GOPALA-CHARYULU v. SUBBAMMA.

SPENCER, J.

I agree with my Lord the Chief Justice that the Lower Court's decision is right and that this appeal should be dismissed with costs.

K.R.

APPELLATE CRIMINAL.

Before Mr. Justice Ayling and Mr. Justice Coutts Trotter.

1920, January 20, 21 and 27.

KING-EMPEROR (COMPLAINANT), APPELLANT,

v.

MESSRS. A. M. HOOSANALLY & CO., REPRESENTED BY ALLY MUHAMMAD SAMSUDDEEN AND THREE OTHERS (ACCUSED), RESPONDENTS.*

Income-tax Act (VII of 1908), sec. 24, proviso 2, 39 (d), 40 and 41—Failure to produce accounts—Prosecution under sec. 39 (d)—Penal Assessment—Levy of, whether a bar to prosecution—Bar under sec. 24, proviso 2, whether applicable.

Section 24, proviso 2, of the Indian Income-tax Act, does not bar the prosecution of an accused for an offence under section 39 (*d*) of the Act, for failure to produce accounts, when penal assessment had been levied on him, under section 24, in consequence of his making a false return of his income.

APPEAL against the order of acquittal of E. H. M. Bower, the Fourth Presidency Magistrate, Egmore, in Calendar Case No. 6850 of 1919 (Georgetown Court).

The respondents, who are a firm of traders in Madras, were called upon by the Collector of Income-tax, Madras, to submit a return of their income for assessment of income-tax. On 12th August 1918, they furnished a return showing an income of Rs. 18,836-12-0 As the Collector was not satisfied with the truth of their return he issued notice to them, under section 18 of the Act, to produce their account books on 4th February 1919. They failed to produce their account books, in pursuance of the notice, nor did they appear before him on a subsequent notice issued to show cause why they should not be prosecuted under section 39 (*d*) of the Act. The Collector thereupon by an order, dated 13th March 1919, directed their prosecution under the said section and a complaint was accordingly made on 3rd April 1919,

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* Criminal Appeal No. 650 of 1919.

before the Presidency Magistrate, Madras. Meanwhile the Collector issued notice to the respondents, on 13th March 1919, to show cause why penal assessment should not be levied, and on 21st March 1919, the Collector passed an order under section 24 of the Act levying penal assessment to the amount of Rs. 2,572, payable in two instalments.

The respondents against whom the complaint was preferred on 3rd April 1919, pleaded *inter alia*, that the prosecution was barred by the provisions of section 24, proviso 2, of the Income-tax Act, as penal assessment had been levied on the same facts by the order previously mentioned. The Presidency Magistrate upheld this contention of the respondents and acquitted them. The Government preferred this criminal appeal.

The Crown Prosecutor for the Crown.

S. Rangaswami Ayyangar for the respondents.

AYLING, J.—The accused in this case were prosecuted for an offence under section 39 (*d*) of the Indian Income-tax Act, for failure to produce their accounts in obedience to a notice issued by the Collector of Madras. AYLING, J.

They have been acquitted by the Fourth Presidency Magistrate on the sole ground that the prosecution is barred by the second proviso to section 24 of the same Act, which runs thus:

"Provided further that no prosecution for an offence against this Act shall be instituted in respect of the same facts on which a penal assessment is made under this section."

The only question for our decision is whether the Magistrate has rightly interpreted the section as barring the prosecution in this case.

In my opinion he was clearly wrong. Exhibit VIII of 21st March 1919 is the order imposing penal assessment on the accused. It does not state the facts on which it was based, but these must be deduced from the Collector's previous letter, Exhibit V, of 13th March 1919, which runs as follows:—

"In your D return, dated 12th August 1918, you showed your income for 1917-18 as Rs. 18,836-12-0, but you did not produce your accounts before the Special Income-tax Officer when he called upon you to do so. On the best information that I could secure, I have estimated your income at Rs. 60,000 and have assessed you on that figure. I have thus reason to

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AYLING, J.

suppose that you have deliberately returned your income at less than its real amount. I hereby require you, under section 24 of Act VII of 1918, to appear before me at 12 noon on 19th March 1919, with a written statement showing cause why you should not be required to pay penal assessment at a rate not exceeding double the rate that would otherwise have been payable on the difference between the income of Rs. 18,836-12-0, shown in your return, and Rs. 60,000 on which I have assessed you to income-tax for 1918-19."

Now it is perfectly true that the accuseds' failure to produce their accounts is set out in the letter, and was, as the Magistrate says, a fact before the Collector at the time he wrote this letter, and when he levied the penal assessment. But it is equally clear that this was not the fact on which the assessment was made. The letter begins by reciting that accused had returned their income at Rs. 18,000 odd. It then adds (1) that that they have failed to produce their accounts in support of their return, and (2) that the Collector's independent inquiries disclose the fact that their real income was Rs. 60,000. The Collector then proceeds :—

"I have thus reason to suppose that you have deliberately returned your income at less than its real amount."

And, on this, calls on them to show cause why they should not be required to pay penal assessment. The failure to produce accounts may have been one reason why the Collector preferred the result of his own inquiries to the assessee's return ; but it is the falsity of the return, not the failure to produce the accounts, which is the fact on which the penal assessment is made.

Indeed, section 24 makes it clear that it is only a return of income below its real amount, which could be the basis of an order for penal assessment. The Collector has to be satisfied that the assessee has returned his income below its real amount, either by concealing particulars of it, or deliberately furnishing inaccurate particulars.

