

(1974) 12 AP CK 0009

In the Andhra Pradesh High Court

Case No : Income-tax Case No. 29 of 1974

Additional Commissioner of Income Tax

APPELLANT

Vs

Narayanadas Ramkishan

RESPONDENT

Date of Decision : 18-12-1974

Acts Referred:

Income Tax Act, 1961 — Section 139(4), 271(1)

Citation : (1975) 100 ITR 18

Hon'ble Judges : Obul Reddi, C.J.;Punnayya, J

Bench : Division Bench

Advocate : P. Rama Rao, for the Appellant; Y.V. Anjaneyulu and P.V. Raghavendra Rao, for the Respondent

Judgement

Obul Reddi, C.J.—This petition is filed u/s 256(2) of the Income Tax Act, 1961, by the Additional Commissioner of Income Tax seeking direction to the Income Tax Appellate Tribunal to state a case and refer for the opinion of this court, the questions formulated in the petition. The questions formulated for reference are the following:

"(1) Whether, on the facts and in the circumstances of the case, there was any material or basis before the Appellate Tribunal to hold that the penal provisions of the Act u/s 271(1)(a) were not attracted?

(2) Whether, on the facts and in the circumstances of the case, the Appellate Tribunal is justified in holding that by the levy of interest u/s 139 of the Income Tax Act, 1961, the Income Tax Officer must be deemed to have granted time up to the date of filing the return of income ?

(3) Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was justified in ignoring the provisions of Section 139(4)(a) of the Act under which the return was filed by the assessee ?

(4) Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was justified in cancelling the penalty levied u/s 271(1)(a)?"

2. The facts necessary for determination of the questions sought to be referred to this court may be stated: The assessee, M/s. Narayanadas Ramkishan, is an unregistered firm. For the assessment year 1966-67, it had to file the return of its income u/s 139(1) of the Income Tax Act, 1961 (hereinafter referred to as "the Act"), on or before 30th June, 1966; but it filed the return only on 16th March, 1970, showing an income of Rs. 12,664. The Income Tax Officer, for the late filing of the return, issued a notice to the assessee to show cause why penalty should not be levied. On the ground that the assessee had not given any reasons, which prevented it from filing the return in time, the Income Tax Officer came to the conclusion that it had no reasonable cause for not filing the return in time and, in that view, levied a penalty of Rs. 724, u/s 271(1)(a) of the Act. The Appellate Assistant Commissioner, on appeal, confirmed the order of the Income Tax Officer, with the result that the assessee" went up in further appeal to the Income Tax Appellate Tribunal, The Income Tax Appellate Tribunal, on the facts presented before it, came to the conclusion that under the orders issued by the Central Board of Direct Taxes u/s 119(2)(a) of the Act, no proceedings for imposition of penalty could be initiated u/s 271, if the assessee had, prior to the issue of notice u/s 139(2), furnished a return of its income before January 1, 1973, and if the total income as declared by the assessee in the return and the total income as assessed did not exceed Rs. 15,000 and that since the assessee"s case fell within the exemption given, Section 271(1)(a) is not attracted. The Tribunal also expressed the view that, although the order of the Central Board of Direct Taxes came Into force on September 1, 1971, there was no reason why the benefit of that order should not be extended to a person who had filed the return prior to 1971. It also held that "we do not find material let in by the revenue to show that the assessee wilfully defaulted, more specially, when it is seen that the return was filed voluntarily without issue of notice u/s 139(2)." The Tribunal, in that view, set aside the orders of the authorities below imposing penalty upon the assessee. As the Tribunal refused to make a reference at the instance of the Commissioner, the Commissioner has filed this petition.

3. Mr. P. Rama Rao, the learned counsel for the revenue, strenuously contended that the Tribunal fell into a grave error in holding that it is for the revenue to show that the assessee wilfully defaulted, more so when the return was filed voluntarily by the assessee before any notice was issued u/s 139(2). It is also his case that it is for the assessee to show that there was sufficient Cause for it in not filing the return within the time prescribed and that no question of mens rea is involved in a case arising u/s 271(1)(a) of the Act, and, therefore, the Tribunal should be directed to refer the questions formulated by the Commissioner for the opinion of this court.

