(1989) 12 KL CK 0008

In the High Court Of Kerala

Case No : Original Petition No. 9041 of 1989

R. T. THOMAS APPELLANT

Vs

TAX RECOVERY OFFICER AND ANOTHER. RESPONDENT

Date of Decision : 07-12-1989

Acts Referred:
Income Tax Act, 1961 — Rule 8

Citation : (1990) 185 ITR 274 : (1991) 55 TAXMAN 288

Hon'ble Judges : T. L. Vishanatha Iyer, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

T. L. VISHANATHA IYER J. - The facts as evident from the ?original petition and the impugned orders, exhibits P-4 and P-6, are as follows. The petitioner who is an assessee to Income Tax and wealth-tax was the owner of an immovable property called Bank House Property. The petitioner was in arrears of Income Tax, wealth-tax and interest amounting to about Rs. 9 lakhs.

The property had been the subject of a mortgage in the year 1973 to the Chartered Bank. The Bank filed a suit O.S. No. 87 of 1981 in the court of the Subordinate Judge of Kozhikode for recovery of the amount due under the mortgage. The suit was decreed on July 31, 1982. This decree was assigned by the bank to one Mrs. Jolly Thomas for a sum of Rs. 4,41,000.

After the decree was passed, demand notices in Form ITCP-1 were served on the petitioner by the Tax Recovery Officer in August, 1983, for payment of the amounts of Income Tax and wealth-tax and the interest thereon due from the petitioner. Since only a part of the amount was realised by the arrest and detention of the petitioner, the Bank House Property of the petitioner was proclaimed for sale by the Tax Recovery Officer. He published two notices, exhibits P-1 and P-2, of which exhibit P-2 is the publication in the Malayala Manorama daily. In the schedule to the notification, exhibit P-1, the Tax Recovery

Officer had mentioned two debts owned by the petitioner of which one was the mortgage debt due to the Chartered Bank (now Mrs. Jolly Thomas). It was stated that these debts were not binding on the Government of India as they had a first charge on the amount of tax arrears due. But there was no such recital regarding the binding nature or otherwise of the debt due to Mrs. Jolly Thomas in exhibit P-2 notice published in the Malayala Manoram daily. It contained a recital only regarding the non-binding nature of the other debt mentioned in exhibit P-1 due to Malabar Produce and Rubber Company Limited.

The property was put up for auction on February 7, 1989, and purchased by the Indian Express group for a sum of Rs. 12,01,000. It is the case of the Department (vide exhibit P-6) that, at the time of the public auction on February 7, 1989, it was clearly mentioned, as a term and condition of the sale, that the liability in respect of the decree in O.S. No. 87 of 1981 would be cleared by the Department out of the sale consideration received in the auction.

Mrs. Jolly Thomas filed E.A. No. 262 of 1969, in the Sub-Court, Kozhikode, for directing payment of the amount due to her out of the proceeds of the auction sale. The Tax Recovery Officer submitted to the court that he will pay the amount due to Mrs. Jolly Thomas as per the decree with interest as ordered by the subordinate judge, the correct amount to be ascertained after deducting a sum of Rs. 4,09,670.80 deposited in court by the Government of Kerala on the acquisition of another property of the defaulters, namely, Kara South Bungalow. The Tax Recovery Officer submitted to the court that he was prepared to deposit was legally due to Mrs. Jolly Thomas E.A. No. 262 of 1989 still remains undisposed of. This submission of the Tax Recovery Officer was in recognition of the prior charge which Mrs. Jolly Thomas had for the amount of the decree due to her over the arrears of tax claimed by the ?respondents.

