(1968) 01 CAL CK 0011

In the Calcutta High Court

Case No : Civil Rule No. 2527 of 1960

Jardine Henderson Ltd. APPELLANT

Vs

Union of India (UOI) RESPONDENT

Date of Decision : 12-01-1968

Acts Referred:

Income Tax Act, 1922 — Section 29, 35, 35(4), 46(2), 46(7)
Public Demands Recovery Act — Section 4, 7, 9
Public Demands Recovery Rules — Rule 39, 40
Taxation Laws (Continuation and Validation of Recovery Proceedings) Act, 1964 — Section 3, 3(1), 5

Citation : (1968) 1 ILR (Cal) 556

Hon'ble Judges : A.N. Chakrabarti, J;A.C. Sen, J

Bench : Division Bench

Advocate : P.K. Roy and Murari Mohan Dutt, for the Appellant; B.L. Pal and Manas Nath Roy, for the Respondent

Judgement

A.C. Sen, J.—The present Rule is directed against the order dated February 24, 1960, passed by Sri B. Sarkar, Member, Board of Revenue, West Bengal, in Case No. 183 of 1957, reversing the order dated May 27, 1957, passed by the Commissioner, Presidency Division, in Case No. 101 of 1956-57.

2. The facts of the case are as follows. On receipt of a certificate u/s 46(2) of the Indian income tax Act, the Certificate Officer, 24-Parganas, filed a certificate under the Public Demands Recovery Act on October 25, 1949, for the recovery of a sum of Rs. 59,541-15-0 from the opposite party No. 2, Haridhan Daw, whereupon a certificate-proceeding being Case No. 367 I.T./50-51 was started.

3. A notice u/s 7 of the Public Demands Recovery Act was served on the certificate-debtor, namely Haridhan Daw, by registered post on or about January 30, 1951. The certificate-debtor filed a petition of objection u/s 9 of the Public Demands Recovery Act, inter alia, denying his liability for the said amount.

4. Sri D.K. Ghosh, purporting to act as the Certificate Officer, 24-Parganas, by his

order dated November 12, 1953, withdrew the case to his file.

5. D.K. Ghosh was appointed as the Certificate Officer and Additional District Magistrate of 24-Parganas by a notification dated October 9, 1953, without being first appointed as a Magistrate of the First Class. Both the orders, namely, the order dated November 12, 1953, by which D.K. Ghosh withdrew the case to his file and the order dated October 9, 1953, by which D.K. Ghosh was appointed as the Certificate Officer were unsuccessfully challenged by the opposite party No. 2 before the Certificate Officer and the Divisional Commissioner in appeal.

6. By a subsequent notification being Notification No. 476 C.A/5C-21/54 dated February 13, 1954, D.K. Ghosh was for the first time invested with the powers "of a First Class Magistrate, and by another notification, being Notification No. 477 C.A./5A-21/54, issued on the said date, D.K. Ghosh was appointed to act as an Additional District Magistrate of 24-Parganas with all the powers of a District Magistrate.

7. The above facts regarding the appointment of D.K. Ghosh as Certificate Officer and First Class Magistrate have been stated in paras. 5 and 6 of the petition. These two paragraphs have not been specifically denied by the Union of India in the affidavit-in-opposition. With reference to paras. 2 to 9 of the petition the deponent on behalf of the Union craved leave to refer to the records of the certificate proceedings and submitted that save as appearing from the said records he made no admission regarding any of the statements contained in the said paragraphs.

8. In this state of the pleadings the facts stated by the Petitioner in paras. 5 and 6 of the petition may be taken as correct.

9. Ground No. 1 in the petition is based on the facts stated in paras. 5 and 6 of the petition, and it runs thus:

For that the Board failed to consider that the appointment of Sri D.K. Ghosh as the Certificate Officer and the Additional District Magistrate by the notification dated October 9, 1953, was wholly invalid and all proceedings subsequent to the illegal assumption of jurisdiction by the said Sri D.K. Ghosh as the Certificate Officer were null and void.

It may be noted that no such ground was taken by the Petitioner either before the Commissioner or before the Board of Revenue. But we shall presently see that it is not at all necessary for us to consider this ground for the purpose of disposing of the present Rule. Other material facts are stated below.

