

(1983) 06 KL CK 0021

In the High Court Of Kerala

Case No : Original Petition No. 6310 of 1981-G

V.N. Purushothaman

APPELLANT

Vs

Agrl. Income Tax Officer and Another

RESPONDENT

Date of Decision : 17-06-1983

Acts Referred:

Kerala Agricultural Income Tax Act, 1950 — Section 40

Citation : (1984) 1 ILR (Ker) 750 : (1984) 149 ITR 120

Hon'ble Judges : K.S. Paripoornan, J

Bench : Single Bench

Advocate : P.A. Mohammed T. and A.B. Jaleel, for the Appellant; Government Pleader, for the Respondent

Judgement

K.S. Paripoornan, J.—The petitioner is an assessee to Agricultural Income Tax on the files of the 1st respondent, the Agricultural Income Tax Officer. For the assessment year 1980-81, he filed a return showing a loss of Rs. 12,049-16. The Agricultural Income Tax Officer assessed him to the best of his judgment as per Ex. P-1 order, dated September 25, 1981, on a total income of Rs. 63,328.38 and levied a tax and surcharge of Rs. 25,791.48. The assessee filed an appeal, Ex. P-2, before the 2nd respondent, AAC, Agricultural Income Tax and Sales tax. Pending the appeal, he also filed a petition to stay the collection of tax till the disposal of the appeal. This is evidenced by Ex. P-3, dated October 22, 1981. By Ex. P-4 order, the 2nd respondent, AAC, passed an order, rejecting the prayer for stay of collection, but, permitted the petitioner to pay the amount in four instalments as detailed therein. Thereafter, this O.P. was filed praying to quash Ex. P-4 order of the 2nd respondent, and for the issue of a writ of mandamus directing the 2nd respondent to consider and dispose of Ex. P-2. appeal on merits and in accordance with law. This court passed an interim order in C.M.P. No. 22854 of 1981 staying further collection of tax on condition that the petitioner remits Rs. 8,000 on or before January 3, 1982.

2. Mr. P. A. Mohammed, counsel for the petitioner, contends that the 2nd

respondent, AAC, has failed to consider Ex. P-3 petition in accordance with law. According to him, Ex. P-4 is laconic and has not been passed bearing in mind the principles which should be applied in exercising his discretion. According to counsel, the power vested in the 2nd respondent to stay collection of tax should be exercised judicially and taking into account all the facts and circumstances of the case. In this case, there has been no judicial disposal. The order is infirm and so should be quashed. Government Pleader raised a contention that Ex. P-4 order satisfies the requirements of law that the AAC has exercised his power taking into account all relevant matters and that the petitioner could have filed a petition before the Agricultural Income Tax Officer under the proviso to Section 40 of the Agricultural Income Tax Act to obtain the relief.

3. Exhibit P-4 order of the AAC of Agricultural Income Tax and Sales Tax, dated October 22, 1981, states as follows :

"Examined the contentions raised in the appeal and stay petitions and also perused the connected records. I do not find sufficient grounds to stay the collection of tax. Hence the stay petition is rejected. However, he is permitted to pay the amount in four instalments as detailed below:

Ist to be paid on or before 2-12-1981

IIInd do. 2-1-1982

IIIrd do. 2-2-1982

IVth do. 2-3-1982. "

4. The question is whether Ex. P-4 order satisfies the requirements of law. It is true that pending an appeal before the AAC, the assessee can file a petition under the proviso to Section 40 of the Agricultural Income Tax Act before the Agricultural Income Tax Officer to treat him as not in default pending the appeal. Section 40 is to the following effect :

" Recovery of tax and penalties.--Any amount specified as payable in a notice of demand u/s 30 or an order under Sections 31, 32 or 33 shall be paid in such number of instalments, within such time, at such place and to such person, as may be specified in the notice or order, or if a time is not so specified, then on or before the first day of the second month following the date of the service of the notice or order and any assessee failing so to pay shall be deemed to be in default:

Provided that, when an assessee has presented an appeal u/s 31, the Agricultural Income Tax Officer may in his discretion treat the assessee as not being in default so long as such appeal is undisposed of. "

5. The scope and content of the said power has been considered by courts in the decisions in VETCHA SREERAMAMURTHY Vs. THE Income Tax OFFICER VIZIANAGARAM, AND ANOTHER., and Aluminium Corporation of India Ltd. Vs. Mr. C. Balakrishnan and Others, , in construing the analogous provision in the

