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Court : Mumbai

Decided On : Feb-04-2011

Judge : V.C.Daga; R.M.Savant, Jj.

Acts : [Constitution of India](#) - Article 226

Appeal No. : WRIT PETITION NO. 1770 OF 2010

Appellant : Shri Sagar Sharma and anr.

Respondent : The Additional Commissioner of Incometax. and ors.

Advocate for Def. : K.R.Choudhari, Adv.

Advocate for Pet/Ap. : Soli Dastoor; Niraj Seth, Santosh Srivastava; Ms.Daya Gupta, Advs.

Judgement :

1 This petition, filed under Article 226 of the [Constitution of India](#), is directed against the certificate dated 13th September, 2000 issued by respondent No.1 directing respondent No.2 to recover arrears of tax as due and recoverable from the deceased father of the petitioners followed by the order of attachment dated 5th March, 2003 together with prohibitory order dated 11th September, 2003 and notice dated 5th November, 2009 for settling proclamation of sale with ultimate action dated 14th January, 2010 leading to the sale by public auction and final

order dated 6th May, 2010 rejecting objections taken by the petitioners contending that they are bad and illegal and contrary to the provisions of the Income Tax Act, 1961 ("Act" for short).

The Facts :

2 The facts in short are that on 18th March, 1978, the Trust known as M/s.Ekta Trust ("said Trust" for short) was formed for the benefit of three minors, namely, Sagar Sharma, Vishal Sharma and Gagan Sharma, all three sons of Late Harishchandra N. Sharma (H.N.Sharma). The said Trust was settled by two Settlers Mr.Atul Desai and Mr.Shamit Mazumdar with an initial corpus of Rs.20,000/. Thereafter, the said Trust received Rs.10,00,000/ as a donation from one Mr.S.L.Sharma from Dubai. The Trust claimed to have purchased two flats Nos.14A and 14B situated on 14th floor of Vidya Apartments, Off C.Loyalka Marg, Chowpatty Ban Stand, Mumbai 400 006 and shares of Hotel Horizon Pvt.Ltd. from the funds received by it. The said Trust is assessed to income tax and wealth tax; wherein the Trust claimed to have disclosed the details of the funds received and investments made and that they were examined and accepted by tax authorities from time to time.

3. The petitioners claim that M/s.Ekta Trust distributed its income, funds and properties to its beneficiaries from time to time and that the beneficiaries used the monies received from the said Trust to purchase shares of M/s.Hotel Horizon Pvt.Ltd., which, according to the petitioners were disclosed by the beneficiaries in their income tax and wealth tax returns. According to the petitioners, all the shares were acquired by the petitioners along with their brother Mr.Gagan Sharma in their own individual capacity without any connection with Late Shri H.N.Sharma, who was assessed to income tax in his personal capacity. The demand to the tune of Rs.1.13 crore was raised against him for the assessment year 1992-93.

4. The petitioners state that the Income Tax Department started pursuing recovery of tax arrears of Late H.N.Sharma from the petitioners and their brother and mother in their capacity as legal heirs of the deceased.

5. The petitioners claim to have appeared before the respondent No.2 from time to time and explained that they and their brother and mother have not acquired any assets from the estate of the deceased and that whatever assets they have are owned by them in their individual capacity acquired from their own sources.

6. It appears that respondent No.2, on 5th March, 2003, proceeded to issue order of attachment of flats owned by M/s.Ekta Trust. The said attachment was objected by the petitioners by writing letter dated 19th March, 2003 explaining therein the facts of the matter and stating that they owned the assets independently and that they had not inherited the same from the estate of Late H.N.Sharma.

7. It appears that the respondent No.2 issued prohibitory order dated 11th September, 2003 with respect to shares owned by the petitioners and their brother and mother.

8. Being aggrieved by the said action of respondent No.2, petitioners filed petition before respondent No.3 for vacating and lifting the attachment order on the flats and the prohibitory order on the shares owned by the petitioners. The said petition was heard by respondent No. 3, who, vide its order dated 18th December, 2008, decided the petition holding it to be without any merit. The petitioners claim to have filed review petition on 6th February, 2009.

