

(1975) 10 BOM CK 0006

In the Bombay High Court

Case No : Special Civil Application No. 690 of 1970

Balkisandas

APPELLANT

Vs

Additional Collector, Akola and Others

RESPONDENT

Date of Decision : 21-10-1975

Acts Referred:

Income Tax Act, 1961 — Section 2(44), 247, 63(1), 86

Citation : (1977) 106 ITR 77 : (1976) MhLj 23

Hon'ble Judges : Shimpi, J; Masodkar, J

Bench : Division Bench

Advocate : N. Kamlakar, for the Appellant; R.V. Patila, J.P. Pendsey and A. Shelat, for the Respondent

Judgement

Masodkar, J.—For a sum of Rs. 4,018.96 as the Income Tax dues found recoverable against the partnership firm, Messrs. Laxminarayan Balkisandas Bhutada, of which the petitioner was the partner, proceedings to recover upon tax recovery certificate were started and in those proceedings three fields of the petitioner, being field survey Nos. 155, 156 and 157 of village Shaha were attached. Sale proclamation was issued on February 2, 1968, and eventually the sale was fixed for March 13, 1968. Meanwhile, the petitioner applied to the Collector on March 6, 1968, for stay of the sale and it is apparent from the order sheets that were produced before us, that a conditional order directing the petitioner to deposit half the amount was made by the Collector but the petitioner did not avail of that concession. It also appears that on the date of sale, the petitioner was present before the Tahsildar who was the Tax Recovery Officer attaching and conducting the sale. Two of the fields, survey Nos. 155 and 156, were eventually put to sale and Rs. 3,600 and Rs. 4,500, respectively, were the price fetched at the auction. By an order of May 15, 1968, the Tahsildar, who was the Tax Recovery Officer, confirmed the sale of these two fields under rule 63(1) contained in the Second Schedule to the Income Tax Act, 1961. Petitioner filed an appeal before the Sub-divisional Officer purporting to be under rule 86(1) of those rules. The said office allowed the appeal by his order of May 31,

1969, holding that the sale was not conducted in accordance with that law as well as the rules as are contained in the Second Schedule. The auction-purchaser, i.e., Gajanappa, purported to file second appeal before the Collector, Akola, under the very same rule which was also entertained and by the impugned order of June 10, 1970, the Collector allowed that appeal. He found that the sale was made in accordance with law. That order is questioned by the present petition.

2. Before us also legal grounds affecting the sale are urged by Mr. Kamlakar appearing for the petitioner who is the owner of these two fields. He contended that the proclamation was had add further that the two field could not be put to sale. According to him, in fact, the proclamation was not affixed to the property and as such the sale was vitiated. He submits that a sale held contrary to the direction given by the Collector which was communicated to him either on the date of sale or thereafter would be bad under the Rules. According to him the findings recorded by the Sub-divisional Officer, therefore, should be restored on merits. Apart from this, the learned counsel contends that the Collector under rule 86 was not entitled to entertain the second appeal, for that rule prescribes only one appeal from the original order. The impugned order, according to this submission, is unauthorised and without jurisdiction.

3. For the auction-purchaser it was urged that in fact the first appeal entertained by the Sub-divisional Officer was not competent in view of the terms of rule 86 and no other question arises in the present petition. It was also urged by Mr. Pendsey that there is no right of appeal against an order confirming the sale under rule 63(1) and it is only when an objection is raised and that is rejected the provisions of rule 86 would be attracted. In other words, it is contended that once the sale becomes absolute, it should be treated as final for the purpose of rule 86 and no appeal is entertainable.

4. For the purpose of the present petition, the parties are on admitted position in that the Tax Recovery Officer who attached and effected the sale, i.e., the Sales Tax Recovery Officer, Akola, who was the Tahsildar, was the Tax Recovery Officer, appointed as such by the State Government to exercise the powers of a Tax Recovery Officer within the meaning of section 2(44)(iii) of the Act.

5. The only question, therefore, is whether the appeal filed before the Sub-divisional Officer was at all competent.

6. The provisions of rule 86 as are relevant and as were existing then read as under :

"86. (1) An appeal from any original order passed by the Tax Recovery Officer under this Schedule, not being an order which is conclusive, shall lie -

(a) in the case of a Tax Recovery Officer, being a Collector or an Additional Collector or an Officer referred to in sub-clause (iii) of clause (44) of section 2, to the revenue authority to which appeals ordinarily lie against the orders of a

Collector under the law relating to land revenue of the State concerned;".

