(1973) 09 KAR CK 0008

In the Karnataka High Court

Case No : Writ Petition No. 1863 of 1971

P. Balchand APPELLANT

Vs

Tax Recovery Officer, Bangalore RESPONDENT

Date of Decision : 20-09-1973

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 30 Rule 6, Order 30 Rule 7
Income Tax Act, 1961 — Section 2 (7), 222, 222 (1)

Citation : (1974) ILR (Kar) 515 : (1974) 95 ITR 321 : (1974) 1 KarLJ 145

Hon'ble Judges : Mohammad Sharif, J

Bench : Single Bench

Advocate : K. Srinivasan, for the Appellant; S.R. Rajasekhara Murthy, for the Respondent

Judgement

Jagannatha Shetty, J.—This is a petition under article 226 of the Constitution in which the petitioner challenges the recovery proceedings under the Income Tax Act, 1961 (hereinafter called "the Act").

2. The petitioner was a partner of the firm named "Hindustan Jewellery Mart" up to November 13, 1966. For the assessment year 1967-68, the said firm was assessed to Income Tax as an unregistered firm. As per the assessment order dated February 12, 1968, the firm was liable to pay Rs. 32,840. The petitioner unsuccessfully changed the assessment order in appeal before the Appellate Assistant Commissioner and also on further appeal before the Income Tax Appellate Tribunal.

3. After November 13, 1966, the petitioner became a partner of a new firm named Hindusthan Drug House.

4. On March 30, 1969, the Income Tax Officer (Collection), Circle-1, Bangalore-1, issued a certificate u/s 222 of the Act to the Tax Recovery Officer, Bangalore, to recover a sum of Rs. 31,919 together with certain interest. The certificate showed the assesses in default as "Hindustan Jewellery Mart". Pursuant to the

said certificate, the Tax Recovery Officer issued a notice of demand for Rs. 35,710 to the Hindusthan Jewellery Mart. The petitioner received that notice and paid a sum of Rs. 6,336.

5. On March 25, 1971, the Tax Recovery Officer issued a notice of attachment to the firm "Hindustan Drug House", attaching the amount standing to the petitioner''s credit in the books of accounts of the said firm. The petitioner challenges the validity of the said recovery proceedings taken against him.

6. The question that falls for decision is whether the Tax Recovery Officer could recover tax from the petitioner pursuant to the recovery certificate issued against the firm "Hindustan Jewellery Mart".

7. Section 2(7) of the Act defines the word "assesses" as follows :

"assesses'' means a person by whom any tax or any other sum of money is payable under this Act, and includes -

(a) every person in respect of whom any proceeding under this Act has been taken for the assessment of his income or of the income of any other person in respect of which he is assessable, or of the loss sustained by him or by such other person, or of the amount of refund due to him or to such other person;

(b) every person who is deemed to be an assesses under any provision of this Act;

(c) every person who is deemed to be an assesses in default under any provision of this Act."

8. Section 220, in so far as it is relevant, provides :

"220. (1) Any amount, otherwise than by way of advance tax, specified as payable in a notice of demand u/s 156 shall be paid within thirty-five days of the service of the notice at the place and to the person mentioned in the notice :

Provided that, where the Income Tax Officer has any reason to believe that it will be detrimental to revenue if the full period of thirty-five days aforesaid is allowed, he may, with the previous approval of the Inspecting Assistant Commissioner, direct that the sum specified in the notice of demand shall be paid within such period being a period less than the period of thirty-five days aforesaid, as may be specified by him in the notice of demand.....

(3) Without prejudice to the provisions contained in sub-section (2), on an application made by the assesses before the expiry of the due date under sub-section (1), the Income Tax Officer may extend the time for payment or allow payment by installments, subject to such conditions as he may think fit to impose in the circumstances of the case.

(4) If the amount is not paid within the time limited under sub-section (1) or extended under sub-section (3), as the case may be, at the place and to the person mentioned in the said notice, the assesses shall be deemed to be in

default...."

