

PATNA HIGH COURT

Kamdar Brothers of Jharia

Vs

Commissioners of Income Tax

Misc. J.C. No. 278 of 1953

(Ramaswami and Choudhary, JJ.)

27.09.1954

ORDER

Choudhary, JJ.

1. In this case the assessee is a Hindu undivided family called Kamdar Brothers of Jharia.
2. The assessment year is 1948-49, and the corresponding accounting year is 2003 Sambat. The assessment was made on the assessee on 26-10-1948, but this was revised on 30-11-1949, and, according to the revised assessment a sum of Rs.15321 and odd was demanded from the assessee as tax by the Income-tax authorities. The assessee preferred an appeal against the assessment to the Income-tax Commissioner. Pending the hearing of the appeal the assessee made payments of the tax from 28-12-1949, up to 20-3-1950.
3. The total amount of payment made by the assessee was Rs.13000. On 10-8-1950, the Appellate Assistant Commissioner dismissed the appeal. But the assessee took an appeal against the order of the Appellate Assistant Commissioner to the Income-tax Appellate Tribunal. While this appeal was pending, the Income-tax Officer imposed a penalty of Rs.3500 upon the assessee under Section 46(1), Income-tax Act, for failure to pay the entire amount of assessment for 1948-49. Against this order of penalty the assessee brought an appeal to the Appellate Assistant Commissioner.
4. The appeal was presented on 5-2-1951, but it was not admitted by the Appellate Assistant Commissioner on that date. It appears that on 2-5-1951, the appeal against the original assessment was heard by the Income-tax Appellate Tribunal and the appeal of the assessee was allowed in part and assessment of tax was reduced to a sum of Rs.9,057 and odd.
5. The appeal against the order under Section 46(1) was heard by the Appellate Assistant

Commissioner on 24-5-1952. On that date the Appellate Assistant Commissioner took the view that the appeal was incompetent and should be struck off as the assessee had not paid the full amount of tax, namely the amount of Rs.15,321 at the time of presentation of the appeal. The Appellate Assistant Commissioner considered that under the proviso to Section 30(1) the assessee was bound to pay the full amount of tax on 5-2-1951, on which date the appeal was presented against the order under Section 46(1).

6. The Appellate Assistant Commissioner conceded that if the crucial date was 24-4-1952, the amount of tax payable by the assessee should have been deemed to have been fully paid. For the admitted position was that the amount of tax reduced by the Income-tax Appellate Tribunal was Rs.9,057 and odd, but the assessee had paid a sum of Rs.13,000, between 28-12-1949, and 20-3-1950. The assessee preferred an appeal to the Income-tax Appellate Tribunal from the order of the Appellate Assistant Commissioner as regards the penalty under Section 46(1). The appeal was dismissed by the Tribunal and the order of the Appellate Assistant Commissioner was confirmed.

7. In these circumstances the Income-tax Appellate Tribunal has submitted the following question of law for the opinion of the High Court:

"Whether, in the circumstances of the case, the appeal preferred on 5-2-51 by the assessee against the penalty imposed under Section 46(1) of the Act was competent?"

8. On behalf of the assessee Mr. Dutt put forward the argument that the appeal preferred before the Appellate Assistant Commissioner against the order under Section 46(1) was competent since, the amount of tax had been fully paid on 24-4-1952.

9. The argument put forward by learned counsel was that the crucial date for paying the amount of tax was not the date of presentation of the appeal, but the date of admission. In the present case, the appeal was presented by the assessee before the Appellate Assistant Commissioner on 5-2-1951, but the appeal was actually, taken up on 24-4-1952, for deciding the preliminary question whether the appeal was competent. The contention was that the amount of tax had been fully paid by the assessee before 24-4-1952, and, therefore, the Appellate Assistant Commissioner was wrong in law in holding that the appeal was not competent on that date. In our opinion, the argument put forward by Mr. Dutt is correct. The question really turns upon the construction of the first proviso to Section 30(1), Income-tax Act, which is in the following terms:

"Provided that no appeal shall lie against an order under sub-section (1) of Section 46 unless the tax has been paid."

