
(1981) 01 KL CK 0009
In the High Court Of Kerala
Case No : O.P. No. 3416 of 1977

Krishna Bhatta

APPELLANT

Vs

Agrl. Income Tax Officer and Others

RESPONDENT

Date of Decision : 13-01-1981

Acts Referred:

Constitution of India, 1950 — Article 226
Kerala Agricultural Income Tax Act, 1950 — Section 41(1)

Citation : (1981) 2 ILR (Ker) 16

Hon'ble Judges : V. Khalid, J;P. Subramonian Poti, J

Bench : Division Bench

Advocate : U.P. Kunikullaya, for the Appellant; Government Pleader, for the Respondent

Judgement

Subramonian Poti, J.—Our learned brother, Kochu Thommen J., felt that the decision in O.P. No. 901 of 1967 (See *infra* p. 29) requires reconsideration and, therefore, referred this case to a Division Bench. The question raised in this case is of some importance. The Agrl. I.T. Act, 1950, provides, in Section 41(1), for the imposition of penalty when an assessee under that Act is in default in payment of agricultural Income Tax. On such default, the Agrl. ITO may, in his discretion, direct that in addition to the amount of the arrears a sum not exceeding that amount shall be recovered from the assessee by way of penalty. There is no time-limit specified in the Act for passing an order imposing penalty. Sub-section (4) of Section 41 provides that no proceeding for the recovery of any sum payable under the Act shall be commenced after the expiration of three years from the last day fixed for payment in the notice of demand served u/s 30 or where the assessee has been treated as not being in default under the proviso to Sub-section (1) of Section 40 pending his appeal, after the expiration of three years from the date on which the appeal was decided. Therefore, by virtue of Sub-section (4), the tax imposed on an assessee becomes irrecoverable after the period specified in Sub-section (4) and, similarly, if penalty is imposed, such penalty becomes irrecoverable after the period specified in Sub-section (4), In a

case, where the tax imposed has become irrecoverable by lapse of time, if after many years, the assessing authority chooses to impose penalty, could such an imposition be validly attacked ? That is the question before us. The period is about 16 years after the demand. Despite the absence of a period specified in Section 41 as that within which penalty could be imposed, could penalty be imposed beyond a reasonable period ? If not, is a period of 16 years a reasonable period ? These are the questions raised in this original petition.

2. The assessee in this case was assessed to agricultural Income Tax for 1958-59, by order dated February 10, 1960, and a demand notice for Rs. 2,787.54 was served on the assessee. Out of this a sum of Rs. 1,082.97 was paid by the assessee and the balance of Rs. 1,705.57 was in arrears. By a notice dated February 5, 1965, the assessee was informed by the first respondent that he was proposing to levy penalty for non-payment of tax. The liability for payment of penalty was disputed by the petitioner. He also contended that recovery of tax had become barred. Thereafter, a notice dated July 1, 1965, copy of which is Ex. P-3 was issued to the petitioner proposing imposition of penalty of 50% of the tax for non-payment. That too was objected to by the petitioner. Nothing seems to have happened on the basis of that notice. Yet, another notice, Ex. P-4 dated October 4, 1972, was issued by the first respondent to the petitioner proposing to levy a penalty equal to the amount of the tax for non-payment of the tax. There is no mention in Ex. P-4 of the earlier proposal to levy penalty at 50% of the tax and the action taken thereon. Evidently no action seems to have been taken pursuant to the earlier notices. Nothing happened thereafter for a long time. Ultimately, by Ex. P-5 order dated June 21, 1976, a penalty equal to the tax in default was imposed. The petitioner thereupon filed a revision to the second respondent, the Dy. Commissioner (Appeals). The Dy. Commissioner took the view that the recovery of tax had become barred but the petitioner was in default and in view of the observations in O.P. No. 901 of 1967 of this court (see *infra* p. 29), it must be taken that there was no embargo in imposing penalty merely because of the lapse of a long time after the assessment. Therefore, the revision was dismissed. It is Ex. P-5 order as confirmed by Ex. P-7 that is challenged in this original petition.

