

(1971) 06 KL CK 0008

In the High Court Of Kerala

Case No : Criminal Appeal No's. 210 and 211 of 1970 and 43 and 44 of 1971

Income Tax Officer

APPELLANT

Vs

Joseph and Others

RESPONDENT

Date of Decision : 01-06-1971

Acts Referred:

Companies Act, 1956 — Section 205(3)
Constitution of India, 1950 — Article 20(1)
Income Tax Act, 1922 — Section 18(3D), 18(6), 51
Income Tax Act, 1961 — Section 194, 2(22), 2(35), 276, 276B
Income Tax Rules, 1962 — Rule 30(1)

Citation : (1972) 83 ITR 362

Hon'ble Judges : K. Sadasivan, J

Bench : Single Bench

Advocate : V. Parameswara Menon, for the Appellant; K. Sukumaran, for the Respondent

Final Decision : Dismissed

Judgement

Sadasivan, J.—The Income Tax Officer, A-Ward, Kottayam, is the appellant in all these appeals. Complaints were brought against the respondents-office bearers of the Ettumanoor Motors (P.) Ltd., under Sections 276(d) and 276B of the Income Tax Act, 1961, as amended by the Finance Act, 1969, for non-payment to the credit of the department all the tax collected on the dividend distributed among the shareholders of the company. C. C. Nos. 107 and 108/69 are the complaints filed. In C. C. No. 107/69, the complaint was against accused, M/s. C. L. Joseph and V. Devassia, complaining that their company had declared dividend amounting to Rs. 27,000 and odd on December 20, 1961, and distributed the same on February 1, 1962, after deducting Rs. 8,217 from the dividend towards tax u/s 18(3D) of the Income Tax Act, 1922. u/s 18(6) of the said Act and u/s 200 of the Income Tax Act, 1961, the principal officer of the company was bound to pay the tax so deducted within 7 days from the date of deduction to the credit of the Central Government. It was not so remitted. The dividend was distributed

on February 1, 1962. Under the Act, therefore, the tax had to be credited to the Central Government on or before February 7, 1962. It was averred in the complaint that accused Nos. 1 and 2 were the principal officers of the company during the period when the deduction was made. Even though the dividend was distributed as early as on February 1, 1962, the tax was paid only on May 26, 1969, and as such the accused are liable to be punished under Sections 276(d) and 276B of the Income Tax Act, 1961.

2. In the connected case, C.C. No. 108/69, the complaint was against three of the office-bearers (M/s. C.L. Joseph, V. Devassia and V.M. Joseph). It was averred that they had committed offences falling under Sections 276(d) and 276B of the Income Tax Act, 1961, as amended by the Finance Act, 1969. According to the complainant, the accused were the principal officers of the company during the relevant period. A sum of Rs. 3,237 was deducted towards the tax u/s 194 of the Income Tax Act, 1961, but they defaulted to pay the same to the credit of the Central Government until May 24, 1969.

3. The common question that arises in the two cases is whether the accused were the principal officers of the company during the relevant period and whether the company had distributed dividends and deducted the tax (Rs. 8,217 in one, and Rs. 3,237 in the other), and whether they had failed to remit the tax to the credit of the Central Government within the time specified. The contention of the accused was that they were never the principal officers of the company and that no dividends were distributed and no tax deducted by them. It was also contended in C. C. No. 107/69 that the offence, if at all, had been committed long before the 1961 Act had come into force and in such a case the prosecution initiated under the successor Act cannot be sustained. The complainant's answer to this contention was that the offence was a continuing one and so the prosecution brought under the successor Act was valid. The learned District Magistrate upheld the complainant's case and convicted the accused in both the cases and sentenced them to fine. Against the conviction and sentence they preferred appeals to the Sessions Judge, Kottayam (Crl. Appeal No. 61/70 against C. C. No. 107/69 and Crl. Appeal No. 62/70 against C.C. No. 108/69). The learned Sessions Judge has allowed the appeals and acquitted all the accused. It is from the order of acquittal that the present appeals--Appeals Nos. 43 and 44/71 have been preferred.

4. Criminal Appeals Nos. 210 and 211 of 1970 are appeals preferred by the same Income Tax Officer against the finding of the lower court that since Section 276B was introduced in the Act only from April 1, 1969, by amendment of the Indian Finance Act, 1969, since the failure to deduct the tax from the dividend took place after 7 days from December 7, 1962, in the one case, and February 1, 1962, in the other, no offence was committed by the accused u/s 276B inasmuch they are entitled to protection under Article 20(1) of the Constitution. According to the appellant, this finding is erroneous and it would in effect amount to acquittal u/s 276B of the Act. These two appeals, however, can summarily be

dismissed as the grounds alleged are not sustainable. It was not proved by the prosecution that the accused had committed an offence punishable under the law in force at the time of the commission. They are, therefore, protected by the bar of Article 20(1) of the Constitution. Learned counsel for the appellant did not labour much on this point. These two appeals are, therefore, dismissed.