9. It appears that the petitioners were served with notice dated 5th November, 2009 to settle proclamation of sale of the flats at Vidya Apartments alleged to be belonging to M/s.Ekta Trust for the recovery of the alleged arrears said to be against Late H.N.Sharma. The petitioners claim that again they filed detailed compilation of documents dated 19th December, 2009 disputing their liability to pay and requested for lifting attachment and prohibitory order. It appears that the respondent No. 3, vide letter dated 14th December, 2009, informed the petitioners that no further orders were necessary since the matter had already been decided.

10. On 14th January, 2010, the respondent No.2 issued proclamation of sale fixing the public auction of the flats belonging to the said Trust on 16th February, 2010 at 3.00 p.m.

11. Being aggrieved by the aforesaid action of the Department, the petitioners filed W.P.No.263/2010 before this Court with identical prayers incorporated in the present petition. The said writ petition was disposed of by this Court vide order dated 10th February, 2010 recording an arrangement that the petitioners shall file their reply to the showcausenotice issued by the Tax Recovery officer, the respondent No.2 under rule 11 of the Second Schedule of the Act and the respondent No.2 was directed to consider the same on its own merits within a period of twelve weeks from the date of receipt of the reply that may be filed by the petitioners making it clear that in the event the order is adverse to the petitioners no coercive steps to be taken by the respondents for a period of four weeks from the date of communication of the order.

12. It appears that after disposal of the above petition, the petitioners vide their letter dated 20th February, 2010 filed additional objections in reply to the notice dated 28th October, 2003 reiterating therein that the subject flat Nos.14A and 14B located in the housing society and the shares of Hotel Horizon Pvt.Ltd. were not assets acquired from the estate of Late H.N.Sharma. The petitioners were represented by their Chartered Accountant and they were heard and, thereafter, the respondent No.2 passed a reasoned order dated 6th May, 2010 holding that the said flats and shares were not purchased by M/s.Ekta Trust or the petitioners from their own shares but they were benami transactions of Late H.N.Sharma. The respondent No. 2, thus, rejected all the contentions raised by the petitioners. Now, the petitioners not satisfied with the said order have invoked writ jurisdiction of this Court to challenge the various actions of the Department as mentioned in the opening part of this order.

Rival Submissions :

13. Mr.Dastoor, learned senior counsel appearing for the petitioners urged that Late H.N.Sharma died intestate. He had not left any assets to the knowledge of his legal heirs and that recovery certificate was issued by respondent No.1 seeking recovery from the legal heirs of the deceased without ascertaining whether or not the legal heirs inherited any assets from the deceased though it was incumbent on his part to ascertain before issuing such notice.

14. Mr.Dastoor further submitted that the actions of respondent Nos.1 and 2 are in contravention of subsections (4) and (5) of section 159 of the Act, which provides that a legal heir is liable to pay out of the estate to the extent the estate is capable of meeting that charge. He further submitted that two flats and the shares of Hotel Horizon Pvt.Ltd. are held by the petitioners in their individual capacity out of their own sources and without in any way connected with the deceased or the estate left by him.

15. Mr.Dastoor pressed into service various orders passed by the Assessing Officer under the provisions of the Income Tax Act and Wealth Tax Act to establish independent source of funds. He also pressed into service various correspondence exchanged between the Income Tax Department and the petitioners and went on to urge that the entire action of the respondents is bad and illegal.

16. Mr.Dastoor placed heavy reliance on the Division Bench judgment of this Court in the case of Sundarlal Daga v. T.R.O., 1997 225 ITR 10 and urged that subrules (4) and (5) of rule 11 of the Second Schedule of the Act bring out the real scope of an enquiry under rule 11 by the Tax Recovery Officer upon objections raised to the sale of immovable property in recovery proceedings. According to him, subrule (3) states that the burden is on the claimants to adduce evidence and to prove that the property at the relevant time was in their possession independent of the defaulter. Thus, according to him, the central point to be adjudicated in a proceeding under rule 11 being possession, the said issue ought to have been decided by the Tax Recovery Officer which, according to him, he failed to consider.

