
(2003) 03 CAL CK 0016
In the Calcutta High Court
Case No : FMA No. 168 of 2003

Shaw Wallace and Co. Ltd. and Another APPELLANT
Vs
Union of India (UOI) and Others RESPONDENT

Date of Decision : 11-03-2003

Acts Referred:

Income Tax Act, 1961 — Section 226(3)

Citation : (2003) 181 CTR 290 : (2003) 262 ITR 528 : (2003) 129 TAXMAN 639

Hon'ble Judges : Rajendra Nath Sinha, J; Dilip Kumar Seth, J

Bench : Division Bench

Advocate : Sudipto Sarkar, J.P. Khaitan, S. Mukherjee and Sandeep Chowdhury, for the Appellant; Pradip Ghosh, Biswanath Samaddar and Anil Kumar Gupta, for the Respondent

Judgement

D.K. Seth, J.—A notice u/s 226(3) of the IT Act, 1961 (Act), issued by the Tax Recovery Officer, Delhi (TRO), has since been challenged by the petitioners/appellants herein. Initially this Court remitted the matter to the TRO, which had issued the said notice. The matter was adjudicated upon and the claim of the petitioners was rejected. Against this order the petitioners had moved the present writ petition since dismissed by the learned Single Judge. Out of the said order, the present appeal arises.

2. It is contended on behalf of the appellants that the IT authority in a proceeding against the petitioners had held that the transaction between the petitioners and one Visisth Chay Vyapar Ltd. (hereinafter termed as "VCVL") was an ingenuine transaction and, therefore, disallowed the deduction of interest on borrowed capital and then directed addition of the amount u/s 68A (68) of the IT Act. The CIT(A) had affirmed the order of the AO and had held that the explanation was not satisfactory and despite opportunity being given, the petitioners did not avail of the same to satisfactorily prove their contention. On the other hand, VCVL had obtained a decree, though ex pane, under Chapter 13 of the Original Side Rules from this Court in respect of the self-same transaction

as against the petitioners in December, 1997. Admittedly, till the writ petition was dismissed by the learned Single Judge out of which the present appeal arises, the decree obtained by VCVL was never challenged. On the other hand, the TRO sought to recover the Income Tax dues payable by VCVL through a recovery proceeding. In the process, the notice u/s 226(3) of the Act came to be issued on the petitioners seeking recovery from the decree obtained by VCVL against the petitioners.

3. Mr. Sudipto Sarkar, learned senior counsel for the appellants, raised three points. First that the IT authority at Calcutta had found in a judicial decision that the transaction was ingenuine whereas its counterpart at Delhi, attempted to treat the same as a genuine one by virtue of a decree obtained by VCVL. When the IT Department itself had knowledge about the judicial finding, which was binding on the parties, it was estopped from treating the amount due for the purpose of exercising jurisdiction u/s 226(3) of the Act. The second contention was that u/s 226(3) of the Act, there is a provision in Clause (vi) through which the garnishee can raise an objection and until the objection is discovered to be false, the garnishee is not liable to pay and the TRO cannot treat such garnishee as an assessee-in-default and proceed to recover the amount. The third contention was that the provisions of Section 226(3) of the Act cannot be applied in respect of a liability arising out of a decree until the decree becomes final. Inasmuch as in the present case an appeal having been preferred, the decree has not reached finality and, therefore, provisions of Section 226(3) of the Act cannot be invoked.

4. Mr. Pradip Ghosh, learned senior counsel for the Revenue, on the other hand, contends that no appeal was preferred until the order appealed against was passed. It is only after the dismissal of the writ petition, the appeal seems to have been preferred. Therefore, the question of finality could not be raised before the learned Single Judge. As such, in this appeal the said order cannot be challenged on that ground. He next contends that despite opportunity the petitioners have not produced the materials before the authority concerned. At the same time, the petitioners are estopped from disputing the dues under the decree when it is still claiming the transaction to be a genuine one in the proceedings before the Tribunal at Calcutta. Therefore, they are estopped from challenging the garnishee proceedings either on the ground of finality of the decree or on any other ground. He further contended that the question cannot be raised by the petitioners in this case since they themselves know that the amount is due under the decree since they are claiming the transaction to be a genuine one and did not challenge the decree till then, and as such they cannot take resort to Clause (iv) of Section 226(3) of the Act. Mr. Ghosh had further contended that the petitioners did not come with clean hands. The petitioners had suppressed material facts, as was apparent on the face of the record. Therefore, they were not entitled to invoke writ jurisdiction.

