

* HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN
AND
HON'BLE Ms. JUSTICE J.UMA DEVI

+ Writ Petition No.11629 of 2007

% Date: 02-05-2018

Shriya Bhupal, D/o Somanadri Bhupal, Major,
R/o. 6-3-215, Road No.1, Banjara Hills, Hyderabad

... Petitioner

Vs.

\$ 1. The Asst. Commissioner of Income Tax,
Circle 2(3), Hyderabad

2. The Tax Recovery Officer, Range 16,
Room No.315, 3rd Floor, Aayakar Bhavan,
Basheerbagh, Hyderabad

3. The Prudential Construction Co. Ltd.,
(in liquidation), Rep. by the Official Liquidator,
High Court of A.P., Hyderabad, 3-5-398,
1st Floor, Kendriya Sadan, Koti, Hyderabad

... Respondents

! Counsel for Petitioner: Mr. S.Ravi, Senior Counsel

Counsel for Respondents 1&2: Mr. J.V. Prasad,
Senior Standing Counsel

Counsel for Respondent No.3: Mr. M.Anil Kumar for O.L.
(Not present)

< Gist:

> Head Note:

? Cases referred:

1. (1998) 6 SCC 658
2. [2000] 246 ITR 814
3. [1995] 214 ITR 594
4. [1998] 234 ITR 30
5. 260 ITR 6
6. AIR 1945 Madras 66
7. AIR 1960 SC 70
8. (2011) 245 CTR 437 (P&H)

HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN
AND
HON'BLE Ms. JUSTICE J.UMA DEVI

Writ Petition No.11629 of 2007

Order: (per V.Ramasubramanian, J.)

The petitioner has come up with the above writ petition challenging an order of the Assistant Commissioner of Income Tax passed under Section 281 of the Income Tax Act, 1961 and an order of attachment of the property passed by the Tax Recovery Officer under Rule 48 of the Second Schedule to the Income Tax Act, 1961.

2. Heard Mr. S.Ravi, learned Senior Counsel appearing for the petitioner and Mr. J.V. Prasad, learned Senior Standing Counsel appearing for the Department.

3. The 3rd respondent-Company which is the assessee, became liable to pay income tax to the tune of Rs.1,92,27,635/-, for the period from 1995-96 to 2002-03. The 3rd respondent-Company was ordered to be wound up, by the Company Court in C.P.No.119 of 2002 by order dated 08-01-2003.

4. The 3rd respondent-Company admittedly owned two immovable properties, one in Jubilee Hills, Hyderabad and another in Chakkarpur, Gurgaon District. By two registered sale deeds dated 20-6-2001 and 22-6-2001 bearing Document Nos.2038/2001 and 2057/2001, the 3rd respondent-Company sold the property at Jubilee Hills, Hyderabad to the petitioner herein.

5. It appears that before the sale, the 3rd respondent-Company made an application for the issue of a certificate under Section 230A of the Act, in May, 2000. But the Assessing Officer refused to issue a

Certificate under Section 230A on the ground that there was a demand for income tax arrears of Rs.36,73,050/-, due from the Company.

6. But subsequently, Section 230A itself was repealed with effect from 01-6-2001. Therefore, the 3rd respondent-Company sold the Jubilee Hills property to the petitioner herein under two registered sale deeds dated 20-6-2001 and 22-6-2001, as stated above.

7. Upon coming to know of the sale, the Assistant Commissioner of Income Tax issued a show cause notice under Section 281 of the Income Tax Act calling upon the petitioner to show cause why the sale should not be declared void. It was stated in the show cause notice that the 3rd respondent-Company is part of the GVK Group of Companies, that the sale was actually in favour of the grandchild of the Chairman of the said Group of Companies and that the sale consideration was far below the market value of the property, indicating clearly that the sale was with a view to defraud the Revenue.

8. The petitioner's father gave a reply to the show cause notice on 20-01-2005 claiming that the market value of the property was found to be Rs.3,000/- per square yard and that since some transactions had taken place even at Rs.2,700/- per square yard, the petitioner purchased the property by offering Rs.2,750/- per square yard.

9. Not satisfied with the reply, the Assistant Commissioner of Income Tax passed an order dated 12-4-2005, declaring the sale to

be void in terms of Section 281 of the Income Tax Act, by pointing out that the certified value of the land as per the Sub Registrar was Rs.53,32,500/- and that the property had been sold for a sum of Rs.36,71,250/-, with a view to defraud the Revenue, when the Company was in liquidation.

10. Immediately upon the said order being passed, the petitioner did not come to Court challenging the same. However, when the Tax Recovery Officer issued an order of attachment on 10-05-2007 under Rule 48 of the Second Schedule to the Income Tax Act, 1961, the petitioner has come to Court challenging not only the order of attachment but also the order under Section 281. In other words, the petitioner did not take steps, for a full period of two years from 12-4-2005, (the date of the order under Section 281) upto 10-5-2007, the date of attachment. Keeping this in mind, let us now go to the main thrust of the argument of Mr. S.Ravi, learned Senior Counsel appearing for the petitioner.

