

(1986) 11 OHC CK 0003

In the Orissa High Court

Case No : Civil Revision No. 543 of 1986

INCOME TAX OFFICER

APPELLANT

Vs

MANMOHANLAL AND OTHERS.

RESPONDENT

Date of Decision : 13-11-1986

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 47
Income Tax Act, 1961 — Section 156, 220, 221, 222, 223

Citation : (1987) 60 CTR 123 : (1987) 168 ITR 56 : (1987) 30 TAXMAN 95

Hon'ble Judges : K. P. Mohapatra, J

Bench : Division Bench

Judgement

K. P. MOHAPATRA J. - In this revision, the petitioner has challenged the order passed by the learned Subordinate Judge, First Court, Cuttack, rejecting a petition u/s 226(4) of the Income Tax Act ("Act" for short).

The petitioners case in a nutshell is that opposite parties Nos. 1 and 2 are the partners of the firm, opposite party No. 3. For the years 1962-63 to 1966-67, they were liable to pay Income Tax along with penalty and interest as follows :

Rs.

Opposite party No. 1 :

1,98,388

Opposite party No. 2 :

1,75,463

Opposite party No. 3 :

3,14,393

6,88,244

The tax not having been paid, the petitioner referred the matter to the Tax

Recovery Officer, Cuttack, for realisation of the arrear dues. Opposite parties Nos. 1, 2 and 3 (hereinafter referred to as the "opposite parties") were entitled to receive compensation on account of land acquisition to the tune of Rs. 3,08,533.10. Therefore, the petitioner sent a letter dated November 1, 1985, u/s 226(3) of the Act attaching a sum of Rs. 2,33,912 payable to the aforesaid opposite parties and lying in the hands of the opposite party No. 4, the Collector Cuttack. Subsequently, the entire compensation amount payable to the opposite parties was deposited in the court of the Subordinate Judge, First Court, Cuttack, in connection with Execution Case No. 181 of 1985 levied by them. Thereupon the petitioner on November 20, 1985, presented a petition in the executing court u/s 226(4) of the Act praying that out of the compensation amount deposited by opposite party No. 4, the Collector, Cuttack, in the executing court, the sum of Rs. 2,99,413.50 representing part of the arrears of tax dues of the opposite parties should be paid to him.

In the counter, the opposite parties raised several objections, the important one being that they were not liable to pay arrears of Income Tax dues either in their individual capacity or as partners of the firm. They were not served with notices of demand for payment of Income Tax. The executing court was entitled to be satisfied about the existence of the orders assessing Income Tax and imposing penalty and interest, service of demand notices and the quantum, and should not act mechanically by making payment whenever a demand was raised. It must satisfy itself that the demand was enforceable according to law. Arrears of Income Tax dues, if any, should be realised by taking recourse to the machinery provided under the law. Therefore, the petition u/s 226(4) of the Act was not maintainable.

The learned subordinate Judge rejected the petition u/s 226(4) of the Act on the grounds that the notices of demand were not issued for the amounts claimed as arrears of Income Tax dues, penalty and interest, reduction of assessment in appeal giving substantial relief of Rs. 20,000 in favour of the opposite parties was not taken into consideration and the documents produced by the petitioner did not prove that the total outstanding arrears was to the tune of Rs. 6,88,244.

Sections 220 to 232 of the Act make provision for collection and recovery of arrears of tax. u/s 222, when an assessee is in default in making a payment of tax, the Income Tax Officer may forward to the Tax Recovery Officer a certificate under his signature specifying the amount of arrears due from the assessee. The tax Recovery Officer on receipt of such certificate shall proceed to recover tax from the assessee in the mode prescribed therein in accordance with the rules laid down in the Second Schedule. A glance at the Second Schedule will show that the recovery proceeding is akin to many of the provisions of Order 21 of the Code of Civil Procedure, 1908 ("Code" for short) which have laid down the modes for satisfaction of a money decree. Undoubtedly, the Second Schedule is a code by itself. This view finds support from the Division Bench decision of this court in GOURISHANKAR Vs. CERTIFICATE OFFICER, BHADRAK, AND OTHERS., . Apart

from the procedure laid down in section 222, section 226 of the Act provides other modes of recovery. In the present case, the Income Tax Officer took recourse to sub-section (4) of section 226 which is quoted below for easy reference along with sub-section (1) :

"226. (1) Notwithstanding the issue of a certificate to the Tax Recovery Officer u/s 222, the Income Tax Officer may recover the tax by any one or more of the modes provided in this section....

