

Jogender Singh Vs Income Tax Officer and Others

Court: Allahabad High Court

Date of Decision: April 16, 1999

Acts Referred: Constitution of India, 1950 " Article 226

Contract Act, 1872 " Section 134, 139

Income Tax Act, 1961 " Section 156, 161, 2(43), 221, 230A

Citation: (2000) 246 ITR 269 : (1999) 107 TAXMAN 394

Hon'ble Judges: R.K. Agarwal, J; M.C. Agarwal, J

Bench: Division Bench

Advocate: A.N. Mahajan, for the Appellant; Govind Krishna, for the Respondent

Judgement

R.K. Agarwal, J.

By means of the present writ petition, the petitioner seeks a writ of certiorari quashing the order dated April 29, 1987,

passed by the Income Tax Officer, Circle-I(6), Kanpur, respondent No. 1 (filed as annexure H to the writ petition), as also the notice dated July

27, 1987, issued by the Tax Recovery Officer (A), Kanpur, respondent No. 2 (filed as annexure-I to the writ petition). The petitioner further

seeks a writ, order or direction prohibiting respondent No. 2 from proceeding with the recovery of the demand mentioned in the notice dated July

22, 1987. The petitioner further seeks a direction to the Commissioner of Income Tax, Kanpur, respondent No. 3, to release the title deed of the

property No. 18/183-A, Kurswan, Kanpur, to the petitioner.

2. The facts of the case are that the petitioner along with two other persons stood surety and executed a surety bond dated May 7, 1974, for the

value of stocks worth Rs. 1,00,559 belonging to one Guru Nanak Metal Stores, 67/40, Bhusa Toli, Daulatganj, Kanpur, which was seized by the

Income Tax Department in pursuance of the search conducted on April 27, 1974, at the business premises of the aforesaid Guru Nanak Metal

Stores. In order to get it released in terms of the surety bond, the petitioner deposited the title deed of his immovable property bearing house No.

18/ 183-A, Kurswan, Kanpur, with the Commissioner of Income Tax, Kanpur, respondent No. 4, by way of equitable mortgage. The petitioner

further undertook that if the said amount of Rs. 1,00,559 or as may be determined as Income Tax, wealth-tax and/or gift-tax liability of the firm

and its partners to the extent of Rs. 1,00,559 or less as confirmed or varied by the appellate authorities or as settled by the Commissioner of

Income Tax, Kanpur, and the said tax liability as may be determined up to the extent of Rs. 1,00,559 only shall be realised from him by sale of his

property mentioned in the schedule of the surety bond. He further undertook that he shall not mortgage or charge or in any way encumber the said

property till the security mentioned above is released.

3. It appears that for the assessment year 1975-76 in respect of Guru Nanak Metal Stores, Kanpur, assessment was completed by respondent

No. 4, vide order dated January 19, 1978. A demand of Rs. 41,455 being Income Tax and interest thereon was raised against the said firm. The

aforesaid amount of Rs. 41,455 was paid by the firm and its partners some time in March, 1978, and no demand was outstanding against the said

firm or its partners, The assessment order dated January 19, 1978, was modified in appeal by the Commissioner of Income Tax, Kanpur, vide

order dated August 28, 1982, and the appeal filed by the Department against the said order was dismissed by the Income Tax Appellate Tribunal,

Allahabad, vide order dated August 22, 1984. The Income Tax Officer, Circle-I(6), Kanpur, respondent No. 1, gave effect to the order of the

Commissioner of Income Tax (Appeals), Kanpur, and issued a refund voucher of Rs. 24,330 to the said firm on February 12, 1985. It appears

that the Income Tax Officer, Circle-1(6), Kanpur, respondent No. 1, initiated penalty proceedings against the firm u/s 271(1)(c) of the Income

Tax Act, 1961 (hereinafter referred to as the "Act"), and imposed penalty on the said firm. The partners of the said firm applied and obtained

clearance certificate u/s 230A of the Act, even after imposition of the penalty u/s 271(1)(c) of the Act, and disposed of their immovable properties.

The Tax Recovery Officer (A), Kanpur, respondent No. 2, had issued notice of demand dated September 30, 1985, to the petitioner requiring

him to deposit the amount of penalty imposed upon the said firm u/s 271(1)(c) of the Act. The amount demanded is Rs. 1,18,540.

