8 SCOB [2016] HCD 132

HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

WRIT PETITION NO. 6882 OF 2012

F.J. Geo-Tex (BD) Limited
...Petitioner

Versus

National Board of Revenue and others
...Respondents

Mr. Sarder Jinnat Ali with
Mr. Md. Delower Hossain, Advocates,
------ For the Petitioner.

Mr. S. Rashed Jahangir, D.A.G with
Ms. Nurun Nahar, A.A.G. and
Mr. Saikat Basu, A.A.G.
-----For the Respondents

Heard on: The 17.09.2013, 24.09.2013 and Judgment on 26.09. 2013.

Present.
Justice A.F.M Abdur Rahman
And
Justice Kashefa Hussain

Income Tax Ordinance, 1984
Section 135(1) and 143(2):
The mandatory provision of Section 135(1) of ITO was not followed by the respondents prior to exercise of power under section 143(2) in freezing the bank account of the assessee-petitioners. In the instant matter the provisions of Section 143 of ITO can be resorted to only after the preceding of provisions of Section 135(1) have been complied with, but the Respondents in this case, circumvented the provisions of the law by outrightly ignoring the mandatory provisions to issue notice under the provisions of Section 135 of the Ordinance, which they cannot lawfully do. The Respondents actions in the instant case are without any lawful authority and therefore has no legal effect.
...(Para 27)

Judgment

Kashefa Hussain, J;

1. This Rule Nisi was issued calling upon the respondents to show cause as to why the impugned alleged demand notice vide TIN-003-201-5215 dated 12.06.2011 (Annexure-B) issued by the Respondent No.3 in respect of the assessment year 2010-2011 and notice u/s 143 of Income Tax Ordinance, 1984 to the bank, for attachment of bank account vide Nathi No.003-201-521/pi-315/2011-2012/56 dated 29.05.2012 (Annexure-A) shall not be declared to have been issued without lawful authority and of no legal effect and/or such other or further orders passed as to this Court may deem fit and proper.

2. The facts in short relevant for the purpose of the case are that the petitioner is a Company engaged in the business of production of Synthetic, Geotube, Geobag and Concrete etc, holding TIN No. TIN-003-201-5215 and the petitioner company filed the instant writ petition challenging the assessment in respect of the assessment year 2010-2011 and notice under section 143 of the ITO 1984 dated 29.05.2001 and the demand notice vide Tin-003-

201-5215 dated 12.06.2011 to have been unlawfully issued, without lawful authority and having no legal effect. The respondent No.1 is National Board of Revenue the Respondent No.2 is the Commissioner of Taxes and the Respondent No.3 is the Deputy Commissioner of Taxes against whom the instant Rule Nisi was issued.

3. The petitioner duly filed Income Tax return for the assessment years 2010-2011. The Respondent No.3, Deputy Commissioner of Taxes, pursuant to the submission of the return for the said assessment year 2010-2011 by the assessee-petitioner issued notices under Section 79 and 83(1) of IT Ordinance, 1984 and the same were complied and the hearing of the case completed on 12.06.2011. But the concerned DCT did not serve the demand notice under section 135(1) of the Income Tax Ordinance 1984, and IT 88, and 30 within 30 days from the dated of completion of assessment as mandated under section 135(1) read with 1st provisio of section 178(1) of the ITO 1984. The concerned DCT thereupon issued notice under Section 143 of the IT Ordinance, 1984 to the Basic Bank Ltd. Dilkusha Branch, Dhaka, wherein the assessee-applicant maintains account to stop operation of the petitioner's bank account Nathi No.003-201-5215/Sha-315/2011-2012/56 dated 29.05.2012 and demanded payment of Tk.98,25,180/- without specifying the amount of demand for the years and as such it is not legible which of the year or years relate to the demand. Therefore, the impugned demand notice sent under Section 143 of ITO 1984 to the bank for attachment of bank account without complying with the mandatory provision of section 135(1) read with 1st proviso of section 178(1) of ITO 1984 is illegal and has no legal footing to stand on and therefore liable to be declared illegal. Thereafter the petitioner moved this Court and obtained the aforesaid Rule.

4. The petitioner asserted that the respondents by their acts infringed the petitioner's fundamental rights of legal protection enshrined in Article 31 of the Constitution of the People's Republic of Bangladesh. The assessee-petitioner also states that on his own interest, he obtained a photocopy of the notices under Section 143 of IT Ordinance, 1984 issued by the Deputy Commissioner of Taxes.

5. That notice of the instant Rule Nisi was duly served upon the Respondents pursuant to which the learned Deputy Attorney General Mr. S. Rashed Jahangir representing the respondents along with learned Assistant Attorney General Ms. Nurun Nahar filed an affidavit-in-opposition on behalf of the respondent.

