(2002) 02 AHC CK 0012

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 190 of 2000 26 February 2002

Subash Chandra Goyal APPELLANT

Vs

Tax Recovery Officer RESPONDENT

Date of Decision : 26-02-2002

Acts Referred:

Citation : (2002) 122 TAXMAN 95

Hon'ble Judges : R.B. Misra, J

Bench : Division Bench

Advocate : Rajesh Kumar, for the Petitioner, for the Appellant;

Judgement

By this writ petition the prayer has been made for quashing the order dated 22-11-1999 (Annexure-16) passed by the Commissioner (Tax Recovery), Agra, purported to have been passed under rule 86(1) of the Second Schedule to the Income Tax Act, 1961 (hereinafter referred to as the Act).

2. I heard Shri Rajesh Kumar, the learned counsel for the petitioner as well as Shri A.N. Mahajan, the learned standing counsel for the respondents.

3. The brief facts necessary for adjudication of the case are that for realisation of demand which was outstanding against the assessee; the assessment year 1987-88 Rs. 6,10,650, the assessment year 1990-91 Rs. 6,63,500, the assessment year 1991-92 Rs. 17,94,783, assessment year 1992-93 Rs. 39,002, the Tax Recovery Officer-1, Agra (hereinafter referred to as "the TRO"), auctioned a shop situated in Sanjay Place, Agra, bearing No. 44/2/08 on 19-3-1997 for Rs. 2,72,000. Against this auction the assessee has filed an application to this office on 1-4-1997 for cancellation of the auction raising certain objections and prayed that the order of the TRO be set aside. The TR O by his order dated 2-7-1997 (Annexure 10) passed a detailed order against which the petitioner has preferred an appeal under rule 86(1) before the Commissioner, Agra, who by its order dated 22-11-1999 dismissed the appeal with following observation :

"Rule 86(1) provides that appeal against the TROs order lies only if the TROs order has not become conclusive. In this particular case, it is observed that the order confirming the sale has been passed by the TRO-1, Agra, under rule 63(1) of the Second Schedule to the Income Tax Act, 1961 on 2-7-1997 and the sale certificate under rule 65(1) of the Second Schedule to the Income Tax Act, 1961 has also been given on 2-7-1997. Therefore, the order of the Tax Recovery Officer has become conclusive and no interference under the law can be done now. In view of the matter, the assessees appeal is dismissed."

4. The learned counsel for the petitioner, Shri Rajesh Kumar, has contended that the order dated 2-7-1997 passed by the TRO is not conclusive order but it is original order against which the appeal lies under rule 86(1) of the Second Schedule is as below :

"86. Appeal.(1) An appeal from any original order passed by the TRO under this Schedule, not being an order which is conclusive, shall lie to the Chief Commissioner or Commissioner.

(2) Every appeal under this rule must be presented within thirty days from the date of the order appealed against.

(3) Pending the decision of any appeal, execution of the certificate may be stayed if the appellate authority so directs, but not otherwise.

(4) Notwithstanding anything contained in sub-rule (1), where a Chief Commissioner or Commissioner is authorised to exercise powers as such in respect of any area, then, all appeals against the orders passed before the date of such authorisation by any TRO authorised to exercise powers as such in respect of that area or an area which is included in that area, shall lie to such Chief Commissioner or Commissioner."

5. Under Part I of the Second Schedule of the Income Tax Act is provided.

"10. Property exempt from attachment.(1) All such property as is by the Code of Civil Procedure, 1908 (5 of 1908), exempted from attachment and sale in execution of a decree of a civil court shall be exempt from attachment and sale under this schedule.

(2) The Tax Recovery Officers decision as to what property is so entitled to exemption shall be conclusive."

For reference rules 63 and 65 the Schedule II of the Income Tax Act reads as below :

"63. Confirmation of sale.(1) Where no application is made for setting aside the sale under the foregoing rules or where such an application is made and disallowed by the TRO, the TRO shall (if the full amount of the purchase money has been paid) make an order confirming the sale, and, thereupon, the sale shall become absolute.

