

charge against a police officer above the rank of a constable under the Police Act and such a magistrate has to be a First Class Magistrate. These sections nowhere exclude departmental enquiry. All that they lay down is that where an offence punishable under the Police Act is committed by a police officer above the rank of a constable and is to be tried by a court of law it has to go before a First Class Magistrate. That, however, does not mean that no departmental enquiry can be held with respect to a matter where it is also possible to prosecute a police officer under the Police Act. There is no force in this contention also and it is hereby rejected.

The appeal therefore fails and is hereby dismissed, but in the circumstances of this case we pass no order as to costs.

Appeal dismissed.

M/s. GUDUTHUR BROS.

v.

THE INCOME-TAX OFFICER, SPECIAL
CIRCLE, BANGALORE.

(S. K. DAS, M. HIDAYATULLAH and J. C. SHAH, JJ.)

Income-tax—Assessment—Penalty—Imposition by Income-tax Officer without reasonable opportunity given to assessee of being heard—Order set aside on appeal and refund directed—No express order of remand—Continuance of proceedings by the Income-tax Officer—Legality—Indian Income-tax Act, 1922 (II of 1922), ss. 28 (1)(a) and 28(3).

The appellants failed to file their return within the prescribed time and on a notice issued under s. 28(1)(a) of the Indian Income-tax Act, 1922, to show cause why penalty should not be imposed on them, they filed a written reply. Without affording them an opportunity of being heard as required by s. 28(3) of the Act the Income-tax Officer imposed a penalty on them. On appeal the Appellate Assistant Commissioner set aside the order and directed refund of the penalty. Thereafter the Income-tax Officer issued a further notice giving an opportunity to the appellants of being heard. The appellants objected to this notice and

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contended that the Income-tax Officer could no longer proceed to re-assess the penalty in the absence of an express order of remand by the Appellate Assistant Commissioner whose order had become final.

Held, that where an order of imposition of penalty made by the Income-tax Officer under s. 28(1)(a) of the Indian Income-tax Act was vitiated, not by any initial illegality but by one which supervened during the course of the proceedings and the said order was vacated on appeal, the Income-tax Officer was well within his jurisdiction in continuing the proceedings from the stage at which the illegality had occurred and could re-assess the penalty though no express order of remand was made.

Jos Chacko Poothokaran v. Income-tax Officer, Ernakulam Circle, [1957] 32 I.T.R. 648, not applied.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 261 of 1958.

Appeal by special leave from the judgment and order dated November 6, 1956, of the Mysore High Court in Writ Petition No. 215 of 1956.

S. N. Andley, J. B. Dadachanji, Rameshwar Nath and P. L. Vohra, for the appellants.

K. N. Rajagopal Sastri and D. Gupta, for the respondent.

1960. July 22. The Judgment of the Court was delivered by

Hidayatullah J. HIDAYATULLAH J.—This appeal has been filed with the special leave of this Court against a decision of the High Court of Mysore, by which it dismissed *in limine* an application by the appellants under Art. 226 of the Constitution for a writ of prohibition or some other appropriate writ against the Income-tax Officer, Bellary, Special Circle, Bangalore.

The facts of the case are as follows. For the assessment year 1948-49, the appellants failed to file a return within the prescribed time and the Income-tax Officer, acting under s. 28(1)(a) of the Indian Income-tax Act, issued a notice to them to show cause why penalty should not be imposed. In answer to this notice, the appellants filed a written reply and the Income-tax Officer proceeded to levy a penalty of Rs. 16,000, without affording a hearing to them as required by the third sub-s. of s. 28 of the Income-tax

Act. The matter was taken up in appeal before the Appellate Assistant Commissioner of Income-tax, who, pointing out that an opportunity of being heard was not granted to the appellants, held that the order was defective. He therefore set aside that order and directed the refund of the penalty if it had been recovered.

On receipt of the order, the Income-tax Officer issued a further notice calling upon the appellants to appear before him, so that they might be given an opportunity of being heard. He also intimated that if no appearance was made, then he would proceed to determine the question of penalty, taking into consideration only the written statement which had been filed earlier. Before, however, the Income-tax Officer could decide the case, the appellants filed a petition under Art. 226 of the Constitution for the issuance of the writs mentioned above. This petition was dismissed *in limine* by the High Court holding that the contention raised by the appellants may perhaps be raised before the Income-tax authorities. The appellants thereupon applied for special leave to this Court and leave having been granted, this matter comes up before us.

There is no question here that the requirements of s. 28(1)(a) of the Income-tax Act were not completely fulfilled. If the appellants had not filed their return, as they were required by law to do, the omission would attract cl. (a) of sub-s. (1) of s. 28. We say nothing as to that. Sub-section (3) of s. 28, however, requires that the penalty shall not be imposed without affording to the assessee a reasonable opportunity of being heard. This opportunity was denied to the appellants and therefore the order of the Income-tax Officer was vitiated by an illegality which supervened, not at the initial stage of the proceedings, but during the course of it. The order of the learned Appellate Assistant Commissioner pointed out the ground on which the illegality proceeded and his order directing the refund of the penalty, if recovered, cannot but be interpreted as correcting the error and leaving it open to the Income-tax Officer to continue his proceedings from the stage at which the illegality occurred

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No express remand for this purpose, as is contended, was necessary.

Our attention was drawn to a decision of a learned Single Judge of the Kerala High Court reported in *Jos Chacko Poothokaran v. I. T. O., Ernakulam Circle* (1), in which, in similar circumstances, it has been held that since an appeal was not taken by the Commissioner of Income-tax to the Appellate Tribunal under sub-s. (2) of s. 33, the order of the Appellate Assistant Commissioner became final and the Income-tax Officer could no longer proceed to reassess the penalty. The reason given is, in our opinion, beside the point. What the Appellate Assistant Commissioner did was to vacate the order and direct refund of the penalty in view of an illegality which had occurred during the course of the assessment proceedings. On receipt of the record it was open to the Income-tax Officer to take up the matter from the point at which the illegality supervened and to correct his proceedings. It was pointed out in the course of the statement of the case by the appellants that such proceedings could only be taken during the course of assessment proceedings and those proceedings are concluded. In our opinion, the notice issued to the appellants to show cause why penalty should not be imposed on them did not cease to be operative, because the Appellate Assistant Commissioner pointed out an illegality which vitiated the proceeding after it was lawfully initiated. That notice having remained still to be disposed of, the proceedings now started can be described as during the course of the assessment proceedings, because the action will relate back to the time when the first notice was issued.

In our opinion, the Income-tax Officer is well within his jurisdiction to continue the proceedings from the stage at which the illegality has occurred and to assess the appellants to a penalty, if any, which the circumstances of the case may require.

The appeal is accordingly dismissed with costs.

Appeal dismissed.

(1) [1957] 32 I.T.R. 648.