11. Placing reliance upon the decision of the Supreme Court in ***The Tax Recovery Officer II v. Gangadhar Vishwanath Ranade***¹, which was followed by the Madras High Court in ***Sancheti Leasing Co. Ltd. v. Income Tax Officer***², it is contended by the learned Senior Counsel for the petitioner that the Tax Recovery Officer cannot declare any transfer made by the assessee in favour of a third party as void and that if the Department finds that a property of the assessee has been transferred with the intention to defraud the Revenue, it will have to file a suit under Rule 11(6), to

¹ (1998) 6 SCC 658

² [2000] 246 ITR 814

have the transfer declared void under Section 281. Paragraph-9 of the decision of the Supreme Court in *Gangadhar Vishwanath Ranade* reads as follows:

“9. The Tax Recovery Officer, therefore, has to examine who is in possession of the property and in what capacity. He can only attach property in possession of the assessee in his own right, or in possession of a tenant or a third party on behalf of/for the benefit of the assessee. He cannot declare any transfer made by the assessee in favour of a third party as void. If the Department finds that a property of the assessee is transferred by him to a third party with the intention to defraud the Revenue, it will have to file a suit under Rule 11(6) to have the transfer declared void under Section 281.”

12. As a matter of fact, even before the Supreme Court settled the law as above in *Gangadhar Vishwanath Ranade*, the Calcutta High Court held in ***Srimati Preeti Rungta v. Income Tax Officer***³ that the Income Tax Officer does not have the power to pass an order on his own under Section 281. The Calcutta High Court relied upon the decision of the Bombay High Court in the very same *Gangadhar Vishwanath Ranade*'s case, before it came to be approved by the Supreme Court.

13. Similarly, the Karnataka High Court in ***Murthy Associates v. Tax Recovery Officer***⁴ also followed the decision of the Bombay High Court in *Gangadhar Vishwanath Ranade* and laid down the principles of law that emerged out of various decisions as follows:

“(1) That the provisions of Section 281 of Income Tax Act, are declaratory by statute itself.

(2) That for the purpose of proceedings against a property which has been transferred or on which a charge is created, for an intention of the Income Tax Officer to proceed

³ [1995] 214 ITR 594

⁴ [1998] 234 ITR 30

against the said property could be by passing an order under Section 281. Even if the order is not passed the transfer contrary to Section 281 would be void against the Revenue. If the order is passed it will be considered to be only a declaration of the intention of the Revenue authorities to proceed against the said property.

(3) The dispute could be agitated by the Tax Recovery Officer under Rule 11 of Schedule II to the Income Tax Act and the finality is given to the order passed by the civil court under Rule 11(6)."

14. After the Supreme Court upheld the decision of the Bombay High Court in *Gangadhar Vishwanath Ranade*, the Madras High Court held in *Sancheti Leasing Co. Ltd.*, as follows:

"7. The Supreme Court of India in its recent decision rendered in the case of *TRO v. Gangadhar Vishwanath Ranade (Dead)* MANU/SC/0600/1998 : [1998] 234 ITR 188 (SC) has held that if the Department finds that the assessee has transferred a property to a third party with the intention to defraud the Revenue, the Revenue will have to file a suit under Rule 11(6) of Schedule II to the Income Tax Act to have the transfer declared void under Section 281 of the Income Tax Act.

8. It is, therefore, clear that the Income Tax Officer had no jurisdiction to declare the transaction of sale to which the petitioners were parties as purchasers, as void. The impugned order, insofar as it affects the petitioners' interest in the property is, therefore, set aside. The writ petitions are allowed accordingly. Consequently, W.M.P. Nos.10903 and 26026 of 1994 are closed."

15. Therefore, it is the contention of Mr. S.Ravi, learned Senior Counsel for the petitioner, that the impugned orders are contrary to law and liable to be set aside.

16. However, Mr. J.V. Prasad, learned Senior Standing Counsel for the Revenue, contended that irrespective of whether the Income Tax Officer had the power to declare a transfer to be void or not, the right of the Tax Recovery Officer to investigate into the

objection of anyone to the attachment of a property is guaranteed by Rule 11 and that even before the stage prescribed by sub-rule (6) of Rule 11 could be reached, the petitioner had rushed to Court. In other words, the contention of the learned Senior Standing Counsel for the Department is that Rule 11 of the Second Schedule to the Income Tax Act contains a scheme that provides for an investigation to be made by the Tax Recovery Officer into any claim or objection made by a party. On the culmination of such an investigation, the Tax Recovery Officer is entitled under sub-rule (5) of Rule 11 to disallow the claim. It is only after the disallowance of such a claim that the party against whom an order is made, may institute a suit in a Civil Court. Therefore, the learned Senior Standing Counsel for the Department contended that the attempt of the Tax Recovery Officer to make an investigation in terms of Rule 11 cannot be aborted through this writ petition. In this connection, the learned Senior Standing Counsel for the Department relied upon a decision of the Bombay High Court in ***Twinstar Holdings Ltd. v. Anand Kedia, Deputy CIT***⁵. In that case, the Supreme Court held that Rule 2 of the Second Schedule will have to be invoked first and that thereafter Rule 11 will automatically come into force.

