

(1964) 03 KAR CK 0004
In the Karnataka High Court
Case No : Writ Petition No. 1406 of 1963

Segu Buchiah Setty

APPELLANT

Vs

Income Tax Officer, Kolar Circle and Another

RESPONDENT

Date of Decision : 04-03-1964

Acts Referred:

Constitution of India, 1950 — Article 226
Income Tax Act, 1922 — Section 29, 46 (2)

Citation : (1965) 58 ITR 225

Hon'ble Judges : K.S. Hegde, J;G.K. Govind Bhat, J

Bench : Division Bench

Advocate : K. Srinivasan, for the Appellant; Ethirajulu Naidu, for the Respondent

Judgement

Govinda Bhat, J.—In this writ petition preferred under article 226 of the Constitution of India, the petitioner has challenged the action taken by respondents Nos. 1 and 2 (income tax Officer, Kolar Circle, and Deputy Commissioner, Kolar) for recovery of Income Tax assessed on an unregistered firm by name Messrs. Segu Buchiah Sett : P. Venkatachaliah and Co., Srinivasapur, for the assessment years 1954-55 and 1955-56. The petitioner was a partner in the firm of Messrs. Segu Buchiah Sett : P. Venkatachaliah and Co., Srinivasapur, hereinafter called "the firm" during the period from 1st February, 1953, to 30th June, 1955. That firm was assessed to tax for the assessment years 1954-55 and 1955-56 as an unregistered firm by separate assessment orders made on 31st August, 1956. The notices of demand for payment of tax were issued to and served on the firm on 31st August, 1956. Petitioner's case is that the firm discontinued its business with effect from 1st October, 1956. It is stated that the date 1st July, 1955, mentioned in the affidavit is a mistake, and the correct date ought to be 1st October, 1956, on which date the firm intimated respondent No. 1 (income tax Officer) that the firm having suffered heavy loss, they were not interested in continuing the partnership business any longer. It is stated in the affidavit filed by the petitioner in support of the writ petition that the firm had been dissolved and the fact of dissolution has been brought to the

notice of respondent No. 1.

2. On 5th March, 1957, respondent No. 1 issued a certificate u/s 46(2) of the Indian Income Tax Act, 1922, hereinafter called "the Act", to respondent No. 2 specifying therein the amount of arrears of Income Tax due from the firm for the assessment years 1954-55 and 1955-56. Pursuant to the said certificate, respondent No. 2 initiated action under the Mysore Land Revenue Code for recovery of a sum of Rs. 10,607.63 nP. by attachment and sale of the immovable properties belonging to the family of the petitioner. On 24th February, 1963, the Tahsildar of Srinivasapuram Taluk issued a demand notice to the petitioner under rule 95 of the rules framed under the Mysore Land Revenue Code, demanding payment of arrears of tax assessed on the firm. Thereafter, a notice proposing to auction the immovable properties of the family of the petitioner, which, according to him, had been allotted to the share of his son under a partition effected on 18th April, 1959, was served on the petitioner on 3rd August, 1963. The petitioner has averred that no notice of demand had been served on him u/s 29 of the Act, and, therefore, he is not a defaulter and further, the certificate issued by respondent No. 1 u/s 46(2) of the Act does not authorise the recovery of the tax from the petitioner.

3. The respondents have not filed any counter affidavit disputing the correctness of the facts averred in the affidavit filed in support of the writ petition and, therefore, the material facts stated by the petitioner to the effect that the assessment was on the unregistered firm, that no notice of demand u/s 29 of the Act has been served on the petitioner and that the certificate issued section 46(2) does not authorise the recovery of the tax from the petitioner, have remained unchallenged.