10. D.K. Ghosh, by his order dated January 13, 1954, rejected the said petition of objection u/s 9 of the Public Demands Recovery Act on the ground of default of appearance of the certificate-debtor, namely the opposite party No. 2. An application for review of the said order filed on behalf of the certificate-debtor was also rejected by the Certificate Officer by his order dated January 27, 1954.

11. On March 2, 1954, the income tax Officer informed D.K. Ghosh, the Certificate Officer, that the original demand of Rs. 59,541-15-0 had been enhanced to Rs. 59,604-7-0 u/s 35 of the Indian income tax Act and requested the Certificate Officer to realise the enhanced amount

12. D.K. Ghosh wrote to the income tax Officer on October 26, 1954, saying that the law did not provide for enhancing the demand of the existing certificate and asking him to file a separate certificate for the additional amount. He, however, continued the certificate proceedings for the recovery of the old amount.

13. In the meantime the Petitioner by a registered conveyance dated September 20, 1954, purchased from Haridhan Daw, opposite party No. 2, his undivided one-half share in premises Nos. 201 to 205/1 Old China Bazar Street, Calcutta, together with the remaining one-half share in the said premises from the other co-sharer for a sum of Rs. 3,01,000.

14. On or about August 6, 1956, the Petitioner received a notice for settling the terms of the sale proclamation in respect of the one-half share of the opposite party No. 2 in the said premises. The Petitioner says that on receipt of this notice he caused enquiries to be made and came to know that the certificate case No. 367 I.T. of 1950-51 had been started against the opposite party No. 2 for the recovery of arrears of income tax.

15. On August 11, 1956, the Petitioner made an application, inter alia, stating that he had purchased the half share of the certificate-debtor in the premises sought to be sold and praying for time to file objection to the sale. The Certificate Officer by his order dated August 13, 1956, inter alia, held that the Petitioner had no locus standi as he had purchased the half share after the service of notice u/s 7 of the Public Demands Recovery Act.

16. On November 13, 1956, the Petitioner preferred an objection to the proposed sale of the share of the certificate-debtor in the said premises, inter alia, contending that as the amount of tax had been increased u/s 35 of the Indian income tax Act, the certificate filed under the Public Demands Recovery Act became void and that the Certificate Officer was acting without jurisdiction.

17. On November 30, 1956, another Certificate Officer by his order of that date rejected the said petition of objection of the Petitioner on he ground that the Petitioner had no locus standi to question the validity of the certificate proceeding.

18. The Petitioner preferred an appeal to the Commissioner, Presidency Division, who by his order dated May 31, 1957, allowed the appeal. The relevant portion from the judgment of the Commissioner is quoted below:

The Certificate Officer continued the certificate proceedings on the old demand. This order of the Certificate Officer A.D.M. was wholly wrong because it is now well-established that a demand cannot be split up for the purpose of certificate proceedings as that would offend against the principle of avoidance of multiplicity of legal proceedings. The existing certificate case No. 367 I.T. of 1950-51 cannot be sustained. A fresh demand notice u/s 29 of the Indian income tax Act will have to be issued for the whole of the increased demand, followed up by a certificate u/s 46(2) of the Indian income tax Act if there be still time for it, whereupon a fresh-certificate case will have to be started. As there was no valid certificate under the P.D.R. Act on the date of the transfer to the Appellant, viz., 20.9.54, the Appellant had every locus standi to file objection against the proposed sale.

19. The opposite party No. 1, the Union of India, being aggrieved by the said order of the Commissioner made an application in revision to the Board of Revenue, and the learned Member, Board of Revenue, set aside the order of the Commissioner with the direction that the certificate proceeding should proceed according to law. The learned Member gave the following reason for his decision:

The learned Divisional Commissioner has referred to the principle of multiplicity of legal proceedings. In this case, if the amount by which the original assessment was increased is not collected by certificate procedure, the question of multiplicity of legal proceedings will not arise. The certificate against Sj. Haridhan Daw for the original amount of assessment is valid and should go on.

