

KERALA HIGH COURT

Income Tax Officer

Vs

C.V. George

W.A. No. 142 of 1975

(P. Govindan Nair C.J., P. Narayana Pillai and P. Subramonian Poti, JJ.)

27.02.1976

JUDGMENT

P. Govindan Nair C.J.

1. The question is whether the partners of a registered firm are liable to be proceeded against for recovery of tax assessed on the firm as such under the Income Tax Act, 1961 (for short "the Act"), pursuant to a certificate issued to the Tax Recovery Officer as envisaged by Section 222 of the Act. The learned judge before whom this question arose answered it in the negative, allowed the writ application and issued a direction not to enforce exhibits P-1 and P-3 communications sent by the Tax Recovery Officer.

2. In exhibit P-1 addressed to the partners it was stated that "a sum of Rs. 70,763 is outstanding as arrears towards Income Tax, penalty, interest, etc., from the firm, M/s. Mutual Benefit Corporation, Calicut, of which you are a partner...." The three partners who are respondents in this writ appeal protested by exhibit P-2 and contended that the arrears of Income Tax due from the firm, M/s. Mutual Benefit Corporation, cannot be recovered from the partners. The reply to exhibit P-2 is in exhibit P-3 and it was stated therein:

".....As per the provisions of the Partnership Act, the partners are jointly and severally liable to the dues of the firm. This position in law is not in any way affected by the Income Tax Act, 1961, and, therefore, your contention that the arrears on account of Income Tax dues of the firm can only be recovered from the firm is not acceptable....."

3. The argument before us on behalf of the revenue also proceeded on the basis of the proposition stated in exhibit P-3. Counsel contended that Section 2(23) of the Act incorporated the meanings attributable to the expressions "partnership", "firm" and "partner" stated in Section 4 of the Indian Partnership Act for the purpose of the Act. So it was submitted that Section 25 of

the Partnership Act which we shall extract immediately must be taken to be a part of the Act.

"25. Every partner is liable, jointly with all the other partners and also severally, for all acts of the firm done while he is a partner."

4. Counsel contended that the assessment order on the firm passed in accordance with the provisions of Section 182(1) of the Act, when that order is read with Section 25 of the Indian Partnership Act, imposed a liability on the partners of the firm. If this submission can be accepted, this appeal has to be allowed. But we find it difficult to accept this submission.

5. The question arose before the Supreme Court whether the partners of a firm, which has been as such assessed to Income Tax under the Act, can also be said to be liable under the Act for the tax assessed on the firm. The answer to the question was that the liability of the partners arose under Section 25 of the Indian Partnership Act and such liability was not a liability which arose under the Act by virtue of the assessment order. We shall extract the relevant passage in the decision in *Sahu Rajeshwar Nath v. Income-tax Officer, C-Ward, Meerut*¹,

"But the argument was stressed that the appellant was 'other person liable to pay such tax' within the meaning of the language of Section 29 of the Act. In our opinion, there is no warrant or justification for this argument. The phrase 'other person liable to pay' in Section 29 should be construed as 'other person liable to pay under the Income Tax Act' and the liability cannot, therefore, be construed with reference to the Partnership Act or any other statute."

6. Section 29 of the Indian Income Tax Act, 1922, which has been referred to in the passage, was in these terms:

"When any tax, penalty or interest is due in consequence of any order passed under or in pursuance of this Act, the Income Tax Officer shall serve upon the assessee or other person liable to pay such tax, penalty or interest a notice of demand in the prescribed form specifying the sum so payable."

7. The corresponding provision in the Act is Section 156 which also we shall extract:

"156. Notice of demand. When any tax, interest, penalty, fine or any other sum is payable in consequence of any order passed under this Act, the Income Tax Officer shall serve upon the assessee a notice of demand in the prescribed form specifying the sum so payable."

We must also refer to the definition of the term "assessee" under the Act as well as the Indian Income Tax Act, 1922.

