
(1967) 02 KAR CK 0003
In the Karnataka High Court
Case No : Writ Petition No. 846 of 1965

M. Damodar Bhat

APPELLANT

Vs

The Third Income Tax Officer, Mangalore

RESPONDENT

Date of Decision : 01-02-1967

Acts Referred:

Income Tax Act, 1961 — Section 223 (3), 226 (3), 297

Citation : AIR 1968 Kar 258

Hon'ble Judges : Ahmed Ali Khan, J;A. Narayana Pai, J

Bench : Division Bench

Judgement

Narayan Pai, J.

(1) The principal prayer in this Writ Petition is for the quashing of an order or notice dated 23rd April, 1965 made and issued by the Third Income Tax Officer, Mangalore, produced as Exhibit VIII with the petition. The other prayers are neither incidental or ancillary to the said main relief.

(2) The impugned notice was issued under sub-section (3) of Section 226 of the Income Tax Act, 1961 and addressed to a third party called the Rajarajeshwari Motor Service from whom certain sums of money, it was believed, were due or payable to the petitioner. The petitioner was in arrears in respect of Income Tax and penalty levied on him in respect of three or four assessment years. The total amount shown as due in the notice was Rs. 74,086.02 P. Although in the affidavit in support of the petition the petitioner has stated that something less was due, it is now conceded that the particulars set out in paragraph 6 of the counter-affidavit are correct. They are;

1. Tax for the assessment year 1960-61 7,056-.15
2. Tax for the assessment year 1961-62 485-55
3. Balance of tax for the assessment year 1962-63 346-42
4. Penalty for assessment year 1962-63 1,890-00

5. Tax for the assessment year 1963-64 64,307-90

Total 74,086-02

The contention of the petitioner is that the notice is invalid. The reasons in support of the said case of invalidity are different in relation to the different items mentioned above.

(3) The argument in relation to items 4 and 5 is the same and may be disposed of briefly. In respect of both these sums, notices of demand were served on the petitioner on 16-4-1965 and the time limited thereby for payment of these sums was due to expire on May 21, 1965. The impugned notice, as already stated, was issued on 23-4-1965 nearly a month before the due date. Obviously that was not possible. Action under sub-section (3) of section 226 can be taken only in respect of such tax or penalty covered by these notices of demand were not due at all till May 21, 1965, a notice of attachment under sub-section (3) of section 226 was incapable of being issued.

That the notice may be invalid to the extent to these sums is a matter of implied, if not, actual admission in paragraph 8 of the counter-affidavit, where it is stated that "Notice u/s 223(3) is not invalid. the said notice will be valid at least in respect of the amounts due then x.x.x." The further contention in the said paragraph of the counter affidavit is that in respect of the amounts not then due, the notice would become valid by efflux of time. The further argument addressed before us on behalf of the Department is that at any rate today it may not be open to the petitioner to ask us to issue a writ when the only argument available to him ceased to be available long ago, that is to say, after May 21, 1965.

The answer, in our opinion, to these contentions is very simple. If the notice had been valid at the time it was issued but suffered from a supervening defect resulting in its being ineffective, it would have been possible to argue that any circumstance including efflux of time which removes the defect may have the result of reviving the cooperativeness or validity of the notice from the date of the removal of such defect. But where any action taken was wholly invalid at the very inception for the reason that in the then existing circumstances such action could not possibly have been taken validly and in accordance with law, there is nothing to validate or to get validated by efflux of time. Action taken without the authority of law is no action at all and must be regarded as non est.

(4) The case of the petitioner, therefore, so far as items 4 and 5 are concerned has to be accepted.

(5) Taking up next for consideration the first of the items, viz., the tax for the year 1960-61 amounting to Rs. 7056-15 P. the only argument is that there was an appeal pending with the Appellate Assistant Commissioner and that therefore, it was incumbent on the Income Tax Officer to exercise the statutory discretion before treating the assessee petitioner as an assessee in default and proceeding to take steps for recovery of the tax. According to the petitioner, he had,

immediately on receipt of the notice of demand or shortly thereafter, written a letter dated 14-4-1965 to the Income Tax Officer intimating the fact of his having preferred an appeal and requesting the officer not to treat him as in default till the disposal of the appeal. This evoked a reply from the officer dated 23rd April 1965 reading:

"I have considered your letters cited above. I do not think it is a fit case to treat you as in no default for the payment of tax and penalty till the disposal of the appeal. You are requested to pay the tax and penalty immediately."

