Third Income-Tax Officer, Mangalore vs M. Damodar Bhat on 6 September, 1968

Equivalent citations: 1969 AIR 408, 1969 SCR (2) 29, AIR 1969 SUPREME COURT 408

Author: V. Ramaswami

Bench: V. Ramaswami, J.C. Shah, A.N. Grover

PETITIONER:
THIRD INCOME-TAX OFFICER, MANGALORE

Vs.

RESPONDENT:
M. DAMODAR BHAT

DATE OF JUDGMENT:
06/09/1968

BENCH:
RAMASWAMI, V.
BENCH:
RAMASWAMI, V.
SHAH, J.C.
GROVER, A.N.

CITATION:
1969 AIR 408 1969 SCR (2) 29
CITATOR INFO :
RF 1969 SC 701 (5)
R 1970 SC 778 (14)
RF 1971 SC 95 (4)
RF 1977 SC1871 (7)
RF 1986 SC 293 (9,10)
RF 1991 SC2278 (9)

ACT:
Income-tax Act, 1961, ss. 226(3), 297(2)(j)-Scope of-Whether provisions of s. 226(3) available for recovery of tax assessed under the Income-tax Act, 1922.-If assessee must be "in default" before a notice under s. 226(3) can issue.-Effect of s. 297(2)(j)-After notice of demand under s. 156 whether tax "due from the assessee" to enable notice under s. 226(3) to be issued.

HEADNOTE:

By a writ petition under Article 226 of the Constitution the respondent challenged the validity of a notice under s. 226(3) of the Income-tax Act, 1961, in respect of tax due from him for the four assessment years from 1960-61 to 1963-64 and penalty for the assessment year 1962-63.

For the assessment year 1961-62 the assessment proceedings against the respondent were taken and concluded under the Income-tax Act, 1922, and as a result of an appeal filed by the respondent, the tax liability was reduced by the Appellate Assistant Commissioner. The I.T.O. thereafter issued a notice to the respondent on December 11, 1963, under s. 156 of the 1961 Act requiring him to make payment within 35 days. This period expired on January 22, 1964. The impugned notice under s. 226(3) was issued much later on April 23, 1965. It was contended on behalf of the respondent that both the assessment order as well as the appellate order having been made under the 1922 Act, the provisions of s. 226 of the 1951 'Act were not applicable. As regards the. penalty sought to be recovered under the impugned notice for the assessment year 1962-63 and tax for 1963-64, it was contended by the respondent that as notices of demand had been served on him for payment of the two sums and the time given in the notice was due to expire on May 21, 1965, the impugned notice dated April 23, 1965 issued prior to the expiry of the time given to him was illegally issued; furthermore, the amount of tax must be "due to be paid by the assessee before a notice can be issued under s. 225(3)of the 1961 Act. In respect of the assessment for 1960-61, it was contended before the High Court that the I.T.O. did not properly exercise the statutory discretion vested on him in issuing the impugned notice when there was an appeal pending against the order of assessment before the AppeLlate Assistant Commissioner.

The High Court allowed the petition and accepted all the respondent's contentions. It also held that action under s. 226 of the 1961 Act was possible only in the case of an assessee who was "in default" and that in the case of an assessment under the 1922 Act, no notice under s. 156 of the new Act was possible and there was no way of taking advantage of the provisions for the 'recovery and collection of tax contained in ss. 220 to 234 of the new Act.

On appeal to this Court,

HELD: The impugned notice under s, 226(3) was valid and the writ petition must be dismissed.

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(i) The Income-tax Officer had authority to issue the. notices under s. 156 and s. 226(3) of the new Act with respect to the liability of the respondent under the old Act. The High Court was therefore in error in holding that the impugned notice was inoperative in regard to the amount to be recovered for the assessment year, 19'51-62.

