Smt Maya Rani Punj

Vs

Commissioner of Income Tax, Delhi

Civil Appeal No. 1943 of 1974

(V. D. Tulzapurkar, Sabyasachi Mukharji, Ranganath Misra JJ)

11.12.1985

JUDGMENT

SABYASACHI MUKHARJI, J. -

1. The assessee is in appeal by special leave challenging the decision of the Delhi High Court reported in 92 ITR 394.

2. The year of assessment is 1961-62. The return was due by September 28, 1961, but the same was neither filed within that time, nor was any extension asked for. The assessee filed the return on May 3, 1962 - beyond more than seven months of the due date. With effect from April 1, 1962, the Income Tax of 1961 ('1961 Act' for short) had come into force. The Income Tax Officer took proceedings under Section 271(1)(a) of the 1961 Act and imposed a penalty of Rs 4060 for failure to furnish the return within the time on a finding that the assessee had not been prevented by any reasonable cause for not complying with the statutory obligation to make the return. The assessee challenged the imposition of penalty by preferring an appeal to the Appellate Assistant Commissioner who refused to interfere and dismissed the appeal. On further appeal, the Appellate Tribunal held that penalty was leviable under the 1961 Act but the amount of penalty had to be quantified according to the provisions of Section 28 of the Income Tax Act, 1922 ('1922 Act' for short). Applying the provisions of the 1922 Act, the Tribunal reduced the penalty to Rs 400. At the instance of the Revenue the following question was referred to the High Court under Section 256(1) of the 1961 Act :

> Whether, on the facts and in the circumstances of the case, the Tribunal was in law competent to reduce the penalty levied under Section 271(1)(a) to a figure lower than the sum equal to 2% of the tax for every month during which the default continued but not exceeding in the aggregate 50% of the tax ?

The High Court answered the reference in favour of the Revenue and against the assessee.

> 3. Though the quantum of penalty is small, the question of law is of substantial importance, and covers an aspect which often arises for determination before the tax authorities and the High Courts.
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> 4. Provisions of three sections, one of the 1922 Act and two of the 1961 Act, are relevant for the decision of the point at issue. Section 28 of the 1922 Act, as far as relevant, provided :

Penalty for concealment of income or improper distribution of profits. - (1) If the Income Tax Officer, the Appellate Assistant Commissioner or the Appellate Tribunal, in the course of any proceedings under this Act, is satisfied that any person -

> (a) has without reasonable cause failed to furnish the return of his total income which he was required to furnish by notice given under sub-section (1) or sub-section (2) of Section 22 or Section 34 or has without reasonable cause failed to furnish it within the time allowed and in the manner required by such notice, or

#(b) * * *(c) * * *##

he or it may direct that such person shall pay by way of penalty, in the case referred to in clause (a), in addition to the amount of the income tax and super tax, if any, payable by him, a sum not exceeding one and a half time that amount.....

5. The two sections relevant to the point of the 1961 Act are Section 271 and 297. Section 271 is the corresponding provision of Section 28. Sub-section (1)(a) thereof is the relevant provision. It provides :

If the Income Tax Officer..... is satisfied that any person -

(a) has without reasonable cause failed to furnish the return of total income which he was required to furnish under sub-section (1) of Section 139 or by notice given under sub-section (2) of Section 139 or Section 148 or has without reasonable cause failed to furnish it within the time allowed and in the manner required by sub-section (1) of Section 139 or by such notice, as the case may be, or

#(b) * * *(c) * * *##

he may direct that such person shall pay by way of penalty, -

#(i)(a) * * *##

> (b) in any other case, in addition to the amount of the tax, if any, payable by him, a sum equal to 2% of the assessed tax for every month during which the default continued.

Section 297(1) repealed the 1922 Act. Sub-section (2), as far as relevant, provided :

Notwithstanding the repeal of the Indian Income Tax Act, 1922 (hereinafter referred to as the repealed Act), -

#(a) to (e) * * *##

> (f) any proceeding for the imposition of a penalty in respect of any assessment completed before the first day of April 1962, may be initiated and any such penalty may be imposed as if this Act had not been passed;
>
> (g) any proceeding for the imposition of a penalty in respect of any assessment for the year ending on March 31, 1962, or any earlier year, which is completed on or after the first day of April 1962, may be initiated and any such penalty may be

imposed under this Act;.....