10. The proviso does not state that "no appeal shall be presented against an order under sub-

section (1) of Section 46 unless the tax has been paid." There is a distinction between the presentation of an appeal and the admission of an appeal, and this distinction has been expressly recognized by the Legislature in the language of Section 30 of the Act. Section 30(2) states:

"The appeal shall ordinarily be presented within thirty days of the payment of the tax deducted under sub-section (3A), (3B) or (3C) of Section 18 or of receipt of the notice of demand relating to the assessment or penalty objected to."

11. If the Legislature contemplated that no appeal shall be presented against an order under sub-section (1) of Section 46 unless the tax has been paid, there appears to be no reason why the Legislature, did not use apt language to that effect. We, therefore, see no justification for the argument advanced by Mr. Bahadur that the first proviso of Section 30(1) should be interpreted to mean that an appeal shall not be presented against an order under sub-section (1) of Section 46 unless the tax has been paid previously.

12. Our view is also supported by the definition of the word 'lie', in the Shorter Oxford English Dictionary, Vol.1, page 1137. The definition states:

"Lie - (Chiefly in law) of an action, charge, claim, etc., to be admissible or sustainable, e.g., there doth lie an appeal to the Bishop prideaux."

The same view is borne out by authorities. In - '*Mt. Durga Chowdhari v. Jewahir Singh*', the question at issue was the proper interpretation to be given to Section 100, Civil Procedure Code, which states that

"Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any court subordinate to a High Court, on any of the following grounds, namely;"

It has been held in that case that the section should be interpreted to mean that the High Court has no jurisdiction to entertain a second appeal except on the grounds specified in the section itself. Similarly in - '*O'Shea v. O'Shea and Parnell*', the English Court of appeal was considering the proper interpretation to be placed on Section 47 of the Judicature Act, 1873, which was in the following terms:

"No appeal shall lie from any judgment of the said High Court in any criminal cause or matter, save for some error of law apparent upon the record, as to which no question shall have been reserved for the consideration of the said Judges under the said Act of the 11th and 12th years of Her Majesty's reign."

It was held in the case that the court of appeal had no jurisdiction to hear an application by a party to a civil action for an attachment against a person not a party to the action, for contempt of court was a "criminal case or matter" within the meaning of Section 47 of the Judicature Act, and no appeal from an order made upon such an application can be heard by the court of appeal. These authorities support to some extent the view that we take as to interpretation of the first proviso of Section 30(1) of the Indian Income-tax Act.

13. In the course of his argument Mr. Bahadur referred to form I prescribed by R.21 of the Rules framed by the Central Board of Revenue under Section 59 of the Income-tax Act. Paragraph 3 of this form states:

"The tax due in respect of the assessment for the assessment year has already been paid."

14. Mr. Bahadur argued that Section 30 must be interpreted with reference to the context of this form prescribed by the Central Board of Revenue. In our opinion, there is no merit in this argument. Paragraph 3 of Form I is not a provision of a mandatory character and the Appellate Assistant Commissioner cannot dismiss the appeal merely because paragraph 3 of the form has not been complied with by the assessee. The contents of the form of appeal prescribed by R.21 have, therefore, no bearing on the interpretation of the first proviso of Section 30, Income-tax Act.

15. For the reasons already given, we hold that in the circumstances of the case the appeal preferred by the assessee against the penalty imposed under Section 46(1) of the Act was competent on 24-4-1952, and the Appellate Assistant Commissioner was wrong in law in holding that the appeal was not competent on that date. The question referred to the High Court must, accordingly, be answered in favour of the assessee and against the Income-tax Department.

16. The Income-tax Department to pay the cost of this reference. Hearing fee Rs.250.
Order accordingly.

Cases Referred.

¹17 Ind App 122 (PC)

²(1890) LR 15 PD 59