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(2001) 11 CAL CK 0012

In the Calcutta High Court

Case No : Writ Petition No. 1024 of 2000 28 November 2001

Munir Ahmed and Another APPELLANT

Vs

Union of India and Others RESPONDENT

Date of Decision : 28-11-2001

Acts Referred:

Income Tax Act, 1961 — Section 226(3)

Citation : (2002) 174 CTR 483

Hon'ble Judges : Pinaki Chandra Ghose, J

Bench : Division Bench

Advocate : Pal, for the Assessee Som, for the Revenue, for the Appellant;

Judgement

Pinaki Chandra Ghose, J.

This is an application filed by the petitioners inter alia praying for an issuance of a writ in the nature of mandamus commanding the respondents Nos. 1 to 4 to withdraw, cancel, recall and rescind the impugned order of attachment of premises No. 40A and 40B, Circus Avenue, Calcutta (hereinafter referred to as the said premises) issued by the respondent No. 4 in Certificate Case Nos. 97/TR/(VII)/15(1)/89-90 and 98/TR-(VII)/15(1)/89-90 and the proclamation of sale dated 26-2-1996, and to forbear from giving any effect or further effect thereto in any manner whatsoever and further to recall and rescind the impugned order dated 21-7-1997, passed by the respondent No. 4 and to forebear from giving any further effect thereto and further to refund the amount so collected by them or by their servants or agents from the tenant of the said premises in question and further injunction restraining them from collecting further rent from the respondent No. 5.

2. Facts of the case briefly are as follows :

One Sk. Barkatulla (since deceased) purchased the said premises on 30-3-1993. On 13-1-1966, said Barkatulla transferred a portion of the said premises in favour of his first wife Khalida Begum by a registered deed. On 18-1-1966,

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another portion of the said premises was transferred in favour of his second wife Zainab Begum by a registered deed and on 15-2-1966, said Barkatulla transferred the remaining portion of the said premises to his third wife Masihunnessa Begum by another registered deed.

On 1-7-1974, the second wife made an oral gift of her portion of the said premises to her minor step son Md. Taruq, the respondent No. 6 herein and later registered a deed of gift on 17-12-1974. On 8-1-1976, portion of the said premises was leased out to Syndicate Bank for a period of 5 months and the lease was renewed twice for further five years consecutively. Income Tax returns were filed by the said Khalida Begum, Zainab Begum and Md. Tarique in respect of the income received by them out of the said properties.

In or about 1986 Income Tax Department attached the personal property of Sk. Barkatulla in Madras and Lucknow. On 3-6-1988, Sk. Barkatulla died. On 14-2-1989, Khalida Begum, his first wife, affirmed an affidavit declaring that on 12-2-1989, she made an oral gift of her to Md. Tariq. On 18-11-1993, order of attachment u/s 226(3) of the Income Tax Act was issued by the Income Tax Department. On 6-1-1994, the said order of attachment of the said properties were sent to Md. Tariq, the respondent No. 6 herein, Khalida Begum and Masihunessa Begum, the first and third wife of Sk. Barkatulla (since deceased) and to one S.M. Eqbal, representative of late Sk. Barkatulla.

On 16-3-1994, the petitioner Nos. 1 and 2 purchased the 2/3rd portion of the said property from Md. Tariq by two registered deeds. On 8-6-1994, an objection on behalf of the respondent No. 6 was filed against the impugned order of attachment. On 20-6-1994, letter of objection to the respondent No. 3 in respect of the said order of attachment and representation was made by the petitioners on 5-2-1996, by way of appeal before the Commissioner. Since no steps were taken, writ petition was filed on 19-2-1996.

On 26-2-1996, notice issued by the respondent No. 4 and on 29-2-1996, the writ petition so filed by the representative in W.P. No. 414 of 1996 and interim order was passed by His Lordship Arun Kumar Dutta, J restraining the respondents from taking any step for sale of the said premises,

On 14-5-1997, appeal was preferred from the judgment dated 24-4-1997. Further, the application was filed before the Tax Recovery Officer (hereinafter referred to as the TRO) under rule 11 of Schedule 11 of the Income Tax Rules (sic) filed by the petitioner. Ultimately, an appeal was disposed of on 9-3-2000, on the ground that the alternative remedy has been availed by the petitioner and liberty was granted to file fresh writ petition. Since respondent-authorities refused to cancel the said impugned attachment, hence this writ application has been filed.

3. Mr. Pal appearing on behalf of the petitioners submitted that the property is not attachable. He submitted that section 222 provides that when an assessee is in default or is deemed to be in default certificate proceedings may be initiated to

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recover the tax dues by inter alia attachment and sale of the assessee''s immovable property. u/s 159 of the Income Tax Act makes the legal representatives of the deceased assessee a deemed assessee. But by reason of sub-sections (4) and (6) of section 159 the liability of the legal representatives is limited of the assets of the estate of the deceased. In support of his submission he relied upon the following judgments :

(i) Union of India Vs. Mrs. Sarojini Rajah, ;

(ii) The Inspector Assistant Commissioner of Agricultural Income Tax and Sales Tax, Kozhikode Vs. V.K. Ramunni Panikkar, Receiver of Zamorin''s Estate, ;

(iii) The Additional Income Tax Officer, Salem Vs. E. Alfred, ;

(iv) First Income Tax Officer, City Circle V, Madras-34 Vs. M.R. Dhanalakshmi Ammal and Others, ; and

(v) Satya Pal Verma Vs. Income Tax Officer, C-Ward and Another, .

