
(1970) 07 AHC CK 0027
In the Allahabad High Court
Case No : Second Appeal No. 3634 of 1961

Jwala Prasad

APPELLANT

Vs

S.N. Varma, Formerly Additional District Magistrate (Rural)
and Another

RESPONDENT

Date of Decision : 27-07-1970

Acts Referred:

Income Tax Act, 1922 — Section 45, 46, 67

Citation : (1970) 78 ITR 352

Hon'ble Judges : M.N. Shukla, J

Bench : Single Bench

Advocate : R.K. Gulati, for the Appellant; Standing Counsel, for the Respondent

Final Decision : Disposed Of

Judgement

M.N. Shukla J.

1. In this appeal the appellant has challenged the validity of an action 61 the executive authorities which involved an invasion of the physical liberty of a citizen. The appellant filed a suit for damages for the humiliation and indignity, the mental and physical pain caused to him by his illegal arrest and detention on the 27th and 28th August; 1963. The plaintiff's case was that he was a respectable citizen of India possessing sufficient property, carrying on a flourishing business under several firm names and was annually assessed to considerable Income Tax. By an order dated the 10th January, 1952, the Income Tax Officer, "A" Ward, Kanpur, assessed him to an Income Tax amounting to Rs. 83,594-3-0 for the assessment year 1947-48, against which he preferred an appeal u/s 3 of the Income Tax Act to the Appellate Assistant Commissioner, Income-tax. He also moved an application before the Inspecting Assistant Commissioner, Income Tax, to the effect that he had filed an appeal and was depositing Rs. 5,000 each and meanwhile no proceedings may be taken against him for the realisation of the aforementioned tax till the disposal of the appeal. On the 22nd of March, 1952, Sri R. N. Mattoo, Inspecting Assistant

Commissioner, Income Tax, ordered that no proceedings be taken for the recovery of the tax assessed under the aforesaid order dated January 10, 1952, till the decision of the appeal, provided the plaintiff deposited a further sum of Rs. 5,000 by the 29th March, 1952. This amount was also deposited by the plaintiff within time, but, notwithstanding these orders, it was alleged that Sri Sukhdeo Prasad Nigani, defendant No. 2, who was then the Tahsildar Magistrate, Income Tax, Kanpur, issued notice to the plaintiff calling upon him to pay the amount of the tax within four days as certificate had been received u/s 46, Clause (2), of the Income Tax Act, through the Collector, Kanpur for the recovery of the said amount and if the deposit was not made within time steps for recovery would be taken. The plaintiff applied to the Tahsildar Magistrate (defendant No. 2) and also to defendant No. 1, who was then the Additional District Magistrate, Rural Area, Kanpur, as well as to the District Magistrate, Kanpur, but to no effect. It was also alleged in the plaint that by mistake the Income Tax Officer had issued recovery certificate in spite of the stay by the Inspecting Assistant Commissioner of Income Tax but the mistake was rectified when the matter was brought to the notice of the income tax authorities by the plaintiff and the Income Tax Officer issued a rectification letter dated April 13, 1953 (Exhibit 40), wherein it was clearly mentioned that the recovery of arrears against Sri Jwala Prasad Nigam (plaintiff) for the assessment year 1947-48" were to be staged as time had been allowed till appeal. It was alleged that despite this stay order, the defendants proceeded to issue coercive measures" for realisation of the income tax and, ultimately, caused him to be arrested on 27th August, 1953. He was lodged in the Unnao jail for more than 24 hours in pursuance of these illegal orders and it was only on the evening of August 28, 1953, when he actually deposited Rs. 10,000 more in cash that he was released from custody. The plaintiff claimed a sum of Rs. 10,000 as damages for his wrongful arrest by the defendants.

