

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 20.03.2018

DELIVERED ON : 13.04.2018

CORAM:

**THE HONOURABLE MR.JUSTICE M.SATHYANARAYANAN
AND
THE HONOURABLE MRS.JUSTICE R.HEMALATHA**

**W.A(MD)No.1186 of 2017 and C.M.P(MD)No.8250 of 2017
AND**

W.A(MD)No.1150 of 2017 and C.M.P(MD)Nos.7953 and 7954 of 2017

W.A(MD)No.1186 of 2017:

M/s.Agasthiya Holdings Private Limited,
Kochi, through its Authorised Signatory S.S.Sarma,
having its Branch Office at Tuticorin,
at Door No.3611, 2nd Street,
Muniasampuram,
Kamaraj Salai,
Tuticorin – 628 003.

... Appellant/
Writ Petitioner

Vs.

1.The Commissioner of Income Tax – I (i/c),
2, V.P.Rathinasamy Nadar Road,
Bibikulam,
Madurai – 02.

2.The Tax Recovery Officer,
Income Tax Office,
WGC Road,
Tuticorin.

3.The Secretary/Commissioner Registration,
Government of Tamil Nadu,
St.George,
Chennai.

4.The Sub Registrar Joint – I,
District Registrar Office,
Tuticorin.

5.J.Vivekavathi
 6.J.Jeyasekar
 7.J.Sampathkumar
 8.J.Subramanian
 9.J.Prakash
 10.J.Shankar
 11.D.Kalaiselvi

... Respondents/
 Respondents

PRAYER: Appeal filed under Clause 15 of the Letters Patent, against the order passed in W.P(MD)No.10885 of 2011, dated 29.06.2017.

For Appellant : Mr.P.S.Sundaram

For Respondents : Mr.C.M.Mari Chelliah Prabu
 Additional Government Pleader for R.1, R.3 & R.4

Mrs.S.Srimathy for R.2

No appearance for R.5 to R.11

W.A(MD)No.1150 of 2017:

1.The Commissioner of Income Tax – I (i/c),
 2, V.P.Rathinasamy Nadar Road,
 Bibikulam,
 Madurai – 02.

2.The Tax Recovery Officer,
 Income Tax Office,
 WGC Road,
 Tuticorin.

... Appellants/
 Respondents 1 & 2

Vs.

1.M/s.Agasthiya Holdings Private Limited,
 Kochi, through its Authorised Signatory S.S.Sarma,
 having its Branch Office at Tuticorin,
 at Door No.3611, 2nd Street,
 Muniasampuram,
 Kamaraj Salai,
 Tuticorin – 628 003.

... 1st Respondent/
 Writ Petitioner

2.The Secretary/Commissioner Registration,
Government of Tamil Nadu,
St.George,
Chennai.

3.The Sub Registrar Joint – I,
District Registrar Office,
Tuticorin.

... Respondents 2 & 3/
Respondents 3 & 4

4.J.Vivekavathi

5.J.Jeyasekar

6.J.Sampathkumar

7.J.Subramanian

8.J.Prakash

9.J.Shankar

10.D.Kalaiselvi

... Respondents 5 to 11/
Respondents 4 to 10

PRAYER: Appeal filed under Clause 15 of the Letters Patent, against
the order passed in W.P(MD)No.10885 of 2011, dated 29.06.2017.

For Appellants : Mrs.S.Srimathy

For Respondents : Mr.P.S.Sundaram for R.1

Mr.C.M.Mari Chelliah Prabu
Additional Government Pleader for R.2 & R.3

No appearance for R.4 to R.10

COMMON JUDGMENT

M.SATHYANARAYANAN,J.

The appellants in W.A.(MD)No.1150 of 2017 are the
respondents 1 and 2/Income Tax Department/Revenue in
W.P.(MD)No.10885 of 2011. The appellant in W.A.(MD)No.1180 of
2017, who was the writ petitioner, made a challenge to the order of

the first respondent, dated 03.03.2011, in and by which, the request made by the writ petitioner to drop the proceedings initiated to declare the transfer of property as void under Rule 16(2) of Second Schedule of the Income Tax Act, came to be rejected as well as the consequential order of the second respondent, dated 09.08.2011, wherein the second respondent communicated that the transfer of property by way of sale is declared as null and void as per the provisions of Income Tax Act.

2. The writ petition, after contest, came to be allowed partly and observed that the right of the Department to proceed against the property on the basis of the attachment dated 06.01.1988 is protected with liberty to the writ petitioner to move the Tax Recovery Officer under Rule 11 seeking adjudication of his claim.

3. The writ petitioner/appellant in W.A.(MD)No.1186 of 2017 as well as the Income Tax Department/Revenue/the appellant in W.A.(MD)No.1150 of 2017, aggrieved by the said order, had filed these writ appeals.