4. On receipt of the demand notice, the petitioner filed a reply stating, inter alia, that the surety bond was executed by him only for Income Tax,

wealth-tax and/or gift-tax liability of the said firm and its partners and as such the amount or penalty imposed on the firm cannot be demanded from

him. It was further stated that the said firm and its partners having paid the entire Income Tax and also claimed refund, the amount of penalty

cannot be demanded from him. The petitioner vide letter dated February 13, 1986, approached the Commissioner of Income Tax, respondent

No. 3, for release of the title deed in respect of his house No. 18/183-A, Kurswan, Kanpur. However, the Commissioner of Income Tax,

respondent No. 3, vide letter dated March 20, 1986, informed the petitioner that the title deed of the said property could only be released if the

petitioner arranges to pay the demand which is outstanding against the firm. The petitioner once again requested respondent No. 3 to release the

title deed of the property whereupon he was directed to meet the Income Tax Officer, Circle-1(G), Kanpur, respondent No. 1. However,

respondent No. 1 vide order dated April 29, 1987, had informed the petitioner that the title deed of the property No. 18/183-A, Kurswan,

Kanpur, cannot be released till the entire amount of the penalty is paid or satisfactory arrangement for payment is being made. Instead of releasing

the title deed of his immovable property No. 18/183-A, Kanpur, he had been informed by the Tax Recovery Officer, respondent No. 2, that he

will take coercive measures for the realisation of the amount of penalty (Rs. 1,18,540) which is outstanding against the said firm by attaching and

selling the immovable property of the petitioner.

5. In the counter affidavit filed by Sri Arun Kumar Bhatia, Inspector, attached in the office of the Tax Recovery Officer (A), Kanpur, respondent

No. 2, the execution of the surety bond dated May 7, 1974, has not been denied. However, it has been stated that, according to the terms of the

surety bond, the petitioner stood surety for the firm and its partners to the extent of Rs. 1,00,559 jointly and severally and the petitioner was aware

that if the said amount of Rs. 1,00,559 or as maybe determined as tax liability under the Direct Tax Act on the firm and its partners shall be

realised from the petitioner by sale of his property. The refund of Rs. 24,330 to the firm on February 12, 1985, as stated by the petitioner in

paragraph 15 of the writ petition, has been admitted in the counter affidavit filed by the said Sri Arun Kumar Bhatia. However, it has been stated

that the penalty imposed u/s 271(1)(c) of the Act, on the firm is a tax liability under the Direct Taxes Act, and on the non-payment by the firm,

Guru Nanak Metal Stores, the recovery can be made against the petitioner, who stood surety to the firm and its partners for a liability to the extent

of Rs. 1,00,559. The fact of the applying and obtaining of Income Tax clearance certificate u/s 230A of the Act, by the partners of the said firm,

according to the respondents, is not relevant, and therefore, the recovery proceeding's for the realisation of the outstanding amount of penalty

imposed against the firm, Guru Nanak Metal Stores, from the petitioner is perfectly justified in law.

6. In the rejoinder affidavit filed by Sri Bhupendra Singh, son of the petitioner, it has been reiterated that the petitioner stood surety only for the

liability of Income Tax, wealth-tax and gift-tax and not for any penalty u/s 271(1)(c) of the Act, and, therefore, the petitioner is not liable to pay the

amount of penalty imposed u/s 271(1)(c) against the firm. He is entitled for the release of the title deeds of the immovable property bearing No.

18/183A, Kurswan, Kanpur.

7. We have heard Sri A. N. Mahajan, learned counsel appearing for the petitioner, and Sri Govind Krishna, learned standing counsel appearing for

the respondents.

8. Sri A. N. Mahajan submitted that the petitioner stood surety only for the Income Tax, wealth-tax and/or gift-tax liability of the firm, Guru Nanak

Metal Stores, and its partners to the extent of Rs. 1,00,559 as would be clear from the surety bond dated 7th May, 1974, executed by the

petitioner along with two other persons (filed as annexure A to the writ petition). The petitioner cannot be made liable to pay the amount of penalty

imposed against the said firm as he has neither stood surety for the amount of penalty nor undertaken at any point of time to pay the said amount.

Thus, the amount of penalty cannot be recovered from the petitioner and he is entitled for the release of the title deeds of the immovable property

bearing No. 18/183-A, Kurswan, Kanpur.

9. Mr. Mahajan further submitted that under the scheme of the Act, tax and penalty are understood and treated differently. He further submitted

that Section 2(43) of the Act, defines tax and it nowhere includes penalty whereas Section 156, which relates to notice of demand specifically

refers to tax, interest, penalty, fine or any other sum payable in consequence of any order passed under the Act. Likewise, various sections

contained in Chapter XXI of the Act, which deals with penalties, provide for imposition of penalty in addition to any tax payable by the assessee.