2. The defendants alleged that the Income Tax Officer was, not competent, to stay further proceedings after he had issued the certificate of recovery the order of stay was without jurisdiction and the defendants were justified in proceeding with coercive measures for realisation of the arrears of Government dues. It was further alleged by virtue of a later amendment in the written statement that the defendants did not receive any stay order from the Income Tax authorities for stay of the proceedings and that they were seized of the case on receipt of recovery certificate from the Income Tax authorities. Another plea subsequently taken was that the defendants were entitled to the protection of the provisions of Section 67 of the Income Tax Act and Section 283(m) of the Land Revenue Act.

3. The trial court decreed the plaintiff's suit for damages to the tune of Rs. 1,000 only, against Which the defendants filed an appeal and the plaintiff also filed cross-objections. The lower appellate court allowed the defendants' appeal and dismissed the plaintiff's cross-objections with the result that the suit for damages stood dismissed with costs.

4. In these circumstances" the plaintiff has preferred this second appeal and prayed that the suit for Rs. 4,000 be decreed with costs throughout. The main points which were urged before me on behalf of the appellant were that the Income Tax authorities were competent to pass the stay order and the order of the Income Tax Officer, dated April 13, 1953, was valid and within his jurisdiction, that the stay order was communicated to the defendants Nos. 1 and 2, and actually received in their office on April 14, 1953, and, thereafter, the defendants had no jurisdiction to proceed with the recovery and were bound to stay their hands and that, in the circumstances, the Additional District Magistrate and the Tahsildar Magistrate, Income Tax, Kanpur, acted plainly without jurisdiction and contrary to law, that they could not claim protection u/s 67 of the Income Tax Act or Section 233(m) of the U.P. Land Revenue Act, and they were liable for damages.

5. The first point, therefore, which falls for consideration is as to the power of the Income Tax authorities to pass the stay order in the circumstances of the case. The relevant facts are that the Inspecting Assistant Commissioner, Income Tax, had granted; a stay order on the 22nd March, 1952, on the condition that the assessee should deposit another sum of Rs. 5,000 by 29th March, 1952. That condition was fulfilled. Therefore, on the 13th April, 1953, the Income Tax Officer, Kanpur, passed an order of stay and communicated the same by his letter dated the 13th April, 1953, exhibit 40, addressed to the Collector, Kanpur, clearly intimating that proceedings in respect of the recovery certificate issued against Sri Jwala Prasad (assessee) were to be stayed on account of the time allowed to him till appeal. It was contended for the respondents that in view of the provisions of Sections 45 and 46 of the Indian Income Tax Act, 1922, an order of stay could be passed only prior to the issue of a recovery certificate or in the alternative only after the cancellation of the recovery certificate, that otherwise there was no jurisdiction to stay the recovery and the Collector was competent to take coercive measures for realising the amount in respect of which the recovery certificate was once issued. Section 45 of the Indian Income Tax Act runs as follows:

" Any amount specified as payable in a notice of demand under Subsection (3) of Section 23A or u/s 29 or an order u/s 3.1 or Section 33, shall be paid within the time, at the place and to the person mentioned in the notice or order, or if a time is not so mentioned, then on or before the first day of the second month following the date of the service of the notice or order, and any assessee failing so to pay shall be deemed to be in default, provided that, when an assessee has presented an appeal u/s 30, the Income Tax Officer may in his discretion treat the assessee as not being in default as long as such appeal is undisposed of."

6. The recovery certificate is issued u/s 46, Sub-section (2), and it reads as under:

" The Income Tax Officer may forward to the Collector a certificate under his signature specifying the amount of arrears due from an assessee, and the

Collector, on receipt of such certificate, shall proceed to recover from such assessee the amount specified therein as if it were an arrear of land revenue."

