

(1975) 03 DEL CK 0008
In the Delhi High Court
Case No : O.M.P. No. 9 of 1972

Sriniwas Pandit

APPELLANT

Vs

S. Jagjeet Singh Sawhney and Another

RESPONDENT

Date of Decision : 25-03-1975

Acts Referred:

Citation : (1976) 104 ITR 20

Hon'ble Judges : D.K. Kapur, J

Bench : Single Bench

Advocate : B. Datta, for decree-holders and R.L. Roshan, for Union of Indi, for the Appellant;

Judgement

D.K. Kapur, J.—This application u/s 151 of the CPC has been moved by the Union of India, through the Commissioner of Income Tax, Central Delhi, New Delhi, as an interlocutory application in a proceeding to which neither the Union of India nor the Commissioner of Income Tax is a party. The application raises very substantial and important question regarding the interpretation of the Second Schedule of the Income Tax Act, 1961. It is necessary to state that the application has been moved in the course of the execution proceedings which are pending in this court in which one Shri Sriniwas Pandit is the decree-holder and S. Jagjeet Singh Sawhney and S. Gurcharan Singh Sawhney, who are brothers, are the judgment-debtors.

2. I may shortly state the facts of the case to the extent necessary for deciding this application. A decree was obtained by the said decree-holder against the judgment-debtors from the civil court of Badayun (U.P.), which was transferred to this court for execution. Even before the execution came to this court, it was being entertained by a subordinate judge of Delhi, but on the setting up of the High Court of Delhi, the execution was transferred to the Delhi High Court, on the original side. In the course of the execution certain house property situated at 152/48, Diplomatic Enclave, Malcha Marg, New Delhi, which was partly owned by the judgment-debtors was attached and then ordered to be sold. Just a few

days before the sale was to take place, the Commissioner of Income Tax moved the present application pointing out that the property in question had already been attached by the Tax Recovery Officer under the Second Schedule to the Income Tax Act, 1961. It was prayed in this application that the property in question should be released from attachment and the proclamation of sale should be withdrawn and the sale already fixed should be cancelled. In the alternative, it was prayed that in case the property was not released from attachment, the sale proceeds should be paid to the applicant to the extent necessary to satisfy the public dues outstanding against the two judgment-debtors before paying anything to the decree-holder. There seems to be no doubt that this court had ordered the sale only of the interest of Jagjeet Singh and Gurcharan Singh in the property whereas their mother, Smt. Basant Kaur, is also a co-sharer in the property in question. As far as the department is concerned, Smt. Basant Kaur is also a defaulter. According to the department different amounts are due from Jagjeet Singh, Gurcharan Singh and Smt. Basant Kaur and the entire property has been attached for the purpose of Realizing these tax dues, in consequence of a certificate issued by an Income Tax Officer to the Tax Recovery Officer. It, Therefore, appears that if the property is sold by the Tax Recovery Officer, the intention is to recover the tax dues from all the three defaulters. But, as far as this court is concerned, the execution, of the decree is concerned with the sale of the interest of Jagjeet Singh and Gurcharan Singh only, and not with the remaining property.

3. Now, the proceedings in this court have been pending since 1967. It appears that even before the case was transferred to this court under the provisions of the Delhi High Court Act, 1966, the property in question had already been attached for the purpose of executing the decree passed by the Civil Judge, Badayun. Since 1967, a number of objections of various types to the execution have been tried by this court, and this court has also recorded a decision, as per judgment of Prithvi Raj J. delivered while deciding O.M.P. 280 of 1968 and some other O. M. Ps., that Smt. Darshan Kaur, step-mother of Jagjeet Singh and Gurcharan Singh, was also entitled to a right of residence in this property. Eventually, by that very judgment the learned judge directed the sale of this property only as far as the interest of the two judgment-debtors was concerned. This sale was later stayed to await the decision of the present application.

4. All these proceedings have taken place in this court without the court being made aware that a notice had been issued by the Tax Recovery Officer under Rule 2 of Schedule II of the Income Tax Act, 1961. The effect of the issue of such a notice is set out in Rule 16 of the said Schedule II. I quote only the relevant portion of that rule :

"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,....."

