

(1969) 03 CAL CK 0014
In the Calcutta High Court
Case No : Matter No. 213 of 1966

Narendra Sharma

APPELLANT

Vs

Income Tax Officer and Others

RESPONDENT

Date of Decision : 05-03-1969

Acts Referred:

Income Tax Act, 1961 — Section 271, 271(1), 274, 297(2)

Citation : (1970) 75 ITR 781

Hon'ble Judges : T.K. Basu, J

Bench : Single Bench

Advocate : D. Pal and P.K. Pal, for the Appellant; Amiya K. Basu, for the Respondent

Judgement

T.K. Basu, J.—The petitioner, Narendra Sharma, was assessed to Income Tax for the assessment year 1961-62 by the Income Tax Officer, Central Circle XV, Calcutta. Although the order of assessment was passed on the 24th March, 1966, it was made under the provisions of Section 23(3) of the Indian Income Tax Act, 1922 (hereinafter referred to as "the repealed Act"). It is not disputed that all the notices issued to the petitioner by the appropriate Income Tax Officer in connection with the aforesaid assessment proceedings, were also issued under the provisions of the repealed Act.

2. On the 23rd March, 1966, the said Income Tax Officer issued two notices on the petitioner proposing to initiate proceedings for imposition of penalty under the provisions of Section 274 read with Section 271 of the Income Tax Act, 1961 (hereinafter referred to as "the Act").

3. The said two notices are set out hereinbelow :

"Notice u/s 274 read with Section 271 of the Income Tax Act, 1961.

CC.XV/34-S/61-62/726 Income Tax Officer, Central Circle XV, Calcutta. Dated 23rd March, 1966.

To Shri Narendra Sharma, 1, Gibson Lane, Calcutta.

Whereas in the course of proceedings before me for the assessment year 1961-62 it appears to me that you :

"have without reasonable cause failed to furnish the return of income which you were required to furnish by a notice given under Sections 22(2)/34 of the Indian Income Tax Act, 1922, or which you were required to furnish u/s 139(1), or by a notice given u/s 139(2)/148 of the Income Tax Act, 1961, No. III(I)/7/IV/F dated June 22, 1961, or have without reasonable cause failed to furnish it within the time allowed and in the manner required by the said Section 139(1) or by such notice."

You are hereby requested to appear before me at 11-30 A.m. on April 11, 1966, and shew cause why an order imposing a penalty on you should not be made u/s 271 of the Income Tax Act, 1961. If you do not wish to avail yourself of this opportunity of being heard in person or through authorised representative you may show cause in writing on or before the said date which will be considered before any such order is made u/s 271.

Sd : Illegible, income tax Officer.

NOTICE u/s 274 READ WITH SECTION 271 OF THE income tax ACT, 1961.

No. CC. XV/34-S/61-62/730 Income Tax Officer, Central Circle XV, Calcutta.
Dated 23rd March, 1966.

To Shri Narendra Sharma, 1, Gibson Lane, Calcutta.

Whereas in the course of proceedings before me for the assessment year 1961-62 it appears to me that you have concealed the particulars of your income or deliberately furnished inaccurate particulars of such income and whereas the penalty proceedings have to be referred to the Inspecting Assistant Commissioner of Income Tax according to Sub-section (2) of Section 274 of the Income Tax Act, 1961, you are hereby informed that the case for levy of a penalty under Clause (c) of Sub-section (I) of Section 271 is being referred by me to the Inspecting Assistant Commissioner of Income Tax, Range II (Central), Calcutta, Further proceedings in regard to the levy of a penalty will take place before the said Inspecting Assistant Commissioner of Income Tax as provided in Sub-section (2) of Section 274.

Sd:..... income tax Officer, Central Circle XV, Calcutta."

4. These notice u/s 271 of the Act read with Section 274 and both dated the 23rd March, 1966, are challenged before me in this application.