7. It was submitted that on a reading of the two sections together the inference must be drawn that the stay order can be passed up to the stage of Section 33, but after a recovery certificate has been issued no such order can be passed. The standing counsel appearing for the respondents has not been able to cite any authority in support of this proposition. In my opinion the language of Section 45 makes it crystal clear that after the assessee has presented an appeal u/s 30, the Income Tax Officer may treat the assessee as not in default as long as such appeal is undisposed of. It is, therefore, not possible to put a contrary construction on this section. Moreover, the recovery certificates can be issued u/s 46 even before the filing of an appeal and it was not the intention of the legislature that once the recovery certificate was issued, it was irrevocable despite the assessee's approach to the superior authorities and his willingness to comply with such conditions as might be imposed upon him. It was not intended that the assessee should be precluded from obtaining a stay of the recovery proceedings and the authorities should become inexorable. On the contrary, the precise object of the legislature in enacting Section 45 appears to be to confer jurisdiction on the Income Tax Officer concerned to afford relief in a proper case to an assessee whose appeal is pending and to treat him as not being in default. Any proceedings for recovery presuppose the assessee being in default and when the default itself has ceased either actually or under fiction of law, the jurisdiction of the recovery authorities who act as the agent of the Income Tax authorities automatically comes to an end. There is nothing in the terminology of Sections 45 and 46 which may either expressly or impliedly suggest that there is a prohibition to treat the assessee as not being in default during the pendency of an appeal against the order of assessment or the notice of demand or after the issue of the recovery certificate.

8. It was also contended by the learned counsel for the appellant that in fact the Income Tax Officer possessed an inherent power to grant stay in a suitable case if he wanted to give relief to an assessee who had preferred an appeal. For this purpose reliance was placed on Income Tax Officer Vs. M.K. Mohammed Kunhi, where the Supreme Court interpreted the provisions of Section 254 of the Income Tax Act which were equivalent to Section 33 of the old Act providing for appeal. The section, it was argued, did not expressly confer any power of granting a stay order, but the Supreme Court held that the grant of a statutory power carried with it by necessary implication the authority to use all reasonable means to make such grant effective. The powers which have been conferred by Section 254 on the Appellate Tribunal with widest possible amplitude must carry with them by necessary implication the powers and duties incidental and necessary to make the exercise of those powers effective. On that reasoning it was held that the Appellate Tribunal could in proper cases pass an order of stay.

9. However, even without the necessity of falling back upon an inherent power of

granting stay, in my opinion, the provisions of Section 45 of the Indian Income Tax Act do confer a statutory power on the Income Tax Officer in his discretion to treat an assessee as not being in default. That is sufficient to enable an assessee to obtain a stay of recovery after he has preferred an appeal and I am unable to see any bar to the exercise of that power anywhere in the statute on the ground that a recovery certificate has been issued. In *KASHIRAM AGARWALLA Vs. COLLECTOR OF 24-PARGANAS AND OTHERS.*, it was laid down that whether or not an assessee would be considered to be in default after an appeal is filed against an assessment is a matter entirely in the discretion of the Income Tax Officer, who has, however, to exercise his discretion after due regard to the circumstance of the case. I find force in the submission of the learned counsel for the appellant that, where a certificate is issued to the Collector, the amount does not become due to the Collector. He acts merely as an agent of the Income Tax department for the purpose of making recovery and after the department itself treats the assessee as not in default, surely the recovery authorities cannot persist in prosecution of the recovery proceedings. In *THE UNION OF INDIA Vs. FIRM RALLA RAM RAJ KUMAR.*, a Division Bench of the Punjab High Court accepted the contention based on Section 4G(5A) of the Income Tax Act that the Collector should not be regarded as possessing larger powers than the Income Tax Officer when acting u/s 46(2) 6f the Income Tax Act. Thus, I find no substance in the contention of the respondents' counsel that no stay order could be passed by the Income Tax Officer u/s 45 of the Income Tax Act unless the recovery certificate had been cancelled. In *Behari Lal Baldeo Prasad, Commission Agents Vs. Commissioner, Jhansi Division and Others*, the auction sale of an assessee's property was quashed by this court even after the sale had been confirmed. It was found that on issue of recovery certificate the petitioner's properly was sold by the recovering authority and the sale had been confirmed during the period the stay order passed by the Inspecting Assistant Commissioner was in operation. It was held that the order of confirmation of sale was, therefore, without jurisdiction.

