

(1967) 01 KAR CK 0007
In the Karnataka High Court
Case No : Writ Petition No. 1024 of 1965

Bibi Plantations

APPELLANT

Vs

Agricultural Income Tax Officer, Mercara

RESPONDENT

Date of Decision : 09-01-1967

Acts Referred:

Mysore Agricultural Income Tax Act, 1957 — Section 31, 41 (1), 42 (1)

Citation : (1967) ILR (Kar) 1021 : (1967) 65 ITR 341 : (1967) 1 MysLJ 278

Hon'ble Judges : K.R. Gopivallabha Iyengar, J;A. Narayana Pai, J

Bench : Division Bench

Advocate : T. Subba Rao and A.N. Jayaram, for the Appellant; G.V. Shantraj, for the Respondent

Judgement

Narayana Pai, J.—The petitioner, which is a partnership firm of the name Bibi Plantations, Suntikoppa, an assessee to agricultural Income Tax, impugns in this writ petition, the validity of an order made by the Agricultural Income Tax, Mercara, on 22nd May, 1965, levying a penalty of Rs. 437 under sub-section (1) of section 42 of the Act and direction its recovery along with a sum of Rs. 3,501.12 said to be tax in arrears.

2. The main contention of the petitioner is that by reason of the pendency of an appeal presented by him against the assessment order to the Deputy Commissioner of Commercial Taxes, it was necessary for the assessing authority, the Agricultural Income Tax Officer, Mercara, to have complied with the requirements of the proviso to sub-section (1) of section 41, and that he having failed to do so, his order is liable to be struck down as invalid.

3. The order of assessment was made in respect of the year 1963-64, which was followed by a notice of demand served on the petitioner on 29th February, 1964, making the tad due and payable on March, 10, 1964.

4. Along with his appeal of the Deputy Commissioner, the petitioner made an application for stay of collection of the tax. An order was made by the appellate

authority granting stay subject to the condition that the petitioner should furnish bank guarantee. Although the original time granted for furnishing that guarantee was extended by the appellate authority, the petitioner could not or did not furnish the security. It was after the expiry of the extended period that the original assessing authority proceeded to levy penalty under the impugned order. It was proceeded by a notice dated 3rd May, 1965, reading :

"You have not either paid the tax in the arrears of furnished bank guarantee for the tax in arrears of Rs. 3,501.12 in respect of the assessment year 1963-64. You are hereby informed that if you fail to pay the tax of Rs. 3,501.12 within there days of the receipt of this notice, you will be treated as defaulter and penalty will be levied."

5. The order itself, after setting out the passion of the assessment order, the issue of notice of demand, in accordance with which tax become payable on or before March 10, 1964, proceeds to state :

"Though the said amount was due for payment on or before March 10, 1964, in full, a sum of Rs. 3,501.12 has not yet been paid in spite of issue of reminders for the same. This clearly constitutes a default under sub-section (1) of section 41 of the Mysore Agricultural Income Tax Act, 1957. I, therefore, levy a penalty of Rs. 437 under sub-section (1) of section 42 or the Act, and order that this penalty of Rs. 437 should be paid along with the tax in arrears or Rs. 3,501.12 on or before June 10, 1965, failing which a second penalty, which will be much more than first penalty, will be levied."

6. The order was accompanied by a demand in Form No. 10 with appropriate particulars.

7. The relevant statutory provisions which are the subject of discussion in this write petition are the first sub-section 41 together with the proviso and the first sub-section 42. They read :

"41. Tax when payable. - (1) Any amount specified as payable in a notice of demand u/s 31 or an order u/s 32, section 34 or section 35, shall be paid within the time, at the place and to the person mentioned in a notice or order or if a time is not so mentioned, then, on or before the first day of the second month following the date the service of the notice or order and any assessee failing so to pay shall be deemed to be in default :

Provided that, when an assessee has presented an appeal u/s 32, the Agricultural Income Tax Officer may, in his discretion, treat the assessee as not being in default as long as such appeal is undisposed of and if in any such case the Agricultural Income Tax Officer considers that the assessee should be held to be in default, he shall refer the matter to the authority to whom the appeal was presented for orders and shall treat the assessee as not being in default until the said authority to whom the appeal was presented for orders and shall treat the assessee as not being in default until the said authority passes orders to the

contrary.

42. (1) Mode and time of recover - When an assessee is in default in making a payment of agricultural Income Tax, the Agricultural Income Tax Officer may, in his discretion, direct that, in addition to the amount of the arrears, a sum not exceeding one-eighth of that amount shall be recovered from the assessee by way of penalty."