5. Now follow the most important words, as far as this case is concerned:

"Nor shall any civil court issue any process against such property in execution of a decree for the payment of money."

6. The question for consideration by me is what is the effect of this rule in relation to the execution proceedings already pending in this court. To my mind there is no doubt that after a notice has been issued by the Tax Recovery Officer under Rule 2 of this Schedule of the Income Tax Act, then the intention of the rule is to prevent the court issuing any process for execution a money-decree against the defaulters. However, there is a clear deficiency in the section, because the court cannot be made aware of the giving of this notice unless somebody informs the court that, in fact, a notice has been given under Rule 2.

7. The provisions of the Schedule are such that the Income Tax Officer sends a certificate to the Tax Recovery Officer and the Tax Recovery Officer in turn sends a notice under Rule 2 to the defaulters mentioned in the certificate. Under Rule 2 of the said Schedule the notice served on the defaulters requires them to pay the amounts specified in the certificate within 15 days, failing which steps can be taken to recover the amounts mentioned in the notice in compliance with the procedure set out in the Schedule. Now, when such a notice has been sent to the defaulters the only persons who know of the factum of such notice having been served are the defaulters and the Tax Recovery Officer. The court which is supposed to desist from issuing any process is completely unaware of the issue of such a notice till somebody brings such notice to the court's notice. There is also another difficulty in complying with Rule 16 which I may point out. The notice sent under Rule 2 does not prescribe or specify any particular property and, Therefore, it is not possible for any one to know as to which property is not to be proceeded against by operation of Rule 16, except the persons to whom such notice has been sent, i.e., the defaulters. The clear meaning of Rule 16 is that all the property of the defaulters to whom the notice has been sent of every description, including his movable property, is incapable of being transferred, mortgaged, charged, leased or otherwise dealt with. It should, Therefore, logically be the obligation of the defaulters to bring this fact to the notice of all the authorities concerned. Unfortunately, there is a lacuna in the rule as it does not make it obligatory on the defaulters to mention these facts to any person who may be dealing with this property, including a court which may be about to issue a process in execution. I make these observations in this case, because they are so apparently appropriate here because the proceedings have been pending since the year 1967 and the demand notice of the Tax Recovery Officer was also issued round about 1967. If this fact had been brought to the notice of the court in 1967, all the multifarious proceedings that had taken place in this court for the last seven years would have been avoided and the time taken to decide the numerous applications which had been placed before the court would have been saved.

8. Having made these observations, I will not proceed to analyze the effect of the

rule. Clearly, as soon as it is brought to the notice of the court that it is incapable of issuing a process in execution in relation to the property, it becomes the duty of the court to stop issuing any further process for Realizing the money sought to be realised in execution of a decree for the payment of money. The present case is a case in which execution is sought on a money decree. It follows that the court has to desist from any further execution of the decree. One point which has arisen during the course of arguments before me is the question whether an application u/s 151 of the Code is competent at the instance of a person who is not a party to the suit and is certainly not either a judgment-debtor or a decree-holder. I think that even if there was no authority to support the moving of such application the application would be competent as otherwise the court would never be informed that a notice under Rule 2 has been issued to a defaulter. As there is no obligation on the defaulter to bring this matter to the notice of the court, it clearly lies on the department to move the court pointing out that a notice had been issued under Rule 2, and, thereafter, no process in execution should be issued by the court for proceeding against the defaulter's property. Such information can only be supplied to the court by moving an application u/s 151. Even if such an application was incompetent, the application could be treated as an information to the court that facts now existed which made it obligatory on the court to cease further execution of the decree. As it happens, there are some reported cases in which applications have been moved u/s 151 of the Code, at the instance of the Income Tax authorities, although in different circumstances. Instances of these cases are to be found in MANICKAM CHETTIAR Vs. Income Tax OFFICER, MADURA., and Builders Supply Corporation Vs. The Union of India (UOI) Represented by the Commissioner of Income Tax, West Bengal and Others, .

9. In these cases the property had already been sold by the court, when the Income Tax department, relying on the principle that Crown or State debts take priority, applied to the court for payment of the amounts realised in selling the judgment-debtor's property, claiming that public dues were to be paid in priority to private dues. I see no difference in principle between those cases and the present case. The principle of priority is as applicable earlier as later. I take these two cases as instances showing that a person other than the decree-holder or judgment-debtor could move the court u/s 151 of the Code. On this footing I have entertained the present application.

