(1976) 12 AHC CK 0015

Allahabad High Court

Case No: Civil Miscellaneous Writ Petition No. 828 of 1974

Santosh Kumar Agarwal		APPELLANT
	Vs	
Tax Recovery Officer and Others		RESPONDENT

Date of Decision: Dec. 16, 1976

Acts Referred:

- Constitution of India, 1950 - Article 226
- Income Tax Act, 1922 - Section 23, 23B, 35, 46(2)
- Taxation Laws (Continuation and Validation of Recovery Proceedings) Act, 1964 - Section 3(1)

Citation: (1978) 112 ITR 178

Hon'ble Judges: R.M. Sahai, J; D.M. Chandrashekhar, J

Bench: Division Bench

Advocate: Shanti Bhushan and R.K. Gulati, for the Appellant; Deokinandan and Ashok Gupta, for the Respondent

Final Decision: Disposed Of

Judgement

D.M. Chandrashekhar, J.
In this petition under Article 226 of the Constitution, the petitioner has prayed for issue of a writ for quashing the proceedings for recovery of Income Tax demanded from him for the assessment years 1954-55 and 1955-56.

2. Most of the material facts are not in dispute and they may be stated. For the assessment years 1954-55 and 1955-56 the Income Tax Officer, Circle 1(10), Kanpur (hereinafter referred to as "the I.T.O."), purported to make provisional assessments u/s 23B of the Indian Income Tax Act, 1922 (hereinafter referred to as "the Act"). Demand notices were issued to the petitioner in pursuance of such provisional assessments. As the petitioner defaulted in paying the amounts so demanded, the I.T.O. levied two sums of penalty of Rs. 5,000 and Rs. 7,500 on January 27, 1956, and March 5, 1956, respectively, for those two years. On March 15, 1956, the I.T.O. also

issued to the Collector, Kanpur, a recovery certificate under Sub-section (2) of Section 46 of the Act for recovering Rs. 85,667-7-0 and Rs. 79,925-8-0 in respect of the assessment years 1954-55 and 1955-56, respectively. The petitioner filed an appeal against the levy of penalty of Rs. 7,500. The Appellate Assistant Commissioner set aside the levy of penalty observing that the provisional assessment u/s 23B of the Act was bad inasmuch as it was made before the petitioner had filed his return. Realising his mistake the I.T.O. passed on May 14, 1958, two orders which read as follows: "1954-55.

3. 14-5-58. Earlier 23B asstt. as on 1-7-55 is cancelled u/s 35 in the light of AAC''s observations and CIT''s direction. Complete fresh 23B asstt. issue N/D Ch.

1955-56

4. 14-5-58. Earlier 23B asstt. as on 1-7-55 is cancelled u/s 35, vide 54-55. Complete 23B asstt. afresh issue N/D Ch." After the aforesaid two orders were made, neither fresh demand notices u/s 29 nor a fresh recovery certificate u/s 46(2) of the Act were issued by the I.T.O. Subsequently, on February 18, 1959, the I.T.O. made orders of final assessment for the years 1954-55 and 1955-56 u/s 23 of the Act. Thereafter, he issued to the petitioner fresh demand notices u/s 29 of the Act in pursuance of those final orders of assessment, but did not issue any fresh recovery certificate u/s 46(2) in pursuance of those demand notices. He merely intimated the tax recovery authorities that the arrears of tax had been reduced to Rs. 1,34,216 (Rs. 71,108-29 for the year 1954-55 and Rs. 63,108-38 for the year 1955-56 after adjusting Rs. 27,679 paid by the petitioner as advance tax).

5. The recovery of tax from the petitioner was stayed by an interim order of this court dated March 24, 1959, in an earlier writ petition filed by him, Civil Misc. Writ No. 801 of 1959. The writ petition was dismissed on September 29, 1961. The petitioner filed a Special Appeal (Special Appeal No. 650 of 1961) against the order dismissing his writ petition. That appeal was also dismissed on January 31, 1962.

