
(1966) 10 KL CK 0025
In the High Court Of Kerala
Case No : O.P. No. 208 of 1965

Koya

APPELLANT

Vs

Additional Income Tax Officer, Calicut and Another

RESPONDENT

Date of Decision : 05-10-1966

Acts Referred:

Constitution of India, 1950 — Article 226, 32

Citation : (1967) KLJ 715

Hon'ble Judges : P. Govindan Nair, J

Bench : Single Bench

Advocate : V. Rama Shenoi and R. Raya Shenoi, for the Appellant; C.T. Peter, for the Respondent

Final Decision : Allowed

Judgement

P. Govindan Nair, J.—The petitioner is an assessee to income tax for the assessment years 1954-55 to 1958-59. Notices u/s 34(1) (a) of the Indian Income Tax Act, 1922 were issued to the petitioner and after hearing his objections assessments were made in relation to what was found by the assessing authority to be income that had escaped assessment. These proceedings were initiated because it was found that the assessee had made certain investments during the years 1954-55 to 1958-59 in his name as well as in the name of his wife amounting to Rs. 47,000/- and odd. The income returned by the assessee was much lower. The explanation offered by the assessee was that though he was only an employee under a timber dealer, he used to get considerable amounts of Bhakshis or "mamool" from his employer's customers and that his wife had savings From the sale of embroidered cloth and that the investments made came out of his savings from Bhakshis received by him as well as from his wife's savings. These explanations were rejected and reassessments were made. Consequent on this, notices were issued to the petitioner to show cause why action should not be taken u/s 28(1) (c) of the Indian income tax Act, 1922. Tire petitioner objected to this. Notwithstanding the objection, penalty

orders Ex. P3, P3(a) P3(b), P3(c) and P3(d) have been passed against the petitioner for the years 1954-55 to 1958-59.respectively. These orders were appealed against and the appeals were rejected by orders that have been produced as Ex. P4, P4(a), P4(b), P4(c) and P4(d). The orders imposing the penalty state:

It is also stated by him that the onus of proving that the income included in the assessment was really income concealed by the assessee is on the department and that the penalty u/s 28 (1) (c) cannot lie. There is absolutely no basis for this-stand.

The same position was taken up by the appellate authority is clear from the following passage in the appellate order Ex. P4 (d).

Even in penalty proceedings the onus is still on the appellant and unless he is able to prove that the offence was not committed by him, the imposition of penalty cannot be said to be unjustified.

The stand taken up by the authorities is clearly against the view that has been expressed by this court in more than one decision. Reference may be made to the judgment of this court in Maney and Co, v. Commissioner of income tax, Kerala reported in/1963/47 I.T. R. 434. Therein it is stated:

The onus of proof is on the department, that the degree of proof is that of a criminal prosecution and that the mere preponderance of probability will not suffice as in the case of a civil action.

In Ramankutty v. income tax Officer, Alleppey reported in 1965 K.L. J. 532, I expressed the same view, and in a recent judgment in I.T. R. No. 39 of 1965, the, position was reiterated by a Division Bench consisting of the Chief Justice and myself. A passage from the judgment of the Bombay High Court Commissioner of income tax Gujarat v. L.H. Vora reported in 1965-56 I. T, R. 126 is relevant:-

The proceedings being of a penal nature and the burden being upon the department, it would be but legitimate to say that mere falsity of an explanation given in assessment proceedings would not necessarily lead to the inference that the disputed amount represented income, and that, besides that circumstance, there must be some additional material from which the income tax Officer has to satisfy himself whether the assessee was guilty of the charge against him u/s 28.

2. Apart from the fact that the explanation was rejected, there were no materials available before the income tax Officer to enable him to hold that what was treated as escaped income was really the income of the assessee. The approach made by the officer and by the appellate authority is also opposed to the view expressed by this court. This constitutes a patent error in the orders impugned before this Court and these orders will have to be vacated.

