(1991) 05 AHC CK 0041

Allahabad High Court

Case No: Civil Miscellaneous Writ Petition No. 350 of 1989

Lal Man		APPELLANT
	Vs	
Commissioner of Income Tax and Another		RESPONDENT

Date of Decision: May 2, 1991

Acts Referred:

- Constitution of India, 1950 - Article 226
- Income Tax Act, 1961 - Section 226(3)

Citation: (1991) 98 CTR 249 : (1992) 196 ITR 743

Hon'ble Judges: B.P. Jeevan Reddy, C.J; S.R. Singh, J

Bench: Division Bench

Advocate: R.V. Gupta, V.B. Upadhyaya and Shashi Kant, for the Appellant; Standing Counsel, for the Respondent

Final Decision: Disposed Of

Judgement

B.P. Jeevan Reddy, C.J.

This is a writ petition for issuance of a writ of certiorari to quash the order dated February 15, 1989 (annexure 17 to the writ petition), issued by the Income Tax Officer, Ward III(2), Bunda. Under the impugned order, the petitioner has been called upon to remit the amount held by him for and on behalf of the defaulter, which was attached by the Income Tax Officer, earlier u/s 226(3) of the Income Tax Act, 1961. The order puts the petitioner on notice that he has made payment to the defaulter even after receiving the attachment order which is illegal. Indeed, the impugned notice was issued in response to a representation made by the petitioner on February 13, 1989.

2. One Gopal Das Gupta is the defaulter. For the assessment years 1974-75 and 1975-76, the total tax assessed was Rs. 67,44,255. A notice of demand was issued to the assessee-defaulter.

3. On February 3, 1978, a notice was issued u/s 226(3) of the Act addressed to the firm, Lalman Bhagwati Prasad (of which the petitioner was then a partner), stating that the aforesaid amount of tax is due from Gopal Das Gupta and that they should pay the amount held by them, on account of the said defaulter, to the Income Tax Officer. According to the petitioner, the firm was holding an amount of Rs. 1,03,008 on account of the said defaulter on that day. The firm did not remit any amount in response to the said notice. The petitioner says that he addressed a letter dated February 25, 1978, to the Income Tax Officer stating that, according to the information furnished by the assessee-defaulter to him, the demand of tax against him was stayed and, therefore, the notice dated February 3, 1978, may be withdrawn. He also says that he enclosed a copy of the stay order dated January 4, 1978, with the said letter. He says that he did not receive any reply to his letter dated February 25, 1978.

4. Against the orders of assessment, Gopal Das Gupta filed appeals. The appellate authority set aside the assessments on October 27, 1978, and remitted the matter for making fresh assessments. While it is not necessary to trace the course of those assessment proceedings, suffice it to mention that an assessment was finally made in 1988, whereunder, the tax assessed came down to Rs. 14,00,000 and odd.

5. According to the petitioner, the firm, Lalman Bhagwati Prasad, of which he as a partner was closed in the year 1982. On November 1, 1982, says the petitioner, he addressed a letter to the Income Tax Officer intimating him of the closure of the said partnership firm and stating further that, though according to Gopal Das Gupta, no demand was pending against him, the order u/s 226(3) issued to the partnership firm had not yet been withdrawn. The petitioner asked the Income Tax Officer to tell him what to do in the matter. The petitioner says, he did not receive any reply to this representation also. He repeated similar requests in the year 1984, but again there was no response.

6. During the years 1984 and 1985, the petitioner says, he paid the entire amount held by him on account of the defaulter to the defaulter. This was done by him because there was no response to his repeated letters addressed to the Income Tax Officer and, according to the material supplied by the defaulter, no demands were outstanding against him.

7. After the assessment was finally made in the year 1988 (against Gopal Das Gupta), another order u/s 226(3) was addressed to the petitioner by the Income Tax Officer. This order is dated December 26, 1988. In this order, the Income Tax Officer stated that Gopal Das Gupta was the creditor of the petitioner and that his credit balance with the firm, Lalman Bhagwati Prasad, was attached u/s 226(3) previously, and further, that the "set aside assessments of Sri Gopal Das Gupta have been completed. Now the demand outstanding against Sri Gopal Das Gupta are as under :..... Total Rs. 14,33,008 ". The petitioner was, accordingly, called upon to remit the said amount out of the credit balance of Gopal Das Gupta. On receiving this order

dated December 26, 1988, the petitioner made a representation stating that the firm was closed with effect from November 10, 1982, of which intimation was given to the Income Tax Officer on December 13, 1982, and that no credit balance of any party existed with the petitioner.

8. On January 30, 1989, another notice was sent by the Income Tax Officer to the petitioner calling upon him to remit the amount held by him on account of the said defaulter whereupon the petitioner submitted another representation stating the following facts :

The partnership firm, Lalman Bhagwati Prasad, did receive a notice u/s 226(3) in the year 1982, but it did not remit the money because of stay orders and also because there was no fresh notice u/s 226(3) later. The firm also addressed letters to the Income Tax Department, but there was no response in that behalf. Meanwhile, the defaulter (Gopal Das Gupta) was insisting upon payment to be made to him. In the circumstances and with a view to avoid litigation and humiliation, payment was made to him. The firm has since been dissolved ; the notice dated January 30, 1989, is invalid. Further, the notice u/s 226(3) sent to the firm in 1978 came to an end when the appeals filed by Gopal Das Gupta were allowed and the demand was set aside. It did not revive when a fresh assessment was made. There was no fresh notice u/s 226(3) addressed to the petitioner. In the circumstances, the notice u/s 226(3) issued in the year 1988-89 may be withdrawn.