6. On January 18, 1972, the I.T.O., Collection I, Kanpur, to whom the work of collection stood transferred, addressed a letter to the Tax Recovery Officer, Kanpur, who had taken over the recovery proceedings pending before the Collector, intimating the Tax Recovery Officer that the amount of arrears of tax outstanding against the petitioner was Rs. 1,34,216. On September 12, 1972, the Tax Recovery Officer, Kanpur, sent a notice to the petitioner calling upon him to pay within 15 days of the service of notice, Rs. 1,65,592.94 and intimating that in case of default, steps would be taken to realise that amount in accordance with the Second Schedule to the Income Tax Act, 1961. As the petitioner did not pay any amount in pursuance of the aforesaid notice, the Tax Recovery Officer proceeded to attach the petitioner''s immovable properties. It is at this stage that the petitioner presented this petition.

7. The principal contention of Shri Shanti Bhushan, learned counsel for the petitioner, runs thus: The purported provisional assessments for the years 1954-55 and 1955-56, u/s 23B of the Act, were void and without jurisdiction inasmuch as they were made before the petitioner had filed his returns for those two respective years. Such void orders could not be rectified u/s 35 of the Act. The I.T.O. himself cancelled the provisional assessments made on July 1, 1955. Hence, the demand notices issued in pursuance of those void orders of provisional assessment and the recovery certificate issued on the basis of those demand notices also became void. When the I.T.O. made fresh provisional assessments on May 14, 1958, he neither issued any fresh demand notices nor any recovery certificate u/s 46(2) of the Act on the basis of those demand notices. Even after final assessments for 1954-55 and 1955-56 were made on February 18, 1959, the I.T.O. merely issued demand notices in pursuance of those assessment orders, but did not follow them by issue of a fresh recovery certificate u/s 46(2) of the Act. Hence there was no recovery certificate in force when the Tax Recovery Officer proceeded to attach the properties of the petitioner in the year 1972. In the absence of a recovery certificate u/s 46(2) of the Act issued within one year from the last day of the financial year in which the demand notices were issued, no proceedings for recovery of tax could be taken by the tax recovery authorities. Hence, the attachment of the petitioner''s properties by the Tax Recovery Officer was illegal.

8. In support of his contention Shri Shanti Bhushan strongly relied on the decision of the Supreme Court in Income Tax Officer, Kolar and Another Vs. Seghu Buchiah Setty, . There, the majority of the Bench held that when the amount of tax assessed is reduced in appeal, a fresh demand notice has to be served on the assessee before he could be treated as a defaulter and that initiation or continuance of recovery proceedings against him, without issuing a fresh demand notice, would be illegal,

9. Shri Shanti Bhushan next relied on the decision of this court in Rameshwar Dass Brahma Prakash v. Sales Tax Officer [1972] UPTC 466 (All). There, the assessee was assessed to sales tax for the years 1960-61 and 1961-62, and notices of demand were served on him. Subsequently, recovery proceedings were also initiated against him. In the appeals preferred by him those assessment orders were set aside and the appellate authority remanded the cases to the Sales Tax Officer who made fresh assessments which were subsequently affirmed in appeal. But no fresh demand notices had been issued to the assessee after such fresh assessments. This court held that no recovery proceedings could be taken against the assessee on the basis of the earlier demand notices since they had lapsed when the assessment orders on the basis of which they had been issued were themselves set aside in appeal. Their Lordships held that fresh notices of demand should have been issued in pursuance of the fresh assessment orders and that if the assessee had committed a default after issue of those notices, recovery proceedings could be taken against him, but that no recovery proceedings could be taken against him on the basis of the earlier notices of demand.

10. The learned standing counsel for the Income Tax department who appeared for the respondents sought to defend the impugned recovery proceedings. He did not dispute that the provisional assessments for the years 1954-55 and 1955-56 made by the I.T.O. on July 1, 1955, were bad inasmuch as they were made before the assessee had filed his returns for those two years. But he maintained that such defect in those two provisional assessments was rectified on May 14, 1958, by the I.T.O. by his orders u/s 35 of the Act and that after such rectification the authorities could proceed to recover the arrears of tax without issuing fresh demand notices and a fresh tax recovery certificate u/s 46(2) of the Act, He further submitted that after the final assessments for those two years were made on February 18, 1959, the I.T.O. had issued fresh demand notices for those years and had intimated the tax recovery authorities what the amount of arrears of tax was as a result of such final assessments. The learned standing counsel maintained that no fresh recovery certificate was necessary either after the rectification made on May 14, 1958, u/s 35 of the Act of the provisional assessments nor after the final assessments made on February 18, 1959, and that the tax recovery authorities could proceed to recover the arrears of tax on the basis of the original recovery certificate issued on March 15, 1956.

