
(2000) 11 KL CK 0062

In the High Court Of Kerala

Case No : Original Petition No. 5462 of 2000-A 24 November 2000

Moni Senan

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 24-11-2000

Acts Referred:

Income Tax Act, 1961 — Section 220, 222, 276

Citation : (2001) 114 TAXMAN 440

Hon'ble Judges : M. Ramachandran, J

Bench : Division Bench

Advocate : T.M. Sreedharan and N. Unnikrishnan, for the Assessee George K. George and P. Kesavan Nair, for the Revenue, for the Appellant;

Judgement

The original petition has been filed by Smt. Moni Senan, who is the wife of Mr. Chandrasenan, an assessee under the Income Tax (PAN 46-011-PZ9065). For the assessment years 1982-83 to 1987-88, there was non-remittance of tax. In respect of those years, the Settlement Commissioner on 28-9-1994 ordered that an amount of Rs. 34,16,388 is payable in four instalments. The amount was not paid and the department had levied interest u/s 220(2) of the Income Tax Act, 1961 (hereinafter referred to as the Act). It comes to Rs. 84,64,563 and the total arrears aggregated to Rs. 1,18,80,951. Ext. P3 addressed to the petitioner is the notice issued by the TRO whereby the petitioner was directed to pay the amount within 15 days of receipt of the notice. Following Ext. P3, as there was no payment made, notices had been issued proclaiming sale of immovable properties, jointly owned and possessed by the petitioner and Shri Chandrasenan. Item 1 was an extent of 25.452 cents of land, item 2, 6508 cents, item 3, 7.867 cents and item 4, 4.69 cents. The first two items were proposed to be sold on 22-2-2000 and the rest on the following day. The petitioner's husband had objected to the proposal on two grounds, viz., that the sale was bad as the proclamation was not in accordance with rule 53(cc) of the Second Schedule of the Act and there was delay in bringing the properties for sale, and the proceedings were vitiated by limitation. Ext. P8 is the letter of objections.

2. By way of reply, it had been pointed out that a corrigendum had been issued in respect of two items of properties. The point of limitation also had been disputed. The text of the letter dated 16-2-2000, marked as Ext. P9, is reproduced below:

"This is to intimate that the contentions raised in your above letter have been carefully considered by this office.

Please note that the income included in your total income is by way of your own income as well as the share income from the firm, Three Star Bottling Co., So far as share income is concerned, it has become final in terms of rule 68B of Second Schedule only when the Tribunal passed its appellate order dated 17-4-1995.

As regards reserve price, it is to be mentioned only when it has been fixed. As per departmental instructions, it can be kept as confidential. In any case, a corrigendum has already been issued in respect of two items of properties to be auctioned on 22-2-2000.

For the reasons stated the cancellation of proposed auction sale of properties does not arise."

3. The objection raised by the husband of the petitioner, therefore, was not reckoned and the original petition had been filed by the petitioner in the aforesaid circumstances. It had been stated that she was interested in the issue since the properties sought to be attached belonged to her and her husband was too ill, and hospitalized, and, therefore, he was not in a position to make arrangements for filing an original petition.

4. Though an application for stay of the auction had been filed, no interim orders had been granted at that time, and the process had went on. From the sale of three items it was possible to fetch a sum of Rs. 41 lakhs. The interlocutory application had come up for further hearing on 21-3-2000. Noticing the development, this court had ordered that in respect of the third item of property, viz., 7.867 cents of land, adjacent to M.G. Road, Ernakulam, the confirmation will be stayed for the time being as it had been reported that the highest bid was only Rs. 36.25 lakhs. The amount received in respect of the above was directed to be deposited in a public sector bank on a fixed deposit. Therefore, the present scope of the original petition concerns only as to the legality of the auction that had been held in respect of item 3 of the properties, consequent to Ext. P3.

5. In the meanwhile, one Thomas Vayalat had filed C.M.P. No. 18761 of 2000 for getting himself impleaded in the proceedings. He had been the auction purchaser of one of the said items which had been sold (Item 3), and as the confirmation stood stayed, he too became a necessary party to the proceedings and was impleaded.

6. The counsel for the petitioner confined his arguments on the following points:

(a) The sale proclamations were illegal and could not have been acted upon.

(b) There was violation of rule 53 of the Second Schedule of the Act.

(c) In view of the above defect, she has been subjected to undue hardship and loss.

(d) The liabilities of Shri Chandrasenan were unrealistically boosted up, and properties far in excess of requirements have been brought to revenue sales, which was illegal.

7. As regards the contention on the issue of limitation, the counsel had not made any submissions. Therefore, I am confining myself only as regards the validity of the sale proclamations and effect thereof on the consequent sale.

