(1971) 11 KL CK 0030

In the High Court Of Kerala

Case No : Criminal Appeal No. 83 of 1971

State APPELLANT

Vs

Halley Mathew RESPONDENT

Date of Decision : 17-11-1971

Acts Referred:

Income Tax Act, 1922 — Section 51
Income Tax Act, 1961 — Section 276, 276B
Income Tax Rules, 1922 — Rule 10

Citation : (1971) 11 KL CK 0030

Hon'ble Judges : K. Sadasivan, J

Bench : Single Bench

Advocate : State Prosecutor, for the Appellant; S. Easwara Iyer, for the Respondent

Judgement

Sadasivan, J.—This appeal is by the State against acquittal. The accused, Halley Mathew, was the principal officer of the Malabar Agricultural Company Ltd., Kottayam, and in that capacity he is stated to have deducted on April 20, 1961, a sum of Rs. 22,213.11, as Income Tax from the dividends declared by the company for the year ending June 30, 1960, but the same was not credited to the Central Government as required by the Income Tax Act and Rules. Hence he was charged u/s 276(d) of the Income Tax Act, 1961 (shortly stated "the Act") for the period of default up to April 1, 1968, and thereafter u/s 276B of the said Act as amended by the Finance Act, 1968, for the period of default after April 1, 1968. The charge was denied by the accused. He stated that he was not the principal officer of the company at the time and that no deductions were made by him in that capacity. He also denied the letters produced by the prosecution alleged to have been sent by him as principal officer of the company to the Income Tax Officer, Company Circle, Ernakulam.

2. The respondent (accused), Halley Mathew, was the appellant in Criminal Appeal No. 377/70, which arose from S.C. No. 18/70. There also, as in the present case which has arisen from S.C. No. 23/70, these points had come up for

consideration. In that case and a few other connected cases, the learned sessions judge found the accused guilty u/s 276(d) for the default up to April 1, 1968, and acquitted him of the other charge, viz., default for the period after April 1, 1968. The points have been thrashed out in detail in Criminal Appeal No. 377/70 and the connected State Appeal No. 78/71. In the present case unlike in the other cases the learned judge has found against the prosecution on both the counts. In other words, the accused has been acquitted in respect of the charge u/s 276(d) also, and the reasoning of the learned judge is that in this case the offence was committed under the 1922 Act and that offence did not survive after the 1922 Act was superseded by the present Act of 1961 under which the charge is brought.

3. On the question whether the accused was the principal officer of the company at the time and whether the tax was deducted by him in that capacity, I think I need not labour much in this case as that point has been covered in my judgment in Criminal Appeals Nos. 377/70 and 78/71. The reasoning adopted by me in that judgment in respect of that point holds good in the present case also. PW-2 was the Income Tax Officer, Company Circle, Ernakulam, from July, 1966, to May, 1970, and during the period various letters and statements had been submitted to him by the accused as the principal officer of the company. They were being habitually submitted to him and PW-2 was thus familiar with the handwriting and signature of the accused. The Explanation to Section 47 of the Evidence Act is, therefore, attracted and PW-2 must be deemed to be competent to prove the signature and hand-writing of the accused. The relevant documents are exhibits P-3 to P-10 and P-15 to P-17. I accept the finding, therefore, that the documents were submitted by the accused for the company. With regard to the question whether he had done so in his capacity as principal officer, the reasoning adopted by me in my judgment in Criminal Appeal No. 377/70 is applicable here also and I accept the finding that he was the principal officer of the company. From exhibits P-4 and P-5 it is seen that the amounts were paid only on September 11, 1961, and January 18, 1969. It has, therefore, to be held that the accused failed to pay within 7 days of the date of deduction as provided in Rule 10(b) of the Income Tax Rules framed under the 1922 Act, which is identical with Rule 30(1)(b) of the Rules under the 1961 Act.

