

**(2001) 04 AP CK 0017**

**Andhra Pradesh High Court**

**Case No:** C.M. Appeal No. 3424 of 1999 17 April 2001

Puvvada Bhaskara Rao

APPELLANT

Vs

Tax Recovery Officer

RESPONDENT

---

**Date of Decision:** April 17, 2001

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Section 80
- Income Tax Act, 1961 - Section 222, 224, 293
- Limitation Act, 1963 - Section 14

**Citation:** (2001) 117 TAXMAN 659

**Hon'ble Judges:** Ghulam Mohammed, J; B. Subhashan Reddy, J

**Bench:** Full Bench

**Advocate:** D. Ramalinga Swamy, for the Assessee, A.S. Ashok, for the Revenue, for the Appellant;

---

**Judgement**

Ghulam Mohammed, J.

This appeal is directed against the judgment and decree dated 26-7-1999 passed in O.S. No. 42 of 1996 on the file of the Additional District Judge, Vizianagaram, dismissing the suit of the plaintiff on the ground that rule 9 of the Second Schedule of the Income Tax Act, 1961 (hereinafter referred to as "the Act") is not attracted in view of the bar contained under rule 86 of the Second Schedule and sections 224 and 293 of the Act.

2. The plaintiff is the appellant herein, who filed the suit to set aside the summary order dated 16-12-1988 in O.P. No. 165 of 1980-81 passed by the first defendant/Tax Recovery Officer, Visakhapatnam, holding that the plaintiff is resident of Vizianagaram and is an assessee during the year 1970-71 vide file No. 710 on the file of the TRO. The Income Tax Officer issued a certificate u/s 222 of the Act against the plaintiff to realise the arrears of tax. The said tax was due from the benami business made by the first plaintiff in the name of N.H. Rao & Company and he disclosed the

said benami business on 19-1-1966 which was accepted by the Income Tax Department and, accordingly, a revised assessment was made taking into account his share in the profits of the firm. But, the Income Tax Department did not give credit to the tax paid by the benamidars. The plaintiff" represented to the Commissioner, who directed his subordinates to give credit to the taxes paid by the benamidars. On 19-8-1980, the petitioner filed a petition before the Commissioner, Visakhapatnam, with a statement showing payment made by the benamidars towards the tax. There was no response to the said representation. On 30-8-1980, the petitioner issued notice u/s 80 of the Code of Civil Procedure, 1908 for which a reply was issued by the Income Tax Department dated 23-9-1980 stating that credit of Rs. 99,405 was given to the plaintiff from out of the taxes paid by the benamidars as per the agreement dated 29-9-1965. Dissatisfied with the reply, the plaintiff filed a petition before the Commissioner on 29-9-1980 requesting to collect the evidence and information regarding the amount lying with the third parties belonging to the benamidars at Calcutta. The Commissioner, in turn, directed the plaintiff to approach the Income Tax Officer. On 3-10-1980 the plaintiff filed a petition before the Income Tax Officer, B Ward, Visakhapatnam, with a request to depute some official to verify the payments made through various banks at Calcutta by the benamidars. The Income Tax Department, West Bengal, refused to furnish such information. Thereafter, the Commissioner, Income Tax Department, Visakhapatnam, deputed one G. Narsimha Murthy, the then Income Tax Officer, Ward-B, Visakhapatnam to go to Calcutta and directed the plaintiff to depute one person to assist him in verifying the correctness of the plaintiff's claim of the payments made by his benamidars. Accordingly, one Subba Raju, accompanied the Income Tax Officer to Calcutta. After verification, the Income Tax Officer prepared notes of payments of benamidars through various banks and amounts lying with the third parties and obtained necessary information from the office concerned and sent a letter dated 12-1-1981 to the plaintiff giving credit of Rs. 74,866. Again, the plaintiff on 3-3-1981 requested the Commissioner to direct the Income Tax Officer to give credit to some more payments made by the benamidars to an extent of Rs. 1,32,437 and furnished the details. The Income Tax Officer was directed to verify the details of the plaintiff together with the list of payments made thereon. On verification, the Income Tax Officer, B-Ward, through letter dated 26-3-1981, informed the plaintiff that an amount of Rs. 13,800 was not supported by any challan and admitted that the other amounts were paid by the benamidars of the plaintiff and that there are no arrears to be paid by the plaintiff. It is stated that in spite of the above, in order to harass the plaintiff and to squeeze more money, the department without amending the certificate under question, has illegally brought to sale the property of the plaintiff. Hence, on 23-3-1981 the plaintiff filed a petition under rule 9 of Schedule 11 of the Income Tax Act before the TRO and that the said matter was adjourned from time to time for a period of two years without any action thereon. It is further stated that the defendants 1 and 2 in collusion and with all intention to apply more pressure on plaintiffs to collect more amount to the tune of

