

(1976) 11 KL CK 0003
In the High Court Of Kerala
Case No : Original Petition No. 3729 of 1976

E.P. Eapen

APPELLANT

Vs

Income Tax Officer, "B" Ward and Others

RESPONDENT

Date of Decision : 19-11-1976

Acts Referred:

Income Tax Act, 1922 — Section 44, 44(1), 44(3)

Income Tax Act, 1961 — Section 156, 189, 189(1), 189(3), 226(3)

Citation : (1977) 1 ILR (Ker) 310 : (1978) 112 ITR 829

Hon'ble Judges : T. Chandrasekhara Menon, J;K. Bhaskaran, J

Bench : Division Bench

Advocate : Easwara Iyer, C. Sankara Menon and E. Subramoniam, for the Appellant; P.A. Francis, P.K. Ravindranatha Menon and Government Pleader, for the Respondent

Judgement

Bhaskaran, J.—The writ petitioner was one of the partners of the firm, " Trivandrum Tobacco Corporation ", which was dissolved on October 26, 1953, and was one of the partners of the firm, " Trivandrum Tobacco Combines ", which discontinued its business in the year 1960. The 1st respondent is the Income Tax Officer, B-Ward, Trivandrum ; the 2nd respondent, the Tax Recovery Officer, Quilon ; and the 3rd respondent, the Sales Tax Officer, First Circle, Mattancherry. This petition under Article 226 of the Constitution of India is for quashing exhibit P-1 notice of the 1st respondent dated July 12, 1976, exhibit P-2 order dated July 13, 1976, of the 3rd respondent and the prohibitory order No. T.R. 358/69 dated July 8, 1976, issued by the 2nd respondent, referred to therein, and exhibit P-4 prohibitory order of the 2nd respondent dated July 29, 1976. There is also a prayer for the issue of a writ of mandamus to compel the 3rd respondent to effect the refund in obedience of exhibit P-1A order of the Government of Kerala dated June 19, 1976.

2. By exhibit P-1A (G.O. Rt. 494/76/TD, Taxes (C) Department, dated June 19, 1976) the Government of Kerala ordered the refund to the petitioner of a sum of Rs. 26,292"50 collected as sales tax from him for the period from September 6,

1955, to December 31, 1965, by M/s. Imperial Tobacco Company, Coimbatore, and paid over to the State Government; the Board of Revenue was directed to take necessary action for the refund of the amount. Thereafter, the 1st respondent issued exhibit P-1 notice u/s 226(3) of the Income Tax Act, 1961 (43 of 1961), dated July 12, 1976, prohibiting the 3rd respondent from making payments due to the petitioner for the reason that a sum of Rs. 35,951 was due from the petitioner, for M/s. Trivandrum Tobacco Combines, Trivandrum, on account of Income Tax, penalty, etc., and that amounts due to the petitioner from him had to be applied to satisfy the claims towards the arrears of tax. In and by exhibit P-2 order No. B-3030/75 dated July 13, 1976, the 3rd respondent informed the petitioner that in view of the 2nd respondent's prohibitory order No. T.R. 358/69 dated July 8, 1976, for Rs. 1,79,254.85 restraining her from making any payment of the amount due to him, she was not in a position to refund the sum of Rs. 26,292 50 ; the reference to the amount obviously being to the amount of sales tax collected from the petitioner, ordered to be refunded to him under exhibit P-1A order dated June 19, 1976, by the Government of Kerala.

