

(1998) 07 KAR CK 0103
In the Karnataka High Court
Case No : Writ Petition No. 10269 of 1990

Salar Publications Trust

APPELLANT

Vs

Income Tax Officer and Another

RESPONDENT

Date of Decision : 30-07-1998

Acts Referred:

Income Tax Act, 1961 — Section 226 (3), 231, 282

Citation : (1999) 235 ITR 13

Hon'ble Judges : V.K. Singhal, J

Bench : Single Bench

Advocate : K.R. Prasad, for the Appellant; M.V. Sheshachala, for the Respondent

Judgement

V.K. Singhal, J.—This is the second round of litigation in this court. The earlier writ petition W. P. No. 15879 of 1987 disposed of on December 7, 1987, was filed by the petitioner along with some other petitioners. In the said writ petition, annexure-K and L, dated September 28, 1987, were assailed. The petitioner filed objections in pursuance of the notice issued u/s 226(3) of the Income Tax Act. The petitioner disputed the liability to pay any amount to Mr. Askar Mirza. The objections were rejected on the ground that the objections are not accompanied by a statement on oath as required u/s 226(3)(vi) of the Act. Learned counsel for the petitioner filed a copy of the letter dated November 4, 1987, from which it was found that the affidavit sworn by Dr. Mumtaz Ahmed Khan, secretary and trustee of the Salar Publications Trust, was submitted, and the court directed that the objections submitted by the petitioner be considered by passing an order u/s 226(3) of the Act and thereafter the proceedings for recovery could be taken. In pursuance of the said directions, the order dated October 7, 1988, was passed by the Income Tax Officer, Ward-3(1), Bangalore, which is now assailed in this writ petition.

2. The facts of the case are that there was a partnership firm in the name of Salar Publications. Salar Publications had borrowed a sum of Rs. 10,74,000 between February, 1981, and May, 1981, from one Sri Askar Mirza who is an

assessee under the Income Tax Act and there were dues outstanding against him. The Tax Recovery Officer initiated proceedings u/s 226(3) of the Income Tax Act and notice dated May 25, 1982, was issued in the name of the firm, which was served on Sri K. Rehman Khan on May 29, 1982. Besides, Sri K. Rehman Khan, power of attorney holder of Sri Askar Mirza was the manager of the newspaper Southern Speaker India Daily, published by the trust and thus was managing the affairs of the trust. This notice was for a sum of Rs. 5,49,644. Salar Publications consisted of six partners and has admitted Salar Publications Trust as the seventh partner on March 1, 1984. The firm was dissolved within a short span of one month from March 31, 1984, whereby all the remaining six partners ceased to be partners of the firm and all assets and liabilities were taken over by the trust.

3. The Income Tax Officer considered the statement on oath filed by Dr. Mumtaz Ahmed Khan and recorded his statement as well. In the statement dated May 21, 1987, Dr. Mumtaz Ahmed Khan admitted the liability of the trust to the extent of Rs. 10,74,000. Following is the extract of the sworn statement of Dr. Mumtaz Ahmed Khan :

"Q-9. I learnt that Sri Askar Mirza has deposited Rs. 10.74 lakhs with Salar Publications (Firm) Is it true ?

A. Yes, it is true.

Q. 10. That means the firm has to repay the said sum to Sri Askar Mirza. Now as you stated that the firm has been dissolved and the assets and the liabilities have been taken over by the Salar Publications (Trust), the trust is now due to pay an amount of Rs. 10.74 lakhs to the assessee, Sri Askar Mirza ?

A. I agree the trust owes Rs. 10.74 lakhs to Sri Askar Mirza because of the above liability of the firm ."

4. The Income Tax Officer had taken into consideration all the objections raised by the petitioner. Regarding the limitation it was found that since the original notice u/s 226(3) was served on May 29, 1982, the period of limitation stipulated u/s 231 of the Act had not expired and it refers to initiation of the proceedings only which was done in time. Regarding the contents of the affidavit of Dr. Mumtaz Ahmed Khan they were rejected in view of the finding given in the order dated October 7, 1988. Regarding the contention that there was no liability on the trust which stepped into the shoes of the firm, it was found that since Dr. Mumtaz Ahmed Khan had admitted in his sworn statement the said liability, the contention has no force.

5. Before me, learned counsel for the petitioner has again raised the very three questions which were raised before the Income Tax Officer, viz., that the trust is not liable to pay the dues because there was no valid service of notice u/s 226(3) and the proceedings are barred by Section 231 of the Act and that the affidavit has only been rejected, but has not been found false.