4. Mr. Anjaneyulu, the learned counsel for the assessee, relying upon the decision of the Supreme Court in Hindustan Steel Ltd. Vs. State of Orissa, and other decisions of the Madras, Mysore, Kerala and Orissa High Courts, contended that the liability to pay penalty does not arise merely upon not filing the return in time, unless it is shown that the assessee had acted deliberately in defiance of

law or was guilty of conduct contumacious or dishonest or acted in conscious disregard of its obligation. It is also contended by him that the fact that the Income Tax Officer is empowered under the statute to impose penalty is not by itself sufficient to invoke the penal provision if it is found that the default is of a technical nature or is a venial breach of the provisions of the Act so long as the assessee had acted bona fide in not submitting the return in time.

5. So, what has to be considered is whether it is necessary that the revenue should establish mens rea or guilty mind of the assessee before it can invoke the penal provisions and levy penalty on the assessee. Mens rea means a guilty mind, a guilty or wrongful purpose; a criminal intent. It presupposes guilty knowledge and wilfulness. The contention of Mr. Rama Rao is that a reading of Section 271(1)(a) would show that the provision does not speak of the existence of mens rea in an assessee and that the failure of an assessee to comply with the requirements of Section 139(1) would automatically invite the penal provision. We may, therefore, notice Section 271(1)(a), which reads :

"271. (1) If the Income Tax Officer or the Appellate Assistant Commissioner, 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 total income which he was required to furnish u/s (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..."

6. The learned counsel for the revenue relied upon the word " without reasonable cause" to contend that it is for the assessee to show that there was reasonable cause for his failure to furnish the return as required under Sub-section (1) of Section 139 and that if he fails to show reasonable cause he will be liable for payment of penalty. Mr. Rama Rao invited our attention to Clause (c) of Sub-section (1) of Section 271 which says "has concealed the particulars of his income or furnished inaccurate particulars of such income" and contended that the absence of the words "without reasonable cause " in Clause (c) would show that it was the intention of the legislature that, unless reasonable cause is shown by the assessee, he will be liable for the penal consequences. We are unable to agree with Mr. Rama Rao that because the words " without reasonable cause" do not appear in Clause (c), the object of the legislature in regard to the imposition of penalties under each of the clauses of Section 271(1) was different. The scope and ambit of Section 271 is this; it lays down the conditions under which the Income Tax Officer or the Appellate Assistant Commissioner may exercise the power of imposition of penalties. Firstly, it must be in the course of the proceedings under the Act, and, secondly, the Income Tax Officer or the Appellate Assistant Commissioner must be satisfied. The satisfaction contemplated by the legislature is subject to the limitations or restrictions imposed upon them under Clauses (a) and (b). It is not open to the authorities referred to in Sub-section (1) of Section 271 to arbitrarily direct an assessee to

pay a certain amount by way of penalty. On the material placed before the Income Tax Officer or the Appellate Assistant Commissioner he should reasonably concluded that the assessee had failed to show any reasonable cause for not furnishing the return as provided therein. If in Clause (c) the legislature as advisedly not used the words " without reasonable cause", it is for the reason that there cannot be any question of any reasonable concealment of particulars. It is for that reason that the words " without reasonable cause " are not there in Clause (c). Whether it is a case falling under Clause (a), Clause (b) or Clause (c), the primary requirement is that the Income Tax Officer or the Appellate Assistant Commissioner must be satisfied that the assessee has failed to furnish the return without reasonable cause. In other words, the authorities are to apply their mind to the explanation offered by an assessee, irrespective of the fact whether his case falls under Clause (a), Clause (b) or Clause (c).

7. Mr. Rama Rao next sought to invite our attention to Order 9, Rule 13, Civil Procedure Code, to contend that under that provision, the burden is upon the defendant to satisfy the court that he was prevented by sufficient cause from appearing when the suit was called on for hearing and, therefore, there is no reason why the principle that is applied in the case of applications made under Order 9, Rule 13, Civil Procedure Code, for setting aside ex parte decrees should not be applied to cases falling u/s 271(1) of the Act. It should be remembered that the object and scheme of each Act is different. Order 9, Rule 13, Civil Procedure Code, is not a penal provision. That provision enables a party who, by reason of his absence, suffers an ex parte decree, to show sufficient cause to the court for setting aside the ex parte decree passed against him. That provision is introduced for the benefit of any person who suffers an ex parte decree and not for imposing any penalty or inflicting any punishment upon him.

