

Tax Recovery Officer II, Sadar, Nagpur

Vs

Gangadhar Visrwanath Ranade (dead) through Shobha Ravindra Nemiwant (Smt)

Civil Appeal No. 3339 (Nt) of 1998

(Smt. Sujata V. Manohar, G. B. Pattanaik JJ)

10.09.1998

JUDGMENT

SMT. SUJATA V. MANOHAR, J.

1. This is an appeal from the judgment and order of 15-12-1982 of the Bombay High Court reported as Gangadhar Vishwanath Ranade (No. 2) v. Tax Recovery Officer ((1989) 177 ITR 176 (Bom) Under the impugned judgment, the High Court has set aside the attachment levied under Rule 11 of the Second Schedule to the Income Tax Act, 1961 by the Tax Recovery Officer on an immovable property originally belonging to the assessee (since deceased). The property was claimed by the wife of the assessee (since deceased) and his daughter, original Respondent 2, as in their ownership and in their possession in the objections which they had filed against attachment proceedings under Rule 11.

2. For the period relevant to the assessment years in question, the assessee was carrying on business as a partner of a firm known as the United Capital Construction Company, and also as a Contractor. For Assessment Years 1962-63, 1963-64 and 1964-65 he was assessed to income tax and the amounts of tax so assessed became final on 7-8-1967. There were also income tax demands which were outstanding for the subsequent assessment years at the time when the Tax Recovery Officer served notices on the assessee under Rule 2 of the Second Schedule to the Income Tax Act, 1961 on 21-10-1972. Thereafter on 23-10-1972 an immovable property being a residential house of the assessee in Ramdaspath, Nagpur was attached by the Tax Recovery Officer. In the objections filed by the assessee, original Respondent 1, it was stated that on 2-12-1967 he had executed a mortgage in respect of this property in favour of the Bank of Maharashtra for raising a loan of Rs. 75,000. He further stated that on 21-2-1969 he had executed a trust deed in respect of the said property in favour of his wife and his daughter. On 27-2-1969, the assessee, the original Respondent 1 had, by a registered deed, conveyed the said property to his wife and his daughter, original Respondent 2. Similar objections were filed on behalf of the wife of the assessee and his daughter, original Respondent 2 claiming that the title to the said property vested in them as full owners and they were in possession of the said property. Objections were also filed by the Bank of Maharashtra. The assessee as well as his wife and his daughter, therefore, contended that on the date when notice was issued under Rule 2 of the Second Schedule to the Income Tax Act and also on the date when the said property was attached by the Tax Recovery Officer, the property was of the ownership of the wife of the assessee and his daughter, original Respondent 2, who were also in g possession of this property. Hence the property was not liable to attachment for the dues of the assessee, original Respondent 1.

3. Thereafter a show-cause notice dated 21-1-1974 was issued under Section 281 of the Income Tax

Act as then in force, on original Respondent 1. It seems that the Income Tax Officer concerned held an inquiry, recorded evidence and passed an order dated 9-5-1974 declaring, inter alia, that the transfer in favour of the wife of the assessee and his daughter, original Respondent 2 of the said immovable property was void as against the Department under Section 281 of the Income Tax Act. This a decision was the subject-matter of challenge in earlier proceedings before the High Court. The High Court by its judgment and order dated 9-1-1981, in the case of Gangadhar Vishwanath Ranade (No. 1) v. ITO ((1989) 177 ITR 163 (Bom)) held that the proceedings taken pursuant to the declaration or expression of an opinion by the Income Tax Officer or authority under Section 281 were a mere prelude to the procedure for the recovery of tax and that the order of 9-5-1974 did not, in any way, affect the rights of the parties pertaining to the said property which could be considered in the proceedings under Rule 11.

