

**(1957) 12 KAR CK 0006**  
**In the Karnataka High Court**  
**Case No : Writ Petition No. 10 of 1956**

K. Sadianna Shetty

APPELLANT

Vs

Second Additional Income Tax Officer, Mangalore

RESPONDENT

**Date of Decision :** 04-12-1957

**Acts Referred:**

Income Tax Act, 1922 — Section 28, 29, 44

**Citation :** (1958) 33 ITR 692

**Hon'ble Judges :** S.R. Das, C.J;A.R. Somnath Iyer, J

**Bench :** Division Bench

**Advocate :** T.V. Viswanatha Aiyar, for the Appellant; D.M. Chandrasekhar, for the Respondent

## Judgement

Das Gupta, C.J.—The only question raised in this petition is whether or not an order of the Income Tax Officer levying penalty on a dissolved firm is valid. The facts necessary to be stated for the purpose of understanding the position in this matter may be shortly stated as follows :

The petitioner before us was one of the three partners of a firm which was dissolved on 18th November, 1953. The said partnership had come into existence in the year 1935. On 31st May, 1952, an assessment was made u/s 23(3) on the said firm for the accounting year ending with 9th November, 1950, the assessment year being 1951-52. There was an appeal by the assessee against the said assessment, filed on 26th June, 1952, and the Appellate Assistant Commissioner by his order dated 17th January, 1956, reduced the amount assessed and gave relief to the assessee to the extent of Rs. 26,000 and odd. There was a further appeal against the said order to the Appellate Tribunal and the Appellate Tribunal by its order dated 31st July, 1957, gave some further relief to the assessee.

2. After making his order of assessment dated 31st May, 1952, as hereinbefore mentioned which was served on the assessee on 12th June, 1952, the Income Tax Officer had also issued a notice u/s 28 of the Income Tax Act calling upon the

firm to show cause why a penalty should not be levied under the said section for concealing the particulars of its income. The said notice was served on 13th June, 1952, and on 22nd July, 1952, the assessee firm sent its objection. Thereafter on 6th November, 1955, the assessee firms made a request to the Income Tax Officer for postponing the penalty proceedings till its appeal was heard. No reply was sent to the said letter. On 18th November, 1953, the said firms was dissolved. On 15th September, 1955, a further notice was issued by the Income Tax Officer addressed to the firms calling upon it to support its explanation. Thereafter the matter stood adjourned from time to time and ultimately on 9th March, 1956, the Income Tax Officer imposed a penalty of Rs. 25,000. The said penalty was imposed on the firm but it was adjusted against the the sum of Rs. 13,175-3-0 being the total of the several sums due to the partners and the balance of Rs. 11,824-7-0 was ordered to be paid on or before 30th March, 1956. Thereafter on 16th March, 1957, a notice of demand u/s 29 of the Indian Income Tax Act, 1922, was issued. The said notice was addressed as follows :

"Notice of demand u/s 29 of the Indian Income Tax Act, 1922.

To Sri K. Sadianna Shetty on behalf of

D. Venkappa Shetty & Co., (now dissolved),

Merchants, Coondapoor.

Status : Regd. Firm

----- G.I.R. No. 72-v"

3. The said K. Sadianna Shetty is the petitioner before us and the said D. Venkappa Shetty & Co. is the dissolved firm., The petitioner before us contests the validity of the said order dated 9th March, 1956, imposing penalty and the notice of demand dated 15th March, 1956.

4. The only contention urged before us by the learned advocate for the petitioner was that the levy of penalty on a dissolved firm was not authorized by the Indian Income Tax Act. He contended that in the Income Tax Act the identity of a firms as a unit distinct from its partners has been maintained. In support of that proposition he referred us to section 3 and section 26A of the Indian Income Tax Act.

5. Section 3 provides as follows :

"Where any Central Act enacts that Income Tax shall be charged for any year at any rate or rates tax at that rate or those rates shall be charged for that year..... in respect of the total income of the previous year of every individual, Hindu undivided family, company and local authority and of every firms and other association of persons or the partners of the firm or the members of the association individually".

6. Section 26A inter alia provides that an application may be made to the Income Tax Officer on behalf of any firm constituted under an instrument of partnership specifying the individual shares of the partners for registration for the purpose of this Act and of any other enactment for the time being in force relating to Income Tax or super-tax. The learned advocate contended before us that these sections show that the Indian Income Tax Act has maintained a difference between a firm and its partners for the purposes of Income Tax. If then, he contended, a firm is dissolved, no penalty can be imposed on it after such dissolution. In this case, he pointed out, the firm was dissolved before 9th March, 1956, which the penalty was imposed. The learned advocate, therefore, contended that the Income Tax authorities had no jurisdiction to impose a penalty u/s 28(1)(c) on a dissolved firm. In support of his contention the learned advocate relied on a decision of the Calcutta High Court in the case of Manindra Lal Goswami v. Income Tax Officer, in which Sinha, J., held that there was no warrant in the Act by which a discontinued firm can be assessed as it ceased to have a legal existence.

