Shaw Wallace Co. Ltd. Vs Union of India (UOI) and Others

Court: Calcutta High Court

Date of Decision: Aug. 28, 2003

Acts Referred: Income Tax Act, 1961 â€" Section 222, 223, 224, 225, 226

Citation: (2004) 267 ITR 241 : (2004) 140 TAXMAN 213

Hon'ble Judges: Barin Ghosh, J

Bench: Single Bench

Judgement

Barin Ghosh, J.
It is claimed by the Income Tax authorities that in the balance-sheet of Visisth Chay Vyapar Ltd. (hereinafter referred to

as ""VCVL"") it has been shown that a sum in excess of Rs. 27 crores is due to it from the petitioner herein. It is also claimed by the Income Tax

authorities that they are entitled to receive a sum in excess of Rs. 27 crores from VCVL on account of arrear tax. It is the contention of the Income

Tax authorities that VCVL has failed and neglected to discharge the tax liabilities mentioned above. It is the contention of the Income Tax

authorities that in order to recover their said dues, steps have been taken u/s 226 of the Income Tax Act, 1961. The said section authorises the

Assessing Officer, being the Tax Recovery Officer, to require any person from whom money is due or may become due to the assessee to pay so

much of the money as is sufficient to pay the amount due by the assessee. In order to recover money from any such person concerned, he is

required to be notified by a notice. The said section authorises the person concerned, to whom such notice is issued, to object. In order to object,

the person concerned, in accordance with the said section, is obliged to make a statement on oath. What statement can be made while making

such objection has also been provided in the section itself. The statement may be either that the sum demanded or any part thereof is not due to the

assessee or that he does not hold any money for or on account of the assessee. The said provision makes it abundantly clear that the moment such

a notice is issued by the Assessing Officer, being the Tax Recovery Officer, he steps into the shoes of the assessee who is the creditor of the

person notified. Any defence available to such a notified person to the creditor in relation to such claim may entail either of the two situations,

which is required to be stated on oath, i.e., (i) the money is not due ; or (ii) the person concerned is not holding the money. When steps were taken

against the petitioner u/s 226 of the Act, the petitioner filed a statement on oath but therein did not state either that the sum demanded or any part

thereof is not due to VCVL or that the petitioner is not holding any money for or on account of VCVL. What it contended was that the Assessing

Officer of the petitioner has doubted the transaction inter se the petitioner and VCVL, which was reflected in the balance-sheet of the petitioner as

well as of VCVL, and, accordingly, until such time the doubt so cast by the Assessing Officer of the petitioner is put to rest ultimately by the

appellate authority, before whom an appeal is pending, the Income Tax authorities should not take steps to recover any money from the petitioner

on account of VCVL. The mode and manner in which the Assessing Officer of the petitioner has dealt with the transaction inter se the petitioner

and VCVL for assessing the Income Tax liability of the petitioner, is no defence of the petitioner to the claim of VCVL as reflected in its balance-

sheet and also as reflected in the balance-sheet of the petitioner. Even, if the Assessing Officer as well as the appellate authority come to a definite

conclusion to the effect that the transaction was a false transaction and ultimately the same is confirmed by the highest court, the same will not be

binding on VCVL, for VCVL is not a party to such assessment proceeding, though it may be summoned in such proceedings for giving evidence,

and accordingly, such a finding will not prevent VCVL from recovering its dues from the petitioner irrespective of such finding by the Income Tax

authorities, unless it supports the case of the Assessing Officer of the petitioner when called upon to give evidence in such proceedings. It is not the

case of the petitioner that VCVL has supported the case of the Assessing Officer of the petitioner. In garnishee proceedings initiated by the Tax

Recovery Officer against the petitioner by invoking the provisions of Section 226 of the Act the one and only defence of the garnishee was and is

its defence to the claim of the creditor and of no one else.

2. In that view of the matter, I am of the view that the moment when such statement was made on oath by the petitioner, the same ought to have

been rejected inasmuch as such statement was not within the parameter of the section inasmuch as the same did not disclose any defence to the

claim of the creditor. The petitioner had approached the Delhi High Court for almost similar purpose. The petitioner had also approached earlier

this court and the matter was taken up before the Division Bench, when before the Division Bench it was contended that the Assessing Officer of

VCVL was taking one stand and the Assessing Officer of the petitioner was taking yet another stand and, accordingly, that itself is a defence to the

claim of the Tax Recovery Officer, Delhi. The Division Bench with anguish expressed that the petitioner must clear its own stand, i.e., which stand

it would prefer--the stand of the Assessing Officer of VCVL or the stand of the Assessing Officer of the petitioner and, accordingly, permitted the

petitioner to go back to the Commissioner of Income Tax for that purpose. Nothing to that effect was done before the Commissioner of Income

Tax. On the last two occasions when the matter was heard I wanted the petitioner to disclose its stand and an adjournment for that purpose was

also accorded. No stand has yet been taken. An affidavit has been filed instead, where it has been stated that the matter is under investigation for

the purpose of advising the management as to which stand should be taken.

