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**(1975) 01 KL CK 0011**  
**In the High Court Of Kerala**  
**Case No : O.P. No. 568 of 1973**

C.V. George and Others

APPELLANT

Vs

Income Tax Officer and Another

RESPONDENT

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**Date of Decision :** 27-01-1975

**Acts Referred:**

Income Tax Act, 1961 — Section 2(31), 2(7), 222(2)

**Citation :** (1976) 102 ITR 724

**Hon'ble Judges :** K. Bhaskaran, J

**Bench :** Single Bench

**Advocate :** K.P. Radhakrishna Menon and K. Ravindranath, for the Appellant;  
P.A. Francis and P.K. Ravindranatha Menon, for the Respondent

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## Judgement

Bhaskaran, J.—The short, but important, question of law that falls for decision in this writ petition is whether the term "assessee" occurring in Sub-section (1) of Section 222 of the Income Tax Act, 1961 (Act 43 of 1961), hereinafter referred to as "the Act", in the context of the definition in Section 2(7), and other relevant provisions of the Act, would include the partners of the firm in a case where the assessment u/s 143(1) of the Act is in the name of that firm, and the certificate issued under Subsection (2) of Section 222 also is in the name of that firm.

2. The facts relevant are few and are not in dispute. The petitioners are partners of a firm known by name "Mutual Benefit Corporation, Calicut." For the assessment years 1965-66 to 1971-72 there was arrears of Income Tax from the firm to the tune of Rs. 70,763. Therefore, certificate for recovery u/s 222(2) of the Act was issued by the first respondent, Income Tax Officer, Asst. II, Calicut, on whose file the petitioners and the firm are assesseees under the Income Tax Act. On the basis of the recovery certificate issued by the first respondent, the second respondent (income tax Officer, Collection (Addl.), Calicut), issued exhibit P-I, Notice No. 46-001-FQ-7570/CLT, dated August 29, 1972, to the petitioners. To exhibit P-I notice the 3rd petitioner filed exhibit P-2 reply dated October 7, 1972. Thereafter, exhibit P-3 reminder was sent by the 2nd respondent to the

petitioners adverting to exhibit P-2 reply also.

3. In this writ petition the relief sought for by the petitioners is the issue of a writ of mandamus directing the respondents to forbear from recovering the tax dues made mention of in exhibit P-I. The contentions of the petitioners are many-fold. It is contended before me that-

(a) Section 222 of the Act prescribes the procedure for recovery of tax from assessees, and according to this procedure, recovery proceedings can be had only against an assessee in default or deemed to be in default, and that too in any one of the four modes prescribed therein ; the firm is a separate legal entity from its partners ; the firm and its partners being separate assessees for the purpose of Section 222 of the Act the firm alone will be a defaulter in case all the tax dues have not been paid off by the firm with respect to the assessment in the name of the firm ;

(b) the principle of joint and several liability of the partners for the dues of a firm available under the Partnership Act can be applied only in the case envisaged u/s 189 of the Act;

(c) the proceedings are hit by Articles 19(1)(f) and 265 of the Constitution ; and

(d) the person named in the certificate forwarded to the 2nd respondent under Sub-section (2) of Section 222 of the Act is the firm; under the Act the Tax Recovery Officer has no jurisdiction to proceed against any person or property other than the assessee named in the certificate.

4. The 2nd respondent has sworn to a counter-affidavit on behalf of himself and the first respondent, in which on questions of fact there is hardly any dispute. In paragraph 5 of the said affidavit it is stated as follows:

" .....It is true that for the purpose of assessment under the Income Tax Act the firm is treated as a separate legal entity. Both the firm and the partners are separately assessed. When a demand notice for the payment of tax is issued against a firm, it becomes a liability or debt of the firm. u/s 2(23) of the Income Tax Act, 1961, " firm", "partner " and "partnership" have the meanings respectively assigned to them in the Indian Partnership Act, 1932. According to the Indian Partnership Act each and every partner is jointly and severally liable for the debts of the firm. Moreover, under Order 21, Rule 50(2), of the Code of Civil Procedure, 1908, the partners can be proceeded against for the debt of a firm. "