8. The learned counsel for the revenue next invited our attention to the decisions of the Supreme Court to which we shall presently refer to show that the question of mens rea is irrelevant and does not arise and the provisions of Section 271(1) are absolute. *Indo-China Steam Navigation Co. Ltd. Vs. Jasjit Singh*, Additional Collector of Customs and Others, as a case under the Sea Customs Act, 1878. Chief Justice Gajendragadkar explained the scope of Section 52-A of that Act which imposed an absolute prohibition on the entry of vessels which showed that there had been any construction, adaptation, alteration or fitting made in them for the purpose of concealing goods. The intention of the legislature, as pointed out by the learned Chief Justice, in providing for such absolute prohibition was to put an end to illegal smuggling which has the effect of disturbing very rudely the national economy of the country. The prohibition referred to in Section 52-A did not concern the owner of the vessel or the master, but concerned the vessel itself and the section provided that a vessel is prohibited from entering the limits of any port in India or the Indian customs waters or remaining there. Therefore, the burden of showing that the alterations were made to serve any operational or functional purpose in the ship was put on the owner of the vessel or the master of the ship. Having regard to the object of enacting that provision, the Supreme

Court held that mens rea need not be proved.

9. To the same effect is the view expressed by Hidayatullah J. (as he then was) in *State of Gujarat Vs. Kansara Manilal Bhikhalal*, . That was a case of an offence u/s 63 of the Factories Act. Having regard to the language of the provisions of that Act, the learned judge said :

"This shows that compliance with the peremptory provisions of the Act is essential and unless the occupier or the manager brings the real offender to book he must bear the responsibility. Such a provision largely excludes the operation of Section 117 in respect of persons guilty of a breach of the provisions of the Act. It is not necessary that mens rea must always be established as has been said in some of the cases above referred to. The responsibility exists without a guilty mind. An adequate safeguard, however, exists in Section 101 analysed above and the occupier and manager can save themselves if they prove; that they are not the real offenders but who, in fact, is."

10. In *State of Maharashtra Vs. Hans George*, Rajagopala Ayyangar J. who spoke for the majority, after referring to the judgment of Wright J. in *Sherras v. De Rutzen* [1895] 1 QB 918 and that of the Privy Council in *Srinivas Mall v. Emperor* AIR 1947 PC 135 explained that " mens rea in the sense of actual knowledge that act done is contrary to law is not an essential ingredient of the offence u/s 8(1) read with Section 23(A) of the Foreign Exchange Regulation Act, 1947. Unless the statute, either clearly or by necessary implication, rules out mens rea as a constituent part of a crime, an accused should not be found guilty of an offence against the criminal law unless he has got a guilty mind. Absolute liability is not to be lightly presumed but has to be clearly established ". The learned judges there, were dealing with the contravention of the provisions of the Foreign Exchange Regulation Act, 1947. Section 8(1) of that Act lays an absolute embargo upon persons, who, without the special or general permission of the Reserve Bank and after satisfying the conditions, if any, prescribed by the bank, bring or send into India any gold, etc. There was an absolute prohibition in bringing gold into India or sending it outside India. Therefore, on the language of Section 8(1) read with Section 24(1), the learned judges, per majority, held that there was no scope for the invocation of the rule that, besides the mere act of voluntarily bringing gold into India, any further mental condition is postulated as necessary to constitute an offence of the contravention referred to in Section 23(1A). That view was expressed for the reason that the Act was designed to safeguarding and conserving foreign exchange which is essential to the economic life of developing country and the provisions have, therefore, to be stringent and so framed as to prevent unauthorised and unregulated transaction which might upset the scheme underlying the controls. The penal provisions, therefore, were aimed at eliminating smuggling which is a concomitant of controls over the free movement of goods or currencies. Therefore, in view of the fact that the scheme and object of that Act is different and the section itself provides ingredients which constitute an offence, the learned judges held that no mens rea in an

accused person need be established.

11. Subba Rao J. (as he then was) speaking for the majority (Shah J., dissenting) in *Nathulal Vs. State of Madhya Pradesh*, considered the question whether mens rea is an essential ingredient of a criminal offence. The learned judge, relying upon the decision of the Privy Council in *Srinivas Mall v. Emperor* and two earlier decisions of the court in *Ravula Haripradasa Rao Vs. The State*, and *Sarjoo Prasad Vs. The State of Uttar Pradesh*, observed :

" Mens rea is an essential ingredient of. a criminal offence. A statute may exclude the element of mens rea; it is, however, a sound rule of construction which is adopted in England and also accepted in India, to construe a provision which creates an offence in conformity with the common law rather than against it except where the statute expressly or by necessary implication excludes mens rea. On the question whether the element of guilty mind is excluded from the ingredients of an offence the mere fact that the object of the statute is to promote welfare activities or to eradicate a grave social evil is not by itself decisive. Only where it is absolutely clear that the implementation of the object of the statute would otherwise be defeated that mens rea may, by necessary implication, be excluded from a statute. The nature of the mens rea that would be implied in a statute creating an offence depends on the object of the Act and the provisions thereof."