6. It is sufficient to take note of the position that under the 1922 Act liability to make a return was contingent upon service of notice under Section 22 while under the 1961 Act every person having a taxable income has under Section 139 the liability to make a return within the time provided by the Act. On the facts of the case before us, clause (f) of Section 297(2) of the 1961 Act is not attracted because the return was filed on May 3, 1962, and assessment was made subsequent to April 1, 1962.

7. The Income Tax Officer found that there was default for a little more than seven months. He imposed penalty at the rate of 2% as provided in Section 271(1)(a) of the 1961 Act and raised a demand of Rs 4060. That demand had been upheld in appeal. The Tribunal did not refer to the provisions of Section 271(1)(a) while reducing the penalty to Rs 400 but the reduction was directed on the basis that the assessee was ill and had been absent from headquarters on that account. Before the High Court the Revenue had taken the stand that there was statutory prescription in the matter of imposition of penalty and the Act having provided that the penalty shall be a sum equal to 2% of the assessed tax for every month during which the default continued, a sum equal to the prescribed rate had to be imposed and could not be reduced. The High Court accepted the stand of the Revenue and found support for it conclusion by relying upon Section 297(2)(j) of the 1961 Act and holding that Section 271(1) of that Act was applicable to the levy of penalty for defaults committed under the 1922 Act. According to the High Court the words "such penalty" occurring in clause (g) of Section 297(2) of the 1961 Act related to penalty which was referred to in the earlier part of that clause, namely, penalty imposable under Section 271 of the 1961 Act and had no reference to penalty under Section 28 of the 1922 Act. It was of the further view that the word 'may' under Section 297(1) of the 1961 Act vested in the Income Tax Officer discretion either to levy or not to levy a penalty but if he did decide to levy one, he had no option but to levy a penalty at the prescribed rate. In the instant case, the Income Tax Officer was, therefore, obliged to levy penalty at the rate of 2% per month subject to a maximum of 50% of the demanded tax. Exercising the same powers as the Income Tax Officer did, the Appellate Tribunal had no jurisdiction to reduce the penalty to a sum lesser than the prescribed rate. Support for the conclusion of the High Court was drawn from a Constitution Bench decision of this Court in Jain Brothers v. Union of India ((1970) 77 ITR 107 : (1969) 3 SCC 311 : AIR 1970 SC 778).

8. In Jain Brothers case ((1970) 77 ITR 107 : (1969) 3 SCC 311 : AIR 1970 SC 778) this Court mainly examined and decided about the vires of Section 297(1)(g) as also the justification of fixing the commencement of the Act of 1961 with effect from April 1, 1962. Challenge was on the basis of Article 14 of the Constitution. This Court took the view that it was for the legislature to fix the date when a particular statute would come into force and with the repealing of the 1922 Act Parliament was fully competent and it was within it legislative jurisdiction to fix April 1, 1962, as the date of commencement of the 1961 Act. The validity of Section 297(2) and in particular clauses (f) an (g) thereof was upheld. The Court held that penalty proceedings were not necessarily a continuation of the assessment proceedings. It was well settled that in fiscal enactments the legislature has a larger discretion in the matter of classification so long as there was no departure from the rule that persons included in a class are not singled out for special treatment. It was not possible to say that while applying the penalty provisions contained in the Act of 1961 to cases of persons whose assessments were not completed after April 1, 1962, any class has been singled out for special treatment. It was obvious that for the imposition of penalty it was not the assessment year or the date of the filing of the return that was important but it was the satisfaction of the income tax authorities that a default had been committed by the assessee which attracted the provisions relating to penalty. Whatever be the stage at which the satisfaction was reached, the scheme of Sections 274(1) and 275 of the Act of

1961 was that the order imposing penalty must be made after the completion of the assessment. The crucial date, therefore, for the purpose of penalty is the date of such completion, and the satisfaction of the authority that proceedings for levy of penalty be initiated.