8. As noticed earlier, the petitioner confined her submissions to the sale of item 3 alone. It was not the first time that the said property had been brought to sale. It is pointed out that the property admeasuring about 7 cents lie in the heart of Ernakuram and on previous occasion, the upset price shown in the proclamation was in the region of 1.3 crores of rupees. The petitioner complains that in Ext. P6 sufficient details had not been shown including the upset price, and there were only two participants in the auction. As a result, the property was auctioned for a ludicrously small amount of Rs. 36.25 lakhs. The suggestion is that this was even lesser than one-fourth of the market price of the said prime land.

9. According to the counsel, the proclamation of sale, under rule 53 of the Second Schedule, should have incorporated all details that had been laid down, and there should have been strict adherence to the procedure prescribed, as the civil rights of parties were involved. Insofar as a short work had been attempted to the proclamation which proceeded the sale was irregular, and, consequently, the sale carried out unenforceable.

10. Mr. P.K. Raveendranatha Menon, the senior standing counsel, points out that Ext. P6 is the sale proclamation. That is dated 17-1-2000, and it conforms to the form prescribed. Reference is made to rules 38 and 52(2) of the Second Schedule. It describes the defaulter, the certificate number, and the order authorising the sale. The dues as on the date of the proposed sale, viz. 23-2-2000 are also incorporated therein. The place of sale also is specified, as the Conference Hall of the Central Revenue Building. General conditions are also prescribed which, inter alia, prescribe that if reserve price had been fixed, it will be taken care of. It is also stated that further details in respect of the property could be had from the TRO, on any working days. Annexure to the notice gives the details of the property and other details of encumbrances. According to him, the objections raised are unwarranted, if not frivolous. It is in this background that I have to examine whether the sale proclamation is defective.

11. The petitioner submits that it was a case of harassment by the Income Tax Department for over a decade. The property concerned was brought under attachment in the year 1984. During the period, the property could have brought a handsome price, and the petitioner particularly points out that on an earlier

occasion, the upset price had been put as Rs. 120 lakhs. This disclosed the range of the probable worth, and as the petitioner was totally restrained from negotiating, the present predicament had resulted. When a single item of property would have adequately wiped out the liabilities, the unrelenting attitude of the department had directly resulted in prejudice. There was inaction all throughout, and the petitioner points out that when the department had security, the delay only helped them, as the interest in the meanwhile was mounting up. The petitioner could not enjoy the properties, nor could it be negotiated. The real estate prices had marginally come down, but nonetheless as the sale proclamation did not point out the upset price, the property had now been sold away for a fraction of its real worth, and the reason for the low price could directly, therefore, be attributable to the defective proclamation and the oversight of the department and there is direct violation of rule 53 of the Second Schedule.

12. The senior standing counsel for the revenue had strongly justified the stand of the revenue. In view of the default, an attachment of the properties was imperative and the consequential hardship was unavoidable, he submits. Repeated attempts were made to sell away the properties, and because of the objections raised by the petitioner, every time, the sale could not be carried out. It was admitted that on one occasion, honouring the wishes of the defaulter, the upset price of the item was notified as Rs. 120 lakhs. But there were no bidders. The petitioner was to thank herself for the present debacle experienced. The predicament pleaded was nothing new, as a defaulter invited prejudices automatically. He also submitted that the bidding in the latest auction was fair, there was sufficient publicity, and apart from the officers of the department there were ten participants. The price quoted by the 4th respondent was assessed as reasonable, and it was in the above circumstances that his bid was accepted.

13. The standing counsel also referred to the contentions raised in regard to rule 53. He pointed out that the said rule could not be interpreted as suggested by the petitioner. It was not a mandatory requirement under the rule to show the upset price in every sale proclamation. Especially in respect of properties which were in the higher brackets of prices, it had been generally found that the incorporation of an upset price will, in fact, never go to help the defaulter. He highlighted that the petitioner herself had experienced it on earlier occasions. The counsel submitted that the delay on all occasions had been caused by the tactics employed by the petitioner, and there was no reason for blaming the revenue for her present predicament.

14. The petitioner had reiterated the various instances were under, according to her, the burden of liability cast on the assessee had grown unbearable.

15. The foundation of the claim for declaring the revenue sale as illegal is on the alleged effective sale proclamation made. I may extract rule 53 of the Second Schedule as following:

"5. Contents of proclamationA proclamation of sale of immovable property shall be drawn up after notice to the defaulter, and shall state the time and place of sale, and shall specify, as fairly and accurately as possible,

(a) the property to be sold;

(b) the revenue, if any, assessed upon the property or any part thereof;

(c) the amount for the recovery of which the sale is ordered;

(cc) the reserve price, if any, below which the property may not be sold; and

(d) any other thing which the Tax Recover Officer considers it material for a purchaser to know, in order to judge the nature and value of the property."

