bawa Maharaj Singh himself was appointed as the Receiver and he was required to furnish a Bank guarantee for the payment of Rs. 1,80,000 to the respondents in the above F.A.O. According to the petitioner, the figures supplied to him by the Receiver in a trial balance-sheet for the period ending 21st December, 1959, showed a sum of Rs. 18,983.93 Paise to his credit in the capital account on that day and this did not include the petitioner's share of the profit for the year ending 31st December, 1959. This profit came to Rs. 1,01,393.71 Paise. The gross amount of the petitioner in the hands of the Receiver on 31st December, 1959, was Rs. 1,20,377.64 Paise. As against this, there was a debit balance of Rs. 28,051.87 Paise in the books of the firm against the petitioner on account of the withdrawals made by him. Thus, the net amount of the petitioner, which was available with the Receiver on 31st December, 1959 was

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Rs. 92,325.77 paise. According to the petitioner, during the period 1st January, 1960 to 31st December, 1960, the shop in Delhi remained closed for over eight months, with the result that the firm might have earned some nominal profit. After this, the business of the firm was conducted by the Receiver and profits had been earned in due course, but the petitioner had not drawn any share out of them. According to Bawa Satya Paul Singh, a sum of about Rs. 3 lakhs would be lying to his credit with the Receiver up to the period ending 31st December, 1962. Ever since the appointment of the Receiver, provisional assessments for the various years had been made by the Income-Tax Authorities under the provisions of section 23-B of the Income-Tax Act, 1922, and demands for advance tax were made from the petitioner. A penalty for Rs. 1,200 had also been imposed for the non-payment of the advance tax for the year ending 31st December, 1959. Thereupon, the petitioner submitted a detailed representation to respondent No. 2, praying that the amounts in question had to be paid by the Receiver and that his name be substituted as the representative-assessee in place of the petitioner in the provisional assessments and the demands made after March, 1960. Since no reply was received from respondent No. 2, the petitioner met him personally and he directed the petitioner to see the Income-Tax Officer. The petitioner, accordingly, submitted a representation to respondent No. 1 on 6th February, 1963. He also requested him in August, 1963, that the demand notices be sent to the Receiver. Respondent No. 1, however, *vide* his letter dated 31st August, 1963, informed the petitioner that the notice for the advance tax for the assessment year 1963-64 had already been served upon him and, therefore, the payment be made within time otherwise penalty will be imposed upon him. By another letter of the same date, the petitioner was also informed that the Receiver had been appointed for the firm only and, therefore ,the demands should be cleared up by the petitioner himself within three days of the receipt of that letter. He was also told that in case the amount was not paid within time, action under the Income-tax Act would be taken against him. Thereafter the petitioner received a notice dated 3rd September, 1963 from respondent No. 3 asking him to show cause on 17th September, 1963 as to why warrants of arrest should not be issued against him. In this notice, it was further stated that it was proposed to execute the recovery certificate by means of arrest and imprisonment of the petitioner. This

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led to the filing of the present petition on 16th September, 1963 and the prayer is that the petitioner should not be made personally liable for all the demands created by the Department after March, 1960, in respect of his share in the profits of his business taken over by the Receiver and recovered from him alone.

In the written statement filed by the Income-tax Authorities, it has been stated, *inter alia,* that the appointment of a Receiver by this Court had nothing to do with the liability of the petitioner to pay the tax and that the respondents were not bound in law to treat the Receiver as the representative of the petitioner. It was further said that the petitioner's request could not be entertained, because the provisional assessments under section 23-B of the Income-tax Act, 1922, had already been made, according to the law, before the receipt of the petitioner's representative. It was also stated that section 41 of the Income-tax Act, 1922, was an enabling section and there was nothing to compel the Income-tax Officer to frame an assessment or to make a demand on the Receiver only. The action taken by them was perfectly legal and within their jurisdiction.

The writ petition came up for hearing before Shamsher Bahadur, J., on 14th April, 1964. The question that arose for determination was as to whether in the circumstances of the present case the tax could be recovered from the Receiver alone. The learned Judge, after quoting certain rulings, came to the conclusion that there was conflict of judicial opinion on this point and the matter required consideration by a larger Bench. That is how this case has come before us for decision.

The main question that falls for determination in the present case is whether the Income-tax Authorities were justified in levying the tax upon the petitioner and recovering the same from him, when, admittedly, the business was being run by the Receiver who had been appointed by the Court.