17. Mr.Dastoor further urged that adjudication of title is not warranted in an enquiry under rule 11. The question of title may become relevant incidentally to decide the character of the possession. The role of title in relation to rule 11 is limited to that extent only. He, thus, submits that the first enquiry ought to have been made as to who is in possession and then the character of possession ought to have been considered. He also placed reliance on the judgment of the Himachal Pradesh High Court in the case of Smt.Darshana Aggarwal v. Tax Recovery Officer, (2008)

302 ITR 82 (HP) to contend that if the Department is of the view that the petitioners are holding property benami then the Department ought to have established its claim by filing suit. In that view of the matter, he submits that the order of proclamation of sale issued by the Tax Recovery Officer and the order of attachment are wholly without jurisdiction. He submitted that the Tax Recovery Officer has no jurisdiction to determine the question whether or not the property was held benami by the petitioners. He also placed reliance on the judgment of this Court in the case of Gangadhar Vishwanath Ranade v. T.R.O., (1989) 177 ITR 176 affirmed by the Apex Court in the case of T.R.O. v. Gangadhar Vishwanath Ranade, (1998) 234 ITR 188.

18. Per contra, Mr.Choudhary, learned counsel appearing for the Revenue urged that the question whether at the time of service of notice of attachment the petitioners were not in possession of the property being a disputed question of fact cannot be gone into in the writ jurisdiction of this Court. In his submission, rule 11(6) of Second Schedule of the Act provides for an alternate remedy as such this petition should not be entertained. He placed reliance on the judgment of Division Bench of this Court in the case of Emar Hotels and Investments P.Ltd. v. T.R.O., (2007) 288 ITR 308 (Bom.) and that of the Calcutta High Court in the case of Munir Ahmed v. Union of India, (2002) 256 ITR 492 in support of his submission.

19. Mr.Choudhary, in the oral submission urged that according to the petitioners themselves, the attached properties are owned by M/s.Ekta Trust formed for the benefit of three minor sons of Late H.N.Sharma, namely, Sagar Sharma, Vishal Sharma and Gagan Sharma. That the petition is filed only by Mr.Sagar Sharma and Mr.Vishal Sharma and not by Mr.Gagan Sharma. That Gagan Sharma is not even made party respondent to the petition. He, thus, submits that the impugned order being joint and indivisible the same has become final and conclusive against the left out beneficiary Mr.Gagan Sharma as such no order running counter to the impugned order can be passed by this Court. In other words, in the same lis there cannot be two contradictory or inconsistent orders running counter to each other. He, thus, submits that the present petition is liable to be rejected at the threshold for nonjoinder of necessary parties. Incidentally, he urged that even the title holder M/s.Ekta Trust is also not a party to the petition. Under these circumstances, the

said petition is liable to be dismissed on this count also. In support of his submission, he placed reliance on the judgment of the Division Bench of this Court in the case of Sheela Wd/o. Vijay Choudhary and ors. v. Central Bank of India and ors., 1998 (4) ALL MR 173.

20. In rejoinder, Mr.Dastoor urged that Mr.Gagan Sharma, who has 1/3 undivided interest, is not a necessary party to the petition because the earlier Writ Petition No. 263/2010 challenging attachment and threatened sale of the properties was filed only by the present petitioners. In other words, according to him, Mr.Gagan Sharma had not filed any objection under rule 11 as such Mr.Gagan Sharma could not have filed writ petition or become party in the present petition. According to him, a person is joined as party respondent, if he could have initiated proceeding but for the reason best known to him, he has chosen not to join petitioners who have initiated the action. In other words, according to him, Mr.Gagan Sharma did not object under rule 11 as such he was not a necessary party to be joined as a petitioner or party respondent. Reliance was placed on the judgment of the Apex Court in the case of Mahendra Lal Jaini v. State of U.P., AIR 1963 SC 1019 to contend that rule of joining necessary parties is applicable in suits and not in the writ petitions. He tried to contend that in a suit by a coowner landlord against heirs of statutory tenant for possession, other coowners are not necessary parties and placed reliance on the judgment in the case of Rampasricha v. Jagannath, AIR 1976 SC 2335. He further submits that at any rate no such objection was raised in reply to the petition and that the judgments relied upon by the Department are of no consequence. He, thus, submits that this is a fit case for entertaining writ petition at the instance of the present petitioners only.

21. Both the advocates canvassed their submissions on the merits of the matter in support of their rival contentions, which we do not propose to recapitulate for the view taken.

