

Surinder Nath Kapoor

Vs

Union of India and Others

Civil Miscellaneous Petition No. 2340 of 1988 in Special Leave Petition (Civil) No. 9946 of 1987

03.08.1988

ORDER

1. This civil miscellaneous petition has been filed by a firm, Raja Properties, praying for certain directions, consequent upon the disposal of the Special Leave Petition (Civil) No. 9946 of 1987 filed by one Surinder Nath Kapoor against the Union of India and others. Before considering the civil miscellaneous petition, it is necessary to state a few facts leading to the filing of the petition.

2. Surinder Nath Kapoor is one of the partners of M/s. Krishna Kapoor & Co. consisting of the following four partners :

(1) Shri Shiv Dayal Kapoor (since deceased).

(2) Shri Surinder Nath Kapoor.

(3) Shri Ram Nath Kapoor.

(4) Shri Narender Nath Kapoor.

3. Partners 2, 3 and 4 are the sons of Shiv Dayal Kapoor, since deceased. There is another firm M/s. Indo-Kashmir Carpets & Handicrafts. It is the sister concern of M/s. Krishna Kapoor & Co. and constituted with the said Shiv Dayal Kapoor, since deceased, and his daughters-in-law. Both the firms are assesses under the Income Tax Act, 1961, hereinafter referred to as 'the Act'.

4. On December 12, 1954, the IAC (Assistant), Range II, Amritsar, passed a garnishee order under Section 226(3)(x) of the Act holding M/s. Krishna Kapoor & Co. a defaulter to the extent of Rs. 8,56,377 on the allegation that the said sum was due by M/s. Krishna Kapoor & Co. to the assessee M/s. Indo-Kashmir Carpets & Handicrafts. The garnishee order was thereafter put into execution and the property of M/s. Krishna Kapoor & Co. was put up for sale by the Tax Recovery Officer I, Jaipur, on January 21, 1986 and was purchased by the petitioner Raja Properties, for the sum of Rs. 37,81,000. The sale was confirmed on March 14, 1986.

5. The said Surinder Nath Kapoor made an application dated February 15, 1986 under Rule 61 of the Second Schedule to the Act before the Tax Recovery Officer, Jaipur, praying for setting aside of the sale of the property of M/s. Krishna Kapoor & Co. The said application was dismissed by the Tax Recovery officer, Jaipur, by his order dated March 14, 1986. He filed an appeal in Form No. 29-A under Rule 86(1)(c) of the Second Schedule to the Act before the Tax Recovery Commissioner, Jaipur. He also filed an application praying for stay of the confirmation of the sale by the Tax Recovery Officer, Jaipur, till the disposal of the appeal. The said appeal was, however, transferred by the Tax Recovery Commissioner, Jaipur, to the Tax Recovery Commissioner, Amritsar. The said

Surinder Nath Kapoor also filed an application for stay before the Tax Recovery Commissioner, Amritsar. As no stay was granted, he filed a writ petition in the Rajasthan High Court. The writ petition was, however, dismissed by the High Court by its order dated September 29, 1986. Being aggrieved by the dismissal of his writ petition, the said Surinder Nath Kapoor filed the above Special Leave Petition No. 9946 of 1986.

6. The special leave petition was disposed of by this Court by its order dated October 12, 1987 as follows :

Heard learned counsel for the parties. Mr. Manchanda for the department agrees that the tax liability of the petition has been reduced to Rs. 3,38,146. Mr. P. N. Misra, counsel for the petitioner states in court that this amount has already been paid to the department. In that view of the matter, the petitioner no more owes any tax to the Income Tax Department. The sale already held confirmation of which we had granted stay shall stand vacated. Special leave petition is disposed of with aforesaid directions.

7. It is clear from the above order of this Court that the sale was set aside. As the Tax Recovery Officer, Amritsar, before whom the said Surinder Nath Kapoor had filed an appeal, did not dispose of the appeal, in view of the said order of this Court setting aside the sale, Surinder Nath Kapoor filed an application for clarification of the said order of this Court dated October 12, 1987. During the pendency of the said application for clarification, the petitioner, Raja Properties, the auction-purchaser, filed the said petition for direction praying for recalling the order dated October 12, 1987 of this Court and the dismissal of the special leave petition.

8. It may be stated at this stage that this Court took the view that its order dated October 12, 1987 was quite clear and did not require any clarification whatsoever. The court reiterated that by virtue of that order, the sale stood set aside. Upon receipt by the Commissioner of Income Tax, Jaipur, of a contempt notice issued by this Court, the appeals which had been filed by Surinder Nath Kapoor, were all disposed of by him on February 4, 1988 in the light of the order of this Court setting aside the sale.