3. The writ petition is seen to have been filed in court, with only exhibits P-1 to P-3, on July 15, 1976. Thereafter, the 2nd respondent issued exhibit P-4 notice No. T.R. 358/69 dated July 29, 1976, informing the 3rd respondent that the 1st respondent had informed him that a sum of Rs. 35,714 and interest thereon was due from the petitioner for M/s. Trivandrum Tobacco Combines and Trivandrum Tobacco Corporation, Trivandrum, and prohibiting and restraining her (3rd respondent) until further orders, from making any payment to the petitioner from out of the amounts due to him from her, and the petitioner from receiving any such payments from the 3rd respondent. A copy of the prohibitory order marked exhibit P-4 was produced by the petitioner along with his reply affidavit dated August 5, 1976 ; and the original petition was got amended as per the order on C.M.P. No. 14505/76 dated August 6, 1976, whereby the petitioner, among other things, sought the additional relief of quashing exhibit P-4 order of the 2nd respondent. Respondents Nos. 1 and 2 have filed separate counter-affidavits rebutting the grounds taken by the petitioner in the writ petition, and contending, inter alia, that the two firms mentioned were assessed as unregistered firms in which the petitioner was a partner when the firm was dissolved or had discontinued its business, and, therefore, all the partners of the firm were jointly and severally liable for the amount of tax, penalty and other sums payable. The first respondent in paragraph 10 of his counter-affidavit has also explained the slight variation in the amount stated to have been due from the petitioner in the prohibitory order issued by him on the one hand, and the one issued by the 2nd respondent on the other, the reason for the difference being that, whereas he had included, in the amount due, interest up-to-date, the 2nd respondent had not done so. In paragraph 4 of the counter-affidavit filed by the 2nd respondent, he has explained the error he had committed in stating in the prohibitory order No. T.R. 358/69 dated July 8, 1976, that a sum of Rs.

1,79,254-85 was due from the petitioner. Along with the counter-affidavit he has produced exhibit R-1 prohibitory order T.R. No. 358/69 dated July 29, 1976 (the same as exhibit P-4) and exhibit R-2 covering letter dated July 29, 1976, under which exhibit R-1 (exhibit P-4) was sent by him to the 3rd respondent. In exhibit R-2 it was stated that the correct amount due from the petitioner was Rs. 35,714, not Rs. 1,74,254.85, as stated in exhibit P-2. In paragraph 4 of the counter-affidavit, the 2nd respondent has expressed regret for the wrong figure, as to the amount outstanding from the petitioner, shown in exhibit P-2 on the basis of the prohibitory order dated July 8, 1976, without noting the fact that a sizable portion of the arrears was already collected. Though in the original petition the correctness of the amount shown in exhibit P-2 as arrears due from the petitioner has been challenged, it has little relevance now, as the prohibitory order referred to therein has subsequently been virtually superseded by exhibit P-4 (exhibit R-1) order; and there is also a prayer for quashing exhibit P-4. It would, therefore, be sufficient now to go into the validity of exhibit P-4 (exhibit R-1) prohibitory order, which is under challenge as per the amended pleadings, without going into the correctness or validity of the prohibitory order No. T.R. 358/69 dated July 8, 1976 (issued by the 2nd respondent) referred to in the 3rd respondent's order exhibit P-2.

4. Sri S. Easwara Iyer, the counsel for the petitioner, submitted that it has not been shown that any amount was due to the Income Tax department from the petitioner personally. On this basis he proceeded to argue that exhibits P-1 and P-4 prohibitory orders restraining the petitioner from receiving the amount due to him from the 3rd respondent, for the reason that amounts were due from the firms, of which the petitioner was, at the time of the dissolution or at the time of discontinuance of the business, as the case may be, one of the partners, could not be sustained in law, and they have to be quashed holding them to be illegal and to have been issued without jurisdiction. Reliance was placed by the counsel on the following passage from paragraph 13 of the judgment delivered by Govindan Nair C.J. for and on behalf of the Full Bench in Income Tax Officer, Assessment II and Another Vs. C.V. George and Others, :

" The assessee in the case of a partnership which has been assessed as such is the firm. 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."