Consideration :

22. Having heard learned counsel for the rival parties, at the outset, two preliminary issues sought to be raised by the Revenue need to be considered.

23. The second objection taken up for consideration first relates to the nonjoinder of the necessary party. It is not in dispute that the property is owned by M/s.Ekta Trust. The said Trust is neither the petitioner nor arrayed as party respondent. The said title holder of the attached property is not before the Court. The said Trust has neither raised any objection to the attachment nor challenged the action of the Department. The petition is filed by Mr.Sagar and Mr.Vishal Sharma. Mr.Gagan Sharma, the third beneficiary is neither petitioner nor arrayed as party respondent. The impugned order is suffered by three persons i.e. Sagar, Vishal and Gagan Sharma each having 1/3rd undivided interest as beneficiary. The impugned order including the order of attachment was suffered by all the three brothers.

24. At this juncture, it is relevant to note that the tenor of the objections raised on 20th February, 2010 by the petitioners in reply to the show cause notice dated 28th October, 2003 would show that the objections were on behalf of Sagar, Vishal and Gagan Sharma, which is clear from the averments incorporated therein extracted herebelow:

"In view of the facts stated above, attachment brought out by you on the abovementioned assets owned by Ekta trust, Sagar Sharma, Vishal Sharma and Gagan Sharma is patently illegal and therefore you are requested to kindly withdraw the same immediately."

(emphasis supplied)

The objections though were signed by Mr.Sagar and Mr.Vishal Sharma, none the less fact remains that they were for and on behalf of all three brothers. In this view of the matter, the contention raised by Mr.Choudhary leading to nonjoinder of necessary party needs consideration in depth.

25. If one has to understand the concept of the Trust the owner of the trust property in Indian Law is one and one alone, namely, the trustee. In *Chattra Kumari v. Mohan Bikram*, AIR 1931, PC 196, the Privy Council observed as under:

"The trustee, in their Lordships' opinion, is the owner of the trust property. Under the Law of India there can be but one owner, and where the property is vested in a

trustee, the owner must be a trustee to whom the property is transferred as required by Sec.6 of the Act."

26. In *Shukoor v. Jagaiya*, AIR 1924 Nag 335, the Court ruled that in a suit for eviction of a lessee, one trustee alone can institute a suit by making other trustees, who refused to join, defendants along with the lessee.

27. In *Atma Ram v. Gulam Hussain*, AIR 1973 Guj 113 (FB), it was held that a suit to recover a possession after determination of tenancy can be filed only by all the trustees joining together and not by one trustee elected unanimously as managing trustee. Unwilling ones may be made defendants.

28. In *Bachchu Lal v. ObiUllah*, ILR 11 Cal 338, the Vice President of a trust filed a suit. It was held that the suit was not maintainable because the general rule is that if several persons have a joint right of action, then all must be joined.

29. In *Vedakannu v. Anna Dana*, AIR 1938 Mad 982, cotrustees as such form, as it were, one trustee. The office of the trustee being thus a joint one the duties of the office must be performed jointly. They must exercise the powers of the office in their joint capacity. The principle behind this law is best stated by the Rajasthan High Court in *Ramdas Trust v. Damodardas*, 1967 Raj LW 273.

"A trust is not a juristic person. "It is the trustees who are the owners of the trust property, ... The author of the trust reposes or declares his confidence in the trustees and they accept it. By the very nature of this relationship, the subjectmatter of the trust, which is called the trust property, is transferred to the joint ownership of the trustees and it does not belong to any one of them singly."

(emphasis supplied)

In *Chhatra Kumari v. Mohan Vikram* (supra), it was held:

"The trust property is transferred to the joint ownership of the trustees, and it does not belong to any one of them singly."

All the trustees, whatever their number, are joint owners of the trust property has been pronounced in several decisions. The principle is that each of them is the

owner, but only jointly with others. They are not co owners as envisaged in sections 44 and 45 of the Transfer of Property Act, each having a distinct or apportionable share. The trustees of the trust property are joint owners of the whole.