9. It was contended by the petitioner auction-purchaser in support of its application for direction that the auction sale having been confirmed on March 14, 1986, the same could not be set aside. During the hearing of the petition of the auction-purchaser, there was a dispute as to the amount for which the auction sale was held. It was urged on behalf of the firm, M/s. Krishna Kapoor & Co. that it did not owe any amount to Indo-Kashmir Carpets and Handicrafts and, therefore, the garnishee order in execution of which its property was sold was illegal. Further, it was urged that M/s. Krishna Kapoor & Co. was only liable to the extent of Rs. 3,38,146 to the Income Tax Department on account of its own income tax dues which amount it had already deposited.

10. The revenue could not produce before this Court any document showing the exact amount in respect of which M/s. Krishna Kapoor & Co. was really indebted to the Indo-Kashmir Carpets & Handicrafts. It was only contended on behalf of the revenue that the firm, M/s. Krishna Kapoor & Co., was liable to the tune of Rs. 10,00,000 and odd arising out of the garnishee order, which was emphatically denied by the said firm. In that state of records, on April 26, 1988, this Court made the following order :

The matter is adjourned to May 9, 1988. In the meantime, as represented by the

learned Additional Solicitor General the Central Board of Direct Taxes will hold an enquiry to find out whether on the date of sale the assessee was liable to the tune of Rs. 10 lakhs and odd arising out of the garnishee order and therefore in the auction sale held this amount was available to be included as debt to the department. The report of the Enquiry Officer shall be made available to us on that day. Parties are free to place further materials before us.

11. Pursuant to the above order, the Central Board of Direct Taxes appointed Shri K. K. Veer, Director of Income Tax (Recovery), New Delhi, the Enquiry Officer. After holding an enquiry into the matter, the Enquiry Officer has since submitted his report. The report reveals a startling fact which will be stated presently. The IAC (Assistant), Range II, Amritsar, issued a show cause notice dated October 12, 1984 under Section 226(3) of the Act to M/s. Krishna Kapoor & Co. In the show cause notice, a demand of Rs. 2,86,450, alleged to be due from the firm Krishna Kapoor & Co. to the firm Indo-Kashmir Carpets & Handicrafts, was made. No reply was received by the Income Tax Officer from M/s. Krishna Kapoor & Co. in respect of the show cause notice. Curiously enough, without passing a garnishee order for the sum of Rs. 2,86,450, a garnishee order for the sum of Rs. 8,56,377 was passed by the IAC (Assistant), Range II, Amritsar, under Section 226(3)(x) of the Act. This fact, which has been clearly stated in the report of the Enquiry Officer, has not been denied before us by the revenue. The basis of passing the garnishee order dated December 10, 1984 was, as pointed out by the Enquiry Officer in his report, a copy of a statement of accounts filed by M/s. Indo-Kashmir Carpets & Handicrafts and a letter dated September 27, 1984 written by two of its partners to the Assessing Officer, inter alia, stating that M/s. Krishna Kapoor & Co. was indebted to M/s. Indo-Kashmir Carpets & Handicrafts to the tune of Rs. 8 lakhs. In this connection, it is significant to notice that the IAC (Assistant), Range II, Amritsar, then holding the post of Dy. Commissioner of Income Tax (Central), Range II, Ludhiana, in his letter addressed to the Enquiry Officer stated, inter alia, that on the basis of the balance-sheet available on the assessment records filed after the garnishee order was passed, no amount was payable to M/s. Indo-Kashmir Carpets & Handicrafts by M/s. Krishna Kapoor & Co. as on March 31, 1982. A copy of the letter is Annexure VII to the report of the Enquiry Officer. The Enquiry Officer observed in his report as follows :

There is nothing on record to show that the Assessing Officer made any attempt to call for the balance-sheet and accounts of the firm. There is also nothing on record to show that the assessing officer tried to record the statements of any or of all the partners specially when the filing of balance-sheets and statement of accounts was being delayed intentionally or otherwise on the ground that there were disputes among the partners. The assessing officer was assessing both the firms and all the partners of the firm, yet no attempt was made by him to include the arrears of the partners also in the show cause notice issued under Section 226(3) on October 15, 1984 ... In view of the facts mentioned above, I express my regrets that I am unable to give a finding in respect of the amount of Rs. 8,56,377.55 mentioned in the garnishee order since without co-operation of assessee and books of account of both the firms and partners, I am unable to establish whether M/s. Krishna Kapoor & Co. owned this amount to M/s. Indo-Kashmir Carpets & Handicrafts. I still hold that the Assessing Officer at the time of issue of garnishee order should have verified the amount being mentioned by him both in the show cause notice as well as in the garnishee order passed by him under Section 226(3)(x) of the I.T. Act, 1961, which he failed to do, with all the powers of production of books as well as summoning the partners of the firm under Section 131 of the I.T. Act, 1961 being at his command.

