

(1970) 07 AHC CK 0034

In the Allahabad High Court

Case No : Civil Miscellaneous Writ No. 788 of 1968

Kampal Sharma and Others

APPELLANT

Vs

The Addl. Commissioner, Agra and Others

RESPONDENT

Date of Decision : 07-07-1970

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 90

Uttar Pradesh Zamindari Abolition and Land Reforms Rules, 1952 — Rule 285I

Citation : (1970) 40 AWR 558

Hon'ble Judges : T.P. Mukerjee, J;R.S. Pathak, J

Bench : Division Bench

Advocate : K.B.L. Gour, for the Appellant;

Final Decision : Allowed

Judgement

R.S. Pathak, J.—I agree with my brother Mukerjee that this petition must be allowed with costs and the order dated, 19-1-1968, made by the Addl. Commissioner must be quashed.

2. The Addl. Commissioner has proceeded principally on the view that the Respondents were not afforded an opportunity by the Collector to produce evidence in support of their objection. It appears to me that there is no basis for taking that view. There is nothing on the record to show that such opportunity was not available to the Respondents in the proceedings before the Collector. The Petitioners say, in para 13 of the petition, that various dates were fixed by the Collector for recording the evidence of the income tax Department and no evidence was produced by that department. In para 14 of the counter-affidavit filed on behalf of the State Bank of India it is averred that no objection was made nor was any right reserved by the Union of India to lead any evidence. A review application was filed by the Union of India before the Collector and that application was dismissed on 31-3-1968 by the Collector who pointed out that it was the duty of counsel for the Union of India to have applied for a date for the examination of witnesses and that instead counsel had proceeded to argue the

case on the merits. The counter-affidavit filed on behalf of the Union of India does not controvert what is stated in the petition in this regard. Indeed, in reply to para 17 of the petition stating that various dates had been fixed for recording the evidence of the income tax Department the counter-affidavit, in para 15, states that

The case did not require any oral evidence as the matter was dependent on the documents on record.

The Addl. Commissioner himself has not indicated anything in his order to show how the Union of India was not allowed an opportunity to produce evidence. The principal basis on which the Addl. Commissioner made the impugned order cannot be sustained. Moreover, several points for the decision of which he remanded the case had already been considered and disposed of by the Collector.

3. Accordingly, I would agree with my brother Mukerjee that the Addl. Commissioner has manifestly erred in the exercise of his jurisdiction in making the order of remand.

4. In the circumstances, I prefer not to express any opinion on the question whether the appeal to the Addl. Commissioner was incompetent.

Mukerjee, J.

5. The facts giving rise to this writ petition are some what complicated. Briefly stated, they are as follows:

One Dr. Vishwa Pal Sharma, hereinafter referred to as the Assessee, had entered into certain contracts with the Union of India which he could not perform. The Union of India obtained a decree for money, for breach of contract, against the Assessee in Suit No. 404 of 1952 in the court of the Civil Judge, Delhi. The decree was transferred for execution to the court of the Civil Judge Mathura. In the execution case, which was numbered 45 of 1956, four houses belonging to the Assessee were sold in auction on 22-7-1958 and purchased by the four Petitioners as detailed below:

1. House No. 595, Tajpura, Mathura, purchased by Petitioner No. 1.
2. House No. 752-A, Golpara, Mathura, purchased by Petitioner No. 2.
3. House No. 674, Satghara, Mathura, purchased by Petitioner No. 3.
4. House No. 788 B Satghara, Mathura, purchased by Petitioner No. 4.

6. The Petitioners are closely related to the Assessee. Petitioner No. 1, Kampal Sharma is the son of the Assessee, Petitioner No. 2 Smt. Madhuri Sharma is the wife of Kampal Sharma, Petitioner No. 3, Nidhipal Sharma is another son of the Assessee, while Petitioner No. 4 Shripal Sharma is the son of Petitioner No. 1, Kampal Sharma. The houses were sold in auction subject to a decree for mortgage in favour of the State Bank of India, Mathura for about Rs. 4,00,000/- passed in suit No. 26 of 1949 in the Court of the Civil Judge, Mathura. The

auction sale which had taken place on 22-7-1958 was confirmed on 30-4-1960 and the Petitioners obtained delivery of possession of the houses in due course.