5. In respect of the other appeals--Cr. Appeals Nos. 43 and 44/71--the first point arising for consideration is whether any of the accused was the principal officer of the company at the relevant time, and whether any tax was in fact deducted. The case of the complainant is that till April 15, 1963, the first respondent in Criminal Appeal No. 44/71 (Sri C.L. Joseph) was the managing director and as such he was the principal officer of the company. It is also their case that dividends were distributed for the year ending March 31, 1962, and the tax was actually deducted by the said C.L. Joseph u/s 200 of the Income Tax Act, 1961. Under Rule 30(1)(b), it is the duty of the person making the deduction to pay the amount to the credit of the Central Government. As no deduction was made by either of the two persons, C.L. Joseph and V. Devassia, no liability can be fastened on them. "Principal officer" is defined u/s 2(35) of the Income Tax Act, 1961, as follows:

" "Principal officer", used with reference to a local authority or a company or any other public body or any association of persons or any body of individuals, means-

(a) the secretary, treasurer, manager or agent of the authority, company, association or body, or

(b) any person connected with the management or administration of the local authority, company, association or body upon whom the Income Tax Officer has served a notice of his intention of treating him as the principal officer thereof."

6. The learned appellate judge has held that as the 1st respondent, C.L. Joseph, was the managing director he should be presumed to be the person in actual management of the affairs of the company and as such the principal officer of the company. The finding entered by the learned judge is:

"As the 1st appellant (C.L. Joseph) was confessedly the managing director entitled to manage under an agreement or the articles of association of the company, it has to be presumed, unless otherwise shown, that he was in actual management of the affairs of the company.....I would, therefore, hold that the 1st accused was the manager of the company up to April 15, 1963, and as such he was the "principal officer" of the company within the meaning of the definition in Section 2(35) of the 1961 Act. "

7. I am afraid the learned appellate judge has approached the question from a wrong; standpoint. The managing director is not one of the persons falling under the category enumerated u/s 2(35)(a) or 2(35)(b). The persons taken in under Clause (a) are "the secretary, treasurer, manager or agent." Under the Indian

Companies Act, manager and managing director are two different entities (see Sections 2(24) and 2(26) of the Companies Act). So the managing director cannot be equated with the manager. The learned appellate judge, it appears, has brought the respondent under Clause (b) as "a person connected with the management or administration of the company." The "managing director", under the Indian Companies Act, means:

"A director who by virtue of an agreement with the company..... is entrusted with powers of management..."

8. Even if the respondent is construed as one entrusted with or entitled to the management of the company, he should have been served with a notice by the Income Tax Officer of his intention to treat him as the principal officer in order that he may be brought under Clause (b) of Section 2(35) of the Act. Such a notice were evidently not given in the instant case. It would, therefore, be wrong to say that the respondent, C.L. Joseph, was the principal officer of the company at the relevant time. Learned counsel placed reliance on exhibit P-4 in C. C. No. 107/69, statement filed by the secretary of the company before the Income Tax Officer on August 23, 1969, wherein C.L. Joseph is described as the principal officer. In the statement as against C.L. Joseph's name, the designation "principal officer" is shown within brackets. The statement, of course, is not signed by C.L. Joseph. It is seen to have been signed by the secretary and we are at a loss to know how the secretary happened to describe C.L. Joseph as the principal officer in the statement. In the statement, V. Devassia, the 2nd accused, is shown as "director/secretary/ principal officer." The person who was responsible for signing this statement has not been examined and we are not in a position to say under what circumstances the statement was submitted and what prompted the secretary who is seen to have submitted the statement to describe them as principal officers. In the circumstances no guilt can be fastened on the respondent by virtue of his being the principal officer for purposes of the Act.

9. Regarding the question whether any deduction was, in fact, made also the evidence is confusing. Exhibit P-4 (marked in C. C. No. 108/69) is a statement submitted by the accused's company to the Income Tax Officer on May 23, 1969. This document is relied on by the prosecution to show that dividends were actually paid to the shareholders and the tax deducted. In the document the query as to "when the Income Tax dues were deducted at source", the answer given is "no amounts were deducted at source on these dividends." Then in answer to the query as to the "dates when the dividends were actually paid to the shareholders" it is stated that "the amounts were only credited in the accounts of shareholders after declaration of dividends." Under query No. 5, "whether the tax deducted at source has since been paid", it is stated that, "this has been paid as under in the Ettumanoor treasury." From these dubious statements it is impossible to come to the conclusion either that the dividends were declared and distributed or that tax was deducted therefrom. The mode of

distribution of dividend has been indicated in Section 2(22) of the Income Tax Act, 1961, and u/s 194 of the said Act:

