

(1965) 03 AHC CK 0028

In the Allahabad High Court

Case No : Civil Miscellaneous Writ No. 2988 of 1964

Behari Lal Baldeo Prasad, Commission Agents

APPELLANT

Vs

Commissioner, Jhansi Division and Others

RESPONDENT

Date of Decision : 16-03-1965

Acts Referred:

Constitution of India, 1950 — Article 226, 31

Income Tax Act, 1922 — Section 25A(3), 45

Taxation Laws (Continuation and Validation of Recovery Proceedings) Act, 1964 —
Section 3, 3(1), 5

Citation : AIR 1966 All 176 : (1967) 63 ITR 555

Hon'ble Judges : Satish Chandra, J

Bench : Single Bench

Advocate : Ashoke Gupta, for the Appellant; S.C. Khare, R.R. Misra and R.L. Gulati, for the Respondent

Final Decision : Allowed

Judgement

Satish Chandra, J.—This is an application under Article 226 of the Constitution praying that the Income Tax recovery certificate and the proceedings consequent thereto be all quashed.

2. The petitioner Messrs. Behari Lal Baldeo Prasad was a Hindu undivided family carrying on business. It was assessed to Income Tax for the years 1952-53 and 1953-54 and a tax demand of Rs. 14,495/- was due from this firm. For the assessment years 1949-50, 1950-51 and 1951-52 an amount of Rs. 19,200/- was due from this firm by way of penalty. Thus a demand of Rs. 33,695/- had to be paid by this firm to the Income Tax Department, In 1956 differences between the members of the family led to a stoppage of business. A Partition Suit (No. 13 of 1956) was instituted in the Court of the Civil Judge, Orai. The trial court appointed a Receiver over the family properties.

3. On 20-7-1959 the Income Tax Officer issued a recovery certificate u/s 46 (2) of the Income Tax Act, 1922 for Rs. 33,695/-. By an order of the Income Tax

Appellate Tribunal dated 6-12-61 the amount of penalty imposed on the petitioner firm was reduced to Rs. 5,900/-. The total amount due from the petitioner thus stood reduced by a sum of Rs. 13,300/-.

4. On 7-2-61 the Income Tax Officer had sent a communication to the Collector stating that the arrears outstanding from the petitioner were Rs. 16,995.70 up. The petitioner has characterised this document as a fresh recovery certificate. In the counter-affidavit the Income Tax Officer has stated that this was not a fresh recovery certificate but only an intimation to the Collector about the details of the assets owned by the firm as also some of the outstanding arrears. From paragraph 11 of the petition it appears that this amount of Rs. 16,995. 70 up consisted of a sum of Rs. 2,500/- only on account of penalty for 1949-50. The petition does not state that this document included the balance of the penalty due for the next two succeeding years. The total penalty on 7-2-1961 was Rs. 19,200. It had not been reduced till then. The reduction was made by the Tribunal ten months later, i.e., on 6-12-61. This document itself has not been filed. It is difficult to fix its true nature or character. But it seems clear that it did not indicate the entire demand then due from the firm. It cannot be treated as a fresh Recovery Certificate u/s 46 (2), so as to nullify the earlier one issued on 20-7-1959.

5. In 1963 certain properties belonging to the petitioner were put up for sale in proceedings for recovery of the tax demand. On 12-11-1963 a property, which the learned counsel for the petitioner identified as a "shop", was sold for Rs. 7,000 in favour of Sri Ram Nath Gupta, the fifth respondent. The next day, i.e., on 13-11-1963 two other properties were sold in favour of the sixth respondent, Sri Ram Swaroop Gupta, in separate lots, one was a bank godown which was sold for Rs. 15,000 and the other is known as Vijai Tila and tin's was sold for Rs. 13,100.