(6) On these facts, the argument is that the officer has failed to exercise duly and properly the discretion which he was bound to exercise before rejecting the petitioner's request to treat him as not in default.

(7) That the case is one for exercise of discretion by the Income Tax Officer is clear from several decisions of courts including a decision of this court in *Esthuri Aswathaiah Vs. Income Tax Officer, Kolar Circle*, . The discretion is one to be exercised judicially which means, that the officer exercising the discretion is bound to take into account all facts and circumstances which are relevant to the exercise of that discretion. Facts may be different in different cases, but the relevant considerations would include such considerations as the difficulty of the points of law or facts involved in the appeal, chances or prospects of success in the appeal, the financial position and property of the assessee, questions whether interests of revenue would be served or prejudiced either by granting time or taking steps for immediate collection.

(8) The legal position is not disputed, but the argument is that the Officer has, in fact, exercised due discretion in this case. The only material on the basis of which we could decide whether there has been such exercise of discretion by him is what the officer himself has stated in his reply to the petitioner's request which we have copied above. The counter-affidavit, which is not by the same officer but by another officer, after setting out the text of the petitioner's letter and the officer's reply states the case of the department as follows:

"The assessee made out no case for the Income Tax Officer to take a decision in favour of the assessee for treating him as not in default except stating that he had appealed to the Appellate Authority for the cancellation of the demand. As is apparent, the Income tax Officer considered the assessee's request but declined to pass an order in assessee's favour."

(9) As the deponent was not himself the officer who has written the letter, we have to take it that he was deposing in the affidavit with reference to the records of the case. We, therefore, proceed upon the footing that if there was any indication in the record of the officer having considered other circumstances or made a fuller examination of the relevant circumstances, the deponent would not have failed to place those facts or portions of the record before court. The very manner in which the case of the department is formulated in the affidavit shows that the one and only circumstance which persuaded the officer to decline the

request of the petitioner was apparently making a claim that for reason only of the fact of presenting the appeal, he was entitled to ask the officer not to treat him as in default.

If that were the only reason, the position taken up by the Department would be right because, if mere presentation of the appeal was sufficient not to treat an assessee as in default, it was unnecessary for the statute to require the officer to apply his mind or exercise his discretion in view of the pendency of an appeal. The statute requires the officer to decide whether or not to treat the appellant as in default in respect of the tax appealed from. It means that the presentation of the appeal and its pendency is the occasion for the exercise of the discretion but that all relevant facts are elsewhere.

(10) From that is stated above, there is no alternative but to take view that the officer is not shown to have applied his mind to any of the facts relevant to the proper exercise of his discretion.

(11) In respect of the first item also, therefore, the case of the petitioner will have to be accepted

(12) Regarding the second item, the sum of Rs. 485.55 P. being tax for the assessment year 1961-62, the position is as follows:

(13) The assessment proceedings were taken and concluded under the Income Tax Act 1922 and a tax of Rs. 2946-56 was imposed and demanded. Thereafter, the assessee presented an appeal to the Appellate Assistant Commissioner. In appeal, the tax liability was reduced to the sum of Rs. 485.55. Thereupon, the Income Tax officer issued to the petitioner a notice dated 11-12-1963 purporting to be u/s 156 of the Act of 1961. The 35 days limited by the notice for payment of the amount expired on 22-1-1963. The impugned notice u/s 226(3) was issued nearly two years thereafter on 23-4-1965.

(14) The argument on behalf of the petitioner is that both the assessment order as well as the appellate order having been made under the Act of 1922, the circumstances of the case do not attract the provisions of Section 226 of the Act of 1961.