7. Sri D.M. Chandrasekhar, on behalf of the respondent Income Tax Officer, urged before us that the word "assessment" in the Income Tax Act has been used in different senses in different parts of the said Act. Sometimes the word "assessment" in the said Act means "assessment of the income", sometimes "assessment of the tax to be paid" and sometimes the said word connotes the entire machinery, the whole procedure, for imposing such tax. According to him, although a firm may be assessed under the Income Tax Act in the sense that its income is determined, the persons to be charged for the payment of the tax payable on such assessment are the partners. He referred us to section 23, sub-section (5), which provides that, in the case of a registered firm, the sum payable by the firm itself shall not be determined but the total income of each partner of the firm, including therein his share of its income, profits and gains of the previous year shall be assessed and the sum payable by him on the basis of such assessment shall be determined. On the analogy of this provision of the Income Tax Act the learned advocate contended that, although a penalty may be imposed on a firm, the persons really liable to pay the same are the partners of the firm. He further contended that the dissolution of the firm makes no difference in the matter of such liability and in support of this contention he relied on the provisions of section 44 of the Income Tax Act, which reads as follows :

"Where any business, profession or vocation carried on by a firm or association of persons has been discontinued, or where an association of persons is dissolved, every person who was at the time of such discontinuance or dissolution a partner of such firm or a member of such association shall, in respect of the income, profits and gains of the firm or association, be jointly and severally liable to assessment under Chapter IV and for the amount of tax payable and all the provisions of Chapter IV shall, so far as may be, apply to any such assessment."

8. The effect of the said section, according to the learned advocate is that, although a firm may be dissolved, the Income Tax authority would be entitled to proceed on the basis as if no dissolution had in effect taken place. In other words, except that the liability of the partners in a case where the firm has been dissolved will be joint and several, the position for the purpose of the Income Tax Act is the same whether or not the firm has been dissolved.

9. The learned advocate then contended before us that the provisions of section 28 are attracted to section 44 of the Indian Income Tax Act because section 44 itself says that all the provisions of Chapter IV (which includes section 28) shall, so far as may be, apply to any such assessment as contemplated in the said section. Therefore, he urged, a penalty can be imposed even though the firm may be dissolved. He relied on a decision of the Andhra Pradesh High Court reported as *Marreddi Krishna Reddy v. Income Tax Officer* in support of his said proposition.

10. In my opinion, none of the contentions of the learned advocate for the respondent can be accepted as sound. In my opinion, when a firm is dissolved and has thus ceased to exist in the eye of law no penalty can be imposed on it. The principle laid down in the Calcutta decision, to which I have already referred and wherein it has been held that there can be no assessment on a dissolved firm as such, would, equally apply to the case of a penalty imposed on such a firm. I cannot accept the argument of the learned advocate for the respondent that, although a penalty is imposed on a firm, the persons really liable to pay the same are its partners. The analogy of section 23(5) of the Income Tax Act cannot be drawn to the case of a penalty imposed u/s 28 of the Income Tax Act. According to section 28, penalty is imposed on the person who has failed to furnish the return of his total income or has concealed the particulars of his income as the case may be. It is such person who is clearly made liable to pay the penalty mentioned in the said section. In this case, the person, who is said to have concealed the particulars of its income, is the firm and section 28 of the Income Tax Act makes such firm liable to pay by way of penalty the amount mentioned in the said section. Unlike section 23(5) of the Income Tax Act, section 28 of the said Act nowhere makes the partners liable for payment of the penalty which has been imposed on the firm. In this connection reference may be made to clause (d) of sub-section (1) of section 28 of the Income Tax Act. It provides as follows :

"When the person liable to penalty is a registered firm, or as unregistered firm treated u/s 23(5)(b) as a registered firm, so that the amount of the Income Tax and super-tax payable by the firm itself has not been determined, that amount shall be taken to be an amount equals to the tax which would have been payable by an unregistered firm on an income equals to the firm's total income, and, in the cases referred to in clauses (b) and (c), the amount of the Income Tax and super-tax which would have been avoided if the income as returned had been accepted as the correct income, shall be taken to be the difference between the

amount of the tax which would have been payable by an unregistered firm on an income equal to the firm's total income and the amount of the tax payable by an unregistered firm on an income equals to the income of the firm as actually returned by the firm."

11. This clause, to my mind, clearly indicate that, although a registered firm itself is not made liable - but its partners are - for the payment of tax assessed on the income of such firm, when the person liable to a penalty u/s 28 is the firm the said penalty has to be determined with reference to the tax which would have been payable by an unregistered firm. This shows that the identity of the firm as such has been maintained in section 28 of the said Act and it is the firm which is made liable to pay the penalty and not its partners as in section 23(5) of the Indian Income Tax Act. This contention of the learned advocate for the respondent must therefore fail.