6. In the Affidavit-in-Opposition it is stated inter alia, that the Respondent No.3, the concerned Deputy Commissioner of Taxes after completion of hearing the assessee-petitioner under Sections 82BB/82BB(2)/83(2) on 12.06.2011, issued Assessment order, demand notice and IT 30 which was served upon the assessee-petitioner on 16.06.2011 under the provision of Section 178(2) (b) read with Section 2(48) of the Income Tax Ordinance, 1984 within the prescribed time limit as per provision of Section 94(3) of the Income Tax Ordinance, 1984. The respondent further states that the assessee-petitioner's submission in this respect is wrong and incorrect; the respondents had issued a "reminder" under Nothi No. TIN 003-201-5215/C-315 dated 03.05.2012 for arrear due demands for the assessment years 2003-2004, 2004-2005 and 2010-2011 with a request to pay the arrear demands amounting to Tk.98,25,180/- on or before 15.05.2012; for the purpose of collection of arrear demand to fulfill the requirement of national budget. That the respondents further state that the DCT, the respondent No.3 did not take any initiative or any measure under the provision of Sections 137, 138, 139, 142 of the ITO 1984, which the respondents could have proceeded against the Assessee-petitioner, but in the instant case they only proceeded under Section 143(2) of ITO

1984. The Respondents further persistently claim that the Assessment Order, Demand notice and I.T 30 for the assessment year 2010-2011 was lawfully and validly served upon the assessee-petitioner within time and hence any question of violation of any law or the violation of the provisions of any rule made thereunder does not arise at all in this respect.

7. The respondents further state that the DCT after completion of assessment under Sections 82BB/82BB(2)/83(2) on the basis of hearing on 12.06.2011 issued the assessment order, demand notice and IT 30 to the assessee-petitioner on 16.06.2011 as per the prescribed time limit i.e. within 30 days from the completion of assessment as required under Section 94(3) of the I.T. Ordinance, 1984 of the Income Tax Ordinance, 1984 and under the provision of section 178(2)(b) read with section 2(48) of the Income Tax Ordinance, 1984. As the assessment order, demand notice and I.T. 30 were lawfully and validly served upon the assessee-petitioner no question arises at all in this issue. The respondent also states that there was no violation of Article-31 of the Constitution of the People's Republic of Bangladesh by issuing notice under section 143(2) of the Income Tax Ordinance, 1984 and that it is a procedural function of the department of taxes to collect the arrear demand in the interests of the public.

8. Mr. Sarder Jinnat Ali with Mr. Md. Delower Hossain, the learned Advocates appeared on behalf of the petitioner while Mr. S. Rashed Jahangir the learned Deputy Attorney General with Ms. Nurun Nahar and Mr. Saikat Basu, the learned Assistant Attorneys General appeared on behalf of the Respondents to oppose the Rule.

9. Mr. Sarder Jinnat Ali, the Learned Advocate appearing on behalf of the assessee-petitioner took us through the impugned order inter alia, other documents/papers and materials available on record. The learned Advocate for the assessee-petitioner emphatically submits that under the provisions of the Income Tax Ordinance, 1984, after complying with Section 83(1), the DCT shall in accordance with the provision of law in the relevant cases, complete assessment under Section 83(2) of the ITO and upon completion of assessment, the DCT concerned, shall before taking any other steps, first proceed under and send a notice under Section 135(1) of ITO 1984 read with Section 178 of the Income Tax Ordinance and the said notice has to be served upon the assessee-petitioner, since it is a mandatory of provision of law. But in the instant case no such notice as required under Section 135(1) of ITO was ever served upon the assesse-petitioner. The learned Advocate for the assessee-petitioner further submits that without serving notice under Section 135(1) of ITO Ordinance, 1984, no question of recovery of taxes, attachment of bank account of the assessee-petitioner under Section 143(2) can arise and to do so is in utter disregard and violation of the law.

10. The learned Advocate strenuously argued that a valid and lawful demand notice can only be served under Section 135(1) of the ITO 1984 and also only in the manner prescribed in the 1st proviso of Section 178(1) of the Ordinance, but in the instant case, the Respondent No.3 proceeded against the petitioner directly under Section 143(2) of the Income Tax Ordinance 1984 for recovery of taxes violating the mandatory provisions of law regarding issuance of the original Demand notice under Section 135(1) read with the provisions of Section 178 of the ITO. The learned Advocate for the petitioner finally argued that the "reminder" dated 03.06.2012 sent by the Respondent No.3 to the assessee-petitioner bears no validity or legality in the eye of law, since no notice was initially served under Section 135(1) of ITO 1984, therefore the so-called "reminder notice " without first exhausting the provision of Section 135(1) is not a notice at all under the provisions of the Act or under any other law.

