(2012) 04 AHC CK 0104

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition (Tax) No. 1767 of 2011

Jitendra Kumar Shaw @ Aditya Kumar — APPELLANT

Vs

Union of India and Others — RESPONDENT

Date of Decision : 02-04-2012

Acts Referred:
Administration of Evacuee Property Act, 1950 — Section 48
Income Tax Act, 1961 — Section 143(i)(i), 156, 226, 226(3), 226(3)(1)

Citation : (2012) 6 ADJ 67

Hon'ble Judges : Prakash Krishna, J;Ashok Bhushan, J

Bench : Division Bench

Advocate : U.K. Saxena, for the Appellant; R.K. Upadhyay, Siddharth Khare and C.S.C., for the Respondent

Final Decision : Allowed

Judgement

1. Heard learned counsel for the petitioner, Sri R.K. Upadhyay appearing for respondent Nos. 2 to 4 and Sri Siddharth Khare appearing for respondent No. 5. Counter and rejoinder-affidavits have been exchanged between the parties and with the consent of the parties the petition is being disposed of finally.

2. By this writ petition the petitioner has prayed for quashing the notice dated 15.2.2011 and subsequent notices and summons as well as attachment order dated 25.4.2011.

3. The brief facts, which emerged from the pleadings of the parties are; that a notice dated 15.2.2011 was issued by the Tax Recovery Officer to the petitioner stating that a sum of Rs. 5,50,000/- is due from Ms. Vejenti, Kanpur, on account of income tax/penalty/interest/fine and the petitioner was required to make payment of the aforesaid amount u/s 226(3) of the Income Tax Act, 1961 (called the ''Act'' for short). Subsequently, the petitioner was issued another notice by the Tax Recovery Officer dated 22.2.2011 asking the petitioner to appear at his office on 1.3.2011 at 11.00 a.m.

4. The petitioner, upon receiving the said notice, filed his objection, vide his letter dated 26.4.2011. In the reply it was stated that the petitioner is unable to find out any reason as to why he has been called upon by the said notice. It was stated that the petitioner is an asses-see at the Income Tax Office at Raipur (Chattisgarh). Subsequently, again a reply letter was sent on 9.5.2011 to the Chief Commissioner of Income Tax, Kanpur, stating that although the notice was replied but Ram Bhargava, Tax Recovery Officer, is harassing the petitioner and his family members. The letter/complaint, submitted by the petitioner, was forwarded to the Commissioner of Income Tax-II by the Chief Commissioner of Income Tax, Kanpur, for redressal of grievances.

5. The Tax Recovery Officer again issued a notice calling upon the petitioner to appear on 1.6.2011 and an order for attachment was issued on 25.4.2011, which has been filed as Annexure ''20'' to the writ petition. Since the petitioner''s immovable property was attached, a notice was also issued by the Tax Recovery Officer to the Branch Manager, Indusind Bank, Krishna Complex, Raipur.

6. Aggrieved against, the petitioner has come up to this Court praying for the following reliefs :

(i) issue a writ, order or direction in the nature of certiorari to quash the notice dated 15.2.2011 and subsequent notices, summon and attachment order dated 25.4.2011;

(ii) issue any other writ, order or direction which this Hon''ble Court may deem fit and proper in the circumstances of the case.

(iii) Award the cost of the writ petition.

7. This Court, while issuing notice by order dated 20.12.2011, passed the following order :

Serious allegations of mala fide has been made against the Tax Recovery Officer - respondent No. 4, who has also been impleaded in person as respondent No. 5.

Issue notice.

Notice on behalf of respondent Nos. 1 to 4 has been accepted by Sri R.K. Upadhyay, learned senior standing counsel, Income Tax Department.

Issue notice to respondent No. 5, fixing 24th January 2012. Steps to be taken within a week.

List on the date fixed in the notice.

Till further orders, further proceedings pursuant to the notice dated 15.2.2011 shall remain stayed.

8. In the counter-affidavit, filed by respondent Nos. 1 to 4, it has been stated that one Smt. Vaijanti Gupta, the asses-see, is in default of Rs. 5,50,000/- to the Department. The recovery certificate pertaining to assessment year 2001-02 was

transferred to the Tax Recovery Officer-3 by letter dated 30.9.2011. However, in the counter-affidavit, no documents have been brought on record by the respondents to indicate that under which proceeding and by which order the amount was due against Smt. Vaijanti Gupta. However, for purposes of this case, we proceed on the assumption that an amount of Rs. 5,50,000/- is due against Smt. Vaijanti Gupta.