(4) The Income Tax Officer may apply to the court in whose custody there is money belonging to the assessee for payment to him of the entire amount of such money, or, if it is more than the tax due, an amount sufficient to discharge the tax."

A plain construction of sub-section (1) of section 226 will lead to the inevitable conclusion that although section 222 provides for recovery of arrears of tax through the Tax Recovery Officer to whom certificate is issued by the Income Tax Officer, section 226 provides other modes of recovery which may be adopted concurrently with proceedings u/s 222 or, if it is, without any proceeding being taken under that section. This view is supported by a decision in *Mohamedaly Sarafaly & Co. v. ITO* [1969] 68 ITR 128. In the present case, the Income Tax Officer has taken recourse to both section 222 as well as section 226(4) of the Act concurrently which, as referred to above, is permissible in law. Therefore, no legal objection can be taken to the effect that having taken recourse to section 222, the Income Tax Officer should not have taken recourse to the other mode of recovery provided in section 226(4).

Mr. R. C. Mohanty, learned counsel appearing for the opposite parties, strenuously urged that there was no service of notices of demand u/s 156 of the Act, particularly after some of the tax demands were reduced. Therefore, the cause of action for taking steps for recovery of the arrears of tax either u/s 222 or section 226(4) had not arisen. Mr. S. C. Roy, learned standing counsel (Income Tax), on the other hand, contended that notices of demand were served on the opposite parties according to law. Even if there was reduction of the tax demand on appeal, they were not entitled to further notice. In any event, whether there was service of notices of demand or not, it was open to the opposite parties to appear before the Tax Recovery officer and prefer their objection so that he could go into the details of the facts. The civil court, on a petition u/s 226(4), was not entitled to go into that question.

With regard to the objection that the notices of demand were not served on the opposite parties, reference may be made to *The Lakshmi Commercial Bank Ltd. Vs. B. Dharam Singh and Co. (P) Ltd. and Others*, . It was held therein that according to paragraph 9 of the Second Schedule, every question arising between the Income Tax Officer and the defaulter or his representative relating to the execution, discharge or satisfaction of a certificate duly filed under the Act shall be determined not by a suit, but by an order of the Tax Recovery Officer

before whom any such question arises. In respect of such recoveries, to the extent permitted by the Act, the jurisdiction of the civil court has been excluded save where fraud is alleged. Advantage can also be taken of the decision of this court in the case of GOURISHANKAR Vs. CERTIFICATE OFFICER, BHADRAK, AND OTHERS., which laid down that if a specific mode of recovery is provided by the statute - in this case the Second Schedule-for realisation of arrear tax demand, it is that mode alone through which the recovery of taxes is to be made. It is needless to point out that paragraph 9 of the Second Schedule is akin to section 47 of the Code. Therefore, if the opposite parties have a real point of objection that notices of demand were not served on them, they should have approached the Tax Recovery Officer. It was for the Tax Recovery Officer to scrutinise the records and find out whether notices of demand were served on them or not. This being the position of law, the civil court to which a petition has been made u/s 226(4), in my opinion, has no jurisdiction to go into the questions of fact, such as, absence of service of notices of demand of arrears of tax. With regard to fresh notices of demand after reduction of tax in appeal, it is sufficient to quote the following from page 938 of Kanga and Palkhiwalas "The Law and Practice of Income Tax, volume I (7th edition)" :

"The Supreme Court held in Income Tax Officer, Kolar and Another Vs. Seghu Buchiah Setty, that where a notice of demand is given in respect of the tax determined by the assessment order and the subsequent orders in appeal or revision either enhance or reduce the amount of tax demand, a fresh notice of demand should be issued under this section. This decision has been superseded with retrospective effect by the Taxation Laws (Continuation and Validation of Recovery Proceedings) Act, 1964, which provides that in case of reduction in appeal or other proceeding, no fresh notice of demand need be issued but the fact of reduction should be intimated to the assessee and the Tax Recovery Officer and in case of enhancement, a fresh notice of demand should be issued only for the additional amount."

