

(1990) 11 KAR CK 0068

In the Karnataka High Court

Case No : Civil Revision Petition No. 1138 and 1906 to 1908 of 1982

M.L. Srinivasa Setty and Sons

APPELLANT

Vs

State of Karnataka

RESPONDENT

Date of Decision : 06-11-1990

Acts Referred:

Income Tax Act, 1961 — Section 64, 64 (1)
Karnataka Local Authorities (Prohibition of Defection) Act, 1987 — Section 4 (2)
Mysore Agricultural Income Tax Act, 1957 — Section 11 (2), 35

Citation : (1992) 193 ITR 548

Hon'ble Judges : M.P. Chandrakantaraj UPS, J;K.B. Navadgi, J

Bench : Division Bench

Advocate : G. Sarangan, for the Appellant; H.L. Dattu, for the Respondent

Judgement

M.P. Chandrakantaraj, UPS.

1. These civil revision petitions under the Karnataka Agricultural Income Tax Act, 1957 (in short the "the Act"), filed as a common petition were directed against a composite order dated August 19, 1987 of the Commissioner of Agricultural Income Tax, Karnataka, Bangalore.

2. The facts leading to the petitions may be stated briefly and they are as follows : By four assessment orders as at annexures "A" to "D", dated December 30, 1978, December 30, 1978, December 31, 1978 and December 30, 1978, respectively, relating to the accounting years relevant to the assessment years 1971-72, 1972-73, 1973-74 and 1974-75, the relevant assessing authority concluded the assessment, under the Act of Messrs. M. L. Srinivasa Setty and Sons, Coffee and Rubber Planters, assessed in its capacity as a registered partnership firm under the Partnership Act as well as under the provisions of the Act (section 29). The Commissioner of Commercial Taxes, respondent herein, in exercise of his power u/s 35 of the Act, issued a show-cause notice dated December 20, 1978, as at annexure-E calling upon the assessee-firm to show-cause as to why : (1) for the assessment year 1971-72, the income of Sri M. S.

Jayaprakash, a minor partner, admitted to the benefits of the firm should not be clubbed with the income of his father, M. L. Srinivasa Setty, and assessed in terms of clause (b) of sub-section (2) of section 11 of the Act in the view that separate assessment to tax of their income was prejudicial to the Revenue; (2) that, with reference to the assessment year 1972-73 the firm ought to have been assessed as an unregistered firm inasmuch as the application for renewal of registration under the Act had not been signed by all the partners. Similarly, the assessment for the assessment years 1973-74 and 1974-75 were also found fault with for the same reason. This power came to be exercised by the Commissioner even under the second head mentioned by us on the ground that the assessment of the firm as a registered firm was prejudicial to the Revenue. The assessee-firm, by its reply dated March 29, 1981, submitted through its chartered accountant, inter alia, contended that there was no need to club the income of the minor partner with that of the father for the relevant assessment year 1971-72 inasmuch as the father was the karta of the Hindu undivided family consisting of himself and his wife and as such the income should not be treated as income when the income of the minor son arose out of his having been admitted to the benefits of the firm of which he was a partner. Reliance was placed on a number of decided cases by the representative of the assessee-firm which, in effect, meant no more than that the father is not an individual member of the firm but a member as karta of the joint family consisting of himself and his wife. In so far as it related to the second charge that the firm ought to have been assessed as an unregistered firm on account of the defect in the application filed for renewal of registration under the Act, it pleaded, that under rule 13(c), the Deputy Commissioner (Appeals) was empowered to accept forms when the appeal was preferred before him and, therefore, the Commissioner should direct the Agricultural Income Tax Officer to exercise the powers of the Officer by himself and treat the registration granted as valid. By the impugned order as at annexure-H, the explanations or causes shown were rejected and the respondent-Commissioner proceeded to pass the order, the operative portion of which reads as follows :

"6. I, therefore, make the following

ORDER

(i) The income of the minor partner, Sri. M. S. Jayaprakash, for the assessment year 1971-72, shall be clubbed with the income of his father, Sri M. L. Srinivasa Setty, for that year, u/s 11(2)(a)(ii) of the Act and the Agricultural Income Tax Officer shall accordingly recompute the tax liabilities of these two partners and levy and demand tax accordingly.

(ii) The orders of the Agricultural Income Tax Officer granting renewal of registration for the assessment years 1972-73, 1973-74 and 1974-75 are set aside and he is directed to reassess the assessee as an "unregistered firm" for the said years and levy tax accordingly".