9. Under Section 28 of the 1922 Act the upper limit of penalty only was provided and there was no prescription of any particular rate as found in Section 271(1)(a) of 1961 Act. That penalty contemplated under the respective sections of the two Acts is quasi-criminal in character is not disputed. Mr Dholakia for the appellant canvassed before us that in Jain Brothers case ((1970) 77 ITR 107 : (1969) 3 SCC 311 : AIR 1970 SC 778) the challenge raised by the assessee was not examined with reference to the provisions of Article 20(1) of the Constitution. Under sub-article (1) of Article 20 no person is to be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. According to counsel, when there was default in furnishing the return within September 28, 1961, the breach had occurred and the assessee had exposed himself to be visited with penalty. That was a time when the Act of 1922 was in force. Therefore, for levying penalty on the assessee resort should have been made to the provisions of Section 28 of the 1922 Act and not to Section 271(1)(a) of 1961 Act. If the 1922 Act applied, in the absence of a prescription of any particular rate or the minimum, it was open to the Tribunal to reduce the penalty in the manner it has done and no objection could be raised to the reduction of the quantum of penalty. In Jain Brothers case ((1970) 77 ITR 107 : (1969) 3 SCC 311 : AIR 1970 SC 778) the conclusions of a three Judge Bench in ITO v. M. Damodar Bhat ((1969) 71 ITR 806 : (1969) 2 SCR 29 : AIR 1969 SC 408), were quoted with approval. In Damodar Bhat case this Court had said :

In other words, the procedure of the new Act will apply to the cases contemplated by Section 297(2)(j) of the new Act mutatis mutandis.

In Jain Brothers case ((1970) 77 ITR 107 : (1969) 3 SCC 311 : AIR 1970 SC 778) the Court held that "similarly the provisions of Section 271 of the Act of 1961 will apply mutatis mutandis to proceedings relating to penalty initiated in accordance with Section 297(2)(g) of that Act".

10. Learned counsel for the appellant has taken the stand that the observations in Damodar Bhat case ((1969) 71 ITR 806 : (1969) 2 SCR 29 : AIR 1969 SC 408) which were approved by the five Judge Bench in Jain Brothers case ((1970) 77 ITR 107 : (1969) 3 SCC 311 : AIR 1970 SC 778) related only to the procedural part of it and this Court did not decide the question of quantum.

11. The contention of Mr Dholakia that in providing a prescribed rate of penalty for imposition under Section 271(1)(a) of the 1961 Act there has been breach of Article 20(1) of the Constitution cannot be accepted. A five Judge Bench of this Court in K. Satwant Singh v. State of Punjab ((1960) 2 SCR 89 : AIR 1960 SC 266 : 1960 Cri LJ 410), examined a similar submission at great length keeping Article 20 of the Constitution in view. In the matter before the Constitution Bench this question arose for consideration in view of the fact that no minimum sentence of fine had been provided under Section 420 of the Indian Penal Code which was the law in force at the time of the occurrence but the provisions of Ordinance No. 29 of 1943 made imposition of a minimum fine compulsory. Imam, J. who spoke for the Constitution Bench. at page 113 of the report stated :

In the present case even if it be assumed that Section 10 of the Ordinance was an ex post facto law in that in the matter of penalty a minimum sentence of fine was directed to be imposed by a court whereas at the time that the appellant committed the offence, Section 420 contained no such provision, what is prohibited under Article 20 of the Constitution is the imposition of a penalty

greater than that which might have been inflicted under the law in force at the time of the commission of the offence. The total sentence of fine - 'ordinary' and 'compulsory' - in the present case cannot be said to be greater than that which might have been imposed upon the appellant under the law in force at the time of the commission of the offence, because the fine which could have been imposed upon him under Section 420 was unlimited. A law which provides for a minimum sentence of fine on conviction cannot be read as one which imposes a greater penalty than that which might have been inflicted under the law at the time of the commission of the offence where for such an offence there was no limit as to the extent of fine which might be imposed.

