(1987) 07 BOM CK 0013

In the Bombay High Court

Case No : Suit No. 812 of 1972

Fatehsinh Gaikwar of Baroda — APPELLANT

Vs

A.D. Gupta — RESPONDENT

Date of Decision : 03-07-1987

Acts Referred:

Income Tax Act, 1922 — Section 46(2)
Income Tax Act, 1961 — Section 220, 221, 222, 222(1), 223
Registration Act, 1908 — Section 17

Citation : (1988) 37 TAXMAN 266

Hon'ble Judges : Khatri, J

Bench : Single Bench

Advocate : A.P. Chinoy and M.D. Siodia, for the Appellant; Anil Mehta and P.K. Rao, for the Respondent

Judgement

Khatri, J.—This suit in substance is for a declaration that the two trust deeds dated 14-3-1959 are valid and operative and that the two properties which are subject-matter thereof are not liable to attachment for recovery of arrears of income tax from the late H.H. Maharaja Fateh- sinh Gaikwar of Baroda (''the Settlor''). A number of consequential reliefs are claimed. The main prayer is for setting aside the two attachments dated 25-7-1970 and 27-7-1970 ordered by the first defendant and his order dated 10-8-1971 whereby he has upheld the validity of the two attachments. It is not necessary to detail other consequential reliefs, inasmuch as both sides are agreed that if the aforesaid impugned order is upheld, the suit will have to be dismissed in its entirety; otherwise it will have to be decreed in full. Almost all material facts are admitted. The Settlor is the father of the present plaintiff H.H. Maharaja Fatehsinh Gaikwar. By two trust deeds executed on 14-3-1959, the Settlor created trust in respect of two properties situated at Bombay, known as ''Chateau Windsor'' and ''Chateau Marine''. He appointed himself and the plaintiff as trustees. The Settlor reserved to himself the right to enjoy the properties during his lifetime. After his demise, the properties were to be enjoyed by the plaintiff''s wife Padmavati, if she survived him. The Settlor died on 19-7-1968.

2. On 27-3-1957, the ITO sent a certificate u/s 46(2) of the Indian income tax Act, 1922 (''the 1922 Act'') to the Additional Collector of Bombay for recovery of arrears of income tax due from the Settlor. This order admittedly was passed under the 1922 Act.

3. On 30-3-1957 the Additional Collector wrote a letter to the Settlor requiring him to pay the dues within three days, or show cause why they should not be recovered from him. Admittedly it was served on him on 4-4-1957. On 14-3-1959, as already indicated, he executed the two trust deeds in respect of the two properties. On 12-5-1959 the trust deeds were lodged with the Registrar, Bombay, for registration.

4. These deeds came to be actually registered on 11-3-1971. Meanwhile a few material events took place which may be stated here. The income tax Act, 1961 (''the Act'') came into effect on 1-4-1962. I shall generally refer to this Act as ''the 1961 Act''. On 30-3-1970, the first defendant who is the TRO, sent a Notice of Demand to the present plaintiff in his capacity as the heir of the deceased Settlor. He referred to the earlier Certificate dated 27-3-1957 [issued to the Additional Collector, Bombay, u/s 46(2)] and required him to pay arrears of the tax with penalty and interest within 15 days. This Notice was issued under rule 2 of the Second Schedule to the Act. Thereafter, on 25-7-1970 and 27-7-1970 he issued the impugned orders directing attachment of the two properties. Here it may be noted that section 34 of the Wealth-tax Act, 1957 (''the 1957 Act'') since repealed with effect from 1-10-1964, prohibited a Registering Officer from registering any document, unless a Certificate of the WTO was produced to the effect that the transferor either had made satisfactory provision for payment of the wealth-tax due to Government or that the registration of the document would not prejudicially affect the recovery of any existing liability under the Act. This constraint operated in respect of transfers worth over Rs. 1 lakh. Admittedly the two properties in question are worth far in excess of that amount. On 8-1-1971 a Certificate purporting to be issued by the ITO (not WTO) was produced and it was thereafter that the two trust deeds came to be registered on 27-3-1971.

5. The plaintiff challenged the two attachments of July 1970 before the first defendant. Some other orders issued u/s 226(3) of the Act to the tenants residing in the two properties, were also challenged. By his order dated 10-8-1971, the first defendant upheld the validity of the two attachments. In substance his findings are :

(i) The registration of the two documents by the Registering Officer on 27-3-1971 was void in view of the fact that the Certificate as required u/s 230A of the Act was not filed before him.