3. Aggrieved by the impugned order, the present revision petitions have been filed. Other undisputed facts which may be stated are as follows : Originally, the family, owning coffee and other plantations, was a Hindu undivided family consisting of M. L. Srinivasa Setty, the father and the Karta of the undivided family, and his nine sons. By a declaration made by the parties as from March 28, 1968, the status of Hindu undivided family was renounced and they came to hold the properties owned by them as tenants-in-common and, thereafter, on March 27, 1970, by a registered deed of partition, the properties held by the family were divided among the coparceners. It was in those circumstances that, for the assessment year 1971-72, registration was sought under the Act after having registered themselves as a firm under the Partnership Act by a deed of partnership dated August 22, 1970, and obtained registration as such under the Act in terms of section 29 of the Act for the relevant assessment year, namely, 1971-72.

4. Mr. G. Sarangan, learned counsel appearing for the petitioner-firm, contended before us that having regard to the decision of the Full Bench of this court in the case of C. Arunachalam Vs. Commissioner of Income Tax, Karnataka, Bangalore, , this court should in view of the fact that the Full Bench had held that the words "any individual" and "such individual" occurring in section 64(1) of the Income Tax Act, 1961 (which is more or less in pari materia with section 11 of the Act and serves the same purpose which section 64 of the Income Tax Act is intended to serve), did not include an individual who may be a Karta of the Hindu undivided family or any other person in his representative capacity but must be confined to the person who was being assessed in his individual capacity and none other. Undoubtedly, the Full Bench has ruled so, but in that case the facts were different. In both the case which fell for consideration by the Full Bench in I. T. R. Cs. Nos. 89 and 90 of 1976 and C. Arunachalam Vs. Commissioner of Income Tax, Karnataka, Bangalore, the income of the spouse was sought to be clubbed or added to the income of the husband who was assessed as an individual but was a member of the firms involved in his capacity as the karta of the Hindu undivided family and was in fact a partner in the relevant firm. It was in circumstance that the expression "individual" was construed by the Full Bench and held as stated by us earlier. On the other hand, here, the admitted facts are as such that the firm or association of persons permissible under the provisions of the Act and not in the capacity of an individual or as a Hindu undivided family. Therefore, the firm was assessed for the purposes of the Act as a registered firm under the Act. In the scheme of The Act, we may state that the advantage of being assessed as a registered firm is no more than that a single return is required to be filed u/s 18 of the Act but tax is realisable not on income of the firm as a whole but on the income apportioned to each of the persons in accordance with the terms of the partnership under which the firm is constituted and tax is collected as such from the individual partners. So far as we are concerned in this case for the assessment year 1971-72, the firm returned a taxable income of Rs. 2,36,385.31 apportioned to each of the partners in equal

sums crediting each partner with an income of Rs. 23,638.53. It was in that circumstance that the income of M. L. Srinivasa Setty, the father, was not the income separately assessed between himself and his wife as Hindu undivided family but as an individual member of the firm from which he derived the agricultural income. Therefore, having regard to the mandate of section 11(2)(b) which reads as follows :

"11 (2). In computing the total agricultural income of any individual, there shall be included all such agricultural income as arises directly or indirectly,-....

(b) to a minor child (not being a married daughter) of such individual, -

(i) from the admission of the minor to the benefits of partnership in a firm in which such individual is a partner;

(ii) from assets transferred directly or indirectly to the minor child by such individual otherwise than for adequate consideration;"

the Commissioner was correct in coming to the conclusion that the father and the minor son, both being partners of the same firm in their individual capacity, regard being had to the factum of apportionment admitted by them in the deed of partnership itself, there was prejudice caused to the Revenue inasmuch as a higher rate of tax under the amount of income exceed Rs. 40,000 was avoided or allowed to escape by the assessee by not clubbing the income of the minor son with that of the father. Therefore, we do not think that either the Full Bench decision of this court is of any assistance to the petitioner-assess-firm or that the Commissioner lacked jurisdiction to exercise his power conferred on him u/s 35 of the Act.

5. In so far as the impugned order refer to the second aspect of the case, we must set aside the order without any hesitation, with reference to the allegation that there was prejudice to the Revenue by assessing the firm as a registered firm which ought to have been assessed as an unregistered firm. We are unable to see any support in the provisions of the Act or the Rules made thereunder at the relevant time for such a conclusion.

6. Section 29 reads as follows :

"29. Procedure for registration of firms. - (1) Application may be made to the Agricultural Income Tax Officer on behalf of any firm, constituted under an instrument of partnership specifying the individual shares of the partners for registration for the purposes of this Act.