3. As we have indicated the Deputy Commissioner was only purporting to follow the decision in O.P. No. 901 of 1967 (see *infra* p. 29). That was a decision by our learned brother, Gopalakrishna Nambiyar J., as he then was. In that case, the petitioner had challenged a notice, Ex. P-2, issued to him proposing recovery of the tax defaulted by the assessee and also proposing to impose a penalty in view of the default in the payment of tax. After referring to Sub-section (4) of Section 41, the learned judge observed in that case thus (See *infra* p. 30) :

"That proceedings for "recovery" are barred by reason of the above provision is not disputed, and cannot be disputed. But Ex. P-3 also threatens the petitioner with penalty proceedings in case of default in paying the tax. I have not been shown any provision in the statute which places an embargo on imposing penalty

beyond a certain time from the date of the assessment."

4. Of course there is no provision in the statute limiting the time within which penalty is to be imposed. The question whether even in the absence of a provision in the statute limiting the time within which action had to be taken, an authority could exercise its power to impose penalty after any number of years and without having any reason for the inordinate delay, was not before the learned judge. In fact, it was not raised in that case. The assessment there was by an order dated February 10, 1962. There was an appeal against that order and it was in March, 1967, that Ex. P-2 notice proposing recovery of tax and imposition of penalty was issued to the petitioner therein. On those facts no contention was raised in that case that there was any inordinate delay in issuing the notice, so much so, there was no occasion to consider it.

5. Our attention has been drawn to the decision of the Supreme Court in *Swastik Oil Mills Ltd. v. H. B. Munshi* [1968] 21 STC 383, by the learned counsel, Sri Dharmadan, appearing for the respondents, in support of his contention that where no period of limitation is specified in the statute it is not for the court to read a period of limitation to hold that proceedings taken by an authority are not validly taken. The question that arose before the Supreme Court in that case concerned the propriety of commencing proceedings by way of suo motu revision u/s 31 of the Bombay Sales Tax Act (3 of 1953), to reopen the assessment for the period from April 1, 1948, to March 31, 1950, and 1st April, 1950, to 31st March, 1951. Notice was issued on 7th January, 1963. There were several contentions raised as to the validity of the notice, one of them being that a notice issued after a long period ought not to be considered as valid. The court noticed that Section 31 of the Bombay Sales Tax Act did not lay down any limitation for the exercise of the power of revision by a Deputy Commissioner suo motu. The court was not prepared to accept the case that such limitation must be necessarily read into the Act. The question which is before us is different. The following observations in the judgment of the Bombay High Court which is seen in the same report at p. 389 (of 21 STC) have been brought to our notice by the learned counsel for the petitioner :

"By reason of the amendment introduced in 1959 in Section 15 of the Act of 1953, it has been provided that there will be no period of limitation for an action to be taken u/s 31 of the Act of 1953, and such action could be taken after any length of time."

6. It is true that there being no period of limitation as prescribed, such period cannot be read into the Act in regard to action to be taken u/s 41(1) of the Act. But the power conferred under a statute cannot be exercised at any point of time but must be exercised within a reasonable time. That question did not arise in that form before the Supreme Court in the case adverted to nor was it purported to be decided.

7. A Division Bench of this court in ITR No. 96 of 1979, [Dy. Commr. of Agrl. I.T.

and S.T. v. Paul Pandian [1981] 128 ITR 808] noticed the decision in Swastik Oil Mills Ltd. Vs. H.B. Munshi, Deputy Commissioner of Sales Tax, Bombay, , and observed in the following terms (p. 812) :

"It has to be noticed that in the case which came up before the Supreme Court the power of suo motu revision of the Deputy Commissioner was exercised when the matter was already pending in revision and the assessment had not become final. In our view, whatever the Supreme Court observed in that case has to be understood in the context of the facts and circumstances of that case, without treating it as one laying down a principle of general application."

8. The Division Bench further observed thus (p. 812) :

"To us it appears to be a sound principle that even though Section 34 of the Act in terms does not prescribe a time-limit within which the power under that section has to be exercised, in order to avoid prejudice and hardship to the assessee it should be exercised within a reasonable time once the assessment becomes final, lest it be a Damocles' sword hanging over the head of the assessee for all time. We have not been shown anything to justify the inordinate delay between the completion of assessment for the years 1967-68 and 1968-69, on November 2, 1967, and November 20, 1968, respectively, on the one hand and its reopening on August 31, 1978, on the other, the delay being about 11 years in one case and about 10 years in the other."