12. We are not inclined to agree that Section 271(1) excludes mens rea by necessary implication. Once it is held by us that mens rea is an essential ingredient for imposing penalty it follows that the onus is upon the department to show the element of guilty mind in the assessee. How this onus has to be established has been stated by Subba Rao J. (as he then was) in *Kundan Lal Rallaram v. Custodian, Evacuee Property* AIR 1961 SC 1316. That was, of course, a case u/s 118 of the Negotiable Instruments Act. But what has been held by the learned judge there, implies to all cases where the burden is laid upon a particular party or the Government. In the words of the learned judge:

"The phrase "burden of proof" has two meanings--one, the burden of proof as a matter of law and pleading and the other, the burden of establishing a case; the former is fixed as a question of law on the basis of the pleadings and is unchanged during the entire trial, whereas the latter is not constant but shifts as soon as a party adduces sufficient evidence to raise a presumption in his favour. The evidence required to shift the burden need not necessarily be direct evidence, i.e., oral or documentary evidence or admissions made by opposite party ; it may comprise circumstantial evidence or presumptions of law or fact."

13. The penalty proceedings are in the nature of criminal or quasi-criminal proceedings. When and under what circumstances penalties could be imposed has been stated by Shah, Actg. C.J., in *Hindustan Steel Ltd. v. State of Orissa*. It may be relevant to say that there is no decision subsequent to this decision which has departed from the view expressed by the learned Acting Chief Justice,

and the binding nature of the decision is, therefore, not in doubt. That was a case where the assessee-company had not registered itself as a dealer. Section 12(5) of the Orissa Sales Tax Act, with which the Supreme Court was concerned, provided that:

" If upon information which has come into his possession, the Commissioner is satisfied that any dealer has been liable to pay tax under this Act in respect of any period and has nevertheless without sufficient cause failed to apply for registration, the Commissioner shall, after giving the dealer a reasonable opportunity of being heard, assess, to the best of his judgment, the amount of tax, if any, due from the dealer in respect of such period and all subsequent periods and the Commissioner may direct that the dealer shall pay, by way of penalty, in addition to the amount so assessed, a sum not exceeding one and a half times that amount."

14. There too, as in Section 271(1)(a) and (b), the words "without sufficient cause" appear, and, considering the scope of that provision, the learned Acting Chief Justice observed :

" But the liability to pay penalty does not arise merely upon proof of default in registering as a dealer. An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged, either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation, penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute."

15. The Supreme Court again considered in Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali, , the question of burden of proof in penalty proceedings. Dealing with the scope of Section 28(1)(c) of the Indian Income Tax Act, 1922, Grover J. observed:

"the gist of the offence u/s 28(1)(c) is that the assessee has concealed the particulars of his income or deliberately furnished inaccurate particulars of such income and the burden is on the department to establish that the receipt of the amount in dispute constitutes income of the assessee. If there is no evidence on the record except the explanation given by the assessee, which explanation has been found to be false, it does not follow that the receipt constitutes his taxable income.....It would be perfectly legitimate to say that the mere fact that the explanation of the assessee is false does not necessarily give rise to the

inference that the disputed amount represents income. It cannot be said that the finding given in the assessment proceedings for determining or computing the tax is conclusive. However, it is good evidence. Before penalty can be imposed the entirety of circumstances must reasonably point to the conclusion that the disputed amount represented income and that the assessee had consciously concealed the particulars of his income or had deliberately furnished inaccurate particulars."

16. In so expressing the opinion, the learned judges endorsed the earlier view of the court in *Hindustan Steel Ltd. v. State of Orissa*.

17. Mr. Rama Rao, however, invited our attention to two decisions of this court to show that, in order to determine whether there was culpable negligence, the burden is upon the assessee to show that he did his best as a reasonable man to avoid the non-compliance. In *Mullapudi Venkatarayudu Vs. Union of India (UOI)*, , the learned judges did not say that the burden was upon the assessee. All that the learned judges said, is that it has to be determined whether the non-compliance with the provisions of Section 139(1) of the Act was with a wrongful intention or culpable negligence. They also held that the element of mens rea is essential before imposing penalty. The unreported decision of another Division Bench of this court in *R. C. No. 4 of 1970 dated 9-9-1971 (Commissioner of Income Tax Vs. Anantharam Veerasingaiah and Co.,)* also does not render any assistance to the case of the department. In that case, the learned judges, while dealing with the burden that the revenue has to discharge, observed :

" It might be that the onus would be heavy in some cases and light in others depending on the facts and circumstances of the case. The burden on the department would not of course be higher than the burden on the prosecution in a criminal case."

