
(1970) 06 KL CK 0014

In the High Court Of Kerala

Case No : Criminal R.P. No's. 83, 89, 90, 91, 92, 93, 94 and 95 of 1970

V. Hallay Mathew

APPELLANT

Vs

State of Kerala and Another

RESPONDENT

Date of Decision : 19-06-1970

Acts Referred:

Constitution of India, 1950 — Article 20(1)
Income Tax Act, 1922 — Section 18(3D), 18(6), 51, 53, 66(1)
Income Tax Act, 1961 — Section 194, 200, 267B, 276, 279
Income Tax Rules, 1962 — Rule 30

Citation : (1971) 79 ITR 72

Hon'ble Judges : E.K. Moidu, J

Bench : Single Bench

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

Judgement

E.K. Moidu, J.—In these criminal revision petitions the order committing the petitioner for trial to the Sessions Court in respect of charges under sections 276(d) and 276B of the Income Tax Act, 1961, which will hereinafter be referred to as " the Act ", has been challenged on the ground that the charge u/s 276B is violative of Article 20(1) of the Constitution of India and that the charge u/s 276(d) is not otherwise sustainable.

2. The Income Tax Officer, A-Ward, Kottayam, instituted eight separate complaints at the instance of the Commissioner of Income Tax, against the petitioner who was alleged to be the managing director of one Malabar Agricultural Co. Ltd., Kottayam, for his failure to pay to the Central Government Income Tax which he deducted from the dividend when it was distributed among its shareholders each year, beginning from April 20, 1961, and ending with February 1, 1968., The year of assessment, the date of declaration of dividend, the date on which the tax was deducted from the dividend, the amount so deducted and the actual payment of the tax to the credit of the Government are given in a tabular form below :

Year of
Declared
Tax deducted
Amount so
Actually paid
assessment
dividend
from dividend
deducted
to the credit
on
on
of Government
on
Rs
1960-61
21-3-1961
20-4-1961
22,213.11
18-1-1969
1961-62
30-12-1961
7-6-1962
26,919.20
20-2-1969
1962-63
31-12-1962
5-2-1963
30,589.45
3-3-1969

1963-64
31-12-1963
5-2-1964
20,084.63
24-5-1969
1964-65
31-12-1964
5-2-1965
14,486.21
24-9-1969
1965-66
21- 1-1965
5-4-1966
13,205.54
24-9-1969
1966-67
29-12-1966
1-2-1967
7,946.97
24-9-1969
1967-68
29-12-1967
1-2-1968
14,526.65
24-9-1969

3. The column (3) of the above list shows that the tax was deducted each year on various dates. But the payment was delayed for a period ranging from 11/2 years to about 8 years as shown in column (5). Rule 30 of the Income Tax Rules, 1962, provides that all sums deducted, in accordance with the provisions of Section 194 of the Act shall be paid to the credit of the Central Government within one week from the date of such deduction or the date of receipt of the chalan by the person making the deduction, as the case may be. There is no

case that any chalan had been either received or issued to the company. So the payments should have been made in each of the above cases within one week from the date of the deduction of the tax. It was because of the failure of the company represented by its principal officer to pay the tax within the stipulated period and thereafter, that these prosecutions have been laid against the petitioner under sections 276(d) and 276B of the Act.

4. It is necessary to refer to the relevant sections of the Act to understand the liability of the petitioner to deduct the tax from the dividend and pay the same to the Government. The first deduction being on April 20, 1961, which was before the Act came into force on April 1, 1962, it is better to quote the relevant provisions of the old Income Tax Act, 1922, Section 18(3D) of that Act read as follows :

" The principal officer of an Indian company or a company which has made the prescribed arrangements for the declaration and payment of dividends (including dividends on preference shares) within India shall, before making any payment in cash, or before issuing any cheque or warrant in respect of any dividend or before making any distribution or payment to a shareholder of any dividend within the meaning of sub- Clause (a) or Sub-clause (b) or Sub-clause (c) or Sub-clause (d) or Sub-clause (e) of Clause (6A) of Section 2, deduct on the amount of such dividend, Income Tax and super-tax at the prescribed rates "

5. After deducting the amount of tax out of the dividend under the above section, the principal officer of the company shall pay that, within the prescribed time, to the Central Government as required by Section 18(6), which read as follows :

" All sums deducted in accordance with the provisions of this section shall be paid within the prescribed time by the person making the deduction to the credit of the Central Government or as the Central Board of Revenue directs."

