(1997) 10 KL CK 0020

In the High Court Of Kerala

Case No : W.A. No. 128 of 1990

K.T. Thomas APPELLANT

Vs

Tax Recovery Officer and Another RESPONDENT

Date of Decision : 08-10-1997

Acts Referred:
Income Tax Rules, 1962 — Rule 8

Citation : (1999) 235 ITR 318

Hon'ble Judges : U.P. Singh, C.J;S. Sankarasubban, J

Bench : Division Bench

Advocate : C. Kochunni Nair, for the Appellant; P.K.R. Menon and N.R.K. Nair, for the Respondent

Judgement

S. Sankarasubban, J.—The petitioner in O. P. No. 9041 of 1989 is the appellant. He was an assessee under the Indian Income Tax Act and Wealth-tax Act on the file of the Income Tax Officer, B-Ward, Circle-I, Calicut. He was in arrears of Income Tax, wealth-tax and interest thereon amounting to Rs. 8,97,773. Recovery proceedings were initiated by the Tax Recovery Officer, Calicut. An item of immovable property belonging to the petitioner, viz., bank house property, was put to auction. The property was sold for an amount of Rs. 12,01,000 at the auction conducted on February 7, 1989. There was a prior liability on the property in favour of the Chartered Bank and the Chartered Bank had obtained a decree on July 31, 1982, in O. S. No. 84 of 1981 of the Sub-Court, Kozhikode. The decree was later assigned in favour of one Jolly Thomas. The charge created by the Chartered Bank on the property was not initially known to the Department. Jolly Thomas filed a petition requesting the Tax Recovery Officer to set aside the sale or in the alternative to pay her a sum of Rs. 8,07,327.14. But the request for setting aside the sale was rejected and the auction sale was confirmed on March 14, 1989.

2. Jolly Thomas filed a petition in the Sub-Court, Calicut, as E. A. No. 262 of 1989 in O. S. No. 84 of 1981 for a direction to the Tax Recovery Officer to

deposit the entire sale proceeds in court. The court ordered that the Tax Recovery Officer would pay her the amount due as per the decree with interest as ordered by the Subordinate Judge. It was brought to the notice of the court by the Department that a sum of Rs. 4,09,673.80 was already in deposit in that court and that Jolly Thomas had prior charge over that amount as that property was one of the two immovable properties given as security to the decree-holder.

3. In the meanwhile, the appellant filed a petition before the Tax Recovery Officer for the return of the balance amount after adjusting the amount of tax arrears. The Tax Recovery Officer rejected the same by exhibit P-4 order. In exhibit P-4, the Tax Recovery Officer said that Jolly Thomas had got first priority over the property and that the liability due to the Department was to be adjusted only after paying the amount due to Jolly Thomas. Hence, the prayer of the petitioner was dismissed. Against that, an appeal was preferred before the Commissioner of Income Tax, Cochin. The Commissioner of Income Tax dismissed the same by exhibit P-6 order. In exhibit P-6 it has been stated that the binding nature of the debt due to Jolly Thomas was not known at the time of sale proclamation. But at the time of conducting the public auction on February 7, 1989, it was clearly mentioned that the liability in respect of the decree of the court will be cleared by the Department out of the sale consideration received from the auction money. Original petition was filed challenging exhibits P-4 and P-6. The learned single judge dismissed the original petition. The learned single judge took note of the fact that Jolly Thomas had a prior charge and at the time of auction, the binding nature of the liability was announced. Further, Jolly Thomas was not made a party to the petition. It is against the above judgment that the writ appeal has been filed.

4. Learned counsel appearing for the appellant argued the matter at great length and contended that exhibits P-4 and P-6 orders are not correct. According to him, under Rule 8 of Schedule II to the Income Tax Act, it was the duty of the Department to adjust the amount got by auction towards the arrears and to return the balance amount to the defaulter. He also stressed the fact that in the sale proclamation the binding nature of the liability towards Jolly Thomas was not considered. Learned counsel for the Department, Shri N. R. K. Nayar, contended that there is no dispute that the amount due to the Chartered Bank was a prior charge and that it had preference over the tax liability. It was further contended that in the execution proceedings, the department has been directed to pay the amount towards the liability of the decree. Hence, counsel contended that the original petition has no basis.

5. After hearing the parties, we are of the view that the appellant''s contention cannot be accepted. Learned counsel for the appellant was correct in submitting that normally under Rule 8 of Schedule II, the Income Tax Officer has to return the excess amount after adjusting the amount due to the Department. But in a case where there is a first charge, it is the duty of the Department to adjust the amount realised under the auction towards that first charge. Even if there is a

mistake in the sale proclamation, that cannot be taken advantage of by the appellant. The appellant also submitted that Jolly Thomas had a first charge over the property. Further; Jolly Thomas had made the petitioner and the Department as parties to the execution proceedings. It is in those proceedings that the order was made to deposit some amounts towards the liability. That order has not been challenged by the appellant.

6. In the above view of the matter, we do not find any merit in the writ appeal. Hence, the writ appeal is dismissed.

