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September 21.

# E. M. MUTHAPPA CHETTIAR
*v.*
# THE INCOME-TAX OFFICER, SPECIAL CIRCLE, COIMBATORE

(S. K. DAS, M. HIDAYATULLAH, K. C. DAS GUPTA, J. C. SHAH and N. RAJAGOPALA AYYANGAR, JJ.)

*Excess Profits Tax—Assessment by service of notices on managing partner—Validity—If binding on the other partner—Tax, if can be recovered by issue of certificate—Excess Profits Tax Act, 1940 (XV of 1940), ss. 8, 13, 21—Indian Income-tax Act, 1922 (XI of 1922), ss. 29, 44, 46(2).*

The firm consisting of the appellant and another, carrying on managing agency business, was on March 31, 1951, assessed to excess profits tax for the year 1942 and the broken period from January, 1943 to March 4, 1943. The prescribed notices were served not on the appellant but on the other partner who, under the terms of the partnership deed, was the managing partner. On March 4, 1943, the managing partner gave notice of dissolution of the firm and thereupon the appellant sued him for dissolution from such date as might be specified by the court. The trial Court upheld the dissolution as and from the date notified by the managing partner but on appeal the High Court by its judgment rendered in 1953 fixed March 10, 1949, as the date of the dissolution. An appeal taken to the Supreme Court from this decision of the High Court was still pending. The appellant challenged the validity of the order of assessment and the consequent proceedings for recovery of the tax assessed, under Art. 226 of the Constitution on the grounds, (a) that there was a dissolution of the firm on March 4, 1943, and that notices served thereafter on the managing partner would not bind him, (b) that there was no demand of the tax due from him under s. 29 of the Indian Income-tax Act and that, consequently, the tax could not be recovered from him under s. 46(2) of the Act, but the High Court dismissed his application.

*Held*, that the appellant could not be allowed to plead a prior dissolution and the assessment was binding on him.

Even assuming that the partnership stood dissolved on the date of the assessment, his position would not be different. Under the Excess Profits Tax Act, 1940, the unit of assessment was not the firm but the business, and an order of assessment passed after notice to the managing partner would be valid and binding on the appellant under s. 44 of the Indian Income-tax Act, 1922, as modified by the Central Board of Revenue under s. 21 of the Excess Profits Tax Act, 1940.

*A. G. Pandu Rao* v. *Collector of Madras*, (1954) 26 I.T.R. 99 and *Bose* v. *Manindra Lal Goswami*, (1957) 33 I.T.R. 435, approved.

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No separate notice of demand under s. 29 of the Indian Income-tax Act, specifically addressed to the appellant, was necessary in order to recover the tax by the mode prescribed by s. 46(2) of the Act. Under the proviso to s. 21 of the Excess Profits Tax Act, 1940, the appellant was an assessee within the meaning of s. 29 of the Indian Income-tax Act, 1922, and the notice of demand served on the managing partner was notice to the appellant by virtue of s. 63 of the latter Act made applicable by s. 21 of the former.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 107 of 1956.

Appeal by special leave from the judgment and order dated January 21, 1954, of the Madras High Court in W. P. No. 498 of 1952.

With

Petition No. 130 of 1958.

Petition under Art. 32 of the Constitution of India for the enforcement of Fundamental Rights.

*M. R. M. Abdul Karim* and *K. R. Choudhri*, for the appellant (in C. A. No. 107/56) and Petitioner (In Petn. 130/58).

*K. N. Rajagopala Sastri* and *D. Gupta*, for the respondents (in both the appeal and petition).

1960. September 21. The Judgment of the Court was delivered by

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AYYANGAR J.—Muthappa Chettiar, the appellant in Civil Appeal 107 of 1956 was sought to be proceeded against for the recovery from him of Excess Profits Tax assessed in respect of the business of Muthappa & Co. of which he was a partner. He disputed the legality of the recovery proceedings and filed Writ Petition 498 of 1952 before the High Court of Madras for the issue of a writ of prohibition for directing the Income-Tax Officer, E. P. T. Circle, Madras, not to take coercive steps against him for the recovery of the tax assessed. This petition was dismissed and Civil Appeal 107 of 1956 has been filed on special leave obtained from this Court. During the hearing by the High Court, of Writ Petition 498 of 1952, Muthappa Chettiar (referred to hereafter as the appellant) sought also to impugn the legality of the order of assessment to Excess

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Profits Tax. The learned Judges held however that such a contention was not germane to the writ of prohibition for which he had prayed, adding also that there were no merits in the grounds urged. To avoid any technical objection, the appellant has filed in this Court Petition 130 of 1958 under Art. 32 of the Constitution in which the prayer is for the grant of a writ of certiorari or other appropriate writ to quash the order of assessment to Excess Profits Tax, and the Appeal and the Petition being thus inter-related have been heard together.

