

1955

Present : Sansoni, J.

KUMATHERIS APPUHAMY, Appellant, and COMMISSIONER
OF INCOME TAX, Respondent

S. C. 514—M. C. Panadure, 38,380

Income Tax Ordinance—Proceedings for recovery of tax—Section 80 (1)—Applicability to an insolvent assessee.

An assessee who is insolvent and has been adjudicated accordingly is not entitled to claim that no proceedings can be taken against him for recovery of tax under section 80 (1) of the Income Tax Ordinance.

APPPEAL, with application in revision, from an order of the Magistrate's Court, Panadure.

H. Wanigatunga, with J. E. R. Candappa, for the accused appellant.

Arthur Keuneman, Crown Counsel, for the respondent.

Cur. adv. vult.

August 31, 1955. SANSONI, J.—

This is an appeal by an assessee who has been sentenced to six months simple imprisonment for failing to pay a sum of Rs. 28,688.02 due as income tax. As no appeal lies from an order made by a Magistrate under S. 80 (1) of the Income Tax Ordinance, an application for revision was also filed. It has been urged for the assessee that he had been adjudicated an insolvent on 15th December 1954, and therefore the Magistrate should not have made the order in question. The argument was that as all the assets of the insolvent were under sequestration and

had vested in the assignee, the assessee was therefore not in a position to pay the tax. I was also referred to S. 78 of the Ordinance which provides that tax in default shall be a first charge upon all the assets of a defaulter, subject to certain provisos, and it was submitted that in view of these provisions the Commissioner of Income Tax should have proved his claim in the insolvency proceedings. In such an event he would be entitled to recover the tax due for one complete year of assessment as a first charge on the assets, while the remaining arrears of tax will rank with the other unsecured debts of the insolvent.

I have not been referred to any authority which suggests that an assessee who is an insolvent and has been adjudicated accordingly is exempt from action under S. 80 (1) of the Ordinance. The procedure laid down in that section may be taken by the Commissioner whenever he is of opinion that recovery of tax in default by seizure and sale is impracticable or inexpedient, or where the full amount of the tax has not been recovered by seizure and sale. In the case of an insolvent assessee it is reasonably certain that recovery of tax in default would be impracticable: in view, therefore, of the fact that the Section vests a discretion in the Commissioner, I can see no objection to such a course as is prescribed in S. 80 (1) being taken by him where the assessee is insolvent.

It has been decided by Maartensz, A. J., in *Commissioner of Income Tax v. de Vos*¹ that the Commissioner is not bound to follow any particular method of recovering the tax from the defaulter. S. 79 (2) provides a method of recovering tax by seizure and sale of movable property; S. 79 (3) provides a method of recovering tax by seizure and sale of movable and immovable property; S. 81 provides a method of recovering tax out of monies lying in the hands of third parties for the use of the defaulter. But S. 83 makes it quite clear that where the Commissioner is of opinion that action under any of these provisions has failed or is likely to fail to secure payment of the whole of the tax due from any person, he may proceed to recover any sum remaining unpaid by any other means. The discretion is his and he may exercise it as he chooses. It follows that the Commissioner need not go against the property of the defaulter before he takes action under S. 80 (1), and that is what he has done in this case. The application of S. 78 only arises in a case where the Commissioner seeks to recover the tax out of the assets of the defaulter, but that is not the case here.

It may be unfortunate that the insolvent is prevented from paying the tax in default by reason of his assets having vested in the assignee, but he is in no worse position than any other person in insolvent circumstances upon whom a fine has been imposed by a Magistrate. The appeal is therefore dismissed and the application for revision is refused.

*Appeal dismissed.
Application refused.*

¹ (1933) 35 N. L. R. 349.