5. The admitted fact is that u/s 2(31) read with Section 4 of the Act, the firm as well as its individual partners are separate assessable entities and both are chargeable to tax in respect of the income earned by the partners carrying on business under the partnership. It is also an accepted "proposition that though, in common law, the firm is not a legal entity, but only a compendious expression for representing the partners collectively, by virtue of the provisions contained in Section 2(31) of the Act, by means of a legal fiction, the firm is treated to be a

person. The argument advanced by Sri P. A. Francis, counsel for the revenue, is that, though there is such a fiction, the applicability of that fiction ceases when the assessment is complete. In support of this argument counsel for the revenue relies on a decision of the Allahabad High Court in SAHU RAJESHWAR NATH Vs. Income Tax OFFICER C-WARD, MEERUT, AND ANOTHER., wherein at pages 757 and 758 there is the following observation by Pathak J., who delivered the judgment on behalf of the Division Bench :

"It is true that under the Income Tax law a firm is treated as an entity distinct from its partners, but that is so only for the purposes of assessment. The procedure relating to assessment concludes when an assessment order has been made and the tax liability consequent upon that assessment has been determined. When a notice of demand is issued requiring the payment of the tax liability, the stage of assessment has been left behind, and with it the distinction between the firm and its partners. Section 29, under which the notice of demand is issued, indicates in terms that the assessment proceeding has been concluded and that tax is due in consequence of the assessment order. It provides that when tax is due in consequence of an order passed under the Act the Income Tax Officer shall serve upon the assessee or other person liable to pay such tax a notice of demand specifying the sum so payable. Therefore, 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. The liability of the partners of the firm is joint and several, and it is open to a creditor of the firm to proceed to recover a debt of the firm from any one or more of the partners. In Simon's Income Tax (2nd edition), volume I, page 337, paragraph 510, the law is thus stated:

"The tax assessed in the firm name is a partnership debt for which all who were partners at the time when the debt was incurred, or who have held themselves out to the revenue to be such, are jointly liable. This means that any or all of those persons may be sued for the whole of the tax due (when the assessment becomes final) without reference to their respective shares under the partnership agreement" : see also *Stevens v. Britten*, [1954] 3 All ER 335 . "

6. Apart from what has been stated by Pathak J. in the said decision, I have not been shown any authority for the proposition that the firm is treated as an entity only for the purpose of assessment. Reliance placed by Pathak J. on certain statements in Simon's Income Tax, presumably, is based on the provisions contained in the Income Tax Act which was in force in the United Kingdom. There is substantial difference between the provisions in the Indian and English laws on the subject. At page 823 of Lindley on Partnership, 13th edition, there is the following passage :

"Reference has already been made earlier in this work to the fact that under English law a partnership, that is to say, all the partners taken together, has no legal or collective existence distinct from the individual partners ; the term

"partnership " is in fact nothing more than a convenient method of referring to the existence of two or more persons who are carrying on business in common with a view to making a profit. The rights and liabilities of a partnership are nothing more than the aggregate of the rights and liabilities of the individual partners. In theory, therefore, there is no reason why the ordinary rules as to the taxation of the income of individuals should not apply to the taxation of partnerships so that the income, if any, of each partner should be the subject of an assessment for the tax which is separate and distinct from the assessment of each of the other partners. So to proceed would, however, give rise to the necessity for dissecting the partnership accounts and apportioning the overall expenses and gross receipts amongst the individual partners in order to determine the net income of each. In order to avoid the necessity for such an unrewarding task, the Income Tax Act, 1918, provided that where a trade was carried on by two or more persons jointly the tax was to be computed and stated jointly and in one sum and was to be treated as separate and distinct from any other tax chargeable to those persons or any of them and also provided for a joint assessment to be made in the partnership name."

7. Section 152 of the Income and Corporation Taxes Act, 1970, reads as follows :

"Where a trade or profession is carried on by two or more persons jointly, income tax in respect thereof shall be computed and stated jointly, and in one sum, and shall be separate and distinct from any other tax chargeable on those persons or any of them, and a joint assessment shall be made in the partnership name."

8. In view of this distinction between the provisions contained in the Income Tax Act applicable in the two countries, I do not think that it is safe to apply the observations contained in Simon's Income Tax law to the present case. Counsel for the revenue seeks support for the position taken by him by referring to the decision in Sahu Rajeshwar Nath Vs. Income Tax Officer, C-Ward, Meerut and Another, in which the very case which was the subject-matter before the Allahabad High Court in Sahu Rajeshwar Nath v. Income Tax Officer, [1964] 54 ITR 735 came up for consideration before the Supreme Court. In that case the Supreme Court upheld the conclusion reached by Pathak J. of the Allahabad High Court, but for different reasons. Ramaswami J., who spoke for the Supreme Court Bench, has observed that under Order 21, Rule 50(2), of the Code of Civil Procedure, the Collector who was the recovery officer in that case could lawfully proceed against the partners where the amount was due from the firm. It has to be noted that Sub-section (2) of Section 46 of the Indian Income Tax Act, 1922, which corresponds to Section 222 of the Act (1961 Act), provides :

"The Income Tax Officer may forward to the Collector a certificate under his signature specifying the amount of arrears due from an assessee, and the Collector, on receipt of such certificate, shall proceed to recover from such assessee the amount specified therein as if it were an arrear of land revenue:

Provided that without prejudice to any other powers of the Collector in this

behalf, he shall, for the purpose of recovering the said amount, have the powers which under the Code of Civil Procedure, 1908 (V of 1908), a civil court has for the purpose of the recovery of an amount due under a decree..."