(2) Where such application is made and allowed, and where, in the case of an application made to set aside the sale on deposit of the amount and penalty and charges, the deposit is made within thirty days from the date of the sale, the TRO shall make an order setting aside the sale :

Provided that no order shall be made unless notice of the application has been given to the persons affected thereby.

65. Sale Certificate.(1) Where a sale of immovable property has become absolute, the TRO shall grant a certificate specifying the property sold, and the name of the person who at the time of sale is declared to be the purchaser.

(2) Such certificate shall state the date on which the sale became absolute."

6. The learned counsel for the petitioner has placed reliance on Balkisandas v. Addl. Collector (1977) 106 ITR 7 where it was held that the terms of rule 86 of Schedule II show that appeals from the orders of the TRO would lie except those orders which are conclusive. Though when a sale is confirmed under rule 63(1) of the Second Schedule by the TRO, the sale is treated as absolute, it does not make the order itself conclusive. To take away the sight of appeal, it should be the order which is conclusive, and not the factum of sale. Right of appeal in terms is provided against orders which are termed as original orders of the TRO.

There could be no doubt that an order confirming the sale would be an original order subject to appeal under the provisions of rule 86.

7. On the other hand, according to para 17 of the counter affidavit in reference to the valuation report, it was indicated that the petitioner went on filing objections after objections with regard to the immovable property in question, and on one occasion he objected to ownership of the property and on another occasion he got the objection filed through his son, and the respondent No. 1 after affording opportunities to them decided the objections on 13-12-1996 and 3-2-1997, respectively. Therefore, according to the respondent, the order dated 2-7-1997 passed by the TRO is in accordance with the law.

8. The terms of rule 86 quoted above are enabling and provide a remedy of appeal. The provisions of rule 86 show that the appeal would be excepted only in cases of those orders which have been treated as conclusive by the rules and one such rule available in Schedule II is rule 10. When an question arises, whether a particular property is exempt from attachment, the TRO can decide that question and his decision under sub-rule (2) of rule 10 holding that a particular property is entitled to exemption from attachment, has been treated as conclusive. It is clear that in the matters of sale of the attached property which is the subject of rules 52 to 68, no such mention is made nor the order confirming the sale has been made conclusive. Therefore, the terms of rule 63(1) are to be read along with the other rules preceding which include the steps by which the property attached can be brought to sale. It is also provided by rule 56 that the sale has to be made by public auction and it is always subject to confirmation by the TRO.

This process of confirmation is part of clause (1) of the rule 63, which provides that where no application is made for setting aside the sale under the foregoing rules or where such an application is made and disallowed by the TRO, the TRO shall, if the full amount of the purchase money has been paid, make an order confirming the sale, and, thereupon the sale shall become absolute. Reading the rule 56 along with sub-rule (1) of rule 63 together, undoubtedly, there is a necessity of making an order by the TRO in the matter of confirmation of the sale and that would be clearly an original order. If such an order is made, then terms of sub-rule (1) indicate that the sale is treated as absolute. In other words, the order confirming the sale is absolute as such under these rules. The word absolute does not make the order itself conclusive. To take away the right of appeal, it should be the order which is conclusive, and not the factum of sale. The right of appeal in terms is provided against the order which are termed as original orders of the TRO. Undoubtedly, an order made confirming the sale would be an original order liable to be appealed against by virtue of the provisions of rule 86.

9. I have considered the submissions of the learned counsels for the parties and I have gone through the records and I find that the order of the TRO dated 2-7-1997 is not conclusive in reference to rule 10 but only the sale has been made absolute and taking it as a conclusive order of the TRO. The appeal under rule 86 is barred. In my considered view the order dated 2-7-1997 is original order against which the appeal under rule 86(1) of Second Schedule could be entertained. Therefore, dismissing the appeal by the Commissioner by its order dated 22-11-1999 with an understanding that the appeal is not maintainable under rule 86(1), is legally not correct and, therefore, it is quashed and the case is remanded back with the direction to the Commissioner, Agra, to decide the appeal expeditiously preferably within six weeks from the receipt of this order after giving opportunity to the assessee-petitioner who is expected to give co-operation on his part.

10. The writ petition is disposed of in view of the above observations.