10. As regards the second contention, namely, that the Inspecting Assistant Commissioner had no power to pass the stay order and that he wrongly assumed an implied power to pass such order by directing the stay of the recovery proceedings by his order dated March 22, 1952, it is not necessary to express any opinion on this point because, as I have already observed, the power of staying recovery by not treating the assessee as being in default has been expressly conferred on the Income Tax Officer and that can be exercised by him irrespective of the issue of the recovery certificate. It is trite that when an assessee is not in default, he cannot be subjected to the recovery proceedings. It is sufficient for the purposes of the present case that the Income Tax Officer had passed the order dated the 13th April, 1953, acting u/s 45 of the Act.

11. It was strongly urged in defence of the action of the Additional "District Magistrate and the Tahsildar Magistrate that they had" no knowledge of the letter of the Income Tax Officer (exhibit 40).

12. It is manifest that the A.D.M., Rural Area was not really labouring under want of knowledge or ignorance of the letter of the Income Tax Officer. On the contrary, he was adamant in his legal stand that he or the Tahsildar could not take orders from the Income Tax Officer who was not competent to: stay recovery once the certificate for recovery had been issued. Under that assumption of law he continued to take coercive measures which culminated in the arrest of the petitioner on 27th August, 1953. I have no hesitation in remarking that the attitude of the A.D.M., Rural Area, was most arbitrary, full of utter disregard for the liberty of a citizen and unusual on the part of a senior officer of the rank of A.D.M.

13. It was contended for the respondents that no malice was alleged against the defendants and their action could not be said to be mala fide. Malice in that sense is not one of the necessary ingredients of "false imprisonment". In an action in tort for damages for false imprisonment the plaintiff has to prove: (a) his imprisonment, and (b) that it was caused by the defendants or his servants acting in the course of their employment. As Salmond remarks: " The wrong of false imprisonment consists in the act of arresting or imprisoning any person without lawful justification, or otherwise preventing him without lawful justification, from exercising his right of leaving the place in which he is". (Salmond on The Law of Torts, 1969 edition, page 160). In AIR 1948 135 (Oudh) Ghulam Hasan C.J. ruled:

"In order to succeed in a suit for damages for wrongful arrest and detention it is not necessary for the plaintiff to prove malice".

14. The distinction between an action of malicious prosecution and one for trespass, i.e., false imprisonment, is that, whereas in the former the plaintiff has to prove the absence of reasonable and probable cause, in an action for trespass he has only to prove the trespass and it is for the defendant to justify the same.

15. The next question arises as to whether the A.D.M., Rural Area, could take shelter behind his ignorance of law. As his deposition in court demonstrates, he assumed that the Income Tax Officer was not competent to stay recovery proceedings after the recovery certificate had been received by the Collector. A responsible officer is supposed to be conversant with law and if he infringes the rights of a citizen by his illegal action he cannot claim protection. In such a case malice incurred need not be proved but is inferred in law from the wrongful act itself. To quote Viscount Haldane L.C. in *Shearer v. Shields* [1914] A.C. 808;

"Between malice in fact and malice in law there is a broad distinction which is not peculiar to any particular system of jurisprudence. A person who inflicts an injury upon, another person in contravention of the law is not allowed to say that he did, so with an innocent mind; he is taken to know the law, and he must, act within the law. He may, therefore, be guilty of malice in law, although, so far as the state of his mind is concerned, he acts ignorantly, and. in that sense

innocently."