3. Be that as it may, the investigation by the petitioner of its own conduct cannot entitle the petitioner to stall the claim of the creditor, which has

already obtained a decree against the petitioner, against which though an appeal has been preferred, but no stay of execution of the decree has

been granted. Under those circumstances, the petitioner has no defence to the demand made by the Tax Recovery Officer, Delhi, in terms of the

provisions contained in Section 226 of the Act.

4. It appears that when the matter was dealt with by the Division Bench in the earlier writ petition, it was contended before the Division Bench that

by reason of a scheme the petitioner is not obliged to pay to VCVL the amount of interest as has been reflected in its balance-sheet but is obliged

to pay a lesser amount of interest. The scheme was not disclosed before the Division Bench, nor the same was disclosed before the Income Tax

Commissioner after the matter was remitted back to him by the Division Bench. The scheme has not been disclosed in the present writ petition.

The logical conclusion, therefore, would be that there is no existence of any such scheme.

5. In the writ petition filed before the Delhi High Court, the petitioner contended that the notice issued u/s 226 of the Act upon Andhra Pradesh

Beverage Corporation Limited (hereinafter referred to as ""APBCL"") u/s 226 of the Act is not permissible. It appears from the orders of the Delhi

High Court that on the condition of payment of a sum of Rs. 2 crores by the petitioner, the notice u/s 226(3) of the Income Tax Act issued upon

APBCL was stayed. Subsequently, the petitioner withdrew the writ petition and in the meantime, did not pay the amount of Rs. 2 crores. While the

writ petition was withdrawn the Delhi High Court expressly revived the said notice issued to APBCL.

6. In the instant writ petition the validity of the said notice has been challenged. It has been contended that Section 226 of the Act does not permit

initiation of garnishee proceeding against a creditor of a garnishee. Sub-section (3) of Section 226 deals with initiation of garnishee proceedings

against a person who is liable to pay some money to the assessee at default. Clause (x) of Sub-section (3) of Section 226 of the Act provides that

if such garnishee fails to pay he shall be deemed to be an assessee in default in respect of the amount specified in the notice and, further,

proceedings may be taken against him for the realisation of the amount as if the same was an arrear of tax due from him, in the manner provided in

Sections 222 to 225 of the Act and the notice shall have the same effect as an attachment of a debt by the Tax Recovery Officer in exercise of his

power u/s 222 of the Act.

7. The Legislature, therefore, while making the garnishee at default a deemed assessee, has restricted the right to recover the money due from him

within the four corners of Sections 222 to 225 of the Act and did not extend the same also to Section 226 of the Act. While interpreting any

statute the plain and simple meaning thereof must be construed. A plain and simple reading of the contents of Clause (x) of Sub-section (3) of

Section 226 of the Act makes it abundantly clear that while framing the said clause the Legislature did not permit initiation of a garnishee

proceeding against the creditors of the garnishee who has become an assessee in default. Therefore, the Tax Recovery Officer, Delhi, it appears to

me, could not issue the notice u/s 226(3) to APBCL for failure of the petitioner to pay in its capacity of garnishee.

8. There cannot be any dispute that Section 222 of the Act itself authorises attachment and sale of the assessee''s movable properties. When the

garnishee becomes an assessee in default, his movable properties, therefore, may be attached and sold. For that purpose steps are required to be

taken in accordance with the provisions contained in the Second Schedule to the Act. Rule 26 of the Second Schedule to the Act provides, inter

alia, that in the case of a debt not secured by a negotiable instrument the attachment shall be made by a written order prohibiting the creditor from

recovering the debt and the debtor from making payment thereof until further order of the Tax Recovery Officer. Sub-rule (3) of Rule 26 of the

said Schedule permits the debtor to pay the amount stated in the order of the Tax Recovery Officer and such payment would discharge the debtor

as effectually as payment to the creditor entitled to receive the same. The statute, however, does not impose any obligation upon the debtor to pay.

