

1955

Present : Weerasooriya, J.

DE JONG, Appellant, and COMMISSIONER OF INCOME TAX,
Respondent

S. C. 6 (with Application 159)—M. C. Colombo South, 38,322

Income Tax Ordinance (Cap. 188)—Proceedings under s. 80 (1)—Omission of Magistrate to order imprisonment in default of payment of tax—Effect thereof—Insolvency of assessee—Sections 78 (2), 81—Criminal Procedure Code, s. 312 (1) (b)—Payment of Fines (Courts of Summary Jurisdiction) Ordinance No. 49 of 1938, s. 12 (2).

In proceedings under Section 80 (1) of the Income Tax Ordinance, where the defaulter appears in Court in answer to the summons and has no cause to show why further proceedings for the recovery of the tax should not be taken against him, but the Magistrate makes no direction at the time that the defaulter should suffer a term of imprisonment in default of payment of the tax due, it is not open to the Magistrate to make such a direction subsequently.

APPEAL from a judgment of the Magistrate's Court, Colombo South.

G. E. Chitty, with *J. V. C. Nathaniel* and *Daya Perera*, for the appellant.
Shiva Pasupati, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

December 13, 1955. WEERASOORIYA, J.—

On the 25th January, 1952, the appellant appeared before the Colombo South Magistrate's Court in obedience to a summons issued on him in Case No. 38,322 to show cause why further proceedings should not be taken against him for the recovery of a sum of Rs. 9,993 certified by the Commissioner of Income Tax in terms of s. 80 (1) of the Income Tax Ordinance to be due from him as income tax. On the appellant admitting that this amount was due from him the Magistrate made the following order: "I fine the accused Rs. 9,993. Time till 1.2 for fine". The time given under this order to pay the "fine" was further extended as a result of instalments paid by the appellant on various subsequent occasions in liquidation of the amount due. On the 27th November, 1954, the original liability had been reduced to Rs. 4,645 and the Court was informed that the appellant had been adjudicated an insolvent.

It appears from the copy of the proceedings (R1) in the insolvency case that the adjudication took place on the 2nd July, 1952. On the 10th December, 1952, the Commissioner of Income Tax filed in those proceedings a notice under s. 81 of the Income Tax Ordinance claiming

payment of a sum of Rs. 6,445 as tax due from the appellant for the year 1949/1950. S. 78 (2) of the Income Tax Ordinance provides that a receiver shall pay out of the assets of the insolvent under his control the tax charged or chargeable for one complete year of assessment prior to the date of the insolvency, to be selected by the Commissioner of Income Tax, as a first charge on such assets and that any other tax charged or chargeable for periods prior to such date shall be an unsecured debt. The claim of the Commissioner of Income Tax was, however, not satisfied, even in part, as there were no assets of the insolvent in the receiver's hands.

On the 23rd June, 1953, the appellant was granted a certificate of conformity of the third class under the Insolvency Ordinance.

On the ground of the appellant's adjudication as an insolvent and the issue to him of the certificate of conformity an application was made to the Magistrate on the 11th December, 1954, for an order of discharge of the appellant from the proceedings in Case No. 38,322. After inquiry the learned Magistrate rejected the application and ordered the appellant to pay the balance sum of Rs. 4,645 giving him time to do so until the 31st December, 1954. The present appeal has been filed from that order.

S. 80 (1) of the Income Tax Ordinance provides that if a person who has been summoned to show cause fails to do so the amount of the tax in default shall be deemed to be a fine imposed by a sentence of a Magistrate on such defaulter for an offence punishable with fine only and the provisions of s. 312 (1) of the Criminal Procedure Code (except paragraphs (a), (c) and (h) thereof) then become applicable, and the Magistrate is empowered to make any direction which, by the provisions of that subsection, he could have made at the time of imposing such sentence. It is clear, I think that the tax due is deemed to be a fine only for the purpose of invoking the provisions of s. 312 (1) of the Criminal Procedure Code relating to the imposition of a term of imprisonment in default of payment of the tax.

While the appellant's admission when he appeared on the 25th January, 1952, in obedience to the summons may be regarded as meaning that he had no cause to show why further proceedings should not be taken for the recovery of the tax due, the Magistrate made no order under the relevant provisions of s. 312 (1) of the Criminal Procedure Code although it was open to him to direct that the appellant shall suffer imprisonment for a term not exceeding six months in default of payment of the tax. Instead, he gave the appellant time, in the first instance till the 1st February, 1952, and ultimately till the 31st December, 1954, to pay the amount due. I can see nothing either in s. 312 (1) of the Criminal Procedure Code or s. 80 (1) of the Income Tax Ordinance which authorises this course of action. In my opinion the power vested in a Magistrate under s. 312 (1) (b) of the Criminal Procedure Code of directing that an offender shall suffer a term of imprisonment in default of payment of a fine to which he is sentenced can be exercised only at the time of the

imposition of the sentence and not thereafter. Even where such a direction has been made by the Magistrate it is clear that in default of payment of the fine forthwith, the offender would have to be committed to prison unless time is allowed under s. 312 (4). It was, no doubt, to meet this situation that sub-sections 1B, 1C and 1D were enacted by a subsequent amendment of s. 80 of the Income Tax Ordinance. Under these sub-sections a Magistrate is empowered to allow time for the payment of the tax or direct payment by instalments, and also to enlarge the defaulter on bail, but it will be observed that these indulgences can be granted to a defaulter only after, and not before, a direction has been made that on failure to pay the tax he shall suffer a term of imprisonment.

The Payment of Fines (Courts of Summary Jurisdiction) Ordinance No. 49 of 1938, contains provision for time being given for the payment of a fine imposed by a Magistrate's Court, but s. 12 (2) of that Ordinance specifically provides that it shall have no application in a case like the present one.

The object of proceedings under s. 80 (1) of the Income Tax Ordinance is to ensure recovery of tax due from a defaulter by subjecting him to a term of imprisonment should he fail to pay the tax. Where at the time when a defaulter appears on summons he has no sufficient cause to show against the further proceedings contemplated in s. 80 (1) being taken, and the Magistrate merely makes an order that he should pay the tax, without giving any direction that in default of payment he should suffer a term of imprisonment, the object of the proceedings is defeated since, in my opinion, it is not open to the Magistrate to give that direction subsequently. This is precisely the position in the present case. In the result, although the appellant has failed to pay the tax on or before the 31st December, 1952, nothing further can now be done under s. 80 (1) of the Income Tax Ordinance for the recovery of the tax.

Mr. Chitty who appeared for the appellant made the submission that in view of the steps subsequently taken by the Commissioner of Income Tax in the insolvency proceedings the method of recovery of tax under s. 80 (1) of the Income Tax Ordinance is no longer available to him. Seeing, however, that the Commissioner's recourse to that method of recovery had already been rendered abortive by the failure of the learned Magistrate to follow the correct procedure, it is not necessary to consider the various arguments advanced by Mr. Chitty in support of his submission.

No appeal seems to lie from the Magistrate's order dated the 11th December, 1954. The appellant has also filed papers applying that this Court, in the exercise of its powers of revision, do set aside that order, but for the reasons given by me it does not seem that any useful purpose will be served in granting this application. The appeal is rejected and the application is refused. I make no order as to costs.