(ii) The Certificate purporting to be under the repealed section 34 did not help the plaintiff to any extent, inasmuch as it was not valid. At any rate it could not take the place of the Certificate u/s 230A which requires certification in respect of liabilities arising not only under the wealth-tax but quite a few other Acts including the 1922 Act and the 1961 Act.

(iii) The attachment levied by the first defendant in July 1970 related back to 4-4-1957 on which date the Certificate u/s 46(2) was served by the Additional Collector, on the Settlor. For this finding the first defendant relied on the provisions of rule 51 of the Second Schedule to the Act.

(iv) Since on the dates of the attachments, that is to say in July 1970 the trusts were not registered, the property still continued to vest in the Settlor and was liable to attachment, and

(v) The trusts were void u/s 281 of the Act, as they were created with a motive to defraud the revenue.

The plaintiff challenges the validity of this order by this suit. The defendants naturally support it. When the case came up for hearing before me on 1-7-1987, the learned counsel of both sides proposed some issues and agreed that the validity of the trust deeds may be decided and the suit finally disposed of on the basis of the findings on those issues alone, without going into the merits of other contentions raised by the two sides. Issues are accordingly settled with their consent. They have also filed an agreed compilation of documents and closed their respective cases without leading any oral evidence. The issues so settled and my findings thereon are given below:

ISSUES

FINDINGS

1.What is the effect in law of the fact that the actual registration of the two Trust Deeds took place on 11-3-1971 when the attachment of the property was subsisting?

This circumstance by itself does not affect the validity of the two Trust Deeds if they are otherwise valid and operative.

2(a)Whether the two Trust Deeds are validly registered and effective in law?

The registration is invalid for failure to comply with S. 230A of the present Act. The deeds are not effective in law.

2(b) Whether the properties comprised in the said Deeds cannot be proceeded against for the recovery of income tax, penal interest, penalty or other tax due from H.H. the Late Maharaja Pratapsinh Gaekwad as alleged in the plaint?

They are liable to be proceeded against.

3.Whether the order dated 10th August, 1971 is void, illegal or ineffective in law?

No. It is valid and operative in its entirety.

4.Whether the orders of attachment dated 25th and 27th July, 1970 are liable to be set aside?

No.

5.Whether the proclamation of sale dated 13th January, 1972 is liable to be set aside?

No.

6.Reliefs and costs?

Suit dismissed with costs. Costs of the three defendants in one set.

Reasons for findings

6. Issue No. 2 (a): This is the central issue and can be disposed of on a short ground. I am, therefore, taking it first of all. The material portion of section 230A may be reproduced verbatim with advantage.

230A. Restrictions on registration of transfers of immovable property in certain cases. --(1) Notwithstanding anything contained in any other law for the time being in force, where any document required to be registered under the provisions of clause (a) to clause (e) of sub-section (1) of section 17 of the Indian Registration Act, 1908 (16 of 1908), purports to transfer, assign, limit, or extinguish the right, title or interest of any person to or in any property valued at more than fifty thousand rupees, no Registering Officer appointed under that Act shall register any such. document, unless the income tax Officer certifies that--

(a) such person has either paid or made satisfactory provision for payment of all existing liabilities under this Act, the Excess Profits Tax Act, 1940 (15 of 1940), the Business Profits Tax Act, 1947 (21 of 1947), the Indian income tax Act, 1922 (11 of 1922), the Wealth-tax Act, 1957 (27 of 1957), the Expenditure-tax Act, 1957 (29 of 1957), the Gift-tax Act, 1958 (18 of 1958), the Super Profits Tax Act, 1963 (14 of 1963), and the Companies (Profits) Surtax Act, 1964 (7 of 1964), or

(b) the registration of the document will not prejudicially affect the recovery of any existing liability under any of the aforesaid Acts.

7. It is fairly conceded by Shri Chinoy for the plaintiff that no certificate in terms of section 230A was filed before the Registering Officer. He, however, faintly suggests that the filing of the certificate dated 8-1-1971 u/s 34 was enough. I cannot accept this submission for several reasons. In the first place it should be noted that the tax liability under as many as 10 different enactments (the 1957 Act is just one of them) is adverted to in section 230A(1)(a) of the 1961 Act. As against this the certificate banked upon by the plaintiff refers to the liability under one Act alone. Then that certificate is signed by an ITO and not by a WTO as prescribed by the 1957 Act. Thirdly, section 34 had been repealed more than six years before the two trust deeds came to be registered in March 1971. The text of the certificate which is available at page 71 of the compilation will show

that it is substantially in a form different from that contemplated by section 34. Without dilating further I hold that the filing of this particular certificate before the Registering Officer does not even remotely meet the requirements of section 230A.