4. By his order dated 17-9-1981, the Tax Recovery Officer in the proceedings under Rule 11 overruled the objections filed by the objectors and declared that the mortgage dated 2-12-1967, the trust deed dated 21-2-1969 and the conveyance dated 27-2-1969 were illegal and void and that the said property was liable to attachment and sale. This order of the Tax Recovery Officer was challenged by the assessee and the other respondents by filing a writ petition before the High Court. The High Court by its impugned judgment has set aside the order of the Tax Recovery Officer.

5. The High Court has upheld the contention of the respondent/s that the Tax Recovery Officer has no power, under Rule 11 of the Second Schedule to the Income Tax Act, to declare as void a transfer of property effected by the assessee during the pendency of proceedings against him under the Income Tax Act on the ground that the transfer was with the intention to defraud the Revenue and was void as against the Department under Section 281 of the Income Tax Act as it then stood. The High Court also negated the contention of the Department that by reason of the judgment of the High Court in the earlier proceedings, the respondent/s were precluded from raising such a contention.

6. The latter contention has been rightly negated by the High Court in view of the express findings of the High Court in the earlier decision in the case of the assessee and reported in Gangadhar (No. 1)² which has become final. While examining the declaration given in the present case by the Income Tax Officer under Section 281 of the Income Tax Act, the High Court had expressly held that by introduction of Section 281 in the Income Tax Act, 1961, the legislature had no intention to confer an exclusive power and jurisdiction upon the Income Tax authorities to decide the questions arising under Section 281. Section 281 merely declared what the law was. Section 281 did not prescribe any adjudicatory machinery for deciding any question which may arise under Section 281. In order to declare a transfer as fraudulent under Section 281, appropriate proceedings would have to be taken in accordance with law in the same manner as they are required to be taken under Section 53 of the Transfer of Property Act, 1882. The High Court had held the order of 9-5-1974 as merely declaratory of the intention of the Department to treat the transfer as void under Section 281 and not as a taking away the right of the respondent/s to raise objections under Rule 11.

7. The question which is now required to be answered is whether in a proceeding under Rule 11 of the Second Schedule to the Income Tax Act, the Tax Recovery Officer can declare a transfer as void under Section 281. Section 281, as it stood at the relevant time, provided as follows :

"281. 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."

8. Section 281 declares as void any transfer made by the assessee during the pendency of proceedings under the Act, with the intention to defraud the Revenue. The powers of the Tax Recovery Officer, however, under Rule 11 of the Second Schedule to the Income Tax Act are somewhat different. Under Rule 11(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. Under Rules 11(4), (5) and (6), it is provided as follows :

"11. (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 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."

9. The Tax Recovery Officer, therefore, has to examine who is in possession of the property and in what capacity. He can only attach property in possession of the assessee in his own right, or in possession of a tenant or a third party on behalf of/for the benefit of the assessee. He cannot declare any transfer made by the assessee in favour of a third party as void. If the Department finds that a property of the assessee is transferred by him to a third party with the intention to defraud the Revenue, it will have to file a suit under Rule 11(6) to have the transfer declared void under Section 281.

10. The provisions, therefore, of Rule 11 are analogous to those of Order 21 Rules 58 to 61 and 63 of the Code of Civil Procedure as they stood prior to the amendment of the Civil Procedure Code in 1976. In fact, the language of Order 21 Rules 60 and 61 is similar to the language of Rule 11(4) and Rule 11(5) of the Second Schedule to the Income Tax Act. Similarly, the language of Order 21 Rule 63 is similar to the language of Rule 11(6). Rules 59 to 62 of Order 21, prior to the amendment of

1976, provided for a C summary investigation into possession as distinct from a thorough trial of ultimate right. No doubt, it is impossible to separate altogether the question of possession and of title. Thus, if the judgment-debtor was in possession, he may have been in possession as agent or trustee for another; and this has to be enquired into. To that extent, title may be a part of the inquiry. Similarly, if the property attached is claimed by a third party who adduces evidence to show that he was possessed of the property under some kind of a title, the property will have to be released from attachment. The procedure is not meant to decide intricate questions of law as to title to the property. Therefore, where a claim is made to the property attached by someone claiming to be a transferee from the judgment-debtor and the claim is disallowed, the claimant can institute a suit under Order 21 Rule 63 to establish his title to the property. In such a suit, it would be open to the attaching creditor to plead in defence that the transfer was in fraud of the general body of creditors and was void under Section 53 of the Transfer of Property Act. Similarly, if the claim of the transferee is allowed, the attaching creditor may sue on behalf of himself and all other creditors under Section 53 of the Transfer of Property Act for a declaration that the transfer was void as it was in fraud of the creditors.

