(1985) 04 KL CK 0011

In the High Court Of Kerala

Case No : M.F.A. No. 482 of 1984

Income Tax Officer APPELLANT

Vs

Official Liquidator RESPONDENT

Date of Decision : 25-04-1985

Acts Referred:
Companies Act, 1956 — Section 446, 446(1), 446(2)

Citation : (1985) 58 CompCas 590 : (1986) 55 CTR 92 : (1985) 155 ITR 510

Hon'ble Judges : K. Bhaskaran, C.J;Sivaraman Nair, J;P.C. Balakrishna Menon, J

Bench : Full Bench

Advocate : P.K. Ravindranatha Menon and N.R.K. Nair, for the Appellant; C.M. Devan and Chithanbharesh, for the Respondent

Judgement

Balakrishna Menon, J.—A Division Bench of this court has doubted the correctness of the decision in Income Tax Officer Vs. Official Liquidator, Swaraj Motors (P.) Ltd. (In Liquidation), and that is why this case has come up before a Full Bench.

2. The Palai Cental Bank Ltd. (In liquidation) (hereinafter referred to as the company), was assessed to Income Tax for the years 1975-76 and 1976-77, allowing permissible deduction to the extent only of Rs. 7,500 for each year as against the claim of the official liquidator for much larger deductions. In appeal by the official liquidator, the AAC allowed the deductions claimed and the taxable income of the company in liquidation was reduced considerably. In further appeal, at the instance of the Department, the Income Tax Appellate Tribunal set aside the orders of the AAC and allowed deduction to the extent of Rs. 10,000 for each year. Fresh demands were made by the ITO for payment of the tax assessed in pursuance of the orders of the Tribunal and the entire tax demanded was paid by the official liquidator on April 27, 1981. Thereafter fresh notices were issued u/s 154 of the I.T. Act for rectification of the orders of assessment to include also interest accrued u/s 220(2) of the I.T. Act. Objections raised by the official liquidator were overruled and demand notices were issued for payment of

Rs. 7,790 for the year 1975-76 and Rs. 6,422 for the year 1976-77 by way of interest accrued u/s 220(2) of the Act. The demand notices were accompanied by an order rectifying the orders of assessment. The official liquidator thereafter filed Application No. 839 of 1981 before the winding-up court for a declaration that the demand of interest u/s 220(2) of the Act is illegal and unenforceable for the reason that the assessment of interest u/s 220(2) of the Act was without the leave of the court as required by Section 446(1) of the Companies Act, 1956. A learned judge of this court allowed the application holding that the levy of interest without the prior sanction of the company court is illegal and unenforceable as against the official liquidator. It is against this order of the company court that the ITO has filed this appeal,

3. Section 446(1) of the Companies Act is extracted below :

" Suits stayed on winding-up order.--(1) When a winding-up order has been made or the Official Liquidator has been appointed as provisional liquidator, no suit or other legal proceeding shall be commenced, or if pending at the date of the winding-up order, shall be proceeded with, against the company, except by leave of the court and subject to such terms as the court may impose. "

4. Interest accrues under Sub-section (2) of Section 220 of the I.T. Act on failure of the assessee to pay the tax demanded within the time specified in the notice of demand.

5. In Union of India (UOI) and Another Vs. India Fisheries (P) Ltd., , the Supreme Court held that once the claim of the Income Tax Department has to be proved and is proved in liquidation proceedings, it cannot, by exercising its rights u/s 49E of the Indian I.T. Act, 1922, get priority over the other unsecured creditors. It was further held that Section 49E of the Indian I.T. Act of 1922 is a general provision applicable to all assessees in all circumstances while Sections 228 and 229 of the Companies Act of 1913 are special provisions dealing with proof of debts and their payments in liquidation proceedings. Section 49E of the Indian I.T. Act authorising set off against refund, it was held, would apply only when insolvency rules do not apply. Construing Section 171 of the Companies Act, 1913 (corresponding to Section 446 of the 1956 Act), the Federal Court in Governor-General in Council v. Shiromani Sugar Mills Ltd, [1946] 16 Comp Cas 71 : 14 ITR 248 held that the words " other legal proceedings " in the section comprise any proceedings by the revenue authorities for recovery of the tax assessed and before forwarding the requisite certificate u/s 46(2) of the Indian I.T. Act, 1922, it is obligatory on the part of the ITO to have applied u/s 171 of the Companies Act, 1913, for leave of the winding-up court.

