
(1971) 11 AP CK 0011
In the Andhra Pradesh High Court
Case No : Writ Petition No. 3853 of 1971

Kethmal Parekh

APPELLANT

Vs

Tax Recovery Officer and Another

RESPONDENT

Date of Decision : 15-11-1971

Acts Referred:

Income Tax Act, 1961 — Rule 2, 73, 222

Citation : (1973) 87 ITR 101

Hon'ble Judges : K.V.L. Narasimhan, C.J.; Parthasarathi, J

Bench : Division Bench

Advocate : S. Dasaratharama Reddy, for the Appellant; P. Rama Rao, for the Respondent

Judgement

Parthasarathi, J.—The petitioner and his father carried on business as partners under the name and style of " Kethmal Parekh & Co." The firm commenced its business on April 16, 1961, and ceased to do business with effect from 13th November, 1963. The Income Tax Officer made an order of assessment under which the firm became liable to pay tax for two successive years at Rs. 2,265 and Rs. 13,000. The firm was treated as an unregistered one and assessment was made on that basis. The petitioner's father died in 1964, It is averred by the petitioner that the deceased left no property. He also states that he could not pay arrears of tax because of the heavy loss sustained by the firm. It would appear that there was a levy of penalty u/s 221 to the tune of Rs. 1,750 and Rs. 9,000 for the two years in respect of which the default has occurred.

2. On March 8, 1967, the Income Tax Officer, Kothagudem, the second respondent herein, forwarded certificate to the Tax Recovery Officer u/s 222 of the Income Tax Act, 1961 (which for the sake of brevity will be referred to as "the Act" hereafter). The amounts recoverable as per the certificate are Rs. 4,162.20 and Rs. 22,793.13. These amounts are inclusive of the interest that accrued due up to the issue of the certificate. The person named in the certificate is the firm of Kethmal Parekh & Co.

3. It is submitted by the petitioner that there was no notice of demand served on him by the second respondent. It is further averred that the certificate issued u/s 222 of the Act mentions the name of the firm alone as the defaulter.

4. On 21st August, 1971, a notice under Rule 73 of the Second Schedule of the Act has been served on the petitioner calling upon him to show cause why he should not be arrested and detained in civil prison. The notice recites that a sum of Rs. 37,978.10 for the assessment years 1962-63 and 1963-64 remains unpaid. On receipt of the notice the petitioner appeared before the Tax Recovery Officer, the first respondent herein, and sought adjournment of the case till October 11, 1971.

5. On October 4, 1971, the petitioner applied to the Inspecting Assistant Commissioner of Income Tax, Hyderabad, asking for the settlement of the arrears at Rs. 8,000 and also for stay of the proceedings of arrest till the disposal of the petition. But, the Assistant Commissioner orally intimated to the petitioner that an earlier application in that behalf was already rejected.

6. The petitioner seeks a writ of prohibition restraining the further proceedings by the first respondent. It is the case of the petitioner that the notice issued under Rule 73 is devoid of jurisdiction inasmuch as he is not a defaulter within the meaning of Rule 1 of the Second Schedule of the Act. There is no certificate issued by the second respondent naming the petitioner as the assessee against whom proceedings under the Second Schedule are to be taken. Another ground urged in the petition is that the issue of a certificate naming the petitioner is a condition precedent for the application of the provisions of the Second Schedule against the petitioner.

7. In the counter-affidavit of the second respondent it is stated that subsequent to the service of the notice of demand and prior to the receipt of the certificate by the Tax Recovery Officer, the petitioner withdrew monies lying to his credit with another firm. The withdrawal of the monies by the petitioner, it is contended, is proof of the existence of adequate means to pay a substantial portion of the tax, nevertheless no portion of the dues was paid. The contention urged by the petitioner that the notice under Rule 73 is devoid of jurisdiction is described as untenable. The stand taken by the second respondent is that the mention of the firm in the certificate does not preclude the Tax Recovery Officer from realising the tax from the petitioner or from initiating proceedings under Rule 73 under the Second Schedule of the Act.

8. An affidavit by way of rejoinder to the counter-affidavit has been filed by the petitioner.

9. It is necessary to advert to the provisions of the Act and the Second Schedule that bear on the determination of the question formulated by the petitioner.