9. The decision of our learned brother, Gopalan Nambiyar J, (V. Kunhikannan v. Agrl. ITO, see *infra* p. 29), is well answered by the decision of the Division Bench. The question is not one of limitation as has been said by many courts but is one of propriety of exercising of power beyond a reasonable time as pointed out by this court in the decision we have just now adverted to. Proceedings enforceable against a party should not continue to be so enforceable for all time. In a case, where there may be sufficient reason for the delay such as attempts by the party to protract and the authority has been vigilant all through, the mere lapse of a number of years may not be very material. That is why it would not be possible to lay down any rule as to the number of years within which proceedings should be taken at the risk of loss of the right to take such proceedings. That would depend upon circumstances which resulted in the delay. At the same time, it cannot be said that irrespective of the conduct of the authority seeking to enforce or exercise its powers if the statute does not lay down a time-limit within which such exercise should be made, it can be exercised at any time. We would in this context refer to a few decisions bearing on the question before us.

10. The question whether in the absence of a period of limitation prescribed for imposing penalty for non-compliance with the notice issued under Sub-sections (2) and (4) of Section 22 of the Indian I.T. Act, 1922, proceedings for levy of such penalty could be taken after the expiry of a long period of about 14 years came up for decision before the Allahabad High Court in MOHD. ATIQ Vs. Income Tax OFFICER, DISTRICT II (V), KANPUR., . The court, considering this plea, held

thus (p. 456) :

"It is true that no period of limitation is provided for imposing a penalty, but it is equally well settled that where no period of limitation is provided, proceedings should be taken within a reasonable time. I do not see how it can be said that this long lapse of fourteen years is reasonable time. To my mind, it is not merely unreasonable ; it is fantastic."

11. A Division Bench of the same High Court in *Ram Kishan Baldeo Prasad Vs. The Commissioner of Income Tax*, , observed in regard to this question thus (p. 494) :

"If the learned single judge intended to lay down that inordinate delay in every case, as a matter of law, would lead to the invalidity of the penalty order then we cannot, with respect, subscribe to it. When there is no prescribed period of limitation, as already observed, delay can only be a factor, albeit a very relevant factor, to be taken into consideration in determining the propriety of the order.....Therefore, where the assessee is not to blame for the inordinate delay in completing penalty proceedings and the sword of Damocles has been kept hanging over his head for many a year without any rhyme or reason, it will certainly be a factor, amongst others, for the Tribunal to consider whether the order passed by the Income Tax Officer was a proper one."

12. In *Bisheshwar Lal Vs. Income Tax, Officer*, , penalty notices had been issued to the petitioner-firm between the years 1944-45, 1945-46, 1946-47 and 1948-49. Since the penalty proceedings were kept pending till 1963, the petitioner filed a writ petition to quash the penalty notices. These notices were quashed by a Division Bench of the Allahabad High Court which found that the department did not explain why the proceedings could not be completed during the interval of 14 years and, therefore, the penalty proceedings must be found to be an abuse of the power conferred on the ITO u/s 28(1)(c) of the I.T. Act. The notices were quashed and the penalty proceedings were directed to be dropped. The contention that since no period of limitation was prescribed in the Indian I.T. Act, 1922, for the issue of notice u/s 28, the issue of a fresh notice by the I.T. authority in 1956 after having taken no action for 12 years on the original notice issued in 1944 would be fully within jurisdiction and valid, and no interference by way of writ would be called for, urged again before the Allahabad High Court in *Income Tax Officer Vs. Bisheshwar Lal*, , did not succeed. The court took the view that the Government counsel had overstated his case. The Division Bench said thus (p. 655) :