Thus, according to him, tax and penalty are different. Mr. Mahajan further submitted that when respondent No. 1 had made an assessment against

the firm and the firm has deposited the tax assessed on it, the petitioner stood discharged as a surety. Not only this, when as a consequence of the

order passed by the Commissioner of Income Tax (Appeals), the Income Tax Officer gave effect to the said order and granted refund of the

excess amount of tax deposited by the firm, there is no justification whatsoever for the respondents to demand the amount of penalty from the

petitioner and not to release the title deed of the immovable property deposited by the petitioner. He further submitted that even by the subsequent

conduct of the respondents, viz., granting clearance certificate u/s 230A of the Act, to the partners of the firm Guru Nanak Metal Stores, enabling

the said partners to dispose of their immovable properties when the amount of penalty imposed u/s 271(1)(c) was outstanding, the petitioner stood

discharged from the surety which he had given and was entitled for the release of the title deeds. In support of his above submission, he relied upon

Sections 134 and 139 of the Indian Contract Act, 1872, and submitted that the petitioner stood discharged as the respondents had acted

inconsistently with the rights of the petitioner. He further relied upon a decision of the Supreme Court in the case of Central Provinces Manganese

Ore Co. Ltd. Vs. Commissioner of Income Tax, for the proposition that interest and penalty are different under the Income Tax Act. Thus, he

submitted that the respondents cannot recover the amount of penalty outstanding against the firm from the petitioner, who was only a surety for the

amount of Income Tax, wealth-tax and gift-tax outstanding against the said firm to the extent specified in the surety bond. On the other hand, the

petitioner was entitled for the release of the title deeds of his immovable properties.

10. Sri Govind Krishna, learned standing counsel for the respondents, submitted that the petitioner stood surety for discharge of the Income Tax,

wealth-tax and gift-tax liability of the firm to the extent specified in the surety bond. The penalty has been imposed upon the said firm under the

provisions of the Act, and, therefore, the petitioner cannot escape from his liability, being a surety. He relied upon Section 161 of the Act, in

support of his submission that the petitioner being a representative assessee is subject to the same duties, responsibilities and the liabilities with

regard to the income in respect of which he is a representative assessee. He equated the petitioner, who stood as a surety to that of a

representative assessee. He further submitted that the petitioner is liable to pay the said amount as the same has been imposed u/s 271(1)(c) of the

Act, and the provisions of Section 221 are fully attracted in the present case.

11. Section 2(43) of the Act defines tax as follows :

2. (43) "tax" in relation to the assessment year commencing on the 1st day of April, 1965, and any subsequent assessment year means Income

Tax chargeable under the provisions of this Act, and in relation to any other assessment year Income Tax and super-tax chargeable under the

provisions of this Act prior to the aforesaid date.

12. It does not specifically include penalty. Section 156 of the Act, which relates to notice of demand specifically refers to tax, interest, penalty,

fine or any other sum payable under the Act. Section 156 of the Act, is reproduced below :

156. When any tax, interest, penalty, fine or any other sum is payable in consequence of any order passed under this Act, the Assessing Officer

shall serve upon the assessee a notice of demand in the prescribed form specifying the sum so payable.

13. Chapter XXI of the Act deals with penalties. Various sections provide for imposition of penalty in addition to the amount of tax payable or to

the extent of the amount of tax payable. Thus, from a conjoint reading of the aforementioned provisions of the Act, it follows that the word "tax

and "penalty" are treated differently under the Act.

14. The petitioner can be made liable for payment of outstanding amount of penalty assessed against the firm, Guru Nanak Metal Stores, Kanpur,

only if it is established that the terms of the surety bond dated May 7, 1974, make him liable in respect of the said amount of penalty also. The

relevant portion of the surety bond dated May 7, 1974, is reproduced below :

We, S. Jogendra Singh, son of S. Rawal Singh, Nizamuddin, son of Shri Hussain Bux, and Babu Lal, son of Sri Puttu Lal, of our own free will

stand surety to the Income Tax department for Guru Nanak Metal Stores and its partners aforesaid to the extent of Rs. 1,00,559 being the value

of stock-in-trade of the firm to be released of the firm against our being sureties. We, however, stand surety for the said firm and its partners to the

extent of Rs. 1,00,559 jointly and severally having the properties specified in the schedule herein reproduced below, which is free from all

encumbrances by way of pledge or mortgage or charge and whereof nobody has right, title or interest or charge and we undertake that if the said

amount of Rs. 1,00,559 or as may be determined as Income Tax, wealth-tax and/or gift-tax liability of the firm, Guru Nanak Metal Stores, and its

partners to the extent of Rs. 1,00,559 or less as confirmed or varied by the appellate authorities or as settled by the Commissioner of Income Tax,

Kanpur, and so that if the said tax liability as may be determined as aforesaid up to the extent of Rs. 1,00,559 only, shall be realised from us by the

sale of our properties given in the schedule below.