10. Having held that the application of the Commissioner of Income Tax is maintainable, it now remains to be seen whether the court should stay the execution altogether, or allow the alternative prayer of the applicant, which is to sell the property through court, and utilize the sale proceeds, firstly for paying the tax dues recoverable from the judgment-debtors and then for meeting the liability under the decree. On an analysis of the provisions of the Second Schedule, I find that the procedure suggested as an alternative is not open to the court. The provisions of Rule 16 of the Second Schedule are perfectly plain. The court is clearly debarred from issuing any process against property belonging to

the defaulters for the purpose of executing a decree for money. Even though the learned counsel for the Union of India has not opposed the sale being effected through the agency of the court, it seems to me that this procedure cannot be followed in view of the express provisions of the rule. It has been urged by the learned counsel for the decree-holder that the provisions of Rule 16 and in fact almost all the provisions of Schedule II of the Income Tax Act, 1961, are ultra virus of the Constitution and particularly Articles 19(1)(f) and (g) of the Constitution. As this is not a point which has been raised in the pleadings, and even otherwise I do not find that the provisions are unreasonable, I have not allowed this question to be fully urged before me. In my view, once it is accepted that the State has priority over other creditors as was held in the Builders Supply case by the Supreme Court, I fail to see what difference it makes whether the execution is carried out by the court or by the Tax Recovery Officer. In either case, the State has the priority and is entitled to get its dues realised first from the proceeds of the sale, and only then can the balance be used for the benefit of other creditors. The only drawback that I see in the present procedure from the point of view of the decree-holder is that he is not entitled to get at the money which may remain after satisfying the tax dues from the proceeds of the sale effected by the Tax Recovery Officer. This drawback is partially met by the procedure that I intend to adopt for safeguarding the interests of the decree-holder, which will be discussed subsequently in this judgment. There is another difficulty in the present case, which makes it imperative for the Tax Recovery Officer to make the sale, rather than the court. The defaulters, as far as the Tax Recovery Officer is concerned, are the judgment-debtors as well as their mother. If the sale is made through the agency of the court, then the interest of the mother cannot be sold by the court, and this difficulty cannot be met in any way by an order of the court. Hence, in view of the fact that the interest of the mother, Smt. Basant Kaur, has also to be sold by the Tax Recovery Officer, this is a case in which the Tax Recovery Officer should make the sale. According to the learned counsel for the decree-holder, the provisions of Rule 16 infringe the fundamental rights of the decree-holder to the extent that the rule restrains the court from proceeding with the execution of the decree. As I have said, the purpose of the rule is in accordance with the well settled principle that the State has priority in the matter of the Realizing its debts. Once that principle is accepted, it follows that the State must first make realisations and only then can a private citizen make appropriations towards the debts due from the defaulters. I, Therefore, come to the conclusion that prima facie I do not find that the rule is unreasonable, but I have pointed out above that there are certain difficulties about the application of the rules in the Second Schedule which should be remedied by making appropriate changes in those rules to deal with situations like the present. In fact, in suitable cases, where there are also private decrees against tax defaulters, it might be preferable to permit the decrees being executed by the court rather than by the Tax Recovery Officer, because the type of objections which have already been tried by this court in this case may now have to be re-decided by the Tax Recovery Officer and, thus, lead to a

multiplicity and prolongation of proceedings, with no special advantage to the taxing authorities. However, as the law now stands, I have no doubt that it is the Tax Recovery Officer who is to effect the sale, and not the civil court. I accordingly confirm the stay of execution of the decree and permit the Tax Recovery Officer to sell the property in accordance with the provisions of Schedule II of the Income Tax Act, 1961.