" The principal officer of an Indian company or a company which has made the prescribed arrangement for the declaration and payment of dividends (including dividends on preference shares) within India, shall, before making any payment in cash or before issuing any cheque or warrant in respect of any dividend or before making any distribution or payment to a shareholder, of any dividend within the meaning of Sub-clause (a) or Sub-clause (b) or Sub-clause (c) or Sub-clause (d) or Sub-clause (e) of Clause (22) of Section 2, deduct from the amount of such dividend, Income Tax at the rates in force :"

10. Dividend is distributed as seen from the above section by payment in cash or issue of cheque or warrant. But the mode indicated in exhibit P-4 (in C. C. No. 108/69) is that the amounts were credited in the accounts of the shareholders. This cannot be treated as an approved mode of distributing dividend. Section 205(3) of the Companies Act, 1956, provides that no dividend shall be payable except in cash and, under Sub-section (5)(b), the mode of payment is indicated and that is :

" Any dividend payable in cash may be paid by cheque or warrant sent through the post directed to the registered address of the shareholder entitled to the payment of the dividend"

11. Payment of dividend by crediting in the accounts of the shareholders is thus no approved mode of disbursement of dividend. I would, therefore, agree with the learned appellate judge in his finding that evidence is lacking as to whether any tax was deducted from the dividend. For the accused to be hauled up under the penal provisions of the Act, the prosecution must show that the deductions were made by the particular officer and he failed to pay it to the credit of the Central Government; in other words, the offence is one attaching personally to the offender and not to the company as such and unless the prosecution succeeds in showing that the deduction was made by the particular accused no conviction can be entered on them. Accused Nos. 2 and 3 (V. Devassia and V.M. Joseph) came into the picture long after the offence was complete and they cannot, therefore, be found guilty in any event.

" It is evident that the dealer cannot reasonably be made liable for any past misconduct of his employee though the dealer can be made liable for any act done by his employee in the course of the employment and whom he can reasonably be expected to influence or control. The maxim *qui facit per alium facit per se* (he who acts through another acts through himself) is not generally applicable in criminal law" (vide *Harakchand Ratanchand Banthia and Others Vs. Union of India (UOI) and Others*, .

12. In respect of the first accused the contention was put forward that the offence though was complete under the 1922 Act, the same must be deemed to continue under the 1961 Act. The offence was committed if at all u/s 51 (a) of

the 1922 Act; but there is no charge under that section; the charge is u/s 276(d) of the 1961 Act; but, as a matter of fact, no offence has been committed by the accused under that section. Section 276(d) is to the effect that "if a person fails without reasonable cause or excuse

(d) to deduct and pay tax as required by the provisions of Chapter XVII-B or under Sub-section (2) of Section 226 "

13. So, to fasten guilt upon the accused the complainant must show that they failed to deduct and pay the tax as required by the provisions of Chapter XVII-B and we have already seen from Section 194 which falls under Chapter XVII-B that the principal officer when he declares and pays dividends under Sub-clause (a), (b), (c), (d) or (e) of Clause (22) of Section 2 should deduct from the amount of such dividends Income Tax at the rates in force. Such a contingency has never arisen at all in the present case. Here, the allegation is that they deducted tax under the Income Tax Act, 1922, and failed to pay the same which is an offence u/s 51 of the said Act. That offence was complete under the Act of 1922, and the prosecution ought to have been launched under that Act at the appropriate time. I see no force in the contention that the offence committed under the 1922 Act must be deemed to continue, so that the prosecution could validly be launched under the subsequent Act which came into force on April 1, 1962. Here it has to be borne in mind that the offence is not a mere default or omission to pay tax; but the failure on the part of the principal officer to deduct tax from the dividend and pay to the credit of the Central Government. If the offence is the omission to do a thing, the act constituting the offence would continue so long as the obligation to do the thing continues. But, in the present case, the obligation to pay the tax has not been established. The accused could be burdened with that obligation only if it is further shown that the dividends were declared and paid and that the tax also was collected by them from the dividends. Then only the obligation to pay to the credit of the Central Government would be cast on the accused; in other words, it is not a mere default or omission to pay tax which a party is bound to pay. That is not the subject-matter of the offence here. Here the offence is the failure to deduct and pay. When the deduction itself is not proved, the further obligation to pay cannot be thrown on the accused. The offence, if at all, was committed u/s 51 of the 1922 Act, which cannot survive so as to be made the subject-matter of a complaint under the 1961 Act, as under the latter Act Section 276(d) requires that the deduction and payment of tax should be one under the provisions of Chapter XVII-B of the 1961 Act. That requirement being absent, the charge is bound to fail and in confirmation of the order of acquittal, these appeals are dismissed.

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