12. Mr Dholakia candidly accepts that his submission is contrary to the ratio of the decision. It is conceded that under Section 28 of the 1922 Act in the facts to the case a fine of more than Rs 4060 (being within the limit of 1/2 times of the tax amount) could have been levied. While conceding to that extent, Mr Dholokia submits that the decision of the Constitution Bench of this Court in Satwant Singh case ((1960) 2 SCR 89 : AIR 1960 SC 266 : 1960 Cri LJ 410) requires reconsideration as it has not taken into account the ratio of an important decision of the United States Supreme Court in the case of Elbert B. Lindsay v. State of Washington ((1937) 81 L Ed 1182). We are bound by the decision of the Constitution Bench. It has held the field for a quarter of a century without challenge and non-consideration of an American decision which apparently was not then cited before this Court does not at all justify the submission at the Bar for a reconsideration of the decision of this Court in Satwant Singh case ((1960) 2 SCR 89 : AIR 1960 SC 266 : 1960 Cri LJ 410). On the ratio of Jain Brothers case ((1970) 77 ITR 107 : (1969) 3 SCC 311 : AIR 1970 SC 778), the following conclusions are reached :

> (a) Though the default occurred in September, 1961 the date relevant for the purpose of initiating proceedings for imposition of penalty is when, following the assessment made, the Income Tax Officer decided to initiate penalty proceedings;
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> (b) The proper provision to apply for dealing with the situation relating to penalty is as provided in Section 271(1)(a) of the 1961 Act.

13. The question that remains for consideration now is as to whether the default of non-filing of the return within the time stipulated by law is not a continuing offence. This aspect is relevant in the matter of imposition of penalty and its quantification. In the decision of his Court in CWT v. Suresh Seth ((1981) 129 ITR 328 : (1981) 3 SCR 419 : (1981) 2 SCC 790 : 1981 SCC (Tax) 168), the default related to non-filing of the return under Section 18(1)(a) of the Wealth Tax Act. The law relating to penalty under that Act was amended in 1964 and again in 1969. These amendments were not retrospective. With reference to the application of these amendments the question as to whether the default was a single one or a continuing one fell for consideration. The amended Wealth Tax Act provided for imposition of penalty with reference to every month during which the default continued. This Court took the view that such a provision indicated the legislative intention that a multiplier had to be adopted for determining the quantum of penalty and did not have the effect of making the default a continuing one. The default having already occurred prior to the enforcement of the amendments, the amending provisions had no application. Dealing with the point this Court observed : (SCC p. 798, para 11, SCC (Tax) pp. 175-6, para 11)

A liability in law ordinarily arises out of an act of commission or an act of omission. When a person does an act which law prohibits him from doing it and attaches a penalty for doing it, he is stated to have committed an act of commission which amounts to a wrong in the eye of law. Similarly, when a person omits to do an act which is required by law to be performed by him and attaches a penalty

for such omission, he is said to have committed an act of omission which is also a wrong in the eye of law. Ordinarily a wrongful act or failure to perform an act required by law to be done becomes a completed act of commission or omission, as the case may be, as soon as the wrongful act is committed in the former case and when the time prescribed by law to perform an act expires in the latter case and the liability arising therefrom gets fastened as soon as the act of commission or of omission is completed. The extent of that liability is ordinarily measured according to the law in force at the time of such completion. In the case of acts amounting to crimes the punishment to be imposed cannot be enhanced at all under our Constitution by any subsequent legislation by reason of Article 20(1) of the Constitution which declares that no person shall be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

There can be no dispute to what has been stated above. In Suresh Seth case ((1981) 129 ITR 328 : (1981) 3 SCR 419 : (1981) 2 SCC 790 : 1981 SCC (Tax) 168) this Court proceeded to say : (SCC pp. 798-9, para 11, SCC (Tax) p. 176, para 11)

In other cases, however, even though the liability may be enhanced it can only be done by a subsequent law (of course subject to the Constitution) which either by express words or by necessary implication provides for such enhancement. In the instant case the contention is that the wrong or the default in question has been altered into a continuing wrong or default giving rise to a liability de die in diem, that is, from day to day. The distinctive nature of a continuing wrong is that the law that is violated makes the wrong doer continuously liable for penalty. A wrong or default which is complete but whose effect may continue to be felt even after its completion is, however, not a continuing wrong or default. It is reasonable to take the view that the court should not be eager to hold that an act or omission is a continuing wrong or default unless there are words in the statute concerned which make out that such was the intention of the Legislature. In the instant case whenever the question of levying penalty arises what has to be first considered is whether the assessee has failed without reasonable cause to file the return as required by law and if it is held that he has failed to do so then penalty has to be levied in accordance with the measure provided in the Act. When the default is the filing of a delayed return the penalty may be correlated to the time lag between the last day for filing it without penalty and the day on which it is filed and the quantum of tax or wealth involved in the case for purposes of determining the quantum of penalty but the default however is only one which takes place on the expiry of the last day for filing the return without penalty and not a continuing one. The default in question does not, however, give rise to a fresh cause of action every day.