In this case also as the notice u/s 7 of the P.D.R. Act was served long before M/s. Jardine Henderson Ltd. purchased a share of the property in question, they have no locus standi for objecting to the sale.

20. It is the validity of the order of the Board of Revenue that has been challenged before us by the Petitioner who, it may be pointed out, is not the certificate-debtor, but the purchaser of the share of the certificate-debtor in the disputed, premises.

21. The Petitioner filed his objection evidently under Rule 39 of the Rules in Schedule II to the Public Demands Recovery Act. Rule 40 says that the objector must adduce evidence to show that in the case of immovable property to be sold in execution of a certificate the objector had some interest in or was possessed of the property attached at the date of the service of the notice u/s 7 of the Public Demands Recovery Act.

22. The notice u/s 7 of the Public Demands Recovery Act was served on the certificate-debtor on or about January 30, 1951. The Petitioner purchased the share of the certificate-debtor in the disputed premises on September 20, 1954. He was evidently not interested in the disputed premises nor was he possessed of the same at the date of the service of the notice u/s 7 of the Public Demands Recovery Act.

23. The Petitioner''s contention is that the notice u/s 7 became void as soon as the amount of the tax was enhanced u/s 35 of the Indian income tax Act. On March 2, 1954, the income tax Officer informed the Certificate Officer that the original demand had been enhanced u/s 35 of the Indian income tax Act. The

enhancement, therefore, must have been made before March 2, 1954. It is not disputed that no fresh notice u/s 7 of the Public Demands Recovery Act has been served after enhancement.

24. Hence the primary question for consideration is whether a fresh notice u/s 7 of the Public Demands Recovery Act is indispensable by reason of the enhancement u/s 35 of the Indian income tax Act, or whether the certificate proceeding can be continued without such notice. According to the Divisional Commissioner, as soon as the amount of the tax is increased u/s 35 of the Indian income tax Act a fresh demand notice u/s 29 of the Indian income tax Act must be issued for the whole of the increased amount followed by a fresh requisition u/s 46(2) of the Indian income tax Act and a fresh certificate u/s 4 of the Public Demands Recovery Act. If this proposition is correct, then there is no room for doubt that a fresh notice u/s 7 of the Public Demands Recovery Act must be issued for the realisation of the enhanced amount. As no fresh notice u/s 7 of the Public Demands Recovery Act has yet been served, it may be argued that the objection of the Petitioner under Rule 39 of the Rules under the Public Demands Recovery Act cannot be summarily thrown out.

25. The view taken by the Commissioner is in accordance with the provisions of Section 35(4) of the Indian income tax Act as it then stood. Sub-section (4) of Section 35 runs thus:

Where any such rectification has the effect of enhancing the assessment or reducing a refund the income tax Officer shall serve on the Assessee a notice of demand in the prescribed form specifying the sum payable, and such notice of demand shall be deemed to be issued u/s 29, and the provisions of this Act shall apply accordingly.

In the instant case the rectification u/s 35 had the effect of enhancing the assessment. The income tax Officer was required to serve on the Assessee, the opposite party No. 2, a notice of demand specifying the sum payable. Such notice, if given, would have the effect of a notice u/s 29. In other words, the larger amount would have become payable by the Assessee on the service of the notice contemplated by Section 35.

26. Was any such notice served upon the Assessee by the income tax Officer after enhancing the assessment by way of rectification? The Commissioner set aside the order of the Certificate Officer as, in his opinion, a fresh demand notice u/s 29 of the Indian income tax Act should have been issued for the whole of the increased demand, followed up by a certificate u/s 46(2) of the Indian income tax Act, whereupon a fresh certificate case should have been started. The Commissioner evidently proceeded on the footing that no fresh demand notice u/s 29 or for the matter of that, u/s 35(4) of the Indian income tax Act was issued after the assessment had been enhanced u/s 35.

27. The learned Member of the Board of Revenue has said this in his order:

It is true that when a demand is increased, the service of a fresh notice u/s 29 of the income tax Act is necessary. As such notice was not served, the amount by which the original assessment was increased is not realisable. The order of the Board, therefore, was made on the footing that no notice u/s 29, either for the whole of the enhanced assessment, or for the additional amount had been served upon the Assessee after the enhancement of the assessment u/s 35. By fresh notice u/s 29 of the income tax Act the learned Member evidently meant the notice contemplated by Section 35(4) of the Indian income tax Act.