30. In *Vedakannu v. Anna Dana* (supra), the Court held that no suit in regard to trust properties would be maintainable by only one or some of the trustees, if the other trustees are not before the court, either as plaintiffs or even as defendants, because the office of trustees is a joint one and cotrustees altogether form one trustee. This view appears to be a settled view affirmed by the Supreme Court in the case of *L.Janakirama Iyer v. P.M.Nilkanta Iyer*, AIR 1962 SC 633.

31. In the case of *Shri Bakshish Singh v. Arjan Singh*, (1966) 3 SCR 295, one Mathra Singh, plaintiff No.1 and defendant Nos.1 to 13 were partners of the factory known as Modern Ice Factory at Gurdaspur. A suit was filed for dissolution of partnership and rendition of accounts. The trial Court dismissed the suit and appeal was also dismissed. While second appeal was pending, two of the partners died and their legal representatives were not brought on record. Consequently, the High Court dismissed the second appeal as having abated as against all the respondents. In the appeal by special leave, the Hon'ble Supreme court held as under:

"(5) It would, therefore, be clear that the High Court has not committed any error of law. Since the appeal has already got abated as against the deceased respondents, the Court cannot proceed further on merits. Equally, the same situation is confirmed in this appeal also. Since respondents Nos. 8 and 14(i) had already died and their rights have become final, since their legal representatives have not been brought on record and the appeal stands abated as against them, it would be inconsistent if we go into the merits of the matter as against the contesting respondents in this appeal. Under these circumstances, this appeal also stands abated at against, all the respondents."

The aforesaid view is followed by the Division Bench of this Court in *Sheela Wd/o. Vijay Choudhary and ors. v. Central Bank of India and ors.* (supra); wherein the question involved was whether the appeal was abated against all the defendants

after deleting the name of legal heir of the original respondent No.2 during the pendency of the appeal. The Court held that when the decree is single and indivisible, there cannot be inconsistent decrees as against the deceased respondents and the contesting surviving respondents. In other words, there cannot be two inconsistent orders in one litigation. The said view is based on the judgment of the Apex Court in the case of Babu Sukhram Singh v. Ram Dular Singh and ors., AIR 1973 SC 204 to reiterate the very same contentions. The ratio is that there cannot be two inconsistent decrees in one litigation.

32. Be that as it may, even if it is assumed that the writ petition was maintainable at the instance of the beneficiaries, then each of them is beneficiary of 1/3rd undivided share in the attached properties. If only two persons having 2/3rd share are challenging the order and the third person having 1/3rd share is not challenging the impugned order or he is not even before the Court as party respondent, then the impugned order becomes final and conclusive so far as 1/3rd interest of the third beneficiary (Mr.Gagan Sharma) is concerned. In this scenario, in our considered opinion, this petition cannot be entertained at the instance of only two joint beneficiaries, especially, in absence of third joint beneficiary.

33. At this juncture, it is relevant to mention that during the course of hearing, the petitioners were asked by this Court as to whether they would like to join the third beneficiary as a party respondent to the petition. In reply, the doctrine of *dominus litis* was pressed into service and reliance was placed on the judgment of this Court in the case of *Devchand Constructions v. Board of Trustees of the Port of Mormugao*, 2006 (5) Mh.L.J. 644 to contend that the petitioners cannot be forced to join any party against their desire. That is how unwillingness to join left out beneficiary was demonstrated.

34. In the above view of the matter, in our view, the law relating to joining of the necessary party is very much applicable to the writ petition. This petition, therefore, cannot be entertained since the impugned order to the extent of undivided 1/3rd interest of one of the co beneficiaries (Mr.Gagan Sharma) has become final and conclusive against him. No inconsistent order in the same *lis* can be passed by this Court.

35. The next objection raised by Mr.Choudhary also needs to be sustained in view of the law laid by this Court in the case of Emar Hotels and Investments P.Ltd. (supra); wherein the petition filed against the identical order rejecting objections under rule 11 of the second Schedule of the Act was rejected by this Court relegating the petitioners therein to an alternative remedy.

36. There are three classes of cases in which a liability might be established, founded upon statute. One is where there was a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law; there, unless the statute contains words which expressly or by necessary implication exclude the common law remedy, the party suing has his election to pursue either that or the statutory remedy. The second class of cases is, where the statute gives the right to sue merely, but provides no particular form of remedy; there, the party can only proceed by action at common law. But there is a third class, viz., where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it The remedy provided by the statute must be followed.