We shall first take up for consideration the matters urged in the Writ Petition, as logically having precedence over the challenge to the legality of the proceedings for the recovery of the tax. The facts necessary to appreciate the points urged are briefly these: The appellant and Thyagrajan Chettiar (impleaded as the second respondent in Civil Appeal 107 of 1956) were partners in a firm named Muthappa & Co. started in November, 1940, and the firm was the managing agent of a textile Mill called Saroja Mills Ltd., in the Coimbatore district. The assessment which is under challenge is for the Excess Profits Tax liability of this managing agency business and the relevant chargeable accounting periods are the calendar year 1942 and the broken period January 1, 1943, to March 4, 1943. The liability of the firm to Income-Tax for the same periods was assessed by the Income-Tax Officer by his orders dated March 15, 1948, by applying the provisions of s. 23(5)(b) of the Income-tax Act, 1922, and the appellant paid, when demanded, his share of the tax and there is now no dispute about the propriety of that assessment. The income of the managing agency business was computed for Excess Profits Tax at the same figure as for assessment to Income Tax, and the assessment for the two chargeable accounting periods was completed by the Excess Profits Tax Officer by his order dated March 31, 1951, and it is the validity of this order of assessment that is challenged in Petition 130 of 1958.

The first matter urged in support of the petition may be set out thus: An assessment to be valid must

be after notice to the assessee. In the present case, the assessment was admittedly completed by serving the prescribed notices on Thyagrajan Chettiar alone, who according to the terms of the partnership between the parties was the managing partner. But it was urged that there had been a dissolution of the firm as and from March 4, 1943, that thereafter the partnership ceased to exist, and with it the mutual agency between the partners, with the result that Thyagrajan Chettiar could not represent the firm which had ceased to exist nor the appellant. On these premises it was submitted that the assessment of the business to Excess Profits Tax after notices only to Thyagrajan Chettiar could not bind the firm nor at any rate bind the appellant.

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In our opinion there are two answers to this submission, either of which would suffice to reject the appellant's plea: (1) That on the facts of the present case the appellant is precluded from pleading that the firm had been dissolved at the date of the assessment in 1951 and from raising any objection to the representative character of Thyagrajan Chettiar, (2) That on a proper construction of the provisions of the Excess Profits Tax Act, 1940, even if the firm of Muthappa & Co. should be held to have been dissolved before 1951 when the order of assessment was passed, the assessment of the managing agency business to Excess Profits Tax was properly and legally effected by notice to Thyagrajan Chettiar.

The facts to which we have made reference are these: Prior to the assessment year 1943-44, Thyagrajan Chettiar, as the managing partner of Muthappa & Co. was submitting returns for Income-tax and was conducting the assessment proceedings on behalf of the firm. Thyagrajan Chettiar published in the newspaper "Hindu" a notice announcing the dissolution of the firm as and from March 4, 1943, and followed it up by informing the Income Tax Officer of this circumstance. Thereafter the Income Tax Officer wrote to the appellant enquiring whether the firm of Muthappa & Co. had been dissolved and if so from what date. By letter dated February 1, 1945, the appellant