9. Order 21, Rule 50, of the CPC states as follows :

"50. (1) Where a decree has been passed against a firm, execution may be granted-

(a) against any property of the partnership ;

(b) against any person who has appeared in his own name under Rule 6 or Rule 7 of Order XXX or who has admitted on the pleadings that he is, or who has been adjudged to be, a partner ;

(c) against any person who has been individually served as a partner with a summons and has failed to appear :

Provided that nothing in this Sub-rule shall be deemed to limit or otherwise affect the provisions of Section 247 of the Indian Contract Act, 1872.

(2) Where the decree-holder claims to be entitled to cause the decree to be executed against any person other than such a person as is referred to in Sub-rule (i), Clauses (b) and (c), as being a partner in the firm, he may apply to the court which passed the decree for leave, and where the liability is not disputed, such court may grant such leave, or, where such liability is disputed, may order that the liability of such person be tried and determined..."

10. The Supreme Court, therefore, held that inasmuch as the provision contained in Sub-rule (2) of Rule 50 of Order 21 is applicable to the proceedings taken by the Collector, it was open to him to recover the amount from the partners who were not entitled to separate notice in that behalf. There are certain observations in the same judgment which would indicate that the Supreme Court felt that the amount due from the firm could not have been recovered from the partners to whom there had been no notice, either under the Indian Income Tax Act or under the Partnership Act. Starting from the last paragraph Sahu Rajeshwar Nath Vs. Income Tax Officer, C-Ward, Meerut and Another, of the above decision, the observation is as follows :

" 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. In the Income Tax Act itself the liability is imposed on other persons to pay the tax apart from the assessee by several sections.....It is true that under the Partnership Act the liability of the partners of a firm is joint and several and it is open to a creditor of the firm to recover the debt of the firm from any one or more of the partners. But a partner of an unregistered firm does not fall within the language of section 29 of the Act, for the liability of the partner is not imposed on account of any provision of the Income Tax Act itself."

11. Whereas Pathak J. sought to rest his conclusion on the ground that the fiction of legal personality of the firm ceases with the passing of the assessment order, the Supreme Court rested its decision solely on the ground that by virtue of the proviso to Section 46(2) of the 1922 Act it was open to the Collector to proceed against the partners of the firm for recovery of the amount due from the firm as provided under Order 21, Rule 50(2), of the Civil Procedure Code. It cannot, therefore, be said that there is any indication in the decision of the Supreme Court upholding the reasoning given by Pathak J. in SAHU RAJESHWAR NATH Vs. Income Tax OFFICER C-WARD, MEERUT, AND ANOTHER., . The contention raised in paragraph 5 of the counter-affidavit (extracted at page 3 of this judgment) that: " Moreover under Order 21, rule 50(2), of the Code of Civil Procedure, 1908, partners can be proceeded against for the debt of a firm " is without bearing in mind the significant fact that the said provision contained in the proviso to Sub-section (2) of Section 46 of the 1922 Act has not been retained in Sub-section (2) of Section 222 of the 1961 Act. This omission in the Act (1961 Act) cannot be presumed to be either unintentional or innocuous.

12. In Income Tax Officer, Agra Vs. Radha Krishan, , there is the following observation by Shah J :

" Counsel for the Income Tax Officer says that this is so because the liability of the partners of a firm in respect of all its obligations including the liability to pay tax is joint and several. 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."

13. Sri K. P. Radhakrishna Menon, counsel for the petitioner, also points out that if no distinction is to be made with respect to the liability of the partners of a firm carrying on or continuing its business on the one hand, and the one which has ceased to have business or has been dissolved on the other, the provision u/s 189(3) of the Act would not have been made. Sub-section (3) of Section 189 is as follows :

" Every person who was at the time of .such discontinuance or dissolution a partner of the firm, and the legal representative of any such person who is deceased, shall be jointly and severally liable for the amount of tax, penalty or other sum payable, and all the provisions of this Act, so far as may be, shall apply to any such assessment or imposition of penalty or other sum."