[37 D]

The High Court had wrongly based its opinion on the premise that all recoveries are possible "only when the stage mentioned in s. 220(4) was reached, namely, that the assessee had become or deemed to have been an assessee "in default" and the action under s. 226 could be taken only when an assessee was in default. The effect of the reasoning adopted by the High Court on this point is that the provisions of s. 297(2) of the new Act are nullified and an interpretation of s. 226(3) of the new Act which leads to such a startling result should be avoided as it is opposed to all sound canons of interpretation. [37 E-G]

In a case falling within s. 297(2)(j) of the new Act, for example in a proceeding for recovery of tax and penalty imposed under the old Act, it not required that all the sections of the new Act relating to recovery and collection should be literally applied but only such of the sections will apply as are appropriate in the particular ease and subject, if necessary, to suitable modifications. In other words, the procedure of the new Act will apply to the cases contemplated by s. 297(2)(j) of the new Act routatis mutandis. [37 H--3-8 A]

Kalawati Devi Harlalka v.C.I.T. West Bengal, 66 I.T.R. 680; referred
to.

The assessments of tax and penalty for 1962-63 and 1963-64 had been made against the respondent and the demand notices had also been issued under s. 156 of the new Act. It was not therefore possible to contend that the amount of tax and penalty were not ',due from the assessee" on April 23, 1965 when the impugned notice under s. 226(3) was issued. [38 H, 3,9 B-C]

Kesoram Industries & Cotton Mills Ltd. v. Commissioner of Wealthtax (Central), Calcutta, [1966] 2 S.C.R. 688, referred to.

(iii)The finding of the High .Court that the Income-tax Officer was not shown to have applied his mind to any of the facts relevant to' the proper exercise of his discretion in relation to the assessment for the year 1960-61 could not be Upheld as the respondent had. not alleged any specific particulars in his writ petition in support of his case that the I.T.O. had exercised his discretion in an arbitrary manner. [39 F]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1654 of1967. Appeal from the judgment and. order dated February 1, .1967 of the Mysore High Court in Writ Petition No. 846 of 1965i .

B. Sen, R. Gopalakrishnan, R.N. Sachthey and B.D. Bharma for the appellant.

K. Srinivasan, M.K. Ramamurthi, Vineet Kumar and Shyamala Pappu, for he respondent.

The Judgment of the Court was delivered by Ramaswami, J. This appeal is brought by certificate on behalf of the II1 Income Tax Officer, Mangalore from the judgment of the Mysore High Court dated February 1, 1967 in Writ Petition No. 846 of 1965 holding that the notice under s. 226(3) of the Income Tax Act, 1961, hereinafter called the 'new Act', bearing No. 770-d/60-61, 61-62, 62,-63 and 63-64 issued by the III Income Tax Officer to M/s. Rajarajeswari Motor Service, Mangalore, produced as Ex. VIII with the writ petition was invalid and inoperative in respect of the following items of tax and penalty included therein :--

1. Tax for the assessment year 1960-61, Rs. 7,056.50

2. Tax for the assessment year 1961-62, Rs. 485.55

3. Penalty for 1962-63 Rs.

1,890.00

4. Tax for the assessment year 1963-64 Rs.

64,307.00 and quashing the notice to that extent.

The impugned notice was issued under s. 226(3) of the new Act. The respondent, Sri M. Damodar Bhat was in arrears in respect of income-tax and penalty levied on him in respect of three or four assessment years. The total amount shown as due in the notice was Rs. 74,086.02 and was made up as follows:

1. Tax for the assessment year 1960-61; Rs. 7,056.15

2. Tax for the assessment year 1961-62; Rs. 485.55

3. Balance of tax for the assess- ment year 1962-63; Rs. 346.42

4. Penalty for assessment year 1962-63 Rs. 1,890.00

5. Tax for the assessment year 1963-64 Rs. 64,307.90 Rs, 74,086;02 It is necessary at this. stage to set out the relevant provisions of the Income Tax Act, 1961 (Act 43 of 1961) and of the Income Tax Act, 1922 (Act 11 of 1922), hereinafter referred to as the 'old Act'. Section 156 of the new Act is to.the following effect:

"Notice of demand.--When any tax, interest, penalty, fine or any other sum is payable in consequence of any order passed under this Act, the Income-tax Officer shall serve upon the assessee a notice of demand in the prescribed form specifying the sum so payable."

