(1995) 06 KL CK 0001

In the High Court Of Kerala

Case No : A.S. No. 310 of 1985

State of Kerala APPELLANT

Vs

R.V.S. Mani and Others RESPONDENT

Date of Decision : 16-06-1995

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 79, 80, 89
Kerala General Sales Tax Act, 1963 — Section 23(2)
Kerala Revenue Recovery Act, 1968 — Section 2
Provincial Insolvency Act, 1920 — Section 28(2), 28(7)
Revenue Recovery Act, 1973 — Section 36, 69(2)

Citation : (1995) 06 KL CK 0001

Hon'ble Judges : K.G. Balakrishnan, J;B.N. Patnaik, J

Bench : Division Bench

Advocate : Jose K. Kochupappu, Government Pleader, for the Appellant; C.M. Devon V. Chitambaresh and N.S. Sundararaman for 2nd Respondent, T.L. Ananthasivan and Tony Sebastian for Respondents 5 and 8, P.S. Usuph and Sam Zachariak for 34th Respondent, Raju Joseph, Thamban Jacob and Mathew Nedumpuzha for 3rd Respondent, for the Respondent

Final Decision : Dismissed

Judgement

B.N. Patnaik, J.—This appeal by the Plaintiff is against the judgment dated 21st January 1985 in O.S. No. 136 of 1983 on the file of the Additional Sub Judge, Cochin. State of Kerala is the Plaintiff. The following prayers were made by the Plaintiff in the suit: (a) to direct the second Defendant to deliver the plaint schedule properties with damages for use and occupation at the rate of Rs. 750 per month from the date of suit till the date of realisation and (b) for a declaration that the sale effected by the Official Receiver in insolvency proceedings No. 2 of 1973 before the Sub Court, Ernakulam is null and void and it is not binding on the Plaintiff. The suit was dismissed with costs.

2. The undisputed facts are as follows: The first Defendant is the owner in possession of the plaint schedule properties. He was an Assessee under the

