
(1976) 05 AHC CK 0055

In the Allahabad High Court

Case No : Civil Miscellaneous Writ No. 427 of 1973

Precision Instruments (Pvt.) Ltd.

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 19-05-1976

Acts Referred:

Income Tax (Certificate Proceedings) Rules, 1962 — Rule 2, 53, 56, 60, 61

Citation : (1976) 104 ITR 723

Hon'ble Judges : R.M. Sahai, J;C.S.P. Singh, J

Bench : Division Bench

Advocate : S.C. Khare, R.R. Agarwal, V.N. Khare, R.K. Gulati and R.H. Zaidi, for the Appellant; S.N. Kacker, S.D. Agarwal and Deokinandan, for the Respondent

Final Decision : Allowed

Judgement

C.S.P. Singh, J.—The controversy in this petition centres round the sale of properties belonging to the petitioner for realisation of arrears of Income Tax dues. The petitioner has, inter alia, prayed for quashing the auction proceedings as also the order of the Tax Recovery Officer confirming the sale and the sale certificate dated 24th November, 1975, issued in favour of respondent No. 3 and the sale deed dated 29th November, 1975, executed by the Tax Recovery Officer.

2. The facts leading up to the controversy may be shortly stated : Income Tax arrears amounting to Rs. 56,628 including penalty and interest were due against the company. A sum of Rs. 8,905 was due against the managing director of the company. Separate recovery certificates appear to have been sent by the Income Tax Officer to the Tax Recovery Officer for realisation of these amounts. It transpires that initially the petitioner-company received a notice from the Tax Recovery Officer stating that a sum of Rs. 75,653 was due against the petitioner. Petitioner made representations against this notice alleging that certain amounts already paid by him had not been credited and that the sum demanded was not correct. In spite of these representations a sale proclamation was drawn up for sale of certain properties of the company for recovery of an amount of Rs.

75,653 together with interest. The sale took place on that date and the highest bid received was Rs. 65,000. As the bid appeared to be low as compared to the reserve price fixed for the property by the department, the sale does not appear to have been confirmed. A fresh sale was held on 3rd July, 1972, but as none appeared to bid, it was postponed and a fresh proclamation of sale was issued on the 6th July, 1972, fixing the date of the sale for the 17th August, 1972. The sale was again postponed on orders of the Additional Commissioner of Income Tax, Kanpur. It is not necessary to refer to certain other facts showing how the tax arrears which were claimed to be Rs. 75,653 were toned down to Rs. 56,628 as that is not relevant for the purposes of the present controversy.

3. Subsequent to the fixation of the dues against the petitioner at Rs. 56,628 and against the managing director at Rs. 8,905 a sale proclamation dated November 22, 1972, was made fixing the date of sale as the 14th December, 1972. On the 25th November, 1972, the petitioner moved a stay application before the Officiating Additional Commissioner of Income Tax for staying the auction scheduled to be held on the 14th December, 1972. A telegram was sent by the Officiating Additional Commissioner of Income Tax, Kanpur, staying the sale, but the respondents' case is that the telegram was received after the sale had already taken place. The sale took place on the 14th December, 1972. The petitioner filed a writ petition in this court on the 19th January, 1973, for staying the confirmation of the sale and stay orders were issued. This petition came up for hearing earlier before another Bench of this court and was dismissed ex parte. That order was subsequently set aside. But by the time the petition came up for hearing the sale had been confirmed by the Tax Recovery Officer, and a sale deed was also executed in favour of respondent No. 4. After that was done, the petition was amended and some of the reliefs now sought for were allowed to be incorporated in the petition.

4. Counsel for the petitioner contended, firstly, that as the stay order had already been passed staying the sale, the Tax Recovery Officer had no jurisdiction either to hold the sale or to confirm it and issue a sale certificate. It is also contended that the proclamation of sale was vague. The contention, however, which we propose to consider is that the property of the petitioner could not be sold for the arrears of the Income Tax dues of the managing director.

5. Now, it is not disputed that the properties in question had been sold for realisation of an amount of Rs. 56,628 due against the company and also an amount of Rs. 8,905 due against the managing director. Annexure "A4" is the sale proclamation, on the basis of which the sale had taken place, mentions that the properties were being sold for realisation of an amount of Rs. 62,513 due from the petitioner. Although the sale proclamation mentions this amount as being due from the petitioner alone, but from the counter-affidavit filed on behalf of the department and on a perusal of the records produced before us, it is clear that this amount represented not only the demand against the petitioner-company but also of the managing director. Question is whether in these

circumstances the sale is valid.