(2) The application shall be made by such person or person, and at such times and shall contain such particular and shall be in such form, and be verified in such manner as may be prescribed and it shall be dealt with by the Agricultural Income Tax Officer in such manner as may be prescribed."

7. We see from the express provision made in sub-section (2) that it has left certain things to be done by prescription by the Rules. The relevant rules in

regard to the grant or refusal to grant are rules 13 to 17. For the above purposes, it suffices for us to extract the relevant portions of rules 13, 14, and 17.

"13. Procedure for registration of firms u/s 29. - An application u/s 29 shall be signed by all the partner (not being minors) personally and shall be made -

(a) before the agricultural income of the firm is assessed for any year u/s 19, or

(b) if no part of such income of the firm has been assessed for any year u/s 19, before such income of the firm is assessed u/s 36, or

(c) with the permission of the Deputy Commissioner hearing an appeal u/s 32, before the assessment is confirmed, reduced, enhanced or annulled, or

(d) if the Deputy Commissioner sets aside the assessment and directs the Agricultural Income Tax Officer to make a fresh assessment before such fresh assessment is made, or

(e) before or after the dissolution of the firm, in respect of the assessment or assessments to be made on its agricultural income up to the date of dissolution :

Provided that, where an application is made under clause (e) after the dissolution of the firm, it shall be signed by all the persons who were partners in the firm immediately before the dissolution and by the legal representative of any such person who is deceased."

"14. Form of application for registration of firms u/s 29. - The application referred to in rule 13 shall be made in Form 7 and shall be accompanied by the original instrument of partnership under which the firm is constituted, together with a copy thereof, provided that, if the Agricultural Income Tax Officer is satisfied that, for some sufficient reason, the original instrument cannot be conveniently produced, he may accept a copy of it, certified in writing by all the partners (not being minors) or where the application is made after dissolution of the firm, by all the persons referred to in the proviso to the said rule, to be a correct copy, and in such a case, the application shall be accompanied by a duplicate copy."

"17 Application for renewal of registration of firm. - Any firm to which a certificate of registration has been granted under rule 15 may apply to the Agricultural Income Tax Officer to have the certificate of registration renewed for a subsequent year in Form 8. Such application shall be signed personally by all the partners (not being minors) of the firm or when the application is made after dissolution of the firm by all the persons (not being minors) who were partners in the firm immediately before dissolution and by the legal representatives of any such person who is deceased. The application shall be made within the time and subject to the conditions, if any, which are specified in rule 13."

8. We see that the opening sentence of rule 13 requires that all the partners must sign the application for registration in the prescribed form and submit the

same to the proper officer who is required to grant or refuse the registration after being satisfied that there has been strict compliance with the requirements of law. That rule 14 has been complied with is not in dispute except in regard to the signature of one of the partners having been omitted in the renewal application made for the assessment years 1972-73, 1973-74 and 1974-75. A reading of rule 17 clearly shows that the application shall be signed by all the partners, not being minors, and if there is a minor partner, is not required to sign the application. The show-cause notice, as we have seen, a true copy of which is produced at annexure E, does not specify which one of the partners has not signed form. In other words, the assesses-firm was not made aware of the exact defect which the relevant application for the relevant year suffered from. In that circumstance, this court would be free to assume, having regard to the fact that a partner was admitted to the benefits of the firm and admitted to be minor, that it could be that the missing signature was that of the minor.

9. Even otherwise, assuming it was some other partner or partners who had not signed, we do not find that the mere absence of a signature becomes fatal to the application because, in none of the rules, i.e., rules 13, 14, 15, 16 and 17 of the Rules, is there any statement to the effect that, in the absence of all the signatures, the application is either void or registration granted therein is void. In other words, this court has to examine whether the requirement of the rules that application in the prescribed form must be signed by all the partners is mandatory or directory.