6. In the case of Income Tax Officer, Kolar and Another Vs. Seghu Buchiah Setty, , the Supreme Court considered the scope of Sections 29 and 45 of the Indian Income Tax Act, 1922. It held that when any tax levied by an assessment order is varied by an appellate or revising authority the original order merges into the order of such authority, In cases where the original order of assessment is varied the original order ceases to exist and all steps taken for the recovery of the demand due on the basis of the original order become null and void. In such cases a fresh notice of demand must be served upon the assessee and proceedings for recovery be taken on its basis, afresh. The effect of this decision is that proceedings for recovery pending on the basis of a notice of demand issued in pursuance of an original order of assessment become null and void the moment the demand is varied in appeal. The Tribunal varied the tax demand due on account of penalty on 6-12-1961. In view of the Supreme Court decision the proceedings for recovery on the basis of the certificate issued on 20-7-1959 became null and void on or after 6-12-1961. The sale of the properties having taken place in pursuance of the certificate of 1959 will also become null and void.

7. To offset the effect of the Supreme Court's decision the Parliament passed the Taxation Laws (Constitution and Validation of Recovery Proceedings) Act, 11 of 1964. Section 5 of this Act makes it retrospective. It says.

"The provisions of this Act shall apply and shall be deemed always to have applied, in relation to every notice of demand served upon an assessee by any Taxing Authority under any Scheduled Act whether such notice was or is served before or after the commencement of this Act."

Hence the provisions of this Act will apply to the notice of demand served upon the petitioner and for non-compliance whereof the Recovery Certificate was issued on 20-7-1959. Section 3 of this Act validates certain proceedings. Its material provisions are that "where Government dues are reduced in appeal or other proceedings, it shall not be necessary for the Taxing Authority to serve upon the assessee a fresh notice of demand", but its Sub-section (1) (b) (ii) and (iii) say:

(ii) "The taxing Authority shall give intimation of the fact of such reduction to the assessee and, where a certificate has been issued to the Tax Recovery Officer for the recovery of such amount, also to that officer."

(iii) Any proceeding initiated on the basis of the notice or notices of demand served upon the assessee before the disposal of such appeal or proceeding may be continued in relation to the amount so reduced from the stage at which such proceeding stood immediately before such disposal".

Clause (c) of the aforesaid section lays down that no proceeding shall be invalid by reason only that no fresh notice of demand was served upon the assessee after the disposal of such appeal or proceeding or that such Government dues have been enhanced or reduced in such appeal or proceeding.

8. In the instant case the learned counsel for the department relies upon this validating Act to save the proceeding but I have not been referred to anything to suggest that after the reduction of the amount of penalty by the Appellate Tribunal, the Taxing Authority gave any intimation of the fact of such reduction to the Tax Recovery Officer. The letter, dated 7-2-1961 is of no use as it was issued ten months prior to the reduction.

9. Clause (c) protects the recovery proceeding from any invalidity arising out of the fact that the Government dues have been reduced in appeal or the fact that no fresh notice of demand or a fresh recovery Certificate was issued. Clause (c) cannot be read in isolation. The words "by reason only" occurring in it are significant. If lack of fresh notice of demand is the only defect, the same is cured by this clause. But if other infirmities are also present Clause (c) will not apply. In *Income Tax Officer, Kolar and Another Vs. Seghu Buchiah Setty*, . it was not argued before the Supreme Court that even if the variation of tax demand is not intimated to the Tax Recovery Officer, the recovery proceeding will nonetheless be valid. It was urged that if such an intimation had been duly given to the

Recovery Officer mere, non-issue of a fresh notice of demand will not nullify the proceeding. Even this submission was not accepted by the Supreme Court. This necessitated the enactment of this validating Act. In this Act also the legislature has specially provided in Sub-clauses. (2) and (3) of Clause (b) that the intimation of reduction shall be given and that the proceedings shall continue in relation to the reduced demand alone. The validation effected by Clause (c) is to be read in the light of these circumstances and in the context of these provisions of the Act.

