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Workmen of Dewan Tea Estate and Ors. v. The Management

Gajendragadkar J.

pute must be governed by Rule 8(a)(i) of the respondent's Standing Orders.

In the result, we reverse the finding of the Tribunal that the lay off declared by the respondent for 45 days in 1959 was justified. That being so, it is unnecessary to consider the individual cases of the nine respective companies, because whatever may have been their respective financial position, under the relevant Rule they could not validly declare a lay off at all, nor could they have declared the lay off in exercise of their alleged common law right. The questions referred to the Tribunal must, therefore, be answered in favour of the appellants. The appeal is accordingly allowed and the appellants' claim for full wages for the 45 days of lay off in respect of the 11 tea gardens is awarded to them. The appellants will be entitled to their costs throughout.

Appeal allowed.

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November, 25

N.A. MALBARI AND BROS.

v.

COMMISSIONER OF INCOME-TAX, BOMBAY

(A.K. SARKAR, M. HIDAYATULLAH AND J.C. SHAH, JJ.)

Income Tax—Penalties—One earlier, the second on disclosure of full facts—Whether justifiable—Income-tax Act, 1922 (11 *of* 1922), *s.* 28.

The appellant, a firm of Surat, had a branch at Bangkok, to which it exported cloth, and the branch also made purchases locally and sold them. During the war the business of the branch had been in abeyance, but was re-started after the termination of the hostilities. In its return for the assessment year 1949-50 the appellant did not include any profit of the branch, but stated that the books of account of branch were not available, and therefore its profits might now be assessed on an estimate basis subject to

action under s. 34 or 35. The assessment was made on the basis of profit at 5% on the export to the branch appearing in the Surat books. A similar estimate was made for year 1950-51. For the year 1951-52 also the business profits of the branch were not shown but the Income-tax officer issued a notice to the assessee to produce the relevant accounts and books. The appellant excused itself by promising that in the following year these accounts for the year 1950 would be produced. Thereupon the Income-tax Officer made an estimate of the sales of the branch and of the net profits at 5% thereon, amounting to Rs. 37,500/-, and the same day he issued a notice to show cause why a penalty for concealment of the particulars of the income of 1951-52 should not be levied. Subsequently, the Income-tax Officer imposed a penalty of Rs. 20,000/- on it as its explanation was not acceptable. In the meantime assessment proceedings for the year 1952-53 had commenced and the appellant adopted a similar attitude. The Income-tax Officer was insistent and, therefore, appellants had to produce the accounts and books of the branch, from which it appeared that for the year 1951-52 the appellant had made a profit of Rs. 1,25,520/-. The Income-tax Officer issued a further notice to the appellant to show cause why penalty should not be levied for deliberately concealing income for the year 1951-52. Pursuant to this notice the Income-tax Officer passed another order imposing a penalty of Rs. 68,501/-. The appellant's appeal to the Appellate Assistant Commissioner against both the orders of penalty was rejected. On appeal, the Tribunal cancelled the first order of penalty but confirmed the second one. Thereafter, the appellant obtained a reference to the High Court of the question: "Whether the levy of Rs. 68,501/- as penalty for concealment in the original return for the assessment year 1951-52 is legal?" The High Court answered the question in the affirmative. On appeal by special leave it was urged that the second order for penalty was illegal because there was one concealment and in respect of that a penalty of Rs. 20,000/- had earlier been imposed, that there was no jurisdiction to make the second order of penalty while the first order stood and for that reason the second order must be treated as a nullity; and that the fact that the first order was subsequently cancelled by the Tribunal would not set the second order on its feet for it was from the beginning a nullity as having been made when the first order stood.

Held: (*i*) The contentions must be rejected. The Income-tax Officer had full jurisdiction to make the second order and he would not lose that jurisdiction because he had omitted to recall the earlier order, though it may be that the two orders in respect of the same concealment could not be enforced simultaneously or stand together. When the Income-tax Officer ascertained the true facts and realised that a much higher penalty could have been imposed, he was entitled to recall the earlier order and pass another order imposing the higher penalty. If he had omitted to recall the earlier order that would not make the second order invalid.

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(*ii*) In the present case the earlier order having been cancelled and no objection to the cancellation having been taken, there is only one order, which is a legal order.

C.V. Govindarajulu Iyer v. *Commissioner of Income-tax, Madras*, 16 I.T.R. 391, distinguished.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 878 of 1962.

Appeal from the judgment and order dated April 13, 1960, of the Bombay High Court in Income-tax Reference No 40 of 1959.

R.J. Kolah, J.B. Dadachanji, O.C. Mathur and *Ravinder Narain*, for the appellants.

N.D. Karkhanis and *R.N. Sachthey*, for the respondent.

November 25, 1963. The Judgment of the Court was delivered by

Sarkar J.

SARKAR J.—This is an appeal against a judgment of the High Court at Bombay given on a case stated to it under the Income-tax Act and answering in the affirmative the following question:

> "Whether the levy of Rs. 68,501/- as penalty for concealment in the original return for the assessment year 1951-52 is legal?"

