

(1984) 06 AP CK 0001

In the Andhra Pradesh High Court

Case No : Writ Petition No. 6713 of 1983

Mohd. Ibrahim Khan

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 19-06-1984

Acts Referred:

Constitution of India, 1950 — Article 226

Income Tax Act, 1961 — Rule 16(2), 146, 230A, 281

Citation : (1985) 155 ITR 10

Hon'ble Judges : Y.V. Anjaneyulu, J;B.P. Jeevan Reddy, J

Bench : Division Bench

Advocate : M.M. Firdos, for the Appellant; M. Suryanarayana Murthy, for the Respondent

Judgement

Jeevan Reddy, J.—This is a petition for the issuance of an appropriate writ, order or direction, directing the 3rd respondent, i.e., ITO, A-Ward, Special Investigation Circle-II, Hyderguda, Hyderabad, to issue an Income Tax clearance certificate under s. 230A(1) of the I.T. Act, 1961, to enable the petitioner to execute a registered lease deed in respect of a newly constructed premises at Punjagutta Cross-roads, Hyderabad. According to the petitioner, best judgment assessment was made against him for the assessment years 1978-79, 1979-80 and 1980-81. The total amount of tax due was determined at Rs. 37,38,450. Appeals have been preferred against the orders of assessment, which are now pending. The petitioner constructed a building with a cellar at the Punjagutta Cross-roads, Hyderabad. When it was nearing completion, he entered into an agreement with one Damodar Ramchandra Shanbhag, for leasing out the said premises for a period of ten years on a monthly rent of Rs. 7,625 and obtained an advance of Rs. 50,000. Since the lease deed has to be registered according to law and because an Income Tax clearance certificate is a prerequisite for such registration, he applied to the 3rd respondent for such a certificate. He sought to convince the 3rd respondent about the reasonableness of the rent and also wrote and also wrote a letter on April 23, 1983, undertaking to remit the entire

monthly rent towards the tax arrears. He deposited the sum of Rs. 50,000 received from the tenants as advance towards the said arrears. The petitioner says that the 3rd respondent directed him to obtain a "No Objection" endorsement from the 4th respondent, i.e., Tax Recovery Officer. When he applied to the Tax Recovery Officer for such an endorsement, the latter opined that he does not come into the picture, nor is there any occasion for granting a no-objection endorsement under rule 16(2) of the Second Schedule to the Act. In such a situation, the petitioner says, he approached the Commissioner of Income Tax, Survey & Investigation, Hyderabad (2nd respondent), requesting him to direct the 3rd respondent to issue the Income Tax clearance certificate. He also filed a copy of the proposed lease deed, and also an undertaking from the proposed tenant, undertaking to vacate the premises within a period of six months from the date of receipt of a notice to that effect from the ITO, or at the end of a period of five years, whichever is later. The petitioner complains that, in spite of all this, he was served with a letter from the 3rd respondent refusing the certificate. The said refusal is impugned as arbitrary, illegal and without jurisdiction, and as being contrary to the provisions of the I.T. Act.

2. A counter-affidavit has been filed by the ITO, on behalf of the respondents, stating that a search was conducted on the business and residential premises of the assessee on August 2, 1980, which revealed that the petitioner had earned substantial income in a number of land deals and that, in spite of service of several notices, he did not co-operate with the authorities in the matter of assessment of his income. In the circumstances, best judgment assessments were made for the aforesaid three assessment years. The petitioner filed an application under s. 146 of the Act for reopening the assessment, which was rejected by the ITO on June 26, 1982. The said order has become final. The appeals preferred by the petitioner against the best judgment assessments, are, however, pending. It is further submitted that a certificate under s. 222 of the Act was issued to the Tax Recovery Officer to attach the immovable properties of the petitioner, including the premises concerned herein, and they were attached on October 1, 1982. Further proceedings for sale could not, however, be taken because of the orders of the Commissioner of Income Tax (Investigation) not to bring the properties to sale till the disposal of the appeals preferred by the petitioner. While admitting that the petitioner has deposited a sum of Rs. 50,000 said to have been received by him by way of advance from the tenant, it is submitted that the agreement for lease entered into by the petitioner subsequent to the attachment, is void according to law and, hence, the Commissioner had directed that no clearance certificate can be issued to the petitioner. With respect to the petitioner's application under rule 16(2) of the Second Schedule, while denying that he ever directed the petitioner as alleged, it is submitted that such an order can be made only where the Tax Recovery Officer is satisfied that the defaulter is capable of raising funds for payment of the tax outstanding. It is also submitted that the amount of rent to be received by the petitioner cannot even meet 25% of the interest payable on the outstanding tax. It is further submitted