6. The relevant provisions for the purposes of the present controversy are Sections 222(1) and 224 as also Schedule 2 of the Income Tax Act, 1961. We will extract the relevant part of Section 222(1) and then refer to the other provisions :

"222. Certificate to Tax Recovery Officer.--(1) When an assessee is in default or is deemed to be in default in making a payment of tax, the Income Tax Officer may forward to the Tax Recovery Officer a certificate under his signature specifying the amount of arrears due from the assessee ; and the Tax Recovery Officer 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-

- (a) attachment and sale of the assessee's movable property;
- (b) attachment and sale of the assessee's immovable property;
- (c) arrest of the assessee and his detention in prison ;
- (d) appointing a receiver for the management of the assessee's movable and immovable properties."

7. u/s 224(1) once a certificate to the Tax Recovery Officer is sent u/s 222 the assessee cannot dispute before the Tax Recovery Officer the correctness of the assessment nor can any objection to the certificate on any ground be entertained by the Tax Recovery Officer. The Income Tax Officer has, however, power to withdraw or correct any clerical or arithmetical error in the certificate by sending information to the Tax Recovery Officer. It appears that the amendment of the demand against the petitioner was made in exercise of this power. Section 225 then empowers the Tax Recovery Officer to stay proceedings under certificate and amend or withdraw it. After the certificate is received the matter is governed by Schedule 2 of the Income Tax Act, 1961. Under Rule 2 of the Second Schedule, on a certificate being received by the Tax Recovery Officer, the Tax Recovery Officer has to serve on the defaulter a notice requiring the defaulter to pay the amount specified in the certificate within 15 days from the date of the service and intimate that in default steps would be taken to realise the amount otherwise. In the event of non-payment of the amount mentioned in the notice, the Tax Recovery Officer is empowered to realise the arrears by attachment and sale of the defaulter's movable and immovable, property or by arrest or appointing a receiver for the management of the defaulter's movable and immovable property. Rule 9 provides that all questions arising between the Income Tax Officer and the defaulter or their representatives relating to the execution, or satisfaction of a certificate duly filed under the Act or relating to the confirmation or setting aside by an order under the Act of a sale held in execution of such certificate have to be determined by the Tax Recovery Officer before whom the question arises, and not by suit. Provision for filing a suit on

the ground of fraud is made by a proviso to Rule 9.

8. Under Rule 53, a sale proclamation has to be drawn, which is after notice to the respondent. The form of sale certificate is set out in Form No. ITPC 17 which has been framed under the Income Tax (Certificate Proceedings) Rules. A perusal of the form indicates that notice is given to the defaulter of the date on which the sale proclamation is to be drawn up and the defaulter can in those proceedings draw the attention of the Tax Recovery Officer to the encumbrances, charges, claims or liabilities attaching to the said properties or any portion thereof. Under Rule 53 the property to be sold, revenue assessed thereon, the amount for the recovery of which sale is ordered and any other thing which the Tax Recovery Officer thinks is material for a purchaser to know, in order to judge the nature and value of the property are to be mentioned. Rule 56 makes it incumbent to hold the sale by public auction. On the auction taking place the auction purchaser is to deposit 25 per cent. of the purchase money and in default thereof the property can be put to resale. Rule 60 provides for applications to set aside the sale of immovable property on deposit. Rule 61, the interpretation of which has been the subject-matter of some controversy, may be extracted :

"61. Application to set aside sale of immovable property on ground of non-service of notice or irregularity.--Where immovable property has been sold in execution of a certificate, the Income Tax Officer, the defaulter, or any person whose interests are affected by the sale, may, at any time within 30 days from the date of the sale, apply to the Tax Recovery Officer to set aside the sale of the immovable property on the ground that notice was not served on the defaulter to pay the arrears as required by this Schedule or on the ground of a material irregularity in publishing or conducting the sale :

Provided that-

(a) no sale shall be set aside on any such ground unless the Tax Recovery Officer is satisfied that the applicant has sustained substantial injury by reason of the non-service or irregularity; and

(b) an application made by a defaulter under this rule shall be disallowed unless the applicant deposits the amount recoverable from him in execution of the certificate."