17. In response to the above contentions of the learned Senior Standing Counsel for the Department, it was argued by Mr. S.Ravi, learned Senior Counsel for the petitioner, that attachment and sale of properties are prescribed as modes of recovery under Rule 4 of the Second Schedule and that in order to invoke Rule 4, the properties sought to be attached and sold should be that of the

⁵ 260 ITR 6

defaulter and that only in cases where Rule 4 is satisfied, the procedure prescribed in Rule 11 for investigation can be followed. In other words, it is his contention that unless a declaration is secured from a Civil Court under Section 281 that a transfer is void, the property cannot be treated as that of the defaulter to enable the Tax Recovery Officer to order attachment under Rule 4 and thereafter to proceed with the investigation under Rule 11.

18. We have carefully considered the rival submissions. Since the sheet anchor of the case of the petitioner is the decision of the Supreme Court in *Gangadhar Vishwanath Ranade*, we may first look at it in greater detail.

19. It is seen from paragraph-2 of the decision of the Supreme Court in *Gangadhar Vishwanath Ranade* that notices under Rule 2 of the Second Schedule were served on the assessee on 21-10-1972 and the immovable property being the residential house of the assessee was attached by the Tax Recovery Officer on 23-10-1972. Objections were filed to the order of attachment on the ground that the property had already been mortgaged in the year 1967 in favour of a Nationalised Bank and that subsequently the property was also conveyed by the assessee to his wife and daughter in the year 1969. In fact, objections were filed both by the Bank of Maharashtra as well as by the wife and daughter of the assessee. After the receipt of the objections, a show cause notice was issued on 21-01-1974 under Section 281. Pursuant to the show cause notice, an enquiry was held, evidence was recorded and an order was passed on 09-5-1974 declaring that the transfer in favour of the

wife and daughter was void. This order, when challenged before the High Court of Bombay, the High Court held that the proceedings taken pursuant to the declaration or expression of an opinion by the Income Tax Officer under Section 281 were a mere prelude to the procedure for the recovery of tax and that the declaration made by the Income Tax Officer on 09-5-1974 did not affect the rights of the parties that could be considered in the proceedings under Rule 11.

20. The decision of the High Court of Bombay was rendered on 09-01-1981. Thereafter, the Tax Recovery Officer proceeded with the investigation under Rule 11 of the Second Schedule and passed an order overruling the objections filed by the objectors and declaring that the mortgage in favour of the Bank and the conveyance in favour of the wife and daughter of the assessee were illegal and void and holding that the property was liable to attachment and sale. This order of the Tax Recovery Officer was challenged by the assessee by filing a fresh writ petition before the High Court. The High Court set aside the order of the Tax Recovery Officer by a decision reported in *Gangadhar Vishwanath Ranade v. Income Tax Officer* [1989] 177 ITR 163.

21. While setting aside the order of the Tax Recovery Officer, in the second round of litigation, the Bombay High Court upheld the contention of the assessee and objectors that the Tax Recovery Officer had no power under Rule 11 of the Second Schedule to declare as void, a transfer of property effected by the assessee during the pendency of proceedings. The High Court held that Section 281 merely declared what the law was, but did not prescribe

any adjudicatory machinery for deciding a question which may arise under Section 281 and that in order to declare a transfer as fraudulent under Section 281, appropriate proceedings would have to be taken in accordance with law, in the same manner as are required to be taken under Section 53 of the Transfer of Property Act, 1882.

22. The decision of the Supreme Court in *Gangadhar Vishwanath Ranade [1998] 234 ITR 188 (SC)* arose out of the decision of the Bombay High Court in the second round of litigation, challenging the proceedings under Rule 11. Therefore, the Supreme Court indicated in paragraph-7 of its decision that the question required to be answered by the Supreme Court was whether in a proceeding under Rule 11, the Tax Recovery Officer can declare a transfer as void under Section 281. After pointing out in paragraph-8 of its decision, that there is a difference between the prescription contained in Section 281 and the power of the Tax Recovery Officer contained in Rule 11 of the Second Schedule, the Supreme Court held in paragraph-9 of its decision that the Tax Recovery Officer cannot declare any transfer as void and that if the Department finds that a transfer had been effected with the intention to defraud the Revenue, the Department will have to file a suit under Rule 11(6).

23. Before confirming the decision of the Bombay High Court that the Tax Recovery Officer cannot make a declaration under Section 281, the Supreme Court took note of the similarity in the language employed in Order XXI, Rules 60 and 61 with the language employed in sub-rules (4) and (5) of Rule 11 of the Second

Schedule. The Supreme Court also found similarity between the language employed in Order XXI, Rule 63 of the Code of Civil Procedure with the language employed in Rule 11(6). Thereafter, the Supreme Court indicated in paragraph-12 as to what should be done in such cases. It reads as follows:

“12. In the light of this discussion about the provisions of Order XXI, Rules 58 to 63, if we examine Rule 11(4) of the Second Schedule to the Income-tax Act, it is clear that the Tax Recovery Officer is required to examine whether the possession of the third party is of a claimant in his own right or in trust for the assessee or on account of the assessee. If he comes to a conclusion that the transferee is in possession in his or her own right, he will have to raise the attachment. If the Department desires to have the transaction of transfer declared void under Section 281, the Department being in the position of a creditor, will have to file a suit for a declaration that the transaction of transfer is void under Section 281 of the Income-tax Act.”