10. In the process provided by the Act for the realisation of the assessed tax, the starting point is the demand. And notice thereof is to be given in conformity with

Section 156. The Income Tax Officer, according to that provision, " shall serve upon the assessee a notice of demand in the prescribed form specifying the sum " payable as per an order passed under the Act.

11. Where the demand is not met or satisfied and the assessee is in default or is deemed to be in default in the payment of tax, the Income Tax Officer may, u/s 222, forward to the Tax Recovery Officer a certificate under his signature specifying the amount of arrears due from the assessee. The Tax Recovery Officer, on receipt of such certificate, shall proceed to recover from such assessee the amount specified therein by one or more of the modes mentioned in Clauses (a) to (d) of Sub-section (1) of Section 222. The process of recovery must conform to the rules laid down in the Second Schedule of the Act.

12. The four alternatives (and concurrent enforcement under more than one mode is permissible) are, attachment and sale of the assessee's movable property, like action in regard to immovable property, arrest of the assessee and his detention in prison, and, lastly, the realisation of dues by the appointment of receiver for the management of the property of the assessee.

13. It is enacted under Sub-section (2) of Section 222 that the Income Tax Officer is competent to issue a certificate notwithstanding that other proceedings are also taken for recovery of arrears.

14. It is evident that the Tax Recovery Officer's competence is attributable only to the certificate which is the foundation of his jurisdiction to proceed against the assessee's person or property. It not only vests in his jurisdiction but defines its limits.

15. The Second Schedule which prescribes the procedure for recovery of tax defines " certificate " to mean a certificate received by the Tax Recovery Officer from the Income Tax Officer for the recovery of arrears. A communication that is not in the form of a certificate as laid down by Section 222 cannot be of any avail. Nor can a supplementary direction which does not purport to be a certificate furnish the legal basis for action by the Tax Recovery Officer.

16. Rule 1 defines a defaulter as the assessee mentioned in the certificate ; Rule 2 enjoins on the Tax Recovery Officer the obligation of serving upon the defaulter a notice requiring the defaulter to pay the amount specified in the certificate within fifteen days from the date of the service of the notice. The defaulter is also apprised by notice that, in default of compliance with the direction to pay, steps would be taken to realise the amount under the Second Schedule.

17. The rules 1 and 2 make it clear that the Tax Recovery Officer's competence to act under the Schedule is limited to the assessee named in the certificate and arises only on the failure of that assessee to pay the arrears specified in the certificate within fifteen days from the date of service of notice as per Rule 2, The conclusion is irresistible that, although more than one person might be subjected to the liability under an assessment, it is only the assessee named in

the certificate that is amenable to the modes of recovery laid down under Schedule 2. Even the assessee named in the certificate can be proceeded against only on service of notice under Rule 2. It follows that the omission of the assessee named in the certificate to comply with the direction as to payment in accordance with the notice served under Rule 2 is an essential prerequisite for the exercise of the power by the Tax Recovery Officer. The coercive process under Schedule 2 is not to be invoked against any person other than the assessee named in the certificate and except after he has failed and neglected to satisfy the demand before the expiry of 15 days from the date of service of notice.

18. The significance of the notice under Rule 2 can be appreciated in the true perspective if one turns to Rule 16 which, inter alia, declares that after the service of such notice, the defaulter or his representative in interest shall not be competent to mortgage, charge, lease or otherwise deal with any property belonging to him, except with the permission of the Tax Recovery Officer. The rule also renders a civil court powerless to issue any process against such property in execution of a decree for payment of money. There is thus a total embargo on the exercise of the powers of disposal incidental to ownership. Even third parties suffer from the constraint because they are under a disability to invoke the civil court's aid to enforce their decrees.

