

(1971) 02 KL CK 0010

In the High Court Of Kerala

Case No : O. P. No. 2306 of 1969

M.S.P. Rajah and Another

APPELLANT

Vs

Inspecting Assistant Commissioner of Agricultural Income Tax
and Sales Tax, (Special) Kozhukode

RESPONDENT

Date of Decision : 08-02-1971

Acts Referred:

Income Tax Act, 1922 — Section 2(m), 3(5), 34, 34(3), 35

Citation : (1972) 83 ITR 46

Hon'ble Judges : Isaac, J

Bench : Single Bench

Judgement

Isaac, J.—The petitioners are two of the four co-owners of an estate known as Karappara Estate in Chittoor Taluk. One of the co-owners is a minor. In 1956, the petitioners who were then the only major co-owners, entered into a partnership in respect of the above estate, admitting the two minors to the benefits of the firm. The firm got itself registered under the Agricultural Income Tax Act, 1950. For the assessment year 1962-63, it filed a return of its total income, and also applied for renewal of the registration. Renewal was refused by the Agricultural Income Tax Officer, Chittoor, who by his order, exhibit P-5, dated November 1, 1963, assessed it as unregistered firm. It filed O. P. No. 2 of 1963 in this court to quash the above assessment. This court, by its judgment, exhibit P-3, dated June 16, 1964, set aside the assessment holding that the assessment cannot be sustained in the light of the finding of the Agricultural Income Tax Officer that there was no partnership under law. This court also observed that the Income Tax Officer would be free to proceed afresh in accordance with law. Thereupon, the respondent, the Inspecting Assistant Commissioner of Agricultural Income Tax and Salles-tax (Special), Kozhikode, took up the matter; and by his order, exhibit P-6, dated December 15, 1965, assessed the Karappara Estate assigning it the status of "tenants-in-common". The assessee filed an appeal before the Deputy Commissioner, North Zone, Kozhikode, from the above assessment without success. Then it filed a second appeal before the Agricultural Income Tax

Appellate Tribunal, who by its order, exhibit P-4, dated September 23, 1968, set aside the assessment holding that the assessment should have been made as an association of persons, and remitted the case for being proceeded with afresh according to law in the light of the observations contained in its order. The Tribunal stated:

If it is an association of individuals, we feel that the procedure adopted by the Inspecting Assistant Commissioner really cannot be upheld for the simple reason that the notice has to be issued to the principal officer. Merely because somebody had filed the returns it cannot be considered that he is the principal officer. He has to be treated as the principal officer and notices will have to be issued in that capacity.

In the light of the above order, the respondent again took up the matter and issued two notices each to the petitioners. Exhibits P-1 and P-1(a) are the notices issued to the first petitioner; and exhibits P-2 and P-2 (a) are the notices issued to the first petitioner. All of them are dated March 21, 1969. Exhibits P-1 (a) and P-2(a) are notices u/s 35 of the Act calling upon each of the petitioners to deliver to the respondent a return of the total agricultural income assessable for the year 1962-63. Exhibits P-1 and P-2 are notices requiring each of the petitioners as principal officers of the association of persons consisting of the four co-owners to file the return of agricultural income for the year 1962-63. This writ petition has been filed to quash the above notices and to direct the respondents to forbear from taking any steps pursuant there to.

2. The main contention urged by counsel for the petitioners is that the impugned proceedings are barred u/s 35 of the Act, which provides a period of three years from the end of the year to which the assessment relates for assessing any income escaping assessment. The learned Government pleader contends that the case falls under the second proviso to sub-section (2) of section 35, and therefore it is not time barred. Section 35 reads;

35. Income escaping assessment. - (1) If for any reason agricultural income chargeable to tax under this Act has escaped assessment in any financial year or has been assessed at too low a rate, the Agricultural Income Tax Officer may, at any time within three years of the end of that year, serve on the person liable to pay the tax or in the case of a company on the principal officer thereof, a notice containing all or any of the requirements, which may be included in a notice under sub-section (2) of section 17 and may proceed to assess or reassess such income and the provisions of this Act shall, so far as may be apply accordingly as if the notice were a notice issued under that sub-section; or to an assessment or reassessment made in consequence of, or to give effect to, any finding or direction contained in, an order under section

Provided that the tax shall be charged at the rate at which it would have been charged if such income had not escaped assessment or full assessment, as the case may be.