28. In the supplementary affidavit affirmed on February 9, 1967, on behalf of the Union of India it has, however, been stated in para. 6 that

the demand was rectified u/s 35 of the said Act on March 2, 1953, and necessary notice of demand dated March 3, 1953, was issued fixing March 18, 1953, as the date for making the necessary payment.

The notice of demand is an annexure to the said affidavit. The heading of the notice runs thus:

Notice of Demand u/s 29 of the Indian income tax Act, 1922.

The notice opens thus:

Take notice that for the assessment year 1945-46 the sum of Rs. 62-8 as specified in the attached form has been determined to be payable by you.

29. In the supplementary affidavit it has not been stated that the notice was actually served on the Assessee. The deponent simply says that the notice was issued. We fail to understand why this fact, namely, that the notice u/s 29 was served on the Assessee for the additional sum of Rs. 62-8 as after rectification, was not brought to the notice on behalf of the Union of India, either of the Commissioner or of the Board of Revenue. Both the authorities below proceeded on the footing that no fresh notice u/s 29 was served either for the whole of the enhanced amount or for the additional sum. In any event, even assuming that a notice of demand u/s 29 for the additional sum of Rs. 62-8 as. was, in fact, served upon the Assessee, that notice can by no means be regarded as the notice contemplated by Section 35(4) of the income tax Act, because a notice u/s 35(4) must be for the whole of the increased assessment and not for the amount by which the assessment is increased by way of rectification.

30. We, therefore, propose to proceed on the footing that no fresh notice of demand within the meaning of Section 35(4) of the Indian income tax Act was served upon the Assessee on rectification. There is no manner of doubt that, under the law as it stood when the Commissioner and the Board of Revenue passed their orders, the service of notice u/s 35(4) was mandatory, because therein it has been stated that

the income tax Officer shall serve on the Assessee a notice of demand.

A fresh notice of demand was to be followed by a fresh requisition u/s 46(2) of the income tax Act and a fresh certificate u/s 4 of the Public Demands Recovery Act. A fresh certificate u/s 4 of the Public Demands Recovery Act necessarily called for a fresh notice u/s 7 of the said Act. All these steps were not taken before the purchase of the share of the Assessee in the disputed premises by the Petitioner on September 20, 1954. The learned Commissioner was, therefore, right in saying that the Petitioner had the locus standi to file his objection under Rule 39 of the Rules framed under the Public Demands Recovery Act.

31. The decision of the Supreme Court in Income Tax Officer, Kolar and Another Vs. Seghu Buchiah Setty, also supports the view taken by the learned Commissioner. Hidayatullah, J., who delivered a separate judgment in that case, quoted with approval the following passage from the judgment of Chakravartti, C.J. in Metropolitan Structural Works Ltd. Vs. Union of India (UOI), :

The real point, however, is whether a second or third notice of demand is at all permissible u/s 29, even when an assessment is altered in a first or second appeal. It appear to me that the necessity of issuing a fresh notice of demand in such circumstances is beyond argument.

Chakravartti, C.J. further pointed out that the orders of the appellate Assistant Commissioner and the Tribunal are orders passed under the income tax Act within the contemplation of Section 29 and came to the following conclusion:

If so, when there is some tax due in consequence of an order passed by the Appellate Assistant Commissioner or in consequence of an order passed by the Appellate Tribunal, a clear occasion arises under the words of the section to serve a notice of demand upon the Assessee. That such fresh notice should be issued when the assessment is altered is but common sense and I see no reason to construe the section against reason and against the actual necessities of realisation.

This conclusion of Chakravartti, C.J. was also quoted with approval by Hidayatullah, J. in his judgment in the case of Income Tax Officer, Kolar and Another Vs. Seghu Buchiah Setty, , just cited.