19. Under Rule 73 of the Second Schedule no order for the arrest and detention in civil prison of a defaulter shall be made unless the Tax Recovery Officer has issued and served a notice upon the defaulter calling upon him to appear before him on the date specified in the notice. The appearance before the officer is to enable the defaulter to show cause why he should not be committed to the civil prison. The detention is ordered if the Tax Recovery Officer is satisfied that with the object or effect of obstructing the execution of the certificate, the defaulter has, after the receipt of the certificate in the office of the Tax Recovery Officer, dishonestly transferred, concealed or removed any part of his property. The detention in civil prison is also permissible if the circumstances enable the Tax Recovery Officer to be satisfied that, since the receipt of the certificate by the officer, the defaulter had refused or neglected to pay the arrears notwithstanding the possession of adequate means to pay the arrears or a substantial part thereof. It is evident from Rule 73 that the physical presence of the defaulter is provided for and certain omissions and commissions on his part can alone serve as the foundation for the exercise of the power to detain the defaulter in civil prison.

20. In the light of the above provisions of law examined by us, can it be said that a partner can be proceeded against or be detained in civil prison under the Second Schedule on the strength of a certificate that has named the firm alone as the assessee ? On behalf of the petitioner it is contended that the rules contemplate two notices to the person concerned, before the defaulter can be committed to civil prison, as conditions precedent for the application of the

coercive process of arrest. The notice prescribed by Rule 2 is the first requisite condition. When this condition is satisfied the procedure under the Second Schedule can be pressed into service against a " defaulter " ; that term connotes the assessee named in the notice. It is only against defaulters as defined in the rules that action can be taken under the Second Schedule. The definition of " defaulter " is couched in very clear and express terms. It is only the person named in the certificate that can be treated as a defaulter. He is entitled to notice before the provisions of Schedule 2 can be used against him. And before the person can be arrested and put in prison Rule 73 makes it obligatory on the Tax Recovery Officer to give a further notice. The rule contemplates the physical presence of the person who is sought to be arrested and kept in prison. The detention in prison cannot be ordered except on the fulfilment of certain conditions. It is thus a mandatory obligation of the Tax Recovery Officer to determine on the facts of the case whether certain acts of commission or omission have taken place so as to justify the arrest and detention in prison.

21. Mr. Dasaratharama Reddy has relied upon the decision of a Full Bench of the Mysore High Court in Raja Pid Naik Vs. Agricultural Income Tax Officer, Yadgiri and Another, That was a case under the Hyderabad Agricultural Income Tax Act. The provisions of that statute which were construed and applied by the Full Bench of the Mysore High court are in pan materia with the provisions of the Income Tax Act, which are pertinent in the present context. Section 34 of the statute considered by the Mysore High Court enabled the Agricultural Income Tax Officer to forward to the Taluqdar a certificate in cases in which the assessee was in default. The wording of Section 34 is identical in all material respects with the language of Section 222. On receipt of the certificate it was competent for the Taluqdar to recover the amounts specified therein as a public demand. The assessee died during the pendency of the recovery proceedings. But, before his death a notice of demand was served on him. The question was whether the proceedings could be continued against the legal representative and whether the successor-in-interest was an "assessee in default ", within the meaning of Section 34. The successor-in-interest was not served with a notice of demand. The Full Bench of the Mysore High Court held that the proceedings could not be continued against the legal representative although Section 22 of the Act fastened the liability of the deceased assessee on the legal representative. It was observed that a certificate forwarded u/s 34(3) authorises recovery of arrears only from the assessee in default named in the certificate. The result is when the assessee dies, the efficacy of the certificate comes to an end and the recovery proceedings cannot be continued against the successor-in-interest on the strength of the certificate. The only method by which the successor could be proceeded against was on the basis of a fresh certificate naming him as the defaulter. Learned counsel calls in aid the ratio of the decision that the proceedings for recovery of the tax are permissible only against the assessee named in the certificate. It was on the application of this principle that the Full Bench of the Mysore High Court held that the certificate which served as the

foundation for the action against the deceased person was no longer operative after the death of the defaulter named in the certificate.