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replied " I wish to inform you that Messrs. Muthappa & Co. has been formed as per the deed of partnership dated November 4, 1940, and the rights of the partners are also retricted therein. But Mr. Thyagrajan Chettiar my partner has acted deliberately beyond the scope of the partnership deed in issuing a notice of dissolution of partnership on me on March 4, 1943, and a suit has been filed against him in the Coimbatore Sub-Court and is pending. Pending disposal of the said suit I regret I am unable to accept the alleged dissolution or to give the date of dissolution of partnership called for in your letter ". Taking the appellant at his word the income-tax assessment was completed after notice to Thyagrajan Chettiar as the continuing managing partner. In line with the position taken up by him, disputing that the firm had been dissolved by the acts or conduct of Thyagrajan Chettiar, the appellant filed a suit in the Sub-Court at Coimbatore contesting the validity of Thyagrajan Chettiar's notice of dissolution dated March 4, 1943, praying for a declaration that the purported dissolution of the firm by Thyagrajan Chettiar was invalid and inoperative, himself seeking a decree for dissolution from a date to be specified by the Court and for rendition of accounts on foot of a subsisting partnership till the date so fixed. The Subordinate Judge upheld the validity of the dissolution by Thyagrajan Chettiar in 1943. From this judgment rendered in 1948 the appellant preferred an appeal to the High Court. This appeal was heard in 1953 when the High Court allowed the appeal and fixed the date of dissolution as on March 10, 1949. It is stated that a further appeal from this judgment of the High Court is pending in this Court, so that even now the precise date on which the firm should be held to be dissolved is a matter of uncertainty.

From the above it would be seen that it has always been the case of the appellant that the firm had not been dissolved in 1943. At the date of the proceedings for the assessment to Excess Profits Tax in 1951, with which Petition 130 of 1958 is concerned, the position therefore was as follows: The assertion by the appellant that the partnership was undissolved

and continued its existence, contained in his letter to the Income Tax Officer in February, 1945, still held good and was backed up by the proceedings he took in the Civil Courts to maintain that stand. No doubt, his claim had not been upheld by the Subordinate Judge, but by the appeal that he filed, he rendered the matter res sub-judice and till the decision of the High Court in 1953, the appellant could not obviously suggest any particular date as the date of the dissolution. The submission of learned Counsel which proceeds on the assumption that there was a dissolution of the firm on March 4, 1943 ; or on March 10, 1949—which was the date fixed by the High Court by its judgment of 1953, has to be rejected as wholly inconsistent with the contentions urged by the appellant in the Civil suit and the appeal therefrom. In the circumstances, the Income Tax Officer could not be blamed for treating the firm as in existence and similarly the Excess Profits Tax Officer also. It was common ground that at the date the Excess Profits Tax Officer started proceedings for assessment, the appellant had filed an appeal against the judgment of the Subordinate Judge in O. S. 50 of 1946 and the same was pending in the High Court and that it was only in 1953 that the appeal was disposed of. The contention now urged before us was, that as the High Court had held that the firm should be treated as having been dissolved as and from March 10, 1949, the issue of any notice to Thyagrajan Chettiar as the managing partner of the firm was invalid and the assessment proceedings completed on that basis would also be illegal. If the contention of the appellant were to prevail it would mean that the validity or otherwise of the assessment order would be retrospectively determined by the result of the appellant's appeal which was pending before the High Court, so that if the High Court had held that the firm should be treated as dissolved only on the date of its judgment in 1953, the assessment would be valid but that if the High Court had fixed the date of dissolution on some date earlier than March 31, 1951, the assessment would be deemed invalid. This argument has only to be stated to be rejected. When this

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aspect of the matter was put to learned Counsel for the appellant, he fairly conceded that he could not on the facts of this case maintain the position that the order of assessment to Excess Profits Tax was vitiated because of the alleged disruption of the firm of Muthappa & Co. before the date of that order.

The other answer to the submission is that even assuming that the firm of Muthappa & Co. had been in fact dissolved on some date anterior to the assessment of the managing agency business to Excess Profits Tax, that would not affect the validity of an assessment order passed after notice to the person in management of the business during the chargeable accounting periods, since it was not the firm but "the business" that was the unit of assessment. In this connection learned Counsel for the appellant drew our attention to a decision of the Madras High Court in *A. G. Pandu Rao* v. *Collector of Madras* (1), and stated that it was against him and directly covered the point and if correct would leave no scope for any further argument. In that case a firm consisting of three partners carried on business under the name of P. Nagoji Rao & Son, with one of them Gannu Rao as managing-partner. The chargeable accounting periods concerned were the years from April 1, 1944 to March 31, 1946. There were quarrels among the partners which led to the filing of a suit on February 26, 1947, for dissolution and accounts by two of the partners against the managing-partner. The suit was decreed on November 14, 1947, declaring the firm dissolved as and from the institution of the suit—February 26, 1947. The assessment of the business to Excess Profits Tax was completed by notices issued subsequent to that date to Gannu Rao as managing-partner and the order of assessment was passed on December 31, 1949, and a notice of demand under s. 29 of the Income Tax Act was served on him. No demand notices were served on the other two partners, but proceedings for the recovery of the tax were taken against them on the strength of the notices served on Gannu Rao. These two partners moved the High Court