Sections 220, 221 and 222 of the new Act provide,:

> "220. When tax payable and when assessee deemed' in default.--(1) Any amount, otherwise, than by way of advance tax specified as payable in a notice of demand under Section 156 shall be paid within thirty five days of the service of the notice at the place and to the person mentioned in the notice:
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> (2) If the amount SpeCified in any notice of demand under Section 156 is not paid within the period limited' under sub-section (1), the assessee shall be liable to pay simple interest at nine per cent per annum from the day commencing after the end of the period mentioned in sub-section (1): (4) H the amount is not paid within the time limited under sub-section (1) or extended' under subsection (3), as the case may be, at the place and to the person mentioned in the said notice the assessee shall be deemed to be in default.
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> (6) Where an assessee has presented an appeal under Section 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.

221. Penalty payable when tax in default.--(1) When an assessee is in default or is deemed to be in default in making a payment of tax, he shall', in addition to the mount of the arrears and-the mount of interest payable under sub-section (2) of Section 220, be liable to pay ,by way of penalty, an mount which, in the case of a continuing default, may be increased from time to time, so, however, that the total mount of penalty does not exceed the amount of tax in arrears:

> Provided that before levying any such penalty the.
>
> assessee shall be given a reasonable opportunity of being heard.
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> (2) Where as a result of any final order the amount of tax, with respect to the default in the payment of which the panalty was levied, has been wholly reduced, the penalty levied shall be cancelled and the amount of penalty paid shall be refunded.

222. Certificate to Tax Recovery Officer.--(1) When an assessee is in default or is deemed to be in, default in making.a payment of tax, the Income-tax Officer may forward to the Tax Recovery Officer certificate under his signature specifying the amount of arrears due from the assessee, and the Tax Recovery Officer on receipt of such certificate, shall proceed to recover from such assessee the amount specified thereto by one or more of the modes mentioned below, in accordance with the rules laid down in the Second Schedule---

> (a) attachment and sale of the assessee's movable property;

(b) attachment and sale of the assessee's immovable property;

(c) arrest of the assessee and his detention in prison;

(d) appointing a receiver for the management of the assessee's movable and immovable properties.

(2) The Income-tax Officer may issue a certificate under sub-section (1), notwithstanding that proceedings for recovery of the arrears by any other mode have been taken."

Section 226 states as follows:

"226. Other modes of recovery.--(1) Notwithstanding the issue of a certificate to the Tax Recovery Officer under Section 222, the Income-tax Officer may' recover the tax by any one or more of the modes provided in this section.

(3) (i) The Income-tax Officer may, at any time or from time to time, by notice in writing require any person from whom money is due or may become due to the assessee or any person who holds or may, subsequently hold money for or on account of the assessee, to pay to the Income-tax Officer either forthwith upon the money becoming due or being held or at or within the time specified in the notice (not being before the money becomes due or is held), so much of the money as is sufficient to pay the amount due by the assessee in respect of arrears or the whole of the money when it is equal to or less than that mount.

(ii) A notice under this sub-section may be issued to any person who holds or may subsequently hold any money for or on account of the assessee jointly with any other person and for the purposes of this sub-section, the shares of the joint-holders in such account shall be presumed, until the contrary is proved to be equal.

(iii) A copy of the notice shall we forwarded to the assessee at his last address known to the Income-tax Officer, and in the case of a joint account to all the joint-

holders at their last addresses known to the Income-tax Officer.