24. From a careful consideration of what had transpired in *Gangadhar Vishwanath Ranade's case*, it can be concluded that in the first round of litigation, the Bombay High Court held the order passed under Section 281 as a mere declaration of an opinion and as a mere prelude to the procedure prescribed under Rule 11. In the second round of litigation, the very order passed by the Tax Recovery Officer under Rule 11(5) was set aside on the ground that the remedy of the Income Tax Officer was to go before the Supreme Court. In other words, after refusing in the first round of litigation, to set aside the declaration made under section 281, the very same Bombay High court set aside the order under Rule 11 and came to a contrary conclusion. But the same was approved by the Supreme court.

25. There are two crucial issues with regard to the decision in *Gangadhar Vishwanath Ranade*. The first is that it is a fundamental principle that once a statute declares a transfer to be void, the Court cannot impose a burden upon the Revenue to go to the Civil Court and seek a declaration. ***Over and above a statutory declaration, there cannot be a judicial declaration.*** The declaration by a taxing statute of certain transactions to be void, cannot be equated to the declaration contained in the Indian Contract Act about the nullity and voidity of certain contracts. Transactions and transfers between two private parties are in the realm of a contract. Therefore, there cannot be an statutory declaration of the nullity and voidity of such transactions or transfers. It is in those cases that the mere declaration by statute of certain transactions between private parties to be null and void would not be sufficient and the party asserting the void nature of the transaction may have to go to a Civil Court to get a judicial declaration.

26. But in respect of the prescriptions contained in the Taxation Statutes where the transactions created or transfers made with a view to defraud the Revenue are declared as void, the same logic as applicable to transactions between private parties may not apply. ***To say that unless the Tax Recovery Officer goes to a civil Court and gets a judicial declaration for giving effect to the statutory declaration contained in Section 281, is to reduce the effect of Section 281 of the Income Tax Act, 1961 to the level of Sections 24, 25, 26, 27, 29 or 30 of the Indian Contract Act, 1872.***

27. In order to understand the scope of Section 281 of the Income Tax Act, 1961, we must compare the said provision with similar provisions contained in certain statutes in the realm of public law that declare certain transfers to be void. For instance, Section 55 of the Presidency Towns Insolvency Act, 1909 declares any transfer of property (except one made before or in consideration of marriage and except one made in favour of a purchaser in good faith and for a valuable consideration) to be void as against the official assignee, if the transferor is adjudged insolvent within two years after the date of transfer. Section 56 of the same statute goes a step further and declares every transfer of property, every payment made, every obligation incurred and every judicial proceeding taken or suffered by any person unable to pay his debts, void, if such a person is adjudged insolvent on a petition presented within three months and if such a transfer or payment made or obligation incurred was with a view to give that creditor a preference over other creditors. Though Section 56(2) saves the rights of a person making title in good faith and for valuable consideration through or under a creditor of the insolvent, sub-section (1) of Section 56 creates a deeming fiction that every transfer made or obligation incurred is fraudulent.

28. Similarly, Section 53 of the Provincial Insolvency Act, 1920 declares every transfer of property (except the one made in consideration of marriage or made in favour of a purchaser in good faith and for a valuable consideration) as voidable as against the Official Receiver. Section 54 of the Provincial Insolvency Act, 1920 declares every transfer of property, every payment made, every

obligation incurred and every judicial proceeding suffered by a person unable to pay his debts to be void as against the Receiver, if it was done with a view to give that creditor a preference over other creditors. Section 54(1) also creates a deeming fiction that the transfer or payment made or obligation incurred, as is referred to therein, will be deemed fraudulent.

29. But there are certain distinguishing features between (i) Section 55 of the Presidency Towns Insolvency Act, 1909 and Section 53 of the Provincial Insolvency Act, 1920 and (ii) Section 56 of the Presidency Towns Insolvency Act, 1909 and Section 54 of the Provincial Insolvency Act, 1920. These features are:

(i) Section 55 of the Presidency Towns Insolvency Act declares every transfer of property (except those exempted) as void as against the official assignee. In contrast, Section 53 of the Provincial Insolvency Act declares every transfer of property merely voidable as against Receiver and stipulates that it may be annulled by Court, if the transferor is adjudged insolvent within two years of the transfer;

(ii) Section 56(1) of the Presidency Towns Insolvency Act declares every transfer of property, every payment made, every obligation incurred and every judicial proceeding suffered, deemed to be fraudulent and void as against the official assignee. Though Section 54(1) of the Provincial Insolvency Act also declares every transfer of property, every payment made, every obligation incurred and every judicial proceeding suffered to be deemed fraudulent and void,

Section 54(1) of the Provincial Insolvency Act adds a rider viz., “**and shall be annulled by the Court**”.