Indian Income Tax Act, 1922, Section 45, and Section 31(3) of the Wealth Tax Act. They were cited with approval by this court in the decision in Yusuf Jan Sahib Vs. Additional Income Tax Officer, Quilon, . Section 45 of the Indian I.T. Act, 1922, states:

" Tax when payable.--Any amount specified as payable in a notice of demand under Sub-section (3) of Section 23A or u/s 29 or an order u/s 31 or section 33, shall be paid within the time, at the place and to the person mentioned in the notice or order, or if a time is not so mentioned, then on or before the first day of the second month following the date of the service of the notice or order, and any assessee failing so to pay shall be deemed to be in default, provided that, when an assessee has presented an appeal u/s 30, the Income Tax Officer may in his discretion treat the assessee as not being in default as long as such appeal is undisposed of. "

6. Velu Piliai J. followed the decision of the Calcutta High Court reported in Aluminium Corporation of India Ltd. Vs. Mr. C. Balakrishnan and Others, and also the decision in VETCHA SREERAMAMURTHY Vs. THE Income Tax OFFICER VIZIANAGARAM, AND ANOTHER., . D. N. Sinha J. observed in the decision in Aluminium Corporation of India Ltd. Vs. Mr. C. Balakrishnan and Others, as follows:

" A judicial exercise of discretion involves a consideration of the facts and circumstances of the case in all its aspects. The difficulties involved in the issues raised in the case and the prospects of the appeal being successful is one such aspect. The position and economic circumstances of the assessee is another. If the officer feels that the stay would put the realisation of the amount in jeopardy, that would be a cogent factor to be taken into consideration. The amount involved is also a relevant factor. If it is a heavy amount, it should be presumed that immediate payment, pending an appeal in which there may be a reasonable chance of success, would constitute a hardship. The Wealth-tax Act has just come into operation. If any point is involved which requires an authoritative decision, that is to say, a precedent, that is a point in favour of granting a stay. Quick realisation of tax may be an administrative expediency, but by itself it constitutes no ground for refusing a stay. While determining such an application, the authority exercising discretion should not act in the role of a mere tax-gatherer."

7. In VETCHA SREERAMAMURTHY Vs. THE Income Tax OFFICER VIZIANAGARAM, AND ANOTHER., Subba Rao C.J., as he then was said :

"The discretionary statutory power conferred upon an authority for the public good is coupled with a duty to perform it under relevant circumstances. The fact that the exercise of the power is left to the discretion of the authorised person does not exonerate him from discharging his duty. If the discretionary power so conferred is exercised arbitrarily, capriciously or unreasonably or by taking into consideration extraneous and irrelevant considerations, in the eye of law, the

authority concerned must be deemed not to have exercised the discretion at all, that is, he has not discharged his duty. If the court on the facts placed before it comes to a definite conclusion that a particular authority has not exercised his duty for one or the other of the aforesaid reasons, it will compel the authority to discharge his duty, or, to put it differently, to exercise his discretion honestly and objectively.

There is also an essential distinction between a refusal to exercise the discretion and the manner of its exercise. If the authority fails to discharge his duty by refusing to exercise his discretion when facts calling for its exercise exist, or, if he exercises discretion under the circumstances mentioned above, which is not an exercise of discretion in law, the court will compel him to do so,"

8. It will be useful to remember that a provision more or less similar to the above is enacted in Section 220(6) of the I.T. Act, 1961, which runs as follows :

" Where an assessee has presented an appeal u/s 246, the Income Tax Officer may, in his discretion, and subject to such conditions as he may think fit to impose in the circumstances of the case, treat the assessee as not being in default in respect of the amount in dispute in the appeal, even though the time for payment has expired, as long as such appeal remains undisposed of."

9. It should be stated that apart from such power vested in the officer, it appears to me that the 2nd respondent, AAC, has got inherent power to pass such orders which will not render the final order, that is likely to be passed in the appeal, ineffective or illusory. Such inherent power is vested in every authority, in whom is vested the power to hear and determine any cause. M. S. Menon C.J., in delivering the judgment of the Full Bench in N.K. Dharmadas Vs. State Transport Appellate Tribunal of Kerala and Others, , observed as follows (p. 75 of AIR) :

" An appeal is a complaint to a superior body of an injustice done or error committed by an inferior one with a view to its correction or reversal. It is a creature of statute, not a constitutional or inherent right. But, as pointed out by Maxwell, where an Act confers a jurisdiction, it impliedly also grants the power of doing all such acts, or employing such means, as are essentially necessary to its execution (11th edition, page 350).