6. In Ranganathan v. Government of Madras [1955] 25 Comp Cas 344 ; 2 SCR 374 the Supreme Court held that a sale effected by the receiver of the trustees of the debenture holders of a company in liquidation without the intervention of court is perfectly valid and is not hit by Section 171 of the Companies Act, 1913, for the reason that a secured creditor is outside the winding-up and can realise

his security without the leave of the winding-up court. If, however, he files a suit or takes other legal proceedings for the realisation of his security, it was held that a secured creditor is also bound u/s 171 of the Companies Act, 1913, to obtain leave of the winding-up court even though such leave would be automatically granted to him. Considering the decisions in Shiromani Sugar Mills Ltd.''s case [1946] 16 Comp Cas 71 : 14 ITR 248 and M.K. Ranganathan and Another Vs. Government of Madras and Others, the Supreme Court in S.V. Kondaskar, Official Liquidator and Liquidator of the Colaba Land and Mills Co. Ltd. Vs. V.M. Deshpande, Income Tax Officer, Companies Circle I(8), Bombay and Another, stated thus at page 693 I

" These two decisions in our opinion do not lay down that assessment proceedings under the Income Tax Act should be held to be within the contemplation of section 371 of the Indian Companies Act, 1913."

7. In the aforesaid decision of the Supreme Court in S.V. Kondaskar, Official Liquidator and Liquidator of the Colaba Land and Mills Co. Ltd. Vs. V.M. Deshpande, Income Tax Officer, Companies Circle I(8), Bombay and Another, , it is held that the expressions " other legal proceeding " in Sub-section (1) and " legal proceeding " in Sub-section (2) of Section 446 of the Companies Act convey the same meaning and proceedings under both the sub-sections must be such as can appropriately be dealt with by the winding-up court. Proceedings by way of assessment or reassessment of Income Tax do not fall u/s 446 of the Companies Act. The Supreme Court stated at page 698 :

" The fact that after the amount of tax payable by an assessee has been determined or quantified, its realisation from a company in liquidation is governed by the Act, because the Income Tax payable also being a debt has to rank pari passu with other debts due by the company does not mean that the assessment proceedings for computing the amount of tax must be held to be such other legal proceedings as can only be started or continued with the leave of the liquidation court u/s 446 of the Act. The liquidation court, in our opinion, cannot perform the functions of Income Tax Officers while assessing the amount of tax payable by the assessees even if the assessee be the company which is being wound up by the court. The orders made by the Income Tax Officer in the course of assessment or reassessment proceedings are subject to appeal to the higher hierarchy under the Income Tax Act. There are also provisions for reference to the High Court and for appeals from the decisions of the High Court to the Supreme Court and then there are provisions for revision by the Commissioner of Income Tax. It would lead to anomalous consequences if the winding-up court were to be held empowered to transfer the assessment proceedings to itself and assess the company to Income Tax. The argument on behalf of the appellant by Sri Desai is that the winding-up court is empowered in its discretion to decline to transfer the assessment proceedings in a given case but the power on the plain language of of Section 446 of the Act must be held to vest in that court to be exercised only if considered expedient. We are not impressed by this argument. The language of Section 446 must be so construed as to eliminate such startling consequences as investing the winding-up court with the powers of an Income Tax Officer conferred on him by the Income Tax Act, because, in our view, the legislature could not have intended such a result."

8. The decision of the Punjab High Court in UNION OF INDIA Vs. SETH SPINNING MILLS LTD. (IN LIQUIDATION)., wherein it was held that the bar u/s 171 of the Companies Act, 1913, applies also to proceedings of the ITO for assessment of penalty and the decision of the Mysore High Court in (In Liquidation) Official Liquidator Vs. Commissioner of Income Tax, Bangalore, , holding that the ITO should also obtain leave of the winding-up Court before quantification or collection of Income Tax are overruled in the decision in S.V. Kondaskar, Official Liquidator and Liquidator of the Colaba Land and Mills Co. Ltd. Vs. V.M. Deshpande, Income Tax Officer, Companies Circle I(8), Bombay and Another, . It is stated at page 699 of 83 ITR 181 of 42 Comp Cas :