7. In the mean time proceedings for recovery of, income tax dues for the assessment years 1946 47 to 1951-52 had been started against the Assessee. The total income tax due by the Assessee amounted to Rs. 1,56,110/-. Certificates were issued by the Income Tax Officer to the Collector on 13-3-1956 u/s 46(2) of the Income Tax Act, 1922, for recovery of the arrears of income tax as arrears of land revenue. Certificates were also issued against the Assessee for recovery of sales tax amounting to Rs. 3,304/1/6.

8. In the course of the certificate proceedings the four houses specified above were attached by the Collector for sale. The Petitioners, preferred objections before the Collector against the attachment of the houses which they had purchased in auction. The Collector dismissed the objection as not maintainable, by his order dated 18-3-1962 and issued sale proclamations on 23-3-1962 fixing 9-5-1961 for sale.

9. The Petitioners thereupon filed writ petitions in this Court for quashing the sale proclamations issued by the Collector. The petitions were heard by Manchanda J., who observed that when a recovery certificate is sent to the Collector u/s 46 of the Act, he acts both under the land Revenue Act as well as under the Code of Civil Procedure. The learned Judge, therefore, directed the Collector to entertain the objection and dispose of them in accordance with the provisions of the Code of Civil Procedure. The learned Judge further directed that having disposed of the objections the Collector shall deal with the recovery proceedings according to law. The order was passed by the learned Judge on 18-10-1962 in writ petition No. 1330 of 1962 filed by Smt. Madhuri Sharma Petitioner No. 2.

10. After the cases came back to the Collector, the Petitioners filed fresh objections to the attachment and sale of the houses. The Collector heard the Petitioners and found that they were all living jointly with the Assessee and the houses constituted the property of the joint family. The Collector, therefore, held that the joint family property could be attached and sold in the proceedings for recovery of the income tax dues from the Assessee. The order of the Collector, Sri G.L. Mittal, was passed on 21-11-1963. The houses in dispute were put up for auction on 19-5-1965 and again purchased by the present Petitioners, respectively, for Ps. 450/-, Rs. 500/-, Rs. 400/- and Rs. 200/-. As already stated, there was a prior mortgage decree in respect of the houses in favour of the State Bank of India, Mathura to the tune of Rs. 4,00,000/-.

11. Against the auction sale of the houses, objections Under Order 21, Rule 90, CPC were filed by the Union of India, (Director of Disposals) and one Sri Brij Gopal Bhatia, a tenant of one of the houses. The objection was to the effect that the sale was vitiated by fraud and material irregularities in the matter of publication of the sale proclamation and therefore, it was liable to be set aside.

Sri H.S. Tewari, the then Collector, Mathura was of the view that the recovery proceedings should have been undertaken under Schedule II of the Income Tax Act, 1961 and not under the old Income Tax Act of 1922. He held, therefore, that the auction sale of the houses which had taken place on 19-5-1965 was vitiated and should be set aside. He, therefore, ordered that a sale proclamation be issued in accordance with Schedule II of the Income Tax Act of 1961. Against this order of the Collector, the State Bank of India, Mathura filed an appeal before the Commissioner, Agra, opposite party No. 1. The appeal was allowed by the Commissioner by his order dated 27-4-1966. He set aside the order of the Collector and remanded the case to the latter for a fresh hearing after giving the parties an opportunity to substantiate their objections.

12. When the case came back to the Collector after remand, the parties were heard by the then Collector Sri B.D. Seth. The Collector by his order dated 22-12-1966 held that the proceedings for recovery had been rightly taken under the Indian Income Tax Act, 1922 and that the provisions of Schedule II to the Income Tax Act, 1961 were not applicable to the case. On the merits of the case he held that there was no evidence to show that the sale was conducted collusively on the contrary he held that the sale had taken place in the presence of representatives of the Income Tax Department and a number of bidders were present. In the opinion of the learned Collector, there was nothing in law to prevent the near relations of the Assessee from bidding or purchasing the properties in the auction sale. The learned Collector was of the view that the low prices for which the houses were sold in auction was due to the fact that they were subject to an encumbrance in favour of the State Bank of India amounting to Rs. 4,00,000/- or there about. The learned Collector, therefore, dismissed the objections filed by the Union of India and Shri Bhatia Under Order 21 Rule 90, Code of Civil Procedure.