30. Annulment by Court has been prescribed both in Section 53 and Section 54(1) of the Provincial Insolvency Act, though such a requirement is not stipulated in Sections 55 or 56 of the Presidency Towns Insolvency Act. In addition, Section 53 of the Provincial Insolvency Act though contains all the ingredients of Section 55 of the Presidency Towns Insolvency Act, uses the word “voidable” in contrast to the word “void” used in Section 55 of the Presidency Town Insolvency Act.

31. The reason as to why we have taken a detour from the Income Tax Act to the Insolvency Act is that the difference between these two enactments came up for consideration before a Full Bench of the Madras High Court and later before the Supreme Court. In ***The Official Receiver, Guntur v. Narra Gopalakrishniah***⁶, the question that was referred to the Full Bench was as to whether the decision of the Privy Council in *Mahomed Siddique Yousuf v. Official Receiver, Calcutta* would apply to the orders of adjudication under the Provincial Insolvency Act as well as to the orders of adjudication under the Presidency Towns Insolvency Act. The English Courts were then following the leading judgment in *ex parte Learoyd*, which arose under Sections 10 and 12 of the Bankruptcy Act, 1869. While answering the said question, the Full Bench of the Madras High Court held as follows:

“Section 54 of the Provincial Insolvency Act says that every transfer of property, every payment made, every obligation

⁶ AIR 1945 Madras 66

incurred and every judicial proceeding taken or suffered by any person unable to pay his debts as they became from his own money in favour of any creditor with a view of giving that creditor a preference over the other creditors, shall, if such person is adjudged insolvent on a petition presented within three months after the date thereof, be deemed fraudulent and void as against the receiver and shall be annulled by the Court. The words “shall be annulled by the Court” do not appear in the corresponding section of the Presidency Towns Insolvency Act, Section 56.”

Therefore, we have these differences between the two Acts – (1) under the Provincial Insolvency Act, the publication in the Official Gazette of the order of adjudication is not evidence of the fact stated therein as is the case in the Presidency Towns Insolvency act; (2) the order of adjudication under the Provincial Insolvency Act relates back only to the date of the petition asking for the adjudication, whereas in the Presidency Towns Insolvency Act, it relates back to the very act of insolvency itself; and (3) the Provincial Insolvency Act requires a fraudulent transfer to be annulled by a direct order of the Court which is not the case under the Presidency Towns Insolvency Act.”

32. Therefore, Courts have made a distinction between a statutory provision that declares a transfer void and a statutory prescription that makes a transfer merely voidable. Courts have also made a distinction between statutory prescriptions which, in addition to declaring a transaction to be void, also require the annulment by a Court and statutory prescriptions which declare transactions to be void without the requirement of annulment by Court.

33. Keeping this distinction in mind, we can take a look at the decision of a 3-member Bench of the Supreme Court in **RM. NL. Ramaswami Chettiar v. The Official Receiver**⁷. Though the main question that arose for consideration before the Supreme Court in that case was about limitation, the Supreme Court compared the

⁷ AIR 1960 SC 70

relevant provisions of the Presidency Towns Insolvency Act and the Provincial Insolvency Act. In his separate but concurring judgment, *Subba Rao, J.* pointed out that under Section 56 of the Presidency Towns Insolvency Act, the transfer of a property in favour of a creditor with a view to give a preference to him over other creditors shall be deemed fraudulent and void as against the official assignee, whereas under Section 54 of the Provincial Insolvency Act, the said transfer has to be annulled by the Court. After pointing out the distinction between the two, *Subba Rao, J.* referred with approval, to the decision of the Full Bench of the Madras High Court in *Narra Gopalakrishniah*.

34. If we keep in mind the distinguishing features between the Presidency Towns Insolvency Act and the Provincial Insolvency Act and the way they were interpreted by the Full Bench of the Madras High Court and the Supreme Court, it will be clear that Section 281(1) of the Income Tax Act, 1961, which does not prescribe the requirement of annulment by Court, cannot be interpreted differently. Section 281(1) of the Income Tax Act does not use the expression “voidable” as used in Section 53 of the Provincial Insolvency Act. Section 281 of the Income Tax Act does not also impose the rider “shall be annulled by Court” as used in Sections 53 and 54(1) of the Provincial Insolvency Act. Therefore, it is not possible to hold that the Tax Recovery Officer should go to the Civil Court, file a suit and get a declaration that the transfer was void. ***In our considered view, the statutory declaration contained in Section 281(1) does not require to be baptised by a judicial declaration.***

35. In fact, any interpretation to be given to Section 281(1) should be in conformity with Rule 11(6). Rule 11(6) opens a window for a person aggrieved by an order of attachment following a declaration under Section 281 to move the Civil Court. In other words, a person in whose favour a transfer is made and which is declared void under Section 281 is not without a remedy. He is conferred with a right to seek the raising of the attachment and in the event of his suffering an order under Rule 11(5), he is made entitled statutorily (though by a subordinate legislation) to move the Civil Court to get such a declaration set at naught.