It is common ground that in order to decide this question the provisions of the Income-tax Act (11 of 1922) are to be applied. The relevant portion of section 41, which deals with this matter, is in the following terms:—

"S. 41(1) In the case of income, profits or gains chargeable under this Act which the Courts

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of Wards, the Administrator-General, the Official Trustees or any receiver or manager (including any person whatever his designation who in fact manages property on behalf of another) appointed by or under any order of a Court, or any trustee or trustees appointed under a trust declared by a duly executed instrument in writing, whether testamentary or otherwise, including the trustee or trustees under any *Wakf* deed which is valid under the *Mussalman Wakf* Validating Act, 1913, are entitled to receive on behalf of any person, the tax shall be levied upon and recoverable from such Courts of Wards, Administrator-General, Official Trustee, receiver or manager or trustee, or trustees in the like manner and to the same amount as it would be leviable upon and recoverable from the person on whose behalf such income, profits or gains are receivable, and all the provisions of this Act shall apply accordingly.

* * *

(2) Nothing contained in sub-section (1) shall prevent either the direct assessment of the person on whose behalf income, profits or gains therein referred to are receivable, or the recovery from such person of the tax payable in respect of such income, profits or gains."

According to sub-section (1), where a Receiver has been appointed by a Court and he receives the profits on behalf of any person, then the tax shall be levied upon such Receiver and recovered from him in the same manner as it would be leviable upon and recoverable from the person on whose behalf such profits were receivable. Sub-section (2), however, lays down that in spite of what has been stated in sub-section (1), the Department would not be precluded from making a direct assessment of the person on whose behalf the Receiver had been appointed or from recovering from him the tax payable in respect of such profits. The language of sub-section (2) is quite clear and gives the Department an option to assess the person on whose behalf the Receiver has been appointed or recover

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the tax from him, even though under sub-section (1) it could levy the tax upon the Receiver and recover the same from him. In other words, two courses are open to the Department. Under sub-section (1) it can assess the Receiver and recover the tax from him, while under sub-section (2) it can directly assess the person on whose behalf the Receiver has been appointed and realise the tax from him. The Department can also make the recovery from the person on whose behalf the Receiver has been appointed, even though the assessment has been made on the Receiver under sub-section (1). A number of authorities had been cited by the learned counsel on both the sides, but it is not necessary to refer to all of them, because, in the first place, in my opinion, the language of the Section is not ambiguous in any manner and as already mentioned above gives an option to the Department to choose any of the two courses noted above. Secondly, the observations made by the Supreme Court in the under-mentioned cases also support this view. *In Mahanath Ramswaroop Das* v. *State of Bihar* (1), the Supreme Court, while dealing with the provisions of the Bihar Agricultural Income-Tax Act (32 of 1948), which are almost identical with those of the Income-Tax Act, 1922, held thus:—

* * * * *

> "When property was in the possession of the Receiver, common Manager, or Administrator, the Taxing Authorities could, but were not bound to treat such persons as assessees and recover tax. The Taxing Authorities could always proceed against the owner of the income and assess the tax against him."

Similarly, in *Commissioner of Income-Tax, Bombay* v. *Mani Lal Dhanji* (2), their Lordships of the Supreme Court at page 886 observed that under Section 41 of the Income-tax Act it was open to the Department either to tax the trustees of the trust-deed or to tax those on whose behalf the trustees had received the amount. Thirdly, the High Courts of Bombay and Calcutta have also taken the same view. In *Commissioner of Income-Tax, Ahmedabad. v. Balwantrai Jethalal Vaidya and others* (3), Chagla C.J. and S. T. Desai J., have held that the basic idea

(1) (1961) 42 I.T.R. 770.
(2) (1962) 44 I.T.R. 876.
(3) (1958) 34 I.T.R. 187.