Rs. 3,85,000 as per the illegal certificate and that the plaintiffs filed a written representation. The plaintiff received a notice dated 29-4-1984 from the TRO and an order dated 23-4-1984 in O.P. No. 165 of 1980-81 was passed rejecting the contentions of the plaintiff and he was ordered to pay Rs. 4,24,883 before 31-3-1984.

3. Aggrieved by the above order, the plaintiff filed a suit O.S. No. 268 of 1984 on the file of the sub-court, Visakhapatnam. On considering the matter, the sub-judge, Visakhapatnam, set aside the impugned order holding that the same was not based on legal principles and remanded the matter to first defendant directing the authority to dispose of the matter in accordance with law.

4. Against the said order, no appeal was filed by the defendants, and defendants kept the matter pending without any reason and surprisingly,, without issuing any notice, took up the matter on 12-8-1987 and passed the orders on 21-1-1988. Thus, it is contended by the plaintiff that the said action of the second defendant is barred by the principles of res judicata as first defendant vide letter dated 24-9-1987 had admitted the amount and given credit to the plaintiff.

5. It is further averred that the first defendant did not give credit to an amount of Rs. 53,000 lying in the deposit of Khaitan & Co., Calcutta and second defendant is estopped from contending that an amount of Rs. 1,18,630.27 cannot be given credit to the plaintiff as the same was already taken into account. The plaintiff further contended that all amount of Rs. 22,510 payable towards annuity deposit for the years 1964-65 and 1965-66 was wrongly shown as tax due. The plaintiff relying upon a judgment of this court in RC. No. 249 of 1978 contended that the penalties for the years 1966-67 and 1968-69 amounting to Rs. 12,666 cannot be levied for those years and as such, levy of penalty is in flagrant violation of the orders of this court. It is further contended that due to enmity with the plaintiff, the Income Tax Officer's with an intention to harass the plaintiff did not admit the payment made and the order vitiated by fraud is liable to be set aside. It is stated that the defendants 1 and 2 having received notices u/s 80 of the code fraudulently prepared sale proclamation on 8-2-1989, ante-dating the same as 30-1-1989 and that the first defendant got the sale proclamation affixed on the premises on 8-2-1989 with an intention to sell the property before the present suit is filed. Thus, it is prayed to set aside the impugned order.

6. The first defendant filed written statement denying the material averments and contended that N.Ch.R. Rao & Co. is a partnership company and that the plaintiff claims the other partners as benamidars and assessed for the period 1958-59 to 1970-71 and as the arrears were outstanding, several reminders were issued and that the plaintiff did not turn up, a certificate u/s 222 was issued for realisation of the arrears, that in spite of the same, the arrears were not recovered and the property of the plaintiff was attached, in pursuance of the certificates sent in the year 1969-70 and that the plaintiff was protracting the matter when ever steps were taken for collection of the arrears. It is further stated that after passing the orders in

O.P. No. 165 of 1980-81, the plaintiff filed O.S. No. 268 of 1984 on the file of the Sub-judge, Visakhapatnam and the matter was remanded back for disposal afresh, and that in pursuance of the said orders, the defendant had taken up the case for fresh enquiry and after giving notices to the plaintiff and others and upon hearing both the parties, orders were passed directing the plaintiff to pay an amount of Rs. 3,21,323.