5. Sri P. K. Ravindranatha Menon, counsel for the revenue, submitted that the principles laid down in the decision of the Full Bench cited, could not be of any assistance to the petitioner. In the Full Bench case, he submitted, the question that arose for decision was whether the partners of a registered firm, which admittedly was carrying on its business during the relevant time, were liable to be proceeded against for recovery of arrears of tax assessed on the firm under the Income Tax Act, 1961, the contention of the partners who were the

respondents in the writ appeal being that arrears of Income Tax due from the firm could not be recovered from them. The stand taken by the department was as stated below (page 145) :

" 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..... "

6. Though the assessment admittedly stood in the name of the firm, the recovery proceeding against the partners was sought to be justified placing reliance on Section 25 of the Partnership Act which provided (page 146) :

" 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."

7. After having examined the relevant provisions of the Income Tax Acts, 1922 and 1961, the Full Bench observed as follows at page 149 of the report :

" 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 u/s 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 assessees 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 assessees. 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."

8. It has further been stated at page 149 of the said decision :

" Any liability for Income Tax imposed on a firm as 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."

9. From the passages from the Full Bench decision quoted it is clear that what has been laid down is that recovery proceedings could be only against the assessee in terms of the assessment order, without importing notion of joint and several liability contained in Section 25 of the Partnership Act. The words " 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 " employed in the passage at page 149 of the judgment of the Full Bench are of great significance; the Full Bench has taken sufficient care to indicate that if the provisions of the Income Tax Act themselves impose liability on the partner, there would be no bar against he being proceeded against though the assessment stood in the name of the firm alone. Otherwise, the words, " only if a liability is imposed under the provisions of the Act against the firm or the partners thereof" would be redundant. Sri Ravindranatha Menon pointed out that the discontinuance of business by the firm, " Trivandrum Tobacco Combines " was on and from July 1, 1960, and that from the said firm for the assessment years 1957-58 to 1960-61 a sum of Rs. 53,565 in the aggregate was due by way of Income Tax. The assessment for the respective years was made on July II, 1960, August 25, 1960, August 25, 1960, and September 30, 1961, all before the coming into force of the Income Tax Act of 1961 (43 of 1961). It, therefore, goes without saying that the liability to Income Tax with respect to the firm is governed by the provisions of the Indian Income Tax Act, 1922 (11 of 1922). The relevant provisions of Section 44 of the 1922 Act provide as follows :

" 44. Liability in case of firm or association discontinued or dissolved.--(1) Where any business, profession or vocation carried on by a firm or other association of persons has been discontinued or where a firm or other association of persons is dissolved, the Income Tax Officer shall make an assessment of the total income of the firm or other association of persons as such as if no such discontinuance or dissolution had taken place.....

(3) Every person who was at the time of such discontinuance or dissolution a partner of the firm or a member of the association, as the case may be, shall be jointly and severally liable for the amount of tax or penalty payable, and all the provisions of Chapter IV, so far as may be, shall apply to any such assessment or imposition of penalty."

10. Section 189 of the Act 43 of 1961 contains provisions corresponding to Section 44 of the Act 11 of 1922. It may be noticed that the Full Bench decision of this court quoted above was rendered in the appeal from the decision in O. P. No. 568 of 1973 (C.V. George and Others Vs. Income Tax Officer and Another, , One of the strong points urged by the petitioners in the writ petition (O.P. No. 568 of 1973) as is evident from paragraph 3(b) of the judgment in that case, at page 725 of the report, was that the principle of joint and several liability of the partners for the dues of a firm available under the Partnership Act could be applied only in the case envisaged u/s 189 of the Act. By virtue of the provisions contained in Sub-sections (1) and (3) of Section 44 of the Act 11 of 1922, the petitioner is jointly and severally liable to discharge the sum of Rs. 35,951 or Rs. 35,714 as mentioned in exhibits P-1 and P-4, the amount being the balance of Income Tax due from the firm for the assessment years 1957-58 to 1960-61, all the assessments having been made after July 1, 1960, on and from which date

the firm discontinued its business, and before April 1, 1962, on which date Act 43 of 1961 came into force. In the light of these facts one fails to understand how the decision of the Full Bench in Income Tax Officer, Assessment II and Another Vs. C.V. George and Others, relied on by the counsel for the petitioner would be of any assistance to the petitioner.

