

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**SPECIAL CIVIL APPLICATION NO. 17280 of 2015****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR.JUSTICE M.R. SHAH Sd/-**
and**HONOURABLE MR.JUSTICE B.N. KARIA Sd/-**
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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	NO
2	To be referred to the Reporter or not ?	NO
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	NO

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NITABEN HARISHBHAI SHAH....Petitioner(s)

Versus

TAX RECOVERY OFFICER-I & 3....Respondent(s)

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Appearance:

MR SN SOPARKAR, SENIOR ADVOCATE with

MR MANAV A MEHTA, ADVOCATE for the Petitioner(s) No. 1

MR MANISH R. BHATT, SENIOR ADVOCATE for the Respondent(s) No. 1

MR HARDIK VORA AGP for the Respondent(s) No. 2

NOTICE SERVED for the Respondent(s) No. 3 - 4

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CORAM: HONOURABLE MR.JUSTICE M.R. SHAH**and****HONOURABLE MR.JUSTICE B.N. KARIA****Date : 02/02/2017**

ORAL JUDGMENT
(PER : HONOURABLE MR.JUSTICE M.R. SHAH)

1.00. By way of this petition under Article 226 of the Constitution of India, the petitioner has prayed for appropriate writ, order and/or direction to quash and set aside the impugned order dated 28/9/2015 passed by the respondent No.1 in respect of the property situated at 4/A, Golden Tulip Bungalow, Near Old Manekbaug Octroi Naka, Satellite, Ahmedabad (hereinafter referred to as "the property in question"), by which the Recovery Officer has declared sale of the aforesaid property in question in favour of the petitioner as null and void under Second Schedule to Rule 16 of the Income Tax Act, 1961.

2.00. It appears that a sum of Rs.45,94,236/- was due and payable by the original assessee – Mr.Harish F. Shah in respect of Certificate bearing No.TRO.Central-II/RC/-4/04/05 dated 16/12/2004 and the interest payable under section 220(2) of the Income Tax Act, 1961. A prohibitory order came to be passed on 4/1/2005 in respect of the property in question of the original assessee in exercise of power under Rule 48 of the Second Schedule to the Income Tax Act, 1961. Thus, an order of attachment of the property in question came to be passed vide order dated 4/1/2005.

2.01. At this stage, it is required to be noted that as such the property in question was jointly owned by four persons namely [1] Mr.Harishbhai Fulchandbhai Shah – original assessee [2] Mr.Bharatbhai Fulchandbhai Shah [3] Ms.Kasturben Fulchandbhai Shah and [4] Dairy Den Engineering Pvt. Ltd. One of the co-owner namely Kasturben

Fulchandbhai Shah died and therefore, her share gone to her two sons namely Mr.Harishbhai Fulchandbhai Shah and Mr.Bharatbhai Fulchandbhai Shah. That all the co-owners including the original assessee sold the property in question in favour of the petitioner – wife of the original assessee by registered sale deed dated 25/3/2008.

2.02. That thereafter after a period of 7 years of the sale transaction in favour of the petitioner herein, Tax Recovery Officer No.I, Ahmedabad has passed the impugned order dated 28/9/2015 declaring sale deed in favour of the petitioner executed by the original assessee as well as other co-owners, as null and void under Second Schedule to Rule 16 of the Income Tax Act, 1961.

2.03. Feeling aggrieved and dissatisfied with the impugned order dated 28/9/2015 declaring the sale transaction in favour of the petitioner with respect to the property in question as null and void, the petitioner herein - purchaser has preferred the present petition under Article 226 of the Constitution of India.

3.00. Mr.S.N. Soparkar, learned Senior Advocate has appeared with Mr.Manav Mehta, learned advocate, on behalf of the petitioner. Mr.Manish Bhatt, learned Senior Advocate has appeared on behalf of the respondent No.1 – Revenue and Mr.Hardik Soni, learned Assistant Government Pleader has appeared on behalf of the respondent No.2.

4.00. Number of submissions have been made by Mr.Soparkar, learned counsel appearing on behalf of the

petitioner including the submission that when the property in question was jointly owned by other co-owners and a joint sale deed was executed, for the dues of one of the co-owners, transaction / sale deed with respect to the entire property in question could not have been declared null and void. Number of other submissions have also been made by the learned counsel appearing on behalf of the petitioner.

