
(1993) 04 KL CK 0012
In the High Court Of Kerala
Case No : O.P. No. 2605 of 1993-I

Tity Thomas and Others

APPELLANT

Vs

Tax Recovery Officer and Another

RESPONDENT

Date of Decision : 07-04-1993

Acts Referred:

Constitution of India, 1950 — Article 226
Income Tax Act, 1961 — Section 187, 188A, 189
Partnership Act, 1932 — Section 25

Citation : (1994) 207 ITR 1072

Hon'ble Judges : T.L. Viswanatha Iyer, J

Bench : Single Bench

Advocate : K. Jaju Babu, for the Appellant; P.K.R. Menon, for the Respondent

Judgement

T.L. Viswanatha Iyer, J.—The petitioners, eight in number, were partners of a firm, Messrs. Gemini Plantations, which owns coffee plantations in this State. This partnership, constituted over a decade and a half ago, has been undergoing reconstructions from time to time, with partners retiring and new partners being inducted. The specific details of these retirements and inductions are unnecessary for the purpose of this case, except to mention that the petitioners were partners of the firm during the financial years ending March 31, 1981, and March 31, 1982.

2. The firm had been granted registration u/s 184 of the Income Tax Act, 1961 ("the Act"). Assessments, exhibits P-4 and P-5, were completed on March 13, 1986, holding that the firm had no income assessable to tax under the Act. These orders were, however, reopened and fresh orders, exhibits P-8 and P-9, passed on August 14, 1987, assessing the firm to tax on the capital gains arising consequent on the sale of certain trees in its plantations. There were consequent demands for Rs. 2,94,590 by way of tax and other amounts for the assessment year 1981-82 and Rs. 1,54,313 for the year 1982-83. The assessments were made on the firm and the demand notices, exhibits P-10 and P-11, were also

addressed to the firm. The amounts demanded remained unpaid, whereupon the Tax Recovery Officer issued exhibit P-7 series of notices dated November 23, 1992, to the petitioners, u/s 188A of the Act, calling upon each of the petitioners to pay one-eighteenth of the arrears due, as their share thereof. This writ petition is filed challenging the notices, exhibit P-7 series, with the contention that the assessment and the demand being on the firm (which continued to be in existence), the partners could not be proceeded against personally for recovery of the amount due. Section 188A which was introduced in the Act with effect from April 1, 1989, by the Direct Tax Laws (Amendment) Act, 1987, has no retrospective operation and is insufficient to sustain the proceedings against the partners for recovery of the amounts due under exhibits P-8 and P-9.

3. Counsel for the petitioner placed reliance on the decision of a Full Bench of this court in *Income Tax Officer, Assessment II and Another Vs. C.V. George and Others*, and *V.V. Ali Koya Haji v. Asst. CST* [1976] 37 STG 618 ; [1976] KLT 762, to contend that the tax demanded from the firm could not be recovered from the petitioners. There is also a secondary submission that the order of reassessment was one completed in violation of the principles of natural justice, without notice to the petitioners and, therefore, not enforceable as against them. Reliance is placed on the decision in *S.N. Govinda Prabhu and Bros. v. Addl. STO* [1985] 59 STC 33 ; [1984] KLT 92.

4. Counsel for the Revenue, on the other hand, submits that Section 188A does not create any new liability, but incorporates merely a machinery provision for enforcement of that liability through the processes envisaged by the Act. Being a machinery provision, it applies to all cases when amounts are in arrears from firms even though the liability might have accrued prior to April 1, 1989. He also refutes the allegation of violation of the principles of natural justice in completing the assessment, pointing out that the assessment has been completed u/s 187 of the Act, in accordance with the procedure prescribed thereby.

5. In *Income Tax Officer, Assessment II and Another Vs. C.V. George and Others*, , what this court stated was that when the assessee is a partnership which has been assessed, and tax demanded from the firm, the assessee in default is the firm and not its individual partners, according to the scheme of the Act. The partners will become liable under the Act only if there are separate assessments on the partners. Since the scheme of the Act visualises proceedings against the firm or the partners only if a liability is imposed on them under the provisions of the Act, any liability for the tax imposed on a firm as such under the Act cannot be treated as the liability of the partners by importing the general principles of partnership law and therefore those dues of the firm cannot be recovered from the partners. In the other case of *Ali Koya Haji* [1976] 37 STC 618, the amount sought to be recovered was sales tax due from a defunct firm under the Kerala General Sales Tax Act, 1963. It was sought to be recovered from a partner by issuing a garnishee notice to his employer u/s 25 of the Act. It was held that the assets of the partners could not be proceeded against in the

mode of recovery provided by Section 25 of the Act which enabled proceedings only against the firm and not against the partners. That decision turned on the language of Section 25 of the statute concerned, and is not directly applicable to the facts of this case. Only the decision in *Income Tax Officer, Assessment II and Another Vs. C.V. George and Others*, has, if at all, any relevance. The scope of the ratio in *Income Tax Officer, Assessment II and Another Vs. C.V. George and Others*, was delineated by a Bench of this court in *E. P. EAPEN Vs. Income Tax OFFICER, "B" WARD, TRIVANDRAUM, AND OTHERS.*, in these words (at page 834) :