(1) (1954) 26 I.T.R. 99.

under Art. 226 of the Constitution for the issue of writs of Certiorari to quash the orders of assessment to Excess Profits Tax and the proceedings for recovery of the tax due thereunder. The order of assessment was impugned on the ground that by virtue of the decree in the suit, there had been a dissolution of the firm and that Gannu Rao having ceased to have authority to represent the firm or the other partners, the assessment could have been legally completed only by notices under s. 13 of the Excess Profits Tax Act being served individually on the other partners, and that the tax could be recovered only after notices to each of them under s. 29 of the Income Tax Act. The learned Judges repelled these objections by reference to the provisions of ss. 8 and 13 of the Excess Profits Tax Act under which it is the "business" producing the income which is the unit of assessment for Excess Profits Tax as contrasted with the provisions of the Indian Income tax Act under which the unit of assessment is either the individual, Hindu undivided family, firm, company or association of persons, carrying on the income-earning activity (vide s. 3 of the Income Tax Act—which has not been made applicable to the Excess Profits Tax Act under s. 21 of the latter Act). Under the provisions of the Excess Profits Tax Act, where a partnership carrying on a business becomes disrupted and the Excess Profits earned by the business before its dissolution have to be assessed the assessment has to be made under s. 44 of the Income tax Act as modified by the Central Board of Revenue under the power vested in that behalf by s. 21 of the Act and as so modified s. 44 runs:

"Where any business carried on by a firm or association of persons has been discontinued, every person who was at the time of such discontinuance a partner of such firm or a member of such association shall, in respect of the profits of the firm or association, be jointly and severally liable to assessment under section 14 of the Excess Profits Tax Act, 1940, and for the amount of tax payable, and all the provisions of the said Act shall, so far as may be, apply to any such assessment."

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The effect of this and other cognate provisions was thus explained by the learned Judges of the Madras High Court :

"The result of s. 44 as amended by the Central Board of Revenue is to attract the procedure applicable to an undissolved firm to a dissolved firm, and, therefore, if two or three persons carry on business as a firm, the assessment could be made on the partnership in the partnership name and the persons, who carried on the business during the chargeable accounting period will be liable to pay the tax as provided by sub-s. (2) of s. 14, read with s. 44, Income-tax Act, as modified by the Central Board of Revenue.

As s. 63, Income-tax Act, is also made applicable to proceedings under the Excess Profits Tax Act, if, during the chargeable accounting period, the firm carried on business as an undissolved firm and even if it became subsequently dissolved, by virtue of the provisions of s. 44, the assessment could be made as if it were an undissolved firm. Under the provisions of s. 63, Income-tax Act, notice under s. 13 may be issued to and served on a partner of a firm. Section 63(2) says that

"Any such notice or requisition may, in the case of a firm or a Hindu undivideded family, be addressed to any member of the firm or to the manager or any adult male member of the family and in the case of any other association of persons be addressed to the principal officer thereof."

So far as the assessment in the present case is concerned, even assuming that by the date notice under s. 13 was issued, the firm became dissolved, the machinery provided under the Act for the service of notice under s. 63 can be availed of by serving notice on the partner. Notice, therefore, to a partner is treated as notice to all."