10. It is urged for the respondents that the provisions of Sub-clauses. (2) and (3) of Clause (b) will not apply to proceedings which have been held prior to the coming into force of the validating Act. The argument is that these provisions do not operate with retrospective effect. Section 5 of this Act says that provisions of this section apply and shall be deemed always to have applied in relation to every notice of demand whether such notice was served before or after the commencement of this Act. So in relation to a notice of demand served even prior to the commencement of this Act the provisions are available and applicable. The phrase "shall be deemed always to have applied" makes the position clear beyond doubt that the provisions of Sub-clauses. (2) and (3) of Clause (b) will have to be complied with even in a case where the notice of demand was served prior to the commencement of this Act.

11. The provisions of Sub-clauses. (2) and (3) are mandatory in nature. Non-compliance therewith will render the proceedings a nullity and Clause (c) will not be available to save the proceedings.

12. In the present case the original demand was Rs. 33,695. On 6-12-1961 the demand on account of penalty was reduced by a sum of Rs. 13,300. From this date on, the proceedings could validly have continued for recovery of the balance namely, Rs. 20,000 and odd. The petitioners' properties were sold on 12th and 33th of November 1963, in three lots for a sum of Rs. 35,100. The reduction was never intimated to the Recovery Officer. These circumstances go to show that the proceedings continued for the recovery of the original demand and not in relation to the reduced amount. The provisions of both Sub-clauses. (2) and (3) were contravened. The proceedings for the sale of these properties were thus without jurisdiction and void.

13. On 7-3-1964 the petitioner made an application to the Inspecting Assistant Commissioner stating that a recovery certificate for Rs. 33,000 and odd was issued and "due to this recovery certificate our property had been auctioned for petty prices; such as a building worth Rs. 80,000 has been auctioned only for Rupees 13,000". It also mentioned the fact that the appeals were pending against the assessment orders and the penalty has been substantially reduced and practically no demand is due. It prayed that the Income Tax Officer be directed to withdraw the recovery certificate; or, at least the recovery certificate be amended suitably. The Inspecting Assistant Commissioner called for a report from the Income-tax Officer on this application and on 20-3-1964 stayed the

demand till 30-6-64 or until the disposal of the appeal, whichever was earlier, subject to the petitioner depositing a sum of Rs. 14,000 by 25-3-1964.

14. It may be mentioned here that the petitioner firm had stopped doing business owing to litigation between the members of his family, since 1955-56, and that the family firm was in throes of a partition suit and that a receiver had been appointed for the entire immovable property of the family. The petitioner approached the Civil Court and obtaining a cheque for Rs. 8,500 which was the amount available with the receiver, it deposited this cheque with the Inspecting Assistant Commissioner and on 3-4-1964 made an application for acceptance of this amount and continuance of the stay order, dated 20-3-1964. The Inspecting Assistant Commissioner allowed this application with the result that the stay order, dated 20-3-1964 continued. That stay order granted time to the petitioner to deposit the balance or demand till 30-6-1964 or till the disposal of the appeals, whichever was earlier. The cheque was, in due course, encashed on 1-5-1964.

15. On 4-4-1964 the petitioner made an application to the Sub-Divisional Officer, who was conducting the recovery proceedings, stating that Rs. 8,500 had been paid towards the arrears of demand against the petitioner and that the Inspecting Assistant Commissioner has stayed the demand. A copy of the stay order was also annexed with this application and it was prayed that the recovery proceedings be stayed and that no steps for the confirmation of sale be taken in respect of the properties which have been auctioned, during the operation of the aforesaid stay order.

16. On 7-4-1964 a letter was issued from the Collector's Office. It requested the Commissioner to confirm the sales of the auctioned properties. A copy of this letter is Annexure I to the petition. It does not mention the fact that a stay order is in operation. The petition states that the Commissioner was not apprised of the stay order. On 14-4-1964 by an order No. 2118/III-50 (62-63) copy whereof is Annexure J to the petition the Commissioner confirmed the sales of all the three properties.

17. The Income Tax Officer in his counter-affidavit has admitted all these facts. Sri Rati Ram Singh, the Naib-Tahsildar has filed a counter-affidavit on behalf of the first four respondents who are the authorities involved in the recovery proceedings. In paragraph 16 of this counter-affidavit also these facts are admitted. But it is further stated that the Inspecting Assistant Commissioner by his order, dated 15-4-1964 revoked the previous stay order as the petitioner had in his application, suppressed the fact of sale from that officer.