4. The next and the more important question is whether the prosecution could have been maintained under the 1961 Act for failure to pay the tax deducted prior to the coming into force of that Act. On the date of deduction, viz., April 20, 1961, the Act that was in force was the Income Tax Act of 1922. For failure to deduct and pay under the 1922 Act, the charge ought to have been filed u/s 51 (a) of that Act; but the prosecution is launched, as was conceded by the Public Prosecutor, in the court below under the provisions of the 1961 Act and not u/s 51 of the 1922 Act. There is also the further fact that a prosecution u/s 51 can be maintained only if the prosecution proves to the satisfaction of the court that no penalty u/s 28 was imposed. But there is no indication in the case to show whether any penalty was imposed or not, u/s 28 of the 1922 Act. That apart, the

main argument of the prosecution is that the failure to deduct and pay being a continuing offence, the same would survive even after the supersession of the 1922 Act. This aspect of the matter has been considered at some length in my judgment in Criminal Appeals Nos. 377/70 and 78/71. Certain rulings were cited before me by the learned State Prosecutor in support of the position that omission to deduct and pay is a continuing offence. One such decision is The State Vs. Kunja Behari Chandra and Others, .. There the omission which was the subject-matter of the charge was the omission by the colliery authorities to construct pithead bath and creche as required by the Rules. The Rules provided for the construction of pithead bath and creche within a time specified, but the construction was not made within that time. There the learned judges observed :

" The expression '' continuing offence'' means that, if an act or omission on the part of an accused constitutes an offence, and if that act or omission continues from day to day, then a fresh offence is committed on every day on which the act or omission continues. "

5. But, the position in the case before me is different Here the act made punishable is not omission to pay tax due from the party or the failure to provide ameliorative measures provided by a statute. The act committed here, on the other hand, is failure to remit to the credit of the Central Government the tax collected from dividends due to particular parties. In other words, the money that came into the hands of the accused was the money due to the Central Government and he was holding it on behalf of the Central Government. The rule provides for the remittance of tax in the treasury within seven days of its collection; the result is that the offence would be complete by the non-deposit within the prescribed time. In the case of an omission to pay tax or failure to do something as provided by a particular statute the failure or omission will continue even after the time allowed for it. But, here, on the expiry of the specified time, the offence itself is complete and no duty is enjoined on the accused by the statute to make any deposit after that. The offence having been committed simultaneously with the expiry of the time prescribed, all that remained was the imposition of the penalty provided in the statute. Such an offence cannot survive after the cancellation of the Act which created the offence. In Saidu Muhamtned v. Bhanukuttan, Executive Officer, Chavara Panchayat [1967] KLT 947 (Ker.) this court observed :

" Had the statute imported any such time element, and made the omission to pay within a particular time the gist of the offence, we would have been inclined to agree with the learned judge. For, the act constituting the offence would have been committed once and for all, and, therefore, the offence once and for all when that time expired. But as it is, we are afraid he was wrong. "

6. The Full Bench was considering the observation made by a learned single judge in Muhammad Lubba v. Neelambaran [1967] KLT 249 : [1967] K.L. J. 403.. The learned single judge held in that case that, by reason of Article 20(1) of the Constitution, there could be no conviction u/s 74 of the Act read with Rule 26 of

the Rules. In so holding, the learned judge stated that the act constituting the offence was " the omission to pay the dues to the panchayat when it fell due ". He went on to observe that, " that having occurred at a time when it did not constitute an offence, the prosecution laid in the case was obviously under an ex post facto law and as such unwarranted". By the words, " when it, fell due", the learned judge introduced a time element which is not to be found in the statute, and it is on these facts that the above quoted observations were made by the Full Bench. The time element which is of vital importance in determining the scope of the liability is prominently present in the case before me : so much so, when once failure to remit within the time prescribed occurs the offence is committed. The same offence cannot continue thereafter so as to be alive even after the law that made it an offence was superseded. There is little scope for thinking that the effect of the penal provision at least was intended to be retrospective :

"... it is one thing to say that any non-penal law or rule or regulation can operate retrospectively, and another thing to urge that by virtue of a parliamentary enactment, even a penal provision can have retrospective effect. In my view, it was not the intention of Section 5(2) that even a penal provision contained in a scheme can act retrospectively. Even if it was intended, it cannot have any effect because of the overriding provision''s of Article 20 of the Constitution. " (Vide Akharbhai Nazarali Vs. Md. Hussain Bhai, .

7. Section 51 of the 1922 Act read with rule 10(b) thereunder would show that the failure to deduct and pay the tax within a week''s time was an offence punishable with fine and on the expiry of the time prescribed the offence was complete. The 1961 Act came into force on April If 1962, only ; but long before that, under the 1922 Act the offence was complete and that did not continue thereafter so as to be treated as an offence under the 1961 Act as well. For the reasons stated above, I agree with the finding of the court below that the offence did not survive so as to form the subject-matter of a charge u/s 276(d) of the Income Tax Act, 1961.

8. The order of acquittal entered by the learned sessions judge is proper and in confirmation of it, this appeal is dismissed.