16. Moreover, I am of the opinion that when the Income Tax Officer acting legitimately under the provisions of Section 45 of the Indian income tax Act passed an order treating the assessee as not being in default, there was no jurisdiction left in the Collector to proceed with the recovery. The latter proceedings, in view of the facts and circumstances proved in this case, must be held to be without jurisdiction. It cannot be gainsaid that the money from the assessee was due to the Income Tax department and not to the Collector. The judicial officers are public servants and while acting in such capacity must be alive to the limits of their jurisdiction and the precise scope of the powers conferred upon them by law. It was observed in *Abbott v. Sullivan* [1952] 1 K.B. 189 : [1952] 1 All ER 226, as follows:

"In general it may be said that the law gives protection from civil liability to persons exercising judicial functions in a court in respect of anything done or said by them in their judicial capacity provided that the court is acting within its jurisdiction. In some cases an issue arises as to the jurisdiction and the court might have to arrive at a conclusion in regard to certain facts in order to decide whether it has jurisdiction. In such cases, even if jurisdiction is wrongly exercised, there may still be protection from civil liability unless the court knew or had the means of knowing certain facts which alone decided the court's jurisdiction."

17. On an examination of the facts of the present case I have not the least doubt that the A. D. M., Rural Area, and the Tahsildar knew or at least had the means of knowing, which they without justification declined to avail themselves of, the fact that the recovery had been stayed and they were not competent to take further coercive measures against the appellant.

18. Protection was also sought by the respondents under the provisions of Section 67 of the Income Tax Act, and Section 233(m) of the U.P. Land Revenue Act. Section 233(m) of the Land Revenue Act provides:

"No person shall institute any suit or other proceedings in the civil court with respect to any of the following matters: . . .

(m) claims connected with or arising out of, the collection of revenue (other than the claims u/s 183), or any process enforced on account of an arrear of revenue, or on account of any sum which is by this or by any other Act is realizable as revenue."

19. This provision in terms cannot apply to the present claim which was in tort. Even though the machinery provided under the U.P. Land Revenue Act may be utilised for the recovery of the Income Tax dues yet such dues are not for the reasons converted into land revenue. Moreover, the protection can never be claimed in respect of proceedings which became subsequently incompetent.

20. Section 67 of the Income Tax Act runs as under:

" No suit shall be brought in any civil court to set aside or modify any assessment made under this Act, and, no prosecution, suit or other proceedings shall lie against any officer, of the Government for anything in good faith done or intended to be done under this Act."

21. The bar enacted by Section 67 cannot apply in respect of proceedings which were incompetent and would, therefore, not be considered under the Act. The present case would come squarely within the dictum of Lord Thankerton in AIR 1940 105 (Privy Council) which is as follows:

"It is settled law that the exclusion of the jurisdiction of the civil courts is not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied. It is also well settled that even if jurisdiction is so excluded, the civil courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with, or the statutory Tribunal has not acted in conformity with the fundamental principles of judicial procedure."

22. The same view was affirmed by the Supreme Court in *State of Kerala Vs. Ramaswami Iyer and Sons*, .

23. I am also not satisfied that the action of the defendants in the present case can be said to be in good faith. In *Kedarnath Vs. State*, , it was held as under:

"Good faith imports the exercise of due care and attention. A person can be excused for having committed an error of judgment only if he exercised due care and attention and his conduct makes it clear that there was not negligence according to reasonable standards. The standard of care required is that of a reasonably prudent man who acts with the care and caution required of a person in his position dealing with a matter of similar importance."

24. It is truism that an officer cannot choose to entertain an absurd view of law and claim that he was bona fide induced to believe that his action was valid and legal, and, therefore, he should be protected from the damages claimed by the party which has been aggrieved by the offending action. The well known leading case on the point is *Spooner v. Juddow* [1850] 4 M.I.A. 353. Lord Campbells' remarks, while delivering opinion in that case, sum up the law:

"Our books actually swarm with decisions putting a contrary construction upon such enactments, and there can be no rule more firmly established, than that if parties bona fide and not absurdly believe that they are acting in pursuance of statutes and according to law, they are entitled to the special protection which the legislature intended for them, although they have done an illegal act."

