The State Vs. P. Topno, Income Tax Officer, Titlagarh.

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Court : Orissa

Decided On : Sep-09-1958

Reported in : 24(1958)CLT479; [1959]36ITR135(Orissa)

Appeal No. : Original Criminal Miscellaneous Case No. 2 of 1958

Appellant : The State

Respondent : P. Topno, Income Tax Officer, Titlagarh.

Judgement :

RAO, J. - By an order of this court dated January 28, 1958, a notice was issued on January 31, 1958, to Shri P. Topno, Income-tax Officer, Titlagarh, to show cause, why he should not be committed for contempt of court for having started a legal proceeding against the official liquidator in a pending winding up case under the Companies Act after the order for winding up was passed, without the leave of the court.

By an order passed on August 30, 1957, the Koraput Swadhin Motor Transport Company Limited was ordered to be wound up by this court and the official liquidator was directed to proceed with the administration of the estate in accordance with the provisions of the Indian Companies Act, 1956. From that date, under section 456 of the Companies Act, all the property and effects of the company should be deemed to be in the custody of the court. Under section 446 of the said Act when a winding up order has been made, no suit or other legal proceeding shall be commenced against the company except by leave of the court and subject to such terms as the court may impose. The opposite party, the Income-tax Officer, Titlagarh, without obtaining the leave of the court before starting proceedings for attachment of the assets in the custody of the court in the hands of the official liquidator issued a notice under section 46, clause (5A), on the official liquidator under the following circumstances.

As in the statement of affairs furnished by the ex-managing director no information regarding assessments, payments and cases, if any, pending either with the Income-tax Officer or the Appellate Assistant Commissioner or the Tribunal in connection with the income-taxes pertaining to the Koraput Swadhin Motor Transport Company Limited was available, a reference, as directed by the court, was made in the matter to the Income-tax Officer by the official liquidator, on January 6, 1958, informing him that a winding up order had been made with regard to the said company; that he was appointed official liquidator to administer the affairs of the company; and that no information relating to assessments, payments and cases, if any, pending either with him or the Appellate Commissioner or the Tribunal was available from the records and registers of the company and requesting him that full and detailed information in the matter might be furnished at an early date. To this the opposite party replied stating the arrears due from 1952-53 to 1956-57 amounting to Rs. 4977-11-0 and requested the official liquidator to made the amount equal to the arrear tax available to the Department on completion of winding up and also enclosed a formal notice of attachment. He also stated that the company filed an appeal against the order of the Appellate Assistant Commissioner confirming the assessment of 1952-53 and pleaded inability to furnish the rest of the information required and also asked the official liquidator to contact the companys legal representative for necessary information. The enclosure referred to in the letter was a notice under section 46(5A) of the Indian Income-tax Act, 1922, and dated January 11, 1958. In this it is stated :

'A sum of Rs. 4977-11-0 is due from M/s. Koraput Swadhin Motor Transport Co. Ltd., Jeypore, on account of income-tax. I am to request you, under section 46(5A) of the Income-tax Act, 1922, to pay to me forthwith any amount due from you, to, or held by you for, or on account of the said M/s. Koraput Swadhin Motor Transport Co. Ltd., Jeypore, upto the amount of arrears shown above, and also request you to pay any money which may subsequently become due from you to them which you may subsequently hold for on account of them upto the amount of arrears still remaining unpaid, forthwith on the money becoming due or being held by us as aforesaid as such payment is required to meet the amount due by the taxpayer in respect of arrears of income-tax. I am to say that any payment made by us in compliance with this notice is in law deemed to have been made under the authority of the taxpayer and my receipt will constitute a good and sufficient discharge of you liability to the person to the extent of the amount refer to in the receipt.

I am to observe that if you discharge any liability to the taxpayer after receipt of this notice, you will be personally liable to me as Income-tax Officer, Titlagarh, to the extent of the liability discharged, or to the extent of the liability of the taxpayer for tax and penalties, whichever is less.

Further if you fail to make payment in pursuance of this notice to me as Income-tax Officer, Titlagarh, further proceedings may be taken by and before the Collector on the footing that this notice has the same effect as an attachment by the Collector in exercise of his power under the proviso to sub-section (2) of section 46.'

