

(1977) 02 MAD CK 0002

In the Madras High Court

Case No : Second Appeal No. 671 of 1974

UNION OF INDIA AND OTHERS

APPELLANT

Vs

AMEENA BI AND OTHERS.

RESPONDENT

Date of Decision : 16-02-1977

Acts Referred:

Income Tax Act, 1922 — Section 46(2)

Citation : (1978) 112 ITR 863

Hon'ble Judges : Ramaswami, J

Bench : Division Bench

Judgement

RAMASWAMI J. - Defendants Nos. 1 to 3 for the appellants. The first respondent-plaintiff is the daughter and only child of one S.M. Sheriff

who died on November 11, 1947. The said S.M. Sheriff has submitted his Income Tax returns for the assessment years 1946-47 and 1947-48 to

the Income Tax Officer, City Circle IV even before his death, but the assessments were not completed. After the death of S.M. Sheriff, one of his

four brothers filed C.S. No. 544 of 1947 on the file of this court for partition. In that suit the other brothers of Sheriff, his sister, his widow and the

present plaintiff who is his daughter were impleaded as defendants. Pending that suit a receiver was appointed in respect of the estate of the

deceased, Sheriff, on February 16, 1948. At the time of the filing of the suit, the plaintiff who was impleaded as the fifth defendant was a minor and

she attained the age of majority on September 24, 1949. The Income Tax Officer appears to have issued notices to the receiver and proceeded to

complete the assessment and ultimately assessment orders were made in respect of 1946-47 on November 24, 1948, and in respect of 1947-48

on April 30, 1949. The preliminary decree in the partition suit was made on

March 7, 1951, and the final decree on July 30, 1956. As per the final decree the plaintiff got half share in the entire estate of her father and she was directed to discharge one-half of the total debts set out in the A schedule to the decree but subject to the condition that she was liable to pay only those debts as were valid and in time. The other shares also were allotted properties subject to the same condition relating to the discharge of the debts set out in the A schedule to the decree. It appears that the receiver who was in possession of the estate had paid certain amounts of money towards the assessments. It is stated that after giving such credit to the amounts paid, there was still a balance of Rs. 22,842-14-3 due and owing in respect of the assessments. On receipt of certificates u/s 46(2) of the Indian Income Tax Act, 1922, the Collector of Madras proceeded to recover the tax from and out of the plaintiffs half share of the properties given to her under the decree. The plaintiff was resisting the recovery proceedings, raising various contentions. On finding that the properties were situate within the jurisdiction of the Collector of Chingleput, the Collector of Madras forwarded the certificate to the Collector of Chingleput for necessary action. The properties of the plaintiff were attached. On 17th March, 1964, the plaintiff filed O.S. No. 883 of 1964 on the file of the 9th Assistant Judge, City Civil Court, Madras, for an injunction restraining the appellants herein from proceeding with the sale of the properties for the recovery of the amount due under the Income Tax orders. Pending the suit, she also applied for a temporary injunction. Though temporary injunction was also given, it appears that it could not be served on the Collector of Chingleput who was bringing the properties to sale before March 19, 1964, and the sale was actually held on that date. But the confirmation of the sale was stayed by the court. Later on, the suit O. S. No. 883 of 1964 was dismissed on the ground that the requisite notice u/s 80 of the CPC had not been given. When a defence on the question of notice was taken in the suit, even during the pendency of the suit, the plaintiff issued a notice u/s 80 of the Code of Civil Procedure, but the suit was dismissed on August 26, 1967, on the ground that a notice u/s 80, Civil Procedure Code, had not been given. The present suit was filed on August 28, 1967, two days after the dismissal of the earlier suit. In this suit also the plaintiff asked for a temporary injunction restraining the appellants

from confirming the sale and that was granted.

In the present suit, the plaintiff had prayed for a declaration that the assessment order dated November 24, 1948, and April 30, 1949, relating to

the assessment years 1946-47 and 1947-48, respectively, are invalid and not binding on the plaintiff and for an injunction restraining the

defendants Nos. 1,2 and 3 from taking any proceedings for recovery of the tax due thereon. She had also prayed for an injunction restraining the

appellant from confirming the auction sale of the properties in favour of defendants Nos. 4 to 7.

The grounds on which the plaintiff prayed for the declaration that the assessment orders were not valid and binding on her were the following. She

contended that after the death of her father, S.M. Sheriff, the assessment orders on the receiver were illegal, ultra vires and without jurisdiction.

According to her, an assessment could be made subsequent to the death of Sheriff only on the legal representatives and the receiver was not a

legal representative. She also contended that there were no valid notices u/s 23(2) and 29 of the Indian Income Tax act, 1922, which are

mandatory and that, therefore, the whole assessment proceedings were invalid.