4.01. Mr.Soparkar, learned counsel appearing on behalf of the petitioner has further submitted that earlier against the dues of Rs.45,94,236/- and interest payable under section 220(2) of the Income Tax Act, for which the order of attachment under Rule 48 of the Second Schedule to the Income Tax Act, 1961 was passed, the original assessee has deposited a sum of Rs.81,94,633 as on January, 2017 and the remaining amount, which was due and payable at Rs.27,13,852/- (including interest under section 220(2) of the Income Tax Act) has been paid by the original assessee on 23/1/2017. It is submitted that therefore, no further amount is due and payable by the original assessee towards the dues, for which order of attachment under Rule 48 of the Second Schedule to the Income Tax Act, 1961 was passed.

4.02. Mr. Soparkar, learned counsel appearing on behalf of the petitioner has further submitted that even considering Rule 60 of the Rules, even if the property in question would have been sold by the department in execution of the Certificate, it is open for the defaulter, or any person, whose interest is affected by the sale, may, at any time within 30 days from the date of the sale, apply to the Tax Recovery Officer, to set aside the sale on his depositing and on

payment of entire amount due and payable with interest and other amount as mentioned in Rule 60, and even the sale can be set aside. It is submitted that in the present case, as such, that stage has not yet come and before that the original assessee has already deposited the entire amount due and payable under the Certificate bearing No.TRO.Central-II/RC/-4/04/05 dated 16/12/2004 along with interest, for which the order of attachment under Rule 48 was passed in the year 2005. Therefore, it is requested to set aside the impugned order, as the entire amount due and payable under Certificate bearing No.TRO.Central-II/RC/-4/04/05 dated 16/12/2004, for which the order of attachment of the property in question was passed under Rule 48, has been paid.

5.00. Mr.Manish Bhatt, learned counsel appearing on behalf of the revenue has submitted that once the order of attachment is passed, the same continuous till the entire amount due and payable by the original assessee (even other than the amount for which the Certificate has been issued). It is submitted that therefore, assuming that now the original assessee has paid the entire amount due and payable under the Certificate, for which order of attachment under Rule 48 was passed, still for the dues of the amount due and payable under penalty order dated 17/3/2006, order of attachment continuous. Therefore, it is submitted that the impugned order is not required to be quashed and set aside on the ground that the original assessee has paid the entire amount due and payable under Certificate with interest.

5.01. Mr.Manish Bhatt, learned counsel appearing on behalf of the revenue has not disputed that the original

assessee has paid the entire amount due and payable under Certificate with interest, however, has submitted that some further amount is due and payable by the original assessee pursuant to the penalty order dated 17/3/2006. Therefore, he has requested to clarify that it will be open for the revenue to take further steps to recovery the amount pursuant to the penalty order dated 17/3/2006, may be from the very property in question, as the property in question has been sold after the penalty order dated 17/3/2006 came to be passed.

6.00. Heard the learned counsel appearing on behalf of the respective parties at length.

6.01. At the outset, it is required to be noted that an order of attachment of the property in question has been passed by the Tax Recovery Officer, in exercise of Rule 48 of Second Schedule of the Income Tax Act vide order dated 4/1/2005 for the amount of Rs.45,94,236/- due and payable by the original assessee – Mr.Harish F. Shah in respect of Certificate bearing No.TRO.Central-II/RC/-4/04/05 dated 16/12/2004 and the interest payable under section 220(2) of the Income Tax Act, 1961. It is true that despite the above, the order of attachment, the original assessee transferred the property in favour of his wife – petitioner herein. However, it is required to be noted that there is serious dispute with respect to service of order dated 4/1/2005 by the original assessee. At this stage it is required to be noted that, as such, the aforesaid property in question was jointly owned by four persons namely [1] Mr.Harishbhai Fulchandbhai Shah – original assessee [2] Mr.Bharatbhai Fulchandbhai Shah [3] Ms.Kasturben Fulchandbhai Shah and [4] Dairy Den

