

## BASHESHWAR NATH VS. I.T.COMMISSIONER

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### BACKGROUND FACTS:

An act called Taxation on Income (Investigation Commission) Act, which came into force on May 1, 1947. In 1948, the case of m/s Basheshwar Nath (further referred as assessee) was referred to the investigation commission under s.3 of act, and it stated that central government had prima facie reasons for believing that the assessee evaded payment of taxation on income to a substantial extent, therefore case of assessee sent to investigation commission. After hearing final report of commission concluded that amount of Rs.4, 47,915 are due on assessee and finally was settled amount of Rs.3, 50,000 which is paid by assessee as penalty and due tax.

Till 1957 assessee had paid in all a sum of Rs.1, 28,000 towards the penalty.

*Further various pronouncement made by this Hon'ble court made the act ultra virus*, by the virtue of various judicial pronouncements such in case of M.C.T Muthiah & 2 others vs. I.T.commissioner, Madras & others<sup>1</sup> and decision in case of Suraj Mall Mohta & co. vs. A.V. Visvanatha Sastri & others<sup>2</sup>, in which majority of judges held that s.5(1) of act was ultra virus the constitution, as it was discriminatory & violative of the fundamental right guaranteed under a.14 of the constitution by reason of amendment which are made in s.34 of the Indian Income Tax, 1922 and others.

Counsel for petitioner appeared before this Hon'ble court humbly requesting that after decision in Muthiah case<sup>3</sup> the settlement made under S.8A of the act had no force & was not binding him and also pray that attached properties should be released from attachment & the amounts recovered under the terms of settlement refunded to assessee.

### ISSUE FRAMED

- SLP (Special Leave Petition) under A.136 of Indian Constitution, 1950 is maintainable.
- The breach of fundamental right flowing from A.14 can be waived.

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<sup>1</sup> AIR 1956 SC 269

<sup>2</sup> AIR 1954 SC 545

<sup>3</sup> 1956 supra 2

## ANALYSIS OF ISSUE

Under A.136<sup>4</sup> of Indian Constitution deals with discretionary power vest to the SC of India which is the apex court of country to grant special leave to appeal against any judgment or order or decree in any matter or cause passed or made by any court or tribunal in the territory of India. This is granted in case of substantial constitutional question of law is involved or gross injustice has been done.

In the instant case and circumstances question of waiver of fundamental rights had been aroused as fundamental rights are such inalienable rights bestowed upon people living in territory of India by the part III of Indian constitution. This chapter of the constitution of India has very well been described as the Magna Carta of India<sup>5</sup>. The inclusion of a chapter of Fundamental Rights in the constitution of India is in accordance with the trend of modern democratic thought, the idea being to preserve that which is an indispensable condition of a free society<sup>6</sup>. In the historic judgment of *Maneka Gandhi vs. Union of India*<sup>7</sup> speaking about importance of fundamental rights, Bhagwati, J., observed: "these fundamental rights represent the basic values cherished by the people of this country (India) since Vedic times and they are calculated to protect the dignity of the individual and create conditions in which every human being can develop his personality to the full extent. They weave a "pattern of guarantee" on the basic structure of human rights, and impose negative obligations on the state not to encroach on individual liberty in its various dimensions." These rights are important as they possess intrinsic values<sup>8</sup>. The need to have fundamental rights was so very well accepted on all hands that in the constituent assembly, the point was not even considered whether or not to incorporate such rights in the constitution. In fact, the fight all along was against the

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<sup>4</sup> A.136. special leave to appeal by the supreme court – (1) notwithstanding anything in this chapter, the SC may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India. (2) Nothing in clause (1) shall apply to any judgment, determination, sentence or order passed or made by any court or tribunal constituted by or under any law relating to the armed forces.