22. The counsel submits that in the present case the position is rendered clearer because of the definition of the word " defaulter " in Rule 1. He has also relied upon the decision in Behari Lal Ram Charan Kothi Vs. Income Tax Officer, "B" Ward and Another, . In that case for the recovery of the dues of a company, notice was issued to another concern on the ground that the latter owed monies to the assessee. The garnishee denied the existence of any debt. But the statement of the garnishee was disbelieved by the Tax Recovery Officer who sought to proceed against the garnishee, on the strength of the certificate which named the assessee as the person to whom the procedure was to be applied. Although the garnishee could be deemed to be an "assessee in default" within the meaning of Section 226(3), the Allahabad High Court held that as no recovery certificate was issued naming the garnishee, the proceedings taken by the Tax Recovery Officer were without jurisdiction. It was observed :

" Some indication of what a recovery certificate should be is provided by Section 222. It is a certificate under the signature of the Income Tax Officer specifying the amount of arrears due from an assessee and forwarded by the Income Tax Officer to the Tax Recovery Officer The two notices are in the statutory form and in the blank space where the number and date of the recovery certificate should be filled in the entry is number nil and dated nil". In the instant case, as no recovery certificate was issued, the recovery proceedings taken by the Tax Recovery Officer are without jurisdiction."

23. M. Rama Rao, counsel for revenue, submits that the decisions relied upon by the counsel for the petitioner are distinguishable and that the action proposed to be taken by the Tax Recovery Officer is sustainable under law. The main basis of his argument is that all the partners are jointly and severally liable for the tax and that when the firm is named in the certificate as the assessee, it is tantamount to the naming of all the partners. According to him all of them are defaulters within the meaning of the Second Schedule. Consequently, he maintains that on the strength of the certificate in which the firm is named as the assessee it is open to the Tax Recovery Officer to proceed against any of the partners, notwithstanding that the notice specified under Rule 2 has not been served on the individual partners.

24. In support of his contention, the standing counsel for the revenue, drew our attention to two decisions in Sahu Rajeshwar Nath Vs. Income Tax Officer, C-Ward, Meerut and Another, and Kapurchand Shrimal Vs. Tax Recovery Officer, Hyderabad and Others, In the first of the cases cited, the Supreme Court had occasion to deal with a proceeding arising out of a certificate issued u/s 46(2) of the repealed Act. Ramaswamy J., speaking for the court, observed as follows :

"In the return filed by the unregistered firm on January 19. 1945, at page 33 of the paper book, also the appellant is shown as one of the partners. It is manifest

that the provisions of Order XXI, Rule 50(2), apply to the present case *mutatis mutandis* and since the appellant does not dispute that he was a partner of the unregistered firm for the relevant accounting year, the Collector could lawfully proceed to execute the certificate u/s 46(2) of the Act against the appellant and recover the Income Tax arrears from him."

25. Accordingly, it was held that the proceedings taken for the recovery of the tax against the appellant were valid. We are unable to accede to the submission of counsel that the point debated before us arose for consideration before the Supreme Court or that the decision lays down a proposition which governs the present case. Their Lordships of the Supreme Court were not invited to consider whether on the strength of the certificate issued in the name of the firm an individual partner could be proceeded against. It is true that the certificate has been held to constitute a valid legal basis for the action against the individual partner. But no exception was taken on the ground that the certificate did not authorise action against the partner not named therein. It must also be borne in mind that their Lordships had dealt with the case under the old Act which did not contain provisions corresponding to Schedule 2. It was on the strength of Order 21, Rule 50, that the action was held to be justifiable. It is not contended before us on behalf of the petitioner that he, as a partner, is under no obligation to pay the arrears of tax. But the submission is that for the coercive process of recovery specified in Schedule 2 to be applied, the condition precedent is the issue of a certificate, naming the person sought to be proceeded against, as the assessee. This question was not specifically dealt with by the Supreme Court in the case cited. Further, the provisions of the repealed Act, on the basis of which the decision was rendered, are materially different from the provisions of the Second Schedule.

26. The argument that was advanced in that case was that it was not open to the Collector in a proceeding u/s 46(2) of the Act to recover from the appellant the Income Tax dues from the partnership. It was this argument that their Lordships of the Supreme Court found themselves unable to accede to. The controversy before us does not relate to the substantive liability of the partner to pay the arrears of tax. The sole question is whether the petitioner can be subjected to arrest and detention in civil prison on the strength of a certificate which does not name him *eo nomine* as the assessee.

