

E. Radhakrishnan Vs. M.S.A. Subramania Mudaliar and anr.

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Court : Chennai

Decided On : Nov-22-1976

Reported in : (1977)1MLJ440

Appellant : E. Radhakrishnan

Respondent : M.S.A. Subramania Mudaliar and anr.

Judgement :

ORDER

G. Ramanujam, J.

1. This appeal arises out of an order passed by the lower Court rejecting the appellant's application under section 19 of the Tamil Nadu Act IV 1938 seeking for the scaling down of the decree dated 13th August, 1972, passed in O.S. No. 5038 of 1969.

2. The respondent, which is a firm, obtained a consent decree against the appellant for a sum of Rs. 19,700, as an assignee of the promissory note executed by the appellant for a sum of Rs. 15,000 in favour of one Manicka Mudaliar the second defendant in the suit, as part of the sale consideration for a bus MSY 2441 which he had purchased on 22nd December, 1966. Subsequent to passing of the said consent decree, the decree-holder, put the said decree in execution. At that stage the appellant filed an application under section 19 of the said Act for scaling down of the decree debt on the ground that he is an agriculturist as defined in the

Act and therefore, he is entitled to claim the benefit, of that Act. The application was resisted by the respondent decree-holder on the ground that though the appellantowns agricultural lands' he is not entitled to the benefits of the Act, as he apart from being a director in a transport company which owns and operates 8 route buses, individually owns, and operates the transport bus MSY 2441 on the route Madras to Vengalathur from 22nd December, 1966 and is also paying income-tax as well as profession tax for the business carried on by him. The Court below has held that though the appellant owns agricultural lands, as he is carrying on a transport business of his own by operating a bus MSY 2441 on the route Madras-Vengalathur, it should be inferred that he should have been paying the profession tax for such business and, therefore, he is not entitled to claim the benefits of the said Act. The said decision of the lower Court has been challenged in this appeal.

3. According to the learned Counsel for the appellant the order of the lower Court holding that the appellant is not entitled to the benefits of the Act IV of 1938 is erroneous, and that there is no basis for the inference drawn by the lower Court that the appellant should have been paying profession tax for the transport business carried on by him. It is also pointed out by the learned Counsel that the appellant's position as a Director of Dhanapal Bus Service Private Ltd., cannot be taken into account, that even if the said Dhanapal Bus Service Private Ltd. had been assessed to income-tax or profession tax, the appellant cannot be taken to be automatically assessed to income-tax or to profession-tax, and that as he had no other individual and separate transport business of his own, the finding of the lower Court contra is not tenable. As already stated the lower Court has held that apart from being a a director of the said Dhanapal Bus Service Private Ltd., having 192 shares out of 1000 shares in the company, the appellant was operating a bus of his own on the route Madras-Vengalathur after having purchased the same from one Manicka 'Mudaliar, the second defendant in the suit for which the suit promissory note formed part of the consideration, Toe said finding of the Court below is being challenged in this appeal.

4. It is said that though the sale agreement (Exhibit B-7) relating to bus MSY 2441 along with the route was entered into by him with the said Manicka Mudaliar on

22nd December, 1966, the bus was being operated only by Manicka Mudaliar and not by him, that the route permit has also been subsequently renewed only in the name of Manicka Mudaliar and therefore, the appellant cannot be taken to have operated the said bus on the route in question.

5. However, a perusal of the sale agreement (Exhibit B-7) shows that the bus MSY 2441 covered by the stage carriage permit to ply on the route Madras to Vengalathur has been sold to the appellant by Manicka Mudaliar for a sum of Rs. 50,000 and that the possession of the bus sold was immediately handed over to the appellant. It provides specifically that the appellant can run the bus from the date of sale, that the vendor will not lay any claim to the income derived from the bus plying on the route on and from 22nd December, 1966, that the vendor shall have no right, title or interest whatever in the vehicle after the date of the sale, and that he is liable to co operate with the appellant for procuring the permission for transfer and for obtaining renewal of the route permit till such transfer of permit is ordered. Exhibit B-7, the sale agreement, proceeds on the basis that the operation of the service has been taken over by the appellant and that he is entitled to operate on the route from the date of sale. Subsequently, when a creditor of the vendor attached his properties for realisation of the amounts due by him, the appellant had protested by issuing a notice to his vendor that the vehicle sold to him had also been attached. That notice which is marked as Exhibit B-8 also indicates that the appellant has become the owner and was possessed of the vehicle purchased by him, under Exhibit B-7. Even before the Court in an application filed by him for reducing the monthly instalments payable by him under the compromise decree, he had stated in his reply statement that the vehicle MSY 2441 is not being run and that he is not getting any income from the route (Exhibit B-6) is the certified copy of the order of the Court below rejecting the application for reducing the amount of instalment. The order refers to the reply statement filed by the appellant wherein he has admitted possession of the bus and also his operation on the route, though he would say that the route is not yielding any income. The above documents clearly disprove the case put forward by the appellant that he has not taken possession of the vehicle along with the route as per the agreement of sale (Exhibit B-7) and that Manicka Mudaliar alone continued to operate the bus on the route in question. I have to therefore agree with the

lower Court, on the materials available in the case, that the appellant has become the owner of the bus MSY. 2441 and has been operating the said bus on the route Madras to Vengalathur which he has purchased under Exhibit B-7.

6 The question then is whether the appellant who is doing a separate trans-post business by operating the bus, which he has purchased under apart from being a director in a transport company, Exhibit B-7, can be taken to be entitled to the benefits of Act IV of 1938 as an agriculturist.