<sup>5</sup> V.G. Ram Chandran, *Fundamental Rights and Constitutional Remedies*, Vol.1 (1964), p.1

<sup>6</sup> Dr. J.N. Pandey, *Constitutional Law of India*, 51<sup>st</sup> edition, Central Law Agency, p.53

<sup>7</sup> AIR 1978 SC 597 at p.619

<sup>8</sup> *M. Nagaraj vs. Union of India*, AIR 2007 SC 71

restrictions being imposed on them and the effort all along was to have fundamental rights on a broad and pervasive a basis as possible<sup>9</sup>.

In the case of Tirupati Balaji Developers Pvt. Ltd. vs. State of Bihar<sup>10</sup> regarding SLP court observed that A.136 is an “Extraordinary jurisdiction “vested by the constitution in the SC with implicit trust and faith.” Also in the case of Jamshed Hormusji Wadia vs. Board of Trustees, port of Mumbai<sup>11</sup>the court in regard to SLP observed, “the power under A.136 is permitted to be invoked not in a routine fashion but in very exceptional circumstance as when a question of law of general public, importance arises or a decision sought to be impugned before the SC shocks the conscience. This overriding & exceptional power has been vested in the sc to be exercised sparingly & only in furtherance of the cause of justice in the SC in exceptional cases only when special circumstances are shown to exist.

Further the breach of fundamental the doctrine of waiver has no application to the provision of law enshrined in part III of the constitution. It is not open to accused person to waive or give up his constitutional rights and get convicted. Sub- section (4) of S.5 of the investigation act have been declared void, parliament passed the Indian income tax amendment act ,1954 amending S.34 of the Indian income tax act,1922. Paradoxical as it may seem, the result of this amendment was that the persons who originally fell only within the ambit of s 5(1) of the investigation act and formed a distinct class of substantial tax evaders also came within the amended S.34 of income tax act, 1922. The position after the amendment therefore, was that the income tax officers could pick out some of these persons and refer their case under s.5 (1) of the investigation act and thereby subject them to the drastic and harsh procedure of that act, while they could deal with other persons similarly situate under s.34 as amended and apply to them the comparatively more beneficial procedure laid down in the Indian income tax act, 1922.

In the case of Meenakshi mills ltd. Vs. A.V.Visvnatha sastri<sup>12</sup> court held ,that s.34 of the income tax act ,as amended by the Indian income tax amendment act,1954 ,operated on the same field as s.5(1) of the investigation act, and ,therefore ,s.5(1) had become void and unenforceable as the procedure applied to persons dealt with there under became

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<sup>9</sup> For an analysis of discussion on fundamental rights in the constituent assembly; see,GRANVILLE AUSTIN,THE INDIAN CONSTITUTION OF A NATION, 50-113 (1966)

<sup>10</sup> AIR 2004 SC 2351

<sup>11</sup> AIR 2004 SC 1815

<sup>12</sup> AIR 1955 SC 13

discriminatory in character. But this case only further prohibits further proceedings before the commission under the investigation act.

Finally in case of M.CT.Muthiah vs. Commissioner of Income tax<sup>13</sup>; in this case the central government had under s.5 (1) of the investigation act referred the case to the commission. The commission after holding an enquiry recorded its findings and held that an aggregate of sum around ten lakh represented the undisclosed income during the investigation. Meanwhile during investigation is going assessee, in that case filed a petition contending that the provisions of the investigation act were illegal ,ultra virus and unconstitutional.

By the virtue of above authorities S.5 (1) must be declared ultra virus, as it infringe the right of persons inferred upon them by part III of Indian constitution, if we look upon the legislative competence or intention to form such act then also it contravenes the provisions of our constitution as. Sometimes a distinction has been drawn between the lack of legislative competency of a State to make and enact a law on a particular topic covered by any of the Lists in the Seventh Schedule and its incompetency to make a law abridging or abolishing the fundamental rights or in violation of any other provisions of the Constitution. When there is a lack of legislative competence, the law made is void ab initio, non-est and a still born law but Art. 13(2) also say:

*"The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void."*

Such a law is void to the extent of the contravention<sup>14</sup>.