" We have not been shown any principle on which the liquidation court should be vested with the power to stop assessment proceedings for determining the amount of tax payable by the company which is being wound up. The liquidation court would have full power to scrutinise the claim of the revenue after Income Tax has been determined and its payment demanded from the liquidator. It would be open to the liquidation court then to decide how far under the law the amount of Income Tax determined by the department should be accepted as a lawful liability on the funds of the company in liquidation. At that stage, the winding-up court can fully safeguard the interests of the company and its creditors under the Act. Incidentally, it may be pointed out that at the bar no English decision was brought to our notice under which assessment proceedings were held to be controlled by the winding-up court. On the view that we have taken, the decisions in the cases of UNION OF INDIA Vs. SETH SPINNING MILLS LTD. (IN LIQUIDATION)., and the (In Liquidation) Official Liquidator Vs. Commissioner of Income Tax, Bangalore, , do not seem to lay down the correct rule of law that the Income Tax Officers must obtain leave of the winding-up court for commencing or continuing assessment or reassessment proceedings. "

9. In Income Tax Officer Vs. Official Liquidator, Swaraj Motors (P.) Ltd. (In Liquidation), , a Division Bench of this court, affirming the decision of a learned single judge, held that the assessment of interest u/s 220(2) of the I.T. Act is a legal proceeding within the meaning of Section 446 of the Companies Act and the sanction of the winding-up court is necessary before the interest payable is assessed. The Division Bench, referring to the decision in S.V. Kondaskar, Official Liquidator and Liquidator of the Colaba Land and Mills Co. Ltd. Vs. V.M. Deshpande, Income Tax Officer, Companies Circle I(8), Bombay and Another, , stated that the Supreme Court had in the said decision approved the decision of the Punjab High Court in UNION OF INDIA Vs. SETH SPINNING MILLS LTD. (IN LIQUIDATION)., , and that of the Mysore High Court in (In Liquidation) Official Liquidator Vs. Commissioner of Income Tax, Bangalore, . The Division Bench was

wrong in its view that the decisions of the Punjab and the Mysore High Courts referred to above were approved by the Supreme Court in S.V. Kondaskar, Official Liquidator and Liquidator of the Colaba Land and Mills Co. Ltd. Vs. V.M. Deshpande, Income Tax Officer, Companies Circle I(8), Bombay and Another, . Those decisions were held as not laying down the correctrule of law in holding that the ITOs must obtain the leave of the winding-up court for commencement of assessment or reassessment proceedings. To the extent, therefore, it holds that the ITO has to obtain leave of the winding-up court for assessment or reassessment proceedings, the decision in Income Tax Officer Vs. Official Liquidator, Swaraj Motors (P.) Ltd. (In Liquidation), , cannot be accepted as laying down the correct law. It should also be borne in. mind that the decision of the Punjab High Court in UNION OF INDIA Vs. SETH SPINNING MILLS LTD. (IN LIQUIDATION)., related to penalty proceedings and when the Supreme Court overruled the said decision, it is clear that proceedings for assessment of penalty are also outside the scope of Section 446(1), of the Companies Act. We, therefore, hold there is no need of a prior sanction of the winding-up court for assessment of interest u/s 220(2) of the I.T. Act.

10. The question as to whether interest for delayed payment of tax should also be paid out of the funds of the company in liquidation and if so to what extent such payments can be made are all matters for the winding-up court to decide when a claim is made by the Income Tax Department under Sections 528 and 529 of the Companies Act.

11. The proceedings for recovery will, however, be hit by the provisions of Section 446(1) of the Companies Act, unless leave of the winding-up court is sought for and obtained prior to the commencement of the recovery proceedings.

12. It is brought to our notice that subsequent to the decision of the learned single judge, the refund due to the company by way of excess tax paid for the years 1981-82 and 1982-83 was adjusted towards the interest assessed u/s 220(2) of the Act for the assessment years 1975-76 and 1976-77. The recovery effected by way of adjustment of interest, without seeking to obtain prior leave of court u/s 446(1) of the Companies Act, is invalid and cannot be sustained. The ITO is, therefore, directed to refund the interest recovered to the official liquidator of the company in liquidation.

13. The appeal is disposed of as above. There will be no order as to costs.