18. The learned judge did not say anywhere in the judgment that the burden is not upon the department and that mens rea, an essential ingredient, is excluded by necessary implication when action is taken u/s 271(1) of the Act.

19. We may, in brief, refer to the view expressed by the High Courts of Madras, Mysore, Kerala and Orissa. In *V. RAMANATHAN Vs. COMMISSIONER OF Income Tax, MADRAS.*, , Srinivasan and Venkatadri JJ. held that it is for the department to show that the assessee who failed to submit the return did so without reasonable cause. In *Michael Fernandes Vs. Commissioner of Wealth Tax, Mysore and Another*, , Govinda Bhat C. J. and Jagannatha Shetty J. held that an order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct, contumacious or dishonest, or acted in conscious disregard of its obligation. To the same effect is the view expressed by the same learned judges in *All India Sewing Machine Co. Vs. Commissioner of Income Tax*, , while dealing with the case u/s 271(1)(a) of the Act, following the decision of the Supreme Court in

Hindustan Steel Ltd. v. State of Orissa. The Orissa High Court, in Commissioner of Income Tax Vs. Alimohamad and Co., , similarly held that "in order that penalty may be leviable u/s 271(1)(a), the revenue has to show that the assessee has failed to furnish the return without reasonable cause. The contention for the revenue that once the assessee failed to show cause when called upon as to why he may not be visited with penalty under the section, it must be assumed that he had no explanation to offer and the Income Tax Officer was justified in proceeding on the footing that the default was without reasonable cause, could not be accepted." In Dawn and Co. Vs. Commissioner of Income Tax, , K.K. Mathew J. (as he then was of the Kerala High Court) and T.S. Krishnamoorthy Iyer J., following the view expressed by the Supreme Court in Hindustan Steel Ltd. v. State of Orissa, held that " no circumstances had been shown by the Tribunal to prove that the omission to file the return had been deliberate. The mere rejection of the explanation offered by the assessee was not sufficient. The view of the assessee that he need file the return only u/s 139(1) in spite of a notice u/s 139(2) meant that he was not ignorant of the law but had misunderstood its provisions. Such a bona fide impression proved the absence of mens rea or a deliberate disobedience of the provision of law. The levy of penalty was, therefore, not justified in law." To the same effect is the view expressed by the same learned judges in P. Vs. Devassy V. Commissioner of Income Tax, . What the learned judges said is that it is permissible to impose a penalty on an assessee who has failed to furnish the return without reasonable cause within time, though he filed it in the manner prescribed after the time; that the mere failure to file the return within the time allowed will not make the assessee liable to penalty; and that the department must prove that the assessee had no reasonable cause for not filing it within the time. It is unnecessary to multiply decisions on this point. In view of what the Supreme Court has laid down in Hindustan Steel Ltd. v. State of Orissa and in Anwar Ali's case, the statutory obligation is upon the department to show that the assessee had acted deliberately in defiance of law or was guilty of conduct, contumacious or dishonest, or acted in conscious disregard of its obligation. The Tribunal, in quashing the order of penalty imposed upon the assessee, has only followed, and rightly too, the decisions of the Supreme Court in Hindustan Steel Ltd. v. State of Orissa and held that:

"Though in this case the assessee has no ostensible reason for the delay in filing the return, yet we do not find any material led in by the revenue to show that the assessee wilfully defaulted, more especially when it is seen that the return was filed voluntarily without issue of notice u/s 139(2)."

20. The Tribunal also took into consideration the facts of the case and found that the penalty for non-submission of return is not imposable for the mere failure to furnish the return in time.

21. Mr. Rama Rao, however, submitted that the Tribunal should have remitted the matter back to the Appellate Assistant Commissioner or the Income Tax Officer

for applying the law, as stated by the Supreme Court, to the facts of this case. When the Tribunal itself has applied the law and correctly too on the material placed before it, there was absolutely no necessity to remit the matter back to the authorities below for application of the principles of law.

22. In the result, we find no case for directing the Tribunal to refer the questions formulated by the Additional Commissioner of Income Tax for opinion of this court. The petition, therefore, fails and is accordingly dismissed. No costs.