Provided further that the Agricultural Income Tax Officer shall not issue a notice under this sub-section unless he has recorded his reasons for doing so.

(2) No order of assessment u/s 18 or of assessment or reassessment under sub-section (1) of this section shall be made after the expiry of three years from the end of the year in which the agricultural income was first assessable;

Provided that where a notice under sub-section (1) has been issued within the time therein limited, the assessment or reassessment to be made in pursuance of such notice may be made before the expiry of one year from the date of the service of the notice even if at the time of the assessment or reassessment the three years aforesaid have already elapsed:

Provided further that nothing contained in this section limiting the time within which any action may be taken or any order, assessment or reassessment may be made shall apply to a reassessment made u/s 19 or to an assessment or reassessment made in consequence of, or to give effect to any finding or direction contained in, an order u/s 31, section 32, section 34 or section 60.

(3) In computing the period of limitation for the purpose of this section, any period during which the assessment proceeding is stayed by any order or injunction of any court or other competent authority shall be excluded.

3. It is obvious from the above section that unless the second proviso to sub-section (2) applies, the proposed assessment would be time-barred. Counsel for the petitioners contends that there is no direction in the Appellate Tribunal's order, exhibit P-4, so as to attract the application of the above proviso. Exhibit P-4 contains certain definite findings : and the impugned notices have been issued in consequence of the said findings. Counsel for the petitioners further contends that the appellant before the Tribunal was a partnership firm, that the present proceedings are against an association of persons and that the finding of the Appellate Tribunal in the appeal cannot be given effect to against persons who were not parties to the appeal. In support of this contention, he relied on a decision of the Allahabad High Court in *Jawahar Lal Mani Ram v. Commissioner of Income Tax*. In that case the Income Tax Officer assessed a person, a manager of a Hindu undivided family, after rejecting his claim that the family had been disrupted into two smaller units. That claim was finally upheld by the Appellate Tribunal, who recognised the partition of the family and directed fresh assessments to be made against the component units of the family. In the meanwhile, one of the units had submitted returns of its income for the relevant assessment years; but the Income Tax Officer took no action thereon. After the Appellate Tribunal's order the Income Tax Officer proceeded u/s 34 of the Indian Income Tax Act, 1922, and required that unit to file returns for assessing its income which had escaped assessment. The assessee filed returns, and contended that the proceedings were time-barred. The Income Tax Officer rejected that contention and his order was upheld by the Appellate Tribunal on the ground that the parent family had been partitioned and the impugned

assessment was within the prescribed period of limitation from the date of the Tribunals order. In the High Court, the order of assessment was sought to be saved from the bar of limitation relying on the second proviso to section 34 (3) of the Act which corresponds to the second proviso to section 35(2) of the Agricultural Income Tax Act, 1950. The contention was rejected following the decision of the supreme Court in *S. C. Prashar v. Vasantsen Dwarkadas*, and the High Court held that the

4. proviso can apply only to a person who was a party to the proceedings, and who alone would be affected by the order of the Appellate Tribunal. I respectfully agree with the above view; and it fully supports the petitioners contention in the instant case.