6. The failure to pay the tax to the Government under the Income Tax Act, 1922, was made punishable u/s 51 of the Act.

Section 51:

" If a person fails without reasonable cause or excuse--(a) to deduct and pay any tax as required by Section 18 he shall, on conviction before a Magistrate, be punishable with fine which may extend to ten rupees for every day during which the default continues. "

7. The provisions similar to the above Sections 18(3D), 18(6) and 51 are, respectively, provided in Sections 194 200 and 276(d) and 276B, respectively, in the 1961 Act. Section 194 of the Act reads:

"Dividends.--The principal officer of an Indian company or a company which has made the prescribed arrangements for the declaration and payment of dividends (including dividends on preference shares) within India, shall, before making any payment in cash or before issuing any cheque or wan ant in respect of any

dividend or before making any distribution or payment to a shareholder, of any dividend within the meaning of Sub-clause (a) or Sub-clause (b) or Sub-clause (c) or Sub-clause (d) or Sub-clause (e) of Clause (22) of Section 2, deduct from the amount of such dividend, Income Tax at the rates in force "

8. The above section deals with the deduction of the tax from the dividend to be distributed. The duty of the person deducting the tax to pay the same to the credit of the Central Government, is contained in Section 200 of the Act, which reads as follows :

" Duty of person deducting tax.--Any person deducting any sum in accordance with the provisions of Sections 192 - 194, Section 194A and Section 195 shall pay within the prescribed time, the sum so deducted to the credit of the Central Government or as the Board directs. "

9. Consistent with the above section, Rule 30 of the Income Tax Rules, 1962, provides that all sums deducted, in accordance with the provisions of Section 194, shall be paid to the credit of the Central Government within one week from the date of such deduction.

10. Non-compliance of Sections 194 and 200 occurring in Chapter XVIIIB of the Act read with Rule 30 of the Rules was made punishable u/s 276(d) which read as follows before April 1, 1968:

" 276. If a person fails without reasonable cause or excuse--.....

(d) to deduct and pay tax as required by the provisions of Chapter XVIIIB or under Sub-section (2) of Section 226 ;

he shall be punishable with fine which may extend to ten rupees for every day during which the default continues. "

11. Out of the above section the words "by the provisions of Chapter XVIIIB or" had been omitted by the Finance Act of 1968 with effect from April 1, 1968. Thus the word " Chapter XVIIIB or " having been deleted out of Section 276(d) it reads as if the non-compliance of the provisions of Sections 194 and 200 of the Act read with Rule 30 of the Rules was no longer an offence u/s 276(d), after April 1, 1968. But, on the same day, Section 276B came to be incorporated in the Act under the Finance Act, 1968. Therefore, it is clear that the non-compliance of Sections 194 and 200 occurring in Chapter XVIIIB is an offence only u/s 276B after April 1, 1968, and that Section 276(d) is defunct thereafter.

12. The petitioner's case is that by the addition of Section 276B with effect from April 1, 1968, to the Act, non-payment or non-deduction of tax on dividends payable to shareholders, made an offence u/s 276(d) of the Income Tax Act of 1961, stood deleted and, therefore, a prosecution after 1st April, 1968, u/s 276(d) of the Income Tax Act of 1961 will not lie. According to the petitioner, the General Clauses Act will not bring into operation for the continuity of the provision of that section. So it is alleged that there is no saving provision in the

Income Tax Act, 1961, subsequent to the repeal made in Section 276(d) of the Act and, therefore, it is contended that the complaints filed u/s 276(d) are unsustainable and, hence, the District Magistrate was not competent to take cognizance of the complaints for offences alleged to have been committed u/s 276(d) of the Income Tax Act for non-payment of tax deducted at source.

13. It is then contended that after the amendment on April 1, 1968, the prosecution u/s 276B of the Act will not also lie as that section reveals that a minimum punishment of rigorous imprisonment and fine is made compulsory if the offence is proved. According to Section 276(d) as it stood before amendment on April 1, 1968, non-payment of taxes on dividends is liable to be punished only with fine. Therefore, the offences alleged to have been committed prior to April 1, 1968, could not be proceeded against u/s 276B by virtue of Article 20(1) of the Constitution of India as it has provided that no person shall be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence." It is accordingly that the petitioner has raised the contention that the complaints in these cases u/s 276B would be violative of Article 20(1) of the Constitution of India, as Section 276B will be attracted only to the cases of non-deduction or non-payment of taxes on dividends distributed to the shareholders after April 1, 1968. On these grounds, the revision petitioner contended that the committal order passed against the petitioner shall be quashed. It is also further contended that there is no evidence to prove that the petitioner was the principal officer of the company as required by Section 2(35) when the tax deduction was made. There is yet another contention that the complaints in the respective cases should have been filed by the Commissioner himself under the provisions of Section 279 of the Act.

