

In the High Court of Judicature at Madras

Dated : 20.4.2016

Coram :

The Honourable Mr.Justice V.RAMASUBRAMANIAN

and

The Honourable Mr.Justice M.V.MURALIDARAN

O.S.A.Nos.91 to 93 of 2016 and CMP.Nos.5569 and 5570 of 2016

Official Assignee,
High Court, Madras

...Appellant in
all the OSAs

Vs

1.T.R.Bhuvaneswari

2.The Commissioner of Income Tax - TDS
Income Tax Building, Chennai-34.

3.The Deputy Commissioner of Income
Tax, Range-9, Kannammai Building,
Mount Road, Chennai-6.

...Respondents
in all the OSAs

APPEALS under Order XXXVI Rule 1 of the Original Side Rules read with Clause 15 of the Letters Patent against the common order dated 7.3.2016 respectively made in Application Nos.28, 29 and 32 of 2015 in I.P. No.77 of 2002.

For Appellant : Mr.N.V.Balaji
For Respondent-1 : Mrs.Narmadha Sampath
For Respondent-2 : Mr.J.Narayanaswamy
For Respondent-3 : Mr.M.Swaminathan, assisted by
Mr.K.Sureshkumar &
Ms.V.Pushpa

COMMON JUDGMENT

(Judgment was delivered by V.RAMASUBRAMANIAN, J)

These three appeals arise out of a common order passed by the learned Judge sitting in the Insolvency Jurisdiction on three applications taken out by the learned Official Assignee.

2. Heard Mr.N.V.Balaji, learned counsel appearing for the Official Assignee, Mr.J.Narayanaswamy, learned Standing Counsel for the second respondent and Mr.M.Swaminathan, learned Standing Counsel for the third respondent.

3. A lady by name T.R.Bhuvaneswari, who was a partner in a firm that owned a cinema theatre, was adjudged as an insolvent and her share in the partnership firm and in the properties were brought to sale by the learned Official Assignee. Out of the sale proceeds, the Official Assignee set apart one portion representing capital gains tax.

4. Thereafter, the Official Assignee came up with three applications in A.Nos.28, 29 and 32 of 2015 before the Insolvency Court. The prayer in A. No.28 of 2015 was to direct the Commissioner of Income Tax (TDS) to waive the interest that may be payable for the assessment years 2008-09 to 2014-15 under Sections 234A, 234B and 234C.

5. The prayer made by the Official Assignee in A.No.29 of 2015 was to direct the Assessing Officer of the concerned circle not to charge interest under Sections 234A, 234B and 234C in the income tax assessments that may be made for the aforesaid assessment years. The prayer made in A.No. 32 of 2015 was to permit the Official Assignee to adopt the directions given in the first two applications, for all other cases for future guidance.

6. By a common order passed on 7.3.2016, the learned Judge, sitting in Insolvency Court, directed the Assessing Authority to pass an order of assessment on merits before the cut off date. The learned Judge also gave liberty to the Official Assignee to file appropriate applications for waiver of interest before the appropriate Authority. The learned Judge further directed that no penal action shall be taken against the Official Assignee.

7. Contending that the Insolvency Court itself has the power and jurisdiction to grant waiver and that there is no necessity for the Official Assignee to approach any other authority under the Income Tax Act, 1961 for grant of waiver, the Official Assignee has come up with the above appeals.

8. The short question that arises for consideration in these three appeals is as to whether for the purpose of grant of waiver of interest and/or penalty, the Official Assignee should approach only the Central Board of Direct Taxes or whether the Official Assignee can get appropriate orders under Section 7 of the Presidency Towns Insolvency Act, 1909 or not.

9. Section 7 of the Act 3 of 1909 reads as follows :

"Power of Court to decide all questions arising in insolvency : Subject to the provisions of this Act, the Court shall have full power to decide all questions or priorities, and all other questions whatsoever. whether of law or fact, which may arise in any case of insolvency coming within the cognizance of the Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case:

Provided that unless all the parties otherwise agree, the power hereby given shall, for the purpose of deciding any matter arising under Section 36, be exercised only in the manner and to the extent provided in that section."

10. It appears from the express language of Section 7 is that the Insolvency Court has full power to decide (i) all questions of priorities and (ii) all other questions whatsoever. The questions that could be decided by the Insolvency Court could be of law or of fact. These questions may arise in the case of insolvency coming within the cognizance of the Court. Alternatively, these questions may be considered by the Court itself to be expedient or necessary to be decided for the purpose of doing complete justice or making a complete distribution of property.

11. However, it is contended by Mr.M.Swaminathan, learned Standing Counsel that the power conferred upon the Insolvency Court under Section 7 is made subject to other provisions of that Act. But unfortunately, the other provisions of the Act do not deal with the issue that has now arisen for consideration before this Court.

12. Section 178 of the Income Tax Act, whose provisions are given overriding effect upon the provisions of any other law for the time being in force by virtue of Sub-Section (6), deals with the liability of the Liquidator to set apart amounts that are payable to the Income Tax Department. Sub-Section (4) of Section 178 makes a Liquidator personally liable, if he failed to set apart an amount, which may become due and payable by a company in liquidation to the Income Tax Department.

13. In S.V.Kondaskar, O.L. and Liquidator of the Colaba Land & Mills Co. Ltd. (in liquidation) Vs. V.M.Deshpande and

another [(1972) 83 ITR 685], the Supreme Court held that income tax is a debt, which has to rank pari pasu with other debts. The Supreme Court also held that Liquidation Court is not vested with the power to start assessment proceedings for determining the tax liability. The Court further held that no leave is necessary to be obtained from the Company Court for holding assessment or re-assessment proceedings.