11. Mr. S. Rashed Jahangir, the learned Deputy Attorney General appearing on behalf of the respondents makes his arguments eloquently and takes us through the affidavit-in-opposition and submits that a " reminder " notice dated 03.05.2012 was sent to the assessee-petitioner for realization of arrear demands for the relevant years for the purpose of fulfilling the requirements of the national budget. That the DCT after completion of assessment under Sections 82BB/82BB(2)/83(2) on the basis of hearing on 12.06.2011 issued assessment order, demand notice and I.T 30 to the assessee-petitioner on 16.06.2011 as per the prescribed time limit i.e. within 30 days from completion of assessment as required under Section 94(3) of the I.T Ordinance, 1984 and the learned Deputy Attorney General argues that notice was duly served under the provision of Section 178 (2)(b) read with Section 2(48) of the Income Tax Ordinance, 1984 and that the assessment order, demand notice and I.T 30 were lawfully and served upon the assessee-petitioner and therefore there arises no question of any violation of law at all.

12. The learned Deputy Attorney General further asserted that there has been no violation of Article 31 of the Constitution of the People's Republic of Bangladesh or any of the provisions of the I.T.O, 1984 nor has there been any infringement of any other legal rights by issuing notice under Section 143(2) of the Income Tax Ordinance, 1984 and that it is a procedural function of the department of taxes to collect the arrear demand and is to be mandatarily complied with by the assessee-petitioner and argued that the alleged impugned Notice under Section 143(2) was served within the parameters of the scheme of the Ordinance and therefore is a lawful notice.

13. We have heard the learned Advocates of both sides and perused the documents and other materials available on record.

14. From the records it appears that the petitioner company filed their Income Tax Return for the assesment year 2010-2011 under the Universal Self Assessment Scheme as prescribed under Section 82BB of the Income Tax Ordinance, 1984, pursuant to which, in the assessee-petitioner's case, the said return was selected for audit by the National Board of Revenue under Section 82BB(3) of the Income Tax Ordinance, 1984 and thereafter the DCT Respondent No.3 proceeded under the provision of Section 83(1) of the Income Tax Ordinance, 1985 which was duly complied with, by the assessee-petitioner in the instant matter.

15. From our scrutiny of the documents and materials placed before us, it is also apparent and quite obvious from the records that as has been alleged by the assessee-petitioner that pursuant to assessment, no Notice of Demand was ever served upon the assessee-petitioner as is required under the provisions of Section 135(1) of the Income Tax Ordinance, 1984 and therefore the petitioner did not get any opportunity at all to comply with the demand, and appears quite obvious that the assessee-petitioner was surprise to learn that the Respondents had taken steps for attachment of his bank accounts by only sending a notice dated 29.05.2012 to the concerned bank under the provisions of section 143(2) of the Income Tax Ordinance, 1984, but without any compliance of the other mandatory provisions.

16. Now the pertinent question for our determination that arises is that whether the sudden and unexpected notice dated 29.05.2012 sent to the concerned bank asking for freezing the bank account of the assessee-petitioner under Section 143(2) of the Ordinance and the alleged assessee-petitioner's " reminder " notice dated 12.06.2011 were at all lawfully served and valid notices in the eye of law. The assessee-petitioner categorically

asserted in his writ petition that no notice was lawfully and validly served upon him under the mandatory provisions of Section 135(1) of the Income Tax Ordinance, 1984 read with Section 178(2)(b). The onus now therefore, lies upon the respondents to show us that the demand notice as they claimed was validly and lawfully served upon the assessee-petitioner.

17. On perusal of the materials on record our finding is that pursuant to assessment of return under Section 83(1), no notice of demand was served upon the assessee-petitioner under the mandatory provision of Section 135(1) of the ITO and furthermore we also find that no such documents have been annexed herewith in the affidavit-in-opposition from which it can be adduced before sending Notice under Section 143 to the concerned bank that the demand notice was duly served under Section 135(1) of the Ordinance the sending of such notice being a mandatory provision of law Section 135(1) of the ITO reads as follows :-

> "Where any tax is payable in consequence of any assessment made or any order passed under or in pursuance of this Ordinance, the Deputy Commissioner of Taxes shall serve upon the assessee (which expression includes any other person liable to pay such tax) a notice of demand in the prescribed form specifying therein the sum payable and the time within which, and the manner in which, it is payable, together with a copy of an assessment order."