(15) For the said contention reliance is placed principally on a ruling of this court reported in *S. C. Magavi v. Commr. of Income Tax* (1966) 8 LR 476 in which this court indicated the approach to be made for interpreting and ascertaining the true effect of section 297 of the Income Tax Act, 1961. By the first sub-section thereof, the Income Tax Act, 1922 was repealed, and sub-section (2) set out what may be briefly regarded as savings. The second sub-section gives several particulars. One of the circumstances relied upon by the department before us is that by virtue of clause (i) of sub-section (2) it was open for the department to take steps to recover the tax due pursuant to the orders made under the repealed Act under the relevant provisions of 1961 Act without prejudice to any action already taken for the recovery of such sums under the repealed Act.

Now in this case, although the assessment order and the appellate order had been passed under the 1922 Act, no steps for recovery were or could be taken before the coming into force of the 1961 Act. Therefore, this was not a case of continuing recovery proceedings already taken under the old Act. According to the ruling of this court, even when section 297 says action may, in specified cases be taken under the provisions of the new Act, such action is possible only under and in accordance with the language and operation of the relevant section of the new Act. Hence in cases where action under any section of the new Statute is related to, or conditional upon, some order or action taken under another section of the new Act, the inevitable position would be that the new section could operate only within the frame-work of the new Act and in respect of action taken under the new Act.

To the extent, therefore, such action under the new Act may be limited in that way, the consequential position would be that the residuary operation of the general provisions of section 6 of the General Clauses Act is left intact and unaffected.-that is to say actions and remedies in respect of matters covered by the repealed Act will have to be taken and pursued under the relevant provisions of the repealed Act itself as if it had not been repealed.

(16) Now in this case, section 226 of the new Act forms part of the scheme of collection and recovery dealt with in the group of sections commencing from S. 220 and concluding with section 234. The general scheme is more or less on the lines of Chapter VI of the old Act which contained sections 45, 46, 46A and 47. Under sub-section (1) of section 220, the position of law is declared to be that any amounts otherwise than by way of advance tax, specified as payable in a notice of demand u/s 156 of the Act shall be paid within 35 days of the notice. Sub-section (4) declares another general proposition, namely, that if the amount mentioned above is not paid within the time limited under sub-section (1), the assessee shall be deemed to be in default. All recoveries or steps for recovery become possible only when the stage mentioned in Section 220(4) is reached, namely when the assessee has become or deemed to be an assessee in default. Action u/s 226 is also possible only in the case of an assessee who is in default.

(17) Now the starting point of the scheme is sub-section (1) of section 220 which statutorily gives 35 days for payment of tax demanded in a notice issued u/s 156. Notice u/s 156, upon the very wording of the section, is possible only in respect of an order made under the Act of 1961. The result, therefore, is that in the case of an assessment under the Act of 1922, no notice u/s 156 of the new Act being possible, there is no way of taking advantage of the provisions for recovery and collection of tax contained in sections 220 to 234 of the new Act or any of them.

(18) We have already stated that the sum of Rs. 485.55 with which we are now concerned was claimed as tax due in a notice issued by the Income Tax Officer purporting to be u/s 156 of the new Act. The said citation, however need not necessarily invalidate the notice, because, it is a well-established proposition that

when an authority passes an order or takes any action which is within its competence, such order or action cannot be invalidated or fail merely because it purports to be made under a wrong provision, If it can be shown that the action was within the competence of the authority and could be validly taken by him, such action should be related to the appropriate provision of law which is the source of his power. (Vide rulings of the Supreme Court reported in *Lekhraj Satramdas, Lalvani Vs. Deputy Custodian-cum-managing Officer and Others*, and *L. Hazari Mal Kuthiala Vs. The Income Tax Officer, Special Circle, Ambala Cantt.*, .

(19) The notice may, therefore, be regarded either as notice of demand u/s 29 of the Act of 1922 or merely as an intimation by him of the reduction of tax liability in consequence of the appellate order passed by the Appellate Assistant Commissioner. We might mention that though at the time the officer issued this notice, it might have been open to contend that after the appellate order, whatever the position, a fresh notice of demand was absolutely necessary, it has since been made clear by the Taxation Laws (Continuation and Validation of Recovery Proceedings) Act, 1964 (Central Act 11, 1964) that a fresh notice of demand after an appellate order is compulsory only when the appellate order enhances the liability but that where such liability is reduced, the only statutory duty of the original authority is to send an intimation to the assessee of the result or consequence of the appeal.