(iv) Save as otherwise provided in this sub- section, every person to whom a notice is issued under this sub section shall be bound to comply with such notice, and, in particular, where any such notice is issued to a post office, banking company or an insurer, it shall not be necessary for any pass book deposit receipt, policy or any other document to be produced for the purpose of any entry, endorsement or the like being made before payment is made withstanding any rule, practice or requirement to the contrary.

(v) Any claim respecting any property in relation "to which a notice trader this sub- section has been issued rising after the date of the notice shall be void as against any demand contained in the notice.

(x) If the person to whom a notice under this subsection is sent fails to make payment in pursuance thereof to the Income-tax Officer, he shall be deemed to be an assessee in default in respect of the amount specified in the notice and further proceedings may be taken against him for the realisation of the amount as it were an arrear of tax due from him, in the manner provided in Sections 222 to 225 and the notice shall have the same effect as an attachment of a debt by the Tax Recovery Officer in exercise of his powers under 'Section 222.

Section 297 provides as follows:

> "297. Repeals and savings.--(1) The Indian Income-tax Act, 1922 (11 of 1922), is hereby repealed.
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> (2) Notwithstanding the repeal of the Indian Income-tax Act, 1922 (11 of 1922), (hereinafter referred to as the repealed Act),--
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> (g) any proceeding for the imposition of a penalty in respect of any assessment for the year ending on the 31st day of March, 1962, or any earlier year, which is completed on or after the 1st day of April, 1962, may be initiated and any such penalty may be imposed under this Act;
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> (j) any sum payable by way of income-

tax, supertax, interest, penalty or otherwise under the repealed Act may be recovered under this Act, but without prejudice to any action already taken for the recovery of such sum under the repealed Act;

..... Section 29 of the old Act reads:

> "When any tax, penalty or interest is due in consequence of any order passed under or in pursuance of this Act, the Income-tax Officer shall serve upon the assessee or other person liable to pay such tax, penalty or interest a notice of demand in the prescribed form specifying the sum so 'payable."

Section 6 of the General Clauses Act, (Act 10 of 1897) states:

> "Effect of repeal.-Where this Act, or any Central Act or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not--
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> (a) revive anything not in force or existing at the time at which the repeal takes effect; or

(b) affect the previous operation of.

any enactment so repealed or anything duly done or suffered thereunder; or (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so. repealed; or

(e) affect any investigation, legal.

proceeding or remedy in respect of any such right , privilege, obligation, liability, penalty, forfeiture, or punishment as aforesaid;

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed."

As regards the second item in the impugned notice, viz., tax in respect of assessment year 1961-62 to the extent of Rs. 485.55 the material facts are as follows: The assessment proceedings were taken and concluded under the old Act and tax of Rs. 2,947.56 was imposed and demanded. Thereafter, the respondent preferred an appeal to the Appellate Assistant Commissioner. In appeal the tax liability was reduced to Rs. 485.55. Thereupon the Income Tax Officer issued a notice to the respondent dated December 11, 1963 purporting to be under s. 156 of the new Act. The limit of 35 days for payment of the amount expired on January 22, 1964. The impugned notice under s. 226(3) was issued nearly two years thereafter on April 23, 1965. The argument on behalf of the respondent was that both the assessment order as well as the appellate order having been made under the old Act, the provisions of s. 226 of the new Act were not applicable. The High Court has. accepted this contention of the respondent and has held that the notice was invalid to the extent it included the tax of Rs. 485.55 for the assessment year 1961-62. The contention of the appellant is that the High Court was in error in holding that action under s. 226 of the new Act was possible only in the case of an assessee who was "in default" and that in the case of an assessment under the old Act, no notice under s. 156 of the new Act was possible and there was no way of taking advantage of the provisions for recovery and collection of tax contained in ss. 220 to 234 of the new Act. In our opinion, the argument on behalf of the appellant is well-founded and must be accepted as correct. In the first place, it is necessary to notice that s. 220(4) of the new Act mentions in what circumstances the assessee shall be deemed to be in default and s. 222 provides that when an assessee is in default or is deemed to be in default in making payment of tax, the Income Tax 'Officer may forward to the Tax RecOvery Officer a certificate under his signature specifying the amount of arrears. due from the assessee, and the Tax Recovery Officer on receipt. of such certificate, shall proceed to. recover from the assessee the amount specified therein by one or more of the modes mentioned in the section. Section 226, however, provides for other methods of recovery and there is no reference in s. 226(3) to any default on the part of the assessee. Section 226(3) merely states that the Income Tax Officer may, "at any time or from time to time,"by notice in writing require any person from whom money is due or may become due to the assessee or any person who holds or may, subsequently hold money

