Supreme Court of India
Commissioner Of Income-Tax, ... vs S.V. Angidi Chettiar on 18 January, 1962
Equivalent citations: AIR 1962 SC 970, 1962 44 ITR 739 SC, 1962 Supp 2 SCR 640
Author: Shah
Bench: B S Mudholkar, M Hidayatullah
JUDGMENT Shah, J.

1. These are three appeals with certificates of fitness granted by the High Court of Madras against orders passed in petitions for the issue of writs of certiorari setting aside orders imposing penalty upon the firm of Messrs. S. V. Veerappan Chettiar & Co. passed by the Income-tax Officer under section 28 (i) (c) of the Indian Income-tax Act.

2. Four persons carried on business in cloth at Virudhunagar in the name and style of S. V. Veerappan Chettiar & Co. - hereinafter called the firm. The firm was registered under section 26A of the Income-tax Act, 1922, for the assessment years 1947-48, 1949-50 and 1950-51. The firm concealed particulars of its income in submitting its returns, and the Income-tax Officer, Virudhunagar, in the course of assessment proceedings directed, by order dated May 20, 1954, payment of penalty of Rs. 20,000 for the year 1947-48, Rs. 10,000 for the year 1949-50 and Rs. 5,000 for the year 1950-51. Against the orders imposing penalty, one of the partners of the firm moved the Commissioner of Income-tax, Madras, in revision but without success. Thereafter, petitions under article 226 of the Constitution for issue of writs of certiorari or other appropriate writs calling for records relating to the orders dated May 20, 1954, passed by the Income-tax Officer, Virudhunagar, in respect of the three assessment orders and the record relating to the order of the Commissioner and for quashing the penalty order were filed by two partners of the firms in the High Court at Madras. It was submitted by the petitioners that by agreement between the partners the firm stood dissolved on April 13, 1951 and intimation in that behalf was given to the Income-Tax Officer and that in any event the firm stood dissolved on May 5, 1953 when one of the partners died and the Income-tax Officer could not in exercise of the power under S. 28 (1) make an order imposing penalty after dissolution of the firm. The High Court accepted the plea of the petitioners and directed that the orders of the Income -tax Officer dated May 20, 1954 and the further action of the Commissioner thereon declining to revise the order of the Income - tax Officer in each of the petitions be set aside. Against the orders passed by the High Court the Commissioner appeals to this Court.

3. This Court in a recent judgment - Abraham v. Income-tax Officer, Kottayam - held that the Income-tax Officer had power under section 28 of the Income-tax Act to impose penalty in the course of assessment of a firm even if the firm stood at the date of the order dissolved by the death of one of its partners. In so holding, this court observed that section 44 of the Income-tax Act sets up machinery for assessing tax liability of a firm which has discontinued its business and that the expression "assessment" in the different section of Chapter IV of the Income-tax Act was not used merely in the sense of computation of income, and when section 44 declared that the partners or members of the firm shall be jointly and severally liable to assessment, it referred to the liability to computation of income under section 23 as well as the application of the procedure for declaration and imposition of tax liability and the machinery for enforcement thereof.

4. Counsel for the respondents, however, contended that Abraham's case was one of an unregistered firm and the principle of that case has no application where the firm is a registered firm But section 44 makes the provisions of Chapter IV, so far as may be, applicable to assessment when any business, profession or vocation carried on by a firm has been discontinued; the section declares liability of all discontinued firms and not merely of unregistered firms. There is nothing in section 44 or the context in which it occurs to indicate that it does not apply to registered firms. This court in Abraham's case approved the decision of the Andhra Pradesh High Court in Mareddy Krishna Reddy v. Income-tax Officer, Tenali which was a case of a registered firm, which was dissolved before imposition of penalty.

5. Counsel then argued that, in any event, no penalty under section 28 can be imposed against a registered firm either before or after dissolution, even if the defaults set out in clauses (a), (b) or (c) are proved. This, counsel submits, is the result of the scheme of the Act under section 23 (5) for assessment of tax liability of a registered firm. This plea was not set up in the petition, and there is no reference to it in the judgment of the High Court and even in the statement of the case filed in this court there is no trace of it. On that ground alone the plea raised by the appellant is liable to be rejected. Even if the appellate is permitted to raise the contention there is, in our judgments, no force in it. Section 28 (i) of the Act (in so far as it is material to these appeals) provides :

"If the Income-tax Officer.... in the cores of any proceeding under this Act is satisfied that any person -

(a) has without reasonable cause failed to urnish the return of his total income which he was required to urnish by notice given under sub-section (1) or sub-section (2) of section 22 or section 34 or has reasonable cause failed to furnish it within the time allowed and in the manner required by such notice, or