This clearly shows that the Income-tax Officer, by issuing the above notice, started a legal proceeding against the official liquidator when he was asked to supply the information required, without the consent of the court as required by law. Under section 446, clause (1), of the Indian Companies Act, 1956.

'When a winding up order has been made or the official liquidator has been appointed as provisional liquidator, no suit or other legal proceeding shall be commenced or if pending at the date of the winding up order, shall be proceeded with, against the company, except by leave of the court and subject to such terms as the court may impose.'

This is a mandatory direction of law. This provision applies also to the proceedings started by the State.

The notice of attachment under section 46(5A) amounts to starting a legal proceeding. The heading of section 46 is 'Mode and time of recovery' and the section contemplates several modes of recovery of the arrears of income-tax. Sub-section (2) of the section says that the Income-tax Officer may forward to the Collector a certificate under his signature and the Collector on receipt of such certificate shall proceed to recover from such assesses, the amount specified therein as if it were an arrear of land revenue. Sub-section (3) lays down that in any area with respect to which the Commissioner has directed that any arrear shall be recovered by any process enforceable for the recovery of an arrear of any municipal tax or local rate imposed under any enactment for the time being in force, the Income-tax Officer may proceed to recover such amounts by due process.

Sub-section (5) says that if any assessee is in receipt of a salary, the Income-tax Officer may require any person paying the same to deduct from any payments any arrears due from such assessee and sub-section (5A) lays down that the Income-tax Officer may, at any time, by notice in writing, require any person from whom money is due or may become due to the assessee to pay forthwith the arrears of income-tax. The explanation below the section says that a proceeding for the recovery of any sum shall be deemed to have commenced if some action is taken to recover the whole or any part of the sum due. In the case of Governor-General in Council v. Shiromani Sugar Mills Ltd., it was held :

'The Crown is bound by the provisions of the Companies Act, and is bound, in regard to the provisions relating to the liquidation of companies, to a statutory scheme of administration wherein the prerogative right of the Crown to priority no longer exists. The Crown is accordingly not entitled to any prerogative, priority, or preferential rights or treatment, in payment of its claims save those expressly conferred and limited by the Act itself, in particular by section 230 and sub-section (2) of section 232 (sections 530 and 537(2) of the new Act).

Clearly action under section 46, Income-tax Act, is not a proceeding in an ordinary court of law. But there is no reasons why in British India no legal proceeding can be taken otherwise than in an ordinary court of law, or why a proceeding taken elsewhere than in an ordinary court of law, provided it be taken in a manner prescribed by law and in pursuance of law or legal enactment, cannot properly be described as a legal proceeding. Accordingly the words other legal proceeding in section 171 comprise any proceeding by the Revenue Authorities under section 46(2) Income-tax Act, and before forwarding the requisite certificate under section 46(2) to the Collector, which would put the machinery for collection of the arrears of income-tax as arrears of land revenue into motion, the Income-tax Department should apply in the liquidation under section 171 for leave of the winding up court.'

These observations clearly apply to a proceeding under section 46(5A) also.

In the case of Bank of Bihar Ltd. v. Secretary of State, a Division Bench of the Patna High Court consisting of Courtney Terrell, C.J., and Kulwant Sahay. J., held that :

'There is no exception to section 171 (section 446 of the present Act) and the leave of the court is essential for the purpose of proceeding to execution even in case of decree obtained by the Government. The Crown debts have no priority over other debts. It was not the intention of the Legislature that the court should be given discretion to permit proceedings which would have the effect of giving to any particular creditor a priority to which he is not otherwise entitled and which would have the effect of absorbing all the available assets.'

An official liquidator like a receiver appointed by the court is an officer of the court and he has similar rights and duties as a receiver. Any initiation of a legal proceeding against him without the leave of the court of the court amounts to contempt. In the case of Braja Bhusan Trigunait v. Sris Chandra Tewari decided by a Division Bench of the Patna High Court, Justice Mullick observed :

'It is a rule based upon public policy which requires that when the court has assumed possession of a property in the interest of litigants before it, the authority of that court is not to be obstructed by suits designed to disturb the possession of the court. The institution of such suits is in the eye of the law a contempt of the authority of the court and therefore the party contemplating such a suit, is required to take the leave of the court so as to absolve himself from that charge.

