

(1960) 09 KL CK 0006
In the High Court Of Kerala
Case No : Appeal Suit No. 1025 of 1959

C.M. Francis

APPELLANT

Vs

The State of Kerala

RESPONDENT

Date of Decision : 01-09-1960

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 386

Citation : (1961) 12 STC 166

Hon'ble Judges : T.K. Joseph, J; M.S. Menon, J

Bench : Division Bench

Advocate : K.K. Matthew and George Vadakkal, for the Appellant; A. Madhavan, The Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

T.K. Joseph, J.—The four appellants were carrying on business in partnership, and for non-payment of a sum of Rs. 1,01,716-27 nP. due from them as sales tax, they were prosecuted before the First Class Magistrate, Ponkunnam, who convicted and sentenced them to pay fines. The Magistrate specified in the order the amount of tax which they had failed to pay. Thereafter a warrant was issued by the Magistrate to the Collector, Kottayam, for recovering the amount and the latter sought execution of the same in the District Court, Kottayam, by attachment and sale of their properties. The appellants filed objections and the two points raised by them in the Court below were :

(1) that the warrant was issued without jurisdiction, and

(2) that the properties sought to be attached did not belong to them. These objections were overruled by the Additional District Judge, Kottayam, and this appeal has been preferred from the order allowing execution as prayed for.

2. The point pressed in appeal is that the warrant which was sought to be executed was issued without jurisdiction. Execution was applied for in this case u/s 386 of the Code of Criminal Procedure which provides as follows : -

386. (1) Whenever an offender has been sentenced to pay a fine, the Court passing the sentence may take action for the recovery of the fine in either or both of the following ways, that is to say, it may-

(a) issue a warrant for the levy of the amount by attachment and sale of any movable property belonging to the offender ;

(b) issue a warrant to the Collector of the District authorising him to realise the amount by execution according to civil process against the movable or immovable property, or both, of the defaulter ;

Provided that, if the sentence directs that in default of payment of the fine the offender shall be imprisoned, and if such offender has undergone the whole of such imprisonment in default, no Court shall issue such warrant unless for special reasons to be recorded in writing it considers it necessary to do so.

(2) The State Government may make rules regulating the manner in which warrants under Sub-section (1), Clause (a), are to be executed, and for the summary determination of any claims made by any person other than the offender in respect of any property attached in execution of such warrant.

(3) Where the Court issues a warrant to the Collector under Sub-section (1), Clause (b), such warrant shall be deemed to be a decree, and the Collector to be the decree-holder, within the meaning of the Code of Civil Procedure, 1908, and the nearest Civil Court by which any decree for a like amount could be executed shall, for the purposes of the said Code, be deemed to be the Court which passed the decree, and all the provisions of that Code as to execution of decrees shall apply accordingly :

Provided that no such warrant shall be executed by the arrest or detention in prison of the offender.

It is contended on behalf of the appellants that while the "dealer" was the firm, the prosecution was taken only against the partners and as such the proceedings are invalid. This is a case in which the assessment as well as the conviction of the appellants have become final. It cannot be said that the Magistrate had no jurisdiction to convict the appellants or pass an order u/s 19(h) of the General Sales Tax Act. Even otherwise, a firm has no separate existence apart from the partners and all the partners were parties to the prosecution proceedings.

3. Learned counsel for the appellants relied on the decision in *In re Behara Lachanna* AIR 1953 Itf. 332 . That was" a revision petition by the accused from an order of conviction for a similar offence under the Madras General Sales Tax Act. The conviction was set aside by the High Court, not because the firm was not an accused in the criminal prosecution but as some of the partners of the firm alone were prosecuted. Reference may be made in this connection to an earlier decision of the Madras High Court in *In Re: Akulu Paddayya Naidu*, in which the two persons who constituted the firm were prosecuted. Chandrasekhara Aiyar, J., observed :

The firm is a "dealer" within the meaning of the Act under Explanation 1 of sub-clause (b) of Section 2. The fact that the firm is a dealer and can be proceeded against as a firm does not appear to me to be a bar to proceedings being initiated against the partners of the firm.

Referring to this decision, Subba Rao, J., said in *The Public Prosecutor Vs. K. Jacob Nadar*,

As both the partners were made accused, the learned Judge presumably treated the firm as accused and convicted both the partners who constituted the firm.

As all the four partners were prosecuted in this case there is no substance in the contention that the prosecution not being against the firm is vitiated by illegality.

4. It was also contended that fine alone could be recovered by executing the warrant in the Civil Court but not arrears of tax. Our attention was drawn to the decision in *Mytheen Kunju v. State of Kerala* 1959 KLT 698 where the distinction between fine and arrears of tax has been stated. The point which arose in that case was whether the accused could be sentenced to imprisonment for non-payment of arrears of tax and it was held that he could not be. The proviso to Section 386(3) makes it clear that no such warrant for recovery of tax can be executed by the arrest or detention of the offender. The question in this case is whether the procedure prescribed for recovery of fine by execution of the warrant in the Civil Court can be allowed. There cannot be any doubt that it can be, in view of Section 19(h) of the General Sales Tax Act which provides that the tax so specified "shall be recoverable as if it were a fine under the Code of Criminal Procedure for the time being in force". Section 386(1)(b) enables realisation of fine by execution according to civil processes and any sum which the statute declares can be recovered "as if it were a fine" can also be realised in the same manner. In these circumstances the Court below rightly overruled the objections raised by the appellants.

5. As regards the second point raised in the Court below, namely, that the properties sought to be attached did not belong to the appellants, this would properly arise only after attachment is levied and claims, if any, are preferred by others. No other point arises in this appeal. We therefore confirm the order of the Court below and dismiss the appeal with costs.