11. The learned standing counsel submitted that in order to overcome the effect of the decision of the Supreme Court in Income Tax Officer, Kolar and Another Vs. Seghu Buchiah Setty, , the Taxation Laws (Continuation and Validation of Recovery Proceedings) Act, 1964 (hereinafter called "the Validation of Recovery Proceedings Act "), was enacted and that u/s 3 of that Act the tax recovery authorities can take recovery proceedings in pursuance of an earlier recovery certificate when the tax assessed has been reduced, enhanced or affirmed in appeal or other proceedings subsequent to issue of such certificate.

12. In order to appreciate the rival contentions of the learned counsel, it is necessary to set out Sub-section (1) of Section 23B of the Act and the relevant portions of Section 3 of the Validation of Recovery Proceedings Act.

13. Sub-section (1) of Section 23B of the Act reads :

"The Income Tax Officer may, at any time after the receipt of a return made u/s 22, proceed to make in a summary manner, a provisional assessment of the tax payable by the assessee, on the basis of his return and the accounts and documents, if any, accompanying it, after giving due effect to (i) the allowance referred to in paragraph (b) of the proviso to Clause (vi) of Sub-section (2) of Section 10, and (ii) any loss carried forward under Sub-section (2) of Section 24."

14. Sub-section (1) of Section 3 of the Validation of Recovery Proceedings Act provides that where any notice of demand in respect of any Government dues is served upon an assessee by a taxing authority under any Scheduled Act (the Indian Income Tax Act, 1922, is one of the Acts in the Schedule to the Validation of

Recovery Proceedings Act) and any appeal or other proceedings is filed or taken in respect of such Government dues, and such Government dues are enhanced or reduced in such appeal or proceeding, it shall not be necessary to issue a fresh notice of demand upon the assessee after the disposal of such appeal or proceeding. Where there has been enhancement of tax in such appeal or proceeding, all that is necessary is to serve upon the assessee another notice of demand only in respect of the amount by which such Government dues are enhanced and where such Government dues are reduced in appeal or proceeding, all that is necessary is that the taxing authority should intimate the fact of such reduction to the assessee and to the Tax Recovery Officer, where a certificate for recovery of tax has been issued.

15. Sub-section (2) of Section 3 of the Validation of Recovery Proceedings. Act reads :

"For the removal of doubts, it is hereby declared that no fresh notice of demand shall be necessary in any case where the amount of Government dues is not varied as a result of any order passed in any appeal or other proceeding under any Scheduled Act."

16. Sub-section (3) of Section 3 states that the provisions of this Section shall have effect notwithstanding any judgment, decree or order of any court, Tribunal or other authority.

17. Section 5 of the Validation of Recovery Proceedings Act gives retrospective effect to the provisions of that Act and states that those provisions shall apply and shall be deemed always to have applied in relation to every notice of demand served upon an assessee by any taxing authority under any Scheduled Act whether such notice was or is served before or after the commencement of that Act.

18. The learned standing counsel contended that the words "other proceeding "occurring in Sub-section (1) of Section 3 of the Validation of Recovery Proceedings Act are wide enough to include a rectification proceeding u/s 35 of the Act. He maintained, that since the original provisional assessments made by the I.T.O. for the years 1954-55 and 1955-56, before the petitioner had filed his returns for those years, had been rectified by the I.T.O. u/s 35 of the Act by his orders dated May 14, 1958, there was no need to issue fresh tax recovery certificate after such rectification and that likewise after the I.T.O. made final assessments for those two years and issued demand notices, there was no need to issue a fresh recovery certificate in view of the provisions of Section 3 of the Validation of Recovery Proceedings Act. He added that all that was necessary for the I.T.O. was to intimate the Tax Recovery Officer the reduction, if any, in the amount of tax as a result of the final assessments and that in the present case such intimation had been given by the I.T.O. to the Tax Recovery Officer.