that assessments for the years 1972-73 to 1977-78 as also for 1981-82 are still pending, which are also likely to result in huge arrears of tax. The filing of an undertaking by the tenant is admitted, but it is submitted that, inasmuch as the petitioner has not made satisfactory provision for payment of all existing liabilities as required by s. 230A(1)(a) of the Act, he is not competent to lease or otherwise deal with the property, and no clearance certificate can be issued to him until he makes such satisfactory arrangement.

3. Mr. M. M. Firdos, the learned counsel for the petitioner, submitted, firstly, that the lease not being a transfer of property within the meaning of rule 16(2) of the Second Schedule to the Act, the prohibition contained in the said rule does not apply and, hence, the authorities were in error in not issuing a certificate under s. 230A. He submitted further that the impugned order is totally devoid of reasons and is, therefore, violative of the principles of natural justice. Counsel brought to our notice that, pending the appeals, the petitioner had applied for stay of recovery of tax, which was refused ; that, against the said refusal, he approached this court by way of a writ petition and that the matter has been remitted back to the ITO for reconsideration, where it is now pending.

4. On the other hand, Sri Suryanarayana Murthy, the learned standing counsel for the Revenue, contended that the lease agreement entered into and the lease deed proposed to be executed subsequent to the attachment, are void under rule 16(2) of the Second Schedule and that, therefore, the ITO was justified in refusing to issue the Income Tax clearance certificate for effecting such a transfer. He submitted that, even though the order communicated by the ITO refusing the certificate does not give any reasons, the facts stated by the petitioner himself and those evident from the record in this writ petition, clearly disentitle the petitioner for a clearance certificate and that, in such a case, it would not be a proper exercise of the discretion of this court under art. 226 of the Constitution to remit the matter back for reconsideration. Of course, he disputed the petitioner's contention that the lease is not a form of transfer of property.

5. The order communicated by the ITO to the petitioner is a one-line order. It refers to the letter filed by the petitioner before the Commissioner of Income Tax on May 20, 1983, and then says :

"I am directed to intimate that in the circumstances of the case, the certificate u/s 230A applied for by you, cannot be issued."

6. It is true that the letter refusing the certificate does not give any reasons for such refusal; it is equally true that the said letter pertains only to the application filed by the petitioner before the Commissioner of Income Tax and the application for the Income Tax clearance certificate filed by the petitioner before the 3rd respondent does not appear to have been disposed of under the impugned order. In the ordinary course, we would have remitted the matter back and/or directed the ITO to dispose of the petitioner's application according to

law, and under a speaking order ; but, for the reasons indicated hereinafter, we do not think that such a course is called for in the circumstances. It is now held by the Supreme Court in *K.L. Tripathi Vs. State Bank of India and Others*, , that "the rules of natural justice are flexible and cannot be put on any rigid formula. In order to sustain a complaint of violation of principles of natural justice on the ground of absence of opportunity of cross-examination, it has to be established that prejudice has been caused to the appellant by the procedure followed." The principle of the said decision is that, unless prejudice is established, any and every violation of the principles of natural justice does not call for the quashing of the order. Indeed, that has been the view right from 1949, when it was said in the case of *Russell v. Duke of Norfolk* [1949] 1 All ER 109 , that the principles of natural justice cannot be put in a strait-jacket and that the application of the said principles depends upon the facts and circumstances of each case. We are not unaware of the reasoning of Lord Reid in *Ridge v. Baldwin* [1964] AC 40 , where the learned judge refused to countenance the argument that, even if principles of natural justice are followed, the result would be the same. We are equally aware of a Bench decision of this court in *Musalappa Reddy v. State of Andhra Pradesh* 1968 (1) An WR 86, echoing the same reasoning. But, the very recent decision of the Supreme Court, referred to above, makes it clear that, since the object of the principles of natural justice is to prevent failure of justice, the court would not interfere unless violation of the principles of natural justice has resulted in the failure of justice, or has resulted in prejudice to a citizen.

