Isha Beevi and Others

Vs

Tax Recovery Officer and Others

Civil Appeals Nos. 1489, 1499, 1159, and 1160 of 1970 and 653 and 654 of 1971

(H.R. Khanna, M.H. Beg, A.C. Gupta JJ)

05.09.1975

JUDGMENT

BEG J. -

1. These are fifteen civil appeals arising out of petitions for writs of certiorari prohibition and mandamus against certain tax recovery proceedings instituted against the heirs and legal representatives of Tangal Kunju Musaliar of Kerala, who died on February 19,1966. It appears the there were arrears of income-tax due under the Travancore Income-tax Act of 1121 M. E. (hereinafter referred to as "the Travancore Act") and other enactments on income form the cashew but export business. By an order passed on June 10, 1968 the Additional Personal Assistant of the District Collector, Quilon, functioning as the Tax Recovery Officer, attached a number of immovable properties mentioned in a schedule to the order. He purported to act under rule 48 in the Second Schedule to the Income- tax Act of 1961 (hereinafter referred to as "the 1961 Act"). He prohibited the appellants from transferring or otherwise dealing with properties in their possession on the basis of 22 certificates covering a total amount of Rs. 50,42,970.34. Some of the certificates were issued under section 46, sub-section (2), of the Indian Income- tax Act of 1922 (hereinafter referred to as "the 1922 Act"), and other under section 221 of the 1961 Act. The appellants, claiming to be in possession of immovable properties gifted in 1947, 1953, 1954 and 1956, by T. K. Musaliar objected to the attachment of their properties on the ground that the income-tax dues against the deceased could not be recovered by attachment or sale of properties belonging to the appellants. The appellants question the jurisdiction of the Tax Recovery Officer to proceed with the recovery against their properties. The appellants also contended that taxes having become due under the Travancore Act and the 1922 Act from the deceased, recovery proceedings by their attachment under the 1961 Act were not legally competent. Furthermore, they objected that all out of 22 certificates having been issued after the death of T. K. Musaliar, expressly stating that the deceased was the assessee, were prima facie invalid because neither section 66, sub-section (3), of the Travancore Act, nor section 221 of the 1961 Act warranted the issue of certificates against an assessee after his death. They submitted that as the amounts covered by the certificates issued after the death of T. K. Musaliar were tacked on to the amounts covered by the other certificate the whole attachment was vitiated. Questions of title to the properties, said to have been gifted by the deceased long ago, were also raised.

At this stage, it may be mentioned that there had been an agreement recorded in a settlement dated July 10,1957, the terms of which were binding upon the deceased and T. K. Musaliar & Sons Ltd., This related to assessments under the Travancore Income-tax Act and the Indian Income-tax Act, 1922. By clause 4 of this settlement it was agreed that the appellate authority before which an appeal in respect of these assessments were pending could enhance or reduce the assessments in

accordance with this settlement. It was also agreed that the writ petitions in connection with assessments for certain year will be withdrawn and that penal interest under section 18A of the 1922 Act will be paid, but no other penalties will be leviable in respect of the assessment years covered by this settlement.

On September 25,1957, an order signed by a Deputy Secretary to the Government of India was passed under section 9, sub-section (2), of the Travancore Taxation on Income (Investigation Commission) Act, 1124, showing that the Government accepted the terms and conditions of the settlement recorded by the Commissioner of Income-tax and directing that demand notice in accordance with the terms of the settlement be served on T. K. Musaliar for a sum of Rs. 9,15,458 and that such other proceeding under the Travancore Income-tax Act or "under any other law", as may be required, should be taken in order to enforce the payment of the amount demanded. Thus, for the amounts sought to be recovered in pursuance of the settlement, the machinery to realise under section 297(2)(j) of the 1961 Act is available according to the department.

The learned judge of the Kerala High Court before whom the writ petitions came up overruled all the objections of the appellants. He held that although the attachment order purports to have been passed under rule 48 of the Second Schedule, the Recovery Officer had authority to proceed under the Travancore Act to recover dues under that Act by recourse to the provisions of the Travancore-Cochin Revenue Recovery Act 7 of 1951. He relied upon the well-established proposition that where the power to proceed is actually there, the mere reference to a wrong section for authority to act, will not vitiate the action taken. (See L. Hazari Mal Kuthiala v. Income-tax Officer, Special Circle, Ambala Cantt. Income-tax Officer, Kolar Circle v. Seghu Buchiah Setty and P.M. Bharucha & Co. v. G. S. Venkatesan, Income-tax Officer, Circle I, Ward A, Bhavanagar. The learned judge also took the view that the income-tax dues covered by the above-mentioned settlement were realized by virtue of an order made under section 3 of the Opium & Revenue Laws (Extension of Application) Act, 1950 (33 of 1950) and the last mentioned enactment having authorised the income-tax authorities to apply the provisions not merely of the Travancore Act but of "any other law", the recovery proceedings for those year, even under the provisions of the 1961 Act, were unassailable. The learned judge also thought that as the appellants had not objected to the validity of the 11 certificates issued after the death of the deceased, when notices were served upon them under rule 85 of the Second Schedule to the 1961 Act, they were debarred from taking up such an objection in their writ petitions. As regards the title claimed to properties alleged to have been wrongly attached, the learned judge pointed out that the appellants had not only already resorted to alternative remedies by way of suits but had not yet availed themselves of their remedy by preferring objections under rule 11 of the Second Schedule to the 1961 Act. where such objections could also be decided.

