

1969 Present: H. N. G. Fernando, C.J., and Samerawickrame, J.

THE COMMISSIONER OF INLAND REVENUE, Appellant,
and D. J. RANAWEERA, Respondent

S. C. 685/64 (F)—D. C. Colombo, 333/AI

Income tax—Issue of certificate to District Court to recover tax by seizure and sale of property—Issue of writ of execution to Fiscal—Application by assessee for stay of execution pending appeal to Commissioner of Inland Revenue—Power of District Court to allow stay of execution—Scope—Right of Commissioner to appeal to Supreme Court from order allowing stay of execution—Civil Procedure Code, s. 761—Income Tax Ordinance, ss. 81 (2), 84 (3).

Where, in consequence of the Commissioner of Inland Revenue issuing a certificate to a District Court in terms of section 84 (3) of the Income Tax Ordinance for the recovery of income tax due from an assessee, the District Court directs a writ of execution to issue to the Fiscal for the seizure and sale of the properties of the assessee, the District Court acts in its judicial capacity and not ministerially if and when an application is made by the assessee to stay the writ which has been issued by the Court in performance of the ministerial duty which the law casts on the Court. Accordingly, an order of the Court allowing stay of execution is appealable at the instance of the Commissioner.

Where stay of execution of the writ is sought by the assessee on the ground that an appeal to the Commissioner of Inland Revenue is pending against the assessment of the tax alleged to be in default, neither section 81 (2) nor any other provision of the Income Tax Ordinance precludes the District Court from staying execution on condition that the assessee should deposit a sum of money so as to enable the Commissioner to obtain payment of the tax in default in the event that the determination of the assessee's appeal wholly or partly confirms the existing assessment.

APPEAL from a judgment of the District Court, Colombo.

P. Naguleswaran, Crown Counsel, for the respondent-appellant.

H. W. Jayewardene, Q.C., with S. S. Basnayake, for the petitioner-respondent.

Cur. adv. vult.

June 16, 1969. H. N. G. FERNANDO, C.J.—

The Commissioner of Inland Revenue, who is the appellant in this case, issued a certificate to the District Court of Colombo in terms of s. 84 (3) of the Income Tax Ordinance, stating that a sum of Rs. 689,760 was payable by the respondent as income tax in default. Thereupon the Court on 3rd September 1962 directed a writ of execution to issue to the Fiscal for the seizure of the properties of the respondent.

On 6th November 1962, Proctors appearing for the respondent filed a petition stating that the respondent had filed an appeal against the assessment of tax and asking for a stay of execution until the appeal is disposed of. The appeal there mentioned was an appeal to the Commissioner in terms of the relevant provision of the Ordinance. The Court on this petition stayed the execution of writ, but directed that notice of the respondent's petition be issued to the Commissioner returnable on 20th December 1962. The respondent however failed to have this notice issued. Thus the order staying execution was in fact made without notice to the Commissioner.

On the 10th January 1964 the Commissioner again applied for the issue of writ, which application was allowed, and the Fiscal thereafter reported to Court that properties to the value of Rs. 660,000 had been seized.

On 24th April 1964, the respondent again filed a petition for the stay of execution and writ, and this application was allowed on 11th November 1964, the learned Judge directing "that execution proceedings be stayed until the determination of the appeal filed on 16.8.62, on the petitioner giving security in a sum of Rs. 500,000 or on the petitioner giving an understanding that he would not alienate, mortgage or encumber any of the properties referred to in the schedule to the certificate of Income Tax filed of record without application to this Court with due notice to the Commissioner. The present appeal is by the Commissioner against this order.

Counsel for the respondent has taken the objection that the order appealed from is not a judicial order, and that accordingly no appeal lies against it. Counsel relied very much on the decision of this Court in *Ranaweera v. Commissioner of Inland Revenue*¹. In that case writs had issued from the District Court upon the filing of a certificate of collection for the recovery of estate duty in terms of a provision of the Estate Duty Ordinance which is substantially similar to the provision of s. 84 (3) of the Income Tax Ordinance. These writs were stayed on an application made by the assessee and notice of the stay was issued to the Commissioner. The Commissioner filed no objection to the stay and the Court thereafter re-called the writs. Subsequently the Commissioner did file objection and asked for the seizure and sale of properties of the assessee. After inquiry the District Judge dismissed the petitioner's earlier application for stay and directed the Fiscal to execute the writs.

On an appeal from the last-mentioned order of the District Judge, the assessee contended that the District Judge had no power to vacate his own order staying the writs, and his contention was made on the basis that the order of the District Judge on the application for stay is a judicial act and could not be vacated by the Judge. In rejecting the assessee's appeal the Supreme Court did make certain observations to the

¹ (1965) 67 N. L. R. 131.

effect that when a District Judge entertains an application for the stay of execution of a writ issued under such a provision as s. 84 (3) of the Income Tax Ordinance, the Court does not act judicially.