"From the passages from the Full Bench decision quoted it is clear that what has been laid down is that recovery proceedings could be only against the assessee in terms of the assessment order, without importing the notion of joint and several liability contained in Section 25 of the Partnership Act. The words "as the scheme of the Act visualises proceedings being taken against the firm or the partners only if a liability is imposed under the provisions of the Act against the firm or the partners thereof employed in the passages at page 149 of the judgment of the Full Bench are of great significance ; the Full Bench has taken sufficient care to indicate that if the provisions of the Income Tax Act themselves impose liability on the partner, there would be no bar against his being proceeded against though the assessment stood in the name of the firm alone. Otherwise, the words "only if a liability is imposed under the provisions of the Act against the firm or the partners thereof would be redundant."

6. It will be noted from the above passage, that the Division Bench laid stress on the question whether the Act itself cast a liability on the partners for the dues of the firm in which event they could be proceeded against for the dues of the firm.

7. The question which arises for consideration therefore is whether any liability is cast on the petitioners for the dues of the firm, Gemini Plantations. It cannot be doubted having regard to the provisions of Section 25 of the Indian Partnership Act that the partners are jointly and severally liable for all the acts of the firm while he was a partner. Therefore, the partners are jointly and severally liable for the tax dues of the firm. In fact Section 189 of the Act casts a liability on the partners, and makes the amount recoverable from them in case the firm is dissolved or if the business of the firm is discontinued. What Section 188A appears to have done is to extend the principles of Section 189 to a firm in existence as well. Section 188A reads :

"188A. Joint and several liability of partners for tax payable by firm.--Every person who was, during the previous year, a partner of a firm, and the legal representative of any such person who is deceased, shall be jointly and severally liable along with the firm for the amount of tax, penalty or other sum payable by the firm for the assessment year to which such previous year is relevant, and all the provisions of this Act, so far as may be, shall apply to the assessment of such tax or imposition or levy of such penalty or other sum."

8. What the section has purported to do is to make the partners jointly and severally liable, along with the firm, for the amount of tax, penalty or other sum payable by the firm. It is really a projection of the principle underlying Section 189 to a firm in existence, and to attract the proceedings under the Act for recovery of the said amount from the partners also. The position as it stood under *Income Tax Officer, Assessment II and Another Vs. C.V. George and Others*, of proceedings under the Act being barred so long as the firm was in existence stood removed by this provision. If Section 188A is applicable to the case, it cannot be doubted that the amount due from the firm could be recovered from the petitioners, even while the firm was in existence, without its being dissolved or its business being discontinued.

9. But then the question arises whether this section which came into force only on April 1, 1989, could be applied to the recovery of the dues for the years 1981-82 and 1982-83. What Section 188A does is only to incorporate a machinery provision facilitating the recovery of dues of a firm. It does not cast any new liability on the partners. Such liability exists *de hors* Section 188A, having regard to the provisions of Section 25 of the Indian Partnership Act which stands recognised otherwise in Section 189. The decision of the Full Bench, in my view, only goes to the extent of interdicting proceedings under the Act for recovery of the tax liabilities of the firm from the partners. The other remedies which the Department may have by way of civil suit or otherwise are not precluded even under the said decision. That position has now been clarified by attracting the provisions of the Act for recovery of the liabilities of the firm from the partners during the subsistence of the firm. As stated by the Supreme Court in *Commissioner of Income Tax, Bombay City II Vs. Associated Commercial Corporation*, , the provisions of a taxing statute laying down the machinery for the calculation of the tax or the procedure for its collection have to be construed so as to effectuate the intention of the Legislature, which is to make the charge effective and to make the machinery of assessment workable. In my view, Section 188A which does not cast any new liability on the partners, is liable to be invoked for recovery of all amounts remaining unpaid by firms, and authorises proceedings against the partners thereof even though the firms continue to subsist. The notices, exhibit P-7, series are thus warranted by the provisions of Section 188A and the proceedings initiated thereunder against the partners are valid in law.

10. The other point regarding alleged violation of the principles of natural justice does not merit serious consideration. The assessment is one completed on the firm as reconstituted u/s 187. There is no case that the procedure prescribed in that section has not been followed. The petitioners, were partners of the firm during the years 1981-82 and 1982-83. If so, there cannot be any room for any complaint that the assessment is bad for violation of the principles of natural justice. Even otherwise, the assessments are not under challenge before me.

11. The original petition is, therefore, without merit. It is accordingly dismissed.