13. Aggrieved by the order of the Collector, the Union of India again filed an appeal to the Commissioner. The appeal was heard by the Addl. Commissioner. It was contended before him that the Collector, Mathura had dismissed the objections of the Appellants without giving them proper hearing and without affording them opportunity to adduce evidence to substantiate their objection that the properties had been sold for inadequate price and that the auction sale held on 19-5-1965 was illegal. The Respondents while controverting the allegations made by the Appellants contended that the learned Addl. Commissioner had no jurisdiction to entertain the appeal.

14. The Addl. Commissioner held that inasmuch as the dues were being realised as arrears of land revenue Under Ch. VIII of the Land Revenue Act, an appeal against the order of the Collector lay to the Commissioner. He, however, found that the learned Collector had not afforded sufficient opportunity to the Appellants to substantiate their objections by production of evidence. He, therefore, allowed the appeal and again remanded the case to the Collector for fresh decision after giving the parties a reasonable opportunity to produce

evidence in support of their objections to the auction sale held on 19-5-1966. In particular, he directed the learned Collector to record evidence and decide the following points:

1. Whether the sale held on 19-5-1965 is vitiated as the provisions of the Income Tax Act of 1961 were not complied with and whether the sale was without jurisdiction on the same ground?
2. Whether any illegality or irregularity had been committed in publishing and conducting the sale?
3. Whether the sale proceedings had been conducted collusively as alleged by the Appellants; if so, its effect?

15. The order was passed by the learned Addl. Commissioner, opposite party No. 1, on 19-1-1968 and it is against this order that the present writ petition is directed. It is contended on behalf of the Petitioners that the learned Addl. Commissioner had no jurisdiction to entertain the appeal because the impugned sale was conducted under the procedure prescribed in Section 46(2) of the Indian Income Tax Act, 1922. It is also submitted that the learned Addl. Commissioner was wrong in holding that the Income Tax Department was not given an opportunity to produce evidence in support of their case; the real fact, it is stated, is that the Income Tax Department did not produce any evidence in spite of an opportunity being given to them. On these grounds it is prayed that a writ of certiorari be issued quashing the order of the Addl. Commissioner dated 19-1-1968.

16. We fail to see how the learned Additional Commissioner could make an order of remand, in the present case, directing the Collector to record evidence and decide the specific points noted above. In fact, the order of the learned Collector, Sri B.D. Seth dated 2-12-1968 is a well-reasoned order in which he has given findings on all the points mentioned in the remand order of the Commissioner. The learned Collector has pointed out that the new Income Tax Act, 1961, was not in force when the Income Tax Officer had issued the certificate for recovery of the tax demand u/s 46(2) of the Indian Income Tax Act of 1922. He also pointed out that the attachment of the houses had taken place not only for the recovery of the income tax dues itself but also for recovery of sales tax dues by the Assessee and that, according to the direction of the High Court in writ No. 1330 of 1962, the procedure to be adopted was that prescribed in the UP Land Revenue Act read with the provisions of the Code of Civil Procedure. The learned Collector pointed out that the order of the High Court was pronounced after the Income Tax Act, 1961 had come into force. Furthermore, the learned Collector referred to Section 297(j) of the Income Tax Act of 1961, according to which proceedings for recovery, of Income Tax already initiated under the Act of 1922 were to be continued under that Act. It appears that the learned Additional Commissioner did not at all peruse the order of the learned Collector when he directed the latter to consider whether the auction sale held on 19-5-1965 was

vitiated on the ground that the provisions of the Income Tax Act, 1961 had not been complied with.

17. Similarly, the learned Collector, Sri B.D. Seth, has given cogent reasons for the view that there was no fraud or collusion nor any illegality or irregularity in the matter of the publication and conducting of the sale. The learned Collector discussed the evidence pro and con bearing on these questions and came to the conclusion that he did.

18. Factually, therefore, there was no basis for the order of remand passed by the learned Additional Commissioner. Evidently, the learned Additional Commissioner committed a grave error in the exercise of his jurisdiction and on this ground alone his order is liable to be quashed.

19. I am also of the view that the appeal to the learned Additional Commissioner against the order of the Collector dated 2-12-1966 was incompetent.

20. As already stated, the certificate dated 13-3-1956 was sent by the Income Tax Officer to the Collector for recovery of Rs. 1,56, 110/3/, u/s 46(2) of the Income Tax Act, 1922. Section 46(2) of the Act runs as follows:

(2) 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 amounts specified therein as if it were an arrears of land revenue.

