

(1960) 08 KL CK 0005
In the High Court Of Kerala
Case No : A. S. No. 9 of 1958

Kumaran

APPELLANT

Vs

1st Addl. Income Tax Officer, Kozhikode

RESPONDENT

Date of Decision : 08-08-1960

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1960) KLJ 1234

Hon'ble Judges : M. A. Ansari, C.J;M. Madhavan Nair, J

Bench : Division Bench

Advocate : P. Govindan Nair, G. Balagangadharan Nair and K. Sukumaran, for the Appellant; G. Rama Iyer, for the Respondent

Final Decision : Dismissed

Judgement

Ansari, C.J.—The appellant's writ petition has been disallowed by a learned Judge of this Court. Before March 13, 1946, he was a member of the Hindu undivided family of Messrs. Mootharakutty & Sons and got half share in the business from April 1, 1946, when the partition in the family was recognised. He, therefore, became a new assessee from 1947-48 assessment year. On September 10, 1947 the appellant filed a voluntary return of his income, but he did not file an estimate of his total income and pay advance tax as required by Section 18A(3) of the income tax Act, hereafter to be referred as the Act. A default has then been committed and penal interest has become leviable u/s 18A(8) of the Act. The income tax Officer by order of April 29, 1951, made provisional assessment u/s 23B and assessed the petitioner on a total income of Rs. 42,172/-. Thereafter, the Officer by order of March 30, 1952, completed the assessment u/s 23(3) on a total income of Rs. 73,275/-. The appellant filed an appeal to the Appellate Assistant Commissioner, who, by order of August 22, 1955, reduced the total income to Rs. 64,602/-, and the tax to Rs. 24,982--3--0.

2. That was the position when, by letter of February 4, 1956, the Officer informed the appellant that as he had not paid advance tax on his estimate of

total income u/s 18A(3) of the Act, the penal interest was leviable u/s 18A(8). This purported to be u/s 35 of the Act, and the appellant by the order of March 30, 1956, was assessed to pay Rs. 5,308--9--0 as such interest. The order is challenged by the writ petition, which the learned Judge has rejected on the ground that the mistake under the circumstances of the case being manifest, the officer would correct it u/s 35 of the Act; and certiorari would not lie. The grounds for allowing the appeal before us are however different. The appellant's learned advocate has urged that:--

(1) The order of the Appellate Assistant Commissioner having been made prior to the notice u/s 35(1) the assessment by the income tax Officer's order, has become merged in that of the appellate authority, and there would thus not be any order of the Officer, whose mistake would be corrected in exercise of powers u/s 35; and

(2) A new proviso to Section 18A(6) having been added, the failure to levy the penal interest must be attributed to waiver rather than to mistake.

3. The advocate in support of the second ground has relied on *Shantilal Rawji Vs. M.C. Nair, IV Income Tax Officer, E Ward, Bombay and Another*, . It is admitted that the first ground taken before us was not raised in that form either before the income tax Officer, or before the learned Single Judge, or in the grounds of appeal. It follows that it is being pressed before us for the first time, and we feel that it cannot be made the basis of allowing the petition under Article 226. For, it is well-established that a petition cannot succeed on the ground against the jurisdiction of the authority, whose order he is challenging unless he has taken the ground before the authority making the order. *Chagla C.J. in Gandhinagar Motor Transport Society Vs. State of Bombay*, supports the practice on the basis of the failure amounting to absence of diligence on the part of the petitioner. One of us has also followed the rule in *S. Kumaraswamy Reddiar v S. Noordeen and others I. L. R. 1960 Kerala 717 J* and it has been held therein that unless the objection to the jurisdiction be raised before the authority, the writ petitioner cannot be allowed to make it the basis of the petition. It is urged on behalf of the appellant, that a general objection to the jurisdiction was taken before the income tax Officer and such objection would suffice. We feel that the reason for the rule is that the authority making the order must have the opportunity of adjudication on the objection, and where the ground be vaguely put, the authority does not have a fair opportunity of doing so. Nor can a party be treated as diligent when, armed with a legal objection, which is known to be strong, he intentionally refrains from urging or pressing the ground in that form. Therefore, the first ground cannot be made the basis of this appeal being allowed. As regards the reliance on the next ground, we feel the argument to be equally inadequate. In *Lata Mangeshkar v Union of India 361. T. R. 527* the learned Judges have distinguished the case relied on by the appellant's advocate, and have held that where no payment of advance tax has been made by the assessee in accordance with Section 18A, the income tax Officer has no discretion in the

matter of reducing or waiving interest under sub-section (8), and the fifth proviso to sub-section (6), which invests the income tax Officer with such a discretion, is not applicable to cases falling under sub-section (8). It is conceded before us that the appellant had paid no tax and his case would be therefore covered by Section 13A(8) and not by sub-section (6). It follows that under the former sub-section the income tax authorities would be bound to levy the penal interest, and the mistake being apparent the Officer has not legally erred in assessing the appellant to such an interest. This appeal, therefore, fails, and is dismissed with costs. Rs. 200/- is fixed as advocates fee.