It only permits the debtor to pay. Therefore, in the event the debtor pays, of its own volition, the same could be had. The Tax Recovery Officer

cannot compel the debtor to pay. In the event the debtor does not pay of its own volition, will the amount remain unrealised ? No, the debt will

then be realised by selling the same. Rule 37 of the Second Schedule of the Act specifically authorises the Tax Recovery Officer to sell such

attached debt. After the sale is effected, the party, who has bought the same, is entitled to recover the debt by stepping into the shoes of the

creditor. When the sale of an asset in the hand of a third party is to be sold, I think natural justice demands that the third party must be informed in

regard thereto. These are the rights and obligations of the Tax Recovery Officer under the Act against APBCL in relation to the amount due by it

to the petitioner. In that view of the matter, for all practical purposes it must be deemed that the notice issued u/s 226(3) of the Act upon APBCL

was in fact an attachment notice with an intimation that APBCL can pay the attached amount to the Tax Recovery Officer, Delhi, in discharge of its

debts due to the petitioner and in the event such payment is made, the receipt to be issued therefore by the Tax Recovery Officer, Delhi,

acknowledging the same would discharge it from the debt due by the amount mentioned in such receipt and for no other purpose. The Tax

Recovery Officer, Delhi, is thus directed to issue a further notice to APBCL mentioning that the notice issued earlier u/s 226(3) dated February 24,

2003, is in fact a notice of attachment. It shall be open to the Tax Recovery Officer, Delhi, to state in that notice that it shall be open to APBCL to

pay the amount due to the petitioner by it and attached at his hand to the Tax Recovery Officer, Delhi, and in the event such payment is made,

APBCL shall stand discharged from its debts due to the petitioner to that extent. It shall also be open to the Tax Recovery Officer, Delhi, to state

in the said notice that in default of APBCL exercising the right to pay the attached amount to the Tax Recovery Officer, Delhi, within a time to be

specified it, the Tax Recovery Officer, Delhi, shall take steps to sell such attached debt.

9. Learned counsel for the petitioner submitted that when the statute has provided a volition of the debtor in Sub-rule (3) of Rule 26 of the said

Schedule, it would not be proper on the part of the Tax Recovery Officer, Delhi, to ask the debtor to exercise such volition. When the statute gives

a right to the debtor to make payment of his own volition, there is no harm in reminding him of the same in the notice. Learned counsel for the

petitioner submitted that Form ITCP 3 has specified how the power under Rule 26(1)(i) of the Second Schedule to the Income Tax Act, 1961, is

to be exercised and what should be stated while exercising such power and in the said form nothing has been mentioned as to Sub-rule (3) of Rule

26. By prescribing a form the person exercising the power is informed as to what minimum he is required to do while exercising the power, but a

prescribed form cannot either abridge or enlarge the statute. If in addition to what has been stated in the prescribed form, the Tax Recovery

Officer intimates the debtor that the rule itself provides that he can make the payment directly to him that would not be such an action, which can

be called in question.

10. Learned counsel for the petitioner submitted that fixation of time to make payment by APBCL and, in default, a threat of taking steps to sell

would in fact be exercise of power u/s 226(3) of the Act against APBCL. I have already stated that the Tax Recovery Officer, Delhi, has no right

to step into the shoes of the petitioner, for the petitioner is an assessee in default. I have also clarified that the buyer of the debt will acquire such

right. That itself answers the question. It is up to APBCL to pay to the Tax Recovery Officer, Delhi, or to permit the buyer of the debt to recover

the same from it. Book debts of the petitioner are nothing but debts due to the petitioner by others. The amount due to the petitioner and lying in

the hands of the debtors of the petitioner can be attached by issuing an attachment order. The debtor of the petitioner may of its own volition pay

the amount to the Tax Recovery Officer. But if that is not done, the Tax Recovery Officer is entitled to sell such debts. I have stated earlier that

when steps are to be taken for sale of assets in the hands of a third party, natural justice demands that the third party should be notified in relation

thereto. Therefore, if APBCL is informed that it has a right to pay the attached debt to the Tax Recovery Officer within a time specified, and in

default, it would be assumed that the debt will not be discharged by it and, accordingly, the same will be sold, nothing would be done by the Tax

Recovery Officer which is not permissible by law.

11. The writ petition is, accordingly, disposed of.

12. There shall be no order as to costs.

13. In the event the petitioner wants to change its stand from the one it has disclosed in the statement, in that event, it shall file a fresh statement on

oath before the Income Tax Commissioner and, thereafter, the matter would be decided in terms thereof, but the directions as above must be

complied with by the Tax Recovery Officer, Delhi, forthwith.

14. All parties are to act on a xerox signed copy of this dictated order on the usual undertaking.