36. In fact, the Bombay High Court in the second round of litigation in *Gangadhar Vishwanath Ranade* (which came to be upheld by the Supreme Court in the reported decision cited earlier), with great respect, fell into an error in comparing Section 281 of the Income Tax Act, 1961 with Section 53 of the Transfer of Property Act, 1882. Section 53 of the Transfer of Property Act deals with fraudulent transfers made by a party with intent to delay or defraud the creditors. But Section 53 does not make such proceedings void. It only makes the transfer voidable at the option of any creditor so defeated.

37. Therefore, there were two distinguishing features between Section 53 of the Transfer of Property Act, 1882 and Section 281 of the Income Tax Act, 1961: (i) Section 53(1) of the Transfer of Property Act makes the transfer of immoveable property created with intent to defeat or delay the creditors as voidable, while Section 281

of the Income Tax Act makes such transfers void and (ii) The Revenue cannot be equated to a mere creditor whose interest is sought to be protected by Section 53(1). The tax due to the State is a crown debt and the statute has declared the transfers made with a view to defraud the Revenue as void. ***Therefore to say that the Tax Recovery Officer, like any other creditor may have to go to the Civil Court seeking a judicial declaration to give effect to the statutory declaration under Section 281, is irreconcilable with the scheme of the Act.***

38. Section 281 of the Income Tax Act reads as follows:

“281. Certain transfers to be void.

(1) Where, during the pendency of any proceeding under this Act or after the completion thereof, but before the service of notice under rule 2 of the Second Schedule, any assessee creates a charge on, or parts with the possession (by way of sale, mortgage, gift, exchange or any other mode of transfer whatsoever) of, any of his assets in favour of any other person, such charge or transfer shall be void as against any claim in respect of any tax or any other sum payable by the assessee as a result of the completion of the said proceeding or otherwise:

Provided that such charge or transfer shall not be void if it is made –

(i) for adequate consideration and without notice of the pendency of such proceeding or, as the case may be, without notice of such tax or other sum payable by the assessee; or

(ii) with the previous permission of the Assessing Officer.

(2) This section applies to cases where the amount of tax or other sum payable or likely to be payable exceeds five thousand rupees and the assets charged or transferred exceed ten thousand rupees in value.

Explanation.—In this section, “assets” means land, building, machinery, plant, shares, securities and fixed deposits in banks, to the extent to which any of the assets aforesaid does not form part of the stock-in-trade of the business of the assessee.”

39. Mr. S.Ravi, learned Senior Counsel for the petitioner, may be right to a limited extent in contending that it is not all transfers that are declared void by Section 281, but that certain exceptions are carved out by the proviso to sub-section (1) of Section 281. But it is precisely for this reason that the Income Tax Officer is given a limited jurisdiction under Rule 11 of the Second Schedule.

40. Rule 11 of the Second Schedule reads as follows:

“11. Investigation by Tax Recovery Officer.

(1) Where any claim is preferred to, or any objection is made to the attachment or sale of, any property in execution of a certificate, on the ground that such property is not liable to such attachment or sale, the Tax Recovery Officer shall proceed to investigate the claim or objection:

Provided that no such investigation shall be made where the Tax Recovery Officer considers that the claim or objection was designedly or unnecessarily delayed.

(2) Where the property to which the claim or objection applies has been advertised for sale, the Tax Recovery Officer ordering the sale may postpone it pending the investigation of the claim or objection, upon such terms as to security or other wise as the Tax Recovery Officer shall deem fit.

(3) The claimant or objector must adduce evidence to show that –

(a) (in the case of immovable property) at the date of the service of the notice issued under this Schedule to pay the arrears, or

(b) (in the case of movable property) at the date of the attachment,

he had some interest in, or was possessed of, the property in question.

(4) Where, upon the said investigation, the Tax Recovery Officer is satisfied that, for the reason stated in the claim or objection, such property was not, at the said date, in the possession of the defaulter or of some person in trust for him or in the occupancy of a tenant or other person paying rent to him, or that, being in the possession of the defaulter at the said date, it was so in his possession, not on his own account or as his own property, but on account of or in trust for some other person, or

partly on his own account and partly on account of some other person, the Tax Recovery Officer shall make an order releasing the property, wholly or to such extent as he thinks fit, from attachment or sale.

(5) Where the Tax Recovery Officer is satisfied that the property was, at the said date, in the possession of the defaulter as his own property and not on account of any other person, or was in the possession of some other person in trust for him, or in the occupancy of a tenant or other person paying rent to him, the Tax Recovery Officer shall disallow the claim.

(6) Where a claim or an objection is preferred, the party against whom an order is made may institute a suit in a civil court to establish the right which he claims to the property in dispute; but, subject to the result of such suit (if any), the order of the Tax Recovery Officer shall be conclusive."

41. It is seen from Rule 11 that the scheme envisaged therein is as follows:

(i) Whenever a claim or objection is made to the attachment or sale of a property, the Tax Recovery Officer may initiate investigation into the claim.

(ii) The claimant or objector should adduce evidence, in the course of such investigation to show that on the date of service of notice under Rule 2, asking the assessee to pay the arrears, the objector or claimant had an interest in or was possessed of the property in question.

(iii) If after investigation, the Tax Recovery Officer is satisfied about the genuineness of the claim or objection he shall make an order releasing the property, from attachment or sale.

