
(1975) 11 KL CK 0010
In the High Court Of Kerala
Case No : Original Petition No. 880 of 1974

V. Radhakrishna Eradi

APPELLANT

Vs

Tax Recovery Officer

RESPONDENT

Date of Decision : 21-11-1975

Acts Referred:

Income Tax Act, 1961 — Section 281
Income Tax Rules, 1962 — Rule 16

Citation : (1976) 105 ITR 30

Hon'ble Judges : T. Kochu Thommen, J

Bench : Single Bench

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

Judgement

Kochu Thommen, J.—The question raised in this original petition is as regards the construction of Section 281 of the Income Tax Act, 1961 (as it stood before the Act was amended in 1975), and Rule 16 of the Second Schedule to the Act. Is the Tax Recovery Officer, conducting an investigation under Rule 11 of the said Schedule concerning matters coming within the ambit of Rule 16, bound to act in accordance with the principles mentioned in Section 281? No direct authority has been referred to me on this question, and I shall, therefore, deal with it on general principles.

2. Before I consider the relevant statutory provisions, I shall briefly state the facts and the respective contentions of the parties. The petitioner is a partner of a firm engaged in timber and banking business. His firm granted a loan of Rs. 25,000 to another firm called M.K. Raru & Sons on the basis of an equitable mortgage created by M.K. Raru, one of the partners of the latter firm, in certain properties belonging to Raru. Upon the death of Raru on December 24, 1971, his properties devolved on the remaining partners of the firm in their capacity as legal representatives. Raru had been assessed to Income Tax in the sum of Rs. 1,38,703 for the assessment years 1957-58 to 1965-66. On the basis of a

certificate issued by the Income Tax Officer u/s 222 of the Income Tax Act, proceedings were initiated by the respondent for recovery of the said sum. A number of notices under Rule 2 of the Second Schedule to the Act had been issued to Raru during the period March 24, 1967, to March 12, 1969. The equitable mortgage was created by Raru in favour of the petitioner's firm only on March 15, 1969. These properties were attached by the respondent under Rule 48 of the Second Schedule by his order dated April 19, 1972. The petitioner's firm then filed under Rule 11 of the said Schedule its objections before the respondent stating that the properties were the subject-matter of an equitable mortgage in its favour, and, therefore, the right of the revenue was subject to the superior rights of the mortgagee. The respondent disposed of the objections by exhibit P-1 order dated November 15, 1973.

3. The main contention of the petitioner before me is that the respondent had failed to take into account the principles embodied in Section 281 which are intended to protect bona fide transfers. Shri K.P. Radhakrishna Menon, counsel appearing for the petitioner, submits that only such transfers as are intended to defraud the revenue are invalidated u/s 281. In any case, a transferee who has paid valuable consideration without notice of the pendency of any proceeding under the Act against the assessee is fully protected under the proviso to the section. He says that Section 281 is the principal provision of the Act dealing with transfers made by an assessee during the pendency of a proceeding under the Act. He points out that Rule 16 and the connected provisions of the Second Schedule to the Act also relate to the same subject-matter but in a subsidiary way. According to him, the section and the rules have to be read together, keeping in mind the principle of harmonious construction. He contends that an order passed under Rule 11 in respect of a matter coming under Rule 16, without regard to the principles stated in Section 281, would be vitiated by an error apparent on the face of the record. Exhibit P-1 order suffers from this vice, and it is, therefore, null and void. Shri P.K. Ravindranatha Menon, counsel for the revenue, contends that Section 281 and the rules of the Second Schedule do not deal with the same subjectmatter, as they deal with alienations taking place in different situations. According to him, Section 281 is related to a transfer which took place while a proceeding in respect of a particular assessment or penalty or fine was pending, whereas Rule 16 relates to a transfer effected during recovery proceedings. As stated by the respondent in his counter-affidavit, "Section 281 and the rules under the Second Schedule are meant to meet two different situations or circumstances". In other words, Section 281 deals with transfers during pro-recovery proceedings, and Rule 16 deals with transfers during the recovery proceedings. He points out that assessment or penalty proceedings necessarily come to an end once the amounts payable are computed and a demand is made u/s 156. Further proceedings by way of recovery do not come within the scope of Section 281. An officer passing an order under Rule 11 of the Second Schedule is not concerned with what is stated in Section 281. The officer acts by virtue of a certificate issued by the Income Tax Officer u/s 222, and he

enforces the certificate by means of recovery proceedings in accordance with the rules laid down in the Second Schedule and without regard to Section 281.