In Keshavan's case<sup>15</sup> Das J., as he then was, in the majority judgment of this Court was interpreting cl. (1) of Art. 13 and while doing so, he said at page 234:-

"In other words, on and after the commencement of the Constitution no existing law will be permitted to stand in the way of the exercise of any of the fundamental rights. Therefore, the voidness of the existing law is limited to the future exercise of the fundamental rights. Art. 13(1) cannot be read as obliterating the entire operation of the inconsistent laws, or to wipe them out altogether from the statute book, for to do so will be to give them retrospective

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<sup>13</sup> AIR 1956 SC 269

<sup>14</sup> Excel wear etc vs .UOI,AIR 1979 SC 25

<sup>15</sup> Keshavan Madhava Menon vs. .State of Bombay, AIR 1951 SC 128

effect which, we have said, they do not possess. Such laws exist for all past transactions and for enforcing all rights and liabilities accrued before the date of the Constitution.”

Court in *Bhikaji Narain Dhakras & Ors. v. The State of Madhya Pradesh and another*<sup>16</sup> wherein Das, Acting C.J., has said at pages 599-600:

"All laws, existing or future, which are inconsistent with the provisions of Part III of our Constitution, are, by the express provision of Article 13, rendered void "to the extent of such inconsistency". Such laws were not dead for all purposes. They existed for the purposes of pre- Constitution rights and liabilities and they remained operative, even after the Constitution, as against non citizens.

In this case further there is major contention that whether fundamental rights could be waived flowing under A.14<sup>17</sup>. Fundamental rights possess intrinsic values, its purpose is to withdraw certain subjects from the area of political controversy to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied and protected by the courts. The object behind the inclusion of the chapter of fundamental rights in Indian constitution is to established “a government of law and not of man”

It confine our contentions on A.14<sup>18</sup>, it is first of the five articles grouped together under the heading “right to equality”. The underlying object of this article is to secure to all persons citizens or non-citizens, equality of status and of opportunity referred to in the glorious preamble of our constitution. Coming to the language of article this article, in form, an admonition addressed to the state and does not directly purport to any right on any person as some of other articles, e.g. art-19, do. That is, however, the indirect, though necessary and inevitable, result of the mandate. The command of the Article is directed to the State and the reality of the obligation thus imposed on the State is the measure of the fundamental right which every person within the territory of India is to enjoy.

The next thing to notice is that the benefit of this Article is not limited to citizens, but is available to any person within the territory of India. In the third place it is to be observed that, by virtue of Art. 12 "the State" which is by Art. 14, forbidden to discriminate between persons includes the Government and Parliament of India and the Government and the legislature of each of the States and all local or other authorities within the territory of India

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<sup>16</sup> AIR 1955 SC 81

<sup>17</sup> A.14-**Equality before law**-The state shall not deny to any person equality before the law or equal protection of the laws within the territory of India.

<sup>18</sup> Ibid



or under the control of the Government of India. Article 14, therefore, is an injunction to both the legislative as well as the executive organs of the State and the other subordinate authorities. As regards the legislative organ of the State, the fundamental right is further consolidated and protected by the provisions of Art. 13. Cl. (1) of that Article provides that all laws in force in the territories of India immediately before the commencement of the Constitution, in so far as they are inconsistent with the provisions of Part III shall, to the extent of the inconsistency be void. Likewise cl. (2) of this Article prohibits the State from making any law which takes away or abridges the rights conferred by the same Part and follows it up by saying that any law made in contravention of this clause shall, to the extent of the contravention, be void.

It seems to us absolutely clear, on the language of Art. 14 that it is a command issued by the constitution the State as a matter of public policy with a view to implement its object of ensuring the equality of status and opportunity which every welfare State, such as India, is by her Constitution expected to do and no person can, by any act or conduct, relieve the State of the solemn obligation imposed on it by the Constitution.

In the case of *Behram vs. State of Maharashtra*<sup>19</sup>, court held that the fundamental rights were not put in the constitution merely for the individual benefit. These rights were there as a matter of public policy and, therefore, the doctrine of waiver could have no application in case of fundamental rights.