8. Shri Chinoy next urges that since the two trust deeds were executed in March 1959, and lodged for registration with the Registering Officer on 12-5-1959, the provisions of section 230A which came on the statute book only with effect from 7-10-1964, will not apply to the documents. I am afraid this contention is not sound. The obligation cast on the Registering Officer is, ''No Registering Officer shall register any such documents''. Obviously the crucial date would be the date on which the officer concerned proceeds to register the document. The date of execution of the document or of its lodgment with the Registering Officer is immaterial. I hold that section 230A does apply to the two trust deeds. The fact that the registration was delayed for about 12 years, is neither here nor there.

9. It follows that the registration of the two documents by the Registering Officer was in direct breach of the mandatory provisions of section 230A. This renders the registration void and ineffective in the eye of the law. Accordingly I return a negative finding on issue No. 2(a).

10. Issue No. 2(b): Shri Chinoy drew my attention to section 47 of the Indian Registration Act, 1908. It says, ''a registered document shall operate from the time from which it would have commenced to operate, if no registration thereof had been required or made, and not from the time of its registration''. This provision could have come to the rescue of the plaintiff, only if the registration had been held to be effective in the eye of the law. When the registration of the two deeds was compulsory u/s 17 of the Indian Registration Act, mere execution of the documents in March 1959 will not create any rights or obligations. It follows that the two properties continued to vest in the deceased settlor till his death. After his death they vested in his legal representatives. In July 1970 when the attachments came to be effected, the two properties were, thus, squarely liable for attachment. I return a finding to this effect on Issue No. 2(b). Resultantly the suit will have to be dismissed. However, I would like to record findings on other issues also with sketchy reasons therefor.

11. Issue No. 1: The circumstances that the attachment of the properties was subsisting at the time of registration of the deeds, would have been innocuous, had the registration been to be valid. In that case u/s 47 of the Indian Registration Act, the deeds would have become effective from the date of their execution (14-3-1959). However, now the question does not survive.

12. Shri Mehta for the defendants, however, has advanced one more submission in this context. He has referred to rules 2, 16(1) and 16(2) of the Second Schedule to the 1961 Act and on their basis made a submission that the two attachments of July 1970 will relate back to 4-4-1957, on which date the certificate u/s 46(2) of the 1922 Act was served by the Additional Collector on

the deceased Settlor. To understand his submission it is necessary to reproduce section 222(1) and rules 2, 16(1), 16(2) and 51 of the Second Schedule to the Act.

Section 222(1) of the Act

When an assessee is in default or is deemed to be in default in making a payment of tax, the ITO may forward to the TRO a certificate under his signature specifying the amount of arrears due from the assessee and the TRO on receipt of such certificate, shall proceed to recover from such assessee the amount specified therein by one or more of the modes mentioned below, in accordance with the rules laid down in the Second Schedule.

Then follows the modes of recovery referred to above. They are (i), (ii) attachment and sale of the assessee''s movable and immovable property, (iii) his arrest, and (iv) appointment of receiver.

Rule 2

When a certificate has been received by the TRO from the ITO for the recovery of arrears under this Schedule, the TRO shall cause to be served upon the defaulter a notice requiring the defaulter to pay the amount specified in the certificate within 15 days from the date of service of the notice and intimating that in default, steps would be taken to realise the amount under this Schedule.

Rule 48 of the Second Schedule to the Act empowers the TRO to attach immovable property of the assessee.

Rule 16

(1) Where a notice has been served on a defaulter under rule 2, the defaulter or his representative in interest shall not be competent to mortgage, charge, lease or otherwise deal with any property belonging to him except with the permission of the TRO nor shall any civil court issue any process against such property in execution of a decree for the payment of money.

(2) Where an attachment has been made under this Schedule, any private transfer or delivery of the property attached or of any interest therein and any payment to the defaulter of any debt, dividend or other moneys contrary to such attachment, shall be void as against all claims enforceable under the attachment.