The legality of the recovery proceedings was also questioned by the plaintiff on the ground that the plaintiff, legally, could not be considered to be

an assessee in default and that, therefore, no recovery proceedings could have been initiated. It was also contended that the recovery proceedings

by issue of a certificate u/s 46(2) of the Indian Income Tax Act, 1922, to the Collector of Madras was barred by limitation as the certificate was

issued beyond the period prescribed u/s 46(7). The plaintiff also questioned the validity of the sale on the ground of non-compliance of the

provisions of sections 25, 27 and 36 of the Revenue Recovery Act and contended that by reason of such non-compliance the properties were sold

for a low price and she was materially prejudiced. The plaintiff, therefore, prayed that the appellants herein should be prevented from confirming

the sale by an order of injunction.

The main defence in the suit was that u/s 67 of the Indian Income Tax Act, 1922, a suit to set aside or modify any assessment made under the Act

is barred and that, therefore, the suit was not maintainable. On the merits also it was contended that the assessment proceedings were completed

after issuing notice to the receiver and in his presence and that for the purposes of the Act the receiver was a legal representative of the deceased.

In so far as the revenue sale is concerned, it was contended that necessary certificate u/s 46(2) was issued to the Collector of Madras in time, that

the plaintiff was aware of the assessment proceedings as well as the revenue sale and that the proceedings to recover the tax arrears from her

properties were valid.

The trial court held that the suit was not barred u/s 67 of the Income Tax Act, though it gave a finding that the assessment orders were validly

made on the receiver who was competent to represent the estate of the deceased. The trial court also found that the certificate issued u/s 46(2)

was valid and that the sale held in pursuance of that certificate had not been proved to be illegal on any ground and that, therefore, the sale also

was valid. In that view the suit was dismissed.

But, on appeal, the lower appellate court held that the receiver was only an officer of the court, that though he is in possession of the estate, it is not

vested in him and that he was not a legal representative of the deceased to whose estate he was appointed as a receiver. After referring to the

various provisions of the Income Tax Act, the lower appellate court ultimately came to the conclusion that since admittedly no notice was issued to

the legal representatives and since the receiver to whom alone the notice was issued was not a legal representative competent to represent the

estate before the Income Tax Officer, the assessment orders were null and void. The lower appellate court also held that since in such a situation

the plaintiff will not be considered to be an assessee, it was not open to her to file an appeal under the relevant provisions of the Act and that,

therefore, section 67 of the Income Tax Act is not a bar. The lower appellate court also held that since the plaintiff could not be considered to be

an assessee, she could not be regarded as an assessee in default and that, therefore, section 46(2) is not applicable and could not have been

invoked by the Income Tax Officer for the recovery of the tax arrears. On the assumption that there was a valid assessment and that the plaintiff

was an assessee in default the lower appellate court also held that the proceedings initiated u/s 46(2) was barred by limitation, that the sale held by

the Collector of Chingleput was illegal and invalid for non-compliance with the

provisions of section 25, 27 and 36 of the Revenue Recovery Act

and that the plaintiff was also materially prejudiced and the sale also did not realise adequate consideration by reason of non-compliance with the

provisions. On these grounds, the lower appellate court held that the sale itself was invalid. Accordingly, the appeal was allowed and the judgment

and decree of the trial court was set aside and the suit was decreed.

It may also be mentioned that the plaintiff raised another plea before the lower appellate court. It appears that the Income Tax department

proceeded to recover the tax arrears against the properties allotted to the other shares which were in the hands of some third party purchasers.

The third party purchasers questioned the action of the department in proceeding against the properties and that became the subject-matter of a

suit. When that matter came in second appeal in S.A. No. 1373 of 1967 on the file of this court, the Income Tax department compromised with

the third party purchasers who purchased the properties and receiving a sum of Rs. 6,000 released the properties which were purchased by them.

On the basis of these proceedings it was contended by the plaintiff that the release of the properties on receiving a sum of Rs. 6,000 should be

deemed to have wiped off the entire debt due from the late Sheriff and that no amount was recoverable from the plaintiff. Since this compromise

was entered into during the pendency of the appeal, the plaintiff was permitted to raise that contention, but the lower appellate court overruled the

contention on the ground that as seen from an affidavit filed by the Income Tax department, the compromise had relinquished only its right to

proceed against the properties that were the subject-matter of that suit and it has not wiped out the entire amount due from the deceased, Sheriff.

