
(1962) 07 CAL CK 0011
In the Calcutta High Court
Case No : Suit No. 1615 of 1960

Lalta Prosad Goenka

APPELLANT

Vs

Biratnagore Jute Mills Ltd.

RESPONDENT

Date of Decision : 20-07-1962

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 52, Order 21 Rule 53, 47
Constitution of India, 1950 — Article 226
Income Tax Act, 1961 — Section 17, 18, 18(3B), 18(3B), 18(7)

Citation : 67 CWN 266

Hon'ble Judges : Ray, J

Bench : Single Bench

Advocate : A.N. Sen, for the Appellant; E.R. Meyer, Balai Pal, S. Chaudhury and D. Pal, for the Respondent

Judgement

Ray, J.—The applicant Messrs. R.N. Jhun Jhunwalla & Co. Private Ltd., took out the summons dated 19 December 1961 for orders to the effect that the applicant be given leave to deduct from the sum of Rs. 50,000/- and/or such sum as the petitioner should become liable to pay under the decrees hereinafter mentioned after deducting all income tax and super tax, payable by Biratnagore Jute Mills Ltd., and in the alternative that suitable provisions be made for deduction of income tax from the decretal sum payable to Biratnagore Jute Mills Ltd., and payment thereof to the appropriate authorities and also for the issue of necessary income tax certificates to the petitioner, evidencing such payment and for other incidental reliefs. The applicant was required to pay a sum of Rs. 3,40,000/- to Biratnagore Jute Mills Ltd., by several installments under the decree dated September 6, 1960 in Suit No. 425 of 1955. By another decree dated September 6, 1960 passed in Suit No. 1670 of 1955 the applicant was required to pay a sum of Rs. 24,000 to the said Biratnagore Jute Mills Ltd. On or about September 30, 1961 a notice dated September 29, 1961 was served in the Suit. No. 1615 of 1960 whereby the applicant was prohibited and restrained until further orders of this Court from satisfying the right, title and interest of

Biratnagore Jute Mills Ltd., under the decrees made in Suit No. 425 of 1955 and Suit No. 1670 of 1955 except by payment of what is payable thereunder into this Court to the credit of this suit. It should be stated here that by tabular statement dated September 29, 1961 affirmed by Lalta Prosad Goenka in this Suit No. 1615 of 1960, the plaintiff Lalta Prosad Goenka took steps in execution of the decree dated September 13, 1961 whereby the plaintiff became decree-holder against Biratnagore Jute Mills Ltd., for the sum of Rs. 6,97,766/10/6 with interest on the principal sum of Rs. 6,00,000/- at the rate of six per cent per annum from September 14, 1961 until realisation. In the tabular statement the plaintiff Lalta Prosad Goenka prayed that a portion of the decretal amount in this suit be realised by attachment of the right, title and interest in the decrees dated September 6, 1960 in Suits Nos. 425 of 1955 and 1670 of 1955 under the provisions of Order 21, Rule 53 of the Code.

2. On these facts the applicant R.N. Jhun Jhunwalla & Co. Ltd., the judgment debtor in the two suits of 1955 to which I have referred, took out the present summons for orders indicated above. The gist of the application is that the applicant the judgment-debtor in the two suits has to pay moneys under the decree to Biratnagore Jute Mills Ltd., and inasmuch as Biratnagore Jute Mills is a foreign company income tax is leviable on the decretal amounts and therefore the judgment-debtor seeks to deduct the income tax payable in respect of the decretal amounts.

3. The summons which was taken out on December 19, 1961 stood adjourned from time to time. On March 15, 1962 it was ordered that notice of the application was to be given to the Biratnagar Jute Mills Ltd. and the Income tax Department. Pursuant to that notice the Income tax Department appeared. Biratnagar Jute Mills Ltd. did not appear.

4. Counsel on behalf of Lalta Prosad Goenka contended first that the Income tax Department was not entitled to be heard on this application as it was not a party to the application and that the Court had not issued any notice on the Income tax Department requiring it to be present. Reference was made to Ch. VI of the Rules of the High Court (Original Side) and it was contended that a notice of the summons was to be served on the Income tax Department before the Income tax Department could be heard. Further it was contended that if the Income tax Department was not a party to the summons the department could later on say that it was not bound by the orders. I am unable to accept the contention. The order to notify the Income tax Department was made in the presence of Lalta Prosad Goenka. No objection was taken at that time. Notice of the application was served on the Income tax Department. Under the provisions of Ch. 6 r. 3 it is stated that the mode of proceeding in Chambers on any application, which may be made ex parte, shall, except where otherwise ordered or prescribed, be by petition and where notice is required to be given, shall, unless otherwise ordered or prescribed, be by summons. Counsel for the Revenue Authorities in my opinion rightly contended that there was ample power of the Court to direct

service of notice by solicitor's letter.