19. To make a provisional assessment u/s 23B of the Act, the receipt by the I.T.O. of a return made u/s 22 was a condition precedent. If a provisional assessment was

made before the assessee had filed his return, such assessment was, in our opinion, void ab initio. As the provisional assessments made in the present case suffered from such serious infirmity, they could not be rectified u/s 35 of the Act. The purported orders of rectification made on May 14, 1958, could not render valid what were void ab initio. The demand notices issued on the basis of such void orders and the recovery certificate issued on March 15, 1956, on the basis of such demand notices were likewise void ab initio and had no legal effect. Assuming that the I.T.O. had power to cancel his own order of provisional assessment, such cancellation would have the effect of obliterating the demand notices and the recovery certificate based on the orders of provisional assessment which were cancelled. Assuming that the I.T.O. had power to make fresh provisional assessments after cancelling his earlier orders of provisional assessments, such fresh assessments did not have the effect of reviving the earlier demand notices and the earlier recovery certificate which also stood cancelled by cancellation of the earlier provisional assessments.

20. Even accepting the submission of the learned standing counsel that the words "other proceeding" occurring in Section 3(1) of the Validation of Recovery Proceedings Act, would include a rectification proceeding u/s 35 of the Act, the proceeding contemplated by those words can only be a valid proceeding and not a proceeding void ab initio. We are unable to read Section 3(1) of the Validation of Recovery Proceedings Act as dispensing with the need to issue a fresh demand notice or a fresh recovery certificate where the earlier demand notice or the earlier recovery certificate was void ab initio or stood cancelled.

21. As there was no valid recovery certificate u/s 46(2) of the Act issued prior to the final assessment orders for the years 1954-55 and 1955-56, the authorities could not proceed to recover the tax in pursuance of the recovery certificate issued on March 15, 1956, which was void ab initio and also stood cancelled. Section 3(1) of the Validation of Recovery Proceedings Act could not be of any aid to the authorities even after the final assessments were made and fresh demand notices were issued for those two years.

22. However, the learned standing counsel contended that in the circumstances of this case we should not exercise our discretionary jurisdiction under Article 226 of the Constitution to quash the impunged recovery proceedings. Elaborating this contention he submitted that the final assessments for the years 1954-55 and 1955-56, made on the petitioner had been affirmed in appeals and had become final, that a large sum of tax was undoubtedly due from the petitioner, that even if there was any irregularity in the recovery proceedings, no injustice could be said to have resulted to the petitioner by the authorities recovering the arrears of tax admittedly due from him and that unless there was any substantial injustice, we should decline to interfere with the recovery proceedings by exercise of our discretionary jurisdiction under Article 226 of the Constitution.

23. In support of his above contention the learned standing counsel relied on several pronouncements of the Supreme Court. In Sangram Singh Vs. Election Tribunal, Kotah, Bhurey Lal Baya, , the Supreme Court said thus at page 429 :

"That, however, is not to say that the jurisdiction will be exercised whenever there is an error of law. The High Courts do not, and should not, act as courts of appeal under Article 226. Their powers are purely discretionary and though no limits can be placed upon that discretion it must be exercised along recognised lines and not arbitrarily ; and one of the limitations imposed by the courts on themselves is that they will not exercise jurisdiction in this class of case unless substantial injustice has ensued, or is likely to ensue."

24. Again in A.M. Allison Vs. B.L. Sen, , the Supreme Court observed thus at page 231 :

"The High Court of Assam had the power to refuse the writs if it was satisfied that there was no failure of justice, and in these appeals which are directed against the orders of the High Court in applications under Article 226, we could refuse to interfere unless we are satisfied that the justice of the case requires it. But we are not so satisfied."