18. From a plain reading and interpretation of Section 135(1) it becomes crystal clear to us and we opine that this Section makes it mandatory to serve a demand notice under this Section and particularly the use of the word " shall " means and it is the intention of the legislature in the above Section 135(1) that the assessee-applicant is entitled under the law to be served with a notice in the prescribed form specifying other requirements under the law and there is no ambiguity in the language of Section 135(1) that may indicate a different intention. It appears quite clearly that no other provisions of the Act can be resorted to prior to issuing the mandatory notice under Section 135(1) subsequent to any order of assessment under the act. The words " in consequence of any assessment made or any order passed " only puts stress on the intention of the legislature, that any assessment or order of assessment, shall be mandatorily followed by a notice under Section 135(1) before any other Section of this Ordinance can be resorted to.

19. Therefore pursuant to any Order of assessment, the next valid and lawful step to be taken by the DCT concern for the purpose of recovery of tax shall be a Service of proper notice under Section 135(1) read with Section 178 of the Ordinance and the said Section 179 sets out the procedure to be followed in sending the Notice

20. Upon a plain reading of the relevant Sections and from our appreciation and understanding of the scheme of the Ordinance we find merit in the arguments of the learned Advocate for the assessee-petitioner and we are in conformity with his assertions. It is crystal clear that Section 143 of the Ordinance cannot be directly resorted to under any circumstances under the law without first exhausting the provisions of Section 135 read with Section 178(1) of ITO 1984 and such notice does not bear only validity and is unlawful.

21. The relevant portion of Section 143 for the purpose of determining the instant case is Section 143(2)(a) of the Income Tax Ordinance which reads as follows :-

> " Income Tax Ordinance 1984
> Section:143
> Other modes of recovery-
> (1) ----------

1(A) ----------
(2) For the purposes of recovery of any tax payable by an assessee, the Deputy Commissioner of Taxes may, by notice in writing, require any person.

(a) from whom [any money or goods] is due or may become due to the assessee, or who holds, or controls the receipt or disposal of, or may subsequently, hold, or control the receipt or disposal of, [any money or goods] belonging to, or on account of, the assessee, to pay to the Deputy Commissioner of Taxes the sum specified in the notice on or before the date specified therein for such payment."

(3) -------- (8) ----------

22. But we feel necessary to persuade here that this Section 143(2) cannot be lawfully resorted to without following the mandatory provisions of Section 135(1) of ITO read with Section 178 of the Ordinance. Contrarily the Respondents have tried to circumvent the mandatory provisions of law and have flouted the mandatory provisions required to be complied with and it is our view that by doing so they bypassed the law, acted arbitrarily and in total disregard of the law and the mandatory procedures prescribed under the law for recovery of taxes.

23. The respondents asserted and claimed in their affidavit-in-opposition that they have complied with the law following the provisions of Section 178(1) of Section 178(1) reads as under :-

"Income Tax Ordinance 1984
Section 178

(1)" A notice, an assessment order, a form of computation of tax or refund, or any other document may be served on the person named therein either by registered post or in the manner provided for service of a summons issued by a Court under the Code of Civil Procedure, 1908 (Act V of 1908);

[Provided that where a notice, an assessment order, a form of computation of tax or refund, or any other document is received by an authorized representative as referred to in section 174, such receipt by the authorized representative, shall be construed as valid service on that person.]

1(A) ----------
(2) ------ (3) ------

24. The assertion of the Respondents here is misplaced and we cannot agree with it and since sending the Demand notice under Section 135(1) is a substantial duty and mandatory function prescribed under the Ordinance thereunder and ought to be carried out by the Respondents. Therefore a mere procedural function provided for under Section 178(1) has no meaning or validity without first serving proper demand notice under Section 135(1) of ITO. The proviso to Section 178(1) including the Section 178 2(b) is quite clear that the said provision in this Section is only a part of the procedural function that has to be complied with only for the purpose of serving Demand notice inter alia, other Orders etc under Section 135(1). In this regard the rationale we apply here is that, since no "notice" was issued at all under section 135(1) of ITO 1984, therefore it follows upon legal reasoning that issuance of the same under the provisions of or any part thereof Section 178 does not arise at all in the instant case and bears no relevance to the issue in question.

25. Therefore we must disagree with the learned Deputy Attorney General's contention that "Notice" was validly served upon the Assessee-Petitioner under the provisions of Section 178 (1) (2) (b) since these Sections as we have already explained above only sets out

mere procedural formalities to be followed pursuant to any Notice under Section 135 (1) of the Ordinance. We do not agree with the Learned DAG when he persists that the impugned "Notice" served upon the Bank under Section 143 of the IT Ordinance for attachment of the Bank account of the Assessee-Petitioner and the "reminder" are valid and lawful Notices and the Learned Deputy Attorney General submission bears no merit.

