

(1977) 09 KL CK 0006
In the High Court Of Kerala
Case No : W.A. No. 407 of 1974

District Collector and Others

APPELLANT

Vs

Makkottathil Kunhi Ayisia Umma

RESPONDENT

Date of Decision : 20-09-1977

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1978) 41 STC 455

Hon'ble Judges : V.P. Gopalan Nambiyar, C.J;G. Balagangadharan Nair, J

Bench : Division Bench

Advocate : Government Pleader, for the Appellant;

Final Decision : Allowed

Judgement

V.P. Gopalan Nambiyar, C.J.—The appeal is by the sales tax department of the State (the Collector, the Tahsildar and the Sales Tax Officer), against the decision of a learned Judge who allowed O.P. No. 127 of 1973, setting aside exhibit P2 attachment proceedings and exhibit P5 order rejecting the writ petitioner's claim that the attached properties were hers and quashing the said two orders.

2. One V.C. Mahammad Haji, the husband of the writ petitioner, died on 17th October, 1963. On 30th April, 1962, he had submitted the return of his turnover under the Sales Tax Act, in respect of his business. As the return itself disclosed that sales tax was due from him, a demand notice was issued on 24th June, 1963, calling upon Mahammad Haji to pay a sum of above Rs. 6,000 by way of sales tax. Mahammad Haji paid up a sum of about Rs. 2,200 under several chalans. These facts are disclosed in paragraph 2 of the counter-affidavit. It was thereafter that he died on 17th October, 1963. On 10th May, 1962, he had executed a deed of gift conveying the property attached by exhibit P2 to the petitioner in the writ petition. The assessment order, in the wake of the return, was passed by exhibit P1 proceedings dated 9th November, 1964. The assessment was against M. Hamsa, shown as the legal representative of the deceased Mahammad Haji. The deficit tax was shown as Rs. 3,842.74. For this,

attachment was levied by exhibit P2 proceedings against the property that was gifted to the writ petitioner. She filed exhibit P3 claim-petition and also exhibit P4 petition before the District Collector, which was rejected by exhibit P5. The learned Judge noticed Section 5 of the Kerala Revenue Recovery Act, which authorises recovery of arrears of revenue only by attachment and sale of the defaulter's immovable property and observed that the writ petitioner is not a defaulter in respect of the arrears sought to be recovered. On the date of the demand notice u/s 34, the property did not belong to the defaulter as it had been transferred under a registered gift deed in favour of the writ petitioner. It was, therefore, not liable to coercive process under the Revenue Recovery Act. The learned Judge relied on *Abdulla v. State of Kerala* ILR (1962) Ker. 396 and *Mariam v. Tahsildar, North Wynad* 1969 KLT 860. The learned Judge observed that Section 44 of the Kerala Revenue Recovery Act was not attracted, as the impugned attachment was not for recovery of public revenue due on the land. For this proposition, reliance was placed on *Gourikutty Amma v. District Collector, Alleppey* 1974 KLT 103.

3. The decision in *Gourikutty Amma v. District Collector, Alleppey* 1974 KLT 103 was reviewed and, after rehearing, the decision rendered is reported in *Gourikutty Amma v. District Collector, Alleppey* 1975 KLT 29. It is enough to notice that the fresh decision rendered after review has put the matter very guardedly and cautiously. Referring to the decision in *Gourikutty Amma v. District Collector, Alleppey* 1974 KLT 103, the fresh decision merely remarked :

The conclusion reached by the judgment is supportable on the basis that the issue of notice in the case dealt with by the learned Judge was after the transfer. By virtue of this fact Section 44 cannot be attracted at all. This decision cannot help the appellants. In the light of the above discussion we have to hold, as we have indicated, that in the case of arrears of dues under the Abkari Act, by virtue of Section 28 of the Abkari Act read with Sub-sections (1) and (4) of Section 68 of the Revenue Recovery Act, Section 44 of that Act is attracted. (para 7) We do not think, the principle of the decision can have any application, as we are of the opinion that quite apart from Section 44 of the Revenue Recovery Act, the sales tax department is entitled to succeed.