37. In this context, it is also useful to refer the following decisions:

In Punjab National Bank v. O.C.Krishnan, (2001) 6 SCC 569, the Apex Court held as under:

"6. The Act has been enacted with a view to provide a special procedure for recovery of debts due to the banks and the financial institutions. There is a hierarchy of appeal provided in the Act, namely, filing of an appeal under Section 20 and this fasttrack procedure cannot be allowed to be derailed either by taking recourse to proceedings under Articles 226 and 227 of the Constitution or by filing a civil suit, which is expressly barred. Even though a provision under an Act cannot expressly oust the jurisdiction of the court under Articles 226 and 227 of the Constitution, nevertheless, when there is an alternative remedy available, judicial prudence demands that the court refrains from exercising its jurisdiction under the said constitutional provisions. This was a case where the High Court should not have entertained the petition under Article 227 of the Constitution and

should have directed the respondent to take recourse to the appeal mechanism provided by the Act."

In *State of H.P. v. Gujarat Ambuja Cement Ltd.*, AIR 2005 SC 3836, the Apex Court observed as under:

"17. We shall first deal with the plea regarding alternative remedy as raised by the appellant State. Except for a period when Article 226 was amended by the Constitution (Fortysecond Amendment) Act, 1976, the power relating to alternative remedy has been considered to be a rule of selfimposed limitation. It is essentially a rule of policy, convenience and discretion and never a rule of law. Despite the existence of an alternative remedy it is within the jurisdiction of discretion of the High Court to grant relief under Article 226 of the Constitution. At the same time, it cannot be lost sight of that though the matter relating to an alternative remedy has nothing to do with the jurisdiction of the case, normally the High Court should not interfere if there is an adequate efficacious alternative remedy. If somebody approaches the High Court without availing the alternative remedy provided the High Court should ensure that he has made out a strong case or that there exist good grounds to invoke the extraordinary jurisdiction."

38. Mr.Dastoor placed heavy reliance on the judgment of the Gujrat High Court in the case of *Shardaben Jayantilal Shah v. R.S.Belsare*, T.R.O., (1978) 112 ITR 156 (Guj.) to contend that alternate remedy must be provided in the law in which a particular action or an order is made. In our view, the said submission is misplaced for two reasons. Firstly, the said judgment was delivered by the Gujrat High Court on 30th June, 1977 when the fundamental right guaranteed under section 91(f) was very much available in the Constitution. Consequently, the Gujrat High Court observed that the case in their hand was covered under clause (a) of Article 226 itself because the fundamental right of holding property of the petitioners therein in the shape of compensation moneys awarded to them in their own right was directly violated by the ultra vires order of the Tax Recovery Officer. Secondly, the foundation of this judgment is based on the text of original subclause (3) of Article 226 of the [Constitution of India](#). Subsequent to the judgment delivered by the Gujrat High Court, Article 226 was amended and the original subclause (3) thereof

was deleted and substituted with the present subclause (3) by the Constitution (Fortyfourth Amendment) Act, 1978 with effect from 1st August, 1979. In this view of the matter, the reliance placed on the said judgment in *Shardaben Jayantilal Shah* (supra) is misplaced. Even otherwise, suit may be a common law remedy but once it becomes a part of the statute under which the order is passed it partakes the character of statutory alternative remedy provided by the statute.

39. It is no doubt true that existence of alternative remedy is not generally a bar, but when the case involves disputed questions of fact warranting appreciation of evidence, this Court is expected not to enter into that territory.

40. On the above canvass, if the alternate remedy is available to the petitioners, we do not propose to deal with the matter on merits. We leave the petitioners to their remedy provided in the statute. Needless to mention that in the event the petitioners file a properly constituted suit, this order shall not come in their way and the suit shall be dealt with and decided on its own merits in accordance with law since we have not dealt with the rival contentions on the merits of the matter. All rival contentions on merits are kept open.

40. We direct the respondents not to proceed with the recovery proceedings for a period of six weeks from today. During this period, petitioners shall be free to approach alternate remedy, if advised.

41. In the result petition is dismissed in limine with no order as to costs.

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