15. It may be mentioned here that the demand of the amount of penalty outstanding against the firm is being made from the petitioner not by virtue

of any provisions of the Act, but by virtue of the surety bond dated May 7, 1974, executed by the petitioner. If under the terms of the surety bond,

the petitioner had not undertaken the liability for payment of penalty imposed upon the firm and its partners, the respondents cannot realise the said

amount from the petitioner. From a perusal of the terms of the surety bond executed by the petitioner on May 7, 1974, which has been

reproduced above, we find that the petitioner has only undertaken to pay the Income Tax, wealth-tax and/or gift-tax liability of the firm, Guru

Nanak Metal Stores, and its partners to the extent of Rs. 1,00,559 only. The petitioner had not agreed or undertaken to pay the amount of

penalty. He had further neither agreed nor undertaken to pay any liability under the Direct Tax Act, as contended by the respondents. Thus, in our

view, the petitioner cannot be asked to deposit or to pay the outstanding amount of penalty imposed u/s 271(1)(c) of the Act against Guru Nanak

Metal Stores, Kanpur, as he had not stood surety for the said amount. We further find that by the subsequent conduct of respondent No. 1, i.e.,

when he refunded the excess amount of Income Tax and interest deposited by the firm in consequence of the order passed by the Commissioner

of Income Tax (Appeals) as also giving the clearance certificate u/s 230A of the Act, to the partners of the said firm enabling them to sell their

properties when the amount of penalty assessed against the firm was outstanding, the petitioner stood discharged as surety in terms of Sections

134 and 139 of the Indian Contract Act, 1872.

16. The submission of Sri Govind Krishna, learned counsel for the Department, that the petitioner is liable u/s 161 of the Act, is wholly misplaced.

Sub-section (1) of Section 161 which is alone relevant for the present purpose, reads as follows :

161. (1) Every representative assessee, as regards the income in respect of which he is a representative assessee, shall be subject to the same

duties, responsibilities and liabilities as if the income were income received by or accruing to or in favour of him beneficially, and shall be liable to

assessment in his own name in respect of that income ; but any such assessment shall be deemed to be made upon him in his representative

capacity only, and the tax shall, subject to the other provisions contained in this Chapter, be levied upon and recovered from him in like manner

and to the same extent as it would be leviable upon and recoverable from the person represented by him.

17. From a perusal of the aforesaid provision it will be seen that it deals with duties, responsibilities and liabilities of a person, who is a

representative-assessee, to the same extent as the person whom he is representing. In the present case, the petitioner is not a representative-

assessee of any other person. It is not the case of the respondents that the petitioner is being"" assessed in respect of the income of the firm, Guru

Nanak Metal Stores, Kanpur, and its partners for whom he had stood surety. It is also not the case of the respondents that the penalties are being

imposed on the petitioner as a representative-assessee of the said firm or its partners. Thus, the provisions of Section 161 of the Act are not at all

attracted in the present case. Similarly, Mr. Govind Krishna, learned counsel for the respondents is not right in invoking Section 221 of the Act.

Section 221 of the Act, provides for levy of penalty when the tax is in default. It is not the case of the respondents that any penalty upon the

petitioner has been imposed or the petitioner has defaulted in payment of any taxes, etc., which are being sought to be recovered from him. What

is being sought to be recovered from the petitioner is the outstanding amount of the penalty imposed u/s 271(1)(c) of the Act, on the firm, Guru

Nanak Metal Stores, Kanpur, and not on the petitioner. We have already found that the petitioner had not stood surety for the amount of penalty

that may be imposed upon the said firm. Thus, the said amount cannot be realised from the petitioner by invoking Section 221 of the Act.

18. Likewise, the provision of Section 271(i)(c) of the Act, which provides for imposition of penalty for concealment is not at all attracted in the

present case. The petitioner is not challenging the order of penalty u/s 271(1)(c) of the Act, imposed upon the firm. No penalty u/s 271(1)(c) of the

Act has been imposed upon the petitioner. Thus, reliance placed by the respondents on Section 271(1)(c) of the Act is ill-founded. No other point

has been pressed before us.

19. We, therefore, hold that the respondents cannot realise the outstanding amount of penalty imposed u/s 271(1)(c) against the firm, Guru Nanak

Metal Stores, Kanpur, from the petitioner. We, accordingly, quash the order dated April 29, 1987, passed by the Income Tax Officer, Circle-I(6)

Kanpur (filed as annexure H to the writ petition), as also the notice dated July 27, 1987, issued by the Tax Recovery Officer (A), Kanpur,

respondent No. 2 (filed as annexure I to the writ petition).

20. We further direct respondent No. 3 to release the title deed of the property No. 18/183A, Kurswan, Kanpur, to the petitioner, which the

petitioner has deposited by way of equitable mortgage while executing the surety bond on May 7, 1974.

21. In the result, the writ petition succeeds and is allowed with costs.