14. This conclusion has been seriously disputed by learned counsel for the Revenue and according to him the amended Wealth Tax Act and Section 271(1)(a) of the 1961 Act provides for a continuing default. A bench of this Court in State of Bihar v. Deokaran Nenshi ((1973) 1 SCR 1004 : (1972) 2 SCC 890 : 1973 SCC (Cri) 114), while examining the provisions of Section 66 of the Mines Act, very appropriately drew the distinction between continuing offence and offences which take place when an act or omission is committed once and for all. Shelat, J. speaking for the court stated : (SCC p. 892, para 5, SCC (Cri) p. 116, para 5)

A continuing offence is one which is susceptible of continuance and is distinguishable from the one which is committed once and for all. It is one of those offences which arises out of a failure to obey or comply with a rule or its requirement and which involves a penalty, the liability for which continues until the rule or its requirement is obeyed or complied with. On every occasion that such disobedience or non-compliance occurs and recurs, there is the offence committed. The distinction

between the two kinds of offences is between an act or omission which constitutes an offence once and for all and an act or omission which continues and therefore, constitutes a fresh offence every time or occasion on which it continues. In the case of a continuing offence, there is thus the ingredient of continuance of the offence which is absent in the case of an offence which takes place when an act or omission is committed once and for all.

Under Regulation 3 read with Section 66 of the Mines Act failure to file the annual return by the appropriate date becomes an offence. There was no scope for applying the rule of de die in diem.

15. Venkataramiah, J. in Suresh Seth case((1981) 129 ITR 328 : (1981) 3 SCR 419 : (1981) 2 SCC 790 : 1981 SCC (Tax) 168)

quoted Lord Lindley in Hole v. Chard Union ((1894) 1 Ch D 293), where the following observation had been made : (at SCC p. 799, para 11, SCC (Tax) p. 176, para 11)

What is a continuing cause of action ? Speaking accurately, there is no such thing; but what is called a continuing cause of action is a cause of action which arises from the repetition of acts or omissions of the same kind as that for which the action was brought.

16. Some decisions of different High Courts were also quoted with approval by Venkataramiah, J. in support of the conclusion that the default had been committed on the last day allowed to file the return and there was no case of a continuing default. We are inclined to agree with counsel for the Revenue that the conclusion reached in Suresh Seth case ((1981) 129 ITR 328 : (1981) 3 SCR 419 : (1981) 2 SCC 790 : 1981 SCC (Tax) 168) is contrary to law. Jain Brothers case ((1970) 77 ITR 107 : (1969) 3 SCC 311 : AIR 1970 SC 778) was not referred to at all in Suresh Seth case ((1970) 77 ITR 107 : (1969) 3 SCC 311 : AIR 1970 SC 778). On the facts found in Suresh Seth case ((1970) 77 ITR 107 : (1969) 3 SCC 311 : AIR 1970 SC 778) where the returns for the assessment years 1964-65 and 1965-66 had been filed on March 18, 1971, and for which assessment was made on March 22, 1971, the ratio of Jain Brother case ((1970) 77 ITR 107 : (1969) 3 SCC 311 : AIR 1970 SC 778) would have been fully applicable. Though Jain Brothers case ((1970) 77 ITR 107 : (1969) 3 SCC 311 : AIR 1970 SC 778) was with reference to the Income Tax Act, 1961, the provisions of Section 18(1)(a) of the Wealth Tax Act, as amended, brought in a similar provision and a sum equal to 2% of the tax for every month during which the default continued with an optimum of 50% of the tax due become payable. As rightly pointed out in Jain Brothers case ((1970) 77 ITR 107 : (1969) 3 SCC 311 : AIR 1970 SC 778), the question of imposition of penalty would arise only after assessment of tax is made and, therefore, in Suresh Seth case ((1981) 129 ITR 328 : (1981) 3 SCR 419 : (1981) 2 SCC 790 : 1981 SCC (Tax) 168) on the analogy of the ratio accepted by this Court in Jain Brothers case ((1970) 77 ITR 107 : (1969) 3 SCC 311 : AIR 1970 SC 778), the amended provisions would become applicable.