Engineering Pvt. Ltd. Therefore, even if it was permissible for the Tax Recovery Officer to sell the property in question for the dues of the original assessee – Mr.Harishbhai Fulchandbhai Shah, in that case also, the property in question could have been sold qua his share only, instead, by the impugned order, the entire sale deed, with respect to entire joint property, executed by all the co-owners, has been declared null and void. In any case, now the original assessee has already deposited / paid the entire amount due and payable under Certificate bearing No.TRO.Central-II/RC/-4/04/05 dated 16/12/2004, along with the interest payable under section 220(2) of the Income Tax Act, 1961, which comes to Rs.1,09,08,485/-. It is required to be noted that the most of the amount has been deposited by the original assessee during the period from 12/10/2015 till date. The aforesaid shows the conduct / Bonafides on the part of the original assessee. Further, remaining amount due and payable under the Certificate i.e. Rs.27,13,852/- has been deposited by the original assessee on 23/1/2017. Therefore, as such not a single rupee is due and payable now to be paid by the original assessee under Certificate bearing No.TRO.Central-II/RC/-4/04/05 dated 16/12/2004, for non-payment of which the property in question was attached under Rule 48 of the second Schedule to the Income Tax Act, 1961.

6.02. At this stage, it is required to be noted that the Rule 60 of the Second Schedule to the Income Tax Act, 1961 is required to be referred to, which reads as under :-

“Rule 60. Application to set aside sale of immovable property on deposit:-

(1)Where immovable property has been sold in execution of a certificate, the defaulter, or any person whose interests are affected by the sale, may, at any time within thirty days from the date of the sale, apply to the Tax Recovery Officer to set aside the sale on his depositing --

(a) the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, with interest thereon at the rate of [one and one-fourth per cent for every month or part of a month], calculated from the date of the proclamation of sale to the date when the deposit is made; and

(b) for payment to the purchaser, as penalty, a sum equal to five percent of the purchase money, but not less than one rupee.

(2) Where a person makes an application under rule 61 for setting aside the sale of his immovable property, he shall not, unless he withdraws that application, be entitled to make or prosecute an application under this rule."

Therefore, even in a case where the property is already sold by the department in an auction for the dues of the original assessee, in that case also, defaulter, or the person

interested in the property can submit an appropriate application to set aside the sale on payment of entire amount due and payable by the assessee / defaulter along with other amount as mentioned in Rule 60.

6.03. At this stage, it is required to be noted that as such no further proceedings were initiated by the department and the property was not even put to auction and before that, the entire amount due and payable under the Certificate for which the property was attached, has been paid along with interest under section 220(2) of the Act.

6.04. Under the circumstances, when the entire amount due and payable under the Certificate for which the property was attached under Rule 48, has been paid along with interest under section 220(2) of the Act, the impugned order declaring the transaction in favour of the petitioner as null and void deserves to be quashed and set aside.

6.05. So far as the submission of Mr.Bhatt, learned counsel appearing on behalf of the revenue that further amount is due and payable by the original assessee – Mr.Harish F. Shah pursuant to the penalty order dated 17/3/2006, and therefore, order of attachment dated 4/1/2005 can be said to be continued for the dues of the penalty order dated 17/3/2006, is concerned, it is required to be noted that the Certificate was issued for the dues of the original assessee to the extent of Rs.45,94,236/- and the interest payable under section 220(2) of the Income Tax Act, 1961. For the said dues, the order of attachment was passed under rule 48 of the Second Schedule to the Income Tax Act, 1961. Even in the

impugned order also, there is reference to Rs.1,19,95,598/- due and payable under Certificate dated 16/12/2004. The order of attachment under Rule 48 can be issued only with respect to the Certificate issued for the amount due and payable by the original assessee. Therefore, the contention on behalf of the revenue that the impugned attachment order dated 4/1/2005 can be said to be continued with respect to amount due and payable under penalty order dated 17/3/2006, has no substance and the same cannot be accepted. It is required to be noted that when the order of attachment was passed on 4/1/2005, the penalty order was not even in existence, as the same has been passed subsequently on 17/3/2006 i.e. after a period of more than one year.

However, still it will be open for the revenue to initiate appropriate proceedings to recover the amount due and payable under penalty order dated 17/3/2006 and may be from the very property in question, if permissible under the law. However, on the aforesaid ground, the impugned order cannot be continued, as the amount due and payable under the Certificate has been paid by the original assessee with interest is 220(2) of the Income Tax Act.

7.00. In view of the above and for the reasons stated above, present petition succeeds. The impugned order order dated 28/9/2015 passed by the respondent No.1 is hereby quashed and set aside. Rule is made absolute accordingly. In the facts and circumstances of the case, there shall be no order as to costs.

Sd/-
(M.R. SHAH, J.)
Sd/-

(B.N. KARIA, J.)

Rafik.