14. But, the above observations were made subject to a caveat in paragraph 22 of the said decision, which reads as follows :

"The argument that the proceedings for assessment or reassessment of a company which is being wound up can only be started or continued with the leave of the liquidation court is also, on the scheme both of the Act and of the Income Tax Act, unacceptable. We have not been shown any principle on which the liquidation court should be vested with the power to stop assessment proceedings for determining the amount of tax payable by the company which is being wound up. The liquidation court would have full power to scrutinise the claim of the revenue after income-tax has been determined and its payment demanded from the liquidator. It would be open to the liquidation court then to decide how far under the law, the amount of Income-tax determined by the department should be accepted as a lawful liability on the funds of the company in liquidation. At that stage the winding up court can fully safeguard the interests of the company and its creditors under the Act. Incidentally, it may be pointed out that at the bar no English decision was brought to our notice under which the assessment proceedings were held to be controlled by the winding up court. On the view that we have taken, the decisions in the case of Seth Spinning Mills Ltd., (In Liquidation) 46 I.T.R. 193 and the Mysore Spun Silk Mills Ltd., (In Liquidation) 68 I.T.R. 695 do not seem to lay down the correct rule of law that the Income-tax Officers must obtain leave of the winding up court for commencing or continuing assessment or reassessment proceedings."

15. Therefore, while there is no impediment for a Statutory

Authority like an Assessing Officer to perform the statutory duty imposed upon him, the question of distribution of the sale proceeds of the assets of the company in liquidation or the assets of the insolvent, is vested only upon the Official Liquidator or the Official Assignee, as the case may be. The Official Liquidator functions within the control of the Company Court and the Official Assignee functions and discharges his duties within the control of the Insolvency Court.

16. Unfortunately for the Department, Section 178 deals only with the obligation on the part of the Official Liquidator to set apart a liability. The question as to whether interest in certain circumstances can be waived or not, is not a matter covered by Section 178, to enable the Department to take advantage of the overriding effect conferred under Sub-Section (6).

17. Let us assume for a minute that the Official Assignee makes an application for waiver of interest before the Central Board of Direct Taxes. In case where the Central Board of Direct Taxes rejects an application for waiver, the Official Assignee will have to necessarily come up only before the Insolvency Court under Section 85. Even if he does not come up, the amount payable to the Income Tax Department, whether it is the principal amount of tax or whether it is interest or whether it is penalty, will have to be decided only by the Official Assignee subject to the control of the Insolvency Court depending upon the amount available in his coffers. Since the amount payable to the Department is a crown debt, which ranks *pari pasu* with other debts, that will also get a rateable distribution.

18. Therefore, if the ultimate payment to the Department actually depends upon the extent of funds available in the coffers of the Official Liquidator or the Official Assignee, it is unthinkable that the Official Assignee should be driven to the necessity of approaching the Authority for the waiver of the interest and to allow him to come up before the Insolvency Court in case he suffers an order. Hence, we are of the considered view that the question of waiver could also be considered by the Insolvency Court itself. In case where surplus funds are available, the Company Court distributes such surplus funds to the promoters. Similarly, the Insolvency Court distributes surplus funds to the insolvent or his or her legal heirs. But at that time, the Company Court can as well say that these surplus funds should be paid only towards discharge of the liability on account of interest and/or penalty.

19. With that leverage in mind, we are of the considered

view that this question of waiver can be decided by the Insolvency Court itself without driving the Official Assignee to go before the Central Board of Direct Taxes depending upon the amounts of funds available with the Official Assignee. As a matter of fact, in the case on hand, the insolvent herself took out an application before the Insolvency Court in A.No.433 of 2009 for a direction to the Official Assignee to set apart capital gains tax. By an order passed by one us (VRSJ) on 28.4.2011, the Official Assignee was directed to set apart 20% of the sale proceeds. Hence, Section 178(4) has been complied with by the Official Assignee and that is the end of Section 178 and nothing more.

20. In view of the above, the original side appeals are allowed, the order of the learned Judge is modified to the effect that the Official Assignee need not go before the Central Board of Direct Taxes praying for waiver of interest. The Insolvency Court itself can consider the question of waiver of interest in terms of the power conferred under Section 7 and in the light of the provisions of the Income Tax Act, together with the quantum of funds available and the distribution already made. We are fortified with the view taken by us by a decision of the Supreme Court in Johrilal Vs. Bhanwari [AIR 1977 SC 2202], which arose in terms of Section 4 of the Provincial Towns Insolvency Act, 1920, which is in pari materia with Section 7 of the Presidency Towns Insolvency Act. No costs. Consequently, the above MPs are closed.

Sd/-

Assistant Registrar(CS-VII)

//True Copy//

Sub Assistant Registrar

To

1.The Commissioner of Income Tax - TDS, Income Tax Building, Chennai-34.

2.The Deputy Commissioner of Income Tax, Range-9, Kannammai Building,

Mount Road, Chennai-6.

3.The Registrar, Official Assigning, High Court, Madras.

4.The Sub-Asst.Registrar, Original Side, High Court, Madras.

1 cc to Mr.M.Swaminathan, Advocate, sr.24400

1 cc to Mr.T.Narayanaswamy, Advocate, sr.24359

1 cc to M/s.Narmadha Sampath, Advocate, sr.24869

RS

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kra 19.05.2016