

(1978) 12 KL CK 0009
In the High Court Of Kerala
Case No : W.A. No. 103 of 1976

Tax Recovery Officer

APPELLANT

Vs

V. Radhakrishna Eradi

RESPONDENT

Date of Decision : 18-12-1978

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 64
Income Tax Act, 1961 — Section 222, 281
Transfer of Property Act, 1882 — Section 53

Citation : (1979) 2 ILR (Ker) 158 : (1979) 117 ITR 868

Hon'ble Judges : V.P. Gopalan Nambiyar, C.J.; T. Chandrasekhara Menon, J

Bench : Division Bench

Advocate : P.A. Francis and P.K. Ravindranathan Menon, for the Appellant; K.P. Radhakrishna Menon and K.K. Ravindranath, for the Respondent

Judgement

Gopalan Nambiar, C.J.—This appeal is against the decision of a learned judge of this court whose judgment is reported in V. Radhakrishna Eradi Vs. Tax Recovery Officer, . The TRO, I.T. department, Calicut, is the appellant before us. The writ petition was to quash Ext. P-1 order passed by the TRO on a claim petition preferred by the respondent (writ petitioner) against the recovery proceedings initiated by the Income Tax department, and attachment of a property in pursuance of the said proceedings. One M.K. Raru was a defaulter to the Income Tax department to the tune of Rs. 1,59,641 plus interest and process fee. The tax recovery certificates for recovery of the said amount had been issued by the ITO and demand notices under Rule 2 of the Second Schedule of the I.T. Act, 1961, were served on the defaulter, and, after his death, on his legal representative between March 24, 1967, and March 29, 1972. The defaulter died on December 24, 1971. The immovable properties of the defaulter were attached under Rule 48 of the Second Schedule to the I.T. Act on April 27, 1972. One item of property attached--item 4 in the order under Rule 48--consisted of houses bearing Corporation Nos. 26/197, 26/196, 26/195, 26/195A, 26/194 and 26/192 together with land measuring 13 cents in Sy. No. 15/1, 41 cents in Sy. No. No.

15/2, 79 cents in Sy. No. 15/3, and 1 acre 17 cents in Sy. No. 15A and 15B, in Kommeri desom. It was represented by the legal representatives that the properties were mortgaged to the respondent, M/s. V. K. Eradi & Co., Calicut. By letters dated January 15, 1973, and June 7, 1973, the respondent preferred a claim petition under Rule 11 of the Second Schedule to the Act. It claimed that the above fourth item among the properties attached was equitably mortgaged under deposit of title deeds to it as security for a loan of Rs. 25,000 granted by it to the firm, M/s. M. K. Raru & Sons. The respondent, therefore, claimed a first charge on the properties and contended that the properties can be attached for claim of Income Tax arrears only after satisfying the prior claim or the first charge of the respondent. The claim was sought to be supported by the production of the mortgage document dated March 15, 1969. The TRO held that the demand notices under Rule 2 of the Second Schedule were served on the defaulter between March 24, 1967, and March 12, 1969, which were all prior to the date of the mortgage (March 15, 1969) relied on by the respondent. Under Rule 51 of the Second Schedule, the attachment under Rule 48 effected on April 27, 1972, would relate back to the date of service of the notices. Under Rule 15 of the Rules of the Second Schedule, an alienation effected subsequent to the attachment would be void against all claims enforceable under the attachment. On this ground the, TRO rejected the claim of the respondent. It was this order (Ext. P-1) that was sought to be quashed in the writ petition. The learned judge noticed Section 281 of the I.T. Act which provides for the avoidance of fraudulent transfers effected with intent to defraud the Income Tax department. That section contained a proviso protecting bona fide transfers effected for valuable consideration without notice of the attachment. The argument advanced before the learned judge was that this protection in favour of bona fide transferees for valuable consideration must be available even to transfers dealt with by Rule 16 of the Second Schedule to the Act. By a process of elaborate reasoning, the learned judge came to the conclusion that the rule has to be read so as to harmonise with the Act and that the protection conferred by the proviso to Section 281 must be available in respect of Rule 16 of the Rules as well. The learned judge concluded as follows (p. 42):

"The respondent has failed to observe the principles mentioned above. He has not considered the question whether in the first place the transfer of interest in the property was effected by the assessee with intent to defraud the revenue and in the second place whether the transferee has paid valuable consideration and acted without notice of the proceeding which was pending. As regards the mental element of fraud contained in the main part of the section, the burden was upon the revenue. It was only after such burden was discharged that the officer could call upon the transferee to prove that he had given valuable consideration without notice of the pendency of any proceeding under the Act. These aspects have not been considered by the officer. Exhibit P-I is, therefore, vitiated by an error apparent on the face of the record and it is null and void and of no effect as against the transferee. Consequently, I quash exhibit P-I. The officer is, however,

free to investigate the claims or objections afresh after giving the parties concerned proper notice and an effective opportunity of being heard. Subject to what is stated above, the original petition is allowed. There will be no order as to costs."