11. Now, the next question to be considered is, what is to happen to the decree-holder's claim to execute his decree when further execution of the decree is to be stayed. The provisions of Schedule II of the Income Tax Act, 1961, indicate the manner in which a Tax Recovery Officer has to proceed to make recoveries, and also indicate the procedure which is to be followed by him in disbursing the realisations made after he has effected a sale, of the defaulter's property. It is indicated in Rule 8 of Schedule II that the amount realised from such sale is first to be utilised to pay the costs incurred by the Income Tax Officer; then, to pay the amount indicated in the certificate issued by the Income Tax Officer; and then, to pay any other dues that may be payable in respect of Income Tax arrears by the defaulter; and, finally, any balance remaining has to be paid to the defaulter. Mr. Roshan, the learned counsel for the Commissioner of Income Tax, has submitted that he is willing to make the payment of the balance remaining, if any, after the sale has been held by the Tax Recovery Officer, to the court, in satisfaction or partial satisfaction of the decree which is being executed by this court. In my view, this cannot be done, because the provisions of Rule 8 have statutory force, and the department is obliged to make payment to the defaulter. This means that some other way has to be found to protect the decree-holder's interest in case the sale is not to be held by this court.

12. In order to meet the difficulty just discussed, the decree-holder has made an application u/s 151 read with Order 21, Rule 46 of the Code for the purpose of ensuring that the amount realised by the Tax Recovery Officer will be used first for Realizing the amount due under the recovery certificate, and then the balance will be paid into this court for satisfaction of the decretal amount. It has been pointed out in this application that a replication was filed on behalf of the Union of India in the main case under consideration, in which annexures have been filed showing the demands outstanding against Gurcharan Singh and Jagjeet Singh, the judgment-debtors, which are only Rs. 65,000. I have examined those annexures, and find that the amount covered by the recovery certificates which have been issued in the case of the judgment-debtors and the amounts still outstanding at present vary substantially. It seems that the demands under the recovery certificates issued in respect of the three assesseds have already been partly realised by the Income Tax authorities and, Therefore, the demands still outstanding may not be quite as much as the value of the property sought to be sold by the Tax Recovery Officer. It is, Therefore, possible that the share of the judgment-debtors remaining from the proceeds of the sale, after deducting the tax demand, might be quite substantial. However, the exact amount remaining will depend on the application of Rule 8 of the Second Schedule of the Income

Tax Act, 1961. As stated by me earlier, the amount realised from the sale of the property is to be utilised first to pay the costs of the Income Tax Officer, then the amount indicated in the certificate of the Income Tax Officer, then to pay the other dues payable in respect of Income Tax arrears and only finally, the balance is to be paid to the defaulters. It is this balance which can be attached by the court under Order 21, Rule 46, of the Code. I accordingly pass an order, on the application of the decree-holder, that an attachment order will issue to the Tax Recovery Officer prohibiting the payment of any balance which may remain payable due to the two judgment-debtors in the present case, after the property situated at 152/48, Diplomatic Enclave, Malcha Marg, New Delhi, has been sold by the Tax Recovery Officer and the deductions allowable under Rule 8 of Schedule II of the Income Tax Act, 1961, have been made there from. The balance remaining due under that provision to Shri Jagjeet Singh Sawhney and Shri Gurcharan Singh Sawhney will not be paid to them, but the same may be paid into this court under Order 21, Rule 46(3) of the Code, for utilisation in respect of the decree now being executed in this court.

13. Thus, the result of this application may now be summarised. I have come to the conclusion that this court can no longer execute the decree under consideration, by selling property No. 152/48, situated at Diplomatic Enclave, Malcha Marg, New Delhi, because of the issue of the notice by the Tax Recovery Officer under Schedule II of the Income Tax Act, 1961, to the judgment-debtors and the subsequent attachment of that property by that officer, and, Therefore, this property can be sold for the purpose of recovering Income Tax dues, etc., in accordance with that Schedule by the Tax Recovery Officer. However, an attachment order has been issued by this court under Order 21, Rule 46 of the Code to attach any balance which may be payable to the two judgment-debtors aforementioned under the provision of Rule 8 of Schedule II of the Income Tax Act, 1961. Thus, the application of the Union of India stands accepted and the application of the decree-holder in E.A. No. 791 of 1975, for attachment of the amount which may remain due to the judgment-debtors in the hands of the Tax Recovery Officer after adjusting the Income Tax dues, is also accepted. I make no order as to costs in the circumstances of the case.