18. Sri Lal Mohammad has filed a counter-affidavit as the mukhtaram of Sri Ram Swaroop Gupta, respondent No. 6. Annexure G to this counter-affidavit is a copy of Inspecting Assistant Commissioner's letter, dated 15-4-1964. This letter is addressed to the Collector, Orai, district Jalaun. It states:-

"Please refer to the telephonic conversation of date. The fact about the sale of

properties of Messrs. Behari Lal Beldeo Pd., Kalpi was not known hence stay was granted. The application did not mention anything about the sale. As the sale had been completed and confirmed by the Collector the stay which has been obtained on suppression of facts would not be operative. A cheque of Rs. 8,500 was sent to the Income Tax Officer for collection and it did not so far collected."

The petitioner's application for stay, dated 7-3-1964 did clearly state that the properties had been auctioned. The averment in this letter that there was no mention about the sale of properties does not appear to be correct. This letter further states that the sale had been completed and confirmed by the Collector. That also seems to be based on some misconception, because, from the affidavits filed it is clear that the sale was confirmed only on 14-4-1964 and by the Commissioner. At any rate, the sale had not been confirmed till 20-8-1964 when the stay order was initially passed.

19. This letter refers to certain telephonic conversation which appears to have taken place between the Collector and the Inspecting Assistant Commissioner. It appears that the Inspecting Assistant Commissioner was influenced by the telephonic conversation in thinking that the petitioner had suppressed the fact of sale of properties and that the sale had been completed and confirmed by the Collector. The order of 15-4-1964 vacating the stay order was undeniably induced by extraneous considerations and incorrect information.

20. The Inspecting Assistant Commissioner has been made a party to this petition. No affidavit has been filed on his behalf. From the other affidavits on the record it is clear that the Inspecting Assistant Commissioner did not afford the petitioner any opportunity to clear those misapprehensions in his mind or to explain them. He vacated the stay order ex parte. It was, in my opinion, incumbent on the Inspecting Assistant Commissioner to have afforded an opportunity of explanation to the petitioner before vacating the stay order. This order does vitiate the principles of natural justice.

21. The power to grant or vacate a stay may be quasi-judicial or administrative in nature. Even if it is administrative it is not an arbitrary one. It has to be exercised according to the rules of reason and justice and not according to one's fancy or humour. The discretion vested in the Inspecting Assistant Commissioner is not arbitrary and fanciful, *Minister of National Revenue v. Wrights Canadian Ropes Ltd.* 1947 15 ITR 104. Article 226 of the Constitution confers on the High Court ample jurisdiction to set aside an arbitrary order passed by a statutory authority. Appropriate orders, as may be necessary to meet the ends of justice, can be passed in respect of an administrative action, vide, *Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another*, and *P.J. Irani Vs. The State of Madras*, . The order, dated 15-4-1961 deserves to be set aside.

22. So long as the stay order was in operation the sale could not be confirmed. The confirmation of the sale took place on 14th April 1964 while the stay order

was in operation--the same having been vacated by an illegal order, dated 15th April 1964. The position is that confirmation of the sale took place in the teeth of the stay order; that was not legally possible. The order of confirmation of the sale was, therefore, without jurisdiction. By the confirmation of the sale the title of the petitioner in the properties became extinguished. On 2-5-1964 the authorities delivered possession to the purchasers. The petitioner stood deprived of the title and possession of his property without the authority of law. His rights guaranteed under Article 31 of the Constitution were infringed.

