HON'BLE SRI JUSTICE RAMESH RANGANATHAN
AND
HON'BLE SMT JUSTICE KONGARA VIJAYA LAKSHMI

WRIT PETITION NO.24899 OF 2018

ORDER: (Per the Hon'ble Sri Justice Ramesh Ranganathan)

Heard Sri P.Vinod Kumar, learned counsel for the petitioner, and Sri K.Raji Reddy, learned Senior Standing Counsel for Income Tax and, with their consent, this Writ Petition is disposed of at the stage of admission. In this Writ Petition, a Writ of Mandamus is sought to declare the order passed by the 3rd respondent dated 24.04.2018, and the consequential proceedings of the fourth respondent (Tax Recovery Officer) dated 18.06.2018, as being contrary to the CBDT Instructions and the judgment in **Commissioner of Income Tax v. S.Khader Khan**[1]; for a consequential direction to set aside the same; and to direct the third respondent to recall the warrant of arrest issued to the petitioner by the fourth respondent.

By his proceedings dated 24.04.2018, the Principal Commissioner of Income Tax-I, Visakhapatnam passed an order in the appeal, preferred by the petitioner, directing the Tax Recovery Officer to keep the show cause notice dated 14.03.2018, issued under ITCP 25, in abeyance on condition that the petitioner pays the entire undisputed demand of Rs.76,27,798/-; and 20% of the demand, pertaining to the assessment year 2013-2014, of Rs.41,49,088/-, aggregating to Rs.1,17,76,886/-, in six equal monthly instalments of approximately Rs.20.00 lakhs each. In the said order, the Tax Recovery Officer assessed the outstanding demand as Rs.2,83,73,238/-. The petitioner, admittedly, did not comply with the said order.

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[1] 352 ITR 480 SC

Consequent thereto, the Tax Recovery Officer passed an order on 18.06.2018 holding that the petitioner had to pay Rs.20.00 lakhs towards the first instalment; the petitioner had not made payment of tax as per the order of the Principal Commissioner of Income Tax, Visakhapatnam dated 24.04.2018; the petitioner had furnished a letter on 31.05.2018 along with a cheque dated 04.06.2018; he had promised to pay tax on 01.06.2018; and as he had failed to comply with the terms and conditions, the stay granted by the Principal Commissioner of Income Tax, Visakhapatnam, against the show cause notice for arrest issued by the Tax Recovery Officer, shall be deemed to have been withdrawn with immediate effect. In view thereof, the warrant of arrest was sent to the Commissioner of Police, Visakhapatnam to arrest the petitioner as per procedure.

On the petitioner invoking the jurisdiction of this Court, an interim order was passed in I.A.No.1 of 2018 in W.P.No.24899 of 2018 dated 20.07.2018, directing the petitioner to deposit Rs.40.00 lakhs with the fourth respondent within ten days from the date of the order; and, in the event of default, the order would stand withdrawn, and the authorities would be at liberty to proceed further in accordance with law. The petitioner filed I.A.No.2 of 2018 seeking modification of the earlier interim order in I.A.No.1 of 2018 dated 20.07.2018. In its order in I.A.No.2 of 2018 dated 30.07.2018, the submission of the learned Counsel for the petitioner that a sum of Rs.10.00 lakhs would be deposited on the same day was recorded, and the petitioner was granted time till 20.08.2018 to pay the balance Rs.30.00 lakhs. This Court observed that, if the petitioner failed to pay Rs.10.00 lakhs, or the balance Rs.30.00 lakhs on 20.08.2018, the interim order shall stand withdrawn; and the authorities would be at liberty to proceed further in accordance with law.

The petitioner had furnished a cheque for Rs.30.00 lakhs which was dishonoured on presentation. The petitioner also failed to pay Rs.30.00 lakhs, as directed by this Court, by 20.08.2018. From the facts as noted hereinabove, it is clear that the petitioner is a chronic tax defaulter because of which all his properties were provisionally attached by the Income-tax Department on 20.03.2015, and a final order of attachment was passed thereafter. The attachment orders are still in force; and the petitioner is disabled thereby from alienating the said properties, and to create third party rights thereupon. While it is clear that the petitioner is a chronic defaulter, the question which necessitates examination is whether the Tax Recovery Officer was justified in passing the impugned order directing his arrest, and detention in civil prison, for non-payment of income tax.

Article 21 of the Constitution of India confers a fundamental right on every person not to be deprived of his life or personal liberty except according to the procedure established by law. The petitioner's fundamental rights under Article 21 can only be deprived following the procedure established by law which, in the present case, is the Second Schedule to the Income Tax Act. Rule 4 of Schedule II relates to the mode of recovery and thereunder, if the amount mentioned in the notice is not paid within the time specified therein or within such further time as the Tax Recovery Officer may grant in his discretion, the Tax Recovery Officer shall proceed to realise the amount by one or more of the following modes under clauses (a) to (d) thereunder. Clause (c) of Rule 4 enables the Tax Recovery Officer to realise the amount by arrest of the defaulter and his detention in prison.

Part - V of Schedule II to the Income-tax Act relates to arrest and detention of the defaulter. Rule 73 and 74 thereunder relate to notice to show cause, and for hearing . They read thus:

Notice to show cause.