4. On the basis of the uncontroverted facts, Sri. K. Srinivasan, learned counsel for the petitioner, has urged that in the absence of notice of demand u/s 29, the respondents have no jurisdiction to initiate recovery proceedings against him u/s 46. In support of that contention, he relied on a decision of this court in T. Govindaswamy v. Income Tax Officer, Special Survey Circle, Bangalore. The facts in Govindaswamy's case are identical to the facts of the present case. In that case, the assessment was made on the firm "Union and Co." as an unregistered firm and notice of demand u/s 29 was served on the firm. No notices had been served on the partners of the said firm u/s 29. The Deputy Commissioner, pursuant to the certificate u/s 46(2), issued by the Income Tax Officer, proceeded to attach and sell the properties belonging to one of the partners. That action was challenged before this court in a writ petition filed under article 226 of the Constitution. This court held that an unregistered firm is unit for assessment under the Income Tax Act having a separate status and existence distinct and different from its partners and assessment is on the firm itself and not on the partners. This court further held that a partner of an unregistered firm, though liable u/s 44 of the Act, to pay the tax assessed on the firm on its dissolution or discontinuances of business, the partner becomes an assessee only

as a person by whom tax is payable u/s 44 and he does not become a defaulter unless and until a notice of demand u/s 29 is issued to him and section 46 confers jurisdiction to recover the tax due from a defaulter. This is what Narayana Pai J. stated in Govindaswamy's cas :

"It is not contended that any proceedings of the nature described in the said definition have been taken in respect of the petitioner. He would be an assessee only as a person by whom the tax is payable u/s 44 of the Act. The highest that can be said, therefore, of the petitioner is that he must be taken to be an assessee by virtue of his liability to pay tax u/s 44. No notice u/s 29 having been admittedly issued to him, he cannot be said to have failed to pay the amount demanded in the notice and cannot, therefore, be described as an assessee in default. Hence, prima facie, there was no jurisdiction to initiate recovery proceedings against him u/s 46."

5. Recovery proceedings can be taken only in cases wherein an assessee is in default. No person can be deemed to be in default unless a notice of demand u/s 29 has been duly served on him and is not complied with. "In case of non-compliance with a notice of demand issued to an unregistered firm which is a separate assessable entity, a partner of the firm to whom no such notice has been issued cannot be considered an assessee in default and the Tax Recovery Officer has no jurisdiction to take proceedings against him individually for recovering the dues of the firm" (vid : The Law and Practice of Income Tax by Kanga and Palkhivala, fifth edition, volume I, page 847). Therefore, the action taken by the respondents for recovery of the tax assessed on the unregistered firm without notice of demand on the petitioner, individually, is clearly without jurisdiction.

6. The learned counsel for respondent No. 1 sought reliance on the decision of this court in Subba Rao v. Third Income Tax Officer, City Circle II, Bangalore. That decision is of no assistance since in that case notice of demand u/s 29 had been made on the petitioner therein, demanding the tax assessed on the unregistered firm. Learned counsel for respondent No. 1 urged that the petitioner is not an aggrieved party since, according to the petitioner, the properties attached and sought to be sold in auction had been allotted to the petitioner's son under a partition. Respondent No. 2 has proceeded to attach and sell the properties as if they belonged to the petitioner ignoring the partition. Since the proceedings are without jurisdiction and the petitioner is aggrieved by the action taken without jurisdiction for recovery of the tax assessed on the firm, he is entitled to seek relief under article 226. It cannot be said that he is not a person aggrieved.

7. For the above reasons, this writ petition succeeds and we issue a direction to the respondents to forbear from proceeding to recover from the petitioner any portion of the tax due under the assessment orders dated 31st August, 1956, made on the firm of Messrs. Segu Buchiah Setty, P. Venkatachaliah and Co., Srinivasapur, for the assessment years 1954-55 and 1955-56 on the strength of

the certificate issued against the said firm, by respondent No. 1 to respondent No. 2. This order, however, will not exonerate the petitioner from his liability to pay the tax, or prevent respondent No. 1 from taking steps permissible under the law for the recovery of the said tax from the petitioner.

8. In the circumstances of the case, there will be no order as to costs.