4. In reply to this contention, counsel for the petitioner points out that the expression "any proceeding" u/s 281 cannot be construed so narrowly as to exclude recovery proceedings. Section 281 covers both assessment and recovery. Assessment proceedings come to an end only when finality is attached to such proceedings by a decision which can no longer be challenged. He relies upon the decision of the Privy Council in *Commissioner of Income Tax v. Khemchand Ramdas*, [1938] 6 ITR 414 and the decision of the Supreme Court in *Garikapatti Veeraya Vs. N. Subbiah Choudhury*, for the proposition that an appeal is a continuation of the earlier proceedings. He says that the recovery proceedings will, in the absence of an order of stay, progress uninterrupted by the assessment proceedings. If the interpretation of the counsel for the revenue is accepted, during the pendency of these parallel proceedings, an innocent assessee or transferee would be denied the protection of Section 281 in matters of recovery while such protection would be available in proceedings connected with the imposition of tax or penalty. Such construction, if adopted, would strain the language of the enactment leading to artificial results, and it would be alien to the normal rules of interpretation.

5. I shall now read Section 281 (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."

6. Any charge created or transfer made without bona fides during the pendency of any proceeding under the Act 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 proceeding. Such a charge or transfer is void if it is made by the assessee with the intention to defraud the revenue. The onus of proving this intention is upon the revenue, for it is the revenue that has to allege such intention. Once such intention is proved, the burden would be upon the transferee to show that he is protected under the proviso to the section. The transferee is protected if he has paid valuable consideration for the transfer and has had no notice of the pendency of any proceeding against the assessee under the Act. In other words, the section, while invalidating fraudulent transfers, offers protection, albeit at the expense of the revenue, to a bona fide, transferee for valuable consideration. It

may be mentioned at this stage that no contention has been raised before me to the effect that the proviso is not intended to protect a transferee, but only a transferor. The controversy is only as regards the respective fields in which Section 281 and Rule 16 operate. In other words, does Section 281 apply to recovery proceedings also, is the sole question urged before me.

7. I shall now read the relevant rules of the Second Schedule concerning the procedure for recovery of tax. Rule 2 says :

"2. Issue of notice.--When a certificate has been received by the Tax Recovery Officer from the Income Tax Officer for the recovery of arrears under this Schedule, the Tax Recovery Officer shall cause to be served upon the defaulter a notice requiring the defaulter to pay the amount specified in the certificate within fifteen days from the date of service of the notice and intimating that in default steps would be taken to realise the amount under this Schedule."

8. Rule 48 relates to attachment. It says :

"48. Attachment.--Attachment of the immovable property of the defaulter shall be made by an order prohibiting the defaulter from transferring or charging the property in any way and prohibiting all persons from taking any benefit under such transfer or charge."

9. Rule 51 says :

"51. Attachment to relate back from the date of service of notice.--Where any immovable property is attached under this Schedule, the attachment shall relate back to, and take effect from, the date on which the notice to pay the arrears, issued under this Schedule, was served upon the defaulter."

10. Once attachment is made, the consequences of Rule 16 immediately follow. Rule 16 says:

"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."

11. The prohibition under Rule 16 thus operates during the period of attachment which relates back to the date of service of notice. All claims and objections as regards the attachment and sale of any property in execution of a certificate for recovery of arrears shall be investigated by the Tax Recovery Officer under Rule

11. This rule says :

"11. Investigation by Tax Recovery Officer.--(1) Where any claim is preferred to, or any objection is made to the attachment or sale of, any property in execution of a certificate, on the ground that such property is not liable to such attachment or sale, the Tax Recovery Officer shall proceed to investigate the claim or objection :

Provided that no such investigation shall be made where the Tax Recovery Officer considers that the claim or objection was designedly or unnecessarily delayed,

(2) Where the property to which the claim or objection applies has been advertised for sale, the Tax Recovery Officer ordering the sale may postpone it pending the investigation of the claim or objection, upon such terms as to security or otherwise as the Tax Recovery Officer shall deem fit.