Section 5 of the said Act has given retrospective effect to its provisions. In the light of the said provisions, the proper view to take is that the notice dated 11-12-1963 which has relevance to this part of the case must be regarded as an intimation sent by the officer of the reduction of liability upon appeal.

(20) For the reasons already discussed, the recovery proceedings in respect of the said demand of Rs. 485.55 P. have to be taken under the relevant provisions of the 1922 Act, namely, the provisions of section 46. It is possible and perhaps also necessary to treat the action actually taken by the officer in this case as action taken u/s 46 of the 1922 Act, because the exercise of jurisdiction by him must be related to the proper source of that jurisdiction. But having done so, it is further necessary to see whether the exercise of jurisdiction is in accordance with the provisions of the law which constitute the source of that jurisdiction.

(21) Although the affidavits originally filed in this petition do not contain the information about any earlier steps taken by the officer, the learned Counsel for the department tells us that even before the notice impugned in this case was issued, the officer had issued a certificate for recovery to the Collector under sub-section (2) of Section 46. Hence the impugned notice must be regarded as representing selection by the officer of a further or another mode of recovery. As such, his action is governed or controlled by the explanation occurring at the foot of sub-section (7) of section 46 of the 1922 Act according to which, whenever he proposes to take advantage of an additional mode of recovery, he has to record the special reasons, if any, which persuaded him to resort to an additional mode of recovery.

(22) Another aspect of the matter to be borne in mind is that the provision corresponding to sub-section (1) of section 220 of the new Act is the first paragraph of Section 45 of the old Act. The difference between the two is that whereas the new section fixes a statutory limit of 35 days for payment of tax demanded with discretion to the officer to reduce it under some circumstances or for special reasons, under the old Act, it was necessary for the officer to specify the period within which the tax demanded should be paid.

(23) Hence both in the matter of fixing the time limit for payment of tax as well as in the matter of choosing to resort to a second mode of recovery it was necessary under the old Act for the officer to apply his mind to certain relevant facts and come to a particular decision.

(24) From the fact that he has actually chosen to issue a notice u/s 156 of the new Act in the first instance after the disposal of the appeal and then proceeded to issue a notice u/s 226(3) also of the new Act. one thing that becomes clear is that the officer was confirming his attention to the provisions and requirements of the new Act. That state of his mind excludes the possibility of his having applied his mind to either the first paragraph of section 45 or the proviso u/s 46(7) of the old Act. This is sufficient to hold that the impugned notice is inoperative in relation to the said sum of Rs. 485.55 P. also.

(25) Regarding the third item of Rs. 346.42 P. being the balance of tax of the year 1962-63, the petitioner has not been able to state any reason invalidating the impugned notice.

(26) The result, therefore, is that except in regard to the last mentioned sum of Rs. 346.42 P., the impugned notice will have to be declared invalid and to that extent quashed.

(27) An order in those terms being sufficient to give the relief to which the petitioner is entitled, no further or ancillary orders are necessary or called for.

(28) We, therefore, make an order declaring that the impugned notice u/s 226(3) of the Income Tax Act, 1961 bearing No. 770-(d)(i)/60-61, 61-62, 62-63 and 63-64 dated 23-4-1965 issued by the Third Income Tax officer, Mangalore to Messrs. Rajarajeswari Motor Service, Lady Hill, Mangalore and produced as Exhibit VIII with the petition is invalid and inoperative in respect of the following items of tax and penalty included therein, namely:

1. Tax for the assessment year 1960-61 Rs. 7056.50 (15?)
2. Tax for the assessment year 1961-62 Rs. 485.55
3. Penalty for 1962-63 Rs. 1890.00
4. Tax for the assessment year 1963-64 Rs. 64,307.00 and quash the notice to that extent. The validity or effectiveness of the notice in regard to the sum of Rs. 346.42 being the balance of tax for the assessment year 1962-63 is unaffected by this decision and will stand.

(29) No costs.

(30) Answered accordingly