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underlying section 41 of the Income-Tax Act, and which is in conformity with principle, is that the liability of the trustees should be co-extensive with that of the beneficiaries. In *Ganesh Chandra Dhar* v. *Commissioner of Income-Tax, West Bengal and others* (4), P. B. Mukherji, J., remarked that the recovery of tax could be made from the beneficiary under section 41(2) of the Income-tax Act and that the Receiver was only a notional assessee, whereas the beneficiary was the real assessee. Learned counsel for the petitioner had placed reliance on a Bench decision of the Bombay High Court in *Saifudin Alimohamed* v. *Commissioner of Income-tax Bombay State* (5), *Managing Trustees, Nagore Durgah* v. *Commissioner of Income-tax, Madras* (6) *J. N. A. Hobbs* v. *Deputy Commissioner of Agricultural Income-tax, Coorg* (7) *A. Razzak* v. *Commissioner of Income-tax, West Bengal* (8), and *S.C. Mazumdar,* v. *Commissioner of Income-Tax Bihar and Orissa* (9). *In Saifudin Alimohamed's case,* Chagla C. J. and Tendolkar J., held that under Section 10 of the Indian Income-tax Act, 1922, it was the person who carried on the business, who was liable to pay tax and what was emphasised was not the ownership of the business but the fact of the business being carried on by the assessee. On this basis, the learned counsel argued that in the present case the business was admittedly being done by the Receiver and, therefore, it was he who was liable to be taxed and not the petitioner on whose behalf the Receiver had been appointed and who was actually the owner of the business. This decision is of no assistance to the petitioner, because the provisions of section 41 of the Income-tax Act were not applied therein. This authority related to the case of a 'guardian' and there was a specific provision under the Act, namely, Section 40, which dealt with the matter. The learned Judges observed that it would be contrary to all canons of construction to put a case under a section which dealt with general provisions, when the Legislature had provided a specific section to deal with a particular case. In *Managing Trustees, Nagore Durgah's case,* the Division Bench of the Madras High Court held that notwithstanding the residual power given to the Department to tax the beneficiary under

(4) (1959) 35 I.T.R. 8.
(5) (1954) 25 I.T.R. 237.
(6) (1962) 44 I.T.R. 341.
(7) (1963) 49 I.T.R. 811.
(8) (1963) 48 I.T.R. 276.
(9) A.I.R. 1948 Patna 385.

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Section 41(2), the law contemplated that the assessment should be made on the Manager only to the extent of the interest of the beneficiary in the income received by the Manager. This authority has not taken into consideration the two Supreme Court decisions mentioned earlier. Besides, for the reasons given by me above, I am, with great respect to the learned Judges, not inclined to follow this ruling. The Division Bench of the Madras High Court in *J.N.A. Hobb's case* has held that under section 10 of the Mysore Agricultural Income-tax Act, which corresponds to section 41 of the Indian Income-tax Act, 1922, the measure of liability of the executor is co-extensive with that of the several beneficiaries. This decision does not support the contention of the learned counsel for the petitioner but, on the other hand, supports the case of the Department. No assistance can be derived by the petitioner from the decision of the Calcutta High Court in *A. Razzak's case,* because there the effect of the provisions of sub-section (2) of section 41 of the Indian Income-tax Act, 1922, was not considered. *In S. C. Mazumdar's* case, a Division Bench of the Patna High Court held that where a Receiver was carrying on a trade or business on behalf of the estate of which he had been appointed the Receiver by an order of the Civil Court, the assessment should have been made on the Receiver alone. This decision, however, runs counter to the Supreme Court rulings already referred to. In view of the reasons mentioned above, I am of the view that the Income-tax Authorities could, under the law, levy the tax upon the petitioner and recover the same from him, even though a Receiver had been appointed for his business by the Court.

Learned counsel for the petitioner then submitted that if it be held that under Section 41(2) the Department had the option to proceed either against the assessee or the Receiver, in that case this provision was *ultra vires* Articles 14 and 19(1) (f) and (g) of the Constitution, because it conferred unfettered and unguided arbitrary power on the Department in dealing with cases covered by this section.

It is undisputed that the Courts should *prima facie* lean in favour of the constitutionality and should support the legislation if it is possible to do so on any reasonable ground and it was for the party, who attacked the validity of the legislation to place all material before the Court which showed that the option given to the Department

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was arbitrary and unsupportable (see in this connection *Chiranjit Lal Chowdhuri* v. *The Union of India* (10). It is significant to mention that in the present case the vires of the statute was not attacked in the writ petition. It was only the particular action of the Authorities that was being challenged. What was actually stated in ground No. (VI) of para 20 of the writ petition was that the entire impugned proceedings and the orders were violative of the fundamental rights guaranteed to the petitioner under Articles 14, 19 and 31 of the Constitution. It was further mentioned that as the impugned orders were violative of the fundamental rights of the petitioner, no question of any alternative remedy arose. That being so, learned counsel for the petitioner is not entitled to raise this argument before us. Besides, a Division Bench of the Madras High Court in *Abdul Azeez Dawood Marzook* v. *Commissioner of Income-tax, Madras* (11), where the vires of section 42(1) of the Income-Tax Act, 1922, was being challenged as violative of Article 14 and 19(1)(g) of the Constitution, held that the power to tax either the principal or the agent did not offend article 14 of the Constitution. There was little scope for arbitrariness or caprice in the choice, because the Income-tax Authorities would only choose the more effective means of assessment with a view to the ultimate collection of the tax assessed. Moreover, the discretion was not unfettered being controlled by the scheme and policy of the Act. In any case, the principal was not exonerated and it was his liability that was being enforced in the hands of the agent. The power did not offend Article 19(1)(g) either because it did not affect the right of the agent to carry on his business or trade. The restriction imposed was not an unreasonable one, as there were ample safeguards for the agent in the proviso to this section, by resort to which he could protect himself.