(iv) If the Tax Recovery Officer is satisfied that the property was in the possession of the defaulter as his own property or was in possession of some other person in trust for him, or in the occupancy of a tenant, the Tax Recovery Officer shall disallow the claim.

(v) Where an order is made overruling the claim or objection, the party against whom such an order is made, may institute a suit in

a Civil Court to establish the right which he claims to the property in dispute.

42. In fact, sub-rule (6) is very clear and unambiguous. Sub-rule (6) of Rule 11 expressly states that the party against whom an order is made by the Tax Recovery Officer may institute a suit in a Civil Court. But in paragraph-9 of its decision in *Gangadhar Vishwanath Ranade*, the Supreme Court held as though the Tax Recovery Officer will have to file a suit under Rule 11(6). This, in our considered opinion and with great respect to the Supreme Court, is clearly contrary to the scheme of Rule 11. The contention of Mr. S.Ravi, learned Senior Counsel for the petitioner, that Rule 4 can be invoked only if the property was that of the defaulter and that unless Rule 4 is satisfied, Rule 11 cannot be invoked, does not appear to be correct. It is no doubt true that Rule 4 enables the Tax Recovery Officer to proceed to realise the amount by attachment and sale of the defaulter's property. But if a transfer made by the defaulter is statutorily declared as void, the defaulter automatically continues to be the owner of the property. If the ownership of the property continues to be with the defaulter, by virtue of the declaration under Section 281, Rule 4 can certainly be invoked. If Rule 4 can be invoked, Rule 11 will automatically follow.

43. In this regard, it may be useful to take note of Rule 16(1) of the Second Schedule, which reads as follows:

"16. Private alienation to be void in certain cases.

(1) Where a notice has been served on a defaulter under rule 2, the defaulter or his representative in interest shall not be competent to mortgage, charge, lease or otherwise deal with any property belonging to him except with the permission of the Tax

Recovery Officer, nor shall any civil court issue any process against such property in execution of a decree for the payment of money.”

44. Therefore, if a transfer had been made by a defaulter in contravention of Rule 16(1), it is automatically void and the question of asking the Revenue to go to the Civil Court to have the transfer declared as void would not arise.

45. In fact, a similar question arose before the Division Bench of Punjab & Haryana High Court in **Karnail Singh v. Union of India**⁸. That was also a case where an order attaching the property and the order declaring a sale to be void in terms of Section 281 was under challenge. Reliance was placed upon the decision of the Supreme Court in **The Tax Recovery Officer II v. Gangadhar Vishwanath Ranade**. But after pointing out that the language of Section 281 underwent a change under Taxation Laws (Amendment) Act, 1975 and that **Gangadhar Vishwanath Ranade** arose under the unamended provision, the Division Bench of Punjab & Haryana High Court held that it is no more necessary to drive the revenue to file a civil suit.

46. At the time when the Supreme Court considered the import of Section 281, the provision contained the words “with the intention to defraud the revenue”. But by the amendment introduced in 1975, these words deleted. Therefore, irrespective of whether the transfer was with a view to defraud the revenue or not, the transfer is declared void by the statute itself. Hence, the question of the

⁸ (2011) 245 CTR 437 (P&H)

Revenue going to the Court to establish that the transfer was with intent to defraud the revenue does not arise.

47. It is true that the transferee still has an escape route under the proviso to sub-section (1) of Section 281. This proviso states that the transfer shall not be void if it is made (1) for adequate consideration and without notice of the pendency of the proceeding or without notice of such tax or other sum payable by the assessee, or (2) with the previous permission of the Assessing Officer.

48. Therefore, it is possible for the petitioner to contend that the questions of fact that would make a case fall within the proviso to sub-section (1) of Section 281 may have to be adjudicated only by a Civil Court and not by the Tax Recovery Officer and that therefore, the ratio in **Gangadhar Vishwanath Ranade** would still be applicable.

49. But in the case on hand, the said contention is incapable of being raised by the petitioner. This is for the reason that in May, 2000, an application was made for the issue of a Certificate under Section 230A. The assessee as well as the petitioner herein were parties. But the Assessing Officer issued a letter dated 18-09-2000 refusing to issue the certificate on the ground that the assessee was due to pay arrears of tax to the tune of Rs.36,73,050/-. Thereafter, Section 230A was omitted by Finance Act, 2001 with effect from 01-06-2001. Therefore, the petitioner went ahead with the purchase and got the sale deed registered on 20-06-2001 and 22-06-2001. Therefore, the petitioner can hardly take umbrage under clauses (i) or (ii) of the proviso to sub-section (1) of Section 281.

50. To fall under clause (i) of the proviso to Section 281 (1), the assessee must show either that the purchase was for adequate consideration and without notice or the purchase was without notice of tax or other sum payable by the assessee. But in this case, on account of the refusal of the Assessing Officer, communicated through his letter dated 18-09-2000, to issue a Certificate under Section 230A, the petitioner became aware of the arrears of tax and other sums payable by the assessee. Hence, the petitioner cannot take cover under clause (i) of the proviso.