3. Counsel on behalf of the revenue has asserted that the series of orders, Ex.

P4, P4 (a), P4 (b), P4 (c), and P4(d) being appealable orders, this Court should not exercise its jurisdiction under Art. 226 of the Constitution. He further urges that the income tax Act provides a complete machinery for assessment of tax and imposition of penalty and for obtaining relief in Respect of any improper ordered passed by the income tax Authorities and this Court should not encourage the tax payers to invoke the jurisdiction under Art. 226 of the Constitution when they have adequate remedy open to them by way of appeals to the Appellate Authorities For these propositions reliance has been placed on the decision of the Supreme Court in C.A. Abraham v. income tax Officer, Kottayam and another reported in 1961/41 ITR 425 and the passage relied on reads thus:

In our view, the petition filed by the appellant should not have been entertained. The income tax Act provides a complete machinery for assessment of tax and imposition of penalty and for obtaining relief in respect of any improper orders passed by the income tax authorities, and the appellant could not be permitted to abandon resort to that machinery and to invoke the jurisdiction of the High Court under Article 226 of the Constitution when he had adequate remedy open to him by an appeal to the Tribunal. But the High Court did entertain the petition and has also granted leave to the appellant to appeal to this court. The petition hearing been entertained and leave having been granted, we do not think that we will be justified at this stage in dismissing the appeal in limine.

4. These observations were made in an appeal from the judgment of this court which disposed of an application under Art. 226 of the Constitution. The question dealt with was, one in relation to which there was conflict of judicial opinion. No question was either urged or considered before or by this Court about the maintainability of the application under Art. 226 of the Constitution. Whatever it be, that the application should not have been entertained by this court. This is clear from the observations of the Supreme Court. I do not think that the observations made by the. Supreme Court contain a general statement that the availability of other remedies completely and invariably bars the exercise of jurisdiction under Art. 226.

5. It has been observed by the Supreme Court that when there is a patent error in the order impugned, the availability of other remedies would not be a bar to the exercise of jurisdiction under Art. 226. A passage from the decision in Smt. Ujjam Bai v. State of Uttar Pradesh reported in 1962 S.C. 1621 may be quoted

An order of assessment made by an authority under a taxing statute which is intra vires and in the undoubted exercise of its jurisdiction cannot be challenged on the sole ground that it is passed on a misconstruction of a provision of the Act or of a notification issued thereunder, Nor can the validity of such an order be questioned in a petition under Art. 32 of the Constitution. The proper remedy for correcting an error in such an order is to proceed by way of appeal, or if the error is an error apparent on the face of the record, then by an application: under Art. 226 of (he Constitution..

6. Reference may be made to two other decisions; the first is in *Municipal Council, Khurai and another v. Kamal Kumar and another* reported in 1965 S.C. 1321 wherein it is observed:

Though the High Court would not ordinarily entertain a petition under Art. 226 of the Constitution where an alternative remedy is open to the aggrieved party, it has jurisdiction to grant relief to such a party if it thinks proper to do so in the circumstances of the case."

Regarding the particular case, the Supreme Court observed:

In the present case the High Court has chosen to exercise discretion in favor of the respondents and it would not be right for the Supreme Court to interfere with the exercise of that discretion unless it is satisfied that the action of the High Court was arbitrary or unreasonable.

The other decision is in *Deputy Commercial Tern: Officer, Madras v. Rayalaseema Constructions* reported in (1966) 17 S.T. C. 505. It was held therein:

that, although, when there was an alternative remedy, the High Court would not normally entertain an application under Article 226 of the Constitution of India, where the High Court had chosen to exercise its jurisdiction to grant relief to the petitioner the Supreme Court would not interfere with the jurisdiction exercised by the High Court.

7. I am convinced that this is a fit case for the High Court to exercise its jurisdiction under Art. 226 of the Constitution. The authorities concerned, it is imperative, must be conversant with the views expressed by this court. The view taken by the authorities is opposed to what has been ruled, in more than one case, by the High Court. The orders are vitiated by patent errors. I quash the orders Exs. P3, P3 (a), P3 (b), P3(c) and P3(d) as well as Exs. P4, P4(a), P4(b), P4(c) and P4 (d) and allow this writ application. There will be no order as to costs.