7. On the above pleadings, the Trial Court framed necessary issues. To substantiate the respective contentions, the plaintiff himself examined as PM. 1 and marked documents Ex. A-1 to Ex. A-53. Defendants adduced the evidence of D.Ws 1 and 2 and no documents were marked.

8. The Trial Court without framing an issue about the fraud played by the defendants and without considering the issues in proper perspective, rule 9 which was amended by Amending Act, 1989 and brought into effect from 1-4-1989 by substituting "Tax Recovery Officer", the Trial Court proceeded on the footing that the present suit is filed questioning the order passed by the TRO on the ground of fraud and as per rule 9, suit is maintainable only when the dispute is between defaulter and the Income Tax Officer and observed that the question on hand is between the defaulter and the TRO and the plaintiff is not entitled to the protection and without giving a specific finding about the fraud and by considering the decisions in [Munshi Ram and Others Vs. Municipal Committee, Chheharta, Commissioner of Income Tax, Bhubaneshwar and Another Vs. Parmeshwari Devi Sultania and Others](#), and [C.A. Abraham, Uppoottil, Kottayam Vs. The Income Tax Officer, Kottayam and Another](#), dismissed the suit holding that the provisions of the Act provide machinery for redressal of the grievances and that under rule 86 the remedy is provided to the Chief Commissioner or Commissioner, and that the plaintiff herein did not exhaust the remedies available under the statute.

9. The learned counsel for the appellant, Mr. D. Ramalinga Swamy, vehemently contended that the entire approach of the Trial Court in not framing an issue about the fraud in the circumstances of the case, particularly in view of the letter dated 26-3-1981 to the effect that an amount of Rs. 13,800 is due and without amending the certificate required u/s 222, proceeded with the proclamation of the sale and that the authority passed the orders without considering the remand order made by the sub-Judge, Visakhapatnam in O.S. No. 268 of 1984, is unsustainable. It is further stated that the learned Judge did not consider this material aspect and, thus, the finding reached is perverse and prayed for setting aside the impugned order by allowing the appeal.

10. On the other hand, the learned counsel for the respondent sustained the impugned orders holding that the machinery provided under the provisions of the Act cannot be divested with the powers of the Civil Court.

11. Emphasis by the learned counsel for the appellant is on the non-framing of issue relating to fraud, which invests the Civil Court with Jurisdiction to try the suit, even though the matter arises under the Income Tax Act. But, Issue Nos. 1 and 2 framed by the lower court sufficiently encompass the said issue relating to fraud. The said issues read as follows :

(i) Whether the summary order dated 16-12-1988 made in O.P. No. 165 of 1980-81 is liable to be set aside ?

(ii) Whether the Civil Court has no jurisdiction to entertain this suit ?

It is pertinent to mention that on an earlier occasion the Civil Court had entertained the suit in O.S. No. 268 of 1984 and set aside the order of the TRO and remitted the matter back to him for fresh consideration. After such remand and after comprehensive enquiry, the TRO, Visakhapatnam had determined the amount payable by the appellant at Rs. 5,44,510.02. While, determining the same, every aspect was gone into, both projected by the appellant and also the representative of the Income Tax Department. In that context, the lower court has held that there is nothing shown to conclude that the TRO did not act in good faith and that, in fact, it is protected by section 293 of the Act. The fraud is a pure question of fact and heavy burden lies upon the person alleging it and the appellant had failed to make out a case of fraud. Even if the appellant's averments made in the plaint are taken as true, they won't make out a case of fraud and may at the most make out a case that there is a wrong decision by the Income Tax authority. There is a marked distinction between a wrong decision and a fraud. While fraud vitiates the order, a wrong decision becomes final, if it is not appealed against. As there is no fraud in the instant case, the suit was not maintainable and we do not find any infirmity in the order passed by the court below. However, this order shall not preclude the appellant from prosecuting the remedies under the Act and the rules framed thereunder. If a question of limitation arises under the said Act, it is for the said authorities to consider as to whether the time spent in the suit and in this appeal should be excluded or not by invoking section 14 of the Indian Limitation Act.

12. Subject to the above observations, this Civil Miscellaneous Appeal is dismissed. No costs.