5. The property in the present case is the decretal amount. The plaintiff attached the decretal amounts. The amounts have been brought into the Court. Counsel for Lalta Prosad Goenka contended that unless the Income tax Department attached the money, it could not contend that it was entitled to any claim for priority or any order in that behalf. The provisions of O.21, r. 52 are that where the property is in custody of a Court any question of title or priority arising between the decree-holder and any other person, not being the judgment-debtor claiming to be interested in such property by virtue of any assignment, attachment or otherwise shall be determined by such Court. Counsel for the Revenue in my view rightly contended that the words "any other person" and "otherwise" in the provisions contained in O.21, r. 52 are of the widest import conferring power on the Court to hear the Income tax Department in the present case and conferring similar right on the Revenue to lay its claim before the Court and to ask for determination of the claim of the Revenue in the money which is in the custody of the Court. Reliance was placed on a Bench decision in Builders Supply Corpn. v. Union of India & Ors., (1) ITR 797 on the observation at p. 801 that the Court in whose custody the amount was, is by law required to determine the question of priority raised before him. I am, therefore, of opinion that the Revenue is entitled to be heard and to ask for determination of its interest in the money. Such interest is fully covered by the word "otherwise" in r. 52 to which I have already referred.

6. It is now necessary to refer to the provisions of the income tax Act on which reliance was placed by the applicant to found this application. The provisions are to be found in s. 18(3B), (6) and (7) of the income tax Act. The provisions are set out hereunder :

18 (3B) : Any person responsible for paying to a person not resident in the territories any interest not being "interest on securities" or any other sum chargeable under the provisions of this Act shall, at the time of payment, unless he is himself liable to pay any income tax and super tax thereon as an agent deduct income tax at the maximum rate and super tax at the rate applicable to a company or in accordance with the provisions of sub-cl. (b) of sub-sec. (1) of s. 17, as the case may be:

Provided that where the person not resident is not a company the proviso to sub-sec. (2B) shall apply to the deduction of income tax and super tax under this subsection as it applies to the deduction of income tax and super tax under sub-sec. (2B).

Provided further that nothing in this section shall apply to any payment made in the course of transactions in respect of which a person responsible for the payment is deemed under the first proviso to s. 43 not to be an agent of the payee. (6) All sums deducted in accordance with the provisions of this section shall be paid within the prescribed time by the person making the deduction to

the credit of the Central Government or as the (Central Board of Revenue) directs. (7) If any such person does not deduct (or after deducting fails to pay) the tax as required by (or under) this section, he, and in cases specified in (sub-sec. 3D) the company of which he is the principal officer, shall without prejudice to any other consequences which he or it may incur, be deemed to be an assessee in default in respect of the tax:

Provided that the Income tax Officer shall not make a direction under sub-sec. (1) of sec. 46 for the recovery of any penalty from such person unless satisfied that such person has willfully failed to deduct and pay the tax.

7. Counsel for the plaintiff Lalta Prosad Goenka contended that the money was not paid to Biratnagar Jute Mills Ltd. and money was paid to the credit of the suit and it was not yet paid to Lalta Prosad Goenka and therefore, the provisions of s. 18 to which I have referred do not apply. The applicant is to pay moneys under the decree to Biratnagar Jute Mills Ltd. The plaintiff Lalta Prosad Goenka is attaching the moneys under that decree. In my opinion there is nexus between Biratnagar Jute Mills Ltd. to whom the money is due and payable and Lalta Prosad Goenka who is seeking to attach these moneys at the time of payment and R.N. Jhun Jhunwalla who is paying the money to Biratnagar Jute Mills. Under the aforesaid provisions of Income tax Act any person responsible for paying to a person not resident in the territories any sum chargeable under the provisions of the Act shall at the time of payment unless he is himself liable to pay any income tax or super tax as an agent, deduct income tax at the maximum rate and super tax at the rate applicable to a company. R.N. Jhun Jhunwalla is not an agent of Biratnagar, nor is R.N. Jhun Jhunwalla liable to pay income tax as an agent of Biratnagar Jute Mills. The decretal amounts attracted the provisions of Income tax Act. The sole test is whether Biratnagar Jute Mills is liable to be brought into computation. As to what the amount eventually will be assessed is in my opinion irrelevant.

8. In the decision in P.C. Ray and Co. (India) Private Ltd. Vs. A.C. Mukherjee, Income Tax Officer and Another, , the appellant company which chartered a ship from foreign company under a charter party had to pay an agreed hire for every 30 days, which in accordance with a subsequent variation was payable in cash in London or Hong Kong. Cl. 14 of the Charter Party provided that the charters or their agents were to advance to the Master if required necessary funds for ordinary disbursements for the vessel's account at any port charging interest at 6 per cent per annum, such advances to be deducted from hire. The appellant company made disbursements at Calcutta. Under the provisions of that el. 14 the appellant company invariably and in each month remitted to the owners the entire balance of the hire after making deduction of only the actual amount paid by it for the disbursements. The Income tax Officer took the view that the amount of the disbursements constituted payment in India to a non-resident for a chargeable sum to which s. 18 (3B) of the Income tax Act applied and, as the appellant had not deducted and paid tax in accordance with that section

demanded payment of such tax from the foreign company under s. 18(7). The appellant paid the tax and then applied under art. 226 of the Constitution for quashing the order demanding payment. It was held, as will appear at p. 328 of the report, that if the amount payable to a non-resident appeared to be, say, income from property or profits and gains of business, profession or vocation or income from other sources it would come within the purview of the section. In the present case the decretal amounts are assessable to income tax and the provisions of s. 18 are attracted.