8. The main provision of sub-section (1) of section 41 has the clear effect of declaring a person a defaulter at a particular point of time viz., the expiry of the time limited by the notice of demand u/s 31 for payment of tax. In the absence of an appeal, nothing further is necessary either by way of an order or a notice by any of the authorities functioning under the statute to make an assessee a defaulter for the purposes of the Act. Upon his becoming a defaulter, certain consequences follow viz., it becomes open to the authority to take coercive steps to collect tax, and, secondly, the original authorised by sub-section (1) of section 42 to impose a penalty.

9. But where an appeal is presented by a assessee against an assessment order made against him, the position becomes subject to the provision of the proviso appended to sub-section (1) of section 41. So long as appeal remains undisposed of, it is open to the assessing authority in his discretion to treat the assessee as not being in default; this means that the declaration of the assessee as a defaulter under the main provision of the sub-section becomes inoperative. That the entire situation gets governed exclusively by the proviso becomes clearer by the provisions contained in the second part thereof, according to which, if the assessing authority considers that the assessee should be held to be in default, he should refer the matter to the appellate authority and is prohibited from treating him as a defaulter until he obtains appropriate orders from the appellate authority. The positive mandate of the statute is that until obtaining the orders of the appellate authority, the assessing authority shall treat the assessee as not being in default even if he should consider that he should be so treated.

10. The effect of this, in our opinion is quite clear, viz., that on the presentation of an appeal against an assessment order, the statutory declaration of an assessee as a defaulter under the main provision of sub-section (1) of section 41 becomes inoperative for the pendency of the appeal. Before he could be treated as a defaulter by the assessing authority, the provisions of the proviso have to be complied with, which means that until after due compliance with those provisions the assessing authority considers the assessee as a defaulter, no action can be taken against him as a defaulter. The said retirements may be regarded as two in number :

(1) that the assessing authority should consider, that is to say, be of the opinion that it is necessary to treat the assessee as a defaulter, and

(2) that he cannot give effect to that opinion until he has obtained the orders of the appellate authority.

11. When he comes thereafter to make an order levying penalty under sub-section (1) of section 42, he is once again required to exercise his discretion whether or not to impose a penalty. The statute makes it perfectly clear that the imposition of penalty is not to be regarded as an inevitable consequence of an assessee being declared defaulter. The only inevitable consequence is that he becomes exposed to coercive steps being taken for recovery of the tax due. The further liability of being exposed to a penalty is dependent and consequential upon the exercise of discretion by the assessing authority.

12. The provisions of section 41 and 42 - except in regard to the necessity of the original authority seeking orders of the appellate authority - are modeled on the similar provisions of the Indian Income Tax Act, Wealth-tax Act, etc. That the discretion vested in the assessing authority by those statutes is a judicial discretion or a discretion to be exercised judicially on a consideration of relevant circumstance is a well-established proposition. So far as this court is concerned, there is the decision reported in *Esthuri Aswathaiah v. Income Tax Officer*, which dealt with section 45 of the Indian Income Tax Act 1922. The same or similar view has been taken by the Calcutta High Court in *Aluminium Corporation of India Ltd. v. Balakrishnan*, in which the court dealt with the discretion of Wealth-tax Officer under sub-section (6) of section 31 of the Wealth-tax Act. According to that sub-section, when an assessee has presented an appeal, the Wealth-tax Officer may, in this discretion and subject to such conditions as he may think fit to impose in the circumstances of the case, treat the assessee as not being in default in respect of the amount in dispute in appeal, even though the time for payment has expired, so long as the said appeal remains undisposed of. The position is more or less analogous to the position under the proviso to sub-section (1) of section 41 of the Agricultural Income Tax Act, except as to the special provision as to the reference to the appellate authority found only in the Agricultural Income Tax Act. The said ruling of the Calcutta High Court is also of importance from another point of view. While dealing with the question of the exercise of discretion and the facts and circumstances bearing on such exercise of discretion, the court states :

"..... there can be no doubt that the matter is one of discretion to be exercised judicially. A judicial exercise of discretion involves a consideration of the facts and circumstances of the case in all its aspect. The difficulties involved in the issues raised in the case and the prospect of the appeal being successful is one such aspect. The position and economic circumstance of the assessee is another. If the officer feels that the stay would put the realisation of the amount in jeopardy, that would be a cogent factor to be taken into consideration. The amount involved is also a relevant factor. If it is a heavy amount, it should be presumed that immediate payment, pending an appeal in which there may be a reasonable chance of success, would constitute a hardship."