(b) has without reasonable cause failed to furnish the return of his total income which he was required to furnish by notice given under sub -section (1) or sub-section (2) of section 23, or

(c) has canceled the particulars of his income or deliberately furnished inaccurate particulars of such income, he or it may direct that such persons shall be way of penalty, in the case referred to in clause (a), in addition to the amount of the income -tax and super-tax, if any, payable by him, a sum not exceeding one and a half times that amount, and in the cases referred to in clauses (b) and (c), in addition to any tax payable by him, a sum not exceeding one and a half times the amount of the income-tax and super- tax, if any, which would have been avoided if the if the income as returned by such person had been accepted as the correct income."

6. The expression "person" is defined in section 2 (a) of the Act as including "a Hindu undivided family and a local authority". That evidently is not an exhaustive definition and recourse is permissible to the General Clauses Act which says in section 3 (42) that a "person" includes "any company or association or nobody of individuals whether incorporated or not". A firm is manifestly a body of individuals and would therefore fall within the definition of "person", and may be exposed to an order for payment of penalty in the circumstances set out in clauses (a), (b) and (c) of section

28 of the Income-tax Act. That a firm, registered or unregistered, may be liable to pay penalty has been further clarified by proviso (d) which declares the quantum of penalty payable by firms, registered as well as unregistered. Counsel for the respondent however contends that even if a firm be regarded as a person within the meaning of he operative part of section 28 and the proviso thereof, because of an obvious defect in drafting no liability for payment of penalty can be imposed upona registered firm and in support of that contention he relies upon the last clause of the 1st subsection which provides for imposition of penalty "in addition to any tax payable by him". Counsel submits that only the person liable to pay tax, may if found guilty of wrongful conduct specified in cls. (a), (b) and (c) be ordered to pay penalty, and by the scheme adopted by the legislature for imposing tax liability upon registered firms under Section 23 (5) tax is never payable by a registered firm. Counsel says that when the Legislature by Act 40 of 1940 enacted cl (d) of the proviso, only the quantum of penal liability of a registered firm was declared but the liability could not still be enforced because by the substantive provision, it depended solely upon the existence of an enforceable obligation of the firm, and so long as an obligation was not imposed upon the firm to pay tax by an adequate amendment of Section 23 (5), the liability though quantified was unenforceable. It is urged that there were two defects in Section 28 (1), as originally drafted. (1) that the penalty could be imposed only upon a person who was liable to pay income tax or super-tax, and (2) that the penalty which may be imposed was a multiple of the income-tax and super-tax, if any which would have been avoided if the income as returned by such person would have been accepted as the correct income, and by the enactment of cl. (d) to the proviso, the second defect was removed, but not the first. In support of this argument, counsel relied upon S. 23 (5) as I it stood, before it was amended by S. 14 of the Finance Act of 1956. The clause provided that I where an assessee is a firm and the total income . of the firm has been assessed under sub-sec. (1), sub-sec. (3) or sub-sec. (4) as the case may be the sum payable by the firm shall not be determined but the total income of each partner of the firm, including therein his share of its income, profits or gains of the previous year shall be assessed and the sum payable by him on the basis of such assessment shall be determined. Under this scheme the income of the registered firm was to be computed but tax was not assessed on the total Income of the registered firm : the income was distributed according to the terms of the agreement amongst the partners of the registered firm, and added to the separate income of the partners and tax was levied on the partners individually. Relying upon this scheme of levying tax, it was urged by counsel for the respondent that as the registered firm was not liable to pay tax it could be rendered liable to pay penalty under S. 28 (1) (c).

7. Section 28, as it was originally enacted, was somewhat obscure. The penalty which could be imposed in case referred to in clauses (b) and (c) was to be a sum not exceeding one and a half times the amount of the tax which would have been avoided if the income as returned by such person had been accepted as the correct income. But the Legislature did not give any indication whether the penalty was related to the tax avoided by the partners of the firm, or by the firm on the footing that it was to be regarded as an unregistered firm. By section 23 (5), income-tax not being made payable by the firm but by the individual partners of a registered firm the legislative intention was not clearly expressed. The Legislature to rectify the defect fixed an artificial basis for computing the penalty payable by a registered firm : it provided that in the cases referred to in clauses (b) and (c), the amount of the income-tax and super-tax which would have been avoided if the income as returned had been accepted as the corret income, shall be taken to be the difference between the

amount of the tax which would have been payable by an unregistered firm on an income equal to the firm's total income. But the provision relating to imposition of liability to pay penalty by registered firms was clearly expressed. The assumption that the expression "any tax" used in S. 28 (1) is intended to indicate that there must be some tax payable by the, assessee before penalty could be imposed is wholly unwarranted. The futility of the assumption is exhibited by the terms of cl. (b). Penalty may be imposed for failure to comply with the notice under sub-sec (4) of S.22 or sub-sec (2) of S. 23 even if the assessee has no assessable in come. To the imposition of a penalty liability to pay tax by the person against whom the penalty is sought to be imposed is therefore not a condition precedent.