A Division Bench of the Kerala High Court consisting of P. T. Raman Nayar C.J. and K. K. Mathew J., agreed with the views expressed by the learned single judge on the questions mentioned above except as regards the 11 certificates which were issued after the death of the assessee. It allowed the objections of the appellants to the extent that it held that the claims sought to be enforced under the attachment order of June 10, 1968 (exhibit P-1) will not include the arrears of income-tax mentioned in the 11 certificates issued after the death of T. K. Musaliar. The appellants have after grant of certificates of fitness of the case for appeals to this court repeated before us the submissions mentioned above.

We may point out that the reliefs claimed in the writ petitions were writs of certiorari, and mandamus and prohibition. It is clear to us after perusal of that so-called "orders" sought to be

quashed that they were only notices of commencement of recovery proceedings by attachment of certain properties. Final orders could only be passed after the appellants have had their opportunities to object under rule 11 of the Second Schedule of the 1961 Act, because the notices purport to be only preliminary notices under rule 48 of the Second Schedule to the 1961 Act. These proceedings could only be quashed even at this stage, if they were entirely without jurisdiction. Otherwise a prayer for quashing proceedings, would obviously be premature. No occasion for the issue of a writ of mandamus can arise unless the applicant show non-compliance with some mandatory provisions and seek to get that provision enforced because some obligation towards them is not carried out by the authority alleged to be flouting the law. The grievance of the appellants, however is that the Tax Recovery Officer had no jurisdiction whatsoever to start tax recovery proceedings against them. They have therefore asked for writs of prohibition. The existence of an alternative remedy is to generally a bar to the issuance of such a writ or order. But in order to substantiate a right to obtain a writ of prohibition from a High Court or from this court, an applicant has to demonstrate total absence of jurisdiction to proceed on the part of the officer or authority complained against. It is not enough if a wrong section or provision of law is cited in a notice or order if the power to proceed is actually there under another provision.

One of the identically similar notices to which objection was taken by the appellants may be reproduced here. It runs as follows :

> "From No. ITCP 16.
>
> (See rule 48 of the Second Schedule to the Income-tax Act, 1961).
>
> ORDER of Attachment of Immovable property.
>
> Office of the Tax Recovery Officer, Collector, Quilon. Dated 10th May, 1958.
>
> To
>
> Smt. Isha Beevi on behalf of minors 1. Umaiba Beevi, 2. Mymoon Beevi, 3. Mariam Beevi and 4. Safia Beevi, Kantanchaalil Veedu, Kannimelcherry, Kilokolloor, Quilon.
>
> Whereas you the legal representatives of late Shri A. Thangal Kunju Musaliar have failed to pay Rs. 50,42,970.34 payable by late Shri A. Thangal Kunju Musaliar, Cashew Exporter, Qulion, in respect of certificates mentioned in the attached statement, forwarded by the Income-tax Officer, Special Investigation Circle, Trivandrum, and Income-tax Officer, Quilon, and the interest payable under section 220(2) of the Income-tax Act, 1961, for the period commencing immediately after the said date.
>
> It is ordered that you, said Isha Beevi be and you are hereby prohibited and restrained until the further order of the undersigned, from transferring or charging the properties as per attached list in any way and that all persons be and that they are hereby prohibited from taken any benefit under such transfer or charge.
>
> Given under my hand and seal at Quilon on this 10th day of May, 1968.
>
> #SD/-Tax Recovery Officer and Addl.Personal Assistant toCollector,Quilon."##

As regards the authority of the Additional Personal Assistant to the Collector, Quilon, as the Tax Recovery Officer no objection appears to had been taken anywhere relating to his appointment in accordance with the law as the Tax Recovery Officer. The Division Bench of the High Court had held that recovery of the dues for the years 1119 to 1125 M.E. could not take place under the 1922 Act and, therefore, no proceedings for their recovery could be taken under the provisions of the 1961 Act. Nevertheless as proceedings could be taken under the Travancore Income-tax Act, it was argued before it that the "Peishkar" alone would have been competent to initiate recovery proceedings under section 66(3) of the Travancore Act. The corresponding officer, according to the appellants, was the Collector and therefore the certificates could only be forwarded it was the proceedings. The Division Bench overruled this contention on the ground that the proviso to section 13(1) of the Indian Finance Act, 1950 made it clear that the authority constituted under the provisions of the Act of 1922, empowered to proceed must be determined by resorting to the provisions of section 8(1) of the General Clauses Act, which reads as follows :

> "Where this Act, or any Central Act or Regulation made after the commencement of this Act, repeals and re-enacts with or without modification any provision of a former enactment then references in any other enactment or in any instrument to the provision so repealed shall unless a different intention appears be construed as reference to the provisions so re-enacted."