9. Under Rule 63 the Tax Recovery Officer has to confirm the sale in case the full purchase money has been paid. The sale certificate is granted to the purchaser under Rule 65. Counsel for the petitioner has contended that these rules authorise sale of property of a defaulter only in respect of arrears due against him and not for the arrears due against a third person. In support of this contention, he has drawn our attention to certain cases decided by this and other courts, viz., *S. Santosha Nadar Vs. First Additional Income Tax Officer, Tuticorin, and Another*, *Vimlaben Khimji and Others Vs. H.S. Manvikar and Another*, *B.A. Sriramiah Vs. Income Tax Officer, Kolar, and Another*, *V. K. Kannan Vs. Collector of North Arcot And Another, and Collector of North Arcot, Vellore Vs. V.K. Kannan*

and Another, . In *S. Santosha Nadar v. First Addl. Income Tax Officer, Tuticorin* , certificates u/s 46(2) of the Indian Income Tax Act, 1922, were issued and were sought to be realised under the Revenue Recovery Act. Before the properties were put to sale, the arrears due against the assessee were reduced. It was held on a consideration of Section 27 of the Revenue Recovery Act (Act II of 1864) that the statute gave jurisdiction to the Collector to attach properties only in respect of the sum that is due, and not for a higher amount than is legally due on the date of the notice of the attachment. Reliance was placed on an earlier decision of the same court in the case of *C. M. George Vs. Income Tax Officer, Madras*, and Another, . In *Vimlaben Khimji v. H.S. Mavikar* a prohibitory order under Order 21, Rule 54, CPC was issued by the Collector in pursuance of the certificate forwarded to him u/s 46(2) of the Indian Income Tax Act, 1922. It was held that the amount sought to be recovered in pursuance of the prohibitory order was in excess of the liability of the assessee, and this being so, the order was void and the mere fact that some amount was due against the assessee could not validate the order. A similar view was taken by the Mysore High Court in *B.A. Sriramiah v. Income Tax Officer, Kolar* following the decision of the Madras High Court in the case of *S. Santosha Nadar*, In *V.K. Kannan v. Collector of North Arcot*, the certificate that was sent by the Income Tax Officer as also the amount for which the property was attached and sold was in excess of the tax liability. The sale and certificate were both set aside on the same line of reasoning as in *S. Santosha Nadar*'s case. A similar view was taken in the case of *Collector of North Arkot v. V.K. Kannan*.

10. Mr. Deokinandan appearing on behalf of the department, however, contended that these decisions are not applicable as the tax is being recovered in accordance with the provisions of the Second Schedule of the Income Tax Act, 1961. We have given careful thought to this contention, but are of the view that even under the new Act and the Second Schedule, properties of an assessee cannot be sold for arrears of a third party. We now proceed to give our reasons for this conclusion.

11. In the present case, there is no dispute that the Income Tax Officer sent separate recovery certificates as respects the amount due against the petitioner as also the amount due against the managing director. The Tax Recovery Officer compounded these recovery certificates and issued a sale proclamation which included not only the dues against the assessee, but also the dues against the managing director. None of the Rules in the Second Schedule permit the Tax Recovery Officer to club together recovery certificate issued against one assessee with recovery certificate issued against another, and to issue a single sale proclamation in respect of dues against two separate assessees. We have already noticed the scheme of the Rules. Rule 2 talks of issue of notice to the defaulter. Obviously, the notice issued to the defaulter on the basis of the recovery certificate must be in respect of arrears which are due from the defaulter. In Rule 8 the method of distribution of the proceeds of the execution are set out. Under Clause (a) the Income Tax Officer is paid the cost incurred by him. Under Clause

(b), the Income Tax Officer is paid the amount due under the certificate in execution of which the amounts are realised. Now, if a sale proclamation is drawn up clubbing together dues under two certificates which relate not to one but to two defaulters, the result would be that the sale proceeds of the property of one defaulter would be utilised under Rule 8(b) for payment of dues of another assessee. To put such an interpretation on Rule 8(b) would be ascribing unreasonableness on the part of the legislature. This apart, the Act does not contemplate sale of properties of an assessee for recovery of dues of another assessee. Rule 53 sets out the contents of the sale proclamation and, under Clause (c), the amount for the recovery of which the sale is ordered has to be stated. In the sequence in which Rule 53 occurs, it is obvious that the amount of which it talks could only mean the amount due against the assessee whose properties are being sold. In the present case, the sale proclamation mentions not only the amount due against the petitioner-assessee but also the amount due against its managing director. Thus, the sale proclamation is contrary to the provisions of Rule 53.

