

(2001) 12 CAL CK 0029

## Calcutta High Court

Case No: Appeal from Original Order No. 220 of 1987

Income Tax Officer and Others

APPELLANT

Vs

Nawal Kishore Choudhury and  
AnotherRESPONDENT

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**Date of Decision:** Dec. 20, 2001**Acts Referred:**

- Income Tax Act, 1961 - Section 226, 226(3), 281

**Citation:** (2002) 174 CTR 391 : (2002) 257 ITR 426 : (2003) 128 TAXMAN 816**Hon'ble Judges:** Ashok Kumar Mathur, C.J; Subhro Kamal Mukherjee, J**Bench:** Division Bench**Advocate:** Ram Chandra Prasad, for the Appellant; J.P. Khaitan and Sourav Ghosh, for the Respondent**Final Decision:** Dismissed

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**Judgement**

Subhro Kamal Mukherjee, J.

This appeal is directed against an order dated January 9, 1979 (see [Nawal Kishore Chowdhury and Another Vs. Income Tax Officer, J-Ward and Others](#)), passed by a learned single judge of this court in connection with an application under article 226 of the Constitution of India.

2. Admittedly, Narayan Prasad Choudhury was the owner of the premises No. 2/2B Harington Street, Calcutta, to the extent of 35/96ths shares and 1/6 of 61/96ths shares. Narayan Prasad Choudhury was an assessee of the Income Tax Act. Narayan Prasad Choudhury was liable to pay certain sums on account of Income Tax, super tax, penalty, interest and fine. He was also liable to pay certain sums under the Wealth-tax Act.

3. Since Narayan Prasad Choudhury did not satisfy the claim of the Revenue on account of his said liabilities, the Revenue initiated proceedings before the Tax Recovery Officer to recover its dues. The Income Tax Officer forwarded the claim to

the Tax Recovery Officer on March 21, 1972. The Tax Recovery Officer issued an order restraining the said Narayan Prasad Choudhury from transferring or charging the said premises No. 2/2B Harington Street, Calcutta, and prohibited all persons from taking any benefit under such transfer or charge. The notices u/s 226(3) of the Income Tax Act were issued and served upon the tenants asking the tenants to pay rent to the Income Tax Department.

4. The writ petitioners, namely, Nawal Kishore Choudhury and Shrimati Chandra Devi Choudhury, who are the son and the wife of the said Narayan Prasad Choudhury, respectively, moved the present application under article 226 of the Constitution of India challenging the certificate proceedings, the notices of demand and the notices u/s 226(3) of the Income Tax Act.

5. It is claimed in the writ petition that the said Narayan Kishore Choudhury executed a deed of trust on May 18, 1972, concerning his shares in the premises, No. 2/2B, Harington Street, Calcutta, and appointed the present writ petitioners as the trustees thereof. It is contended that the Revenue acted erroneously in treating the said deed of trust as a revocable trust. It is, further, alleged that the Revenue was not entitled to initiate proceedings against the trustees to recover the dues from Narayan Prasad Choudhury.

6. The respondents filed an affidavit-in-opposition. It was contended that the deed of trust was created fraudulently and to defraud the creditors including the Revenue to whom large sums of money were due.

7. The learned single judge in his order dated January 9, 1979 (see [Nawal Kishore Chowdhury and Another Vs. Income Tax Officer, J-Ward and Others,](#) ), however, decided to proceed on the basis that the said trust was a revocable trust. However, the learned judge quashed the notices u/s 226(3) of the Income Tax Act and quashed the certificate proceedings challenged before him. So far as the assessment for the assessment year 1973-74 was concerned, since the appeal was preferred before the appellate authority, the appellate authority was directed to dispose of the appeal in accordance with law. It was made clear that nothing in the said decision would in any way prejudice the rights of the Revenue to take appropriate steps by a suit or otherwise for setting aside the deed of trust, if so advised, and if they were entitled in law to do so.

8. Being aggrieved the Revenue has come up with this appeal.

9. Mr. Ram Chandra Prasad, the learned advocate, appearing in support of the appeal, argued that in view of the provisions made in the deed of trust, which was admittedly executed on May 18, 1972, that is, after the claim of the Revenue were forwarded to the Tax Recovery Officer, the deed was fraudulent and was created in order to defraud the Revenue. Mr. Prasad, therefore, submitted that the learned trial judge ought not to have relegated the Revenue to a suit for declaring that the deed of trust was a void one.

10. Mr. J. P. Khaitan, the learned advocate, appearing on behalf of the writ petitioners/respondents in this appeal, argued that the Income Tax Officer and the Tax Recovery Officer were not competent to examine whether the transfer by way of trust by Narayan Prasad Choudhury was void u/s 281 of the Income Tax Act, 1961, and as such the learned trial judge rightly granted liberty to the Revenue to take appropriate proceedings in accordance with law for having such transfer declared void u/s 281 of the said Act.

11. In the order impugned the learned judge himself has observed that having regard to the terms of the deed and the conduct of the parties, it left little scope for doubt as to for what purpose the said deed of trust was created, but the learned judge refrained from making any final observation in the matter holding, inter alia, that the learned judge was not called upon to decide the said question finally as a fact.

12. We have considered the deed of trust. The said deed of trust was created for the maintenance, education, marriage and other expenses and benefits of the minor children of Narayan Prasad Choudhury and his wife. It is also clear from the provisions of the deed of trust that part of the income and benefit has been derived by the settlor himself. The settlor has been given the right of residence and as well as 1/7th of the net income of the trust property for his maintenance. Prima facie, we are, also, of the opinion that the deed of trust was created to avoid payments.

13. However, concerning the jurisdiction of the Tax Recovery Officer to declare any transfer as void u/s 281 of the Income Tax Act, the point is no longer res Integra. The Supreme Court of India in [The Tax Recovery Officer II, Sadar, Nagpur Vs. Gangadhar Vishwanath Ranade \(Dead\) Through Mrs. Shobha Ravindra Nemiwant](#), has categorically held that the Revenue could not have examined whether the transfer was void u/s 281 of the Income Tax Act, 1961. The adjudication by the Revenue that the transfer as void u/s 281 of the said Act was without jurisdiction. However, the right of the Revenue to have the transfer declared as void u/s 281 of the said Act, as it stood at the relevant time, was not thereby taken away. The Department might take appropriate proceedings in accordance with law for having the transfer declared void u/s 281 of the said Act.

14. However, Mr. Ram Chandra Prasad sought to distinguish the said case by contending that the fraud is so apparent in this case that it was not necessary to relegate the Department to a suit. We are unable to accept such contentions of Mr. Prasad.

15. Accordingly, we do not find any infirmity in the order impugned before us. We, however, make it clear that the Department may initiate proceedings, as indicated in the order of the learned single judge, within three months from the date of receipt of the certified copy of this order and in the event such proceeding is initiated by the Department within the aforesaid time frame, the writ petitioners and the said

Narayan Prasad Choudhury, who was subsequently added as a party before the learned single judge, will not be entitled to challenge the claim of the Department on the ground Of limitation.

16. The appeal is, thus, dismissed with the aforesaid observations.

17. There will be no order as to costs.

18. Photocopies of this judgment, if applied for, be supplied to the parties on urgent basis.

Ashok Kumar Mathur, C.J.

19. I agree.