5. Before I deal with the respective contentions of the parties, it will be useful to set out Section 271 of the Act which is as follows :

"271. Failure to furnish returns, comply with notices, concealment of income etc.--(1) If the Income Tax Officer or the Appellate Assistant Commissioner, in

the course of any proceedings under this Act, is satisfied that any person-

(a) has without reasonable cause failed to furnish the return of total income which he was required to furnish under Sub-section (1) of Section 139 or by notice given under Sub-section (2) of Section 139 or Section 148 or has without reasonable cause failed to furnish it within the time allowed and in the manner required by Sub-section (1) of Section 139 or by such notice, as the case may be, or

(b) has without reasonable clause failed to comply with a notice under Sub-section (1) of Section 142 or Sub-section (2) of Section 143, or

(c) has concealed the particulars of his income or deliberately furnished inaccurate particulars of such income,

he may direct that such person shall pay by way of penalty,--

(i) in the cases referred to in Clause (a), in addition to the amount of the tax, if any, payable by him, a sum equal to two per cent. of the tax for every month during which the default continued, but not exceeding in the aggregate fifty per cent. of the tax ;

(ii) in cases referred to in Clause (b), in addition to any tax payable by him, a sum which shall not be less than ten per cent. but which shall not exceed fifty per cent. of the amount of the tax, if any, which would have been avoided if the income returned by such person had been accepted as the correct income ;

(iii) in the cases referred to in Clause (c), in addition to any tax payable by him, a sum which shall not be less than twenty per cent., but which shall not exceed one and a half times the amount of the tax, if, any, which would have been avoided if the income as returned by such person had been accepted as the correct income.

(2) When the person liable to penalty is a registered firm or an unregistered firm which has been assessed under Clause (b) of Section 183, then, notwithstanding anything contained in the other provisions of this Act, the penalty imposable under Sub-section (1) shall be the same amount as would be imposable on that firm if that firm were an unregistered firm.

(3) Notwithstanding anything contained in this section,--

(a) no penalty for failure to furnish the return of his total income under Sub-section (1) of Section 139 shall be imposed under Sub-section (1) on an assessee whose total income does not exceed the maximum amount not chargeable to tax in his case by one thousand five hundred rupees ;

(b) where a person has failed to comply with a notice under subsection (2) of Section 139 or Section 148 and proves that he has no income liable to tax, the penalty imposable under Sub-section (1) shall not exceed twenty-five rupees ;

(c) no penalty shall be imposed under Sub-section (1) upon any person

assessable under Clause (i) of Sub-section (1) of Section 160, read with Section 161, as the agent of a non-resident for failure to furnish the return under Sub-section (1) of Section 139.

(4) If the Income Tax Officer or the Appellate Assistant Commissioner in the course of any proceedings under this Act, is satisfied that the profits of a registered firm have been distributed otherwise than in accordance with the shares of the partners as shown in the instrument of partnership on the basis of which the firm has been registered under this Act, and that any partner has thereby returned his income below its real amount, he may direct that such partner shall, in addition to the tax, if any, payable by him, pay by way of penalty a sum not exceeding one and a half times the amount of tax which has been avoided, or would have been avoided if the income returned by such partner had been accepted as his correct income ; and no refund or other adjustment shall be claimable by any other partner by reason of such direction."

6. Dr. Debi Pal appearing on behalf of the petitioner drew my attention in the first place, to the opening words of Section 271(1) of the Act and contended on the strength of the expression "in the course of any proceedings under this Act" that proceedings for the imposition of penalty u/s 271 of the Act can only be initiated if the assessment proceedings have also taken place under the Act, i.e., the Income Tax Act, 1961. He contended that, as the assessment proceedings in the present case had been commenced and concluded under the provisions of the repealed Act, the Income Tax Officer had no jurisdiction to initiate penalty proceedings u/s 271 of the Act.

7. Dr. Pal next drew my attention to Sub-clauses (a), (b) and (c) of section 271(1) of the Act in support of the contention that penalty proceedings under that section should be initiated only if there was any default or non-compliance on the part of the assessee with regard to the various notices mentioned in the said Sub-clauses (a), (b) and (c) of Section 271(1) of the Act. As all the notices mentioned in the said Sub-clauses were notices under the Act of 1961, Dr. Pal contended that proceedings for imposition of penalty under the new Act could be only initiated if there was a failure to comply with any of the notices issued under the provisions of the new Act. As, admittedly, all the notices in connection with the assessment proceedings for the assessment year 1961-62 were issued in the present case under the provisions of the repealed Act, no proceedings for penalty u/s 271 of the Act could be taken in the instant case. In other words, the conditions precedent for the assumption of jurisdiction to initiate proceedings u/s 271 of the Act being totally absent in the present case, the said notices were entirely without jurisdiction and void.

8. Reliance is placed in this connection on a decision of the Bombay High Court in the case of MISS SAROJ NAYUDU Vs. APPELLATE ASSISTANT COMMISSIONER OF Income Tax, NAGPUR and ANOTHER., . In that case, it was held by a Division Bench of the Bombay High Court that the initial condition for initiating proceedings for imposing penalty under the new Act is that the proceedings in

respect of which penalty has to be imposed must be one under the new Act itself.