This is the latest position of law on the point. The contention of Mr. R. C. Mohanty, therefore, is no tenable.

In Union of India (UOI) Vs. Tata Mills Ltd. and Others, it was held that under the general law, the partners of a firm are liable for the debts and liabilities of the firm. They are jointly and severally liable for the same. Tax and penalties due by the firm are also such dues for which the partners are so liable. In this case, the arrears of tax demand is in respect of opposite parties Nos. 1 and 2 individually as also in respect of the partnership firm constituted by them. Therefore, they are jointly and severally liable to pay the arrears of tax of the partnership firm.

Mr. R. C. Mohanty urged that although the civil court cannot, according to law, question the assessment of tax, it can examine the quantum of the arrears of tax. This again is a fallacious argument because of the principle laid down in the case of The Lakshmi Commercial Bank Ltd. Vs. B. Dharam Singh and Co. (P) Ltd. and Others, according to which all such questions relating to execution,

discharge or satisfaction of a certificate duly filed under the Act shall be determined not by a suit but by an order of the Tax Recovery Officer before whom any such question arises according to paragraph 9 of the Second Schedule. Therefore, if the opposite parties have a point relating to the quantum of the arrears of tax, they should have approached the Tax Recovery Officer to press their objection. The civil court to which a petition has been made u/s 226(4) cannot enter into questions of fact relating to the quantum of the arrears of tax. The contention is, therefore, not acceptable.

Mr. R. C. Mohanty then referred to section 231 of the Act and pleaded that the civil court should also decide the question of limitation as provided therein. Firstly, such an objection was not raised earlier and secondly, even if such an objection can be raised, it should be done before the Tax Recovery Officer to be disposed of as provided in paragraph 9 of the Second Schedule according to the principle decided in the case of *The Lakshmi Commercial Bank Ltd. Vs. B. Dharam Singh and Co. (P) Ltd. and Others*, . This is also an untenable plea.

The last point for consideration is what action the civil court shall take when a statutory petition u/s 226(4) is made before it by a statutory authority, such as, an Income Tax Officer. Sub-section (1) read with sub-section (4) of section 226, on a bare interpretation, makes it clear that on a petition by the Income Tax Officer, the arrears of tax can be recovered. In other words, if any money is in deposit before a civil court, the same can be recovered by the Income Tax Officer if an application is made to that court under sub-section (4) No discretion has been given in the statute to the civil court to make an investigation as to whether the assessment of tax is according to law, the quantum of the tax, whether the tax is in arrears or not, whether a notice of demand has been served or not or whether the tax recovery proceeding is barred by any general or special law of limitation. It is settled law that a taxing statute shall be strictly construed. There is no scope for a liberal construction or for introducing some meaning into the provisions which have not been specifically provided. If the intention of the Legislature was to confer jurisdiction on the civil court to make an investigation as in section 47 of the Code or paragraph 9 of the Second Schedule of the Act, then such intendment should have been expressed. An implied meaning, therefore, cannot be introduced for conferment of jurisdiction on the civil court to go into the questions of execution, discharge and satisfaction. The legislative intention is, therefore, that on a petition u/s 226(4), the amount in deposit in the civil court can be straight away recovered.

In the petition u/s 226(4), the petitioner-income tax Officer has claimed recovery of Rs. 2,99,413.50 which is in deposit with the learned court below to the credit of the opposite parties which they are jointly and severally liable to pay as arrears of tax and is liable to be recovered.

For the foregoing reasons, the civil revision is allowed and the impugned order is set aside. The petition of the Income Tax Officer u/s 226(4) of the Act is allowed. Parties shall bear their own costs.