(3) The claimant or objector must adduce evidence to show that--

(a) (in the case of immovable property) at the date of the service of the notice issued under this Schedule to pay the arrears, or

(b) (in the case of movable property) at the date of the attachment, he had some interest in, or was possessed of, the property in question.

(4) Where, upon the said investigation, the Tax Recovery Officer is satisfied that, for the reason stated in the claim or objection, such property was not, at the said date, in the possession of the defaulter or of some person in trust for him or in the occupancy of a tenant or other person paying rent to him, or that, being in the possession of the defaulter at the said date, it was so in his possession, not on his own account or as his own property, but on account of or in trust for some other person, or partly on his own account and partly on account of some other person, the Tax Recovery Officer shall make an order releasing the property, wholly or to such extent as he thinks fit, from attachment or sale.

(5) Where the Tax Recovery Officer is satisfied that the property was, at the said date, in the possession of the defaulter as his own property and not on account of any other person, or was in the possession of some other person in trust for him, or in the occupancy of a tenant or other person paying rent to him, the Tax Recovery Officer shall disallow the claim.

(6) Where a claim or an objection is preferred, the party against whom an order is made may institute a suit in a civil court to establish the right which he claims to the property in dispute; but, subject to the result of such suit (if any), the order of the Tax Recovery Officer shall be conclusive."

12. Any person having an interest in or possession of the property attached--whether as transferor or transferee--is entitled to raise his claims or objections under this rule.

13. Any private alienation effected subsequent to the date of the notice and

during the operation of the attachment is declared void. Rule 16, like Section 281, invalidates transfers of property taking place during the pendency of proceedings under the Act. While the section refers to transfers effected during the pendency of any proceeding under the Act, the rule deals with transfers effected during the recovery proceedings. The section has wider application as it covers the entire area in which the Act operates while the rule is limited in its application to the recovery stage. The section and the rule are differently worded. While the section says that a bona fide transfer for valuable consideration is protected, the rule does not specifically say so. The question, therefore, is whether the immunity provided u/s 281 can be read into Rule 16 so as to protect an innocent transferee in recovery proceedings against the assessee. Section 281 is part of the main enactment whereas the rule appears in the Schedule to the Act.

14. Statutes may contain provisions which are general and those which are specific. Where repugnancy arises between a general provision and a specific provision, the principle of construction is what was stated by Romilly M.R. in *Pretty v. Solly*, [1859] 26 Beav 606.:

"The rule is that, whenever there is a particular enactment and a general enactment in the same statute, and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply."

15. Romilly M.K. clarified this further in *De Winton v. Brecon Corpn.*, [1859] 28 LJ Ch 598 as follows:

"For instance, if there is an authority in an Act of Parliament to a corporation to sell a particular piece of land, and there is also a general clause at the end that nothing in the Act contained shall authorise the corporation to sell any land, that would not control the particular enactment, but the particular enactment would take effect notwithstanding that it was not clearly expressed and distinct..... If the court finds a positive inconsistency and repugnancy, it may be difficult to deal with it, but so far as it can, it must give effect to the whole of the Act of Parliament." (see *Craies on Statute Law*, 7th Edn., page 222).

16. In *Devassia v. State of Kerala*, [1965] KLJ 33 this court had occasion to consider this rule of construction. Referring to *J.K. Cotton Spinning and Weaving Mills Co. Ltd. v. State of Uttar Pradesh*, AIR 1961 SC 1173 M.S. Menon C.J. observed :

".....the rule that general provisions should yield to special provisions is not an arbitrary rule made by lawyers and judges but springs from the common understanding of men and women that when the same person gives two directions, one covering a large number of matters in general, and the other covering only some of them, his intention is that the latter should prevail as regards those matters, and that the general direction should have effect only as

regards matters uncovered by the special direction."