17. In Words and Phrases, Permanent Edition, under the head 'Continuing Offence', instances have been given which indicate that as long as the default continues the offence is deemed to repeat and, therefore, it is taken as a continuing offence. As has been appropriately indicated in Corpus Juris Secundum, Vol. 85, p. 1027, accrual of penalty depends upon the terms of the statute imposing it and in view of the language used in Section 27(1)(a) of the 1961 Act, the position is beyond dispute that the legislature intended to deem the non-filing of the return to be a continuing default - the wrong for which penalty is to be visited, commences from the date of default and continues month after month until compliance is made and the default comes to an end. The rule of de die in diem is applicable not on daily but on monthly basis.

18. In State v. A.H. Bhiwandiwalla (AIR 1955 Bom 161 : 56 Bom LR 1172 : ILR 1955 Bom 192 : 1955 Cri LJ 666), (a decision referred to in Suresh Seth case ((1981) 129 ITR 328 : (1981) 3 SCR 419 : (1981) 2 SCC 790 : 1981 SCC (Tax) 168)), Gajendragadkar, J. (as he then was), after quoting the observations of Beaumount, C.J. in an earlier Full Bench decision of that Court observed :

Even so, this expression has acquired a well-recognised meaning in criminal law. If an act committed by an accused person constitutes an offence and if that act continues from day to day, then from day to day a fresh offence is committed by the accused so long as the act continues. Normally and in the ordinary course an offence is committed only once. But we may have offences which can be committed from day to day and it is offences falling in this latter category that are described as continuing offences.

19. The imposition of penalty not confined to the first default but with reference to the continued default is obviously on the footing that non-compliance with the obligation of making a return is an infraction as long as the default continued. Without sanction of law no penalty is imposable with reference to the defaulting conduct. The position that penalty is imposable not only for the first default but as long as the default continues and such penalty is to be calculated at a prescribed rate on monthly basis is indicative of the legislative intention in unmistakable terms that as long as the assessee does not comply with the requirements of law he continues to be guilty of the infraction and exposes himself to the penalty provided by law.

20. There are several statutory provisions where such default is stipulated to be visited with daily penalty. For instance, see Ajit Kumar Sarkar v. Assistant Registrar of Companies (1979 Tax Law Reports 2001), where the Calcutta High Court dealing with the provisions of Sections 159 and 162 of the Companies Act of 1956, held the liability to be a continuous one : United Savings and Finance Co. Pvt. Ltd. v. Deputy Chief Officer, Reserve Bank of India (1980 Cri LJ 607 (Cal HC), where referring to Section 58-B(2) of the Reserve Bank of India Act it was held that refusal to comply with the terms of the said section created an offence and continued to be an offence so long as such failure or refusal persisted; Oriental Bank of Commerce v. Delhi Development Authority (1982 Cri LJ 2230 (Del HC), where referring to the provisions of the Delhi Development Act of 1957, the Court held that the offence was a continuous one. In G.D. Bhattar v. State (AIR 1957 Cal 483 : 61 CWN 660 : 1957 Cri LJ 834), it was pointed out that a continuing offence or a continuing wrong is after all a continuing breach of the duty which itself is continuing. If a duty continues from day to day, the non-performance of that duty from day to day is a continuing wrong. We are of the view that the legislative scheme under Section 271(1)(a) of the 1961 Act in making provision for a penalty coterminus with the default to be raised provides for a situation of continuing wrong.

21. In the instant case assessment was made on June 30, 1964, and proceedings for imposition of penalty were directed to be initiated that day. Provisions of Section 271(1)(a) of the 1961 Act were fully applicable and the demand of penalty was thus justified being within the limits of law. In our opinion the High Court had taken the right view and the appeal has, therefore, to be dismissed. In the facts of the case we direct parties to bear their own costs.

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