In *Olga Tellis*<sup>20</sup> the court asserted that, “the high purpose which the Constitution seeks to achieve by conferment of fundamental rights is not only to benefit individuals but to secure the larger interests of the community”. No individual can barter away the freedoms conferred upon him by the Constitution. A concession made by him in a proceeding, whether under a mistake of law or otherwise, that he does not possess or will not enforce any particular fundamental right, cannot create an estoppels against him in that or any subsequent proceeding. Such a concession, if enforced, would defeat the purpose of the Constitution. Were the argument of estoppels valid, an all-powerful state could easily tempt an individual to forego his precious personal freedoms on promise of transitory, immediate benefits.

Ours is a nascent democracy. And situated as we are, socially, economically, educationally and politically, it is the sacred duty of the Supreme Court to safeguard the fundamental

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<sup>19</sup> AIR 1955 SC 123

<sup>20</sup> *Olga Tellis vs. Bombay municipal Corporations*, AIR 1986 SC 180

rights which have been for the first time enacted in Part III of our Constitution. The doctrine of non-waiver developed by SC of India denotes manifestation of its role of protector of fundamental rights.

## **CONCLUSION**

The special leave petition is maintainable it relied on the provisions of order xxii of the code of civil procedure, 1908, as A.136 vests discretionary power on SC to allowed the petition on the substantial question of law involved and gross injustice has been done. In the above stated facts the question over fundamental rights enshrined by part III of Indian constitution has been in raised, which is matter of utmost importance as these rights are imbibed in constitution to guarantee certain natural , inalienable rights to all persons in territory of India ,difference can be made on certain rights guaranteed to citizens only. But still fundamental rights are of prime importance and courts must take into account any infringement done to these rights. Further fundamental rights are inalienable rights bestowed upon citizens and certain others to non-citizens too. Firstly S.5 of investigation is ultra virus to A.14 as it classifies people on unreasonable basis forming distinct class of tax evaders; infringing their right to equality as in nascent democracy we are here to protect our rights. SC works as a bulwark to protect our rights bestowed upon us by certain natural and basic rights and other by various legal principles. Thus with different contention presented above fundamental rights of an individual can't be waived.

## **END NOTES**

- An analysis of discussion on fundamental rights in the constituent assembly; see, Granville Austin, *The Indian Constitution of a Nation*, 50-113 (1966)
- *Bhram vs. State of Maharashtra* AIR 1955 SC 123
- Dr.J.N.Pandey, *Constitutional Law of India*,51<sup>st</sup> edition ,Central Law Agency,p.53
- *Excel wear etc vs. .UOI*,AIR 1979 SC 25
- JAIN M.P., '*Indian Constitutional Law*', 7<sup>th</sup> Edition 2010, LexisNexis, ButterworthsWadhwa
- *Jamshed Hormusji Wadia vs. Board of Trustees, port of Mumbai* AIR 2004 SC 1815
- *Keshavan Madhava Menon vs. .State of Bombay*, AIR 1951 SC 128
- *M.CT. Muthiah vs. Commissioner of Income tax* AIR 1956 SC 269

- M.Nagraj vs. Union of India, AIR 2007 SC 71
- Maneka Gandhi vs. Union of India AIR 1978 SC 597 at p.619
- Meenakshi mills ltd. Vs. A.V. Visvnatha sastri AIR 1955 SC 13
- Narain Dhakras & Ors. v. The State of Madhya Pradesh and anothers AIR 1955 SC 81
  
- Olga Tellis vs. Bombay municipal Corporations, AIR 1986 SC 180
- Suraj Mall Mohta & co. vs. A.V. Visvanatha Sastri & others AIR 1954 SC 545
- Tirupati Balaji Developers Pvt. Ltd. vs. State of Bihar AIR 2004 SC 2351
  
- V.G.Ram Chandran, Fundamental Rights and Constitutiona Remedies,Vol.1(1964),p.1

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