12. It has, however, been contended by Sri Deokinandan, counsel for the department, that the objection now taken by the petitioner can be taken by him under Rule 9 of the Second Schedule or under Rule 61 and that inasmuch as no prejudice has been caused to the assessee, inasmuch as it has not been shown that any substantial injury has been caused, the sale should not be set aside on the mere ground that the properties of the petitioner have been sold also for arrears due against the managing director. In the present case, the petitioner had filed objections bringing this fact to the notice of the Income Tax Officer, but that was rejected by him on the ground that the petitioner had not deposited the amount due against him in execution of the certificate. The view that he took was based on Rule 61(b) of the Rules in the Second Schedule. Under this rule, a sale of immovable property can be set aside on the ground that notice was not served on the defaulter as also on the ground of material irregularity in publishing or conducting the sale, and only after the assessee-defaulter deposits the arrears, i.e., which are mentioned in the sale proclamation. Now, in so far as asking the Tax Recovery Officer to decide the objection afresh, it would be an idle formality, for the petitioners would have to deposit not only their arrears, but also that due against the managing director. Though expressing no final opinion, we may assume that an objection of the type taken could be raised under Rule 9, but that objection has been rejected. Counsel for the department urged that the petitioner should be thrown back to the remedy of appeal under Rule 86 of the Rules. Now, if such an alternative remedy exists in the present case, we do not think it advisable to ask the petitioner to file an appeal under Rule 86 of the Second Schedule which may by this time have become time barred, the reason being that we had entertained this petition before the sale actually took place. The objections filed by the petitioner were dismissed by the Income Tax Officer as it transpired from a perusal of the record produced before us on the ground that the writ petition of the petitioner has been rejected. That order was set

aside and the petition was restored. In such circumstances, inasmuch as the objections of the petitioner to the sale had been rejected, inter alia, on the ground that the writ petition filed before this court has been dismissed, it will not be in the interest of justice to throw out the petition on the ground that an appeal lies, which may now have become time barred as the period of one month from the date of passing the order rejecting the objection of the petitioner has already expired. The contention that no prejudice has been caused to the petitioner as it had not been established that the properties had not fetched the proper price, and as such this court should not interfere also does not appeal to us. The present is a case of clear illegality and not merely of irregularity in publishing or conducting the sale. The illegality is on account of the fact that the properties of the petitioner have been sold for realisation of dues against another person. This being so, all steps beginning from the sale proclamation to the confirmation of the sale and the subsequent sale deed executed in favour of the auction purchasers are all invalid. Mr. Deokinandan drew our attention to a decision of the Supreme Court in the case of Dhirendra Nath Gorai and Subal Chandra Shaw and Others Vs. Sudhir Chandra Ghosh and Others, , and certain other cases under the CPC and contended that mere non-specification of certain particulars in a sale proclamation do not make the sale void. The present is not a case of non-specification of the particulars required but properties of the assessee being sold in disregard of the provisions of the Act and the Second Schedule.

13. Counsel for the auction purchaser urged that he has acquired an indefeasible title under Rules 63 and 65 of the Rules in the Second Schedule, as the sale has been confirmed and the sale certificate has been issued. This argument would have been valid in case the various steps leading up to the sale were valid. We have already held that the entire procedure beginning from the issue of the sale proclamation to the confirmation of the sale were invalid, and are without jurisdiction on account of the properties of the petitioner being put to sale for arrears which were not due against him. Reliance by counsel for the auction purchaser on the decision of the Supreme Court in the case of Janak Raj Vs. Gurdial Singh and Another, is also misplaced for, in that case, the judgment-debtor had not challenged the sale and sought to impugn it only after the decree passed against him had been set aside. In the present case, the petitioners have challenged the sale by filing a petition in this court and also preferred objection before the Tax Recovery Officer. This being so, it will not be appropriate to apply the principles laid down in the case of Janak Raj v. Gurdial Singh.

14. The petition is accordingly allowed. The impugned sale and the confirmation thereof and the sale deed executed in favour of the auction-purchaser are quashed. The petitioners are entitled to their costs.