10. The Supreme Court, in the case of *The State of Uttar Pradesh and Others Vs. Babu Ram Upadhyaya*, had occasion to consider the directory or mandatory nature of a statutory provision by applying certain tests, *K. Subba Rao J.* (as he then was), speaking for the majority, held as follows (headnote) :

"When a statute uses the word 'shall, prima facie, it is mandatory, but the court may ascertain the real intention of the Legislature by carefully attending to the whole scope of the statute. For ascertaining the real intention of the Legislature, the court may consider, inter alia, the nature and the design of the statute, and the consequence which could flow from construing it one way or the other, the impact of other provisions whereby the necessity of complying with the provisions in question is avoided, the circumstances that the statute provides for a contingency of the non-compliance with the provisions, the fact that the non-compliance with the provisions is or is not visited by some penalty, the serious or trivial consequences that flow therefrom, and, above all, whether the object of the legislation will be defeated or furthered. Rule 1 of para 486 of the U. P. Police Regulations is conceived not only to enable the Superintendent of Police to gather information but also to protect the interests of subordinate officers against whom departmental trial is sought to be held. As the rule says that a departmental trial can be held only after a police investigation, it is not permissible to hold that it can be held without such investigation. Paragraph 486 is mandatory and if the investigation has not been held under Chapter XIV of the

Criminal Procedure Code, the subsequent inquiry and the order of dismissal are illegal Hari Vishnu Kamath Vs. Syed Ahmad Ishaque and Others, and State of U.P. Vs. Manbodhan Lal Srivastava, and Montreal Street Railway v. Normandin AIR 1917 PC 142 relied on."

11. In other words, one of the crucial tests to determine whether a particular statutory requirement is mandatory or directory is that the court had to see whether any penal consequences will follow by the non-compliance with a particular statutory requirement. If no penal consequences are indicated, then it would be safe to infer that the statutory requirement was directory and not obligatory or compulsory.

12. A Division Bench of this court, construing section 4(2) of the Karnataka Local Authorities Prohibition of Defection Act, 1987, which provides for completing the enquiry by the competent authority within seven days from the date of receipt of complaint, held the word "shall" to be not mandatory as no penal consequences were indicated in the statute in the event of non-compliance with the requirement of completing the enquiry within 7 days. Applying the ratio decidendi of the cases cited by us, we should have no hesitation to hold that rules 13, 14, 15, 16 and 17 requiring the signatures, if any, of all the partners was directory in character and not mandatory. It is not uncommon that courts generally apply what is known as the rule of substantial compliance. For instance, a plaint is required to be in the form prescribed under the Code of Civil Procedure. But it causes inconvenience when the plaint presented in court does not properly conform to the form prescribed. Many a time, courts find that verification is not done in the manner prescribed by the code. Nevertheless, courts accept the plaint or written statement presented to them because there has been substantial compliance with the requirement of law. In the absence of a complaint by a member of the firm the firm was registered without his consent or knowledge, it will not be open to the Commissioner to go behind the grant of registration by the officer concerned and then record a finding that the firm should have been assessed as an unregistered firm. No such provision is made that the assessee-firm or association of persons may be assessed as an unregistered firm under the provisions of the Act. The firm was not made aware in the show-cause notice as to how it was prejudicial to the interests of the Revenue to assume jurisdiction u/s 35 of the Act by the Commissioner. We see that the only provision which throws some light on the facts of this case in regard to registration is rule 23 of the Rules and that is as follows :

"23. Appeal u/s 32 to the Deputy Commissioner. - An appeal u/s 32 shall, -

(a) in the case of an appeal against the order of the agricultural Income Tax Officer u/s 19, be in Form 13;

(b) in the case of an appeal against the order of the Agricultural Income Tax Officer under sub-section (2) of section 26, be in Form 14;

(c) in the case of an appeal u/s 32, be in Form 15;

- (d) in the case of an appeal u/s 30, be in Form 16 :
- (e) in the case of an appeal u/s 22, be in Form 17; and
- (f) in the case of an order u/s 9, be in Form 28-A."

13. It is seen from the provisions made that the assessee firm which is required to be specified as in the case of the firm or association of persons who claim to be assessed in that capacity and not for the Commissioner on the facts of this case because the authority competent to grant registration had granted and assessed the firm as an unregistered firm (sic). Despite our drawing attention to the specific provision, learned Government Pleader, Sri Dattu, was unable to point to any of the provisions of the Act which empowered the Commissioner to set aside the grant of registration made by an officer even on a defective application in the exercise of his revisional power. If that power is wanting not only u/s 35 but also under other provisions of the Act, then the Commissioner cannot assume jurisdiction in the manner he has done, directly or indirectly, suggesting that it should have been assessed as an association of persons.

14. We, therefore, set aside that part of the impugned order which relates to the prejudicial aspect of the firm having been assessed as a registered firm for the relevant assessment years which was the subject-matter of the show-cause notice.

15. Accordingly, the impugned order is set aside to the extent indicated above. In other respects, the order remains undisturbed.

16. There will be no order as to costs.