It was then contended by the learned counsel that in any case, the impugned action of the Income-tax Authorities in the circumstances of this case was liable to be quashed, because the same was *mala-fide* and an abuse of the powers vested in them. The submission was that the sole purpose behind the assessment against the petitioner was his harassment and not the realisation of the

(10) A.I.R. 1951 S.C. 41.
(11) (1958) 33 I.T.R. 154.

tax dues. This is of course denied by the Department. The case of the petitioner is that ever since the appointment of the Receiver, he had not received his share of the profits and the entire income was with the Receiver, who alone should have been assessed. According to the petitioner, it was the Receiver, who was carrying on the business and the recovery of the Income-tax should also have been made from him alone. On the other hand, according to the Department, it had made inquiries and was satisfied that it would be able to recover the income-tax from the petitioner and under the law, it was not necessary for them to approach the Receiver in the first instance.

I have already held above that under the law it was purely within the discretion of the Department to proceed either against the petitioner or the Receiver. That being so, their action can be struck down only if it is shown that the same was *mala fide* or taken *solely* with the object of harassing the petitioner and not for realizing the income-tax from him. On that there is no convincing proof on the record. On the material before us it is impossible for us to say that responsible officers of the Department are interested in merely harassing the petitioner and not in realizing the tax. The Department says that the Income-tax Authorities feel satisfied that the tax can be recovered from the petitioner. The mere fact that the petitioner alleges to the contrary is hardly a ground to hold that the averment solemnly made by the Income-tax Authorities is false. There is no allegation of any enmity or bias against any Income-tax Authority. On the present record, therefore, it is impossible to conclude and give a firm finding in these proceedings that the impugned action was *mala fide* or that the sole object of the Department in taking the same against the petitioner was to harass him and nothing else. That being so, this contention of the learned counsel also fails.

Lastly, it was submitted by the learned counsel for the petitioner that the imposition of the penalty of Rs. 1,200 without issuing any notice for the non-compliance with the provisional demand of Rs. 50,815.99 Paise, for the assessment year 1960-61 was illegal.

The Department could not point out any document on the record from which it could be shown that the said notice was given to the petitioner. In the absence of such

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a notice it could not be seriously urged by the learned counsel for the Department that the imposition of the penalty was in accordance with law. Such an imposition clearly violated the principles of natural justice. Under these circumstances, the Department cannot recover this amount from the petitioner.

It may be mentioned that the learned counsel for the petitioner also tried to argue that there were errors of law apparent on the record, which vitiated all the proceedings taken by the Income-tax Authorities for the assessment and recovery of the tax from his client. Our attention, however, was not invited to any error of law which had materially affected the assessment and recovery proceedings against the petitioner so as to entitle him to get them quashed in writ proceedings

The result is that the petition partly succeeds and the order regarding the imposition of the penalty of Rs. 1,200 is set aside. The petition with regard to other matters, however, stands dismissed. The parties, in the circumstances of this case, however, are left to bear their own costs.

Mehar Singh, J.

MEHAR SINGH, J.—I agree.

B.R.T.

CIVIL MISCELLANEOUS

Before Inder Dev Dua and Daya Krishan Mahajan, JJ.

M/S PARTAP ROSIN AND TURPENTINE FACTORY,—

Petitioners

versus

THE STATE OF PUNJAB AND ANOTHER,—*Respondents*

Civil Writ No. 1750 of 1963

1964

December, 24th.

Constitution of India (1950)—*Art.* 19—*Reasonable restrictions—Meaning and test of—Part IV—Directive Principles of State Policy—Whether enforceable—Ministers—Duties and functions of—How to be performed—Allegations made against Chief Minister in writ petition—State Government—Whether must file his affidavit to contradict them—Failure to file such affidavit—Effect of.*