32. In Seghu Buchia''s case the tax was reduced on appeal but no fresh notice of demand was issued u/s 29. The Assessee contended that he was not in default as no notice of demand in respect of the reduced amount was served upon him and that the proceedings for the recovery of tax as an arrear of land revenue on the basis of the original assessment were void and inoperative. This contention of the Assessee was accepted by the Supreme Court. It was pointed out by the Supreme Court that the default in complying with the notice of demand in respect of the original amount was cured as soon as the amount was increased or decreased on appeal. Sarkar, J., as he then was; observed as follows:

Therefore, I think that on the income tax Officer''s order being revised in appeal the. default based on it and all consequential proceedings must be taken to have been superseded and fresh proceedings have to be started to realise the dues as found by the revised order.

33. Hedayatullah, J. explained why it was necessary to send a fresh notice of demand for the entire amount when the tax was enhanced on appeal. His Lordship observed as follows:

Further it is not clear from the later decision Ladhuram Taparia Vs. D.K. Ghose and Others, , decided by Chakravartti, C.J. and Das Gupta, J. of the Calcutta High Court) whether on the enhancement of the tax a fresh notice of demand is required for the excess only or for the whole of the sum.... If a notice of demand were to issue in respect of the excess only, there will be two notices of demand and two starting points of limitation, both for the purpose of coercive action u/s 46(7) as well as for purposes of any appeal that might be. If, however, a fresh notice of demand is to go in respect of the composite sum, the question to ask would be, what happens to the default which was incurred already? How does it disappear? In my opinion, there is only one possible answer and it was given by the learned Chief Justice (Chakravartti, C.J.) in the earlier case.

The earlier case is the case of Metropolitan Structural Works Ltd. v. Union of India Supra wherein Chakravartti, C.J. observed that when an assessment was altered the necessity of issuing a fresh notice of demand was beyond argument. Hedayatullah, J. is, therefore, clearly of opinion that when the tax is enhanced on appeal, even then a fresh notice of demand is required for the entire amount.

34. In the instant case the assessment was increased not on appeal but by way of rectification u/s 35 of the Indian income tax Act. Section 35(4) provides that where rectification has the effect of enhancing the assessment the income tax Officer shall serve on the Assessee a notice of demand. If the service of a fresh notice of demand is mandatory then, on the principle laid down by the Supreme Court, the default based on the original assessment and all consequential proceedings must be taken to have been superseded and fresh proceedings have to be started to realise the duties as found by the order of rectification. In the instant case, therefore, the enhancement of the tax by way of rectification had the effect of superseding the default and all consequential proceedings based on the notice of demand served on the Assessee, the opposite party No. 2, in respect of the original assessment. The Board of Revenue, therefore, was not justified in saying in the state of law then existing that the Petitioner had no locus standi to file objection to the sale of the disputed premises, because no fresh proceedings for the recovery of the enhanced amount were started on service of a fresh notice of demand before the date of purchase by the Petitioner.

35. But after the decision of the Supreme Court in Seghu Buchiah''s case Supra the Central Legislature passed as Act known as the Taxation Laws (Continuation and Validation of Recovery Proceedings) Act, being Act 11 of 1964, to remove the difficulties in the collection of income tax and other direct taxes likely to be created by the above decision of the Supreme Court. Section 3(1)(a) of the Act runs thus:

3(1) Where any notice of demand in respect of any Government dues is served upon an Assessee by a Taxing Authority under any scheduled Act, and any appeal or other proceeding is filed or taken in respect of such Government dues, then,

(a) where such Government dues are enhanced in such appeal or proceeding, the Taxing Authority shall serve upon the Assessee another notice of demand only in respect of the amount by which such Government dues are enhanced and any proceedings in relation to such Government dues as are covered by the notice or notices of demand served upon him before the disposal of such appeal or proceeding may, without the service of any fresh notice of demand, be continued from the stage at which such proceedings stood immediately before such disposal....

(The rest of Section 3 is omitted)

36. The Indian income tax Act, 1922, is one of the Acts mentioned in the Schedule.

37. Section 5 of the Act is relevant for our purpose; it reads thus:

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.

This section gives retrospective effect to the Act.

38. In the instant case the notice of demand was served on the Assessee long before the introduction of the present Act; still by virtue of Section 5 the Act shall apply in relation to the notice served upon the Assessee.