5. In reply on behalf of the appellants, it is contended that there was certain

proceedings under the Companies Act, 1956, for winding up of the petitioner-company for which a scheme was formulated, which was approved but ultimately on being challenged, the said scheme was revoked. This order of revocation was affirmed by the apex Court. Therefore, a subsequent scheme was formulated during the pendency of this proceeding, which was representative in character, and was a proceeding in rem. There was an interim order by which the decree remained in executable. This decree was obtained two days before the proceedings for winding up had commenced. Therefore, it was not necessary for the petitioners to challenge the decree in appeal since it was subject to the scheme. It was further contended on behalf of the appellants that under the scheme, the rate of interest was reduced from 21 per cent (twenty-one per cent) to 12 per cent (twelve per cent) and that some other amounts, which were paid by the petitioner to VCVL, were not adjusted. According to him, this decree was obtained ex pane under Chapter 13 of the Original Side Rules. At the said time, after the appeal was filed upon condonation of delay, the same was admitted, though no order of stay was granted, yet the question of finality is starting on the face. These are matters of record, which can be looked into. On the question of suppression of facts, it was contended that these facts were not unknown to the IT authority, as it appears from the order dt. 13th Dec., 2002, passed by the CIT, Delhi, which is Annexure "P-17". Therefore, it cannot be contended that there was suppression of material facts. But, at the same time, the question of estoppel on the part of the respondents is germane to the issue.

6. After having heard the learned counsel appearing on behalf of the parties, to our mind, it appears that the petitioners had not take a correct stand before the IT authority at Delhi, in respect of the proceedings u/s 226(3) of the Act. Under clause (vi), they are entitled to raise objection. Admittedly, the petitioners have not denied the entire dues under the decree. They are claiming that a part is due but not the whole. But that has not been specified. The petitioners had always been insisting that the transaction was genuine. In order to prove this contention, they preferred the appeal before the learned Tribunal at Calcutta, where the appeal is pending against the order of the CIT(A). The petitioners are not denying the decree. They are disputing the extent or quantum of the decree.

7. Section 226(3) of the IT Act, 1961, empowers the TRO to issue notice upon any person from whom any amount is due to an assessee-in-default. Admittedly, the Income Tax due from the VCVL was being sought to be recovered from the petitioners as garnishee by virtue of the decree obtained by VCVL against the garnishee. Clause (vi) entitles the petitioners to raise an objection. Once objection is raised, the TRO is not supposed to recover tax until the claim is found to be false. There was no material placed before the TRO with regard to the proceedings pending before Company Forum and the scheme formulated. Therefore, the TRO had no material before it to find out that the objection raised was correct. Therefore, it had discovered the claim raised by the petitioners to be false and proceeded to recover the same. But the question remains that one of its counterpart had held the transaction to be ingenuine, which is pending

determination in appeal before the learned Tribunal at Calcutta. Therefore, it would mean that the subject-matter of a judicial proceeding had not reached its finality. But still then, such order was staring on its face.

8. The TRO cannot blow hot and cold in order to exercise jurisdiction under the provision of Section 226(3) of the Act when it had some other device or mode of recovery available to it for recovering tax due from VCVL. It is only when the amount is found due and payable, s, 226(3) can be resorted to. But when the IT authority itself had held that the transaction was not genuine, it cannot harbour a concept that the amount was due even though a decree was obtained by the VCVL.