73. (1) No order for the arrest and detention in civil prison of a defaulter shall be made unless the Tax Recovery Officer has issued and served a notice upon the defaulter calling upon him to appear before him on the date specified in the notice and to show cause why he should not be committed to the civil prison, and unless the Tax Recovery Officer, for reasons recorded in writing, is satisfied—

(*a*) that the defaulter, with the object or effect of obstructing the execution of the certificate, has, after the drawing up of the certificate by the Tax Recovery Officer, dishonestly transferred, concealed, or removed any part of his property, or

(*b*) that the defaulter has, or has had since the drawing up of the certificate by the Tax Recovery Officer, the means to pay the arrears or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same.

(2) Notwithstanding anything contained in sub-rule (1), a warrant for the arrest of the defaulter may be issued by the Tax Recovery Officer if the Tax Recovery Officer is satisfied, by affidavit or otherwise, that with the object or effect of delaying the execution of the certificate, the defaulter is likely to abscond or leave the local limits of the jurisdiction of the Tax Recovery Officer.

(3) Where appearance is not made in obedience to a notice issued and served under sub-rule (1), the Tax Recovery Officer may issue a warrant for the arrest of the defaulter.

(3A) A warrant of arrest issued by a Tax Recovery Officer under sub-rule (2) or sub-rule (3) may also be executed by any other Tax Recovery Officer within whose jurisdiction the defaulter may for the time being be found.]

(4) Every person arrested in pursuance of a warrant of arrest under this rule shall be brought before the Tax Recovery Officer issuing the warrant as soon as practicable and in any event within twenty-four hours of his arrest (exclusive of the time required for the journey):

Provided that, if the defaulter pays the amount entered in the warrant of arrest as due and the costs of the arrest to the officer arresting him, such officer shall at once release him.

[*Explanation.*—For the purposes of this rule, where the defaulter is a Hindu undivided family, the karta thereof shall be deemed to be the defaulter.]

Hearing.

74. When a defaulter appears before the Tax Recovery Officer in obedience to a notice to show cause or is brought before the Tax Recovery Officer under rule 73, the Tax Recovery Officer shall give the defaulter an opportunity of showing cause why he should not be committed to the civil prison.

Rule 73(1) disables the Tax Recovery Officer from ordering arrest and detention of a defaulter in civil prison unless (i) he has issued and served a notice upon the defaulter calling upon him to appear before him on the date specified in the notice; and (ii) has asked the defaulter to show cause why he should not be committed to civil prison. The further requirement of Rule 73(1) is that the Tax Recovery Officer, for reasons to be recorded in writing, should be satisfied (*a*) that the defaulter, with the object or effect of obstructing the execution of the certificate, has, after the drawing up of the certificate by the Tax Recovery Officer, dishonestly transferred, concealed or removed any part of his property, or (*b*) that the defaulter has, or has had since the drawing up of the certificate by the Tax Recovery Officer, the means to pay the arrears or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same.

The impugned order does not reflect the satisfaction of the Tax Recovery Officer of either of the ingredients of clauses (a) and (b) of Rule 73(1) having been satisfied. Rule 73(2) contains a non-obstante clause, and would therefore prevail notwithstanding anything to the contrary contained in Rule 73(1). Rule 73(2) enables the Tax Recovery Officer to issue a warrant for the arrest of the defaulter if he is satisfied, by affidavit or otherwise, that, with the object or effect of delaying the execution of the certificate, the defaulter is likely to abscond or leave the local limits of the jurisdiction of the Tax Recovery Officer. The impugned order does not reflect any such satisfaction either.

Rule 73(3) enables a warrant of arrest to be issued where appearance is not made in obedience to a notice issued under Rule

73(1). The impugned order does not also record that the ingredients of Rule 73(3) are attracted. Rule 74 further requires the Tax Recovery Officer to give the defaulter an opportunity to show cause why he should not be committed to civil prison.

While Rule 4(c) of Schedule II no doubt confers power on the Tax Recovery Officer to realise the amount by arrest of the defaulter, and his detention in prison, it is only if the requirement of Rules 73 and 74 of Schedule II to the Income-tax Act are complied with, can a defaulter be arrested and detained in civil prison. Admittedly, the provisions of Rules 73 and 74, of Schedule II to the Income Tax Act, have not been complied with in the present case.

While Sri K.Raji Reddy, learned Senior Standing Counsel for Income Tax, would submit that the interim order passed by this Court has not been complied with, the fact remains that the interim order passed by the Division Bench, as extracted hereinabove, makes it clear that failure, on the part of the petitioner to comply with the interim order, would result in vacation of the interim order, and would enable the Tax Revenue Officer thereafter to take action in accordance with law. Since the Tax Recovery Officer is required to take action in accordance with law, i.e Rules 73 and 74 of Schedule II to the Income Tax Act, it is not open to him to arrest the petitioner and detain him in civil prison without complying with the requirements of these rule.

The impugned order dated 18.06.2018, to the limited extent a warrant was issued to the Commissioner of Police, Visakhapatnam to arrest the petitioner, is set aside. It is made clear that this order shall not disable the Tax Recovery Officer from complying with the requirements of Rules 73 and 74 of Schedule II to the Income Tax Act and, thereafter, take further action in accordance with law.

The Writ Petition is disposed of accordingly. There shall be no order as to costs. Miscellaneous petitions, if any, pending shall stand dismissed.

RAMESH RANGANATHAN, J

KONGARA VIJAYA LAKSHMI, J

Date:10.10.2018
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