12. It is manifestly clear from the observation of the Enquiry Officer extracted above that he could not come to a finding that a sum of Rs. 8,56,377.55 in respect of which the garnishee order was passed was actually due by M/s. Krishna Kapoor & Co. to M/s. Indo-Kashmir Carpets & Handicrafts. It is true that the Enquiry Officer has observed that both the firms did not co-operate in the matter, but it is equally true that the revenue had failed to substantiate that the said sum was due by Krishna Kapoor & Co. to the other firm. The most glaring fact that has been found by the Enquiry Officer is that although the IAC (Assistant), Range II, Amritsar, issued a show cause notice to Krishna Kapoor & Co. under Section 226(3) in respect of Rs. 2,85,450, yet he issued a garnishee order for Rs. 8,56,377.55. It has been observed by the Enquiry Officer that it was due to the carelessness of the officer concerned that he did not issue the show cause notice for the sum of Rs. 8,56,377.55 for which a garnishee order was issued, but such carelessness, in our opinion, is unpardonable. Moreover, as stated already, there is no satisfactory evidence before the IAC (Assistant), Range II, Amritsar, that a sum of Rs. 8,56,377.55 was due by the firm, Krishna Kapoor & Co., to M/s. Indo-Kashmir Carpets and Handicrafts, inasmuch as the Enquiry Officer himself has been unable to come to a finding in respect of that amount. Thus, without giving the firm, Krishna Kapoor & Co., an opportunity of showing cause in respect of the sum of Rs. 8,56,377.55 under Section 226(3) of the Act, a garnishee order in respect of that amount was passed under Section 226(3)(x) and a very valuable property of the firm was put up to auction and sold to the petitioner.

13. The contention of the petitioner auction-purchaser as well as of the revenue is that the petitioner being a third party auction-purchaser, the sale could not be set aside after it was confirmed on March 14, 1986. On the other hand, it has been strenuously urged on behalf of the firm, Krishna Kapoor & Co., that as no show cause notice was issued to it under Section 226(3) of the Act in respect of the sum of Rs. 8,56,377.55, the garnishee order passed under Section 226(3)(x) for that amount and sale held in execution of such an order are null and void.

14. Section 226(3)(x) provides for the issue of a notice on a garnishee. Section 226(3)(vi) provides as follows :

226(3)(vi) Where a person to whom a notice under this subsection is sent objects to it by a statement on oath 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, then nothing contained in this sub-section shall be deemed to require such person to pay any such sum or part thereof, as the case may be, but if it is discovered that such statement was false in any material particular, such person shall be personally liable to the Income Tax Officer to the extent of his own liability to the assessee on the date of the notice, or to the extent of the assessee's liability for any sum due under this Act, whichever is less.

15. The object of serving a notice under clause (3)(vi) of Section 226 is to give the garnishee an opportunity to admit or deny his liability for the amount mentioned in the notice. Under clause (i) [sic (vi)] of Section 226(3), if the garnishee objects to the notice by a statement on oath that the sum demanded or any part thereof is not due to the assessee, then the garnishee will not be required to pay any such sum or apart thereof, as case may. Thereafter, clause (x) of Section 226(3) provides as follows :

226(3)(x) If the person to whom a notice under this sub-section is sent fails to make payment in pursuance thereof to the Income Tax Officer, 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 it were an arrear of tax due from him, in the manner provided in Sections 222 to 225 and the notice shall have the same effect as an attachment of a debt by the Tax Recovery Officer in exercise of his powers under Section 222.

16. Under clause (x), if the person to whom a notice is sent fails to make payment in pursuance thereof to the Income Tax Officer, he shall be deemed to be an assessee in default in respect of the amount specified in the notice. The amount that was specified in the notice was Rs. 2,86,450. The firm, M/s. Krishna Kapoor & Co., did not deny on oath that the said sum demanded or any part thereof was due by them to Indo-Kashmir Carpets & Handicrafts. So, in view of clause (x), M/s. Krishna Kapoor & Co. shall be deemed to be an assessee in default in respect of the said sum of Rs. 2,86,450 as specified in the notice and not for any other amount. The Income Tax Officer, however, put up the property to sale for Rs. 8,56,377.55, which was not at all specified in the garnishee notice. In other words, the garnishee order was for a fictitious sum of Rs. 8,56,377.55 inasmuch as it was not mentioned in the notice under Section 226(3) of the Act.