13. Such being the position in law, the first question is whether the proviso to section 41(1) of the Mysore Agricultural Income Tax Act does or does not require

a passing of a formal order by the Agricultural Income Tax Officer treating the assessee as in default. The second question is what the nature and the general contents of that order should be.

14. Both these questions should be considered along with and in the light of the possible of the imposition of penalty under sub-section (1) of section 42. So far as penalty is concerned, section 42(1) clearly states that the officer may direct that a certain sum be recovered by way of penalty. That undoubtedly means the passing of an order. That inference is further strengthened by the provisions of section 31, according to which where any tax or penalty is due in consequence of any order passed under or in pursuance of the Act, the officer is required to serve on the assessee a notice of demand.

15. Another reason which should also be borne in this connections is that if, as we have already held, the presentation of an appeal against as assessment order renders the statutory declaration under the first paragraph of section 41(1) inoperative and brings into operation the proviso thereto, the treating of an assessee as a defaulter by the assessing authority must be regarded as a positive decision intended to be communicated to the assessee. It is all the more so because, even if he should entertain the opinion or consider that the assessee should be treated as a defaulter, he is asked by the statute not to do so until he obtains an order to the contrary by the appellate authority. All these provisions are clearly intended as safeguards in the interest of the assessee and therefore, are matters in which the assessee is interested or matters which the assessee is entitled to claim, should be attended to and duly dealt with by the assessing authority. The reason is obvious, viz., that such a positive decision is the foundation for such serious consequence as the imposition of penalty to which he may be exposed.

16. It is because these provisions are in the nature of such safeguards that the next question as to the nature and contents of the order assumes importance.

17. If, as we have stated, both the proviso to section 41(1) as well as sub-section (1) of section 42 require or call for a passing of an order, and if, as pointed out by the cases already cited by us, both the matters proceed upon a previous exercise of the discretion by the officer judicially, little else is necessary to make out that he should make a record of the reasons for his order. Further, because the treating of an assessee as a defaulter under the proviso to sub-section (1) of section 41 subject to his obtaining previous sanction or a approval of the appellate authority, the obtaining of such sanction is the foundation of his jurisdiction. If the jurisdiction itself depends upon the existence of certain facts, the statement of those facts in an order in the exercise of that jurisdiction becomes, in our opinion, quite inevitable. Hence, an order in cases of this nature should contain a statement of the officer having obtained the previous sanction of the appellate authority under the proviso to section 41(1).

18. Although in both the matters what the officer is required to do is to exercise

his discretion judicially and although in ordinary circumstance a proper exercise of discretion is not likely to be interfered with by superior authorities like a High Court because the order may be called in question both by means of an appeal u/s 32 to the first appellate authority to the extent it imposes a penalty as well as directly by means of a petition to the extent it imposes a penalty as well as directly by means of a petition under article 226 and 227 of the Constitution, in our opinion, the order on the face of it must disclose that the officer has judicially applied his mind to all relevant factors and has not permitted himself to be moved by irrelevant circumstance.

19. We should, however, add that there need not be two different orders - one under the proviso to sub-section (1) of section 41 and another under sub-section (1) of section 42 when the officer proceeds to impose a penalty under the latter provision, because the entire matter starting from the original, jurisdictional facts right down to the imposition of penalty may be said to constitute one continuous process.

20. Applying these standards to the order impugned in this writ petition, there is no alternative but to hold that it suffers from the infirmity of being totally devoid of any statement of the officer having obtained the previous sanction of the appellate authority as well as of his having applied his mind to the relevant circumstance and exercised his discretion judicially. Indeed, if one reads the order alone, it would appear that the officer was acting merely on the first paragraph of section 41(1) without reference to the pendency of the appeal. But we do find from the original records produced before us by the learned Government Pleader that the officer had in fact written to the appellate authority, after the failure on the part of the assessee to furnish bank grantee, seeking the appellate authority permission to treat the assessee as a defaulter and obtained such sanction from him. But the infirmity consisting in his omission to state the said fact in his order remains uncured. The order also does not contain any indication of the officer having applied his mind to relevant circumstance before exercising his discretion.

21. We, therefore, quash the impugned order dated 22nd May, 1965, and the notice of demand issued pursuant thereto.

22. There will be no order as to costs.

23. Order quashed.