11. Sri Easwara Iyer made a further submission that by virtue of the provisions contained in section 297(2)(j) of Act 43 of 1961 recovery proceedings for the dues of the firm, even if the assessments were made under the repealed enactment, could be taken only under the provisions of the new Act (43 of 1961), and, if so, the decision of the Full Bench of this court in Income Tax Officer, Assessment II and Another Vs. C.V. George and Others, would squarely apply; and respondents Nos. 1 and 2 could not proceed against the petitioner for recovery from him of the amounts due from the firm on the ground that he is or was one of the partners of the firm. As we have already noticed, the real test for the application of the dictum laid down in the Full Bench decision referred to above is whether there had been a joint and several liability in so far as the partner is concerned in relation to the firm's liabilities or whether there are separate assessments on the firm and on the partners. If there are separate assessments on the firm and on the partners and no joint liability by the operation of the provisions of Section 44 of the Act 11 of 1922 or Section 189 of the Act 43 of 1961 exists, the principles laid down in the Full Bench decision would be applicable. On a careful consideration of the provisions of the Acts and the rationale behind the decision of the Full Bench in the case in Income Tax Officer, Assessment II and Another Vs. C.V. George and Others, we are of the view that the immunity from being proceeded against the partner for realisation of the amount assessed on the firm could not be considered to extend to cases where, under the provisions of the Income Tax Act, there is a joint and several liability cast on the partner for the amounts due by way of tax from the firm. This is the reasonable way in which the dictum laid down by the Full Bench in Income Tax Officer, Assessment II and Another Vs. C.V. George and Others, could be understood and applied to cases.

12. The fact that exhibits P-5 and P-5 A, notice u/s 156, and order u/s 210 respectively of Act 43 of 1961, relating to payment of advance tax from M/s. Trivandrum Tobacco Combines for the financial year 1962-63 were received by the firm does not absolve the liability of the petitioner or advance his case in any way; for one thing, the advance tax demanded was for the financial year 1962-63, whereas, as we understand it, the prohibitory orders, exhibits P-1 and P-4, have been issued with respect to the firm's liabilities for the assessment years 1957-58 to 1960-61; for another thing, the assessment even in the case of a firm which has been dissolved or had discontinued its business, in terms of subsection (1) of Section 189 of Act 43 of 1961 or Sub-section (1) of Section 44 of Act 11 of 1922, has to be as if no dissolution, or discontinuance of the business of the firm had taken place. In the light of these facts and circumstances re-consideration of the decision in Income Tax Officer, Kozhikode

Vs. Swamy Satchidanand and Others, as contended for by the petitioner, which contention gave rise to the reference to a Division Bench, does not appear to be necessary.

13. Assuming, without recording a finding, that there is any technical flaw in the procedure adopted or some mistakes in the provision of law quoted, if the court is satisfied that in accordance with the law for the time being in force the petitioner is jointly and severally liable for the tax demanded, the prohibitory orders issued by respondents Nos. 1 and 2 have only to be upheld, as the court would be slow in rendering assistance to the petitioner who invokes the extraordinary jurisdiction under Article 226 of the Constitution of India to delay or evade, on trivial grounds, the tax legitimately found due to the State from him.

14. For the foregoing reasons we find that the petitioner is not entitled to any relief and there are no grounds for issuing a writ of certiorari quashing exhibits P-1, P-2 and P-4 orders or for issuing a writ of mandamus directing the 3rd respondent to effect the refund in obedience to exhibit P-1A order of the Government of Kerala. The result is that the writ petition is dismissed, however, in the circumstances of the case, without any order as to costs.