4. Regarding the view of the learned Judge that without avoiding or setting aside the transfers, the attachment of the property transferred by Mahammad Haji prior to his death and prior to the issuance of the notice of demand, cannot be maintained, it has to be pointed out that this view is against the principle of a Division Bench ruling of this Court in *Isha Beevi and Others Vs. Tax Recovery Officer and Others*, . Paragraph 15 of the judgment may well be quoted :

15. It was contended for the appellants that Thangal Kunju Musaliar had executed four gift deeds during his life that the title to the properties included in the gift deeds passed to the donees and that the revenue should not have proceeded to attach the properties as if they belonged to Thangal Kunju Musaliar at the time of his death. It is contended that the revenue should have filed a suit

and obtained an adjudication that the gift deeds were either sham or intended to defeat or delay his creditors before proceeding to attach the properties. Reliance was placed in this connection upon the ruling of this court in *Abdulla v. State of Kerala* ILR (1962) Ker. 396, where Vaidialingam, J., held that when a dealer assessed to sales tax transferred his property, the amount assessed cannot be recovered from the property transferred, unless there is an adjudication by a civil court that the transfer was either intended to defeat or delay the creditors or that it was sham. We are not satisfied that it was necessary for the revenue to have filed a suit for declaration that the gift deeds executed by Thangal Kunju Musaliar were either sham or intended to defeat or delay the creditors before proceeding to attach the properties on the basis that they belonged to him on the date of his death. We think that the revenue was entitled to proceed as if the properties belonged to Thangal Kunju Musaliar on the date of his death. The appellants, if they are aggrieved, could file claims before the concerned authority and get an adjudication of the claims; and if dissatisfied with the adjudication, they can approach the civil court for appropriate relief. The revenue is in the position of a decree-holder who is entitled to attach property which he believes to be his judgment-debtor's ignoring a sham transfer, or by the attachment avoiding a fraudulent transfer leaving it to the person interested to make a claim or institute a suit to establish his rights. " In this case, for part of the properties covered by one of the gift deeds, suits were filed in the Sub-Court, Quilon and in the Munsiff's Court, Quilon, as O.S. Nos. 14 of 1968 and 76 of 1967, respectively. Although the courts passed decrees declaring the title of the appellants to the suit properties, the District Court, in appeals filed by the revenue, reversed the decrees and declared the gift deeds as not binding on the revenue, in the enforcement of their claim for recovery of the arrears of tax against the properties. It is represented that second appeals from these decrees filed by the appellants are pending in this court. We are of the opinion that the proper forum for adjudicating the question, so far as the properties covered by the suits are concerned, is the court in which the appeals are pending. In respect of the properties not covered by the suits, the remedy of the appellants, as stated by the learned Judge, is to file claim petitions and get an adjudication of the question and then, if so advised, approach the civil court, if the decision in the claim enquiry is adverse to them. As the appellants have effective alternative remedy and as the claims involve resolution of disputed questions of fact, we think, the learned Judge was right in declining to adjudicate on this controversy.

Recently, a Division Bench, of which one of us (myself) was a member, had occasion to refer to this aspect of the matter in a common Judgment in W.A. No. 341 of 1974 and O.P. No. 4133 of 1974 *Peedikayulla Parambath Devi v. State of Kerala* AIR 1978 Ker. 34 . It was not necessary to expatiate on this aspect of the question as it did not pertinently figure for determination in those cases. In the light of the principle of the decision in *Isha Beevi and Others Vs. Tax Recovery Officer and Others*, , we cannot support the reasoning of the learned Judge based on the two decisions in *Abdulla v. State of Kerala* ILR (1962) Ker. 396 and

Mariam v. Tahsildar, North Wynad 1969 KLT 860. Nor can we accept the principle of the said two decisions. We are of the opinion that, notwithstanding the registered deed of gift, it is open to the State to attach the property as the property of the defaulter and the remedy of the aggrieved person lies in filing a claim petition or a suit, as pointed out in the Division Bench ruling Peedikayulla Parambath Devi v. State of Kerala AIR 1978 Ker 34 referred to.

5. This appeal should therefore succeed. Besides arguing on the merits, counsel for the appellants also contended that the writ petitioner has an alternative remedy of revision u/s 83(1) of the Revenue Recovery Act. That section reads :

83. Power of revision of Board of Revenue and Government.-(1) The Board of Revenue may, either of its own motion or on an application by any person interested, call for any proceeding which has been taken by the Collector or the authorised officer under this Act and may make such enquiry or cause such inquiry to be made and, subject to the provisions of this Act, may pass such order as it thinks fit:

Provided that no order shall be passed under this Sub-section without previous notice to the party who may be affected by such order.

* * *

In view of this alternative remedy available to the writ petitioner, it was contended that the writ petition would abate under Article 226(3) of the Constitution, as amended by the 42nd Amendment and Section 58 of the 42nd Amendment Act. The contention is well-founded and we think that the same should also be accepted.

6. In the result, we allow this writ appeal, set aside the judgment of the learned Judge and direct that the Original Petition No. 127 of 1973 will stand dismissed. We make no order as to costs.