9. My attention was also drawn to a decision of the Gujarat High Court in the case of Commissioner of Income Tax, Gujarat I Vs. Hiralal Mohanlal Shah, . In that case, it was held by a Division Bench of the Gujarat High Court relying on the language of Section 271 of the Act that, before the Income Tax Officer can initiate proceedings for imposition of penalty under the said section, he must be satisfied "in the course of any proceedings under this Act", i.e.. under the Act of 1961 that a person has committed any of the defaults, mentioned in Sub-clauses (a), (b) and (c) of the said Section 271(1).

10. In my view, this contention of Dr. Pal must be upheld. It is clear from the language of Section 271 itself that proceedings for penalty can be initiated thereunder only in respect of proceedings under the Income Tax Act, 1961, on the fulfilment of the conditions precedent, viz., the various defaults mentioned in Sub-clauses (a), (b) and (c) of Section 271(1). As, admittedly, in the present case, the proceedings were under the repealed Act and all the notices had been issued and the return was filed under the repealed Act, it must be held that the conditions precedent to the assumption of jurisdiction u/s 271 of the Act are totally absent in the present case.

11. Mr. Amiya Kumar Basu, appearing on behalf of the respondents, invited me to hold that the notice u/s 271 of the Act in the present case should be construed as a notice u/s 28(1) of the repealed Act. He relied in this connection on a decision of the Supreme Court in the case of L. Hazari Mal Kuthiala Vs. The Income Tax Officer, Special Circle, Ambala Cantt., . In that case the Commissioner of Income Tax purported to take certain proceedings u/s 5(7A) of the Indian Income Tax Act, 1922, whereas the said proceedings could have been validly taken only u/s 5(5) of the Patiala Income Tax Act, 2001. It was held by the Supreme Court that the exercise of a power would be referable to a jurisdiction which confers validity upon it and not to a jurisdiction under which it will be nugatory. As the Commissioner of Income Tax had power under the Patiala Act to issue the notice, it was held that the mere mention of a wrong section of a wrong Act did not render the notice a nullity.

12. Relying on the above observations of the Supreme Court, Mr. Basu contended that, since the Income Tax Officer, by virtue of the provisions of Section 297(2) (a) of the Act, as interpreted by the Supreme Court in the case, of Kalawati Devi Harlalka Vs. Commissioner of Income Tax, West Bengal and Others, had jurisdiction to issue the notice u/s 28(1) of the repealed Act, I should hold that the notice in the instant case is, in effect, a notice issued u/s 28(1) of the repealed Act and consequently it is not a nullity.

13. Dr. Pal sought to repel this contention of Mr. Basu by arguing that the principles enunciated in the above decision of the Supreme Court could only be applied when the two statutes, viz., the one under which the notice is wrongly issued and the other which the notice can be validly issued, are in pari materia.

He contended that, since the provisions of Section 28(1) of the repealed Act were not in pari materia with the corresponding provisions of Section 271 of the Act, the principles enunciated in the above decision of the Supreme Court have no application to the present case. He pointed out by a comparative analysis of Section 28(1) of the repealed Act and Section 271 of the Act that the provisions of Section 271 of the Act were much more onerous and burdensome than the corresponding provisions of the repealed Act.

14. In my view, this contention of Dr. Pal must be accepted. As is clear from a comparative study of the two sections of the repealed Act and the Act with regard to the imposition of penalty, they cannot be said to be identical or similar in material particulars. In that view of the matter, I hold that the above decision of the Supreme Court has no application to the facts of the present case. This contention of Mr. Basu, therefore, fails.

15. Dr. Pal next contended that if the revenue sought to rely on the provisions of Section 297(2)(g) of the Act for justifying the notice u/s 271 of the Act in the present case, I should hold that the provisions of Section 297(2)(g) are violative of Article 14 of the Constitution of India and are, therefore, ultra vires.

16. Before dealing with this contention, it will be useful to set out Sections -297(2)(f) and 297(2)(g) of the Act, which are in the following terms :

" (f) any proceeding for the imposition of a penalty in respect of any assessment completed before the 1st day of April, 1962, may be initiated and any such penalty may be imposed as if this Act had not been passed ;

(g) any proceeding for the imposition of a penalty in respect of any assessment for the year ending on the 31st day of March, 1962, or any earlier year, which is completed on or after the 1st day of April, 1962, may be initiated and any such penalty may be imposed under this Act."