In the present case before me there is also a statutory provision that before any initiation of the legal proceeding, leave of the court should be obtained. In the case of York City and County Banking Co., Ltd. v. Derwent Rolling Mills Co., Ltd. it was observed that the receiver had possession by the order of the court of all the property of the defendant-company including the book debts and that an interference with him in getting in that debt was an interference which the court would not sanction even by a stranger.'

On these facts and the authorities cited it is clear to my mind that the action of the opposite party in issuing notice under section 46(5A) of the Income-tax Act, 1922, to the official liquidator is an act which amounts to contempt of this court.

But the opposite party, at the very earliest opportunity, as soon as he received the notice of contempt, by his letter dated February 19, 1958, informed the official liquidator that he thereby withdrew the notice of attachment issued on January 11, 1958, under section 46(5A) and on February 24, 1958, filed a counter-affidavit showing cause to the notice issued by this court in which he offered an unconditional and since apology for the act committed by him and assured the court that he had never any intention to do any such act that might amount to contempt of court. He stated that his sole purpose in issuing the notice under section 46(5A) was to afford facility to the official liquidator to make the payment on the conclusion of the winding up proceedings when funds would be available with him. In paragraph 9 he also stated that the Central Government was protected under section 537(2) of the Indian Companies Act and that the notice under section 46(5A) of the Income-tax Act was not an attachment until certificate proceedings would be started by the Collector of the District in exercise of his powers under the proviso to sub-section (2) of section 45 of the Indian Income-tax Act. He further stated that it was under this impression and with a view to help the official liquidator to make the payment at the conclusion of the winding up proceedings, he issued the notice acting bona fide and in good faith; and that he very much regretted that he was not aware that leave of the court was to be taken before nay such notice could be issued under section 46. He also stated that the above facts were stated to appraise this court all the circumstances under which the said notice had been issued and not to justify his action. The impression that the notice under section 46(5A) of the Income-tax Act was not an attachment until certificate proceedings were started by the Collector is an erroneous impression, but I have no reason to doubt that it was bona fide and was made in good faith as the Income-tax Officer being a junior officer was not aware that such a notice would amount to attachment. Mr. H. Mohapatra, the learned standing counsel for the Department, submitted that in view of the unconditional apology tendered by the contemner and expression of sincere regret, the proceeding for contempt started against him might be dropped. In may opinion, the proceedings for contempt cannot be dropped. His unconditional apology amounts, in law, to a confession of the guilt and as such he should be held guilty of contempt though the contempt in this case may amount to only technical contempt. In the case of M. Y. Shareef v. Honble Judges of the Nagpur High Court the Supreme Court held :

'There cannot be both justification and an apology. The two things are incompatible. Again an apology is not a weapon of defence to purge the guilty of their offence; nor is it intended to operate as a universal panacea, but it is intended to be evidence of real contriteness.'

His Lordship Mahajan, C.J., in the course of this judgment observed :

'The proposition is well settled and self-evident that there cannot be both justification and an apology. The two things are incompatible. Again an apology is not a weapon of defence to purge the guilty of their offence; nor is it intended to operate as a universal panacea, but it is intended to be evidence of real contriteness. The appellants having tendered an unqualified apology, no exception can be taken to the decision of the High Court that the application for transfer did constitute contempt because the judges were scandalized with a view to diverting the due course of justice, and that in signing this application the two advocates were guilty of contempt. That decision therefore stands.'

But in view of the apology tendered by the learned Advocates in that case, they allowed the appeal to the extent that the sentence of fine passed on both the appellants was set aside and the unqualified apology given by them to that court and the High Court was accepted, and issued a strong admonition and warning to the two counsel for their conduct. Accordingly, in my view, on the authority of the above-said decision if the contemner tenders an unqualified apology after receipt of notice to show cause why he should not be punished for contempt, he should be held guilty of contempt, but the court might accept the unqualified apology and discharge him without any punishment. It cannot, in view of the unqualified apology, drop the proceedings against the contemner.

Accordingly I hold the opposite party, Shri P. Topno, Income-tax Officer, Titlagarh, guilty of technical contempt of this court, but in view of the unconditional apology offered by him I do not propose to impose any punishment except observing that he would act with more circumspection and regard for law in future. The proceeding is disposed of accordingly. Under the circumstances of this case there will be no order as to costs.