14. Counsel for the revenue submits that in view of the provisions contained in Section 2(23) of the Act, assessment could only be with reference to a "person" in the case of a firm which is a "person" within the ambit of Section 2(31), no separate provision as contained in Sub-section (3) of Section 189 is necessary so

long as it carries on business or is not dissolved, and that explains the special provision made with regard to the joint and several liability in respect of the partners of the firm which is dissolved or has ceased to carry on business. Counsel for the revenue has also taken me through the various amendments undergone from time to time to the Code of Civil Procedure, Income Tax Act, Partnership Act and the Contract Act to press the point that the evolution of the procedure has been such that a stage has been reached where a special provision is not really necessary for casting a liability on the partners of a defaulting firm with respect to tax assessed in the name of the firm. It is also submitted that the reason for not incorporating the provisions contained in the proviso to Subsection (2) of Section 46 of the 1922 Act has to be attributed to this cause.

15. The counsel for the revenue has also urged that as held in *Dulichand Lakshminarayan Vs. The Commissioner of Income Tax, Nagpur*, the firm is not a person, and as such is not entitled to enter into a partnership with another firm or Hindu undivided family or individual. I do not think that the observation in that judgment has much relevance here, as the context in which that reference happened to be made is not identical to that with which we are concerned in the present case. It is the admitted case of the revenue itself that for the purpose of assessment the firm is a legal entity. The only dispute, as I have already stated, is with respect to the point of time at which the firm ceases to have the fictitious personality.

16. It was held in *Ravula Subba Rao and Another Vs. The Commissioner of Income Tax, Madras*, that the Indian Income Tax Act is a self-contained Code. The observation by Venkatarama Iyer J. reads as follows :

"The Indian Income Tax Act is a self-contained code exhaustive of the matters dealt with therein, and its provisions show an intention to depart from the common rule, *qui facit per alium facit per se*. Its intention is that a firm should be given the benefit of Section 23(5)(a) only if it is registered u/s 26A in accordance with the conditions laid down in that section and the rules framed thereunder. And as those rules require the application to be signed by the partner in person, the signature by an agent on his behalf is invalid."

17. It is pointed out by the counsel for the revenue that that observation happened to be made in a context where the question was whether a general provision would prevail or a particular provision contained in a particular statute would prevail, and all that was held in that judgment is that the special provisions would prevail. Whatever be the context in which it was made, the observation by the Supreme Court that "the Indian Income Tax Act is a self-contained code exhaustive of the matters dealt with therein", is of great weight, and the significance thereof cannot be brushed aside. In this context it will be useful to refer to a Division Bench decision of the Bombay High Court in *Commissioner of Income Tax Vs. Ellis C. Reid*, . The observation of Beaumont C.J. quoted by Kapur J. in the decision of the Supreme Court in *The*

Commissioner of Income Tax, Bombay City I, Bombay Vs. Amarchand N. Shroff, by his heirs and Legal Representatives, is extracted below :

"The correct position is that apart from Section 24B no assessment can be made in respect of the income of a person after his death : See Commissioner of Income Tax Vs. Ellis C. Reid, . In that case, and that was a case before Section 24B was enacted, a person was served with a notice u/s 22(2) of the Income Tax Act but no return was made within the period specified and he died. It was held that no assessment could be made u/s 23(4) of the Act after his death. At page 106 it was observed :

"It is to be noticed that there is throughout the Act no reference to the decease of a person on whom the tax has been originally charged, and it is very difficult to suppose the omission to have been unintentional. It must have been present in the mind of the legislature that whatever privileges the payment of Income Tax may confer, the privilege of immortality is not amongst them. Every person liable to pay tax must necessarily die and, in practically every case, before the last instalment has been collected, and the legislature has not chosen to make any provisions expressly dealing with assessment of, or recovering payment from, the estate of a deceased person".

18. The case in Commissioner of Income Tax v. Ellis C. Reid arose where the Income Tax authorities proceeded against the legal heirs of a deceased assessee. It was argued in that case that the term " assessee " would include the legal heirs or legal representatives of a deceased assessee. Negating that contention, Beaumont C.J. and Barlee J. upheld the contention of the person against whom proceedings were taken for recovery of the amount. Presumably, it was as a sequel to this decision that necessary amendment was introduced to the provision so as to include the legal representatives of an assessee also among the persons against whom proceedings for recovery of Income Tax due from the assessee in default could be taken.