17. There can be no doubt that when an order is made for the payment of a fictitious sum without giving any opportunity to a person, against whom the order is made, to show cause against the passing of such an order for the said sum, the order is a nullity. In other words, in the eye of law it will be deemed that there was no existence of such an order and any step taken pursuant to or in enforcement of such an order will also be a nullity. It will be tantamount to selling a property in execution of a decree when the decree has no factual existence. In such a case also, the sale will be null and void. The garnishee order that was passed by the IAC (Assistant), Range II, Amritsar, for the sum of Rs. 8,56,377.55 is, therefore, null and void.

18. In this connection, we may refer to a decision of the Privy Council in *Baijnath Sahai v. Ramgurt Singh* ((1896) 23 IA 45 : 23 Cal 775 (Bengal HC)). In that case, a property was sold in execution of a certificate issued under the Bengal Public Demands Recovery Act, 1880, when, as a matter of fact, there was no existence of any certificate. The Privy Council observed as follows :

If no such certificate is given then the whole basis of the proceeding is gone. There is no judgment, there is nothing corresponding to a judgment or decree for payment of the amount, and there is no foundation for the sale. The authority to proceed to the sale is based on the certificate which has the effect, as has been already pointed out, of a judgment or decree, and if no judgment or decree is given, and no certificate is filed having the force or effect of a judgment or decree, there can be no valid sale at all.

19. In the instant case, the garnishee order that was passed was a nullity and any sale held pursuant to such an order is also a nullity. It is quite immaterial that the sale was confirmed. When a decree or order is illegal, any sale held in execution of such a decree or order and confirmed cannot be set aside on the ground that it was illegal when the sale is in favour of a third party. But, when a decree or order is a nullity, it will be deemed to have no existence at all and any sale held in execution of such a decree or order must also be held to be null and void. In the language of the Privy Council in the above case, there is no judgment, there is nothing corresponding to a judgment or decree for payment of the amount, and there is no foundation for the sale.

20. For all this, the revenue is responsible and is liable to compensate the auction-purchaser who is a stranger to the litigation. Our attention has been drawn by the learned Additional Solicitor General

to the order dated October 12, 1987, which has already been extracted above, showing that a representation on behalf of the said Surinder Nath Kapoor, had been made to this Court that the income tax dues of the firm, Krishna Kapoor & Co., to the extent of Rs. 3,38,146 had already been paid to the department, when, admittedly, on the date the said order was passed it was not paid, but on the next day. It is pointed out by the learned Additional Solicitor General that by making a false representation to this Court the firm and/or its partner, Surinder Nath Kapoor, got an order setting aside the sale. In the circumstances, it is submitted that the order setting aside the sale should be recalled.

21. We are unable to accept the contention. It has already been held by us that the sale is a nullity and even though there was some misrepresentation on the part of the firm, it is difficult for us to recall the order setting aside the sale which is null and void. We are, however, of the view that in view of the conduct of the firm and/or its said partner, they should share along with the revenue a part of the compensation that may be allowed to the auction-purchaser.

22. It has already been noticed that a sum of Rs. 37,81,000 was deposited by the auction-purchaser. The auction-purchaser will be entitled to withdraw the said amount unconditionally. The revenue shall see that the said amount is refunded back to the auction-purchaser. Further, the auction-purchaser will be entitled to get interest on said amount at the rate of 15 per cent per annum for a period of two years and a half, during which the amount remained blocked, by way of compensation. The amount of interest calculated at the said rate for the said period comes to Rs. 14,17,875. Out of the said amount, the revenue shall pay to the auction-purchaser a sum of Rs. 11,17,875 and the remaining sum of Rs. 3,00,000 shall be paid to the auction-purchaser by the firm M/s. Krishna Kapoor & Co. and/or the said Surinder Nath Kapoor, who was the petitioner in the special leave petition. The said firm and/or Surinder Nath Kapoor shall pay the said amount of Rs. 3 lakhs to the auction-purchaser within three months from date, in default the auction-purchaser will be entitled to execute this order and realise the same by the sale of the self same property or such portion thereof as will be sufficient for the realisation of the said amount. The revenue is also directed to pay the said sum of Rs. 11,17,875 to the auction-purchaser within a period of two months from date.

23. The CMP is disposed of as above. There will, however, be no order as to costs.

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