"Even though no period of limitation is prescribed by the Act for the issue of the notice, it is clear that the notice has to be issued within a reasonable time--vide *Khemchand Ramdas v. Commissioner of Income Tax* [1934] 2 ITR 216, MOHD. ATIQ Vs. Income Tax OFFICER, DISTRICT II (V), KANPUR., and *In re Rajendra Narain Bhanja Deo of Kanika*, MR 1925 Pat 581. To hold that a notice for which no period of limitation has been prescribed can be issued after the lapse of any

time whatsoever, would lead to absurd results, for, it would mean that a notice might issue to an assessee after the lapse of 50 or even 100 years, when all the evidence originally in his possession that might enable him to show cause against the imposition of penalty might well have disappeared. We are satisfied, therefore, that when a notice regarding penalty is issued u/s 28 of the Income Tax Act, 1922, after an unreasonable lapse of time, it amounts to an abuse of power and the proceedings can certainly be quashed by a writ issued by this court. The answer to the question of what is a reasonable time will of course depend on the peculiar facts and circumstances of each case. In the present case, we are fully satisfied that the time which lapsed between the assessment (accompanied by the original notice) of 1944, and the notice issued in 1956, in the present case, was not a reasonable time. As pointed out by the learned single judge, there could be some justification for the Income Tax department staying its hands up to the year 1949, when the appeal against the assessment was finally decided, but between 1949 and 1956 there is not the least suggestion of any valid excuse for inaction on the part of the department."

13. The High Court of Andhra Pradesh also seems to have made a similar approach to the question in the decision in *K.P. Narayanappa Setty and Co. Vs. Commissioner of Income Tax*, . The question there arose by way of reference by the Appellate Tribunal and the question was : "Whether, on the facts and in the circumstances of the case, any penalty was exigible in the assessee's case for the assessment year 1946-47?" The assessment had become final on 24th July, 1954, and there was no order levying penalty till 1st July, 1963. The court observed thus :

"Though no period for levying the penalty has been fixed in the Indian Income Tax Act, 1922, it has been held by this court that there should not be any inordinate delay and it should be levied within a reasonable time.....The department has not chosen to furnish any explanation for the inordinate delay.....As there is inordinate delay, we consider that the levy of penalty has not been made within a reasonable time."

14. The decision of the Orissa High Court in *COMMISSIONER OF Income Tax, BIHAR AND ORISSA Vs. RUPSA RICE MILL.*, has been referred to in *Bisheshwar Lal Vs. Income Tax, Officer*, and explained. There the question referred concerned the validity of an order imposing penalty u/s 28(1) of the Indian I.T. Act. The Orissa High Court was not prepared to read a rule of limitation so as to restrict the time within which penalty was to be imposed. But all the same the court considered that the question was one of propriety and if the Tribunal chose to interfere with the order imposing penalty on the ground of impropriety it was competent to do so.

15. It appears to us, as observed by the Division Bench in the unreported decision (since reported at p. 29 *infra*) to which we have adverted that if it could be found on the facts and circumstances of the case that there is unreasonable delay in taking proceedings for imposition of penalty such proceedings could be

said to be bad in law. The long delay by itself may prima facie be unreasonable but if, in such a case, there is an explanation for the delay that explanation may have to be considered. But if there be no explanation at all and the authority acts under the impression that in the absence of a period of limitation in the Act it is open to it to exercise its power after any number of years that would be an unsustainable approach. If in such a case the court finds that such exercise has been beyond a reasonable time and there is no scope for an examination of the explanation, or, there is none, the action may be found to be bad. We are indicating that, perhaps, had there been an explanation for the delay and the explanation called for appreciation of the facts and circumstances of the case, this court under Article 226 of the Constitution might not be the appropriate body to consider it. If, on the other hand, as has happened in this case, an inordinate delay of 16 years is not attempted to be explained at all and there is no case that there was any impediment in the way of imposing a penalty earlier nor is there any case that the assessee was in any way responsible for the delay, the court could very well find that there is unreasonable delay and, therefore, the power to impose penalty could not be exercised. Neither the order of the assessing authority, Ex. P-5, nor the order of the revisional authority, Ex. P-7, has offered any explanation for the delay and it is not as if the proceedings were taken after this long period because of any circumstance which prevented the assessing authority from taking such proceedings earlier. In these circumstances, we hold that the penalty could not have been imposed by the assessing authority as it has done. Exhibit P-5, as confirmed by Ex. P-7, is quashed. Parties are directed to suffer costs in the circumstances of the case.

16. Learned Government counsel on behalf of the respondents made an oral application for certificate for leave to appeal to the Supreme Court under Article 134A of the Constitution. We do not see any substantial question of law of general importance which needs to be decided by the Supreme Court arising in this case. Leave refused.