19. Counsel for the revenue has argued that in view of the definition contained in Section 2(23) of the Act it has to be construed that the liability of the partners of the firm under the Income Tax Act is the same as what is provided under the Partnership Act. Reference has been made to the provisions contained in Section 25 of the Partnership Act. Section 2(23) of the Act reads as follows :

" "Firm ", "partner" and "partnership" have the meanings respectively assigned to them in the Indian Partnership Act, 1932; but the expression "partner" shall also include any person who, being a minor, has been admitted to the benefits of partnership. "

20. It was also argued by the counsel that in construing the words used in the definition, due regard has to be given to the other provisions contained in the Act and that there is a vast difference between the "definition "and the "meaning" of a term and that fact has to be borne in mind when construing the significance of the term " meanings " occurring in Section 2(23) of the Act. It is argued that the

definition clause does not necessarily apply to all possible contexts in the statute ; statutory definitions have to be read subject to qualification ; parliamentary enactments have to be construed as a whole and their meaning attributed to words should, as a general rule, be inspired by the context and the nature and object of the subject-matter, for the words may be enlarged or restricted to harmonise with the provisions of the statute; the legislative intent must prevail over the legislative definition and the latter should not be allowed to control the former ; this is all the more so in cases where the definition clause opens with the words " subject to the context to the contrary" as in the present case; there is a presumption that the legislature does not intend to overthrow a well-established principle of common law unless the intention to that effect is put beyond doubt; it is possible that words have different meanings in different sections, but it is a rule of interpretation well-settled that in construing the legal fictions, it would be proper and even necessary to assume all those facts on which alone the fiction can operate ; a construction which defeats the very object sought to be achieved by the legislature must, if possible, be avoided; a definition in a statute has to be read with due regard to the scheme of the Act to accord with the intention of the legislature; a definition in a statute must be read in its context with the scheme of the statute and what the intendment to remedy. The counsel has cited the decisions in *V. K. Balakrishnan v. Asoka Bank Ltd.*, AIR 1966 P&H 42 , *Kassimiah Charities Rajagiri Vs. Madras State Wakf Board* , *Kuriakose Kurian Vs. Saramma Chacko and Others* , *Vanguard Fire & General Insurance Co. Ltd. v. Fraser & Ross*, [1960] 30 Comp Cas 13 (SC) , *Gulzara Singh Nanta Singh Vs. Smt. Tej Kaur* , *Panangat Unneeran's son Ayyappan and Another Vs. Pozhankevil Thekkemadathil Venkedeswara Naikkan and Another* , *Employers, Osmania University v. Industrial Tribunal*, AIR 1950 AP 388 and *Commissioner of Income Tax, Delhi Vs. S. Teja Singh*, to support the above contention. Reference has also been made to passages from *Craies on Statute Law* and the meaning given to the relevant terms in *Stroud's Judicial Dictionary*.

21. The question for consideration, however, is whether in the Income Tax Act which is a self-contained code there is machinery provided for recovery of the amount due by the assessee-firm in default from its partners so long as the firm is continuing to carry on its business and is not dissolved. We are not immediately concerned as to whether there will be or will not be a liability, as the partners are concerned, with respect to the debt owed by the firm. Our immediate concern is whether there is any machinery provided in the Act to proceed against the partners for recovery of the amount due from the defaulting firm arising out of assessment made in its name. Having given my anxious consideration to the provisions of the Act, I am led to the conclusion that the Act has, whether due to deliberate omission or due to a lacuna in the drafting of Section 222 of the Act, made no provision in the Act enabling the Tax Recovery Officer to proceed against the partners of a firm, while the assessee in default in terms of Section 2(7)(c) of the Act is the firm assessed to tax separately. For this view that I have taken I find support in the recent decision of the Mysore High

Court in P. Balchand Vs. Tax Recovery Officer, Bangalore, wherein in paragraph 14, Jagannatha Shetty J. has stated as follows :

"Under the Act, the mere existence of liability to pay tax is not sufficient to recover the tax. Liability may be there when an assessment order is made. But there should be machinery provision to enforce that liability. That apart, the contention that the word " defaulter " in Rule 32 means and includes a partner, would run counter to the entire scheme of the Act."

22. In the result, the writ petition is allowed and the second respondent is directed not to proceed to recover the tax dues made mention of in exhibit P-I from the petitioners on the strength of the tax recovery certificate issued by the first respondent to the second respondent. I make it clear that on the question of liability of the partners with regard to the debts of the firm I have not considered or pronounced anything in this judgment.

23. The writ petition is disposed of as above. There will be no order as to costs.

24. Carbon copy of this judgment will be issued to the parties if applied for in that behalf on usual terms.