17. As pointed out by the House of Lords in *Institute of Patent Agents v. Joseph Lockwood*, [1894] AC 347 where conflicts arise between two sections of the same enactment :

"You have to try and reconcile them as best you may. If you cannot, you have to determine which is the leading provision and which the subordinate provision, and which must give way to the other. That would be so with regard to the enactment and with regard to rules which are to be treated as if within the enactment."

18. If the enacting part and the Schedule cannot be made to correspond, the latter has to yield to the former. (*Re Baines*, [1840] 12 Ad 210 *Dean v. Green*, [1883] 8 PD 79 and *Attorney-General v. Lamplough*, [1878] 3 Ex D 214). According to Craies :

"The Schedule is as much a part of the statute, and is as much an enactment, as any other part, but if an enactment in a schedule contradicts an earlier clause the clause prevails against the schedule." (Statute Law, 7th Edn., pages 224-225). Maxwell says : "Schedules to statutes are as much part of an Act as any other, and may be used in construing provisions in the body of the Act. Similarly, provisions in a schedule will be construed in the light of what is enacted in the sections." (Interpretation of Statutes, 12th Edn., page 12).

19. Bearing these principles in mind, one has to look at the provisions to find out whether there is in fact a conflict between Section 281 and Rule 16. If the language of Section 281 and that of Rule 16 suggest that they deal with the same subject-matter and seek to achieve the same results, then both the provisions, as far as possible, must be read in such a way that there is no conflict between the two.

20. If Section 281 was general and Rule 16 was particular and they were inconsistent with each other, then according to the principle of interpretation, Rule 16, although appearing in the Schedule, would prevail against the former. The same would be the position if Rule 16 was the leading provision and Section 281 the subordinate provision, and they could not be reconciled.

21. In my opinion, Section 281 and Rule 16 (read with the connected provisions of the Second Schedule) deal with the same subject-matter, not generally but specifically. The section deals with the principle governing alienation during any stage of the proceedings under the Act, and the rule with the procedure of invalidation, but confined to recovery. Looked at this way, one cannot be considered to be general and the other particular; nor can one be regarded as subordinate and the other leading. Both are directed to the same end, the only difference being that the section specifically refers to the principle of safeguarding the interest of an innocent transferee (or transferor) while the rule does not. " All rules of procedure are intended to advance justice and not to

defeat it." Lakshmi Rattan Engineering Works Ltd. Vs. Asstt. Commr. Sales Tax, Kanpur and Another, , In the absence of any contrary indication, the section and the rule must be harmoniously read so as to effectuate the principle stated in the section.

22. It may be apposite to extract here a passage from what the Supreme Court has stated in C.A. Abraham, Uppoottil, Kottayam Vs. The Income Tax Officer, Kottayam and Another,

"In interpreting a fiscal statute, the court cannot proceed to make good deficiencies if there be any; the court must interpret the statute as it stands and in case of doubt in a manner favourable to the taxpayer."

23. The object of both the section and the rule is to invalidate transfers made without bona fides during the pendency of proceedings under the Act. I fail to see how the expression "any proceeding under the Act" in Section 281 can be read so narrowly as to limit it to pre-recovery proceedings. There is nothing in the section which warrants such interpretation. Any such interpretation would deprive an innocent transferee of the protection guaranteed under the section if property was transferred to him, although for valuable consideration, after the recovery proceedings against the assessee had commenced and of which he had no knowledge. If that had been the intention of the legislature it would have plainly stated so. On the other hand, the language of the section is clear enough to take in any proceeding at any stage of the assessment or recovery. The prohibition and protection contained in the section continue to operate until all amounts payable under the Act are paid in full. The section seeks to ensure effective recovery of tax having due regard to bona fide claims.

24. My attention has been drawn to the Taxation Laws (Amendment) Act, 1975, whereby Section 281, as it stood at the relevant time, has been substituted by a new section with effect from October 1, 1975. The new section 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."

25. Two of the basic changes introduced by this new provision are : (1) it has limited the duration of the "proceeding" contemplated u/s 281 to the period preceding the notice under Rule 2 ; and (2) the cardinal rule of evidence regarding the onus of proof contained in the original section has been discarded : whereas under the original section the burden of proving that a transfer was made with intent to defraud the revenue was placed upon the department, such burden has been done away with in the new section.