The petitioner filed two applications on February 20, 1989, and March 10, 1989, claiming payment to him of the amount remaining in balance after adjusting the arrears of tax due from him. He did not, however, challenge the auction sale. After hearing the representative of the petitioner, the Tax Recovery Officer rejected the petitioners claim for payment of the balance remaining after adjusting the arrears of tax. The Tax Recovery Officer rejected his plea by his proceedings, exhibit P-4, wherein he adverted to the claim made by Mrs. Jolly Thomas and concluded that since the decree in O.S. No. 87 of 1981 had been passed on July 31, 1982, before the service of notice of the Tax Recovery Officer, she was entitled to payment with priority over the arrears of tax and, therefore, only the balance remaining, after payment of the decree debt, will be available at the Departments disposal to be dealt with under rule 8 of the Second Schedule to the Income Tax Act, 1961. The Tax Recovery Officer also stated that since the exact amount due to Mrs. Jolly Thomas had not been worked out and the matter was still pending in the Sub-court, Kozhikode, he will await orders of the Sub-court in E.A. No. 262 of 1989 for depositing the balance amount due to Mrs. Jolly Thomas in court. In this view of the matter, he directed that the amount realised in the auction sale will be disbursed in accordance with rule 8 aforesaid after settling the amount payable to Mrs. Jolly Thomas under the decree. It was, therefore, stated that the request of the petitioner to pay the balance amount immediately cannot be entertained and acted upon at present.

The petitioner challenged this order by filing a petition under rule 86 of the Second Schedule to the Income Tax Act, 1961, before the Commissioner of Income Tax, Cochin. The Commissioner rejected this petition by his proceedings, exhibit P-6. The Commissioner noted that Mrs. Jolly Thomas had priority for her debt. The petitioners contention that, in view of the statement in exhibit P-1 proclamation that she did not have prior charge over the tax dues, the amount remaining out of the sale price, after adjusting the tax dues, should be paid to the petitioner without payment to Mrs. Jolly Thomas, was not accepted by the Commissioner, in view of the clear intimation at the time of auction of the priority in favour of Mrs. Jolly Thomas as also the legal position conferring priority on her.

The petitioner challenges the two orders, exhibits P-4 and P-6. Before me it was not disputed-it was in fact rightly admitted-that the mortgage decree debt in favour of Mrs. Jolly Thomas had priority over the arrears of tax due from the petitioner. But the petitioners contention is that in exhibit P-1 sale proclamation, the Tax Recovery Officer had chosen to state that the debt due to Mrs. Jolly Thomas was not binding on the Department as the arrears of tax were a first charge over the property and over the amount realised at the auction. The contention, in the first stance, is that the respondents cannot go behind this sale proclamation and contend that the amount due to Mrs. Jolly ?Thomas has to be reserved and that only the balance could be credited towards the arrears of tax. Secondly, it is contended by the petitioner that rule 8 mandates adjustment of the tax arrears out of the amount realised on sale and that the balance has necessarily to be paid to the defaulter.

I am unable to accept either of these contentions of the petitioner. Rule 8 of Schedule II to the Income Tax Act, 1961, reads as under :

"8. Disposal of proceeds of execution. - (1) Whenever assets are realised by sale or otherwise in execution of a certificate, the proceeds shall be disposed of in the following manner, namely :-

(a) they shall first be adjusted towards the amount due under the certificate in execution of which the assets were realised and the costs incurred in the course of such execution;

(b) if there remains a balance after the adjustment referred to in clause (a), the same shall be realised for satisfaction of any other amount recoverable from the assessee under this Act which may be due on the date on which the assets are realised; and

(c) the balance, if any, remaining after the adjustments under clauses (a) and (b) shall be paid to the defaulter.

(2) If the defaulter disputes any adjustment under clause (b) of sub-rule (1), the Tax Recovery Officer shall determine the dispute."

Thereunder, proceeds of the sale of property are to be adjusted first towards the amount due under the certificate in execution of which the assets are sold and if any balance is left after such adjustment, the same shall be utilised for any other amount recoverable from the assessee under the Act. The balance, if any, remaining after these adjustments is to be paid to the defaulter.