The proviso though couched in general terms appears to be intended to bar a prosecution under section 40 of the Act, not one under section 39, which deals with omissions of a totally distinct nature to the act with which section 24 is concerned.

I would set aside the Magistrate's order and direct him to restore the case to file and dispose of it according to law.

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COUTTS TROTTER, J.

COUTTS TROTTER, J.:—I agree, but as the case is of some public importance, I will state my reasons in my own words. The respondents were prosecuted before the Fourth Presidency Magistrate, under the Indian Income-tax Act (VII of 1918). He acquitted the accused, on the view that the second proviso to section 24 of the Act barred the prosecution. Government appeals against the acquittal.

The facts can be stated very briefly. The respondents are a firm carrying on business in Madras, and they were called upon in the ordinary way by the Collector to furnish a return of their income for purposes of assessment for income-tax. On 12th August 1918, they furnished a return showing an income of Rs. 18,836-12-0. The Collector was not satisfied of the truth of the return, and on 4th February 1919 notice was given to the respondents to produce their account books, under section 18 of the Act. This notice and a subsequent one calling upon the firm to show cause why they should not be prosecuted under section 39 (*d*) of the Act were disregarded, and the books were not produced. The case of the respondents, on the merits, is that the books required for production were in the hands of partners out of Madras, who could not be communicated with in time; that defence will of course be open to them hereafter.

The Collector had meanwhile given the respondents notice, by a letter, dated 12th March 1919, that he disbelieved the truth of their return, and had estimated their income at Rs. 60,000, and he called upon them to show cause on 19th March why they should not pay a penal assessment on the difference between the figure returned and that found by the Collector to be the true one. On 21st March he passed against the firm an order levying a penal assessment of two annas in the rupee, on the difference between the actual return of Rs. 18,836-12-0 and what he held to be the true figure of Rs. 60,000. This he is empowered to do by section 24 of the Act, and no question arises as to it before us.

Meanwhile, he had on 12th March issued proceedings directing the prosecution of the respondents for failure to produce their books, a power vested in him by section 41 of the Act. This is the case that has been dismissed by the Magistrate on a point of law: and that is the sole matter that is before us.

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The penal section is quite clear (section 39):

"If a person fails without reasonable cause or excuse to produce on or before the date mentioned in a notice under section 189 (which was admittedly duly given) such accounts and documents as are referred to in the notice, he shall be punishable with a fine."

But it is said that these proceedings are barred by the fact that the respondents have already been punished under section 24 of the Act, by the penal assessment made on 21st March. Section 24 enables the Collector to make such an assessment in cases where he finds that the assessee has:

"concealed the particulars of his income, or has deliberately furnished inaccurate particulars of such income, and has thereby returned it below its real amount".

Then follows this proviso:

"Provided, that no prosecution for an offence against this Act shall be instituted in respect of the same facts on which a penal assessment is made under this section."

The case for the respondents is that it is sought to punish them doubly, by a penal assessment and a prosecution, on the same facts, and the learned Presidency Magistrate gave effect to that contention. He was clearly led to do so on his view that the Collector's letter, of 12th March 1919 (Exhibit V), treated the withholding of the books as a reason for the penal assessment, which he then threatened. I think this view wholly fallacious. The Collecter directed a penal assessment on the only ground open to him under the Act: viz., that the respondents had made a false return. He had three considerations which led him to that conclusion, and has clearly indicated them in his letter, Exhibit V. They had returned a figure of Rs. 18,836-12-0, he had information that their true income was Rs. 60,000, and they had not produced their books which would have established their case if it was a true one. The last fact was merely used as evidence of the falsity of their return. They were not and could not have been penally assessed for non-production of their books. This prosecution is not for a false return of income; they could have been prosecuted for that offence under section 40 of the Act, and then a previous penal assessment would doubtless have been a bar. But they are now prosecuted on a definite allegation of withholding books, which is at most a step to aid a false return to get through; it is not

even a necessary step, because a man may make a false return who has no books either to produce or to withhold. Conversly, a man might withhold his books and render himself liable to punishment under section 39, without taking the further step of sending in a false return. I conceive the policy of the statute to be, to provide by section 39 a punishment for any of the steps likely to be adopted by a fraudulent assessee to impede the Collector in a just estimate of his true income; and to provide an alternative remedy of punishment under section 40, or penal assessment under section 24, for an actual false return. If he commits one of the former offences, he may be punished for it, though he does not commit the latter; if he commits the latter, he may be punished for it in one of two ways, and one only. But if he commits both, he may be separately punished for each. Perhaps the clearest way to put it is by an illustration. Suppose a man to have committed an offence under section 39, by withholding his books, and to have been prosecuted and convicted for it before he made a return of his income, as he clearly might be; suppose that subsequently he returns his income at a figure found to be false—could any one say that his conviction under section 39 was a bar either to his being penally assessed, under section 24, or convicted under section 40?

K.R.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Oldfield and Mr. Justice Seshagiri Ayyar.

UDIPI SESHAGIRI (PLAINTIFF), APPELLANT,

v.

SESHAMMA SHETTATI AND THREE OTHERS (DEFENDANTS NOS. 1 TO 3 AND 5), RESPONDENTS.*

1920 January 21, February 3 and 23.

Mulgeni lease—Covenant against alienation—Breach—Assignment, validity of.

In the case of mulgeni leases in Kanara executed prior to the Transfer of Property Act, an assignment of the lease by the lessee in breach of his covenant not to assign is perfectly valid. *Parameshri* v. *Vittappa Shanbaga*, (1903), I.L.R., 26 Mad., 157, explained.

* Letters Patent Appeal No. 31 of 1919.