9. The respondents have further relied on a letter dated 18.12.2008 of Smt. Vaijanti Gupta, which is addressed to the Tax Recovery Officer-4, filed as Annexure ''CA-3'' at page 21 of the counter-affidavit, informing the Tax Recovery Officer that she has given Rs. 5,50,000/- to the petitioner for purchase of a truck. The petitioner, however, neither purchased the truck nor has returned the amount to her (Smt. Vaijanti Gupta). She, therefore, requested that the amount of Rs. 5,50,000/ -, which is due on her, should be recovered from the petitioner. Further, a letter dated 21.5.2008, alleged to have been signed by the petitioner, filed as Annexure ''CA-3'' at page 22, reveals that an amount of Rs. 5,50,000/- has been received by Modi Enterprises.

10. In the rejoinder-affidavit the petitioner has vehemently denied the averments made in the counter-affidavit that the petitioner was paid Rs. 5,50,000/- by Smt. Vaijanti Gupta. The allegations made in paragraph 11 of the counter-affidavit has been replied specifically in paragraph 11 of the rejoinder-affidavit, which is quoted as below :

11. That the contents of paragaraph No. 11 of the counter-affidavit are denied as stated. It is specifically stated here that Smt. Vejenti Gupta was not assessee in default in view of the fact that in paragraph under reply also there is no disclosure to the effect that the recovery relating to the assessment of which year and further did not disclose that any notice u/s 143(i)(i) is ever issued to Smt. Vejenti Gupta and thereafter any order was passed at any time even u/s 156 of the Act and in the absence of such notice and the demand notice, all the proceedings initiated under the garb of the assessment of Smt. Vejenti Gupta in respect of the petitioner is forged for which a serious action may be taken to the answering respondent over the same. It is further stated here that although the above named Smt. Vejenti Gupta told the petitioner that she has no knowledge with regard to any proceeding against her with the Income Tax department and further the letter dated 18.12.2008 seems to be a forged letter in view of the fact that it is written in the said letter that the husband of the above named Smt. Vejenti Gupta is died two years back while her husband namely Babu Lal is still alive and further it is mentioned that her son deposited a sum of Rs. 5.50 lakh in account of the petitioner bearing No. 62032584656 in State Bank of Hyderabad, Kanpur while in fact no transaction is ever be held between the petitioner and the above named Smt. Vejenti Gupta. It appears that the respondent No. 5 made inspection of the account of the petitioner and he came to know that a sum of Rs. 5.50 lakh is credited in the above mentioned account of the petitioner hence said letter is manipulated while infact a sum of Rs. 5.50 lakh has been

transferred to the account of the petitioner on 21.5.2008 from his client residing at Raichur, State of Karnataka which is evident from the Code number of the bank given in the said entry. A photostat copy of the aforesaid statement of account of the petitioner showing said entry is being filed herewith and marked as Annexure RA-2 to this affidavit.

11. The petitioner''s case is that he never received any amount of Rs. 5,50,000/-, as alleged and the alleged Annexure ''CA-3'' is nothing but a forged document.

12. On the facts, which have come on record, the issue to be considered by this Court is as to whether the Tax Recovery Officer was justified in the facts of the present case to proceed u/s 226(3) of the Act for effecting recovery against the petitioner. Section 226(3) of the Act, which is relevant, is as follows :

(3)(i) The Assessing Officer or Tax Recovery Officer may, at any time or from time to time, by notice in writing require any person from whom money is due or may become due to the assessee or any person who holds or may subsequently hold money for or on account of the assessee to pay to the Assessing Officer or Tax Recovery Officer either forthwith upon the money becoming due or being held or at or within the time specified in the notice not being before the money becomes due or is held so much of the money as is sufficient to pay the amount due by the assessee in respect of arrears or the whole of the money when it is equal to or less than that amount.

13. Sri R.K. Upadhyay, learned counsel for the Department, submitted that in view of the fact that Smt. Vaijanti Gupta informed the Department that the amount of Rs. 5,50,000/- is due on the petitioner, which was paid by her to the petitioner, the Income Tax Department may recover the amount from the petitioner. The petitioner''s categorical case in the writ petition is that he was never paid any amount of Rs. 5,50,000/- nor he holds any amount for the petitioner.

14. From the materials, which have been brought on record, it is clear that the petitioner had denied his liability to pay the amount of Rs. 5,50,000/-, which is claimed as due to one Smt. Vaijanti Gupta. In the notice (Annexure ''4'' to the writ petition), which was issued on 22.2.2011, the following was mentioned :

Please refer to the above notice. vide above notice you were required to deposit the sum of Rs. 550,000/- which is held by you of Ms. Vejenti, Kanpur. But till date you have failed to remit the above amount to the undersigned in compliance of above notice.

The petitioner, in his reply to the notice, have stated that he does not know Ms. Vejenti of Kanpur nor any amount is due.