7. Another consideration which impels us not to remit the matter to the authorities is that the petitioner is not entitled to an Income Tax clearance certificate on the facts stated in the writ petition itself. The facts and circumstances placed before us - and which are not in dispute - also clearly disentitle the petitioner from such a relief. As we shall point out hereinafter, a direction to the ITO to reconsider the matter would be a futile exercise, and the discretionary jurisdiction of this court under art. 226 of the Constitution would not be exercised to issue such futile orders.

8. Now, to the merits : the building in question was attached by the Tax Recovery Officer on October 1, 1982. The petitioner wants to execute a registered lease deed for a period of ten years in respect of the said building, after attachment. There can be little doubt about the proposition that lease is also a form of transfer of property. Rule 16(2) of the Second Schedule declares any such transfer of attached property to be void. Rule 16 reads as follows :

"16. (1) Where a notice has been served on a defaulter under rule 2, the defaulter or his representative-in-interest shall not be competent to mortgage, charge, lease or otherwise deal with any property belonging to him except with the permission of the Tax Recovery Officer, nor shall any civil court issue any process against such property in execution of a decree for the payment of money.

(2) Where an attachment has been made under this Schedule, any private transfer or delivery of the property attached or of any interest therein and any

payment to the defaulter of any debt, dividend or other moneys contrary to such attachment, shall be void as against all claims enforceable under the attachment."

So long as the attachment subsists, execution of any lease deed is void in law and cannot be recognized. If so, there is no purpose to be served by directing the ITO to consider whether a clearance certificate should be issued to the petitioner in respect of such a transaction. It would be a futile exercise; nor can the ITO be asked to issue a clearance certificate to enable the defaulter-petitioner to enter into, or execute, a deed of lease, which is prohibited by law. It is another matter if the attachment is raised for one or the other reason. In case the attachment is raised, the bar under r. 16(2) disappears. It is not necessary for us in this writ petition to go into the question whether the attachment can be raised only in the circumstances mentioned in r. 12, or whether it is open to the Tax Recovery Officer to raise the attachment in other situations as well. That question does not arise for our consideration herein.

9. Counsel for the petitioner contended that the attachment in this case was effected as far back as October 1, 1982 and that no further proceedings have been taken in that behalf, while, at the same time, the ITO has refused to issue the certificate, thereby disabling the petitioner from leasing out the property. It is contended that the petitioner is losing the lease amount. Firstly, no such allegation is made in the writ petition. Secondly, the steps subsequent to attachment could not be taken by the Tax Recovery Officer because the petitioner himself obtained a stay of sale of the properties from the Commissioner of Income Tax, pending disposal of the appeals before the AAC. Having obtained the stay himself, the petitioner cannot be heard to complain of the delay. It is also not clear from the writ affidavit that the property has not been leased out. Indeed, it appears that the tenant has paid an advance of Rs. 50,000 to the petitioner which he has, in turn, deposited with the Department. Whether the property has actually been leased out or not, and whether the petitioner is suffering from any prejudice or not, is not a matter upon which we are called upon to make any pronouncement. We may also point out that there may be cases where, after attachment, the sale cannot be held for one or the other reason, there may be an objection-petition under r. 11 or there may be other circumstances which do not allow the sale to go through. In appropriate circumstances, it is always open to the Tax Recovery Officer to resort to the mode prescribed in clause (b) of r. 4, viz., appointment of a receiver for management of the defaulter's movable and immovable properties. At the same time, we affirm the principle that recovery proceedings, once begun, must be proceeded with reasonable expedition. Uncalled for or unexplained delay in taking the successive steps is liable to be termed as unreasonable and oppressive and may well call for judicial interference. Such delay is equally not in the interest of the Revenue.