12. As for the contention of the learned advocate for the respondent, namely, that section 44 attracts section 28 of the Income Tax Act and enables the authorities to impose a penalty, which was payable by the firm, on its partners, I am also unable to accept the same. In the first place, the section itself does not say anything about penalty. It only makes the person, who were at the date of the dissolution of the firm its partners, in respect of the income, profits and gains of the firm, jointly liable to assessment and for the amount of tax payable. It does not says that such persons are liable also to pay penalty, if any, for which the firm was liable. The learned advocate for the respondent laid emphasis on the concluding portion of the said section wherein it is stated that "all the provisions of Chapter IV shall, so far as may be, apply to any such assessment" and contended that the said portion of section 44 attracts section 28 of the Income Tax Act and makes the partners liable for such penalty. This was no doubt the view taken by their Lordships of the Andhra Pradesh Highs Court in the case, Mareddi Krishna Reddi v. Income Tax Officer, on which the learned advocate relied. In my opinion, it is not possible to hold that the said section empowers a penalty, for which the firm which has since been dissolved was liable, to be imposed on the persons who were its partners before dissolution. On this point, I very respectfully disagree with the view taken by their Lordships of the Andhra Pradesh High Court in the case, Mareddi Krishna Reddi v. Income Tax Officer. I should mention that a Bench of the Madras Highs Court in the case of S.V. Veerappan Chettiar v. Commissioner of Income Tax, Madras, did not also accept the view taken by their Lordships of the Andhra Pradesh Highs Court in the said case. I am assuming for the moment that in this case the penalty has been imposed on its partners which in fact was not. What the said section in its concluding portion says is that all the provisions of Chapter IV shall apply to any such "assessment". It does not says that the said provisions would also apply to penalty. I am also unable to accept the view which has been urged before us, namely, that imposition of penalty is only a process for assessment of tax. In my opinion, penalty is not the same thing as assessment. It is a liability arising out of the fact that the assessee has concealed a part of his income or has not

furnished his return. It is no doubt true that the amount of penalty is to be calculated with reference to the amount of tax assessed or which could have been assessed but it is still a penalty and not an assessment of tax. In this respect, I agree with the view taken by their Lordships of the Madras High Court in the case to which I have just now referred.

13. Even if section 28 is attracted to section 44 by virtue of the concluding portion of section 44, that would not, in my opinion, help the learned advocate for the respondent in his present contention.

14. u/s 28 the person to be penalised is the person who has concealed the particulars of his income or has deliberately furnished inaccurate particulars of such income. If then such a person happens to be the firm, then penalty can be imposed only upon the firm. In fact clause (d) of section 28, as I have already mentioned, lays down the manner in which the amount of such penalty is to be determined if the person liable to penalty happens to be a registered firm. I have already pointed out that unlike section 23(5), section 28 nowhere provides that the amount of penalty to be imposed on a firm would be payable by its partners. Under the said section the penalty has to be imposed on the firm, if the firm happens to be a person who has concealed the particulars of its income or deliberately furnished inaccurate particulars of such income, and it is the firm which has to pay the said penalty.

15. This being the true effect of section 28 of the Income Tax Act, it is not possible to apply the said section to a case coming u/s 44 of the Income Tax Act. Section 44 mentions that the provisions of Chapter IV shall "as far as may be", which in my opinion means "so far as it is possible", apply to any such assessment. To hold that a penalty can be imposed on the partner in a case where the firm (which has been subsequently dissolved) has in its return concealed its true income, because of section 44, would be straining the language of that section to a degree which, in my opinion, is not permissible. Apart from this, section 44 covers a case where the dissolution has taken place before the assessment is made. The said section does not apply to a case where an assessment has already been made on a firm which, after such assessment, is dissolved. Such a case is not covered by section 44 of the Income Tax Act. Therefore, even if section 28 is attracted to section 44 even then no penalty can be imposed on a dissolved firm nor can a penalty imposed on such a firm be charged against its partners. In other words, if a dissolved firm as such cannot be assessed u/s 44, a penalty u/s 28 cannot also be imposed upon such a dissolved firm., Similarly, if section 44 does not empower the Income Tax authorities to charge the partners for assessment made on a dissolved firm as such, section 28 also would not permit the said authorities to charge the partners of a dissolved firm for the penalty which may have been imposed on the dissolved firm as such. These matters are outside the purview of section 44 of the Income Tax Act. All that section 44 lays down is that when a firm is dissolved, the persons who were its partners before such dissolution would be

jointly and severally liable to assessment in respect of the income, profits and gains of the firm. Applying that analogy to section 28, even if section 28 is attracted to section 44, all that can be said is that in a case where a firm has been dissolved, the penalty can be imposed on its partners. This is the highest which can be said even if section 28 is to be read subject to section 44. But that is not what has happened in this case. In this case, penalty has been imposed on a firm as such, although, at the date of such imposition, it was dissolved, and not on the partners of such dissolved firm. Therefore, in any view of the matter, the imposition of penalty in the present case cannot be justified by the provisions of section 44 of the Indian Income Tax Act, nor can the demand made against the persons, who were the partners of the said firm before its dissolution, for the payment of the amount of the said penalty, be justified by the said section.

16. The result, therefore, is that the petition succeeds and there will be an order quashing the penalty order dated 9th March, 1956, and the notice of demand dated 15th March, 1956, of the Second Additional Income Tax Officer, Mangalore. The petitioner will get the costs of this application. Advocate's fee is Rs. 150.

Somnath Iyer, J.

17. I agree

18. Petition allowed.