9. Section 222(1) provides :

"When an assesses is in default or is deemed to be in default in making a payment of tax, the Income Tax Officer may forward to the Tax Recovery Officer a certificate under his signature specifying the amount of arrears due from the assesses, and the Tax Recovery Officer, on receipt of such certificate, shall proceed to recover from such assesses the amount specified therein by one or more of the modes mentioned below, in accordance with the rules laid down in the Second Schedule -

(a) attachment and sale of the assesses''s movable property;

(b) attachment and sale of the assesses''s immovable property;

(c) arrest of the assesses and his detention in person;

(d) appointing a receiver for the management of the assesses''s movable and immovable properties."

10. Section 189(3) of the Act provides :

"Every person who was at the time of such discontinuance or dissolution a partner of the firm, and the legal representative of any such person who is deceased, shall be jointly and severally liable for the amount of tax, penalty or other sum payable, and all the provisions of this Act, so far as may be, shall apply to any such assessment or imposition of penalty or other sum."

11. Rules were framed providing the procedure for the recovery of tax. Rule 1 in the Second Schedule of the Act defines certificate" as a certificate received by the Tax Recovery Officer from the Income Tax Officer for the recovery of arrears under the said Schedule. The same rule defines "defaulter" as the assesses mentioned in the certificate. Rule 32 of the Second Schedule provides :

"(1) Where the property to be attached consists of an interest of the defaulter, being a partner, in the partnership property, the Tax Recovery Officer may make an order charging the share of such partner in the partnership property and profits with payment of the amount due under the certificate, and may, by the same or subsequent order, appoint a receiver of the share of such partner in the profits, whether already declared or accruing and of any other money which may become due to him in respect of the partnership, and direct accounts and enquiries and make an order for the sale of such interest or such other order as the circumstances of the case may require.

(2) The other person shall be at liberty at any time to redeem the interest charged or, in the case of a sale being directed, to purchase the same".

12. Section 189(3) of the Act corresponds to section 44(3) of the Income Tax Act, 1922. Section 222 of the Act corresponds to section 46(2) of the Income Tax Act, 1922, the only difference being that the proviso to section 46(2) of the

Indian Income Tax Act, 1922, is omitted in section 222 of the Act. The said proviso read thus :

"Provided that without prejudice to the powers conferred by this sub-section, the Collector shall, for the purpose of recovering the amount specified in the certificate, have also all the powers which -

(a) a Collector has under the Revenue Recovery Act, 1890 (1 of 1890);

(b) a civil court has under the Code of Civil Procedure, 1908 (V of 1908), for the purpose of the recovery of an amount due under a decree."

13. The question, similar to the one before me, came up for consideration before the Supreme Court in Sahu Rajeshwar Nath v. Income Tax Officer. That case arose under the Indian Income Tax Act, 1922. The assesses therein was an unregistered firm of partnership. A certificate of recovery was also issued in the name of the said assesses. On the strength of the certificate, the Tax Recovery Officer proceeded against the partner of the firm to recover the amount of arrears of tax due from the assesses. He challenged the said recovery proceedings, contending that it was not open to the Collector, on receipt or a certificate u/s 46(2), to recover from the partner the amount of tax due by the unregistered partnership. Repelling that contention, the Supreme Court held :

"The proviso to section 46(2) of the Act states that the Collector shall, without prejudice to any other powers in that behalf ''for the purpose of recovering the said amount, have the powers which under the Code of Civil Procedure, 1908 (V of 1908), a civil court has for the purpose of the recovery of an amount due under a decree''. Reference should be made in this context to Order XXI, rule 50, of the Civil Procedure Code, which states :

''50. (1) Where a decree has been passed against a firm, execution may be granted -

(a) against any property of the partnership;

(b) against any person who has appeared in his own name under rule 6 or rule 7 of Order XXX or who has admitted on the pleadings that he is, or who has been adjudged to be, a partner;

(c) against any person who has been individually served as a partner with a summons and has failed to appear :

Provided that nothing in this sub-rule shall be deemed to limit or otherwise affect the provisions of section 247 of the Indian Contract Act, 1872.