9. In the facts and circumstances of the case whether the decree had been put to execution by VCVL or not is immaterial. If the decree is offered, the TRO is free to proceed upon it u/s 226(3) of the Act. But by reason of Clause (vi) thereof the judgment debtor/garnishee has a right to object. As soon objected to, the TRO cannot proceed to recover until discovery of falsity of the objection. If the executability of the decree is challenged, the TRO cannot assume jurisdiction to decide a dispute between the garnishee and the assessee. It cannot usurp the jurisdiction of the executing Court. The jurisdiction of the TRO is confined within the dispute between the assessee and the IT authority. It cannot assume jurisdiction in respect of any dispute between the assessee and the garnishee nor can it embark upon an exercise to determine any such dispute unless it appears to be false on the face of it. As soon there appears to be a dispute *prima facie*, the objection cannot be presumed to be false. The proceedings u/s 226(3) of the Act would then be subject to the determination by the appropriate forum. Until determination, the TRO has no scope of discovering falsity of the objection. When the gamishee does not admit or denies that he owes the debt to the assessee, the TRO cannot sit in judgment over the denial and come to his own conclusion. It was so held in *Mohamedaly Sarafaly and Co. Vs. Income Tax Officer, Central Circle III, Madras, and Others*, and *P.K. Trading Company Vs. Income Tax Officer, "K" Ward, .* Once on oath the garnishee denies the liability towards the assessee, the burden of showing the statement on oath is false in any material particular would be upon the Revenue. The Revenue has to disclose material particulars that led it to a definite conclusion. Then only the payment can be imposed on the gamishee u/s 226(3)(vi) of the Act. The apex Court had taken such a view in *Beharilal Ramcharan Vs. Income Tax Officer, Special Circle "B" Ward, Kanpur and Another, .* It is only when the objection is altogether false and it is so apparent and is so discovered the TRO can proceed against the garnishee u/s 226(3) of the Act. It is only the part, which cannot be objected to come within its purview.

10. At the same time, it cannot be lost sight of that though not brought before the authority concerned but yet there was a proceeding before the Company Forum and that there was an interim order, which restrained execution of the decree by VCVL during the pendency of the proceedings and it was also subject

to a proceeding before the Company Forum which is a judgment in rem and is binding on VCVL and, therefore, no amount, except as is permissible under the scheme, can be claimed by VCVL and as such the dues available under the decree is yet to be determined so as to attract the provision of Section 226(3) of the Act.

11. We must also remember that the petitioners had taken one stand before the IT authority viz., that the transaction was genuine whereas it had denied its liability under the decree by raising an objection. However, all the learned counsel representing the appellants before us, namely, Mr. Sarkar, Mr. J.P. Khaitan and Mr. S. Mukherjee, in their usual fairness, had contended that petitioners ought to have taken a clear stand making its position clear as to the extent of its liability under the decree. No appeal was preferred until the order appealed against was passed. Therefore, we cannot take note of the subsequent filing of the appeal with regard to the question of finality of the decree. But then the objection being unqualified, the petitioners do not seem to have come with clean hands. They ought to have clarified their stand in no uncertain terms. When before the IT authority at Calcutta they were insisting that the transaction was a genuine one, the petitioners are estopped from claiming that they are not liable under the decree arising out of the same transaction. On the other hand, they could have specified the extent of their liability under the decree and to that extent the recovery could have proceeded but not on the rest which was not admitted or denied.

12. It is contended on behalf of the appellant that the IT authority is recovering from two sources in respect of the same transaction. They should stick to one and not to the other. Mr. Ghosh, in his usual fairness had also accepted the proposition that it has to recover from one source and not from both having regard to the facts and circumstances of the case.

13. In the circumstances, we dispose of this appeal, which was argued by the respective learned counsel at length, treating the same by consent of the parties as on day's list for hearing and the application as well by the following order :

The petitioners shall specify the amount payable by them in terms of the order passed by the Company Forum or the scheme that might have been formulated therein, if any, without prejudice to their rights and contentions in the pending appeal before the Tribunal and the proceedings before the TRO, Delhi, and the appeal against the decree. The recovery will be made only to that extent in the proceedings u/s 226(3) of the Act and not against the rest. At the same time, the TRO shall also take into account that the amount so recovered shall not exceed the whole of the amount, that is being sought to be recovered in the proceedings before the learned Tribunal, now being recovered from two sources. It will be open to the petitioners to make appropriate application before the learned Tribunal for modification of the order for recovery. The amount already recovered shall be taken into account and adjusted against the dues under the decree and if it is found that the total amount exceeds the amount sought to be

added u/s 68A (sic-68) of the Act, in that event, it might pass appropriate order and make the said recovery subject to the result of the decision in the appeal before the learned Tribunal as well as the appeal against the decree preferred before this Court. This order is without prejudice to the rights and contentions of the parties including the assessee VCVL in any proceedings in any other forum.

14. We were not inclined to invoke our discretion because of the conduct of the appellant, but for the fair stand taken by the respective learned counsel for the appellants, we have passed the above order.

15. The appeal and the application are thus disposed of. There will be no order as to costs.