27. Another decision of the Supreme Court to which our attention was drawn is at page 623 (*supra*) of the same volume. In that case the position was that a Hindu undivided family committed default and the karta was sought to be arrested and detained in prison. Their Lordships of the Supreme Court pointed out that the Hindu undivided family is a distinct entity and was the assessee in default. It was no doubt represented by the karta. But the omission or the default of the Hindu undivided family did not entail the penalty to which the karta could be subjected. Mr. Rama Rao seeks to deduce a proposition from certain dicta of the Supreme Court and it is sought to be elucidated in this manner : the

arrest of the karta was found to be illegal because the Hindu undivided family was a distinct taxable entity and the manager of the undivided family could not, for the purpose of Section 226 of the Income Tax Act, be deemed to be the assessee when the assessment was made against the undivided family and the certificate for recovery was issued against the family. Mr. Rama Rao lays stress on the fact that the petitioner, being a partner, is an assessee within the meaning of the Act and an assessee in default within the meaning of Section 222.

28. We are unable to accede to the suggestion made by Mr. Rama Rao that the necessary implication of the decision of the Supreme Court is that when the certificate is issued u/s 222, it must be deemed to be a certificate treating all the individual partners also as defaulters. In our opinion, the pronouncement of the Supreme Court does not justify the deduction of a principle in the manner formulated by him. In fact some observations in the judgment furnish a clear basis against the deduction of the principle contended for. Shah J. (as he then was) pointed out that the expression "person" occurring in Sections 276, 276A and 277 cannot be assigned the meaning as per the definition in Section 2(31) of the Act. His Lordship pointed out that the provisions are intended to penalise only those individuals who fail to carry out the duty cast by the specific provisions of the statute or are otherwise responsible for the acts done. On this hypothesis, his Lordship said that, for the default of the Hindu undivided family, the karta cannot be arrested and detained in the prison, notwithstanding that in proceedings against the members of the undivided family the manager represents it before the Tax Recovery Officer. It is true that the expression "assessee " u/s 2(7) means a person by whom any tax or any other sum of money is payable under the Act. But the mode of recovery prescribed by Schedule 2 becomes applicable only on the proved default or the omission of the person against whom a coercive process is sought. The reasoning adopted by his Lordship in regard to penal proceedings is equally applicable in regard to the coercive procedure prescribed by Schedule 2. If the expression "person" cannot be understood with reference to penal proceedings in the manner defined u/s 2(31), by the same token the expression " assessee " cannot be understood in the sense in which it is defined by the Act, in respect of the proceedings under Schedule 2.

29. The mandatory requirement is that there should be notice to the defaulter under Rule 2 before further action can be taken. We are of opinion that the provisions of Rule 2 cannot be said to have been complied with, and the doctrine of constructive notice cannot be resorted to. What the rule makes a condition precedent is actual notice to the assessee and not constructive notice, which may be imputed to him in his capacity as partner.

30. Our : attention was next drawn to a decision of the Allahabad High Court in Ram Das Jaiswal Vs. Income Tax Officer, . In that case a single judge of the Allahabad High Court held that it is not necessary that a further notice should be served upon a partner of the firm in order to render that partner liable for the

payment of tax if a notice of demand has been served upon a partnership firm. Pathak J. of the Allahabad High Court held that the liability is a personal one for the enforcement of which " the partner is vulnerable to all the processes of recovery which can be taken as if it was his personal debt. The learned judge accordingly held that the partner is not immune from arrest in proceedings for recovery of the Income Tax due by the firm. With respect we are unable to accede to the conclusion of the learned judge. He was of opinion that the decision of the Supreme Court in *Sahu Rajeshwar Nath v. Income Tax Officer, C-Ward, Meerut*;, furnishes a precedent which is applicable. We find that the learned judge's attention was not invited to the definition of the expression "defaulter " nor was he called upon to test the question from the relevant angle. We think it necessary to approach the question from this point of view. The arrest necessarily postulates the physical presence of the person and the detention in civil prison can be ordered on the Tax Recovery Officer being satisfied about certain omissions or commissions. The acts- or omissions might relate to the affairs or property of the firm or the affairs or the property of the individual partner. The penalty under which a person suffers loss of liberty is in the nature of a punishment inflicted on him for a criminal offence. It results in the deprivation of freedom that constitutes a fundamental right. A constraint on a man's liberty is an extremely drastic step that can be resorted to only on proof of a deliberate or wilful or culpable avoidance of the obligation to pay the tax. This is a measure that can be resorted to only because of certain antecedent acts of commission and/or omission. If the argument of Mr. Rama Rao is accepted it would mean that the law permits the ultimate remedy of arrest to be resorted to against a person to whom the opportunity to avoid the extreme penalty was not given by notice served on him. We think the scheme of the enactment is incompatible with such a cause of action.