4. The facts leading to the filing of these writ appeals briefly narrated and necessary for the disposal, are as follows:

4.1. The appellant/writ petitioner, in the affidavit filed in support of the writ petition in W.P.(MD)No.10885 of 2011, would aver, among other things, that it is a private limited company engaged in real estate business and before purchasing the property through the legal representatives of the deceased P.Jeyappan – respondents 5 to 11 to cull pre-causes by getting legal opinion from their Advocate and also by verifying the encumbrances through encumbrance certificate bearing No.2701/2008, dated 06.06.2008, which pertains to the period from 01.01.1960 to 30.06.1974 and they also applied for encumbrance certificate and it is also bearing No.3058/2008, dated 10.06.2008, which pertains to the period from 01.07.1974 to 31.12.1986 and yet another encumbrance certificate bearing No.3047/2008 which pertains to the period from 01.01.1987 to 06.06.2008 and another encumbrance certificate bearing No.4217/2010 which pertains to the period from 01.01.1987 to 16.09.2010 and according to them, the entries which contained in the said encumbrance certificates, showed no encumbrance.

4.2. It is the case of the appellant in W.A.(MD)No.1186 of 2017/writ petitioner that the property which is the subject matter of the present litigation/attachment made by the second respondent/Tax Recovery Officer, Tuticorin, originally belonged to

P.Jeyappan and after his demise, his daughter viz., the respondent No.11 had executed a release deed in favour of the private respondents 5 to 10, vide a registered Document No.1339 of 2008, dated 10.04.2008.

4.3. The appellant in W.A.(MD)No.1186 of 2017/writ petitioner was issued with a show cause notice, dated 23.09.2008 by the second respondent as to why the sale in their favour, should not be declared as void and the said notices were issued to the respondents 5, 8, 9 and 10 alone and not to all the legal heirs of the deceased P.Jeyappan.

4.4. The appellant in W.A.(MD)No.1186 of 2017/writ petitioner would further add that the assessment order was passed on 20.10.2009, after a search of original assessee's house after two years, four months and two days and after the sale of the said property in favour of the petitioner vide registered document No. 2212/2008, dated 18.06.2008 registered on the file of the Joint Sub-Registrar, Tuticorin. The appellant/writ petitioner sent a response, dated 14.10.2008, wherein it has been clearly stated that the encumbrance certificates did not disclose/reflect any encumbrance of the said property and they are *bona fide* purchasers for value and consideration without any notice to any prior

encumbrance and as such, the order of attachment, when an attempt to sell the property, cannot be sustained in law.

4.5. It is also the stand of the appellant/writ petitioner that the tax payable through the attachment notice dated 18.12.1987 was intimated belatedly on 28.09.2000 and vide proceedings, dated 09.08.2011, the said official has declared the sale effected on 18.06.2008 in favour of the appellant/writ petitioner as null and void and he has no jurisdiction to declare so for the reason that it is only a civil Court having jurisdiction to do so. The appellant/writ petitioner, after purchase, also changed the revenue records in their favour and continued to be remained in possession of the sale and therefore, prayed for quashment of the impugned notice.

4.6. The second respondent had filed the counter affidavit contending among other things that before passing the impugned order, the appellant/writ petitioner was given an opportunity of hearing and the last assessment order was passed on 20.10.2009. As per Rule 68-B(1) of II Schedule of the Income Tax Act, no sale of immovable property shall be made under the said Act after the expiry of three years from the end of the financial year, in which, the order which gave rise to a demand of any tax, interest, fine, penalty or any other sum for the recovery of which the immovable

property has been attached, has become conclusive.

4.7. The second respondent has also filed additional affidavit stating that the dues of the income tax have been recovered. It is relevant to extract the same, which is as follows:

06.10.1989 Rs. 50,000/-

15.11.1990 Rs. 86,000/-

19.11.1990 Rs. 14,000/-

By auction sale of
another property Rs.81,00,000/-

Amount attached from legal
heirs of the defaulter from
different banks Rs.14,02,094/-

4.8. The learned Judge, after taking note of the rival submissions and rule positions, found that in terms of Rule (16)(1) and (2) of II Schedule of Income Tax Act, the Tax Recovery Officer has no power to declare the alienation as null and void and granted liberty to the Department to proceed against the properties of the defaulters which came to be attached on 06.01.1988 and granted liberty to the appellant/writ petitioner to approach the Tax Recovery Officer under Rule 11(1) of II Schedule of Income Tax Act claiming that the property purchased by them is not liable for attachment and with a further direction that as and when such claim is preferred, it has to be adjudicated and disposed of in accordance

with law as stipulated in the Act.

5. The learned Counsel appearing for the appellant in W.A. (MD)No.1186 of 2017 has made the following submissions:

5.1. In the light of Rule 68B of Second schedule of the Income Tax Act, there cannot be a postponement of sale beyond the period of limitation. It is for the Department to move the civil Court to declare the transaction in the form of sale in their favour as null and void.

5.2. Admittedly in the encumbrance certificates obtained by the appellant/writ petitioner prior to their purchase, the attachment effected in respect of the said property, had not been reflected and as such, they are the *bona fide* purchasers for value and consideration without any notice of pre-encumbrance and therefore, the property is liable to be released from attachment.

5.3. Admittedly the eleventh respondent/daughter of the original owner has executed a registered Document No.1339 of 2008, dated 10.04.2008 in favour of the other private respondents and the said document has not been attached as null and void by the Tax Recovery Officer.