for or on account of the assessee, to pay to the Income 'Tax officer either forthwith so much of the money as is sufficient to pay the amount due by the assessee in respect of arrears or the whole of the money when it is equal to or less than that amount. In a proceeding under s. 226(3) of the new Act therefore it is not necessary that the assessee should be in default or should be deemed to be in default and no such condition or limitation is imposed by the language of that sub-section. We are accordingly of the opinion that the Income Tax Officer had authority W issue the notice dated December 11, 1963 under s. 156 of the new Act with respect to the tax liability of Rs. 485.55 incurred by the respondent under the old Act. The High Court has expressed the view that "in the case of an assessment under the old Act no notice under s. 156 of the new Act was possible", and "there was no way of taking advantage of the provisions for recovery and collection of tax contained in ss. 220 to 234 of the new Act". The High Court has based its opinion on the premise that all recoveries are possible "only when the stage mentioned in s. 220(4) was reached, namely, that the assessee had become or deemed to have been an assessee in default" and the action under s. 226 could be taken only when an assessee was in default. In our opinion, the reasoning adopted by the High Court and the conclusion reached by it is not correct in law. The effect of the judgment of the High Court on this point is that the provisions of s. 297(2)(j) of the new Act are nullified and declared to be of no consequence. An interpretation of s. 226(3) of the new Act which leads to such a starting result should be avoided as it is opposed to all sound canons of interpretation. As we have already stated, there is nothing in the language of s. 226(3) of the new Act to warrant the conclusion that the assessee should be in default or should be deemed to be in default before the issue of the notice under that sub-section. It is true that the group of sections from s. 220 to s. 232 of the new Act are placed under the heading "Collection and recovery". But in a case falling within s. 297(2)(j) of the new Act, for example in a proceeding for recovery of tax and penalty imposed ,under the old Act, it is not required that all the sections of the new Act relating to recovery and collection should be literally applied but only such of the sections will apply as are appropriate in the particular case and subject, if necessary, to. suitable modifications. In other words, the procedure of the new Act will apply to the cases contemplated by s. 297(2)(j) of the new Act mutatis mutandis. In this connection it is relevant to refer to the decision of this Court in Kalawati Devi Harlalka v.C.I.T., West Bengal(1), in which it was pointed out that s. 6 of the General Clauses Act will not apply in respect of those matters where Parliament had clearly expressed its intention to, the contrary by making detailed provisions for similar matters mentioned in that section. For these reasons we are of opinion that the Income Tax Officer had authority to issue the notices under s. 156 and s. 226(3) of the new Act with respect to the liability of the respondent under the old Act. The High Court was therefore in error in holding that the impugned notice was inoperative in regard to the amount of Rs. 485.55 for the assessment year 1961-62. As regards items 4 and 5 for the assessment years 1962-63 and 1963-64 the argument of the respondent is that the impugned notice issued on April 23, 1965 was not legally valid as notices of demand were served on the respondent for payment of these sums and time given in this notice was due to expire on May 21, 1965. The impugned notice was issued on April23, 1965, nearly a month before that date. As the tax and penalty covered by the notice were not due till May 21, 1965 it was' said that notice of attachment under s. 226(3) of the new Act could not legally ., be issued on April 23, 1965. In our opinion, there is no warrant for this argument. As we have already observed, there is nothing in the language of s. 226(3) of the new Act to suggest that the assessee must be in default before a notice under that subsection could be issued. It-is. true that s. 220 of the new Act deals with the question as to when the tax is payable and when the