Provided that without prejudice to any other powers of the Collector in this behalf, he shall for the purpose of recovering the said amount have powers which under the CPC a Civil Court has for the purpose of the recovery of an amount due under a decree.

Sub-section (2) of Section 46, read with the proviso thereto, quoted above, vests the Collector with the power to recover arrears of income tax mentioned in the certificate issued by the Income Tax Officer as though, it were an arrear of land revenue. The Collector may also exercise the powers of a civil court "for the purpose of recovering the said amount". The scope of the powers of the Collector, as prescribed in Section 46(2) and the proviso thereto, has been laid down by the Supreme Court in the case of Purshottam Govindji Halai Vs. Shree B.M. Desai, Additional Collector of Bombay and Others, . In that case, Das, C.J., delivering the leading judgment of the court, observed that, on a proper reading, Sub-section (2) of Section 46 "does not prescribe two alternative modes of procedure". "All that the sub-section directs the Collector to do" his Lordship continued, "is to proceed to recover the certified amount as if it were an arrear of land revenue; that is to say, he has to adopt the procedure prescribed by the appropriate law of his State for the recovery of land revenue and that in thus proceeding he is, under the proviso, to have all the powers of a Civil Court as under the Code." His Lordship further remarked that the proviso "does not indicate a different and alternative mode of recovery of the certified amount of

tax, but only confers additional powers on the Collector for the better and more effective application of the only mode of recovery authorised by the body of Sub-section (2) of Section 46".

21. Having regard to the interpretation made by the Supreme Court of the terms of Section 46(2) and the proviso thereto, it would appear that the Collector while executing a certificate forwarded to him by the Income Tax Officer does not act as full fledged Civil Court vested with all the powers conferred by the CPC on such court for execution of a decree for money, nor is he competent to take any independent proceeding under the Code of Civil Procedure. The Collector can only proceed under the appropriate State Law for recovery of arrears of land revenue and in such proceeding he may exercise all the powers a Civil court has under the Code. In other words, the Collector may invoke the powers conferred on a civil court for execution of a decree for money, as an auxiliary measure for the better and more effective recovery of the certified amount, if the appropriate State law for recovery of arrears of land revenue is found wanting in any respect.

22. Before the introduction of the UP ZA and LR Act, 1950 (UP Act No. I of 1951) the procedure for recovery of land revenue was governed by the provisions of Ch. VIII of the UP Land Revenue Act (UP Act No. 111 of 1901). By the UP ZA and LR Act (UP Act No. I of 1951) Ch. VIII of the UP Land Revenue Act, inter alia, was deleted and the procedure for recovery of arrears of land revenue was prescribed in Ch. X, Section 279 et seq. of UP ZA and LR Act (No. I of 1951). Section 279 of the Act runs as follows:

279. The procedure for recovery of an arrear of land revenue--(1) An arrear of land revenue may be recovered by any one or more of the following processes:

- (a) by serving a writ of demand or a citation to appear on any defaulter;
- (b) by arrest and detention of his person,
- (c) by attachment and sale of his movable property including produce.
- (d) by attachment of the holding in respect of which the arrear is due.
- (e) by lease or sale of the holding in respect of which the arrear is due.
- (f) by attachment and sale of other immovable property of the defaulter, and
- (g) by appointing a receiver of any property movable or immovable of the defaulter.

The mode of execution prescribed in this section corresponds more or less, to the modes laid down in Order 21 Rule 11(2)(j) of the Code of Civil Procedure.

23. Rule 285-I of the UPZA and LR Rules, hereinafter referred to as the Rules, provides as follows:

- (i) at any time within thirty days from the date of the sale, application may be made to the Commissioner to set aside the sale on the ground of some material

irregularity or mistake in publishing or conducting it, but no sale shall be set aside on such ground unless the Applicant proves to the satisfaction of the Commissioner that he has sustained substantial injury by reason of such irregularity or mistake....

(iii) The order of the Commissioner passed under this rule shall be final.

Sub-rule (i) above, it would appear, corresponds, substantially with the provisions of Order 21 Rule 90, Code of Civil Procedure.