The question arose in the assessment of the appellant, a firm, for the year 1951-52 in respect of which the accounting year was the calendar year 1950. The assessee carried on business at Surat. It had a branch at Bangkok to which it exported cloth from India. The branch also made purchases locally and sold them. During the last world war the business at Bangkok had been in abeyance but it was re-started after the termination of the hostilities.

In its return for the assessment year 1949-50 the assessee did not include any profit of the Bangkok branch but stated that the books of account of the Bangkok branch were not available and that therefore its profit might now be assessed on an estimate basis subject to action under s. 34 or 35 on production of statement of account. The assessment was there-

upon made on the basis of profit at 5% on the export to Bangkok branch appearing in the Surat books.

For the year 1950-51 again there was no reference to the Bangkok branch in the return and a similar estimate was made for this year also. For the year 1951-52 also the Bangkok business profits were not shown but on January 11, 1952, the Income-tax Officer issued a notice to the assessee under s. 22(4) of the Act to produce the profits and loss account and balance-sheet with the relevant books. The assessee excused itself by alleging on January 29, 1952 that the books were at Bangkok and the profit and loss account and the balance-sheet could not be drawn up unless its partner, Hatimbhai A. Malbary, went there personally and there was no certainty as to when he would go there and promising that in the following year these accounts for the calendar year 1950 would be produced. Thereupon the Income-tax Officer made an estimate of the sales of the Bangkok branch at Rs. 7,50,000 and of the net profits at 5% thereon, amounting to Rs. 37, 500/-. This assessment was made on January 31, 1952. On the same day he issued a notice under s. 28(3) of the Act requiring the assessee to show cause why a penalty under s. 28(1)(c) for concealment of the particulars of the income of 1950 should not be levied. The assessee was heard on this notice and on January 22, 1954, the Income-tax Officer imposed a penalty of Rs. 20,000 on it as its explanation was not acceptable.

In the meantime assessment proceedings for the year 1952-53 had commenced and this year also the assessee adopted a similar attitude as in the previous years. The Income-tax Officer was however insistent and, therefore, after various adjournments, the assessee had on August 17, 1953 to produce the accounts and books of the Bangkok branch. It appeared from these books that in the calendar year 1950 the assessee had made a profit of Rs. 1,25,520/-. The Income-tax Officer thereupon commenced proceedings under s. 34 of the Act against the assessee in respect of the assessment year 1951-52 and gave

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notice to the assessee to submit a return. The assessee then submitted a return stating therein correctly the profits for the calendar year 1950. The Income-tax Officer completed that assessment after directing the issue of a further notice under s. 28(3) on April 8, 1954 requiring the assessee to show cause why penalty should not be levied for deliberately concealing the particulars of his income of 1950. Pursuant to this notice the Income-tax Officer passed another order on February 28, 1957 imposing a penalty of Rs. 68,501. So there were two orders of penalty.

The assessee appealed to the Appellate Assistant Commissioner against both the aforesaid orders of penalty but the appeals were rejected. There is no dispute as to the assessment of the income. The assessee then appealed to the Income-tax Appellate Tribunal. The Tribunal observed, "It is indeed difficult to understand the action of the Department in splitting up one offence into two proceedings. So far as the levy on the basis of the 23(3) assessment is concerned, it appears to have no basis as till that stage the Department had not succeeded in establishing and bringing home any guilt. It was still in the region of estimate.....The levy of Rs. 20,000 has to be remitted in full. The levy of Rs. 68,501 is entirely different. With the definite knowledge that the Income-tax Officer had obtained that the profit for the year was Rs. 1,25,520 he has clearly proved the guilt of concealment against the assessee.....The penalty is not at all excessive and accordingly confirmed." The revenue authorities never questioned the cancellation of the first order of penalty.

Thereafter the asseseee obtained a reference to the High Court of the question which we have set out at the beginning of this judgement. That question, it will be noticed, referred only to the penalty of Rs. 68,501/- imposed pursuant to the second notice under s. 28(3) for concealing the particulars of the income of 1950. It has to be observed that in the return that was filed in the proceedings started under

s. 34, the assessee furnished correct particulars and it also produced the books. So it had not committed any default in connection therewith. The notice must therefore be taken to have been in respect of the original concealment of the income. The assessee knew—and this is what was found by the Tribunal and that is a finding of fact which is binding on a Court in a reference—that its profits were Rs. 1,25,520/- and it had not disclosed that profit originally nor produced the relevant books but permitted the Income-tax Officer to proceed on an estimate of that profit at Rs. 37,500/-. It was contended in the High Court that in respect of the same concealment there were thus two penalties involved, namely, one of Rs. 20,000/- and the other of Rs. 68,501/-. The High Court agreed with the contention of the assessee that two penalties could not be levied in respect of identical facts but it held that the penalties in this case had not been levied on the same facts. It observed that the original assessment was solely on the basis of an estimate and the second assessment was after knowledge of the full facts of the concealed income.

In this Court Mr. Kolah has urged that the second order for penalty was illegal because there was one concealment and in respect of that an order for penalty of Rs. 20,000/- had earlier been made. He contended that there was no jurisdiction to make the second order of penalty while the first order stood and for that reason the second order must be treated as a nullity. He further stated that the fact that the first order was subsequently cancelled by the Tribunal would not set the second order on its feet for it was from the beginning a nullity as having been made when the first order stood.