A remand by an appellate court is usually made when the record before it is in such shape that the appellate court cannot in justice determine what final judgment should be rendered and the power to do so cannot but be an essential requisite of the very jurisdiction to entertain the appeal. It is an old maxim of the law that to whomsoever a jurisdiction is given, those things also are supposed to be granted, without which the jurisdiction cannot be exercised : *cui jurisdictio data est, ea quoque concessa esse videntur, sine quibus jurisdictio explicari non potest.*

Kent says that the grant of a jurisdiction implies the grant of all the powers necessary to its exercise (1 Kent, Comm. 339). And Sutherland that where a

statute confers powers or duties in general terms, all powers and duties incidental and necessary to make such legislation effective are included by implication (3rd edition, Vol. 3, page 19)."

10. That such inherent power exists in the Income Tax Appellate Tribunal as incidental and ancillary powers by implication when it entertains an appeal, was decided by this court in a matter arising out of the I.T. Act in the decision in M. K. Mohammed Kunhi Vs. Income Tax Officer, Cannanore, and Another, . This decision was approved by the Supreme Court in ITO v. M. K. Mohammed Kunhi [1969] 71 ITR 815, wherein the Supreme Court observed at page 819 :

" It is a firmly established rule that an express grant of statutory power carries with it by necessary implication the authority to use all reasonable means to make such grant effective (Sutherland's Statutory Construction, third edition, articles 5401 and 5402). "

11. Again at page 822 it was held :

"It could well be said that when Section 254 confers appellate jurisdiction, it impliedly grants the power of doing all such acts, or employing such means, as are essentially necessary to its execution and that the statutory power carries with it the duty in proper cases to make such orders for staying proceedings as will prevent the appeal if successful from being rendered nugatory."

12. The fact that the assessing authority has the power, under the proviso to Section 40, to treat the assessee as not in default pending the appeal, will not deprive the AAC from invoking or exercising his inherent power of stay pending the appeal. An unreported decision by a learned single judge of this court in O.P. No. 238 of 1970, in a matter arising under the Indian I.T. Act, is instructive in this regard. In O.P. No. 238 of 1970, V. P. Gopalan Nambiar J., as he then was, held as follows :

" On the principle of the decision in Income Tax Officer v. Mohammed Kunhi [1969] 71 ITR 815, it seems clear to me that power to grant stay of collection of the tax must be inherent and must be an incidental power to the effective exercise of the appellate powers of the Appellate Assistant Commissioner. I can see no difference in principle between the Appellate Tribunal which was found to have an inherent power of stay in Mohammed Kunhi's case, and the power of the Appellate Assistant Commissioner with which I am concerned in this case. Following the principle in Mohammed Kunhi's case, I hold that the Appellate Assistant Commissioner has inherent power to grant stay of collection of the tax pending disposal of the appeal."

13. This decision was upheld by a Division Bench in Writ Appeal No. 136 of 1972.

14. In the light of the above decisions, it cannot be contended that the AAC has no inherent power to order stay of recovery of tax pending the appeal or that the petitioner should invoke the power vested in the assessing authority vested in him under proviso to Section 40 of the Act. The AAC is a quasi-judicial authority.

He should exercise the discretion vested in him in accordance with law. According to Halsbury's Laws of England, third edition, vol. 30, p. 688,--" statutory powers must be exercised bona fide, reasonably, without negligence, and for the purpose for which they were conferred. " The order should show that he has applied his mind and has taken into consideration the basic requirements which will be germane to the issue. There is no reason why the principles formulated by the decisions referred to above, i.e., Aluminium Corporation of India Ltd. Vs. Mr. C. Balakrishnan and Others, , and VETCHA SREERAMAMURTHY Vs. THE Income Tax OFFICER VIZIANAGARAM, AND ANOTHER., , and cited with approval by Velu Piliat J. in Yusuf Jan Sahib Vs. Additional Income Tax Officer, Quilon, , should not be applicable to such exercise of power by AAC. So viewed, Ex. P-4 does not satisfy the requirements of law. There is nothing in the order to show that the guidelines which should be borne in mind as formulated above were borne in mind. In view of the above, I hold that the 2nd respondent has failed to consider the matter judicially or in accordance with law. Exhibit P-4 is unsustainable. It is quashed. The 2nd respondent is directed to hear and dispose of Ex. P-2 appeal as expeditiously as possible. If the petitioner has paid or remitted the amount of Rs. 8,000 on or before January 3, 1982, as ordered by this court, in C.M.P. No. 22854 of 1981, there will be a stay of collection of tax till the disposal of the appeal by the 2nd respondent. The original petition is allowed. No costs.