2. We are unable to agree with the conclusion and the reasoning of the learned judge. We may extract Section 281 of the Act as it stood at the relevant time:

" 281. ""Transfers to defraud revenue void.--Where, during the pendency of any proceeding under this Act, any assessee creates a charge on or parts/with the possession by way of sale, mortgage, exchange or any other mode of transfer whatsoever, of any of his assets in favour of any other person with the intention to defraud the revenue, such charge or transfer shall be void as against any claim in respect of any tax or any other sum payable by the assessee as a result of the completion of the said proceeding :

Provided that such charge or transfer shall not be void if made for valuable consideration and without notice of the pendency of the proceeding under this Act."

3. Section 222 of the Act provides for the issue of a tax recovery certificate to the TRO. As that furnishes the statutory background for the Second Schedule to the I.T. Act, we may notice that section:

"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.....

(2) The Income Tax Officer may issue a certificate under Sub-section (1) notwithstanding that proceedings for recovery of the arrears by any other mode have been taken."

4. The Second Schedule to the I.T. Act is a detailed and self-contained Schedule--an innovation introduced by the 1961 Act--, which deals fully with the modus operandi of recovering the tax arrears in the different modes open to the department under the law. Rule 16 of the said Schedule enacts:

"16. Private alienation to be void in certain cases.--(1) Where a notice has been

served on a defaulter under Rule 2, the defaulter or his representative-in-interest shall not be competent to mortgage, charge, lease or otherwise deal with any property belonging to him except with the permission of the Tax Recovery Officer, nor shall any civil court issue any process against such property in execution of a decree for the payment of money.

(2) Where an attachment has been made 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 monies contrary to such attachment, shall be void as against all claims enforceable under the attachment."

5. We have already referred to Rules 2, 48 and 51. It is unnecessary to quote these rules. It appears to us that the learned judge has proceeded on a wrong track of enquiry. No question of harmonising Section 281 with Rule 16 arises in the circumstances; nor can there be any question of discerning any disharmony between the section and the rule. The two operate in different spheres and deal with quite different and distinct matters. The section deals with the subject of fraudulent transfer provided for, for instance, by Section 53 of the Transfer of Property Act. The rule, on the other hand) operates on a different sphere altogether, and deals with private transfers made after an attachment of property has been effected in the course of recovery proceedings for realising the arrears of tax. The provision corresponds to what is enacted by Section 64 of the CPC. It is not possible to equate the one with the other, or to read the provisions of the one into the other or to draw a similarity between the two. In the circumstances, the learned judge was wrong in holding that the protection in favour of a bona fide transferee for valuable consideration indicated by the proviso to Section 281 of the Act must get incorporated, or be implied, into Rule 16 of the Second Schedule as well. There is neither reason nor logic in doing so and we are unable to accept this process of reasoning of the learned judge.

6. Counsel for the respondent invited our attention to Section 281 as amended by Act 41 of 1975 with effect from October 1, 1975. The section as amended reads as follows:

"281. Certain transfers to be void.--(1) Where, during the pendency of any proceeding under this Act or after the completion thereof, but before the service of notice under Rule 2 of the Second Schedule, any assessee creates a charge on, or parts with the possession (by way of sale, mortgage, gift, exchange or any other mode of transfer whatsoever) of, any of his assets in favour of any other person, such charge or transfer shall be void as against any claim in respect of any tax or any other sum payable by the assessee as a result of the completion of the said proceeding or otherwise :

Provided that such charge or transfer shall not be void if it is made--(i) for adequate consideration and without notice of the pendency of such proceeding or, as the case may be, without notice of such tax or other sum payable by the

assessee; or

(ii) with the previous permission of the Income Tax Officer.

(2) This section applies to cases where the amount of tax or other sum payable or likely to be payable exceeds five thousand rupees and the assets charged or transferred exceed ten thousand rupees in value.

Explanation.--In this section "assets" means land, building, machinery, plant, shares, securities and fixed deposits in banks, to the extent to which any of the assets, aforesaid does not form part of the stock-in-trade of the business of the assessee."

7. We do not think we should get involved in a discussion of the scope of the change introduced by the amendment, or the purpose or object underlying the same; nor need we consider whether the amendment is declaratory of the real meaning of the section. It is enough to notice that, even after the amendment, the rule covers only cases of charge created or transfer effected before the service of notice under Rule 2 of the Second Schedule. Even after the amendment the section operates in a sphere different from the rule.

8. We are of the opinion that the learned judge was wrong in interfering with ext. P-1 and in allowing the writ petition. We allow the appeal and set aside the judgment of the learned judge. The result is that O.P. No. 880 of 1974 will stand dismissed. There will be no order as to costs.