9. Counsel for the Revenue relied on the decision in *Agarwal Chamber of Commerce Ltd. v. Ganapat Rai Hiralal*, (3) reported in 331. T.R. 245 in support of the proposition that persons who are bound under the Indian Income tax Act to make deduction of Income tax at the time of making payment of any income, profits or gains are not concerned with the ultimate result of the assessment of the person to whom the payment is made. Counsel for the plaintiff contended that in the Supreme Court decision there was competition between persons as to whether a business was carried on behalf of a foreigner and secondly that the Income tax Department attached the money. On these grounds he sought to distinguish the decision as having no application. I am unable to accept the distinction or the grounds thereof. As I have already indicated an attachment is of no relevance in determination of priority when the money is in the custody of Court, It is the custody of the Court which is required by law to determine this question. If the Income tax authorities had attached the money, the question in the present case would still be the same.

10. Counsel for the Revenue submitted that the Government was not in the present case attaching but was asking for priority and the revenue Authority came pursuant to the notice by the custody Court. Under the provisions of O. 21, rr. 52 and 53 along with provisions of s. 47 of the Code I am of opinion that the Revenue is entitled to come and agitate its question of priority.

11. Counsel for the Revenue relied on the recent decision in *Collector of Tiruchirapalli Vs. Trinity Bank Ltd., Trichirapalli and Another*, It is a Full Bench decision of the Madras High Court. A suit was instituted by the mortgagee against the mortgagor, and the mortgagee obtained a preliminary decree and on his application the Court appointed a Receiver to collect the rents and profits from the mortgaged property. The Collector to whom a certificate of arrears was forwarded in regard to income tax assessed on and due from the mortgagor, applied to the Court for payment of the arrears out of the amount collected by the Receiver and deposited to the credit of the suit. The assignee of the decree opposed the Collector's application. It was held that the decree-holder had no preferential right over the amounts collected by the Receiver and the Collector was entitled to be paid arrears of tax out of the amounts collected by the Receiver. This decision was distinguished by counsel for the plaintiff on the ground that in the Madras case there was an application by the Revenue and the question there was whether the money was brought for both the parties. The

observations appearing at pp. 194-195 of the report are to my mind apposite in the present case:

In both these cases the claim of the Government is one for recovery of the amount of income tax levied and due and payable by the assessee who is the judgment-debtor in civil actions instituted against him by his other creditors. Such tax liability is undoubtedly a debt due to the Government by the subject on whom the tax has been imposed, and such a debt often goes by the name of a "Crown debt". A debt due to the sovereign Government of the land carries with it a paramount preferential right to recover and realise the debt from the person liable to pay, the claim of the other creditors being postponed till after the sovereign authority obtains payment in full. It is now settled law that the Crown or the sovereign authority over the territory has priority, over creditors of equal degree, to payment out of the assets of a debtor which are distributed by a Receiver as an administrator.

12. At this stage I may also refer to the observations of the Supreme Court in the decision in *Agarwal Chamber of Commerce Ltd.* (3) 33 ITR 245, 252 that the principle of taxing statute is that the profits are taxable where they are found. In the present case the moneys are in the hands of R.N. Jhun Jhunwalla, and they are payable to Biratnagar Jute Mills Ltd. Those persons who are bound under the Act to make deduction at the time of payment of any income, profits or gains are not concerned with the ultimate result of the assessment.

13. I am, therefore, of opinion that the applicant is entitled to make an application for directions with regard to payment of income tax. The revenue has now appeared and I am of opinion that the income tax should be deducted in accordance with the provisions of the Income tax Act. There was some controversy as to whether the prayers in the summons were in proper form. It is well settled that prayers can be moulded in accordance with the facts and circumstances of the case. The decision reported in (5) 32 I.A. 123 is an authority for that proposition. I therefore make an order in terms of cl. (b) of the summons that the applicant will deduct income tax from the decretal sum in accordance with the provisions of the Income tax Act and pay the sum to the appropriate authority who will issue the necessary income tax certificate to the petitioner evidencing such payment. I also make an order in terms of prayer (e) that Lalta Prosad Goenka, the plaintiff is restrained from withdrawing any further amount now lying in custody of the Court. The plaintiff Lalta Prosad Goenka will pay costs of this application to the applicant and to the Income tax Department. Let the operation of this order be stayed for a fortnight.