24. It would be noticed that the power to set aside a sale on the ground of some material irregularity or mistake in publishing or conducting the sale has been given only to the Commissioner and not to the Collector under the aforesaid rule. If the Union of India and Sri Bhatia had been substantially prejudiced by any material irregularity or alleged collusion in publishing and conducting the sale, it was incumbent on them to file an application Under Rule 285-I of the Rules to the Commissioner and not to the Collector, within thirty days from the date of sale. The application to the Collector was, therefore, incompetent. As already noted, the Collector, while exercising powers u/s 46(2) of the Income Tax Act, 1922, has to proceed under the appropriate State law for recovery of an arrear of land revenue; he cannot act as a full-fledged civil court vested with the powers conferred by Order 21 of the CPC for execution of a decree for money. The Collector, therefore, could not entertain the petition of the Union of India and Sri Bhatia framed Under Order 21 Rule 90, Code of Civil Procedure. In the case of Hindustan Commercial Bank, Ltd. Varanasi v. The Collector 1964 ALJ 505 a Bench of this Court, of which one of us was a member, held that it was not open to the Collector while exercising powers u/s 46(2), to invoke the provisions of Section 151 of the Code of Civil Procedure. In a more recent case, Smt. Kalawati and Another Vs. Union of India (UOI) and Others, , a learned Single Judge of this Court held that the attachment made by the Collector in exercise of his power u/s 279(a) of the UP ZA and LR Act does not become an attachment Under Order 21 Rule 54 of the CPC and hence, when a Collector attaches the property of a third party other than the Assessee, who owes the tax liability, it is open to the third party aggrieved to apply to the Collector to vacate the attachment but such an application would not be deemed to be a claim preferred or objection raised to the attachment within the meaning of Order 21, Rule 58 of the Code of Civil Procedure. I respectfully agree with the view expressed in the above cases.

25. In the present case, as already stated, the Collector could not take upon himself the powers of a civil court and entertain the petition Under Order 21 Rule 90 CPC filed by the Union of India and Sri Bhatia. The power could be only exercised by the Commissioner as laid down in the Rules. The application to the Collector being incompetent, his order thereon must be regarded as non est in the eye of law and the appeal to the Commissioner against that order was equally so. Hence, in disposing of the appeal, the Addl. Commissioner exercised a jurisdiction not vested in him by law.

26. It appears that the jurisdiction of the Commissioner to entertain and hear the appeal was challenged before the learned Addl. Commissioner but he observed that Under para 86 of Schedule II of the Income Tax Act, 1961 appeals from orders passed by the Tax Recovery Officer, who is a Collector or an Addl. Collector, shall lie to the revenue authority to which appeals ordinarily lie against the orders of a Collector under the law relating to land revenue of the State concerned. The learned Addl. Commissioner pointed out that in this case dues were being realised as arrears of land revenue Under Ch. VIII of the Land Revenue Act and u/s 210 of that Act orders of the Collector are appealable to the Commissioner. Hence, the appeal from the order of the Collector dated 2-12-1966 lay before the Commissioner.

27. It is difficult to understand how the learned Addl. Commissioner relied on the provisions of Schedule II of the Income Tax Act 1961 without first holding that they were applicable to the present proceedings in recovery. The learned Collector has correctly pointed out that u/s 297(j) of the Income Tax Act, 1961 the present proceeding for recovery which was started under the provisions of Section 46(2) of the Indian Income Tax Act, 1922, shall be continued under that Act. The provisions of Schedule H of the Income Tax Act, 1961 cannot be pressed into service. Then again, the learned Addl. Commissioner was wrong in holding that in this case the Collector had to proceed to recover the arrears of Income Tax and Sales Tax as arrears of land revenue Under Ch. VIII of the Land Revenue Act. It has been pointed out above that by the ZA and LR Act (Act No. I of 1951) Ch. VIII of the UP Land Revenue Act (Act No. III of 1901) was repealed. When the certificate was issued by the Income Tax Officer to the Collector in March, 1956, the appropriate State law for recovery of arrears of land revenue was the law laid down in Ch. X, Section 279 of UP Act No. I of 1951.

28. In all the circumstances of the case, the Commissioner was incompetent to entertain the appeal from the order of the learned Collector Sri B.D. Seth, dated 2-12-1966. The Petitioners are, therefore, entitled to a writ of certiorari. The order passed by the Addl. Commissioner dated 19-1-1968 is quashed. The Petitioners will be entitled to their costs of this writ petition.

By The Court

29. For the reasons contained in our respective judgments the writ petition is allowed. The order dated 19-1-1968, made by the Addl. Commissioner is quashed. The Petitioners are entitled to their costs.