The 1922 Act was repealed by the 1961 Act. Hence, it held that section 2(44) of the 1961 Act read with section 221 of that Act, were sufficient to enable the Additional Personal Assistant to the Collector to proceed as a Tax Recovery Officer.

Section 13, sub-section(1) of the Finance Act, 1950, laid down :

> "13. (1). If immediately before the last day of April, 1950, there is in force in any Part B State other than Jammu and Kashmir or in Manipur, Tripura or Vindhya Pradesh or in the merged territory of Cooch-Behar any law relating to income-tax or super-tax or tax on profits of business, that law shall cease to have effect except for the purposes of the levy, assessment and collection of income-tax and and super-tax in respect of any period not included in the previous year for the purposes of assessment under the Indian Income-tax Act, 1922 (XI of 1922), for the year ending on 31st day of March, 1951, or for any subsequent year, or, as the case may be, the levy, assessment and collection of the tax on profits of business for any chargeable accounting period ending on or before the 31st of March, 1949 :
>
> Provided that any reference in any such law to an officer, authority, tribunal or court shall be construed as as reference to the corresponding officer, authority, tribunal or court appointed or constituted under the said Act, and if any question arises as to who such corresponding officer, authority, tribunal or court is, the decision of the Central Government thereon shall be final."

Section 46 of the 1922 Act had also laid down :

> "46. (2) The Income-tax Officer may forward to the Collector a certificate under his signature specifying the amount of arrears due from an 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."

Section 2, clause (44), of the Act of 1961 provides :

> "(44) 'Tax Recovery Officer' means -
>
> (i) A Collector or an Additional Collector;
>
> (ii) any such officer empowered to effect recovery of arrears of land revenue or other public demand under any law relating to land revenue or other public demand for the time being in force in the State as may be authorised by the State Government, by general or special notification in the Official Gazette, to exercise the powers of Tax Recovery Officer."

And, section 222(1) of the 1961 Act, lays down :

> "222. (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 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."

Hence, even if the "Peishkar" was the competent officer under the Travancore Income-Tax Act, the duties of the Peishkar as the Recovery Officer, would, by operation of the above-mentioned provision of law, automatically devolve upon the Collector or an Additional Collector or upon such officer as may be empowered by the State Government by a special or general notification in the Official Gazette "to effect recovery of land revenue or other public demand" under any law relating to land revenue or other public demand. The appellants, not having raised the question at any earlier stage that the Additional Personal Assistant to the collector was not an officer so authorised, cannot do so in appeal to this court. However, we leave it open to them to take such an objection, which really raises a question of fact as to whether the required notification was or was not made, before the Tax Recovery Officer himself. If such an objection had been taken there or even in the High Court, the relevant notification may have been produced. We are unable to see any flaw in the reasoning adopted by the High Court.

Another objection as to jurisdiction related to the lumping together of demands which were legal as well as those, which could not, according to the assessee, be covered by provisions of law. The High Court had held that 11 out of 22 certificates which had been issued after the death of T. K. Musaliar, were not legal. To that extent the demands against property attached could be said to be not covered by required certificates. Nevertheless, neither had any property been sold nor any action taken against the person of any of the appellants. The authorities relied upon by the appellants related only to either sales of properties for recovering amounts which were larger than those which were legally

recoverable or arrest of the judgment-debtor in execution of dues. The cases before us are those of attachment only. If any part of the property is illegally or unjustifiably attached, it does not really affect the jurisdiction of the Tax Recovery Officer to proceed to deal with an objection under rule 11. The High Court has held that the appellants can file all their objection under rule 11 in Schedule 2 of the 1961 Act.

It has also been stated on behalf of the department that it has no objection to the application of the procedure laid down in the Travancore Act for recovery of such dues against the appellants as are releasable from the assets of the deceased. In view of this concession, it is unnecessary for use to deal with the question whether there was any additional burden or disadvantage imposed upon the appellants by the procedure in the 1961 Act. In view of this concession, the Tax Recovery Officer will only use the procedure in the Travancore Act so far as it is possible to apply it.

For the reason given above, these appeals are hereby dismissed, but, in the circumstances of these cases, the parties will bear their own costs in this court.

Appeals dismissed.

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