(2005) 02 KL CK 0021

In the High Court Of Kerala

Case No : O.P. No. 5113 of 1997

Jaya APPELLANT

Vs

State of Kerala RESPONDENT

Date of Decision : 14-02-2005

Acts Referred:

Constitution of India, 1950 — Article 246
Kerala General Sales Tax (Amendment) Act, 1993 — Section 13
Kerala General Sales Tax Act, 1963 — Section 23(1), 26A, 45A(1)
Kerala Revenue Recovery Act, 1968 — Section 34, 38, 44, 49, 5

Citation : (2005) 2 ILR (Ker) 364 : (2005) 2 KLT 543

Hon'ble Judges : M.N. Krishnan, J;K.S. Radhakrishnan, J

Bench : Division Bench

Advocate : S.V. Rajan and M.V.S. Namboothiry, for the Appellant; Raju Joseph, Spl. Government Pleader (Taxes), for the Respondent

Final Decision : Dismissed

Judgement

K.S. Radhakrishnan, J.—Petitioner is the wife of defaulter of sales tax dues. She was served with a notice of demand seeking recovery of an amount of Rs. 24,01,476/- and also an amount of Rs. 1,86,65,176/-. Properties were brought to sale to recover the amount and the petitioner has obtained stay. Petitioner has also challenged the validity of Section 26A of the Kerala General Sales Tax Act and the learned Single Judge referred the matter to the Division Bench and hence the matter has been placed before us.

2. Petitioner''s husband was an assessee in the rolls of the Assistant Commissioner (Assessment), Sales Tax Office Special Circle, Thiruvananthapuram. Penalty proceedings were initiated against him in respect of assessment years 1992-93 and 1993-94. Assessing Authority imposed a penalty of Rs. 24,01,476/- for the offence committed under Sub-section (1) of Section 45A. Notice to that effect was sent to him under Form No. 24A on 14.9.1994. On the same day another notice was also sent claiming an amount of Rs. 1,86,65,176/-. Since the amounts were not paid proceedings were initiated

for sale of the properties. Consequently notice of sale in Form No. 16 dated 29.7.1996 was served on him claiming a total amount of Rs. 5,04,38,708/-. A communication was also sent by the Tahsildar on 13.2.1997 to the husband of the petitioner which reads as follows:

"Whereas you had defaulted the payment of Rs. 5,04,38,708/- and its interest towards the arrears of Sales Tax and whereas you have failed to clear the dues in spite of issuance and publication of auction sales notice for the sale of the property of 38.80 Ares in Survey No. 513/15 and the property of 34.12 Ares in Survey No. 524/3 the auction sale is conducted today and whereas there was no one to bid, the property has been purchased on behalf of the Government for an amount of ten paise. In the event of non-payment of the arrears and the cost of the proceedings in lump at a stretch, the property will be acquired by the Government and the sale shall be confirmed."

Petitioner, wife of the defaulter has then preferred this Original Petition on 19.3.1997 to declare that she is not a defaulter to Government and the revenue recovery proceedings taken against her properties in violation to Sections 5, 34, 38 and 49 of the Kerala Revenue Recovery Act, 1963 are liable to be quashed. A declaration that no charge was created over the properties in Exts.P1 and P2 on 22.2.1994 as per Section 23(1) of the Kerala General Sales Tax Act, 1963, since the date of default as per Exts.P3 and P4 commenced only from 17.11.1994, is also sought for. She is also challenging the validity of Section 26A of the K.G.S.T. Act, 1963.

3. Counter affidavit has been filed by the 4th respondent on 3.11.1994 stating that the documents referred to as Exts.P1 and P2 are sham documents brought into existence to defeat the interest of the revenue. Further it was also pointed out that those documents were registered at the Sub Registry Office, Ooroottambalam where as the property is situated outside the limits of the said Sub Registry Office. Further it was also pointed out that the properties were transferred in the name of the petitioner so as to escape from the liability. It was also stated in the counter affidavit that petitioner had filed a suit before the Munsiff Court, Neyyattinkara as O.S. No. 18 of 1996, which was dismissed and that fact was also not disclosed in the Writ Petition. Further it was also pointed out that by virtue of Section 26A there is a statutory charge over the property owned by the petitioner''s husband and consequently sale would be void. Yet another counter affidavit has been filed by the third respondent stating that the documents executed were sham documents and only to get over from the sales tax liabilities.