(2) Where the decree-holder claims to be entitled to cause the decree to be executed against any person other than such a person as is referred to in sub-rule (1), clause (b) and (c), as being a partner in the firm, he may apply to the court which passed the decree for leave, and where the liability is not disputed, such court may grant such leave, or, where such liability is disputed, may order

that the liability of such person be tried and determined in any manner in which any issue in a suit may be tried and determined.....''

In the present case we see no reason why the Collector should not execute the certificate for demand of Income Tax against the appellant who admits that he was a partner of the unregistered firm for the relevant accounting year. In the return file by the unregistered firm on January 19, 1945, at page 33 of the paper book also the appellant is shown as one of the partners. It is manifest that the provisions of Order XXI, rule 50(2), apply to the present case mutatis mutandis and since the appellant does not dispute that he was a partner of the unregistered firm for the relevant accounting year, the Collector could lawfully proceed to execute the certificate u/s 46(2) of the Act against the appellant and recover the Income Tax arrears from him."

14. The principles of the above decision cannot be extended to a certificate issued u/s 222 of the Act, because rule 50 of Order XXI of the CPC cannot be applied to recovery proceedings under the Act. Mr. Rajasekhara Murthy, relying upon rule 32 of the Rules, urged that it is more comprehensive than rule 50 of Order XXI of the Code of Civil Procedure.

15. I do not think that the contention is correct. The rule provides that where the property to be attached consists of an interest of a defaulter, being a partner, in the partnership property, the Tax Recovery Officer may make an order charging the share of such partner in the partnership property. "Defaulter" is defined under the Rules as the assesses mentioned in the certificate. The assesses mentioned in the certificate is the partnership firm. The rule, therefore, enables the Tax Recovery Officer to recover tax from the defaulter, and the petitioner not being an assesses, cannot be said to be a defaulter within the meaning of the said rule.

16. To overcome the difficulty, Mr. Rajasekhara Murthy urged that the definition of the word "defaulter" should not be extended to that word in rule 32. According to him, the "defaulter" in rule 32 means and includes a partner of a firm, because he is liable to pay the tax assessed on the firm.

17. There cannot be any dispute about the liability of a partner to pay tax assessed on the firm. Under the Act, the mere existence of liability to pay tax is not sufficient to recover the tax. Liability may be there when an assessment order is made. But the should be machinery provision to enforce that liability. That apart, the contention that the word "defaulter" in rule 32 means and includes a partner, would run counter to the entire scheme of the Act.

18. When an order is made under the act and when tax is payable thereunder, the Income Tax Officer shall serve upon the assesses a notice on demand in the prescribed form, specifying the sum so payable (section 156). The said sum specified in the notice shall be paid within thirty-five days of the service of notice [section 220(1)]. If the amount is not paid within the time limited or extended, as the case may be, the assesses shall be deemed to be in default [section

220(4)]. When an assesses is in default or is deemed to be in default in making payment of the tax, the Income Tax Officer may forward to the Tax Recovery Officer a certificate, specifying the amount of arrears due by the assesses, and on receipt of the said certificate the Tax Recovery Officer shall proceed to recover from such assesses the amount specified therein [section 222(1)]. It is thus seen that the assesses, when he fails to pay tax, becomes a defaulter and, against the defaulter only, a tax recovery certificate may be issued. Therefore, rule 32 could be invoked against the partner who has become a defaulter and in whose name the certificate is issued. In this view, it must be held that the proceedings taken against the petitioner to recover the tax specified in the said tax recovery certificate was illegal and unauthorised.

19. In the result, the petition is allowed, and a writ of mandamus be issued to the respondent to forbear from recovering the tax from the petitioner on the basis of the certificate issued by the Income Tax Officer (Collection), Bangalore Circle.

20. The petitioner is entitled to his costs. Advocate''s fee Rs. 100.

21. Petition allowed.