11. In the case of *C. Abdul Shukoor Saheb v. Arji Papa Rao* (AIR 1963 SC 1150) (at p. 1158) this Court considered, inter alia, the nature of proceedings under Order 21 Rules 58 to 61 prior to the amendment of the Civil Procedure Code in 1976. This Court observed :

"In the summary proceedings under Order 21 Rules 58 to 61, having regard to the terms of Rule 61, the Court is concerned only with the question as to whether the transferee is in possession of the property in his own right and not on behalf of the judgment-debtor. When a transfer is real, though it is liable to be impeached as a fraud on creditors, and the transferee has entered into possession, he would succeed in the summary proceedings, with the result that it is the defeated attaching a creditor who would have to figure as a plaintiff. ... In every case, therefore, where a transfer is real but is liable to be set aside under Section 53(1) of the Transfer of Property Act, on the provisions of Order 21 Rules 58 to 61 Civil Procedure Code, the transferee is bound to succeed in the summary proceedings and the attaching decree-holder would have to figure as a plaintiff"

This Court also held that where the suit is filed by the transferee if the decision in the summary proceedings goes against him, it is open to the attaching creditor to plead in his defence that the transaction is vitiated by fraud and is void under Section 53 of the Transfer of Property Act.

12. In the light of this discussion about the provisions of Order 21 Rules 58 to 63, if we examine Rule 11(4) of the Second Schedule to the Income Tax Act, it is clear that the Tax Recovery Officer is required to examine whether the possession of the third party is of a claimant in his own right or in trust for the assessee or on account of the assessee. If he comes to a conclusion that the transferee is in possession in his or her own right, he will have to raise the attachment. If the Department desires to have the transaction of transfer declared void under Section 281, the Department being in the position of a creditor, will have to file a suit for a declaration that the transaction of transfer is void under Section 281 of the Income Tax Act.

13. In the present case, the Tax Recovery Officer could not have examined whether the transfer was void under Section 281 of the Income Tax Act. His adjudication of the transfer as void under Section 281 is without jurisdiction. The Tax Recovery Officer has relied upon the earlier order of the Income Tax Officer dated 9-5-1974 declaring that the transaction is void under Section 281 of

the Income Tax Act. In the earlier proceedings, however, although the High Court has not set aside this order of the Income Tax Officer, the High Court has expressly held that the order amounted only to an intention or declaration on the part of the Department to treat the transaction as void under Section 281. Such a declaration cannot affect the legal rights of the parties affected under Rule 11. The High Court expressly held that the rights of the parties under Rule 11 were not affected in any way by this declaration. The Department, therefore, cannot proceed on the assumption that the transaction is void under Section 281, nor can the Tax Recovery Officer, while proceeding under Rule 11, declare a transaction of transfer as void under Section 281 by relying on the order of 9-5-1974 or otherwise. His jurisdiction relates to examining possession, and only incidentally, any question of right to possession as claimed by the objector. The High Court has, therefore, rightly set aside the order of the Tax Recovery Officer.

14. However, the right of the Department to have the transfer declared as void under Section 281 of the Income Tax Act, as it stood at the relevant time, is not thereby taken away. We are informed that the property continues to be under attachment by virtue of interim orders passed in this appeal. The Department may, if it so desires, take appropriate proceedings in accordance with the law for having the transfer declared as void under Section 281 of the Income Tax Act.

15. In the premises, the appeal is dismissed. There will, however, be no order as to costs.