4. Question that is germane for consideration is not whether the petitioner is a defaulter or not but whether the defaulter has tried to execute document so as to get over tax liability. We are in this case convinced that Exts.P1 and P2 documents were executed by the defaulter in favour of his wife to get over the tax liability. P1 is a settlement deed executed on 22.2.1994 and P2 is the sale deed dated 22.2.1994. The assessment orders in question were for the years

1992-93 and 1993-94. In other words, during the pendency of the proceedings the properties were transferred. This transfer, in our view, is clearly hit by Section 26A of the Act. The said provision is extracted below for easy reference.

"26A. Certain Transfers to be void: (1) Where, during the pendency of any proceedings under this Act or after the completion thereof, any assessee creates a charge on, or parts with the possession (by way of sale, mortgage, gift, exchange or any other mode of transfer whatsoever), of any of his assets in favour of any person, such charge or transfer shall be void as against any claim in respect of any tax or any other sum payable by the assessee under this Act."

Section 26A was inserted by Act 13 of 1993 with effect from 1.4.1993. Ext.P1 settlement deed was executed on 22.2.1994 and Ext.P2 sale deed was also executed on the same day, that is, after insertion of Section 26A of the Kerala General Sales Tax Act, 1963.

5. Section 26A was introduced by the State Legislature to get over the attempt of the assessee to create a charge on or parts with the possession by way of sale, mortgage, gift, exchange or any other mode of transfer whatsoever of any of his assets in favour of any other persons so as to get over any claim in respect of any tax or any other sum payable by the assessee under the Act. We are of the view State Legislature is competent to enact such provision in exercise of its legislative power under Entry 54 of List II of the 7th Schedule read with Article 246 of the Constitution of India. Section 26A does not indirectly imposes an unreasonable restriction on the assessee''s freedom of trade. Section 26A does not restrict or purport to impose any restriction on any freedom of trade by the citizen of the country, but only to safeguard public interest. Apart from the provisions of Section 26A, there are provisions in Revenue Recovery Act itself to proceed against the transfer of property to defeat the claim for tax arrears. Reference may be made to Section 44 of the Revenue Recovery Act which is extracted below:

"44. Effect of engagements and transfers by the defaulter:--

(1) Any engagement entered into by the defaulter with anyone in respect of any immovable property after the service of the written demand on him shall not be binding upon the Government.

(2) Any transfer of immovable property made by a defaulter after public revenue due on any land from him has fallen in arrears, with intent to defeat or delay the recovery of such arrear, shall not be binding upon the Government.

(3) Where a defaulter transfers immovable property to a near relative or for grossly inadequate consideration after public revenue due on any land from him has fallen in arrear, it shall be presumed until the contrary is proved, that such transfer is made with intent to defeat or delay the recovery of such arrear, and the Collector or the authorised officer may subject to the orders of a competent Court, proceed to recover such arrear of public revenue by attachment and sale

of the property so transferred, as if such transfer had not taken place:

Provided that, before proceeding to attach such property the Collector or the authorised officer shall--

(i) give the defaulter an opportunity of being heard; and

(ii) record his reasons therefore in writing.

Explanation: For the purpose of this section, "near relative" includes husband, wife, father, mother, brother, sister, son, daughter, step-son, step-daughter, uncle, aunt, son-in-law, daughter-in-law, brother-in-law, nephew or niece of the transferor."

The scope of above mentioned provision came up for consideration before a Division Bench of this Court in Kurian Mathew v. State of Kerala 1990 (1) KLT 14 and held that in the case of arrears of due any transaction effected to get over the recovery proceedings would be illegal. The said decision was followed by a learned Single Judge of this Court in Kuriakose Vs. District Collector and Others, The learned Judge held that eventhough the transfer of the property is effected much before the service of demand on the defaulter, still if the transfer is effected to a close relative and it would be a transfer with intend to defeat or delay the creditors unless the contrary is proved.

6. In the facts and circumstances of the case we have no hesitation to hold that Exts.P1 and P2 were executed to defeat the claim of the sales tax authorities as against the defaulter. Section 26A of the K.G.S.T. Act has given ample power to the assessing authorities to proceed against the properties as well. Under such circumstance the Writ Petition lacks merits and the same would stand dismissed.