In this second appeal, the learned counsel for the appellants questioned all the findings against the department. On the other hand, the learned

counsel for the plaintiff, first respondent, supported the findings of the lower appellate court on the question of jurisdiction of the court as also on

the question of validity of the sale held by the Collector of Chingleput. The learned counsel also argued that the view of the a lower appellate court

that the earlier compromise in S.A. No. 1373 of 1967 did not wipe out the entire debt is not correct. But in the view I take relating to the recovery

proceedings u/s 46 it is not necessary of me to go into the larger question

whether the assessment orders were legally and validly made and whether that could be questioned in a civil court. I will proceed on the assumption that there was a valid assessment order made and that the plaintiff was also an assessee in default.

The first question for consideration is whether the certificate u/s 46(2) was made beyond the period of limitation and that, therefore, neither the

Collector of Madras nor the Collector of Chingleput to whom the Collector of Madras transferred the certificate had any jurisdiction to proceed

with the recovery of the tax. u/s 46(2), the Income Tax Officer may forward to the Collector a certificate under his signature specifying the amount

of arrears due from the assessee and the Collector on receipt of such certificate shall proceed to recover from such assessee the amount specified

therein as if it were an arrears of land revenue. But sub-section (7) of section 46 provided that no proceedings for the recovery of any sum payable

under the Act shall be commenced after the expiry of made under the Income Tax Act. In respect of the assessment year 1946-47, the assessment

order and the demand were issued on November 24, 1948. The last date of the financial year in which the demand was made, therefore, was

March 31, 1949. In respect of 1947-48, the assessment order and the demand were made on April 30, 1949, and the last date of the financial

year was, therefore, March 31, 1950. So. the certificate in respect of 1946-47 should have been issued on or before March 31, 1950, and in

respect of 1947-48 on or before March 31, 1951, as per sub-section (7) of section 46. But the finding of the lower appellate court on this

question is that the certificate in respect of 1946-47 was not issued before March 31, 1950. It observed that there was some evidence to show

that it was received in the Collectors office only on April 10, 1950, and that, therefore, it must have been issued some time after March 31, 1950,

and before April 10, 1950, and that there was no evidence to show that it was issued on or before March 31, 1950. In respect of 1947-48, it

appeared to have been given only on December 11, 1952. There was no evidence to show that it was issued or forwarded on or before March

31, 1951. In that view it was held that the certificate was issued after the expiry of one year from the last day of the financial year in which the

demand was made and that, therefore, the Collector of Madras had no

jurisdiction to proceed with the recovery on the basis of that certificate.

Though this is a finding on a pure question of fact, the learned counsel for the appellants questioned the finding and contended that in the note-file

marked as exhibits B-11 to B-13, the Income Tax officer had directed the issue of a certificate in respect of 1946-47 on March 30, 1950, and it

shall be presumed that such a certificate was issued on that day itself. The lower appellate court which had considered this argument also held that

the note-file did not clearly evidence the issue of the certificate that day itself. What it noted in exhibits B-10 is ""the assessee has not paid the tax.

I.T. Number put up. Certificate to respondent put up. Reminder to the assessee put up"" and this is signed by some officer on March 30, 1950.

Another officer has signed it on March 31, 1950. From this it could not be stated that the certificate was issued or forwarded on that date. Section

46(2) use the expression ""may forward to the respondent"" and section 46(7) uses the words ""shall be commenced after the expiry of one year"".

These provisions clearly show at least the certificate should have been issued factually and forwarded to the respondent on or before the 31st

March of the financial year in which the demand is made, though the certificate might be received by the respondent subsequent to that date. The

finding of the lower appellate court is that a certificate was not issued or forwarded on or before March 31, 1950, in respect of 1946-47 and on

or before March 31, 1951, in respect of 1947-48 and that is a finding with which I could not interfere with on the meagre evidence that is available

in this case. It may also be mentioned that even the note-file that was available in respect of 1946-47 is not available in respect of 1947-48.

This court also in the decision in Arunadevi Jajodia and Others Vs. The Collector of Madras and Others, held that the proceedings for the

recovery commence when the Income Tax officer forwards a certificate to the Collector u/s 46(2). The evidence of forwarding the certificate

before the relevant date is, therefore, absolutely essential in order to clothe the Collector with the jurisdiction. The result of it is the entire

proceeding for the recovery by the Collector was without jurisdiction.