"2. Definitions.--In this Act, unless the context otherwise requires,

(7) 'assessee' means a person by whom any tax or any other sum of money is payable under this Act, and includes-

(a) every person in respect of whom any proceeding under this Act has been taken for the assessment of his income or of the income of any other person in respect of which he is assessable, or of the loss sustained by him or by such other person, or of the amount of refund due to him or to such other person;

(b) every person who is deemed to be an assessee under any provision of this

¹(1969) 72 ITR 617 (SC)

Act;

(c) every person who is deemed to be an assessee in default under any provision of this Act."

"2. In this Act, unless there is anything repugnant in the subject or context:--

(2) 'assessee' means a person by whom Income Tax or any other sum of money is payable under this Act, and includes every person in respect of whom any proceeding under this Act has been taken for the assessment of his income or of the loss sustained by him or of the amount of refund due to him."

8. It is clear from the definitions that only a person who is liable under the Act is an assessee as defined in the Act. An order of assessment on the firm as such, which is considered a separate entity for the purpose of the Act, does not by itself impose any liability on the partners of the firm. This has been ruled by the Supreme Court in the decision referred to.

9. The question whether the tax imposed on a partner of a firm under Section 23(5)(a) of the Indian Income Tax Act, 1922, could be recovered from another partner of the firm arose for consideration in the decision in *Income Tax Officer v. Radha Krishan*², Section 23(5) of the Indian Income Tax Act, 1922, which was considered in the case as it stood at the relevant time ran thus:

"(3) 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-section (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 previous year, shall be assessed and the sum payable by him on the basis of such assessment shall be determined:.....

(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) as applicable to a registered firm, if, in his opinion, the aggregate amount of the tax including 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."

10. The firm consisted of four partners A, B, C and D. The firm had been registered under Section 26A of the Indian Income Tax Act, 1922. A represented his Hindu undivided family in the partnership and his share was 8 annas. In assessing A under Section 23(5)(a) for the year the income of A from the firm was added to the other income of the Hindu undivided family and assessments were made on the total income. The tax liability attributable to the share of A in the income of the firm for the years in question was not satisfied. A demand for such tax was, therefore, made on D, a partner of the firm. D challenged the procedure by moving the High Court under article 226 of the Constitution. The High Court allowed the petition and on further appeal to the Supreme Court by counsel for the revenue, the Supreme Court

²(1967) 66 ITR 590 (SC)

held that the tax liability attributable to A's share of income of the firm could not be recovered from D pursuant to the assessment already made on A. The following passage from the judgment is apposite:

"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 severally enforced against the partners."

The provisions of Section 25 of the Partnership Act cannot be imported into the Income Tax Act, 1961, unless there is any provision to that effect in the Income Tax Act or at least there was such a necessary implication arising from the provisions thereof. We are unable to discern any such provision in the Income Tax Act.

11. The reasoning in the judgment of the Supreme Court must apply on all fours to the case before us; the liability of the partner to pay the tax imposed on the firm is sought to be made out by counsel on behalf of the revenue on the basis of the provision in Section 25 of the Indian Partnership Act.

12. Under the provisions of the Act there can be assessments made either on a firm as such or on the partners of the firm in given circumstances. When there has been only an assessment on the firm as in the case before us the firm alone is considered as an assessee for the purpose of the Act and it is to that firm that notice has to be issued under Section 156 of the Act and if the notice has not been complied with, it is that firm that can be treated as a defaulting assessee which can be proceeded against as envisaged by Section 222 of the Act. This section commences by stating "when an assessee is in default...." The question is whether the partners of a firm can be said to be assessee when the firm as such alone has been assessed. Counsel for the revenue contended

that by virtue of Section 25 of the Indian Partnership Act the partners of a firm assessed as such must also be treated as assesseees. We do not think that it is possible to accept the contention in the light of the provisions of the Act, which envisage separate assessments being made on the firm as such and on the partners separately.