9. It is in response to this letter that the Income Tax Officer addressed the impugned notice/letter dated February 15, 1989.

10. Sri V. B. Upadhyaya, learned counsel for the petitioner, questioned the validity of the notices issued to the petitioner u/s 226(3) on the following grounds.

11. The order dated February 3, 1978, addressed to the firm lapsed and ceased to be effective the moment the appeals filed by Gopal Das Gupta were allowed and the orders of assessment (whereunder a tax of Rs. 67,00,000 and odd was assessed as payable) were set aside. It is true that, while allowing the appeals and setting aside the orders of assessment, the matter was remitted for de novo assessments and fresh assessments were made ultimately in the year 1988, but this does not revive or resurrect the order dated February 3, 1978. The petitioner could not pay the said amount because he was apprised by the defaulter of the stay orders obtained by him coupled with a request not to remit the amount to the Department. After his appeals were allowed, the defaulter insisted upon payment of his amount and it was paid to him. The payment is perfectly unobjectionable and a valid payment. In the year 1988, when fresh assessments were made and when another order u/s 226(3) was served upon the petitioner, he was not holding any amount on account of the defaulter. The impugned notices are, therefore, untenable and must be quashed.

12. A counter-affidavit has been filed by the Income Tax Officer. The correctness of the facts stated by the petitioner and which are mentioned hereinbefore is not

denied. It is, however, contended that the order of attachment dated February 3, 1978, did not cease to be operative or effective just because the demand was stayed pending the appeals preferred by the defaulter. Learned standing counsel for the Revenue contended that the said order of attachment continued to be valid and effective, even though the appeals against the assessment orders giving rise to the said demand were allowed, because, says counsel, the appeals were not allowed absolutely, but that they were allowed with a direction to make fresh assessments. Accordingly, fresh assessments were made and though they resulted in the scaling down of the amount of tax payable, the tax demand is still substantial.

13. In the circumstances, the question squarely arises, whether an order of attachment u/s 226(3) comes to an end where the assessment which gave rise to the order of attachment is set aside in appeal with a direction to make an assessment afresh. Learned counsel for the petitioner says that there is no provision in the Act or the Rules which keeps such an order of attachment alive in such a situation. He says that, unless there is such a provision, the order of attachment falls to the ground once the order of assessment is set aside, though with a direction to make a fresh assessment. On the other hand, the Department''s contention is that no such express provision is necessary and that the order of attachment continues to be in force so long as the assessment proceedings are pending. Counsel says that, where the assessment order is set aside with a direction to make a fresh assessment, it is a case where the assessment proceedings are still pending and if the fresh assessment results in a tax liability, that is sufficient to sustain the earlier order of attachment. We are told that there is no direct authority of any court on this aspect.

14. On a consideration of the matter, we are of the opinion that counsel for the assessee is right in his submission. The order of attachment issued under Sub-section (3) of Section 226 is only a mode of recovering the tax which has become due. The tax is due under and by virtue of an order of assessment. Once the order of assessment is set aside in appeal, the demand falls to the ground. In such a situation, the order of attachment issued u/s 226(3) cannot survive ; it has no independent existence. Unless there is a provision in the Act or the Rules which keeps the order of attachment alive and subsisting notwithstanding the setting aside of the assessment order, it cannot survive. In other words, the situation would have been different if the Act contained a provision which kept such an order of attachment alive and subsisting in cases where the assessment order which gave rise to the demand (consequent attachment order) was set aside (whether on appeal or otherwise), coupled with an order to make a de novo assessment. Since there is no such provision, it is not possible to say that such attachment order survives and remains effective, notwithstanding the setting aside of the assessment order which gave rise to the attachment order.

15. In this connection, it would be instructive to notice the decision of the Supreme Court in Income Tax Officer, Kolar and Another Vs. Seghu Buchiah Setty, , holding

that, where the amount of tax assessed was reduced on appeal, a fresh demand notice had to be served on the assessee before he could be treated as a defaulter and any recovery proceedings initiated against the assessee without issuing such fresh notice are illegal. It is after this judgment that Parliament enacted the Taxation Laws (Continuation and Validation of Recovery Proceedings) Act, 1964, appropriately amending Section 225 and providing that, in a case of reduction of tax in appeal or other proceeding, it is not necessary for the Income Tax Officer to issue a fresh certificate to the Tax Recovery Officer. It is enough if he intimates the assessee and the Tax Recovery Officer of the fact of reduction and, in such a case, the Tax Recovery Officer would have jurisdiction to recover only the reduced amount. It may be noticed that no similar provision was introduced in Section 226. Even if there had been one, it is doubtful whether it would avail in a case like the present one where the assessment is set aside in toto with a direction to make a fresh assessment.

16. For the above reasons, it must be held that the order of attachment dated February 3, 1978, served upon the firm (of which the petitioner was a partner) ceased to be effective and operative the moment the appeals filed by the defaulter were allowed and the orders of assessment (which gave rise to the said attachment order) were set aside. The mere fact that, while setting aside the assessment orders, a direction to make a fresh assessment was given, does not keep alive the attachment order dated Februrary 3, 1978. By the time the second order u/s 226(3) dated December 26, 1988, was sent, not only was the firm which was holding the money on behalf of the defaulter, dissolved, but no money of the defaulter was available with the petitioner. (The order u/s 226(3) dated December 26, 1988, was addressed to the petitioner). By that date, the amount was paid over to the defaulter. On the date the amount was paid, there was no order of attachment in force, on the above reasoning. If so, the order u/s 226(3) dated December 26, 1988, is liable to be quashed and is, accordingly, quashed.

17. The writ petition is disposed of in the above terms. There shall be no order as to costs.