51. The petitioner cannot also take cover under clause (ii) of proviso, since the purchase was not made with the previous permission of the Assessing Officer. On the contrary, it was made after the rejection of permission by the Assessing Officer.

52. Therefore, to say that the revenue should go to the Civil Court to get a declaration in terms of Section 281 (1) is not borne out of the scheme. In fact, as rightly pointed out by the Punjab & Haryana High Court in **Karnail Singh**, the scheme of Section 281 has now undergone a change. The changes made to Section 281 can be well appreciated, if the unamended and amended provisions are presented in a tabulation.

Unamended Section 281 considered in <i>Gangadhar Vishwanath Ranade</i>	Amended Section 281
Section 281: Where, during the pendency of any proceeding under this Act, any assessee creates a charge on or parts with the possession by way of sale, mortgage, exchange or any other mode of transfer whatsoever, of any of his assets in favour of any other person with the intention to defraud the revenue, such charge or transfer shall be void as against any claim in respect of any tax or any other sum payable by the assessee as a result of the	281 (1) Where, during the pendency of any proceeding under this Act or after the completion thereof, but before the service of notice under rule 2 of the Second Schedule, any assessee creates a charge on, or parts with the possession (by way of sale, mortgage, gift, exchange or any other mode of transfer whatsoever) of, any of his assets in favour of any other person, such charge or transfer shall be void as against any claim in respect of any tax

completion of the said proceeding; Provided that such charge or transfer shall not be void if made for valuable consideration and without notice of the pendency of the proceeding under this Act.	or any other sum payable by the assessee as a result of the completion of the said proceeding or otherwise: Provided that such charge or transfer shall not be void if it is made- (i) for adequate consideration and without notice of the pendency of such proceeding or, as the case may be, without notice of such tax or other sum payable by the assessee; or, (ii) with the previous permission of the Assessing Officer. (2) This section applies to cases where the amount of tax or other sum payable or likely to be payable exceeds five thousand rupees and the assets charged or transferred exceed ten thousand rupees in value. Explanation- In this section, "assets" means land, building, machinery, plant, shares, securities and fixed deposits in banks, to the extent to which any of the assets aforesaid does not form part of the stock-in-trade of the businesses of the assessee.
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53. Due to the incorporation of the words “with the intention to defraud the revenue”, in Section 281 as it stood at that time, the burden of proof was on the department. Intention to defraud correlates to *mens rea*. Therefore, the same was not capable of being adjudicated by the Tax Recovery Officer. This is why the Supreme Court pointed out in **Gangadhar Vishwanath Ranade** that the revenue should go to the Civil Court to obtain a declaration that the transfer was void.

54. Under the unamended provision, which was considered in **Gangadhar Vishwanath Ranade**, the revenue should go to the Civil Court and first establish that there was an intention to defraud the revenue. Once this is established, the burden will get shifted to the transferee to show, as per the proviso that the transfer was for

valuable consideration and without notice of the pendency of the proceeding.

55. But under the amended provision, the question of *mens rea* or intention to defraud does not arise. Hence, the entire burden to show that the transfer falls within the two clauses of the proviso to sub-section (1) of Section 281 is now upon the assessee under the amended provision. Hence, it is up to the assessee under the amended provision, to go to the Civil Court and establish that his case falls under the proviso.

56. Therefore, we are of the considered view that the petitioner cannot take shelter under the decision of the Supreme Court in **Gangadhar Vishwanath Ranade**. Having come to know of the fact that the assessee is due to pay arrears of tax and having got the application for a Certificate under Section 230A rejected, the petitioner clearly took a chance by going ahead with the purchase. Therefore, we do not think that the petitioner is entitled to have the order of attachment and the order declaring the sale to be void set aside by this Court. As we have pointed out in the first part of the order, the order declaring the sale to be void was passed in the year 2005. The petitioner did not come to Court immediately. She came to Court only after the issue of an order of attachment.

57. Therefore, in the given circumstances, the writ petition lacks merits. Hence, it is accordingly dismissed. The miscellaneous

petitions, if any, pending in this writ petition shall stand closed. No costs.

V.RAMASUBRAMANIAN, J

J.UMA DEVI, J

After pronouncement of order, the learned counsel for the petitioner made a request for continuing the interim protection that the petitioner was in enjoyment, during the pendency of the writ petition, to enable her to workout her remedies. The interim protection that the petitioner had was the suspension of the order of attachment subject to condition that the petitioner shall not create any third party interests.

Though we cannot grant suspension of the order of attachment, we can protect the petitioner from further proceedings pursuant to the attachment, upon the same condition namely that the petitioner shall not, for a period of four weeks, alienate or create any third party interests or charge over the property. Accordingly, there will be an interim order, directing the department not to take further steps pursuant to this order, for a period of four (4) weeks, to enable the petitioner to workout her rights against this order. This is subject to the condition stated above.

V.RAMASUBRAMANIAN, J

J.UMA DEVI, J

Date: 02-05-2018
Ak/Ksn

HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN
AND
HON'BLE Ms. JUSTICE J.UMA DEVI

Writ Petition No.11629 of 2007
[per VRS, J.]



May, 2018.
(Ksn)