We are unable to accept this argument. It may be that in respect of the same concealment two orders of penalty would not stand but it is not a question of jurisdiction. The penalty under the section has to be correlated to the amount of the tax which would have been evaded if the assessee had got away with the concealment. In this case having assessed

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the income by an estimate, the Income-tax Officer levied a penalty on the basis of that estimate. Later when he ascertained the true facts and realised that a much higher penalty could have been imposed, he was entitled to recall the earlier order and pass another order imposing the higher penalty. If he had omitted to recall the earlier order that would not make the second order invalid. He had full jurisdiction to make the second order and he would not lose that jurisdiction because he had omitted to recall the earlier order, though it may be that the two orders could not be enforced simultaneously or stand together. However, in the present case the earlier order having been cancelled and no objection to the cancellation having been taken, we have only one order and that for the reasons earlier stated is, in our view, a legal order.

It was also said that when the first order of penalty was passed the Income-tax Officer was in possession of the full facts which would have justified the imposition of the higher penalty. It was pointed out that the first order of penalty was passed on January 22, 1954 while the books disclosing the real state of affairs had been produced before the Income-tax Officer on August 17, 1963. It was contended that in inspite of this he passed the order imposing a lower penalty, he had no right later to change that order. In support of this contention reference was made to *C.V. Govinderajulu Iyer* v. *Commissioner of Income tax, Madras*[1]. There it was argued that the original proceeding under s. 23(3) and a proceeding under s. 34 in respect of the same period were different and in the latter proceeding a penalty could not be imposed for a concealment in respect of the original proceeding. Rajamannar C.J. rejected this contention and held, "that so long as the proceedings under Section 34 relate to the assessment for the same period as the original assessment, the Income-tax Officer will be competent to levy a penalty on any ground open to him under Section 28(1), even though it relates

(1) [16] I.T.R. 391

to the prior proceeding". He however proceeded to observe, "There may be one possible qualification of his power, and that is when the default or the act which is the basis of the imposition of the penalty was within the knowledge of the officer who passed the final order in the prior proceeding and if that officer had failed to exercise his power under Section 28 during the course of the proceeding before him. Possibly in that case he would have no power." Learned counsel for the appellant relied on this latter observation in support of his contention. We do not think that Rajamannar C.J. wished to state this qualification on the power of the Income-tax Officer as a proposition of law. It was not certainly necessary for the purposes of the case before him. We do not wish to be understood as subscribing to it as at present advised.

But assume that this statement of the law is correct. It has no application to the present case. What is said is that if the default which entails the penalty was within the knowledge of the authority when it passed the final order in the prior proceeding no penalty could be later imposed. Now Rajamannar C.J. was not dealing with a case in which two penalties had been imposed. The case before him was one in which no return had been filed pursuant to a general notice but subsequently s. 34 proceedings had been started and resulted in an assessment and an order imposing a penalty was thereupon passed. The final order in the prior proceedings referred to by the learned Chief Justice must, therefore, be final assessment order in the prior proceedings. Now in the present case the final order in the prior assessment proceedings was made on January 31, 1952 and on that date the Income-tax Officer had no knowledge of the concealment of income of Rs. 1,25,520. Therefore it seems to us that the observation of Rajamannar C.J. does not assist Mr. Kolah. We may also observe that the first order of penalty passed on January 22, 1954, was pursuant to a notice issued on January 31, 1952 in respect of which the assessee had offered

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his explanation on March 11, 1952. That notice was not concerned with any concealment that came to light from the production of the books on August 17, 1953 and, therefore, on this concealment the assessee had never been heard. In assessing a penalty on this notice subsequently acquired knowledge would be irrelevant.

The result is that the appeal fails and it is dismissed with costs.

Appeal dismissed.

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November 29

MCLEOD AND COMPANY LTD.

v.

WORKMEN

(P.B. GAJENDRAGADKAR AND K.C. DAS GUPTA, JJ.)

Industrial Dispute—Worker's claim for cash allowance in lieu of tiffin arrangements—Implied condition of service—Re-employment of retired persons—Limited direction by Tribunal, if proper.

The disputes between the appellant company and its workmen were referred to the Industrial Tribunal. The workmen claimed that (1) they should be given cash allowance in lieu of the tiffin arrangements made by the company. and (2) the practice started by the company of re-employing retired persons should be discontinued. The Tribunal directed : (1) the clerical staff should be paid As. -/8/- per day and the subordinate staff As. -/6/- per day on all working days, and (2) the company should stop the re-employment of retired workmen in the category of clerks above C grade. In respect of the subordinate staff as also in regard to the lower grade clerks, the Tribunal thought it unnecessary to make any such direction. The evidence showed that in the region 31 comparable concerns were supplying free tiffin to their employees and that the appellant company had been throughout making provision for tiffin to its employees. It was also found that the policy adopted by the company of re-employing the retired personnel was not based solely on humanitarian grounds and that when retired persons were re-employed they were paid a much smaller salary for doing the same work than they were drawing before retirement.