5. The learned Government pleader referred me to a decision of the Supreme Court in *Daffadar Bhagat Singh & Sons v. Income Officer, A-Ward, Ferozepur*. In that case a Partnership firm filed a return of its income for the assessment year 1952-53, and also applied for registration as a firm u/s 26A of the Income Tax Act, 1922. The Income Tax Officer refused registration, and made an assessment holding that the assessee constituted a Hindu undivided family and not a firm. The firm filed an appeal; and the Appellate Assistant commissioner made an order directing registration of the firm and the exclusion of its income from that of the family. Thereupon, the Income Tax Officer proceeded to assess the firm. The proceedings were objected to by the assessee as barred by limitation u/s 34 (3) of the Indian Income Tax Act, 1922. The objection was overruled by the Income Tax Officer, the matter was pursued by the assessee, and it came before the Supreme Court. The Supreme Court accepted the view of the High court that the second proviso to section 34 (3) of the Act applied to the case, and the assessment proceedings were not time-barred. In doing so, the court said;

The question was of the assessment of the income of the business of the firm. The Income Tax Officer treated the father and the sons as a Hindu undivided family. On appeal, however, the Appellate Assistant Commissioner accepted their contention that they formed a partnership firm. It is difficult, in these circumstances, to agree that the appellant was a total stranger to the assessment which was under appeal before the Appellate Assistant Commissioner and had no intimate connection with the person whose assessment was made by the Income Tax officer and was set aside in appeal by the Appellate Assistant Commissioner.

6. The learned Government Pleader laid great stress on the last sentence in the above passage, and contended that it was sufficient to attract the application of the proviso that the assessee was not a stranger to the proceedings in which the direction or finding is contained. He submitted that, in the instant case, the petitioners were two of the partners of the firm, who was the appellant before the Appellate Tribunal and that the assessment proceedings now pursued against them as an association of persons would fall within the ambit of the proviso. I am unable to accept the above argument, which seems to be based on some

confusion of the facts of the case. The appeal before the Appellate Tribunal was by a firm; and the present assessment proceedings are against an association of persons. They are different persons, having different status under the Agricultural Income Tax Act, 1950, and also under the Income Tax Acts of 1922 and 1961. In the case before the Supreme Court, the appellant was a firm and the impugned assessment proceedings were taken in that case against the same firm, to give effect to the finding and direction contained in the appellate order. That was a case to which the proviso squarely applied. The learned Government pleader also referred me to my decision in *Ishwara Bhat v. Commissioner of Agricultural Income Tax*. That decision has no application to the instant case, since the assessee sought to be proceeded against is a different person from the one concerned in the appeal, as pointed out above. It may also be incidentally observed that the above decision appears to have been overruled by a Full Bench of this court in *I. T. R. case No. 9 of 1968*, in which the majority took the view that the Commissioner acting u/s 34 of the Agricultural Income tax Act must act within the period prescribed in section 35 for making a reassessment. The reasoning in that decision appears to apply to the Appellate Tribunal also.

7. Counsel for the petitioners also contends that the petitioners are not liable for assessment as an association of individuals along with other co-owners of the estate, as held by the Appellate Tribunal. The Tribunal, in its order, exhibit P-4, stated:

It has to be admitted that the word tenants-in-common can be construed only as an association of persons under the Agricultural Income Tax Act.

8. It is on the basis of the above view that the Tribunal held that the assessment should be made as an association of persons, after issuing notice to the principal officer. Under the Act, tax is charged on the total agricultural income of the previous year of every person. The word person is defined in section 2 (m) of the Act; and it includes an association of individuals. The different capacities or status in which a person may be assessed are those mentioned in the said definition; and a person in any of those capacities is an assessable unit. Therefore, an association of individuals is a person, and an assessable unit. Tenants-in-common do not come within the definition of person. They are specifically dealt with in section 3(5) of the Act, which provides that persons holding property as tenants-in-common deriving agricultural income shall be assessed at the rates applicable to the agricultural income of each tenant-in-common is an individual; and he has to be assessed in that capacity in respect of his share of the income in the common properties. The proceedings as per the impugned notices to assess the petitioners and the other co-owners as an association of individuals, though it is based on the finding of the Appellate Tribunal, cannot, therefore, be sustained.

9. In the result, I quash the notices exhibits P-1, P-1(a), P-2 and P-2(a) and allow this original petition. There will be no order as to costs.