Kerala Sales Tax Act. He defaulted in the payment of sales tax due under various assessments made by the Sales Tax Officer, 1st Circle, Mattancherry, Cochin. The Sales Tax Officer (31st Respondent herein) initiated a proceeding u/s 69(2) of the Revenue Recovery Act on 25th June 972 for realisation of a sum of Rs. 9,328.10. On the issue of a certificate by the District Collector, Cochin on 3rd July 1972, the Tahsildar, Cochin attached those properties on 20th November 1972 u/s 36 of the Revenue Recovery Act. The first Defendant had created an equitable mortgage by giving the plaint schedule property as security by deposit of title deeds and obtained a loan by way of overdraft from the second Defendant Bank. The mortgage was created on 2nd September 1963. The first Defendant was indebted to several persons. When it came to a crisis, he filed insolvency proceeding No. 2 of 1973 before the Sub Court, Ernakulam on 13th April 1973 for being adjudged as an insolvent. Defendant No. 2 was the first Respondent and Defendant No. 31 was the 30th Defendant in that petition. The other Defendants herein were also parties in the petition. Notice was served on the 31st Defendant, viz. the Sales Tax Officer on 5th June 1973 and he entered appearance in the insolvency case on 19th June 1973. In spite of the fact that the 31st Defendant had been served with the notice of the insolvency proceeding, the Tahsildar held the sale of the property on 28th June 1973. The 34th Defendant as the highest bidder, purchased the property for Rs. 33,000. He had deposited 15 per cent of the bid amount on the date of sale and the balance on 28th July 1973. The second Defendant informed the Tahsildar on 1st August 1973 that the properties are involved in the said insolvency proceeding No. 2 of 1973 filed by the first Defendant. The Sub Collector confirmed the revenue sale on 17th February 1973, though later by an order, dated 25th May 1975, he cancelled the revenue sale. But, the Board of Revenue suo motu by its order dated 7th August 1976 cancelled the order of the Sub Collector. The second Defendant filed O.P. No. 4986 of 1976 before the High Court challenging the order of the Board of Revenue dated 7th August 1976. The said O.P. was dismissed on the ground that an alternative remedy by way of revision to Government was available with an observation that the dismissal of the Original Petition will not in any manner affect the disposal of the case pending before the Insolvency Court or before the Civil Court or before the R.D.O. and they will have to dispose of the case untrammelled by the fact that the writ petition has been dismissed. In the insolvency proceeding, the Official Receiver was directed to take possession of the plaint schedule property. In compliance with the said order, he took possession of the property on 11th January 1974. In his report, the official receiver sought for a direction from the court to sell the property and intimated the court about the revenue sale that had taken place. Defendant No. 2 the Tahsildar and the 34th Defendant were heard in the matter and the Insolvency Court passed orders directing the Official Receiver to sell the property in public auction according to law by ignoring the revenue sale alleged to have been conducted at the instance of the Sales Tax Officer (31st Defendant). The Official Receiver sold the property in public auction subject to the mortgage in favour of the 2nd Defendant-Bank. On 12th August 1975, this Defendant purchased the property for Rs. 5,000 reserving the mortgage liability of Rs. 85,000. The sum of Rs. 5,000 was deposited with the Official Receiver and thereafter a registered sale deed was executed in its favour. Defendant No. 2 took over possession of the property. When these proceedings were pending before the insolvency court, the Tahsildar filed I.A. No. 2784 of 1975 representing that the properties have been sold by Government and that it is pending confirmation. The second Defendant however contested the petition and contended that the revenue sale was void. The court accepted the contention of the second Defendant-Bank and held that the sale effected by the Government is void. Against the said order, the Tahsildar filed an appeal which was registered as A.S. No. 111 of 1977 before the District Court, Emakulam and the 31st Respondent, the Sales Tax Officer filed an appeal which was registered as A.S. No. 7 of 1979 before the District Court, Ernakulam. By a common judgment, dated 18th July 1980, the District Court dismissed the appeals holding that the sale effected by the Revenue Department is vitiated by lis pendens.

3. The 5th Defendant filed a suit against the 1st Defendant for realisation of Rs. 20,000. On 24th January 1974, the District Collector received a notice attaching Rs. 23,6719-0 in revenue deposit out of the amounts deposited by the 34th Defendant. Out of the amounts deposited by him, the Tahsildar Cochin sent a sum of Rs. 23,688.40 to Sub Court, Efnakulam in O.S. No. 88 of 1972 as per orders of the court. The decree holder has withdrawn the amount thus deposited.

4. The 34th Defendant who was the auction purchaser in the revenue sale filed O.S. No. 183 of 1979 before the Sub Court, Cochin against the Plaintiff herein (State) for the return of the money with interest which had been deposited with the Tahsildar as bid money. That suit was decreed. He did not press for the recovery of the possession of the property.

5. Plaintiff''s contentions are that the State is a secured creditor at the time of Commencement of the insolvency proceeding. In view of the effective attachment of the plaint schedule property under the Revenue Recovery Act, Sections 28(2) and 28(7) of the Provincial Insolvency Act, for short, the Act have no application in respect of the property. The property sold in execution under the Revenue Recovery Act should be deemed to be the property vested in Government for being handed over to the purchaser. The properties sold in revenue sale before the date of adjudication of the insolvency petition could not be vested with the Receiver and hence the sale by the Receiver of the very same property in the insolvency proceeding is void. In none of the aforesaid proceedings, this Plaintiff was made a party. The order passed by the Sub Court in I.P. No. 2 of 1973 is not binding on the Plaintiff as it is not a party to that proceeding. Plaintiff is entitled to recover possession of the property from Defendant No. 2 to deliver the same to Defendant No. 34. Plaintiff shall be put to unnecessary loss and irreparable injury if the property is not delivered to the 34th Defendant. The execution petition filed by the 34th Defendant in O.S. No. 183/79 is pending. Plaintiff is ready and willing to deliver the property to the

34th Defendant after recovery of the same from Defendant No. 2.