14. A common question has arisen in all these cases, and, therefore, the revision petitions are disposed of in one and the same order.

15. It is admitted that except in the failure to pay tax after the deduction of tax on April 20, 1961, in all other cases the alleged offence would fall within the ambit of Section 276(d) of the Act. But in the nature of the case it is necessary to come to a conclusion, whether an offence could be made out u/s 276(d) before an offence u/s 276B was considered. It is also clear that a conviction under Sections 194 and 200 read with Section 276(d) depended upon a conviction u/s 18(3D) and 18(6) read with Section 51 of the Act of 1922, in respect of failure to pay the tax after the deduction was made on April 20, 1961. The conviction and sentence in all the cases are, therefore, inter-related under these provisions of the two Acts referred to above. Under those circumstances, this court will not be justified at this stage to interfere with the committal order. In a case, *Thakurdas Kimatrai and Others Vs. The State*, it was held that it would not be expedient in the interests of justice to allow the accused to raise an academic point of law u/s 215 of the Criminal Procedure Code and to press the High Court to decide a hypothetical academic point. In that case the accused were committed to stand their trial in the court of sessions for the offences under

Sections 376 and 406, Indian Penal Code, and u/s 6, Bigamous Marriages Act, and they applied u/s 215 of the Criminal Procedure Code to quash the commitment in respect of the offence u/s 376, Indian Penal Code. But the question of the competence of the charge and the effectiveness u/s 376 depended on first establishing the charge under the Bigamous Marriages Act which was not established. Under those circumstances, the High Court of Bombay did not think that it would be expedient in the interests of justice that it should allow an academic point at that stage.

16. In all these cases one question that requires to be considered is whether either under the relevant provisions of the Act of 1922 or 1961, the offence contemplated u/s 51 of the 1922 Act and Section 276(d) of the 1961 Act was a continuing offence or not. In a Full Bench decision of this court in Saidu Mohammed v. Bhanukuttan [1967] KLT 947 (Ker) [F.B.] it is pointed out that the omission to pay within a particular time or an omission to do a thing within a stipulated period is different from the omission to do the thing constituting the offence continued to be done so long as the obligation to do the thing, continued. In the latter case, it was pointed out, that an offence was continued to be committed even after the particular provision of the particular Act or rule came into force after the commission of the offence. In that case Section 74 of the Kerala Panchayat Act, 1960, read with the Rule 26 of the Rules made thereunder made the non-payment of tax an offence though it was not an offence prior to the Act and the rule. But since the failure to pay the tax was found continued to be done the omission to pay the tax was held to be an offence. But the Patna and the Calcutta High Courts in connection with the construction of creches and bathrooms as provided in the Mines Creche Rules and the Coal Mines Pithead Bath Rules, 1964, the management having omitted to construct these amenities within the time specified, it was prosecuted in those cases, after the lapse of the term before which prosecution should have been launched (sic). In both, the defence contended that the prosecution would not lie after the expiry of the term; the prosecution urged, however, that the offence of omission to construct these amenities was a continuing one. In the Patna High Court, *The State Vs. Kunja Behari Chandra and Others*, there was a difference of opinion, the majority view being that it was a continuing offence and the prosecution was not barred by section 42 of the Mines Act, which provided a limitation for such prosecutions. The matter is elaborately discussed in the Calcutta judgment in *G.D. Bhattar and Others Vs. The State*, :

" The question whether an illegal omission is a continuing offence or not can hardly be answered in a summary manner without considering the nature of the duty imposed, the object which the legislature had in view in imposing the duty. The pithead baths and the mines creches are amenities required by the legislature, the first for the sanitation and health of the miners and the second for the proper care of the children of female miners. without these the miners could not be expected to preserve their health, and children of the female miners could not be properly looked after. The mere fact, therefore, that the

specified date within which the baths and the creches were required under the Rules to be constructed expired, cannot possibly mean that the duty of the owner ended with the expiry of the date. That duty still remains. It continues till the pithead baths and creches are constructed as required by the Rules. A continuing wrong or a continuing offence is, after all, a continuing breach of a duty which itself is continuing. If a duty continues from day-to-day, the non-performance of that duty from day-to-day is a continuing wrong. "