25. On the other hand, Shri Shanti Bhushan contended that Article 265 of the Constitution provides that no tax shall be levied or collected except by authority of law and that where the levy or collection of a tax is not in accordance with law, it would be the duty of this court to prevent the authorities from making such illegal levy or collection. He maintained that that a tax was undoubtedly due from the petitioner would be no justification for our not interfering with the realisation of such tax where the procedure for such realisation is not in accordance with law. In support of his contention he relied on the decision of this court in CHHAGAN LAL RATHI Vs. Income Tax OFFICER, DISTRICT III(I), KANPUR, AND ANOTHER., . There, to recover the arrears of the Income Tax and excess profits tax due from an assessee, the Income Tax Officer purported to take action u/s 46(5A) of the Act and served a notice on the bank in which the assessee had money in deposit, not to pay him any monies to the extent of such arrears of tax. In pursuance of such notice the bank deposited with the Government a sum of Rs. 18,119.48. The assessee challenged the action of the Income Tax Officer by filing a writ petition in this court. The petition was dismissed by a learned single judge who took the view that there was no manifest injustice in the impugned action of the Income Tax Officer. In the appeal filed by the assessee, the Division Bench reversed the order of the learned single judge holding that the provisions of Section 46 of the Indian Income Tax Act, 1922, had not been incorporated in the Excess Profits Tax Act, that, therefore, that sub-section could not apply to proceedings for realisation of excess profits tax and that the proceedings taken by the Income Tax Officer were without jurisdiction. Repelling the contention of the revenue that the equities of the case were against the assessee and that the court should not grant its discretionary relief to the

assessee because he had not paid any amount towards the excess profits tax assessed on him as early as in 1959, their Lordships observed (page 786) :

"The mere fact that a party who comes to a court challenging the validity of proceedings for recovery of tax owed by him has not paid the tax cannot disentitle him to relief under Article 226 of the Constitution. If it were held that the court is entitled to decline relief to such a petitioner on the ground that he had not paid the tax due, it would amount to holding that a party challenging the validity of recovery proceedings must deposit the amount due with the taxing authority before he is entitled to maintain a petition under Article 226. That would be to impose a condition upon a party not contemplated by the provisions of Article 226 or of any rules of this court made in respect of such petitions. Moreover, the acceptance of the contention would also mean that no order can be sought by a petitioner restraining the recovery authorities from recovering the tax, because obviously if the petitioner had to deposit the amount sought to be recovered before filing his petition, no occasion would arise for seeking such "order. We cannot agree with the view taken by the learned single judge that there was no manifest injustice and, therefore, certiorari should not issue. There being no authority of law under, which the Income Tax Officer could require the bank to pay the money from the account of the appellant, the appellant was deprived of property belonging to him without authority of law. Indeed, Article 265 of the Constitution expressly prohibits the collection of tax without authority of law. It is also immaterial that it was open to the Income Tax Officer to proceed to recover the tax due by adopting another mode of recovery. The mere circumstance that it is open to him to adopt some other mode cannot, in our opinion, necessarily render futile a direction or writ issued by this Court."

26. In Rameshwar Dass Brahma Prakash v. Sales Tax Officer [1972] UPTC 466 (All) also this court restrained the authorities from recovering from the petitioner therein the arrears of sales tax as there were no valid demand notices and recovery certificate which could empower the authorities to take recovery proceedings.

27. In Income Tax Officer, Kolar and Another Vs. Seghu Buchiah Setty, also the Supreme Court upheld the decision of the High Court which quashed the recovery proceedings on the ground that there was no valid recovery certificate u/s 46(2) of the Act.

28. Hence we are unable to accept the contention of the learned standing counsel that merely because the tax for the years 1954-55 and 1955-56 was undoubtedly due from the petitioner and he had not paid such tax, we should decline to exercise our discretionary jurisdiction under Article 226 of the Constitution, even though the procedure followed for recovering such arrears was without the authority of law.

29. In the result, we allow this petition, quash the attachment of the petitioner''s properties for recovery of Income Tax for the assessment years 1954-55 and

1955-56 and issue a writ in the nature of mandamus restraining the respondents from recovering from the petitioner the arrears of tax for those two years by following the procedure under the Second Schedule to the Income Tax Act, 1961.

30. In the circumstances of the case, we direct the parties to bear their own costs in this petition.