16. The statement about reserve price, coming under clause (cc) cannot be treated as a mandatory requirement, by the terms of the rules, submits the senior standing counsel. On a plain reading, the submission of the counsel may appear to be justified. Before going to the above provisions, in view of the submissions that have been made, I may examine the contentions in some more detail.

17. The Second Schedule prescribing procedure for recovery of tax is drawn in exercise of the mandate given by sections 222 and 276 of the Act. Part I of the Second Schedule refers to general provisions, rule 2 speaks about the duty to issue notice. Ext. P3 evidently had been issued by the TRO in exercise of this power. This is dated 6-1-2000. The petitioner in the original petition has referred to it as notice under rule 117B of the Income Tax Rules, 1962 but I am of opinion that it is in fact issued under rule 2 of the Second Schedule.

18. Though not specifically highlighted, on going through the documents produced, I find that a lapse has been committed, vitiating the procedure. Steps to be taken after notice are contemplated rule 4. If the amount is not paid within the time specified or further time granted, the Officer is obliged to proceed to realise the amount by one or more of the modes prescribed. Clause (b), viz., attachment and sale of immovable property has been adopted in this case. The attachment, however, had already been brought about. Attachment and sale are two distinct and independent steps, though inter-connected. The Officer while exercising powers has to bear in mind the import of rule 3 as well. No step in execution of a certificate shall be taken until the period of 15 days has elapsed, since the date of service of the notice referred to in rule 2.

The bar is in absolute terms. Therefore, even if the date of Ext. P3 is taken as the date of service, then also any steps for execution could have been resorted to only by 22-1-2000.

19. Ext. P6 undoubtedly is the step in execution of the order. This, however, bears the date of 17-1-2000. Ext. P6 although refers to a certificate dated 9-2-1995, as TR-3/94-95, and the property is stated as attached, does not directly make reference to Ext. P3. The sum recoverable is shown as Rs.

89,08,770, and the figures shown in Ext. P3 are incorporated in the body of the order as Rs. 1,18,80,951. There is no case that Ext. P3 is not a certificate as envisaged by the rule issued under rule 2. It bears the number TR.98/T/99. When Ext. P3 had been passed and follow-up action was being initiated, for realising a sum referred to therein, it should have been ensured that the mandate of rule was observed. The proximity of the certificate with reference to proclamation and the figures do show that the sale was on the authority of the said certificate as well. If that be so, I have to hold that Ext. P6 was invalid and could not have been acted upon. When statute prescribes a procedure, the authorities have no right or jurisdiction to adopt a procedure at their discretion, as rights of third parties are involved. Though the pleadings did not highlight the above, when the contentions urged in the original petition are that there were procedural irregularities which tainted the sale, and when I find this defect in the proclamation, it is unfair to leave the irregularity unnoticed. The certificate issued in 1995 was not the immediate authority for Ext. P6, it was definitely Ext. P3, and as the stipulation of minimum notice has not been adhered to, the further proceedings are invalid from such point. Rule 3 of the Second Schedule states that no step (Emphasis here italicised in print supplied) in execution of a certificate shall be taken until the lapse of 15 days. The proviso to the rule only referred to the right of attachment permissible in certain contingencies before the deadline. Insofar as a new certificate was drawn up on 6-1-2000, the defaulter could not have been denied the benefit of the procedures directed to be followed by the rule. I am aware of rule 61. But nevertheless, since the petitioner had approached this court well before the sale, the procedure prescribed for setting aside the sale by permitting of a deposit may not confer justice on the facts of the case. Also only on the satisfaction of the TRO the above procedure need be followed. If the justification for proclamation was the certificate of 1995, it can well be contended that irrespective of Ext. P3, the officer need not have waited for 15 days. But the above will be highly arbitrary, since the figures shown as arrears specifically refer to the sums drawn up in Ext. P3 certificate. True, the properties may be under attachment and what had been added was the interest element which accrued after 1995. But in that case a fresh certificate might have been superfluous. Obviously, Ext. P3 is intended to be acted upon, one cannot ignore the impact thereof when it preceded Ext. P6, and reference thereto had also been made.