13. With respect we are unable to agree with the view taken by the Allahabad High Court in *Sahu Rajeshwar Nath v. Income Tax Officer*³, that "when a notice of demand is issued by the Income Tax Officer in the name of the firm, it is a demand upon the partners of the firm who are liable to meet it in the same manner as a demand made in respect of any other liability of the firm". Nor are we with respect able to agree that a firm is treated as an entity distinct from its partners only for the purpose of assessment and that those proceedings ended with the issue of notice under Section 29 of the Indian Income Tax Act, 1922, and thereafter the liability of the firm as such can be treated as the liability of the partners by applying the general principles of law. The assessee in the case of a partnership which has been assessed as such is the firm.

³(1964) 54 ITR 755

When tax is demanded from that firm and if it is not paid the assessee in default is the firm and not its individual partners according to the scheme of the Act. The partners will become liable under the Act only if there are separate assessments on the partners. Any liability for Income Tax imposed on a firm as such under the Act cannot be treated as the liability of the individual partners of the firm arising under the Act by importing the general principles of partnership law as the scheme of the Act visualises proceedings being taken against the firm or the partners only if a liability is imposed under the provisions of the Act against the firm or the partners thereof. This is the view that has been taken by the Supreme Court in the decisions that we have already referred to.

14. The passage quoted from Simon's Income Tax Law in the judgment in *Sahu Rajeshwar Nath v. Income Tax Officer*⁴, is based on the decision in *Stevens v. Britten*⁵, The facts of the case were the following: The plaintiff and the defendant in the suit were formerly partners carrying on a business in the name of a firm. By a deed of dissolution dated 26th February, 1951, the partnership was dissolved with effect from December 10, 1950, and the plaintiff, who retired from the partnership, assigned his interest in the business to the defendant. It was provided by Clause 4 of the deed of dissolution that:

"The continuing partner (the defendant) hereby covenants with the retiring partner (the plaintiff) that he will duly pay and satisfy all debts and liabilities of the said partnership and will at all times hereafter keep the retiring partner indemnified against the said debts and liabilities...' An assessment of schedule. D tax for the year 1950/51 was made in the name of the firm and the plaintiff was required to pay & 37 9s. 6d., i.e., half of the assessment. On Mar. 13, 1954 the plaintiff paid this sum to the collector of taxes and obtained a receipt for the payment."

It was thereafter that the plaintiff sued to recover the sum from the defendant under Clause 4(a) of the deed. The defendant denied liability. The court held that the tax assessed in the name of the firm was a partnership debt or liability within the meaning of Clause 4(a) of the deed of dissolution, and the plaintiff was entitled to recover the amount claimed from the defendant. It has to be noted that the liability that was sought to be enforced by the retired partner against the other stemmed mainly from the terms of the deed of dissolution; that the question arose between a retired partner and his erstwhile partner, and that the question was whether under the general law of partnership the tax assessed on the firm is a debt or liability of the firm and further whether one partner who had discharged that liability could recover from the other partner in terms of the agreement of dissolution. The liability of a firm under the general law and its application as we have seen cannot be applied for the purpose of the Income Tax Act to enable the partners being proceeded against under the Income Tax Act for the liability imposed on the firm as such. The decision is no authority for the proposition that the liability imposed on a firm under the Income Tax Act by an assessment order against the firm also imposed a liability under the same Act on the partners. Only if a liability has been imposed under the provisions of the Income Tax

⁴(1964) 54 ITR 755

⁵(1954) 3 All ER 385

Act on the partners can the partners be proceeded against under the provisions of the Act.

15. A certificate issued for collection of tax from the firm cannot be utilized for the purpose of taking coercive steps against the partner of the firm.

16. The Indian Income Tax Act, 1922, contained a provision specially incorporating Rule 50 of Order XXI of the Civil Procedure Code. It was in the light of that specific provision that the Supreme Court in the decision in *Income Tax Officer, Agra v. Radha Krishan*⁶, already referred to, upheld the proceedings taken against the partners of the firm. Such a provision is significantly absent in the Act. This has been noticed in the judgment under appeal and the absence of such a provision makes all the difference. It is, therefore, not possible for steps being taken against the partners of a firm for collection of tax imposed on the firm as such.

17. We dismiss this appeal but direct the parties to bear their costs.

Dismissed.

⁶(1967) 66 ITR 590