6. Re : Service of notice.--It is not disputed that the notice was served on Sri K. Rehman Khan on May 29, 1982, The only contention which has been raised is that Sri Rehman Khan was never a partner of the firm and was only a general power of attorney holder and therefore, it is not a proper service on the partnership firm. According to the respondents, Sri K. Rehman Khan was the editor and was looking after the management and business of the firm. Section 282 of the Income Tax Act refers to the mode of service. The requirement of the section is that notice has to be addressed and served on the person. In the case of a firm, it can be addressed to any member of the firm or to the manager. Whether Sri Rehman Khan was an authorised person or was an unauthorised person has not been disputed by filing any affidavit of Sri K. Rehman Khan or any partner of the firm. It is not disputed that the notice was addressed to the firm. Regarding the service, in the normal course of business, if any person is managing the affairs of the firm, he could be served. In the case of KUNDAN LAL VEDI Vs. COMMISSIONER OF Income Tax., , service of notice on the accountant was considered proper service, Even an unauthorised person could sign the acknowledgment. In ILR 46 Cal 456, it was observed that even an unauthorised person might have been requested by the assessee to sign the acknowledgment on a particular occasion. It may be observed that it was the burden of the assessee to establish that there was no valid service of notice. No steps were taken by the petitioner to establish that Sri K. Rehman Khan was a stranger and was not concerned with the day-to-day business of the firm. The only contention which has been raised is that he was not a partner. Presuming it to be true that he was not a partner, it is not necessary that the service of notice could be on the partner alone in accordance with the provisions of Section 282 of the Act. The burden which was on the assessee had not been discharged and, therefore, the service of notice dated May 29, 1982, is considered to be sufficient service. Even before the Income Tax Officer, no steps were taken to establish that K. Rehman Khan was not an authorised person. This contention, therefore, has no force and is rejected.

7. Regarding the limitation prescribed u/s 231 of the Act, it may be observed that the said section has been omitted by the Direct Tax Laws (Amendment) Act of 1987 with effect from April 1, 1989. This section mentions that no proceedings for the recovery of any sum payable under this Act shall be commenced after the expiry of three years from the last date of the financial year in which the demand is made. Since it is considered that the valid service is effected on May 29, 1982, this contention also has no force.

8. Regarding the contention that the affidavit was not found false in accordance with the provisions of Section 226(3)(vi) of the Act, it may be observed that the said clause provides that "where a person to whom a notice under this sub-section is sent objects to it by a statement on oath that the sum demanded or any part thereof is not due to the assessee or that he does not hold any money for or on account of the assessee, then, nothing contained in this sub-section shall be deemed to require such person to pay any such sum or part thereof, as

the case may be, but if it is discovered that such statement was false in any material particular, such person shall be personally liable to the assessing authority or Tax Recovery Officer to the extent of his own liability to the assessee on the date of the notice or to the extent of the assessee's liability for any sum due under this Act, whichever is less." In this case the affidavit was filed by Dr. Mumtaz Ahmed Khan. Even in the earlier proceedings it was submitted that an affidavit of Dr. Mumtaz Ahmed Khan has been submitted. In this affidavit it is stated that the trust was taken as partner on March 1, 1984, in the firm Salar Publications and took over the business on dissolution on March 31, 1984. He also admitted that Mr. Askar Mirza has lent a sum of Rs. 10.74 lakhs to the firm. The other contention which was raised was that the debt due to Askar Mirza had become time-barred as per the law of limitation in 1984. This was not an averment of fact but it is a question of law and as I have already discussed above, it was admitted in the affidavit that the trust has taken the liability of the firm on dissolution, and the liability was denied only on the ground of limitation. He has referred to the notice dated September 4, 1987, issued to the trust. The said affidavit has no reference to the service of notice on K. Rehman Khan. So notice was issued by the Income Tax Officer, Central Circle V, Bangalore, and he has also not been impleaded as a party. In the statement of Dr. Mumtaz Ahmed Khan dated May 21, 1987, it was admitted that Mr. Askar Mirza has deposited 10.74 lakh rupees with the firm Salar Publications and on the dissolution of the firm, the assets and liabilities have been taken over by Salar Publications Trust and the same sum is due and payable to Mr. Askar Mirza. If there is no specific finding that the affidavit is false that would not affect the validity of the recovery proceedings for the reason that the affidavit has not specifically been rejected. Rejection of an affidavit is a negation of the contents of such affidavit. In other words, the said affidavit is not relied upon and, therefore, on account of its being rejected it was found not to be true and thus false. This word "false" is not to be stressed so that the falsity is to go to the extent of proving a criminal offence. The Income Tax Officer has to conduct an enquiry whether the statement on oath is false or not, more particularly with reference to the amount which is alleged to be due from the garnishee. That factual position is not denied and rather admitted by Dr. Mumtaz Ahmed Khan and thus the principles of natural justice were observed for reaching that objective decision. Once it is found that the amount was due and payable by the garnishee to Mr. Askar Mirza then the other contention that remains is about the limitation in the affidavit, which was purely a question of law and for that it was not necessary to decide that the affidavit was false. As a matter of fact, after admission that the amount of Rs. 10.74 lakhs is payable by the firm and consequently by the trust to Mr. Askar Mirza, nothing remains to be done by the Income Tax Officer. Therefore, this contention has also no force.