17. Similar view was expressed in *Akharbhai Nazarali Vs. Md. Hussain Bhai*, . In that case some employers of a textile industry were prosecuted u/s 406, Indian Penal Code, for criminal breach of trust read with paragraphs 76(a) and 76(c) of the Employees' Provident Funds Scheme, 1952, which was notified in October, 1953, giving effect to it from 2nd September, 1952. The case against the employers was that the amounts deducted during the months of January, February and March, 1953, from the wages of their employees as contribution to the employees' provident fund, which the accused employers retained themselves and failed to deposit into the fund. Therefore, they failed to comply with paragraph 38 of the Scheme which directed that the employer shall deduct the employees' contribution from their wages, and then add his own contribution and such administration charges as might be fixed by the Central Government and shall pay to the fund by cheque or bank draft within 15 days from the close of each month. The same paragraph directed that he should also forward to the Commissioner within 15 days from the close of each month, a monthly consolidated statement showing the recoveries from the employees' and employer's own contribution. Failure to do so was punishable under paragraphs 76(a) and (c) of the Scheme with imprisonment up to 6 months and fine up to Rs. 1,000 or both. It was contended that the act of nonpayment into the fund of the contribution and administration charges was a non-recurring or non-continuing offence, and, therefore, unless the offence was committed after October, 1953, it could not be punished under paragraph 76. .. Dealing with that question the following observation was made in the above case :

" whether the non-payment of contribution and non-submission of the return, in the manner provided in paragraph 38, are offences that recur and continue every moment, till the payment is made and the returns are submitted, or whether they are complete on the 15th of the next month and do not continue after that. If these offences are continuing offences that are, as it were, being committed every moment till the payments are made and the returns submitted, they would be punishable after October, 1953. . . . it is clear that the pith and substance of paragraph 38 is that the contributions should be paid into the fund, and the return should be made to the Commissioner. While the fixing of a date does mean that the employer should pay into the fund and send to the Commissioner the returns by that date, it cannot mean that once the date is passed, the employer is relieved of his duty and there is nothing more to be done. On the contrary, the duty of the employer is, in any event, to pay and to send the returns; otherwise, one will be ignoring the very purpose of the scheme."

18. It is an obligation and duty covered by statute and, therefore, it continued day after day, till of course the payment was made and the returns were submitted. If the above viewpoint was to be accepted it would be obvious that the failure to pay up the tax on dividend in the instant case would be a continuing wrong which may become a penal offence even after April 1, 1968. But I am afraid whether I should decide the question whether the offence was a continuing offence coming within the purview of Section 276B or not in view of the earlier circumstances which I pointed out. It is sufficient for me to say that a prima facie case having been made out the court below was correct in committing the petitioner for trial to the court of sessions.

19. I may also consider whether by reason of the repeal of the 1922 Act by the 1961 Act or by reason of the deletion of " Chapter VIIB or " out of Section 276(d) of the Act the prosecutions u/s 51 of the 1922 Act or u/s 276B of the Act after the amendment on April 1, 1968, are not saved and, therefore, the prosecutions under those sections are not maintainable. T.S. Baliah Vs. T.S. Rengachari, is the authority for the position that by virtue of Section 279(2) of the Act the prosecution u/s 52 of 1922 Act (section 51 applicable to this case) is saved in respect of any legal proceeding for an offence committed under the 1922 Act to be instituted even after the repeal of the 1922 Act by the 1961 Act and for punishment to be imposed as if the repealing Act has not been passed. In this regard, the following observation at page 705 of the Supreme Court decision referred to above may be seen:

" It is true that there is no express sub-clause in Section 297(2) of the 1961 Act which provides for the continuation of such proceedings, but our concluded opinion is that Parliament did not intend Section 297(2) of the 1961 Act to be completely exhaustive and in regard to such matters as are not expressly saved by Section 297(2) of the 1961 Act, the provisions of Section 6(e) of the General Clauses Act will apply. It follows, therefore, in the present case that u/s 6 of the General Clauses Act a legal proceeding in respect of an offence committed under the 1922 Act may be instituted even after the repeal of the 1922 Act by the 1961 Act and punishment may be imposed as if the repealing Act had not been passed. "

20. I have already indicated that for the offence committed prior to April 1, 1968, in violation of Sections 194 and 200 read with Rule 30 of the Rules if it was found to be an offence continued from day to day, it would be open to prosecute the offender u/s 276(d) as it stood before the amendment on April 1, 1968. I have already stated that I did not express any opinion as to whether the offence u/s 276(d) committed in this case was a continuing offence or not.