assessee is .deemed to be in default but so far as s. 226(3) of the new Act is concerned, the question of any default of the assessee is irrelevant. It was argued by Mr. Srinivasan on behalf of the respondent that the amount of tax must be "due to be paid" by the assessee before a notice can be issued under s. 226(3) of the new Act. It is not disputed in this case that the notices of demand under s. 156 of the new Act were served on the respondent before the issue of the notice under s. 226(3) of the new Act. As pointed out by this Court in Kesoram Industries & Cotton Mills Ltd. v. Commissioner of Wealth-Tax (Central), Calcutta (a), the liability to pay income-tax is a present liability though the tax becomes payable after it is quantified in accordance with ascertainable data 'and therefore the amount of the provision for payment of income-tax and super-tax in respect of the year of account ending March 31, 1957 in that case, was a "debt owed" within the (1) 66 I.T.R. 680. (2) (1966)2 S.C.R.

688. meaning of s. 2(m) of the Wealth Tax Act and was as such deductible in computing the net wealth. It was further observed in that case that there was a perfected debt at any rate on the last date of the accounting year and not a contingent liability. In the present case, there is the additional circumstance that the assessments of tax and penalty have been made against the respondent and demand notices have also been issued under s. 156 of the new Act. It is therefore not possible to argue that the amount of tax and penalty for the assessment' years 1962-63 and 1963-64 were. not "due by the assessee" on April 23, 1965 when the notice under s. 226(3) of the new Act was issued. We are accordingly of the opinion that Mr. Srinivasan is unable to make good argument on this aspect of the case. It follows therefore that the impugned notice dated April 23, 1965 was validly issued as regards items 4 & 5, viz., Penalty for assessment year 1962-63 i.e., Rs. 1,890/- and tax for the assessment year 1963-64 i.e.. Rs. 64,307.90. We proceed to consider the next question arising in this appeal, viz., whether the High Court was right in taking the view that the Income Tax OffiCer did not properly exercise the statutory discretion in issuing the impugned notice with regard to the first item, viz., tax for the assessment year 1960-61 amounting to]Rs. 7,056.15. It was argued on behalf of the respondent that there was an appeal pending with the Appellate Assistant Commissioner against the order of assessment and therefore it was incumbent upon the Income Tax Officer to exercise the statutory discretion properly under s. 220 (6) of the new Act in treating the assessee as being in default. The finding of the High Court is that the Income Tax Officer "was not shown to have applied his mind to any of the facts relevant to the proper exercise of his discretion". In our opinion, the finding of the High Court cannot be upheld, because the respondent has not alleged in his writ petition any specific particulars in support of his, case that the Income Tax Officer has exercised his discretion in an arbitrary manner. In paragraph 12(b) of the writ petition the respondent had merely said that "the order of the Income Tax Officer made under s. 220 was arbitrary and capricious". No other particulars were given by the respondent in his writ petition to show in what way the order was arbitrary or capricious. In the counter- affidavit the allegations of the respondent have been denied in this respect. We are of opinion that in the absence of specific particulars by the respondent in his writ petition it is not open to the High Court to go into the question whether the Income Tax Officer has arbitrarily exercised his discretion. In the result we hold that the respondent is unable to substantiate his case that the impugned notice is in any way defective with regard to item no. 1 i.e., tax for the assessment year 1960-61 amounting to Rs. 7,056.15.

For the reasons expressed we set aside the judgment of the Mysore High Court dated February 1, 1967 and order that the writ petition no. 846 of 1965 filed by the respondent should be dismissed. We accordingly allow this appeal with costs.

R.K.P.S. Appeal allowed.