15. In the notices, which were issued u/s 226(3) of the Act to the petitioner by the Tax Recovery Officer, there was no detail as to how the amount of Rs. 5,50,000/- of Smt. Vaijanti Gupta is due on the petitioner. But, in the counter-

affidavit, filed by respondent Nos. 1 to 4, certain details have been brought on record. It has been stated that a recovery certificate, in the case of Smt. Vaijanti Gupta, was drawn on 8.1.2007. Smt. Vaijanti Gupta thereafter, vide letter dated 18.12.2008, requested the Tax Recovery Officer-4 to recover the amount, due to her, from the petitioner. Copy of the letter of Smt. Vaijanti Gupta dated 18.12.2008 has been brought on record as Annexure ''CA-3'' to the counter-affidavit. The allegation in the letter dated 18.12.2008 was that in the last year she had given Rs. 5,50,000/- to the petitioner for purchase of a truck, but neither any truck was purchased nor the amount of Rs. 5,50,000/- has been returned, which has to be recovered from the petitioner. It was mentioned that the amount of Rs. 5,50,000/- was deposited in the bank in the amount of Modi Enterprises. Reference of advance receipt dated 21.5.2008, issued by the proprietor of Modi Enterprises, has also been attached to the letter dated 18.12.2008.

16. The petitioner, who was unaware of the nature of allegations against him, after coming to know of the allegations against him by Smt. Vaijanti Gupta, has in the writ petition denied taking of any amount from Smt. Vaijanti Gupta. The advance receipt dated 21.5.2008 has also been termed as forged document. The averments of the petitioner in paragraph 11 of the rejoinder-affidavit has already been noted above. Thus, the petitioner''s categorical case is that he does not owe any amount to Smt. Vaijanti Gupta nor Smt. Vaijanti Gupta paid any amount to the petitioner at any point of time.

17. The question to be considered in the present case is as to whether, in the facts of the present case, the Tax Recovery Officer had jurisdiction to issue notice to the petitioner.

18. Section 226(3) of the Act, as noticed above, empowers the Tax Recovery Officer to require any person from whom money is due or may become due to the assessee or any person who holds or may subsequently hold money for or on account of the assessee to pay to the Assessing Officer or Tax Recovery Officer. The condition precedent for exercising power u/s 226(3)(1) of the Act is when money is due to a person on whom any money of assessee is due could be proceeded u/s 226(3)(i) of the Act.

19. The word "due" as defined in Law Lexicon by P. Ramanatha Aiyar, 2nd Edition, is as follows :

Due. As a noun, an existing obligation; an indebtedness; a simple indebtedness without reference to the time of payment; a debt ascertained and fixed though payable in future; As an adjective, capable of being justly demanded; claimed as of right; owing and unpaid, remaining unpaid; payable; regular; formal; according to rule or form. (4 M.H.C. 385.) "Due'' in an installment bond means payable. (15 IC 231; Re European Life Assrce, Co. 39 LJ Ch 326.)"

The expression ''due'' is defined by Webster to mean that which is owed; that which custom, statute or law requires to be paid and by Worcester that which any one has a right to demand, claim or possess; that which can justly be required. A debt or other obligation is due when it is legally enforceable, i.e., when the creditor has a right to demand payment and to enforce collection. Custodian General of Evacuee Property v. Haman Singh, AIR 1957 Pun 58, 59. [Administration of Evacuee Property Act, 1950, Section 48]

20. An amount can be said to be due which a person is obliged to pay and the person to whom the amount is due can rightfully demand or claim the amount.

21. In the facts of the present case when the petitioner categorically denies any amount due to him of Smt. Vaijanti Gupta, the assessee, and the amount cannot be said to be due within the meaning of Section 226(3) of the Act on the petitioner, the allegation made by Smt. Vaijanti Gupta in her letter dated 18.12.2008 are serious allegations against the petitioner of fraud which is alleged to be played on Smt. Vaijanti Gupta, there is nothing on record that there is any adjudication by any competent authority holding the liability of the petitioner to pay an amount of Rs. 5,50,000/- to Smt. Vaijanti Gupta. The claim of Smt. Vaijanti Gupta having been denied by the petitioner both before the Recovery Officer by filing objection and in this writ petition by filing rejoinder affidavit, it is, at best, be termed as a dispute between the petitioner and Smt. Vaijanti Gupta.

22. The power u/s 226(3) of the Act cannot be invoked for effecting recovery of a claim which is disputed, the letter written by Smt. Vaijanti Gupta to the Department on 18.12.2008 is nothing but making allegations against the petitioner and merely on an allegation made by an assessee, the proceeding u/s 226(3) of the Act cannot be initiated.

