

**(1966) 07 KL CK 0013**

**In the High Court Of Kerala**

**Case No :** Second Appeal No's. 233 and 234 of 1962

P.V. Muhammed

APPELLANT

Vs

The Collector of Palghat

RESPONDENT

**Date of Decision :** 25-07-1966

**Acts Referred:**

Criminal Procedure Code, 1898 (CrPC) — Section 386(1)  
Penal Code, 1860 (IPC) — Section 70

**Citation :** AIR 1967 Ker 254 : (1967) 19 STC 475

**Hon'ble Judges :** T.S. Krishnamoorthy Iyer, J; S. Velu Pillai, J

**Bench :** Division Bench

**Advocate :** K. Raghavan Nair, for the Appellant; Govt. Pleader, for the Respondent

**Final Decision :** Dismissed

## Judgement

Krishnamoorthy Iyer, J.—The two second appeals arise out of the orders passed by the Subordinate Judge, Palghat, holding that the E.Ps 762 of 1959 and 761 of 1959 are not barred by limitation. The appellant who is the same in both the appeals was an assessee under the Madras General Sales Tax Act (IX of 1939). In default to pay the amounts specified in Section 8-B Sub-section (2) of the Act within the prescribed time he was prosecuted u/s 15 thereof in C. C. 146 of 1951 and C. C. 145 of 1951 on the file of the Additional First Class Magistrate, Palghat, and he was convicted and sentenced to pay a fine of Rs. 100 in each case. As enjoined by Section 15(h) of the Act the amount due from the appellant by way of arrears of sales-tax were specified in the orders passed by the Magistrate and the amounts specified were Rs. 1,334-12-0 in C. C. 146 of 1951 and Rs. 1,766-2-6 in C. C. 145 of 1951. Warrants were issued by the Magistrate u/s 386(1)(b) of the Criminal Procedure Code to the Collector of the District authorising him to realise the fine and the arrears of sales tax specified in the orders in the two criminal cases.

2. The execution petitions out of which these appeals arise were filed for the

realisation of the arrears of tax due under the warrants issued. In the execution petitions there is no prayer for the realisation of the fine which the appellant is liable to pay. The objection of the appellant that the execution petitions are barred by limitation was overruled by the Courts below.

3. The main contention of the learned Advocate for the appellant was that the execution petitions are barred by limitation in view of Section 70 of the Indian Penal Code. Section 15 of the Madras General Sales Tax Act, 1939, as it stood on the relevant date to the extent it is necessary for the purpose of these appeals is extracted below:

"Any person who --

(g) to pay the amounts specified in Section 8-B, Sub-section (2), within the prescribed time, or.

(h) wilfully acts in contravention of any of the provisions of this Act, shall, on conviction by a Presidency Magistrate or a Magistrate of the First Class, be liable to a fine which may extend to one thousand rupees, and in the case of a conviction under Clause (b), (d). (f) or (g), the Magistrate shall specify in the order the tax, fee or other amount, which the person convicted has failed or evaded to pay or has wrongfully collected, and the tax, fee or amount so specified shall be recoverable as if it were a fine."

It is also necessary to extract the provisions of Section 386 of the Criminal Procedure Code:

"(1) Whenever an offender has been sentenced to pay a fine, the Court passing the sentence may take action for the recovery of the fine in either or both of the following ways, that is to say, it may

(a) issue a warrant for the levy of the amount by attachment and sale of any movable property belonging to the offender;

(b) issue a warrant to the Collector of the District authorising him to realise the amount by execution according to civil process against the movable or immovable property or both, of the defaulter. Provided that, if the sentence directs that in default of payment of the fine the offender shall be imprisoned, and if such offender has undergone the whole of such imprisonment in default, no Court shall issue such warrant unless for special reasons to be recorded in writing it considers it necessary to do so.

2. The State Government may make rules regulating the manner in which warrants under Sub-section (1) Clause (a), are to be executed, and for the summary determination of any claims made by any person other than the offender in respect of any property attached in execution of such warrant.

3. Where the Courts issue a warrant to the Collector under Sub-section (1), Clause (b), such warrant shall be deemed to be a decree, and the Collector to be the decree-holder, within the meaning of the Code of Civil Procedure, 1908, and

the nearest Civil Court by which any decree for a like amount could be executed shall, for the purposes of the said Code, be deemed to be the Court which passed the decree and all the provisions of that Code as to execution of decrees shall apply accordingly;

Provided that no such warrant shall be executed by the arrest or detention in prison of the offender.

Section 386(1)(b) provides that the Court passing the sentence of fine may take action for the recovery of the fine by issuing a warrant to the Collector of the District authorising him to realise the amount by execution according to civil process against the movable or immovable property, in both, of the defaulter Clause (3) of Section 386 of the Criminal Procedure Code provides that the warrant issued u/s 386(1)(b) shall be deemed to be a decree, and the Collector to be the decree-holder, within the meaning of the Code of Civil Procedure. In view of the provision in Section 15(h) of the Madras General Sales Tax Act (IX of 1939) which provides that the tax "so specified shall be recoverable as if it were a fine" the learned Counsel for the appellant submitted relying on Section 19 of the Madras General Clauses Act, 1891, that the applications for execution for realising the tax specified in the orders should have been filed within the period of limitation provided for in Section 70 of the Indian Penal Code. Section 19 of the Madras General Clauses Act, 1891, is extracted below:

"The provisions of Sections 63, 68, 69 and 70 of the Indian Penal Code shall apply to all fines imposed under the authority of any Act."