10. It was urged by the learned counsel for the petitioner that, inasmuch as the

petitioner is prepared to make a satisfactory provision for payment of his existing liabilities under the Act, the existence of attachment can not be treated as a bar to the issuing of a certificate under s. 230A. This contention raises a question with respect to the mutual operation and interaction of s. 230A and r. 16(2). Sub-section (1) of s. 230A reads as follows :

"230A. (1) Notwithstanding anything contained in any other law for the time being in force, where any document required to be registered under the provisions of clause (a) to clause (e) of sub-section (1) of section 17 of the Indian Registration Act, 1908 (16 of 1908), purports to transfer, assign, limit, or extinguish the right, title or interest of any person to or in any property valued at more than fifty thousand rupees, no registering officer appointed under that Act shall register any such document, unless the Income Tax Officer certifies that -

(a) such person has either paid or made satisfactory provision for payment of all existing liabilities under this Act, the Excess Profits Tax Act, 1940 (15 of 1940), the Business Profits Tax Act, 1947 (21 of 1947), the Indian Income Tax Act, 1922 (11 of 1922), the Wealth-tax Act, 1957 (27 of 1957), the Expenditure-tax Act, 1957 (29 of 1957), the Gift-tax Act, 1958 (18 of 1958), the Super Profits Tax Act, 1963 (14 of 1963), and the Companies (Profits) Surtax Act, 1964 (7 of 1964); or

(b) the registration of the document will not prejudicially affect the recovery of any existing liability under any of the aforesaid Acts....."

11. It is evident from a reading of sub-s. (1) that the certificate can be issued in three situations, viz., (i) where the applicant has paid all his existing liabilities under the I.T. Act and other Acts specified in clause (a) of of the sub-section; (ii) where the applicant has made satisfactory provision for payment of all such existing liabilities; (iii) where the registration of the document will not prejudicially affect the recovery of any existing liability under any of the Acts mentioned in clause (a). In this case, the petitioner has neither paid the existing liabilities, nor can it be said that the execution of the lease deed will not prejudicially affect the recovery of the existing liability. If tomorrow the property is to be sold, the existence of a tenant with a ten years" lease in his favour would definitely result in lesser bids being received than in case where the property is vacant. The only question is whether the petitioner can say that he will make a satisfactory provision for paying his existing liabilities and that, thereupon, the ITO is bound to issue a certificate to him. We do not think that, where an attachment of the defaulter's property is already effected and is subsisting, the defaulter can be allowed to say that he will make a satisfactory provision for payment of his existing liabilities and that, thereupon, a certificate must be issued to him, to enable him to transfer the attached property. The failure or refusal of the petitioner to discharge his liabilities has itself led to the attachment and the attachment is only a step towards the sale of property for realisation of the arrears. When r. 16(2) prohibits any form of transfer during the subsistence of attachment, it is idle to contend that it is still open to the defaulter to make a

satisfactory provision for payment of the arrears, and then call upon the ITO to issue a certificate. For, even if a certificate is issued to him under s. 230A and the defaulter transfers the property, it would still be void under r. 16(2). As we have indicated hereinbefore, the situation would be different if the attachment is raised, for, once the attachment is raised, the bar under r. 16(2) disappears, and the ITO would be free to consider the question of issuance of a clearance certificate in accordance with law. We may also indicate that sub-r. (1) of r. 16 provides for a qualified bar which operates once a notice under r. 2 has been issued. In this context, s. 281 of the Act has also got to be kept in mind, which too prohibits the transfer of property during the pendency of proceedings under the Act, or after the completion thereof, but before the service of notice under r. 2 of the Second Schedule. It is, however, unnecessary in this case to consider the mutual operation of s. 230A and r. 16(1), or of s. 230A and s. 281. We may also mention that the arrangement to be made by the defaulter should be to the satisfaction of the ITO; there is no evidence before us that the petitioner has ever made any attempt to make such a satisfactory arrangement or that the ITO was satisfied with any such arrangement. For the above reasons, the writ petition fails and is, accordingly, dismissed with costs. Advocate's fee Rs. 250.