31. It is not difficult to envisage several situations especially in regard to unregistered firms where the very existence of the jural relationship as partner might be in dispute. We are not persuaded that the constructive liability of a partner for tax liability is to be understood in such a manner as to enable the Tax Recovery Officer to proceed against persons whom he deems to be partners although they may question the fact of the jural relationship. Can it be said that without such persons being named in the certificate, and without their having an opportunity to raise the, question at any earlier stage, they can be called upon under Rule 73 to show cause against their detention in prison ? It is very doubtful whether under rule 73 an inquiry whether he is a partner is permissible. An intention cannot be attributed to the legislature to provide only for a summary inquiry of such an issue. It involves a hardship and renders possible the use of a coercive machinery in an oppressive manner which could not have been intended by the legislature.

32. We cannot overlook the distinction between the constructive liability of a partner for the tax and disability which arises by reason of the certificate making a partner constructively liable for the application of the provisions of Schedule 2

of the Act although his name is not specified eo nomine in the certificate. The effect of the certificate on the hypothesis urged by Mr. Rama Rao is that a person can be adjudged to be a partner, although he might be questioning that basic factual position, without his being heard. The consequences of the acceptance of the proposition advanced by the counsel for revenue are far reaching and startling. Let us consider one of the many possible consequences as illustrative of the position. The effect of Rule 16 is that even a lease cannot be granted by a defaulter after the receipt of the certificate by the Tax Recovery Officer. In cases where the firm alone is named as defaulter, the result of the theory of constructive liability under the certificate would be that a partner who is unaware of the issue of certificate and who may have dealt with his property bona fide suffers from the disability arising under Rule 16. This may affect a large number of bona fide transactions entered into with partners by third parties. And what would be the result of involuntary sales held by courts in execution of decrees against partners who have not been named in the certificate ? We must also bear in mind the basic principle of partnership law that for the liabilities of the firm the assets of the firm should be proceeded against in the first instance. All these considerations point to the conclusion that we cannot hold a partner to be liable under Schedule 2 unless the certificate expressly names him and he becomes a "defaulter " as defined by Rule 1.

33. In *Cape Brandy Syndicate v. Inland Revenue Commissioners* [1921] 1 K.B. 64 : 12 T.C. 358. Rowlatt J. expressed a principle which is relevant in the present context. The learned judge was dealing with the rule of interpretation that in a taxing Act clear words are necessary in order to tax the subject. His Lordship pointed out that:

"Too wide and fanciful a construction is often sought to be given to that maxim, which does not mean that words are to be unduly restricted against the Crown, or that there is to be any discrimination against the Crown in those Acts. "

34. The true meaning of the maxim is that in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used. On this principle it must be held that the certificate issued in the name of the firm cannot be said to be effective against the individual partners also so as to make them liable on the strength of a certificate naming the firm alone.

35. We are of opinion that there is no warrant for the view that on the strength of a certificate naming the firm as the defaulter it will be permissible to arrest an individual partner.

36. We are of opinion that the construction of the relevant provisions of law advocated by the counsel for revenue cannot be accepted. It is, however, open to the Income Tax Officer to amend the certificate already issued by him naming the individual partner also as a defaulter. We are of opinion that the ruling in

UNION OF INDIA Vs. SATYANARAYAN KHAN AND OTHERS., is applicable to a situation like the present one. The Income Tax Officer may amend the certificate previously issued by him enabling the Tax Recovery Officer to take steps now against the petitioner under Schedule 2. For the reasons mentioned above, we hold that the notice issued under Rule 73 on August 21, 1971, is ultra vires and has to be quashed.

37. The rule nisi is made absolute. But, in the circumstances, we direct each party to bear its costs.