Relying upon these observations Counsel appearing for the respondent in the present appeal has argued that the order of the District Judge in the present case directing a stay of execution on the terms which I have set out above was one made in a purely ministerial capacity, and is not therefore subject to appeal in this Court. The judgment in the case just cited as well as the judgment in a subsequent case reported in *68 N. L. R. p. 573* state quite clearly that the District Court does not exercise its judicial power when it issues a writ of execution upon a certificate being filed by the Commissioner for the recovery of tax. But it does not appear in either of those cases consideration was given to the quite different question whether or not the District Court acts judicially if and when an application is made to stay a writ which has been issued by the Court in performance of the ministerial duty which the law casts on the Court.

Section 84 (3) affords to the Commissioner the privilege of resorting to the process of execution by means of what may be called a short-cut. In this way the Commissioner is entitled to have the process of execution applied against an assessee, without the need for a judicial determination that a debt is due from the assessee. But there is little or nothing in the statute which purports to alter the character of orders or proceedings which have to be made or taken in a Court at a stage subsequent to the issue of a writ of execution.

To take a simple though perhaps quite a theoretical example, an assessee against whose properties a writ of execution has issued may in fact pay up thereafter the amount of the tax in default. In such an event he would naturally wish for a stay of further execution proceedings; and if he asks for the stay on the ground that payment was actually made after the issue of writ, there would be a need for the Court to determine whether the payment had been made, and such a determination in the event of a dispute on the point must surely be reached after judicial inquiry, and I hold accordingly that such a determination is one made by the Court in its judicial capacity.

Section 84 (3) provides that sections 226 to 297 of the Civil Procedure Code are applicable in relation to a seizure and sale under a writ issued under s. 84 (3), and there is no question that in the course of the application of these sections, the Court would have to act judicially just as much as it does in proceedings for the execution of its own decree.

In the instant case the respondent, in asking for a stay of the writ, invoked the ordinary and inherent jurisdiction of the District Court to stay its own process of execution, and the particular ground upon which the stay was granted was one which is commonly invoked by judgment-debtors.

in civil actions. Section 761 of the Civil Procedure Code expressly provides for the stay of execution of an appealable decree, and the fact relied on by the respondent in the present case, namely that an appeal to the Commissioner was pending against the assessment of the tax alleged to be in default, is fairly comparable to the ground on which execution is occasionally stayed under s. 761 in ordinary civil proceedings.

Learned Crown Counsel has referred to s. 81 (2) of the Income Tax Ordinance which is to the following effect :—

“Tax shall be paid notwithstanding any notice of objection or appeal unless the Commissioner orders that payment of the tax or any part thereof be held over pending the result of such objection or appeal.”

Crown Counsel has argued in view of this express provision, that the Legislature has by this provision committed to the Commissioner the function of deciding whether or not the recovery of tax in default should await the determination of an appeal. I agree that in view of this provision a Court has no power to stay execution solely on the ground that an assessment of tax is the subject of a pending appeal under the relevant taxing statute. But the order of the District Judge in the present case does not depend solely on this ground. The condition contemplated in the order of the District Judge, that the respondent must deposit a large sum in cash, is a condition upon which a Civil Court ordinarily stays execution of its own decrees, and there is nothing in the Income Tax Ordinance which expressly or by implication precludes the District Court from staying execution on such a condition. This condition in my opinion will sufficiently and certainly enable the Commissioner to obtain payment of the tax in default, in the event that the determination of the respondent's appeal wholly or partly confirms the existing assessment. I hold that the Court does have power to allow a stay of execution upon such a condition.

I note however, that the order of the learned District Judge contains an alternative condition which might well defeat the purposes which the learned Judge thought will be achieved thereby. The condition that the petitioner give an undertaking not to alienate his properties will probably carry with it the sanction that a breach of the condition will be punishable as a contempt of Court; but this condition will not ensure with certainty that the respondent's properties will be available in satisfaction of the debt claimed by the Commissioner. I hold that the District Court has no power, upon such a condition to stay a writ which has issued under s. 84 (3) of the Income Tax Ordinance.

For these reasons the order of the learned District Judge is set aside. The record will be returned to the District Court, and it will be open to the respondent to deposit in cash to the credit of the case a sum of Rs. 600,000 on or before 1st August 1969. If this deposit is made, the District Court

will order that execution proceedings be stayed until the determination by the Commissioner of Inland Revenue of the appeal filed by the respondent on 16th August 1962. The deposit so made will be available for payment to the Commissioner of the whole or part of the sum determined upon such an appeal to be due as tax from the respondent.

If the deposit is not made on or before 1st August 1969, the District Judge will forthwith order the re-issue of the writ.

In view of the fact that the alternative condition set out in the order of the learned District Judge was entirely unfavourable to the Commissioner, I order that the respondent must pay to the Commissioner the costs of this appeal.

SAMERAWICKRAME, J.—I agree.

Order set aside.