He further contended that the property was not a part of the assets to the estate of the deceased by reason of his divesting in 1966 and Md. Tariq becoming the owner of the property in his own right prior to the impugned attachments made in 1994, the property was not the immovable property of the deceased assessee nor was Md. Tariq holding the property as legal representative of Sk. Barkatulla. Therefore, according to him, the property was not a part of the estate of the deceased. As such certificate proceedings were ultra vires section 222 read with section 159. Therefore, he submitted that certificate proceedings were without jurisdiction, null and void and the attachments were also without jurisdiction, null and void. In support of his contention he relied upon a judgment in Kitran Singh & Ors. v. Chaman & Ors. AIR 1954 SC 340.

He further submitted that the order of the TRO dated 21-7-1997, becomes automatically without jurisdiction in view of the above submissions that the attachment proceedings were nullity. He further contended that the TRO has not applied his mind or has been considered the main issue whether Md. Tariq was in possession as the legal representative of S.K. Barkatulla. In other words, he did not address his mind to the basic question as to whether the property formed part of the assets of the deceased.

He further contended that TRO does not question divesting Sk. Barkatulla nor the assessment on income from the property in the hands of Khalida Begum, etc. He also contended that the certificate proceedings and the attachment are also without jurisdiction because no notice of demand u/s 156 was issued to Md. Tariq. In support of such contention he relied upon judgments Satya Pal Verma v. ITO & Anr. (supra) and Sri Mohan Wahi Vs. Commissioner, Income Tax, Varanasi and Others, .

4. Mr. Som appearing on behalf of the respondent drew my attention to rule 16(2) of Schedule II and contended that where an attachment has been made

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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. He also drew my attention to rule 48 of Schedule II and contended that all steps have been taken by the authorities by issuing the notice under the said rule. He also drew my attention to section 167 of the Income Tax Act and contended that the assessing officer shall have the same remedy against all properties of any kind vested in or under the control or management of any representative assessee. He further drew my attention to rule 11, sub-rule (6) which reproduced hereunder :

"Where a claim or an objection is preferred, the party against whom an order is made may institute a suit in a Civil Court, to establish the right which he claims the property in dispute; but, subject to the result of such suit (if any), the order of the TRO shall be conclusive".

Therefore, according to him, the order passed by the TRO is conclusive so far in respect of the property in question and the petitioner has not yet filed any suit claiming such title in respect of the property in question. He further contended that the petitioner shall be at liberty to file a suit in to establish his right in respect of the said property in question.

5. Mr. Pal in reply, submitted that rule 16(2) of Schedule II is not applicable in view of the fact that the attachment itself is bad. He further contended that rule 48 of Schedule II is not applicable in view of the fact that the property does not form part of the estate of the deceased and is illegal for the reasons stated above. He further contended that rule 17 has no application in view of the definition of the representative assessee in section 160.

Mr. Pal also submitted that the cases cited by the respondent-authorities have no application in the facts and circumstances of this case.

6. After considering the facts and circumstances of this case I do not have any hesitation to hold that the title in the property in question cannot be decided by me in this writ jurisdiction. In my opinion, rule 11, Schedule II empowers the Tax Recovery Officer to decide the objection in respect of the attachment or sale of the property in execution of a certificate and the TRO shall proceed to investigate the claim or objection. It further has been specifically stated under the said rule that no such investigation shall be made where the TRO considers that the claim or objection was designed or unnecessary delayed. In the instant case, as it appears that the petitioner earlier came before this court and the application was dismissed directing the petitioner to file an application or the objection before the TRO. The petitioner also filed such objection before the TRO and as it appears that the TRO after giving a hearing to the petitioner has passed an order rejecting the objection so filed by them. The petitioner thereafter came before this court and filed this application. In my opinion, as it appears that the TRO has come to the conclusion that the respondent No. 6 Md. Tariq was in possession of

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the said property in question on the date of the attachment issued by the department. It has also been held by the said TRO that on the date of service of the attachment notice 2/3rd shares of the above property of the said possession of the said Md. Tariq, son of late Sk. Barkatulla. That fact cannot be denied at this stage. In my opinion, that is a disputed question of fact whether or not Md. Tariq at the time of service of the said attachment notice. It is also a disputed question of fact whether the property had been sold prior to the date of issuance of such attachment and whether transfer was effected prior to the said attachment notice was issued by the department. In my opinion, those facts cannot be decided in this application. The petitioner also has to prove his right and title in respect of the said property in question and further to prove that the transfer has been effected prior to the issuance of the said notice. The said fact is also disputed question of facts in my opinion, cannot be decided in this writ application. Therefore, in my opinion it would be proper for me not to pass any order in this application excepting granting a time to the petitioner to file a suit before the proper forum and to proceed accordingly. The petitioner shall take steps to file such suit within four weeks from the date of this order and the respondent authorities shall not take any steps in respect of the said attachment order for four weeks if the petitioner takes steps and files suit and can take steps in accordance with law or can produce any order from the competent court of law before the authorities. In that case the authorities shall proceed in accordance with law in the matter. In default of taking any steps or to file any suit by the petitioner within the stipulated period, the respondent shall be at liberty to take steps in accordance with law in the matter.

For the reasons stated hereinabove, this application is thus disposed of.

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