39. Clause (a) applies not only when Government dues are enhanced in any appeal filed, but also when Government dues are enhanced in any proceeding taken. ''Proceeding'' certainly includes a proceeding u/s 35 of the Indian income tax Act. In the instant case the proceeding u/s 35 was taken after the service of the notice of demand on the Assessee, and the Government dues were enhanced in such proceeding.

40. Clause (a) requires that the Taxing Authority shall serve upon the Assessee another notice of demand only in respect of the amount by which such Government dues are enhanced. There is nothing on record to show that such notice for the excess amount has been served on the Assessee, the opposite party No. 2, though it has been stated in the supplementary affidavit affirmed on behalf of the Union of India that a notice u/s 29 in respect of the excess amount was issued on March 3, 1953, fixing March 18, 1953, as the date for making the necessary payment. The learned Commissioner as well as the Board of Revenue proceeded on the footing that no fresh notice of demand was served on the Assessee after enhancement on rectification. We too propose to decide the dispute on that footing. Therefore, it must be taken that no notice of demand in

respect of the amount by which the Government dues were enhanced u/s 35 has been served upon the Assessee.

41. Clause (a) provides for two things: (i) The Taxing Authority shall serve another notice of demand only in respect of the excess amount, (ii) Any proceedings in relation to such Government dues as are covered by the notice of demand served before the disposal of the appeal or proceeding may be continued from the stage at which such proceedings stood immediately before such disposal. These two matters are connected by the word ''and''. The word ''and'' has been used only to separate the two matters mentioned in Clause (a). From the use of the word ''and'' it cannot be said that the service of the fresh notice for the excess amount is the condition precedent to the continuation of the proceeding from the stage at which such proceedings stood immediately before such disposal. In that case the word ''thereupon'' would have been inserted immediately after the word ''and'', but the word ''thereupon'' or any similar expression is not there. We, therefore, agree with Mr. Pal, the learned Advocate for the Revenue, that the proceeding for the recovery of the amount covered by the original notice of demand may be continued even if another notice for the excess amount is not served as enjoined by the first part of Clause (a). The two matters are independent of each other. The proceedings in relation to these two matters shall run on parallel lines. We therefore, hold that the recovery proceeding initiated on the basis of the original demand notice may be continued from the stage at which it stood immediately before the passing of the order u/s 35 of the Indian income tax Act, 1922.

42. From the supplementary affidavit filed on behalf of the Union of India it transpires that the order u/s 35 was passed on March 2, 1953. Therefore, the recovery proceeding is to be continued from the stage at which the proceeding stood immediately before March 2, 1953.

43. The notice u/s 7 of the Public Demands Recovery Act was served on the certificate-debtor, the opposite party No. 2, on or about January 30, 1951. Therefore, there is no necessity of serving a fresh notice u/s 7 of the Public Demands Recovery Act, because the validity of the notice served on or about January 30, 1951, cannot be questioned in view of the provisions of Clause (a) of Section 3(1) of the Taxation Laws (Continuation and Validation of Recovery Proceedings) Act, 1964.

44. The Petitioner purchased the share of the opposite party No. 2 in the disputed premises on September 20, 1954, long after the service of the notice u/s 7 of the Public Demands Recovery Act. The Board of Revenue was, therefore, justified in holding that the Petitioner has no locus standi to file any objection to the sale under Rule 39 of the Rules framed under the Public Demands Recovery Act.

45. The notice u/s 7 of the Public Demands Recovery Act was served, not by D.K. Ghosh, but by his predecessor-in-office, and the competence of the Certificate

Officer who served the said notice has not been challenged before us. Therefore, even assuming that the first appointment of D.K. Ghosh as Certificate Officer on October 9, 1953, was invalid, the effect of such invalid appointment need not be considered so far as the validity of the notice u/s 7 of the Public Demands Recovery Act is considered. As indicated above, it is not at all necessary to consider ground No. 1 taken by the Petitioner for the disposal of the present Rule. Act 11 of 1964 -is a complete answer to grounds Nos. 2 to 4. The Rule was issued only on the first four grounds. As none of them are tenable, the Rule is discharged. There will, however, be no order as to costs.

A.N. Chakrabarti, J.

46. I agree.