26. In our opinion, the action of the Respondents in directly serving a Notice upon the concerned Bank under Section 143 without first issuing Notice under Section 135 (1) of the IT Ordinance upon the Assessee-Petitioner is arbitrary, unlawful and a direct infringement upon the fundamental rights of the Assessee-Petitioner and is in no way acceptable in the eye of law and equity. And to come to the so called "reminder" dated 03.05.2012 sent by the Respondents, is to say the least, an absurdity since no question of any "reminder" can even arise, since no valid, lawful initial Notice under Section 135 (1) of the Ordinance was ever sent to the Assessee-Petitioner. The Assessee-Petitioner in our opinion has been deprived of his fundamental right under the constitution *inter-alia,* his statutory rights under the Ordinance of his entitlement to be served with a valid Notice under Section 135 (1) before any other steps may be taken under any other Section of the Ordinance for recovery of any Tax that may be due from him by the Respondents.

27. In view of the foregoing facts and circumstances and discussions made above, we are of the opinion that the mandatory provision of Section 135(1) of ITO was not followed by the respondents prior to exercise of power under section 143(2) in freezing the bank account of the assessee-petitioners. In the instant matter the provisions of Section 143 of ITO can be resorted to only after the preceding of provisions of Section 135(1) have been complied with, but the Respondents in this case, circumvented the provisions of the law by outrightly ignoring the mandatory provisions to issue notice under the provisions of Section 135 of the Ordinance, which they cannot lawfully do. The Respondents actions in the instant case are without any lawful authority and therefore has no legal effect.

28. In consequence, upon analysis of the legal reasoning we have relied upon and taking consideration the corresponding facts presented before us and the other the reasons explained above, we find no merits in the Rule and we have arrived at the conclusion that the said notice sent by them are not valid notices and are a nullity in the eye of law.

29. We are further inclined to add here that, as is apparent from the materials on record and the assessee-petitioner's submissions an Application of Stay of Recovery of Taxes was made by the assessee-petitioner during pendency of the Rule. The petitioner stated in his subsequent application for recovery of tax that this Court while pleased to issue Rule in the matter, did not issue any ad-interim order against recovery of tax, conversely while issuing Rule this Court directed the petitioner to prefer an appeal first and in case of failure to obtain relief the assessee-petitioner would be at liberty to come back to this Court with the appellate result for consideration by us in matters relating to stay of recovery of such tax.

30. From the assessee-petitioner's statement made in the application for stay and Annexure-C (annexed in the application for stay) that pending Rule, the assessee-petitioner preferred an appeal to the Commissioner of Taxes (Appeals), on the grounds of non-service of Demand Notice and I.T. 30 within the prescribed period of 30 days following the assessment, asserting that consequently the assessment order is barred by limitation and the demand is unenforceable.

31. The Commissioner of Taxes (Appeals) allowed the appeal but as far as the assessment order under Section 83 of ITO 1984 is concerned, the Commissioner of Taxes (Appeal) Dhaka in his order dated 22.11.2012 upheld the earlier Demand Notice dated 12.06.2011 passed by the DCT and which is the impugned Demand Notice in the instant Writ Petition. Consequently the earlier assessment order passed by the DCT is still alive so far as it relates to the assessment of return filed by the petitioner. It further appears that against the order of the CTA dated 22.11.2012 the assessee-petitioner did not prefer a further appeal before the Taxes Appellate Tribunal which is the next proper forum to obtain proper relief. But since it appears that not preferring an appeal before the Appellate Tribunal was an inadvertent mistake on the part of the petitioner and the writ jurisdiction is not the proper forum to obtain relief against upholding and affirmation of the assessment order of the DCT by the C.T.A, we feel inclined to add that the petitioner will be at liberty to prefer an appeal before the Taxes Appellate Tribunal and thereby leave it at the assessee-petitioner's discretion to try his luck there if he so desires.

32. In the Result, the Rule is made absolute with the observations made above and the impugned alleged demand notice vide TIN-003-201-5215 dated 12.06.2011 (Annexure-B) issued by the Respondent No.3 in respect of the assessment year 2010-2011 and notice u/s 143 of Income Tax Ordinance, 1984 to the bank, for attachment of bank account vide Nathi No.003-201-521/p¡-315/2011-2012/56 dated 29.05.2012 dated 29.05.2012 (Annexure-A) are declared to have been issued without lawful authority and of no legal effect.

33. However, there shall be no order as to costs.