6. Defendants Nos. 2, 24 and 34 have filed separate written statements. The 34th Defendant stated that he was the highest bidder in the revenue sale. Though he has deposited the bid amount, no steps were taken by the Plaintiff to issue the sale certificate and deliver the property to him. So, he filed O.S. 183/79 for recovery of the property or to return the bid amount with interest. Execution was taken out in August, 1981. No amount has been disbursed to him so far. This suit has been filed only to cause delay in the execution of the decree.

7. The 24th Defendant contended that he is a creditor of the first Defendant who is liable to pay Rs. 8,000 with 12 per cent interest. The first Defendant contended that the sale conducted by the Official Receiver in I.P. No. 2 of 1973 is valid and that the Plaintiff is not entitled to get any remedy in the suit.

8. The 2nd Defendant contended inter alia that the suit is barred by res judicata by reason of the decision of the 1st Additional Sub Court, Ernakulam in I.A. 2784 of 1975 in I.P. No. 2 of 1973 which was confirmed in A.S. No. III of 1975 and A.S. No. 7 of 1979. Identical contentions were raised in the aforesaid cases and therefore the Plaintiff is not entitled to agitate the same issue which was directly and substantially in issue in the former proceeding between the same parties. Despite the fact that the first Defendant had informed the Tahsildar that Defendant No. 2 Bank has the charge over the property by a prior mortgage, the Tahsildar did not issue a notice to him before proceeding to attach the property and effecting the same of the same. The 31st Defendant was served with the notice of the insolvency proceedings on 5th June 1973 and entered appearance on 19th June 1973. Thus, he had notice of the institution of the insolvency proceedings before the revenue sale was held on 28th June 1973. The revenue sale is subsequent to the commencement of the insolvency proceedings. The revenue sale is therefore void. Having come to know of the revenue sale, Defendant No. 2 informed the Tahsildar in July 1973 that the property sold in revenue sale was the subject matter of the insolvency proceeding No. 2 of 1973. Despite the said letter, the Tahsildar proceeded further and got the sale confirmed on 17th December 1973. The 31st Defendant has not taken any sanction or leave of the insolvency court for the continuance of the proceedings under the Revenue Recovery Act against the insolvent and his assets. Hence the revenue sale held at his instance was without any bona fides. The sale by the official receiver supersedes that of the sale made by the Tahsildar, in terms of the provisions in Sections 28(2) and 28(7) of the Act. In the insolvency petition, the 31st Respondent herein, viz. the Sales Tax Officer was the 30th Defendant. For all purposes, he represented the State. Only the department to which the debtor owed money is made the party. Moreover, both the Tahsildar and the Sales Tax Officer having entered appearance in the insolvency proceeding and filed appeals against the order of the insolvency court, it should be taken that they entered appearance and contested the proceedings by representing the State Government. The sale conducted by the Official Receiver is valid and binding on

all the parties including the Plaintiff who was represented by the Sales Tax Officer. Hence, neither the Tahsildar nor the Plaintiff is entitled to recover possession of the property. The Plaintiff is not entitled to get any relief from this Defendant.

9. By an interim order of this Court dated 11th November 1993, the Plaintiff was directed to deposit the amount decreed in O.S. No. 183/79 in the execution court and the disbursement of the same of course has been stayed.

10. No oral evidence was adduced by any of the parties. The Plaintiff relied on the certified copy of the judgment in A.S. 111/1977 marked as Ext. A-1 and the Defendants relied on Exts. B-1 and B-2, which are the plaint and judgment in O.S. 183/79.