20. Now, I may also deal with the contentions of the petitioner that there is violation of rule 53(cc) of the Second Schedule. The rule has already been extracted earlier. On an examination, it is seen that reference to the said rule is made in two other places in the Second Schedule. This is rule 56 and rule 59. An isolated examination of the impact of a provision as contained in a rule, when the expression has been used in more than one place in the statute also may not be advisable, since a comprehensive view as regards the scope and purport may not be obtained by such approach. Rule 56 prohibits a confirmation if the bid is below the reserve price fixed, if any. Rule 59 gives a right to the Central

Government to bid for the property in any subsequent sale. Reading rules 53 and 59 together, it has to be noticed that once a reserve price is fixed, a special procedure is mandatorily to follow. The rule also does not give any power to put the property for sale, and sell it away, once a tag of reserve price has been fixed. The government also has not been given power to under quote the original price specified, as rule 59 is silent on this matter. The right of the government to participate in auction does not ipso facto do away with the rights of the defaulter. It also does not authorise a sale for a lower price to a new bidder. The rule is intended, according to me, for the safety of the defaulter, expressing an anxiety that the property is not lost to him for the only reason that there was no adequate offer. A defaulter may be in an unenviable position and may be passing through a phase of distress. The state as the protector of rights of all citizens, who may include criminals, defaulters, or undesirables, has to give them equal protection of law. The rights of property of a defaulter are also to be safeguarded, and he is not to be viewed as a fugitive nor can he be placed in a disadvantageous position. The right of the government to participate in the auction is to rejuvenate the bids, and intended to give a protective shield to the defaulter, and the upset price can neither be ignored nor done away with. Scanning through the certificate rules, it was not possible to come to a finding that the method adopted was valid and proper.

21. Mr. Sreedharan, the counsel for the petitioner, had invited my attention to a decision in *Elumalai Naicker v. Kishtambal Ammal* AIR 1988 Mad. 106. This was a case where the upset price had been reduced at the instance of the decree holder. The court has, in the said decision, made observations, which I think are relevant, as extracted herein below:

"As observed above, when the court fixes the upset price that fixation is only for facilitating the conduct of the sale and to safeguard the interests of the judgment-debtor by fixing a reserve price. The object of fixing the upset price is to fix the lowest sum for which the property which is being auctioned will be sold or in other words, it is the sum from which the bidding may start. The upset price, therefore, has some relation to the price which the property intended to be sold in the auction is expected to fetch. When the court gives the upset price, it cannot do so merely on the ipse dixit of either the judgment-debtor or the decree-holder. What should be the amount to be fixed as the up set price must, therefore, be determined after an objective consideration of all the relevant facts to which the court must apply its mind, so as to safeguard the interests of the judgment debtor. It is true that for fixing the upset price, no elaborate enquiry may be required to be made, but the upset price cannot also be any figure having no relation whatsoever to the minimum price which the property intended to be sold is expected to fetch at the auction sale. . . ."

22. Mr. Menon, senior standing counsel, however, pointed out that rule 53(cc) of the Second Schedule does not at all in mandatory terms require the authority to fix a reserve price, and the expression used is "if any" which has a definite

connotation. But this has to be examined from one yet different angle. The rule, according to me, has to be strictly construed. A proclamation of sale has to be drawn up only after notice to the defaulter. The expression can be understood as the procedure to be followed. It is not a simple notice. As regards fixation of upset price, the views of the defaulter also are to be given due importance. What is postulated is definitely not a notice about the proclamation to the defaulter. But notice is to be given before the proclamation is drawn up. This, according to me, is the quintessence of the rule prescribing the procedure. When the defaulter gets an opportunity as above, he has the option to suggest the reserve price. He has to be realistic and normally cannot afford to be casual as it is in his interest to discharge the liability on the earliest point of time, once the properties have parted from his hands. The department also is able to get the views of the defaulter and the reserve price is, thus, fixed. Therefore, there is an inbuilt safety mechanism for minimising arbitrariness. Viewed from this point, I have to find that the condition for a reserve price becomes automatically relevant. Only because the rule has referred to the procedure as "if any", the discretion arising from the procedure cannot be ignored. If there is a failure for giving notice of drawing up of proclamation, I am of the opinion that there is procedural irregularity. In the present case, as a reserve price in respect of the property at the time of previous occasion was specified, a sale proclamation not incorporating the above at least was irregular. It should have found a place as a condition coming under rule 53(d) of the Second Schedule as well. As there was no notice given to the defaulter about the drawing up of the proclamation, the consequent steps cannot be held as valid and binding. Ext. P6 was unsustainable for this reason as well.

23. In this view, I hold that the proclamation evidenced by Ext.P6 and sale in favour of the 5th respondent were in violation of the statutory prescriptions. As a consequence, the sale was invalid and did not give any right to the purchaser over the properties. He will be entitled to get back the amount remitted together with interest. The petitioner is entitled to insist that item 3 could be put to auction only after compliance with the statutory formalities to be observed. The original petition to this extent is allowed. The department would be free to resort to further steps for enforcing recoveries as authorised by law and as the issue of limitation is looming large, I am of the opinion that the department would be justified if further auction is carried out within a period of three months from today. There will be no order as to costs.