23. For the respondents an objection in limine was raised. It was urged that a mandamus restoration of possession cannot be ordered from a private individual. The writ of mandamus goes to a statutory authority alone. Even if the orders were bad and are set aside, the auction purchasers cannot be directed to restore back possession of the properties. No authority was cited in support of this proposition. Under Article 226 of the Constitution the High Court is not confined to what was known as the High Prerogative Writ of Mandamus in England. The High Court is not bound by its technical limitations. It can issue other writs, directions and orders. It has jurisdiction to issue such directions and orders as the ends of justice require or in order to effectively repair the breach of a citizen's fundamental rights. It is not disputed that the officers who took possession of the auctioned properties can be directed to restore it back. The officers delivered possession to the purchasers on 2-5-1961. These purchasers claim immunity from an order of restoration of possession because their status is not statutory, because they do not hold any statutory office and have no statutory duty to perform.

24. The source of their possession is statutory action. The incidents and liabilities of such action attach equally to their right of possession. On such action being set aside, and on the statutory authority being directed to undo the wrong by restoring possession, the purchasers will in the eye of law be duty bound to aid and assist them. At common law they will be deemed entrusted with the public duty to give back possession to the authorities. Mandamus lies against a private person or body entrusted by Common Law with a public duty. See *Firm AL. AR. Arunachalam Chettiar and Others Vs. Kaleeswarar Mills Ltd., Coimbatore and Others*, , para. 9. When all concerned parties are before the Court, a complete and an effective order is appropriate

25. The second preliminary objection urged was that on the petitioner's own showing the Joint Hindu Family which was assessed to tax has stopped business since 1955-56 and has ceased to exist since 1956 owing to the institution of a partition Suit (Suit No. 13 of 1956) between Chandra Shekher, one of the members of the family and the other members, in the Court of the Civil Judge, Orai, which had been decreed. The institution of the partition suit or its being decreed will not cause disruption of the Hindu undivided family for the purposes of the Income Tax Act. Section 25-A, Clause (3) of the Income Tax Act 1922 says:--

"Where such an order has not been passed in respect of a Hindu family hitherto assessed as undivided, such family shall be deemed, for the purposes of this Act, to continue to be a Hindu undivided family."

The order referred to is an order u/s 25-A(1) whereunder the Income Tax Officer has to make an enquiry and if he is satisfied not only that a partition has taken place but also that the joint family property has been partitioned among the various members in different portions, he has to record an order to that effect. Until such an order is recorded, the family is deemed to continue to be a Hindu undivided family. Section 171(1) of the Income Tax Act, 1961 is to the same effect. It says:--

"A Hindu family hitherto assessed as undivided shall be deemed for purposes of this Act to continue to be a Hindu undivided family, except where and in so far as a finding of partition has been given under this section in respect of the Hindu undivided family".

It is nobody's case that a finding of partition has been recorded by the Income Tax Officer in this case. For the purpose of the Income Tax Act, the family continued to be joint. The levy and collection of Income Tax is the main purpose of the Income Tax Act. The recovery proceedings for realizing the tax demand, are proceedings for purposes of the Income Tax Act. They are being conducted against the undivided family as such. If for purposes of these proceedings the undivided family is deemed to continue to exist, the fiction will hold good for the purpose of challenging the validity of the recovery proceedings in this Court under Article 226 of the Constitution. Only an aggrieved party can petition this Court. One of the aggrieved party is the undivided family. If for purposes of the proceedings which have caused grievance, the existence of the undivided family as an entity is by a legal fiction continued, it will be available for purposes of seeking redress, for such a grievance. In my opinion, the undivided family was competent to present this petition.

26. It was next urged that the petitioner had an adequate alternative remedy. The existence of an alternative remedy is not a bar to the existence of jurisdiction of this Court under Article 226 of the Constitution. It is one of the factors germane to the exercise of it. When violation of fundamental rights has been made out, it will be a sound exercise of discretion to exercise these powers and undo the mischief.

27. The petition succeeds. The actions taken in the course of recovery proceedings after 6-12-1961 are quashed. The auction sale and the order of the Commissioner, dated 14-4-1964 confirming the sales are set aside. The Inspecting Assistant Commissioner's order, dated 16-4-1964 cancelling the stay order is quashed. The parties are relegated to the position as it obtained on 6-12-1961. The respondents shall forthwith restore back the possession of the auctioned properties to the petitioner. In the circumstances the parties shall bear their own costs.