16. Briefly put, Dr. Pal's contention is that in respect of proceedings for the imposition of penalty where assessment has been completed before the 1st April, 1962, the provisions of the repealed Act may be invoked ; whereas in respect of proceedings for imposition of penalty where the assessment has been completed on or after the 1st April, 1962, the provisions of the new Act may be invoked. This classification of assessees into two groups, viz, those whose assessments are completed before the 1st April, 1962, and whose assessments are completed thereafter, is not a reasonable classification and has no nexus with the object of the statute. The matter of completion of assessment before a particular date, it was pointed out, is a fortuitous circumstance entirely beyond the control of the assessee and such a factor could not form the basis of a classification with an intelligible differentia having any rational connection with the object of the statute. It was pointed out, by a comparison of various provisions of the repealed Act with the corresponding provisions of the new Act, that the provisions for imposition of penalty under the Act were more onerous and burdensome than those under the repealed Act. Hence, it was contended that the provisions of

Section 297(2)(g) should be struck down as infringing Article 14 of the Constitution of India.

17. My attention was drawn in this connection to the decision of the Bombay High Court mentioned herein above in the case of *Shakti Offset Works v. Inspecting Assistant Commissioner of Income Tax*, [1967] 64 ITR 637. In that case, after an exhaustive review of the various provisions of the two Acts and a review of the relevant authorities, it has been held that Section 297(2)(g) of the Act contravenes Article 14 of the Constitution of India and was invalid to the extent to which it permitted proceedings for penalty being initiated or completed under the provisions of the Act in the case of assesseees who had filed their returns before the 1st April, 1962, i.e., before the new Act came into force.

18. Learned counsel on behalf of the revenue drew my attention to an unreported decision of a Special Bench of this court in the case of *M.M. Ispahani Ltd. Vs. Commissioner of Income Tax (Central) and Another*, . In that case, the judgment of the Special Bench was delivered by Sinha C. J. on the 6th December, 1968. It was argued in that case on behalf of the petitioner that the provisions of Section 297(2)(d)(i) of the Act are ultra vires as being violative of Article 14 of the Constitution of India.

19. Reliance was placed on behalf of the petitioner in that case on the decision of the Bombay High Court in the case of *MISS SAROJ NAYUDU Vs. APPELLATE ASSISTANT COMMISSIONER OF Income Tax, NAGPUR and ANOTHER.*, reference to which has been made hereinabove. In that case, Sinha C.J., in dealing with the Bombay decision, pointed out that their Lordships in the Calcutta case were not concerned with the provisions of Section 297(2)(g) of the Act. It appears, however, that Sinha C.J. was inclined to the view that, in the case of an assessment, the classification of assesseees against whom proceedings were pending under the old Act into a separate class and to make the same subject to the law which was in force when the liability accrued, is perfectly constitutional and is not violative of the provisions of Article 14 of the-Constitution of India.

20. In view of my decision on the first question, viz., that the conditions- precedent to the applicability of Section 271 of the Act have not been fulfilled in the present case, it is not necessary for me to come to a decision on. the vires of Section 297(2)(g) of the Act in the instant case.

21. Even assuming that Section 297(2)(g) of the Act is intra vires, the provisions of that sub-section do not, in my view, contain any substantive power for the imposition of penalty but merely lays down the procedural requirement as to the law which is to be applied. If the conditions precedent to the applicability of Section 271 of the Act are not satisfied in a case or, in other words, Section 271 of the Act is not capable of being applied on its own force, although the case may otherwise come under the provisions of Section 297(2)(g) of the Act, no proceedings for the imposition of penalty can be initiated nor can penalty be imposed under the new Act. This view has been taken by their Lordships of the

Gujarat High Court in the case of Commissioner of Income Tax, Gujarat I Vs. Hiralal Mohanlal Shah, . With respect, I am in entire agreement with that view.

22. As I have already held, the conditions precedent for the applicability of Section 271 of the Act are totally absent in the present case. In that view of the matter, it must also be held that the provisions of Section 297(2)(g) is of no avail to the revenue in the present case.

23. In the result, this application succeeds and the rules is made absolute- There will be a writ in the nature of mandamus directing the respondents to recall, cancel and withdraw the two notices NOS. CC. XV/34-S/61-62/726 and CC. XV/34-S/61-62/730, both dated 23rd March, 1966, issued by respon dent No. 1 and a writ in the nature of prohibition restraining the respondents from giving any effect to the said two notices or from acting on the basis thereof in any manner whatsoever. This will, however, not preclude the respondents from proceeding according to law. There will be no order as to costs.