8. The Calcutta High Court in Khusiram Murarilal v. Commissioner of Income-tax was called upon to deal with the submission made before us in this case. In that case the question which fell to be determined was whether imposition of a penalty on a registered firm under section 28 (1) (b) of the Income-tax Act was justified in law. It was urged in that case on behalf of the assessee - a registered firm - that inasmuch as under section 28 (1) (b) a persons can be made liable to pay penalty, in addition to the amount of income-tax and super-tax, if any, payable by him in cases falling under clauses (b) and (c), no order for payment of penalty can be made against a registered firm, because under the Income-tax Act no tax is made payable by the firm. Chief Justice Chakravartti, speaking for the court, observed : ".....event when construed by its own language the concluding paragraph of section 28 (1) cannot be said to make it a condition precedent that a person must be liable to pay some income-tax or it may be also super-tax if he is to be made liable for a penalty. Clause (b) of the proviso to my mind emphasizes that meaning of the concluding paragraph of S. 28 (1) and rests on an assumption that under that provision a person may be chargeable to penalty although he may not be chargeable to tax." The learned Chief Justice also observed, "......it was not really necessary for clause (d) of the proviso to enact specifically that a registered firm would be liable to pay a penalty despite the fact that it could not be charged and was not, in fact, charged to income-tax or super-tax. The whole argument of Dr. Sen, Gupta was that the concluding paragraph of S. 28 (1) had left a gap which had been attempted to be filled up by cl. (d) of the proviso, but the attempt had not been successful. In my view the gap which undoubtedly existed in the concluding paragraph of S. 28 (1) was only an absence of provision regarding the quantum of the penalty that could be levied from a registered firm because the quantum depends upon the amount of income- tax payable."

9. In our view the learned Chief Justice was right in so enunciating the law. Under section 23 (5) of the Indian Income-tax Act, before it was amended in 1956, in the case of a registered firm the tax payable by the first itself was not required to be determined but the total income of each partner of the first including therein the share of its income, profits and gains of the previous year was required to be assessed and the sum payable by him on the basis of such assessment was to be determined. But this was merely a method of collection of tax due from the firm.

10. The penalty provisions under section 28 would therefore in the event of the default contemplated by clause (a), (b) or (c) be applicable in the course of assessment of a registered firm. If a registered firm is exposed to liability of paying penalty, by committing any of the defaults contemplated by clause (a), (b) or (c) by virtue of section 44, notwithstanding the dissolution of the firm the assessment proceedings are liable to be continued against the registered firm, as if it has

not been dissolved.

11. Counsel contended that in any event, penalty for the assessment year 1949-50 could not be imposed upon the assessee firm because there was no evidence that the Income-tax Officer was satisfied in the court of any assessment proceedings under the Income-tax Act that the firm had concealed the particulars of its income or had deliberately furnished inaccurate particulars of the income. The power to impose penalty under section 28 depends upon the satisfaction of the Income-tax Officer in the course of proceedings under the Act; it cannot be exercised if he is not satisfied about the existence of conditions specified in clauses (a), (b) or (c) before the proceedings are concluded. The proceeding to levy penalty has, however, not to be commenced by the Income-tax Officer before the completion of the assessment proceedings by the Income-tax Officer. Satisfaction before conclusion of the proceeding under the Act, and not the issue of a notice or initiation of any step for imposing penalty is a condition for the exercise of the jurisdiction. There is no evidence on the record that the Income-tax Officer was not satisfied in the course of the assessment proceedings that the firm had concealed its income. The assessment order is dated the 10th November, 1951, and there is an endorsement at the foot of the assessment order by the Income-tax Officer that action under S. 28 had been taken for concealment of income indicating clearly that the Income-tax Officer was satisfied in the course of the assessment proceedings that the firm had concealed its income.

12. In our view, the High Court was in error in holding that penalty could not be imposed under section 28 (1) (c) upon the firm Messrs. S. V. Veerappan Chettiar & Co. after its dissolution.

13. The appeals will therefore be allowed and the orders passed by the High Court will be set aside and the petitions filed by the respondents dismissed with costs in this court and the High Court. One hearing fee.

14. Appeals allowed.