11. The learned Sub Judge held that the order of the insolvency court dated 11th December 1974 directing the official receiver to conduct the sale after ignoring the revenue sale has become final as no appeal has been filed against that order. However, I.A. 2784/75 which was filed on 15th August 1975 in I.P. 2/73 having been dismissed and the same having been confirmed by the District Judge in A.S. No. 111/1977 and A.S. No. 7/77, the same is binding on the Government insofar as the finding that the sale conducted by the Tahsildar is vitiated by the doctrine of lis pendens. In the insolvency proceeding, the Sales Tax Officer and the Tahsildar having entered appearance being Government Officers, the contention of the Plaintiff that it was not duly represented is without any foundation. Since the second Defendant is in possession of the plaint schedule property as per the valid sale conducted by the official receiver in the insolvency proceeding, his possession is legal and the 34th Defendant is not entitled to get possession of the same. Hence the prayer for recovery of plaint schedule property is not tenable. With the above observations, the suit was dismissed.

12. The main contentions raised by the learned Government Pleader appearing for the Appellant in this appeal are two fold. They are: (i) the State as envisaged in Sections 79 and 89 of the CPC having not been made a party in any of the proceedings before the insolvency court as well as before the District Judge, any order passed by the insolvency court is not binding on it and (ii) revenue being the first charge on the property and the same having been held in accordance with the Revenue Recovery Act prior to the sale held by the Official Receiver, the latter sale is void and no right, title or interest passed to Defendant No. 2 purchaser, and the sale held by the Tahsildar being valid, the 34th Defendant acquired the right, title and interest over the property. Both the contentions are challenged by Respondent No. 2. Learned counsel for the 34th Respondent has contended that in case the sale in favour of Defendant No. 2 is held to be valid and he having given up his claim for taking possession of the property in O.S. 183/79, the State is liable to pay the money deposited by him.

13. Section 79 of the CPC contemplates that in a suit by or against the Government, the authority to be named as Plaintiff or Defendant, as the case

may be, shall be in the case of a suit by or against the Central Government, the Union of India and in the case of a suit by or against a State Government, the State. Section 80 of the CPC has got two parts. It relates firstly to suits against Government and secondly to suits against public officers in respect of any acts purporting to be done by some public officers in their official capacity. Thus Section 80 CPC does not preclude a party from filing a suit against a public officer in respect of any act done by him in his official capacity. It is true that the State as such has not been made a party in the insolvency proceeding. But, the Sales Tax Officer at whose instance, the revenue recovery proceeding was initiated was made a party as a public officer inasmuch as it was he who made the demand of sales tax due against Defendant No. 1 and it was he who sent the requisition to recover the sale price in accordance with the provisions of the Revenue Recovery Act. He is purported to have done all these acts in his official capacity as a public officer. A public officer is deemed to be an agent of the State and the Department which he represents is a part and parcel of the State Government. Only the department to which the debtor owed money is made a necessary party. For all purposes, the 31st Defendant, viz. the Sales Tax Officer represented the State in the insolvency proceeding. The Tahsildar and the Sales Tax Officer have entered appearance and being aggrieved by the order of the insolvency court, preferred appeals before the District Court in their official capacity and not in their personal capacity. The Sales Tax Officer received the notice of the institution of the insolvency proceeding before the Tahsildar held the revenue sale of the property. The Sales Tax Officer is supposed to have informed the revenue authorities about the institution of the insolvency proceeding. It is improbable to believe that the Sales Tax Officer and the Tahsildar entered appearance and contested the proceeding without the knowledge of their authorities or the State Government. There is no evidence to show that in entering appearance and contesting the proceeding, either the Sales Tax Officer or the Tahsildar acted in any manner detrimental to the interest of the State.

14. In this view of the matter, we are opinion that the orders passed in the insolvency proceeding are binding on the Plaintiff-Appellant inasmuch as the State was represented by the public officers, viz. the Sales Tax Officer and the Tahsildar.