21. The next point which has been urged on behalf of the petitioner is whether the provisions of Section 276(d) are hit by Article 20(1) of the Constitution. Article 20(1) reads as follows:

"20. Protection in respect of conviction for offences.--(1) No person shall be

convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence."

22. I am of the view that I am relieved of the necessity of considering this question, because in two cases, Rao Shiv Bahadur Singh and Another Vs. The State of Vindhya Pradesh, and Kedar Nath Bajoria Vs. The State of West Bengal, their Lordships of the Supreme Court have already considered the precise question.

23. With regard to the applicability of Article 20(1) of the Constitution in a similar case their Lordships have been pleased to observe in Shiv Bahadur Singh v. State of Vindhya Pradesh that:

"In this context it is necessary to notice that what is prohibited under Article 20 is only conviction or sentence under an ex post facto law and not the trial thereof. Such trial under a procedure different from what obtained at the time of the commission of the offence or by a court different from that which had competence at the time cannot ipso facto be held to be unconstitutional. A person accused of the commission of an offence has no fundamental right to trial by a particular court or by a particular procedure, except in so far as any constitutional objection by way of discrimination or the violation of any other fundamental right may be involved. "

24. A reading of Article 20(1) would show that it sets two limitations on the legislative authority : (1) that no person shall be convicted of any offence if there was no law in force at the time of the commission of the offence which makes the act an offence. But differently put, it prohibits the creation of a new offence, the punishment of which may be prescribed with retrospective effect. This depends upon whether the offence with which the petitioner stood charged was not an offence at the time of the alleged commission. The other limitation is that no one shall be subjected to, a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. It is for the presiding judge over the sessions to award a sentence in respect of the charges if any established against the petitioner. But at this stage no question of any heavier penalty arises and till the petitioner is tried and convicted there is no question of punishment. Article 20(1) opens by saying that " no person shall be convicted of any offence " and not that " no person shall be tried for any offence ". In view of these circumstances, I am of the opinion that it is not necessary for me to consider at this stage before the petitioner is convicted that the provisions of Section 276B of the Act are hit by Article 20(1) of the Constitution.

25. Then there remained only one or two points more" on which argument was advanced in these cases. One such point is that without the Commissioner of Income Tax himself filing the complaint against the petitioner the prosecution is invalid and unsustainable. It is conceded that the Commissioner of Income Tax

has given written authority to the Income Tax Officer to file the prosecution against the petitioner and that his written authorisation had also been filed into court. What Section 279 of the Act requires is that the prosecution shall not be proceeded against an offender u/s 276(d) or Section 276B except at the instance of "the Commissioner". The clause " at the instance of the Commissioner" occurring in Section 53 of the Act of 1922 only meant " on his authority " and since it was sufficient compliance of the statutory requirement of the section the complaint filed under the Act had been held to be good in the case which is already quoted as T.S. Baliah v. Rangachari. The relevant portion of the judgment is at page 794. I find, therefore, on the authority of the above decision that the prosecution of the petitioner u/s 279 of the Act is sustainable.

26. Then it is contended that the prosecution did not prove that the petitioner was the principal officer as required by Sub-section (35) of Section 2 of the Act and that, therefore, the prosecution could not be launched against him. It is contended further that there was no evidence in support of the case that the petitioner was the principal officer at the relevant time. It could not be said that the petitioner was not the principal officer when the admitted tax was paid to the credit of the Central Government. Exhibit P-2 dated September 24, 1969, which is a statement furnished by the petitioner to the Income Tax Officer showing the various payments made by him and also the circumstances under which the payments could not be made earlier. Exhibit P-2 was signed by the petitioner as managing director of Malabar Agricultural Company Ltd. In all the revision petitions the petitioner is described as the managing director of the said company. There is the evidence of P.W.-1, the Income Tax Officer, that the petitioner was the principal officer. I may also point out that in none of the grounds of the revision petitions filed in this court the petitioner alleged any ground that he was not the principal officer during the relevant period and, therefore, he could not be proceeded against. In the absence of any specific allegation in the pleading to that effect and in view of the evidence of P.W.-1, I am of the opinion that the prosecution has made out a prima facie case to enable the lower court to commit the petitioner to the court of sessions. I may not be understood to have stated that the prosecution has proved that the petitioner was the principal officer during the relevant period conclusively beyond reasonable doubt. It is sufficient to say that there is a prima facie case in favour of the prosecution.

27. In view of all these circumstances, I have to hold that these revision petitions are not sustainable as against the committal order passed by the lower court. Therefore, all the revision petitions are dismissed.