As observed by Chakravartti, C. J., in *Bose* v. *Manindra Lal Goswami* (1) :

"It will thus be seen that in the case of excess profits tax, there is no difference in the method of assessment prescribed for the assessment of the profits of a running business and that prescribed for

(1) (1957) 33 I.T.R. 435, 447.

the assessment of the past profits of a business carried on by a firm, since dissolved. In the case of a running business too, the assessment is to be made on the persons, carrying on the business, jointly. In the case of the business of a firm which has been dissolved, it is to be made on the partners jointly and severally; and since section 44 of the Act is made applicable to the assessment of pre-dissolution profits of the business of a dissolved firm, such assessment can obviously be made in the partnership name. It was obviously in view of these provisions that the learned Judge in the Madras case stated that even assuming that the firm had been dissolved by the date of the issue of the notice under section 13, still, the machinery provided for by sections 13 and 14 of the Act could be availed of and the partners would continue to be jointly and severally liable to assessment under section 14 of the Act and for the amount of tax payable after determination."

In our opinion, the passages extracted correctly express the legal position resulting from the relevant provisions of the Excess Profits Tax Act, 1940. We, therefore, hold that the notice served on Thyagrajan Chettiar was valid and was binding on the appellant and that there is no basis for challenging the legality of the assessment to Excess Profits Tax.

Before leaving the question of the validity of this order of assessment dated March 31, 1951, a minor point was made to which it is necessary to advert. The business income of the managing agency of Muthappa & Co. was computed at Rs. 1,02,219 for the 1st chargeable accounting period, viz., the calender year 1942, and at Rs. 6,387 for the broken period January 1, 1943, to March 4, 1943. These figures which were the same as those in the assessment for income-tax were based on the remuneration to which the firm became entitled on its managing agency agreement, with the Saroja Mills Ltd., and with which amount the latter debited itself in its accounts. The company however did not disburse this remuneration in cash, but this would make no difference to the tax-liability of the firm, since the firm's accounts were

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made on the mercantile basis. The Mills raised a dispute that the managing agents had not fulfilled certain of the obligations undertaken by them in regard to the extension of the mills by increasing the spindleage, by reason of which default they claimed to have suffered a loss of income and for that reason carried the amount of their cross claim for damages to a suspense account, instead of crediting the entire amount of managing agency remuneration to the firm. The sum of which immediate payment was thus withheld was Rs. 89,137. At the time of the Income Tax assessment for the corresponding period, Thyagrajan Chettiar—who as the managing-partner of the firm participated in these proceedings, had urged the contention that as the Mills had withheld remuneration to the extent of Rs. 89 thousand odd and had not credited that amount to the managing agents, the sum could not be treated as the income of the firm for the assessment year. This objection was overruled on the ground that the Mills had never disputed that the entire amount of Rs. one lakh odd was due by them to the firm and in fact had claimed to deduct that entire sum as part of their business expenditure. The sum of Rs. one lakh odd was due by them to the firm and in fact had claimed to deduct that entire sum as part of.their business expenditure. The sum of Rs. one lakh odd was therefore held to have accrued to the firm as its income and that this remained unaffected by the existence of the cross claim. The contention which was repelled by the Income Tax Officer was addressed to us as a ground for disputing the inclusion of the Rs. 89 thousand odd as the income of the firm in its Excess Profits Tax assessment. We see no substance in the point urged. Learned Counsel referred us to the decision of this Court in *Commissioner of Income-tax, Madras* v. *K. R. M. T. T. Thiagaraja Chetty & Co.* (1) and to the observations at p. 261. We consider that the decision far from supporting the appellant is really against him.

There are therefore no legal grounds for impugning

(1) [1954] S.C.R. 258.

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the validity of the order of assessment to Excess Profits Tax dated March 15, 1951, and we consider that the same is binding on the business and on the owners of that business including the appellant. As a result, Writ Petition 130 of 1958 fails and has to be dismissed.

The point that next calls for consideration is the subject matter of Civil Appeal 107 of 1956 and this is whether the Excess Profits Tax assessed could be validly recovered from the appellant by resort to the machinery for collection provided by s. 46 of the Income Tax Act.