25. In spite of the categorical allegations made in the successive applications presented by the appellant before the A. D. M., Rural Area, on which he himself ordered enquiry, it is not explained as to why the A. D. M., Rural Area, did not await the result of the enquiry and instead he submitted to the position that his subordinate Tahsildar, Income Tax, did not comply with his orders and failed to make any enquiry or submit a report. I have already referred to the entry in the

peon book of the Income Tax department as also to the statement of the Nazut clerk saying that the letter of the Income Tax Officer staying the recovery had been received in the Collectorate office. Therefore, the only thing which prevented the A. D. M., Rural Area, from acting upon it was his own obsession that in law the stay of the recovery proceedings was not competent. Surely, the action of the respondents could not be said to have been based on due care and attention.

26. Lastly, the learned counsel for the respondents raised two technical objections with regard to the letter, exhibit 40. In the first place, he stated that it was not admissible in evidence as no notice had been given u/s 66 of the Indian Evidence Act, which was necessary for claiming a right to procedure secondary evidence. The facts of this case, however, belie his contention. The plaintiff took care to have "summons issued to the A. D. M. as well as the Income Tax Officer. That document is paper 51-R on record. The original document must have been in the office of the Collectorate, presumably with the A. D. M., or the Tahsildar and the Income Tax Officer did produce an authenticated copy of the same. The copy bore the seal of the Income Tax Officer and the endorsement that it was compared. Notwithstanding the summons, the respondents did not produce the original of the letter. In the circumstances, the plaintiff was entitled to adduce secondary evidence in proof of the same. Even otherwise, I feel that an adverse inference must be drawn against the respondents for not producing that letter, inasmuch as it was a very important document and since it must have been in their possession in the ordinary course, it was their duty to produce it before the court. It was held in *Mul Chand-Nandu Mal Vs. Kanhaiya Lal and Another*, as under:

"Apart from the question of onus of proof, it lies upon a party to a suit, whether he be plaintiff or defendant, to produce in court all such material documents relating to the suit as may be in his possession, even though no application has been made for its production by the other party."

28. The same view was affirmed, in *Hiralal and Others Vs. Badkulal and Others*, .

29. The next objection urged by the respondents was that the document, exhibit 40, had not been proved in accordance with law. This may be countered by the dictum of the Privy Council in AIR 1943 83 (Privy Council) which is as follows:

"Where the objection to be taken is not that the document is in itself inadmissible but that the mode of proof put forward is irregular or insufficient, it is essential that the objection should be taken at the trial before the document is marked as an exhibit and admitted to the record. A party cannot lie by until the case comes before a court of appeal and then complain for the first time of the mode of proof."

30. In the instant case no objection was taken to the manner of proof of the document in the trial court and it was marked as exhibit 40. An objection with regard to the mode of proof cannot be raised for the first time in second appeal.

31. Thus, I am satisfied that in the present case the appellant was arrested without lawful justification. His false imprisonment by the respondents has been conclusively established and the appellant is entitled to damages. The trial court had decreed the suit for a sum of Rs. 1,000 only, though in the plaint the plaintiff had claimed a sum of Rs. 10,000 as damages. In the second appeal before me, the appellant has asked for a decree of Rs. 4,000. Even though the trial court passed a decree for Rs. 1,000 only, I am inclined to take a serious view of the action of the respondents as the liberty of a citizen is involved. Dealing with the tort of false imprisonment, Salmond says (On the Law of Torts, 1969 edition) (page 160):

"As it is derived from the action of trespass there is no need to prove actual damage. In any event if the liberty of a subject is at stake questions as to the damage sustained become of little importance, and aggravated damages may be awarded in a proper case."

32. As the action of the respondents has been most unlawful and has resulted in grave indignity and harassment of the appellant, and the respondents have failed to justify their action, in my opinion, a sum of Rs. 2,000 would be adequate damages to which the appellant is entitled in the circumstances of the case. Lord Atkinson's remarks in *Shearer v. Shields* apply with equal force to this country wherein the liberty of citizens is enshrined as a fundamental right in the Constitution. He observed:

"I think human liberty is such a valuable thing in this country--as in Scotland--that a person who invades it by arresting an individual must justify his action in that respect."

33. The result is that this appeal succeeds and the appellant's suit for damages to the extent of Rs. 2,000 is decreed with costs, throughout.