23. In P. RAJESWARAMMA Vs. Income Tax OFFICER, NELLORE, AND ANOTHER., , the Andhra Pradesh High Court had occasion to consider the similar provision of the Income Tax Act, 1922. The Andhra Pradesh High Court has clearly laid down that if a person to whom notice is sent denies that any money is due from him then the Income Tax Officer cannot take any further proceeding. The following was laid down by the Andhra Pradesh High Court :

Mr. Kondaiah, for the Department, argues that the whole object and purpose of enacting sub-section (5A) would be nullified if it is to be held that a mere objection by the person upon whom a notice is served entitled him to plead immunity from coercive proceedings which the income tax Officer is expressly authorized to enforce by the clause preceding the clause now under discussion. I am not disposed to agree. The provision, it seems to me, is intended to apply only to an admitted liability. Where a person admits by word or conduct that any money is due to the assessee or is held by him for or on account of the assessee, he becomes liable to pay it and may well be exposed to the penal provision which enables the income tax Officer to take further proceedings before the Collector on the footing that the notice issued has the same effect as an attachment by the Collector in exercise of his powers under the proviso to sub-section (2) of this section. If, for instance, after taking the notice, a person makes a payment to the assessee, and that can only be on the footing that he owed money to the assessee, and that can only be on the footing that he owed money to the assessee, then, to the extent of the sum so paid (up to the amount due from the assessee), the person would become liable personally to the Department and the penal provisions of the Act can be invoked and enforced against him for its recovery. Where, however, the person to whom the notice is sent denies that any money is due from him, then the income tax Officer cannot take any further proceedings under this sub-section even though the denial may not be true. Mr. Kondaiah''s contention is that the last clause applies only to cases where the person to whom the notice is sent is raising a bona fide objection, an objection which is true and not false to his knowledge. In such a case, he contends, it is open to the authorities to ascertain and find whether, as a matter of fact, any money is or is not due to the assessee and resort to the coercive processes if it be found that there is a debt due to the assessee. I am not prepared to accede to this contention. If the position taken up by Mr. Kondaiah were right, then the authorities acting under the Act would be armed with what seems to me a very extraordinary power : they would be able to decide questions of liability of third persons to the assessee. There is nothing in the language of the sub-section which points to such a result. It seems to me that the interpretation I am inclined to put is also in consonance with principle because the Legislature could hardly have meant to entrust the officers of the Department with the jurisdiction to decide questions relating to the existence and quantum of such liability - matters which are normally within the purview of Civil Courts.

24. The interpretation which was put by the Andhra Pradesh High Court on the similar provision under the Income Tax Act, 1922 are fully applicable to Section 226 of the Act. The powers u/s 226 of the Act have not been given to the Assessing Officer or Tax Recovery Officer to adjudicate upon private disputes or to issue notices when there are no admission of liability to pay any amount to assessee.

25. Section 226 of the Act is only a mode of recovery and sub-section (3) of Section 226 of the Act contains provision regarding collection from persons who owe money to assessee. Subsistence of the relationship of a debtor or creditor is sign qua none for the exercise of power u/s 226 of the Section. Section 226(3)(vi) itself contain a provision to the effect that "where a person to whom notice under this sub-section is sent objects to it by a statement on oath that the sum demanded or any part thereof is not due to the assessee or that he does not hold any money for or on account of the assessee, then nothing contained in this sub-section shall be deemed to require such person to pay any such sum or part thereof"

26. Although, the petitioner has sent reply to the notices in which it was stated that he does not owe any money to Smt. Vaijanti Gupta, but there is nothing on record that any affidavit was filed. However, since in none of the notices details as to how the petitioner owe money to Smt. Vaijanti Gupta were given and it is

for the first time in the counter-affidavit details have come which has been denied by the rejoinder-affidavit. The present is a fit case where the respondents are not entitled to proceed u/s 226 of the Act.

27. We are of the view that the Tax Recovery Officer has illegally and without any basis proceeded to issue notices to the petitioner u/s 226(3) of the Act. The present was not a case where the Tax Recovery Officer could have exercised his power to issue notices u/s 226(3) of the Act. The notices issued to the petitioner were wholly without jurisdiction and clearly indicate exercise of unauthorised and illegal power by the Tax Recovery Officer to harass the petitioner. In view of the foregoing, we are of the opinion that the entire proceedings initiated against the petitioner were wholly without jurisdiction and deserves to be set aside with costs. The writ petition is, accordingly, allowed. The notice dated 15.2.2011 and subsequent notices and summons as well as the attachment order dated 25.4.2011 are set aside. The respondents are restrained from proceeding against the petitioner u/s 226 of the Act for recovery of any amount due to Smt. Vaijanti Gupta, as alleged. However, it shall be open for the respondents to proceed for recovery of its dues against Smt. Vaijanti Gupta, if any, in accordance to law.