Taking up the first of the contentions raised by the petitioner, it is true that in exhibit P-1, it was stated that the arrears of tax were a first charge over the property and that the debt due to Mrs. Jolly Thomas was not binding on the Department. But then, such a recital has not been included in exhibit P-2, which refers only to the other debt due from the petitioner to Malabar Produce and Rubber Company Limited. It is nowhere stated in exhibit P-2 sale notice that Mrs. Jolly Thomas cannot enjoy priority for her debt over the dues to the Department. Apart from that, it is seen from exhibit P-6 order of the Commissioner of Income Tax, that the Tax Recovers Officer had announced at the time of auction, as a term and condition of the sale, that the debt due to Mrs. Jolly Thomas will be cleared by the Department out of the sale consideration. This statement in exhibit P-6, about the declaration by the Tax Recovery Officer, has not been challenged as incorrect in the original petition. It was, therefore, understood by all concerned that the debt due to Mrs. Jolly Thomas will enjoy priority over the arrears of tax due to the Department.

In any case, I am of the opinion that the mistake in exhibit P-1, regarding the priority of Mrs. Jolly Thomas, cannot afford a cause of action to the petitioner to contend that no part of the sale proceeds should be paid to Mrs. Jolly Thomas despite the priority in her favour. As stated earlier, the petitioner admits that, in law, Mrs. Jolly Thomas has priority for her debt over the arrears of tax. The mere fact that the Tax Recovery Officer made a mistaken recital in exhibit P-1, which was ?not persisted with or followed in exhibit P-2 or at the time of auction, cannot detract from the legal position that Mrs. Jolly Thomas has priority for her debt. The petitioner cannot estop the Department based on his tenuous plea that, irrespective of the legal position, he should be paid the residue after adjusting only the tax arrears, without clearing the debt notice due to Mrs. Jolly Thomas despite her priority. There is no warrant in la for any such proposition and I am unable to accept this contention.

Rule 8 also does not warrant the proposition put forward by the petitioner. It does not lead to any conclusion that irrespective of prior charges or irrespective of other dues, the defaulter should be paid all the residue left after adjusting only the arrears of tax. It is not as if the only amount that can be adjusted in the arrears of tax and nothing else. Rule 8 does not rule out the adjustment of other debts having priority over the arrears of tax. The question of adjusting the arrears of tax will arise only after the debts having priority are cleared. In other words, out of the proceeds, debts having priority have to be discharged in the first instance, and only any balance left after such payments can be adjusted towards the tax arrears. If still there is any balance left, that may be dealt with under rule 8(c) and paid to the defaulter. This procedure has got to be followed and the question of adjustment the tax arrears itself will arise only after the prior charges are discharged, unless the sale is one expressly made subject to the mortgage or other charges. If this be the correct view of the matter, the question of adjustment of the arrears of tax due from the petitioner arises only after the debt due to Mrs. Jolly Thomas is cleared. This was rightly recognised by the Tax Recovery Officer and that is why he said that the petitioners claim for payment cannot be entertained and accepted at present. If, after paying off Mrs. Jolly Thomas and after adjusting the amount due to the Department, any balance is left, certainly an occasion arises for the petitioner to stake his claim for payment of that amount. That stage has not arisen inasmuch as the amount due to Mrs. Jolly Thomas is yet to be crystallised by the Sub-Court in the pending application E.A. No. 262 of 1989. The Tax Recovery Officer has to make deposit of that amount as soon as that is determined and then adjust the tax dues. The second contention raised by the petitioner also, therefore, fails.

There was a faint submission that the Tax Recovery Officer is not depositing the amount due to Mrs. Jolly Thomas in court and thereby interest is accumulating on the decree debt, increasing the burden on the petitioner. There is absolutely no substance in this contention having regard to the statement in exhibit P-4 that the Tax Recovery Officer had already intimated the court that he will deposit the amount due to Mrs. Jolly Thomas as soon as the said amount is determined. E.A. No. 262 of 1989, filed by Mrs. Jolly Thomas in the Sub-Court, is still pending and it is evident that the Tax Recovery Officer has not been ?able to deposit the requisite amount in the Sub-Court, as it is yet to be determined.

No other contentions are raised before me. The original has, therefore, to fail. It has to fail for another reason as well. Mrs. Jolly Thomas will be the person primarily affected by any decision in favour of the petitioner in this original petition. But the petitioner has not chosen to make Mrs. Jolly Thomas a party to this original petition. The original petition has to fail on this ground of non-joinder of a necessary party as well.

The original petition is, therefore, dismissed in limine.