The entire argument of the learned Advocate for the appellant was built on the clause "and the tax, fee or amount so specified shall be recoverable as if it were a fine" in Section 16(h) of the Madras General Sales Tax Act, 1939 According to the learned Counsel, the legal effect of such a clause is that "the tax, fee or amount so specified" is by a statutory fiction treated as fine and if so done Section 19 of the Madras General Clauses Act, 1891 will apply to the realisation of this amount also. In support of his argument, the learned Counsel relied on the following observations of the Supreme Court in *The State of Bombay Vs. Pandurang Vinayak Chaphalkar and Others*, at P. 246:

"When a statute enacts that something shall be deemed to have been done, which in fact and truth was not done, the Court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to and full effect must be given to the statutory fiction and it should be carried to its logical conclusion."

4. We are not impressed with the contention of the learned Counsel and we do not think that the observations of their Lordships of the Supreme Court relied on by him really support his contention In *Mytheen Kunju Vs. State*, a Bench of this Court had to consider the question whether resort to Section 64 of the Indian Penal Code can be had to recover the sales tax specified in the order passed u/s 19(h) of the Travancore-Cochin General Sales Tax Act (XI of 1125) The wording

of Section 19(h) of the Travancore-Cochin Act XI of 1125 is identical with Section 15(h) of the Madras Act, 1939, extracted already in this judgment. In holding that Section 64 of the Indian Penal Code cannot be invoked for the realisation of the amounts specified in the order u/s 19 (h) Sankaran, C. J. observed:

"The direction contained in Section 19 that the amount thus specified in the Magistrate's order, shall be recoverable as if it were a fine under the Code of Criminal Procedure, clearly indicates that the said amount is not really a fine imposed by way of penalty. The legislative sanction for the recovery of such amount as if it were a fine, cannot have the effect of placing it in the category of fine imposed as a penal liability. The expression as if it were a fine" necessarily means that it is not a fine, as understood in law. In respect of the amount specified in the Magistrate's order as recoverable from the defaulter under the provisions of the General Sales Tax Act, the direction in Section 19 goes only to the extent of adopting the procedure prescribed by the Code, of Criminal Procedure for the recovery of a fine. "

On an identical question Joseph. J, coming to the same conclusion said thus in Thomas v. State, 1969 Ker LT 408 at pp. 404 and 405:

"All that Section 19 provides is that the tax which the person convicted has failed to pay should be specified in the order so that it may be recovered as fine. The fact that it is made "recoverable as fine" shows that the Court is not really imposing a sentence of fine when it specifies the amount of tax which the person convicted has failed to pay. Section 19 thus only enables the Court to set in motion the machinery for realisation of fines for collecting the arrears of tax by specifying the amount. On behalf of the State the order was sought to be supported on the ground that Section 64 of the Indian Penal Code enabled the Court to impose such a sentence. This contention is not sound because Section 64 only enables the Court to direct that the offender sentenced to pay fine shall suffer imprisonment for a certain term in default of payment of the same . It is by virtue of this section that the Court awards a sentence of imprisonment. If the fine is not paid, even though the penalty provided by Section 19 of the Sales Tax Act is only a fine and not imprisonment The provision in Section 19 that the Court should specify the amount of arrears of tax does not mean that such amount automatically becomes transformed into a fine so as to attract the provisions of Section 64 of the Penal Code."

We respectfully follow the interpretation of the expression "as if it were, a fine" in these decisions The expression "as if it were a fine" is not a deeming provision. On the other hand the use of such expression shows that "tax, fee or amount so specified" is not to be treated as a fine . The language of the section is not sufficient to construe the same as a deeming provision. If that had been the intention of the legislature, it would have been very easy to have made this section perfectly clear. If the legislature had said that "tax, fee or amount so specified" was to be deemed "fine" the position would have been different. In statutes the expression "deemed" is commonly used for the purpose of creating a

legal fiction. The expression "deemed" is used a great deal in modern statutes and for many purposes. Even if the expression "as if it were a fine" is construed to be a deeming provision the Court has to ascertain the purposes for which the legal fiction has to be resorted to by a reference to Section 15(h) of the Madras Act, 1939 The statutory fiction is only for its recovery and not for anything else. The recovery provision is contained in Section 386(1) of the Criminal Procedure Code. There is therefore no scope for the application of Section 70 of the Indian Penal Code to the instant case. We, therefore, hold that the execution of warrant issued u/s 386(1)(b) of Criminal Procedure Code for the recovery of arrears of "sales tax, fee or amount so specified" is not controlled by Section 70 of the Indian Penal Code. If so the contention regarding limitation has to be overruled. It has to be mentioned that the learned Advocate for the appellant bud no contention that the execution petitions are barred by limitation on account of any other statute. In the result, the second appeals are without substance and they are dismissed with costs