9. It was also submitted that the notice dated May 25, 1982, was for a sum of Rs. 5,49,644 and, therefore, the recovery beyond that amount could not be effected. This contention has also no force as valid proceedings were initiated by

issuing notice u/s 226(3) which was served on May 29, 1982. Even if no amount is mentioned in the notice, the notice would not be void. The undisputed fact remains that the trust has taken over the liability of the firm and the amount borrowed, i.e., Rs. 10.74 lakhs, from Mr. Askar Mirza is still stated to be due and payable to him by the trust, according to the statement of Dr. Mumtaz Ahmed Khan. In Behari Lal Ram Charan Kothi Vs. Income Tax Officer, "B" Ward and Another, , the amount payable by the third person was not mentioned in the notice. The Allahabad High Court observed that it is desirable and proper to mention the amount in the notice issued u/s 226(3)(i). But it was observed that in every case where notice does not expressly specify even the sum due it will not be invalid. This judgment of the Allahabad High Court was carried to the apex court as reported in Beharilal Ramcharan Vs. Income Tax Officer, Special Circle "B" Ward, Kanpur and Another, . There also it was held that if the notice does not indicate any specific amount alleged to be due, it was not invalid since no prejudice was caused to the appellant because the appellant had at no time complained about the vagueness of the notice. In the present case also no prejudice is caused to the petitioner as even in the statement of Dr. Mumtaz Ahmed Khan he admits that a sum of Rs. 10.74 lakhs is payable by the trust to Mr. Askar Mirza and as such this contention also has no force.

10. It may also be observed that against the order of the Income Tax Officer, the petitioner has the remedy of revision. The Allahabad High Court in the case of Mansa Devi Mithal Vs. U.P. State Warehousing Corporation and Another, , has observed that if the facts are disputed then interference under article 226 of the Constitution is not proper. The Nagpur Bench of the Bombay High Court in Sunderlal Daga (Decd.) and another (Through Lrs) Vs. Tax Recovery Officer and others, , has held that a writ against dismissal of objection is not maintainable, though in this case the order was passed by the Tax Recovery Officer but even when it is passed by the Income Tax Officer, the remedy of revision lies.

11. In National Glass Silicate and Chemical Works Vs. Deputy Commissioner of Income Tax (Assessment), , a Division Bench of the Allahabad High Court was also of the view that where a factual controversy arises, the remedy of revision u/s 264 of the Act is the more appropriate remedy.

12. It may also be observed that the manner in which the trust was taken as the seventh partner and the firm was dissolved in just a month's time are directly hit by the following observations of the apex court in Sunil Siddharthbhai Vs. Commissioner of Income Tax, Ahmedabad, Gujarat, :

"If the transfer of the personal asset by the assessee to a partnership in which he is or becomes a partner is merely a device or ruse for converting the asset into money which would substantially remain available for his benefit without liability to Income Tax on a capital gain, it will be open to the Income Tax authorities to go behind the transaction and examine whether the transaction of creating the partnership is a genuine or a sham transaction and, even where the partnership is genuine, the transaction of transferring the personal asset to the

partnership firm represents a real attempt to contribute to the share capital of the partnership firm for the purpose of carrying on the partnership business or is nothing but a device or ruse to convert the personal asset into money substantially for the benefit of the assessee while evading tax on a capital gain. The Income Tax Officer will be entitled to consider all the relevant indicia in this regard, whether the partnership is formed between the assessee and his wife and children or substantially limited to them, whether the personal asset is sold by the partnership firm soon after it is transferred by the assessee to it, whether the partnership firm has no substantial or real business or the record shows that there was no real need for the partnership firm for such capital contribution from the assessee. All these and other pertinent considerations may be taken into regard when the Income Tax Officer enters upon a scrutiny of the transaction, for, in the task of determining whether a transaction is a sham or illusory transaction or a device or ruse, he is entitled to penetrate the veil covering it and ascertain the truth."

13. In view of the above, the writ petition has no force and accordingly it is dismissed.

14. A copy of this order be sent to the Commissioner of Income Tax, Bangalore, to call for the file of recovery as to in what manner files have been maintained after 1982 and why no effective steps were taken till 1987. The officials who were at fault should be made responsible by initiating disciplinary action against them. Compliance report be sent within a period of three months from the date of receipt of a copy of this order.