15. Sub-sections (2) and (7) of Section 28 of the Act read as follows:

28. Effect of an order of adjudication.

* * * (2) On the making of an order of adjudication, the whole of the property of the insolvent shall vest in the court or in a receiver as hereinafter provided, and shall become divisible among the creditors, and thereafter, except as provided by this Act, no creditor to whom the insolvent is indebted in respect of any debt provable under this Act, shall, during the pendency of the insolvency proceedings, have any remedy against the property of the insolvent in respect of the debt, or commend any suit or other legal proceeding, except with the leave of the court may impose and on such terms as the court

* * * (7) An order of adjudication shall relate back to, and take effect from, the date of the presentation of the petition on which it is made.

Since the effect of an adjudication relates back to and takes effect from the date of presentation of petition, consequently the vesting also relates back to the date of presentation of petition, for, that is the effect of the provision of Sub-section (7) when lead with Sub-section (2). The intendment and purpose of Section 28(2) is bradely two fold, namely, (1) to make the entire estate of the insolvent vest in the court or in a Receiver the moment an order of adjudication is made and to make it available for distribution among the body of creditors, and (2) to prohibit any creditor of the insolvent from proceeding against his property in respect of his debt or commence any suit or other legal proceeding, without the leave of the Insolvency Court during the pendency of the insolvency proceedings. u/s 28(2) of the Act, on the making of an order of adjudication, the whole of the property of the insolvent shall vest in the court or in a receiver and shall become divisible among the creditors. The effect of this provision is that the insolvent loses title to the property which vests in the court or in the Receiver. The order of adjudication relates back to the date of presentation of the petition.

16. Admittedly, in this case, the Sales Tax Officer received the notice of the insolvency proceeding on 5th June 1973 and entered appearance on 19th June 1973, whereas the revenue sale took place on 28th June 1973. The insolvency proceeding was initiated on 13th April 1973. By 28th June 1973, the suit property had already vested in the Insolvency Court and the 1st Defendant was divested of his rights therein, by operation of Sub-sections (2) and (7) of Section 28 of the Act. After having received the notice, it was obligatory on the part of the Sales Tax Officer, at whose instance, the revenue recovery proceeding was initiated to intimate the Tahsildar about the pendency of the proceeding and it was his bounden duty under the law to prevent the sale until leave of the court was obtained. Without obtaining leave of the court of insolvency, it was not open to the Sales Tax Officer or the Tahsildar as the creditor of the insolvent-Defendant No. 1 to proceed with the sale of the property during the pendency of the insolvency proceeding. Hence the revenue sale is void.

17. Plaintiff does not become a secured creditor because the revenue claimed is arrears of sales tax and not "a public revenue due on land" as defined in Section 2(J) of the Kerala Revenue Recovery Act. It is only a "public revenue due on land" which is a charge on the land and not the arrears of sales tax. The Kerala Sales Tax Act provides for the recovery of arrears by resort to revenue recovery proceedings as if it were an arrears of land revenue. Section 23(2)(a) of the Kerala Sales Tax Act gives only the power to recover the arrears of tax from the dealer as if it were an arrear of land revenue. This section does not convert the sales tax arrears into "public revenue due on land" Only if the amount claimed is arrear of public revenue on land, a charge will be created on the land and not otherwise. Plaintiff-State is therefore not a secured creditor when the insolvency proceeding was initiated. Attachment of land does not create any charge on the

property. Therefore the contention that the revenue sale is valid as it preceded that of sale by the official receiver cannot be sustained. Hence no right, title or interest could pass to the 34th Defendant. On the other hand, the sale conducted by the Official Receiver being valid, second Defendant cannot be dispossessed and the prayer for recovery of possession cannot be granted.

18. Thus, we hold that the appeal has no merit. The 34th Respondent, viz. Sri T.A. Kunjammoo is entitled to proceed with the execution in O.S. 183/79. The judgment and decree of the court below are confirmed. Appeal is dismissed. Parties are directed to bear their costs in this appeal.

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