7. The learned Counsel for the appellant then contends that once it is shown that he is possessed of agricultural lands, he is entitled to the benefits of the Act unless it is shown by the other side that he is not so entitled in view of the exceptions contained in the Act, that the onus of proving that he is not entitled to the benefit of the Act is on the decree-holder and that the said onus has not been duly discharged in this case. The learned Counsel refers to the decision in Sundaresan Chettiar v. Muthuvelavendxn : AIR1976 Mad73 . in support of his stand that the burden is upon the creditor to prove that the debtor is not entitled to the benefits of the Act, once the debtor is shown to have owned agricultural lands. In that case after referring to three earlier decisions, Ismail, J., observed that the burden of proving that a person who has a saleable interest in agricultural land comes within the scope of one or the other of the provisos to section 3 (ii) of Madras Act IV of 1938, is on the creditor. The decisions referred to by the learned Judge are: Veerayya v. Sivagami Achi (1949) 2 M.L.J. 688 : 62 L.W. 819 : A.I.R. 1949 P.G. 319. Periasami Filial v. Sivathia Pillai : AIR1941 Mad112 . and Suryanarayanamurthi v. Satyanarayanamurthi : AIR1946 Mad264 . In Vcerayya v. Sivagami Achi (1949) 2 M.L.J. 688 : 62 L.W. 819 : A.I.R. 1949 P.G. 319. the Judicial Committee had expressed the view that in the first instance the burden was upon the debtors to show that they were agriculturists, that once they showed that they fall within the definition of agriculturists, they would be entitled to the relief, unless they are deprived of the privilege by one of the provisos, and that the burden would lay upon any one so asserting to prove his case. In, Periasami Pillai v. Sivathia Pillai : AIR1941 Mad112 . a Bench of this Court had expressed the view that the judgment-debtor who claims to be an agriculturist has to first establish a prima facie case that he falls under one of the categories enumerated in section 3

(ii) (a) to (d) of the Act and then the burden shifts to the respondent to show prima facie that the appellant is excluded by one or other of the provisos to that section, If that is done, the burden again shifts on the judgment-debtor to adduce materials which are specially within his knowledge and have a bearing on the applicability of the provisos. The same view has been reiterated in *Suryanarayanamurthi v. Satyanarayanamurthi* : AIR1946 Mad264 . by observing that when once a person is shown to have a saleable interest in any agricultural land the burden of proving that he is disentitled to get the benefit under one or other of the four provisos to section 3 (ii) of the Act lies upon the creditor. The learned Counsel relying on the above decisions contends that it is for the respondent decree-holder to prove affirmatively that the appellant falls within any of the four provisos set out in section 3 (ii) and that no proof has been adduced by him in this case to-show that the appellant comes within any of the provisos.

8. As already stated, the lower Court has held that from the materials placed by the creditor, it could be inferred that the appellant has paid profession tax for the separate transport business carried on by him. The learned Counsel is not right in his submission that the onus is always on the decree-holder to prove that the appellant is not entitled to the benefits of the Act. The decisions referred to-above clearly recognise the principle that the onus will shift, to the judgment-debtor if the material placed before the Court by the creditor leads to the inference that the judgment-debtor would fall within the proviso and in such a case he has to prove that the said inference is not possible and that he does not fall within the proviso. As already stated in this case the appellant denied that he has got any separate transport company Dhanapal Bos Service Private Ltd. But as already found on the documents filed by the decree-holder the appellant has been carrying on a separate transport business from December, 1966. Once the appellant is shown to have been carrying on a transport business by operating a bus on the route Madras to Vengalathur which he had acquired by purchase from Manicka Mudaliar under Exhibit B-7, it is possible to infer that he has been assessed to profession-tax from December, 1966 onwards for the business carried on by him. In such an event the burden shifts to the appellant and it is for him to establish by adducing the necessary evidence that he has not, in fact, been assessed to profession-tax either for the reason that he does not have the requisite turnover or that he is not

liable to pay profession tax. As has been pointed out by the Bench of this Court in *Periasami Pillai v. Sivathia Pillai* : AIR1941 Mad112 . when the decree holder had produced materials prima facie to show that the judgment-debtor is excluded by one of the provisos it is for the judgment-debtor then to adduce materials which are specially within his knowledge and have a bearing on the applicability of the provisos. Admittedly, in this case, the appellant has not gone to the witness box and has avoided the Court. Whether he was in fact assessed to profession tax is exclusively a matter within his knowledge but he has chosen to avoid Court by merely saying that the onus was on the decree-holder to prove that he had been assessed to profession-tax. Once the decree-holder proves that the appellant has been doing a separate transport business of his own, it can be presumed that the appellant would have been assessed to profession tax in relation to his carrying on such business. The learned Counsel for the appellant would say that since the permit for the route still continued to be in the name of the vendor, the business should be deemed to have been conducted by the vendor. But in this case, it has been shown that the appellant was operating the bus which he purchased on 22nd December, 1966, even though the permit for the route stood in the name of his vendor. That is, in fact, the agreement, Exhibit B-7, entered into between the parties. The agreement specifically provides that till the transfer is recognised by the transport authorities the route will be operated only by the appellant and the vendor has no interest in the subsequent business carried on by him. In this case the ultimate onus which shifted to the appellants has not been discharged by him, and, therefore, the inference could be drawn on the materials adduced by the respondent that the appellants should have paid the profession tax for the period referred to in the proviso.

9. In the result, no interference is called for in this appeal. The appeal is dismissed. There will be no order as to costs.