Rule 51

Where any immovable property is attached under this Schedule, the attachment shall relate back to, and take effect from, the date on which the notice to pay the arrears, issued under this Schedule, was served upon the defaulter.

13. Shri Mehta argues that reading rules 2, 16(1), 16(2) and 51 together, the Court should hold that the Demand Notice dated 30-3-1957, by the Additional Collector, on the Settlor on 4-4-1957 should be treated as notice contemplated by rule 2 and by pressing in aid rule 16(1), it should be further held that the two

trust deeds of March 1959 came into being while the two attachments were in force. Thus the benefit enuring to the beneficiaries under the deeds would become void under rule 16(2) as against the claim under the attachments. Shri Chinoy countered these submissions by contending that the constraints under the Second Schedule would materialise only if the initial notice of demand was served or issued under rule 2. He drew my attention to the portions of the rules, I have emphasised while reproducing their text in para 13 (supra). According to him, the notice dated 30-3-1957 does not fulfil the description of a notice under rule 2 of the Second Schedule and as such, Shri Mehta''s submissions should not be accepted.

14. The submissions of neither counsel can be accepted in their entirety. Section 297(2)(j) of the 1961 Act provides that notwithstanding the repeal of the 1922 Act, any sum payable by way of income tax, super tax, interest, penalty or otherwise under the 1922 Act may be recovered under the 1961 Act, but without prejudice to any action already taken for the recovery of such sum under the 1922 Act.

15. Admittedly the liability of the Settlor arose under the 1922 Act. Relying on this provision the Supreme Court has ruled in Third Income Tax Officer, Mangalore Vs. M. Damodar Bhat, that the liability arising under the 1922 Act can be realised under the provisions of the 1961 Act. It is further clarified that it is not necessary in every case that all the sections of the 1961 Act relating to the recovery and collection, that is, sections 220 to 232 of the Act must be literally applied. Only such of the sections will apply as are appropriate in the particular case and subject, if necessary, to suitable modifications. In other words, the procedure of the 1961 Act will apply mutatis mutandis to the cases contemplated by section 297(2)(j).

16. The question that focally falls for consideration in the present case is whether the provisions of rule 51 and/or rule 16(1) and 16(2) apply to transfers which have already been virtually accomplished before the advent of the Act (which includes the Second Schedule) on 1-4-1962. The obvious answer is ''No''. The intention to affect transfers already completed cannot be implied from the language of rule 51, and/or rule 16(1) and 16(2) by rule 51.

17. As the facts in the present case show the certificate u/s 46(2) was sent to the Additional Collector on 27-3-1957. The letter issued by him on 30-3-1957 to the Settlor appears to be in compliance with sections 150(a) and 152 of the Bombay Land Revenue Code, 1879. The Additional Collector was obviously acting under these provisions in order to recover the dues from the Settlor as arrears of land revenue. No doubt, section 150(a) prescribes that arrears of land revenue could be recovered by serving a written notice of demand on the defaulter u/s 152. There was, however, no further provision in the Code analogous to rule 51 of the Second Schedule. Indeed, a study of Chapter XI of the Code which deals with the topic ''Realization of the land revenue and other revenue demands'', will show that where dues were to be recovered by sale of immovable property,

attachment of such property was not at all contemplated. Attachment was necessary only in case of movable property. For immovable property, the Collector straightway used to issue proclamation of sale u/s 155 read with sections 165 and 166 of the Bombay Land Revenue Code. The finding is thus inescapable that in our case, the attachment in express terms came to be effected only in July 1970, that is long after the advent of the 1961 Act.

18. For all these reasons I hold that provisions of rule 2, 16(1), 16(2) or 51 are not applicable to the facts of the present case. Had the provisions of section 230A stood duly complied with, I would have upheld the operative validity of the two trust deeds as against the subsequent attachment. However, on this point the plaintiffs must fail. Issue Nos. 3 to 6: The learned counsel have agreed that the validity of the two trust deeds may be decided on the basis of the findings as recorded above and the suit finally disposed of on that basis. I have recorded findings on Issue Nos. 2(a) and (b) against the plaintiffs. Consequently the impugned order dated 10-8-1971 made by the first defendant will have to be upheld. The two attachments dated 25-7-1970 and 27-7-1970 are valid in law and do not deserve to be set aside. So also the proclamation of sales dated 13-1-1972. In the result, the suit, stands dismissed with costs. Costs of all the three defendants in one set.

Suit dismissed.