26. Counsel for the revenue contends that the new section does not limit the duration of the proceeding, as I just stated, but in fact it extends the duration to the point of service of notice under Rule 2 because, according to him, the duration of the proceeding under the original section was limited to the point of time when a demand was raised by the Income Tax Officer u/s 156.

27. I do not see how such a narrow interpretation is applicable to Section 281, as it stood at the relevant time, as in my opinion, the section was wide enough to take in all proceedings under the Act, which would include proceedings for recovery as well. The very fact that the legislature found it necessary to replace Section 281, as it originally stood, by substituting a new section in its place, shows that according to the legislature it was necessary to limit the duration of the proceeding contemplated u/s 281 to the point of time immediately preceding the service of notice under Rule 2. The legislature has also done away with the burden of proof that was cast on the revenue in regard to fraud. These are basic changes introduced by the new Section 281 and these are, according to the principles in *Heydon's case*, the remedies adopted by Parliament to cure the defects for which the earlier section did not provide. As stated by the Barons of the Exchequer :

"That for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law), four things are to be discerned and considered: (1) what was the common law before the making of the Act, (2) what was the mischief and defect for which the common law did not provide, (3) what remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth, (4) the true reason of the remedy." ([1584] 3 Co. Rep. 7a ; See *Craies*, op. cit, p. 96) In interpreting statutes according to the rules laid down in *Heydon's case*, [1584] 3 Co Rep 7 the court has to examine "not only the common law, but the law as it then stood under previous statutes, in order properly to interpret the statute in question" : *Macmillan & Co. v. Dent*, [1907] Ch 107 *Clare v. Joseph*, [1907] 2 KB 369 and *Conway v. Wade*, [1909] AC

506 . This principle will, when applied in the reverse, throw light on the earlier law. By looking at the later law which has cured the defect in the earlier law, one can have a clearer perception of the true scope of the earlier law. The meaning and scope of Section 281, as it stood at the relevant time, can be discerned by examining the changes brought about in 1975 by the amendment Act. In this connection it may be mentioned that counsel for the revenue rightly drew my attention to *Sher Khan and Another Vs. State*, where the court stated :

"Subsequent legislation on the same subject may be looked to in order to see the proper construction to be put upon an earlier Act where that earlier Act is ambiguous."

28. While the new section clearly restricts the period of time in regard to a "proceeding", the earlier section was wide enough to take in all proceedings contemplated under the Act.

29. As pointed out by the House of Lords in *Warburton v. Lowland*, [1832] 2 Dow 480:

"... No rule of construction can require that when the words of one part of a statute convey a clear meaning it shall be necessary to introduce another part of a statute for the purpose of controlling or diminishing the efficacy of the first part." (See *Craies*, op, cit. p. 99).

30. If the language of Section 281 is clear, it must receive full effect. If, however, two constructions are possible, the construction more favourable to the innocent transferee has to be preferred.

31. In my opinion, the language of Section 281 is sufficiently clear and explicit. It covers the entire field in which the Act operates--whether in regard to assessment or recovery. Rule 16 operates in a region already covered by Section 281, and the two provisions have to be read consistently with each other. There is no clash between the two; there is no repugnancy or inconsistency. The protection mentioned u/s 281 in respect of any proceeding under the Act has to be read into Rule 16 in matters of recovery as well.

32. Viewed in this light, tax recovery is a proceeding which comes within the ambit of Section 281. The officer conducting an investigation under Rule 11 has of necessity to take into account the principles stated in Section 281. His power has to be exercised in a manner consistent with the interests of an innocent transferee who has paid valuable consideration.

32. Rule 11 postulates a quasi-judicial enquiry into the claims and objections raised by a transferee of the property. The officer has to address himself to such claims and objections and satisfy himself as to their correctness or otherwise. He has to come to a satisfaction. This is not the subjective satisfaction of an administrator entrusted with purely ministerial functions. The satisfaction mentioned under the rule is the objective satisfaction of a judicial or a quasi-judicial functionary.

33. 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-1 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-1. 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.

34. A carbon copy of this judgment may be handed over to the counsel for the revenue as well as for the petitioner on payment of the usual charges.