The argument of learned Counsel for the appellant in regard to this point was on the following lines:

Sections 45 to 47 of the Income Tax Act, 1922, which provide for the recovery of Income-tax by coercive process, no doubt apply for the recovery of Excess Profits Tax by virtue of their inclusion in s. 21 of the Excess Profits Tax Act as provisions applicable to the latter Act, and by reason of the assessment on the firm of Muthappa & Co. the appellant became liable to pay the Excess Profits Tax assessed. It was nevertheless urged that the coercive process for recovery of his tax liability under s. 46(2) of the Income Tax Act could not be invoked against the appellant, the submission being rested on two propositions: (1) That the appellant was not an "assessee" but only a "person liable to pay the tax" within s. 29 of the Income Tax Act—which runs:

> "When any (tax, penalty or interest) is due in consequence of any order passed under or in pursuance of this Act, the Income-tax Officer shall serve upon the assessee or other person liable to pay such (tax, penalty or interest) a notice of demand in the prescribed form specifying the sum so payable."

It was further urged that as in the present case there had been no notice of demand under s. 29 of the Income Tax Act specifically addressed to and served on the appellant, he could not become an "assessee in default", neither would the tax payable by him become "an arrear" as to permit the invocation of the coercive process under s. 46(2) for recovery. (2)

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That the procedure for recovery enacted in ss. 45 to 47 including s. 46(2) were confined in their application to "assessees" and "assessees in default" and did not apply to the class of "other persons liable to pay the tax" as against whom the filing of a suit for the recovery of the tax and the execution of decrees in such suits was the only machinery through which the tax liability of this class could be enforced. For the purposes of this case we do not consider it necessary to deal with the larger second question as to whether the expression "assessee" and "assessee in default" in ss. 45 & 46 of the Income Tax Act, 1922, should be held to be confined to "assessees" as distinguished from "other persons liable to pay such tax" as these expressions occur in s. 29 of the Act, or whether the expression "assessee" when it occurs in ss. 45 to 47 should be understood as defined in s. 2(2) as including "every person by whom income-tax..............is payable", since we are clearly of the opinion that the appellant was an "assessee". Section 21 of the Excess Profits Tax Act carries a proviso which reads:

"Provided that references in the said provisions to the assessee shall be construed as references to a person to whose business this Act applies".

In view of this provision the appellant as the partner of the "business" to which "this Act applies" would be "an assessee"—and not merely an "other person liable to pay the tax". He would also be an "assessee in default" and the amount due from him would be an arrear since the notice of demand under s. 29 of the Income Tax Act was served on the managing partner—Thyagrajan Chettiar, and such service would be tantamount to a notice served on the appellant himself by reason of s. 63 of the Income Tax Act. Indeed the entire basis on which the assessment proceedings completed after notice to Thyagrajan Chettiar as the managing-partner of Muthappa & Co. have been held by us to be binding on the appellant would preclude any argument of the type advanced to challenge the binding character of the notices served. The appellant was clearly an "assessee in default" within

s. 46(1) of the Income-tax Act and the amount of tax and penalty due from him would be "an arrear" within s. 46(2).

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We therefore hold that the proceedings for the recovery of the Excess Profits Tax could properly be taken and that the order of the High Court dismissing the appellant's petition for the issue of a writ of prohibition was correct.

The appeal fails and is dismissed with costs. The petition is also dismissed but as these two have been heard together there will be no order as to costs in the petition.

*Both the Appeal and the Petition dismissed.*

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## THE STATE OF BOMBAY
*v.*
## BANDHAN RAM BHANDANI AND OTHERS.

*1960*

*September 23.*

(JAFER IMAM, A. K. SARKAR and K. C. DAS GUPTA, JJ.)

*Company—General meeting not called wilfully—Whether it can be a defence—Indian Companies Act, 1913 (VII of 1913), as amended by Companies Act, 1936 (22 of 1936), ss. 5, 32(5), 131 and 133(3).*

The respondents, directors of a company, were prosecuted under ss. 32(5) and 133(3) of the Companies Act, 1913, for breaches of ss. 32 and 131 of that Act for having knowingly and wilfully authorised the failure to file the summary of share capital for the year 1953 and being knowingly and wilfully parties to the failure to lay before the company in general meeting the balance sheet and profit and loss account as at March 31, 1953. The respondents contended that there was no default in complying with the requirements of the section as no general meeting had been held in the year concerned.

*Held*—A person charged with an offence cannot rely on his default as an answer to the charge and so, if the respondents were responsible for not calling the general meeting, they cannot be heard to say in defence to the charges brought against them that the general meeting had not been called.

The company and its officers were bound to perform the conditions precedent, if they could do that, in order that they might perform their duty.