I shall now proceed to consider whether the sale held by the Collector of Chingleput is valid on the assumption that the certificate issued by the

Income Tax officer u/s 46(2) was valid and within time. There is no substance in

the contention of the plaintiff that the certificate could not have been forwarded by the Collector of Madras to the Collector of Chingleput for recovery. In all cases where any amount is due to any officer other than the Collector of Madras or Government of the State and is recoverable as if it was an arrear of land revenue, it is open to the Collector to whom the certificate is forwarded to transmit the same to another Collector within whose jurisdiction the property that is sought to be proceeded against is situate. In this case, the property that was sought to be proceeded against within the jurisdiction of the Collector of Chingleput and, therefore, the Collector of Madras forwarded the certificate issued u/s 46(2) of the Collector of Chingleput. That was valid and could not be questioned. In fact, the question is not *res integra* and it is covered by the authority in *Sri Raja Venkata Ramayya Appa Rao Bahdur Varu Vs. The Collector of Madras and Another*, . A similar question came up for consideration and *Subba Rao J.* (as he then was) held that the arrears of Income Tax is recoverable by the Income Tax officer as arrears of land revenue within the meaning of section 5 of the Revenue Recovery Act but the process of recovery is entrusted to the Collector and consequently the Collector of the district in which the office of the Income Tax officer is situate has power to send a certificate of the amount to be recovered to the Collector of another district. The Collector of Chingleput, therefore, was properly entrusted with the certificate for recovery of the amount.

The next question is whether there is any contravention of sections 25, 27 and 36 of the Tamil Nadu Revenue Recovery Act (II of 1864), which is the Act that is applicable for recovery of the amount in this case. u/s 25, before a Collector, or other officer empowered by the Collector in that behalf, proceeds to attach the land of the defaulter, he shall cause a written demand to be served on the defaulter, specifying the amount due. Such demand shall be served by delivering a copy to the defaulter, or to some adult male member of his family at his usual place of abode, or to his authorised agent, or by affixing a copy thereof on some conspicuous part of his last known residence. The plaintiff denied the service of such notice and the finding of the lower appellate court is that there is no proof that any such service of demand was made on the plaintiff.

Section 27 requires that the attachment of the land shall be effected by affixing a

notice thereof to some conspicuous part of the land. It also requires that the attachment shall be notified by public proclamation on the land, and by publication of the notice in the district Gazette. Admittedly, there was no publication of the notice in the district Gazette.

Under section 36 previous to the sale the Collector shall issue a notice thereof in English and in the language of the district, specifying the name of

the defaulter, the position and the extent of land and the amount due and the time, place and conditions of sale. The finding of the lower appellate

court is that there was no specification of the time, place and conditions of sale and that though it was generally referred to in the notice of sale that

the sale will be held in a particular village, it was actually held in front of the house of the village munsiff and that such a notice also seems to have

been affixed only on the survey stones in the land and not in the Collectors office and in the taluk katcheri and in the police station house as

required u/s 36. These are material defects which invalidate the sale itself.

In fact, it appears from the findings of the lower appellate court that the entire proceedings seem to have been made a farcical affair. I have

therefore, no doubt that the sale also is invalid.

Under section 59 of the Tamil Nadu Revenue Recovery Act, such suits by persons aggrieved by the proceedings taken under the Act were

specifically saved. But the learned counsel for the appellants contended that a suit u/s 59 questioning the validity of a revenue sale has to be filed

within six months from the date at which the cause of action arose and the cause of action in this case is the demand by the Collector which was six

months before August 28, 1967, when the suit was filed and that therefore, the suit was barred by limitation. This contention is devoid of any

substance. Even before the sale was held the suit, O.S. No. 883 of 1964, was filed by the plaintiff. As already stated, the plaintiff also obtained

an interim order of injunction restraining the appellants from holding the sale but before it could be served there was a sale on March 19, 1964,

and, therefore, the confirmation of the sale alone was stayed later on. But the learned counsel for the appellants contended that even when the

demand was made on her to pay the money, a cause of action arose. We have already seen that no notice of demand was served on her and when

she came to know that the Collector is taking steps to sell, she filed the suit. I

am also of the view that in so far as the validity of the sale held under that Act the cause of action would be the sale or confirmation of sale and not the demand by the Income Tax officer on the assessee. I am, therefore, of the view that the suit is not barred by limitation u/s 59 of the Tamil Nadu Revenue Recovery Act. That was the finding of the lower appellate court also with which I agree.

But since I did not go into the question of the validity of the assessment orders are not valid and binding on the plaintiff. There will be only an injunction restraining the defendants from confirming the sale on the basis that there was no valid sale. The learned counsel for the respondents states that the purchasers had deposited the auction amount before the Collector and it is lying in deposit. He also states that pending the second appeal the plaintiff had sold the very same properties to the auction purchasers or their nominees and that as per their agreement the plaintiff is entitled to receive the money from the Collector. That is a matter which I could not take up for consideration in this proceeding. On the basis that the sale is invalid, defendants Nos. 4 to 7 would be entitled to get back the money from the Collector and the plaintiff will have to work out her remedies as against defendants Nos. 4 to 7 separately and not in these proceedings. With these observations and subject to the modification of the decree as stated above the second appeal is dismissed. No costs.