7. We are not concerned with clause (b) of rule 86 which provides for appeals from the orders of the revenue authorities other than those mentioned in clause (a) quoted above.

8. Now, it is obvious that for the purpose of appeal the order made by any officer contemplated by section 2(44)(iii) has to be treated to be the order made by the Collector, though the said officer may not be the Collector having the powers of tax recovery. The appeal, therefore, will be entertainable as if the order has been made by the Collector under the provisions of the Maharashtra Land Revenue Code which was then applicable. The provisions of appeal are contained in section 247 and Schedule E of the Code indicates the appellate authority. By item 3, if the order of the officer who is a Collector is to be questioned in an appeal, it is provided that the appellate authority would be the Divisional Commissioner. Therefore, reading rule 86, clause (a), along with the provisions of Schedule II appended to the Income Tax Act, 1961, along with the provisions of section 247, Schedule E, item 3 of the Maharashtra Land Revenue Code together, it is clear that the appeal was entertainable only by the Divisional Commissioner and not by the Sub-divisional Officer.

9. Both the orders made by the Collector as well as by the Sub-Divisional Officer will have to be treated as unauthorised.

10. That leaves us with the submission made on behalf of the auction-purchaser that there is no appeal at all entertainable because the confirmation of sale is made absolute under rule 63 if no objection is taken to the same. The terms of rule 86 quoted above are enabling and in fact provide a remedy and we would be slow to exclude the remedy unless there are clear indications providing that the remedy of appeal is not available. Now, a look at those provision of rule 86 shown that appeals would be excepted only in cases of those orders which have been given the conclusiveness by the rules. One such rule available in Schedule II is rule 10. When the question arises whether a particular property is exempt from attachment, the Tax Recovery Officer can decide that question and his decision under sub-rule (2) of rule 10 holding that a particular property is entitled to exemption from attachment, has been treated as conclusive. In the matters of sale of the attached property which is the subject of rules 52 to 68 no such mention is made nor the order confirming the sale has been made conclusive. The terms of rule 63(1) are to be read along with the other rules preceding which include the steps by which the property attached can be brought to sale. It is provided by rule 56 that the sale has to be by public auction and it is always subject to confirmation by the Tax Recovery Officer. This process of confirmation is part of clause (1) of that rule 63. That provides that where no application is made for setting aside the sale under the foregoing rules or where such an application is made and disallowed by the Tax Recovery Officer, the Tax Recovery Officer shall, if the full amount of the purchase-money has been paid, make an order confirming the sale, and thereupon, the sale shall become absolute.

Therefore, reading rule 56 along with clause (1) of rule 63 together, undoubtedly there is a necessity of making an order by the Tax Recovery Officer in the matter of confirmation of the sale. That would be clearly an original order. If such an order is made, then terms of clause (1) indicate that the sale is treated as absolute. In other words, without the order confirming the sale there is no sale absolute as such under these rules. The word "absolute" does not make the order itself conclusive. To take away the right of appeal, it should be the order which is conclusive, and not the factum of sale. Right of appeal in terms is provided against the orders which are termed as original orders of the Tax Recovery Officer. We have no doubt in our mind that an order made confirming the sale would be an original order liable to be appealed against because of the provisions of rule 86. There is no substance, therefore, in the submission of Mr. Pendsey on that count.

11. As a result of these findings the only course open to this court is to set aside the order made by the Additional Collector, Akola, and impugned in this petition along with the order made by the Sub-Divisional Officer, Murtizapur, and direct the Divisional Commissioner, Nagpur to gate the appeal field on June 14, 1968, the Sub-Divisional officer withdrawn to his own file and treating it as an appeal under rule 86(a) hear the parties and decide the same according the law.

12. During the present proceedings a sum of Rs. 5,000 was deposited by the petitioner. The same would be refunded to the petitioner.

13. As we have found that the order made by the sub divisional officer was without jurisdiction and as on the record there is an order confirming the sale of the two fields, i.e., Survey Nos. 155 and 156 mentioned above, the petitioner is not entitled to remain in possession thereof. The petitioner to hand over the possession to the auction-purchaser within one month. If his appeal succeeds, it is obvious that he will be restored back to the possession.

14. Though the petition is thus allowed, we do not make any order as to costs.