6. The learned Counsel for the appellant/writ petitioner, upon making his submissions, has placed reliance upon the following decisions:

- (i) ***Tax Recovery Officer Vs. Gangadhar Viswanath Ranade (decd.,)*** reported in ***AIR 199 SC 427***;
- (ii) ***Smt. Shanty Devil. Singh and another Vs. Tax Recovery Officer and others*** reported in ***AIR 1991 SC 1880***;
- (iii) ***Chaturbhuj and another Vs. Recovery Officer and another*** reported in ***MANU/MAHARASHTRA/0227/1991***;
- (iv) ***A.R.C.I. Ltd., Vs. Commissioner of Income-Tax, Range & Others*** reported in ***2012(1) D.R.T.C. 361 (Gujarat) (DB)***;

7. Per contra, Mrs.S.Srimathy, learned Counsel appearing for the respondents/revenue in W.A.(MD)No.1186 of 2017 and the appellants in W.A.(MD)No.1150 of 2017 made the following submissions:

7.1. Under Section 222 of the Income Tax Act 1961, if an assessee is in default or is deemed to be in default in making a payment of tax, the Tax Recovery Officer may draw up under his signature a statement in the prescribed Form specifying the amount of arrears due from the assessee and shall proceed to recover from

such assessee the amount specified in the certificate by one or more of the modes mentioned in accordance with the rules laid down in the Second Schedule and one of the modes is attachment and sale of the assessee's movable property and admittedly, the property in question was attached on 18.12.1987 and the alienation was made by the legal representatives of the original assessee on 18.06.2008 vide two registered documents and the claim made by the appellant in W.A.(MD)No.1186 of 2017 has been rightly considered and taking into consideration the factual aspects and legal decisions, it was rightly rejected.

8. The learned Counsel appearing for respondents/revenue in W.A.(MD)No.1186 of 2017 and the appellants in W.A.(MD)No.1150 of 2017 has invited the attention of this Court to the Second Schedule of the Income Tax Act and would submit that as per Rule 16, private alienation shall be void in certain cases and in the case on hand, admittedly, after the attachment of the property was made, the legal representatives of the original assessee had alienated one of the properties in favour of the appellant/writ petitioner and as such, the claim made by them is unsustainable in law.

9. The learned Counsel appearing for the

respondents/revenue in W.A.(MD)No.1186 of 2017 and the appellants in W.A.(MD)No.1150 of 2017 has further drawn the attention of this Court to the proceedings of the Commissioner of Income Tax, dated 03.03.2011 and would submit that the representation dated 23.09.2010 submitted in this regard, was rightly considered and categorically, a finding has also been recorded and that the Tax Recovery Officer has acted in accordance with Rule 16(2) of Second Schedule, after providing opportunity to both buyer and seller before declaring the said transaction as void and it is followed the proceedings of the Tax Recovery Officer, dated 09.08.2011 declaring the said sale transaction as null and void as per the provisions of the Income Tax Act and in the light of the said order, it is for the appellant in W.A.(MD)No.1186 of 2017 by filing a civil suit and since adjudication has already been made under Rule 11 by the Tax Recovery Officer, the leave granted to the appellant/writ petitioner to move the Tax Recovery Officer does not arise at all and prays for interference.

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10. This Court paid it's best attention to the rival submissions and also perused the materials placed before this Court.

11. It is relevant to extract the following provisions of the

Income Tax Act:

Sections 222, 226 and 228A of the Income Tax Act:

"Certificate to Tax Recovery Officer.

222: "[(1) When an assessee is in default or is deemed to be in default in his signature a statement in the prescribed form" specifying the amount of arrears due from the assessee (such statement being hereafter in this Chapter and in the Second Schedule referred to as "certificate") and shall proceed to recover from such assessee the amount specified in the certificate by one or more of the modes mentioned below, in accordance with the rules laid down in the Second Schedule -]

- (a) attachment and sale of the assessee's movable property;
- (b) attachment and sale of the assessee's immovable property;
- (c) arrest of the assessee and his detention in prison;
- (d) appointing a receiver for the management of the assessee's movable and immovable properties.

[Explanation – For the purposes of this sub-section, the assessee's movable or immovable property shall include any property which has been transferred, directly or indirectly on or after the 1st day of June, 1973, by the assessee to his spouse or minor child or son's wife or son's minor child, otherwise than for adequate considerations, and which is held by, or stands in the name of, any of the persons aforesaid; and so far as the movable or immovable property so transferred to his

minor child or his son's minor child is concerned, which shall, even after the date of attainment of majority by such minor child or son's minor child, as the case may be, continue to be included in the assessee's movable or immovable property for recovering any arrears due from the assessee in respect of any period prior to such date.]

[2. The Tax Recovery Officer may take action under sub section (1), notwithstanding the proceedings for recovery of the arrears by any other mode have been taken.]

Other modes of recovery:

226. [(1) where no certificate has been drawn up under Section 222, the Assessing Officer may recover the tax by any one or more of the modes provided in this section.

(1A) where a certificate has been drawn up under Section 222, the Tax Recovery Officer may, without prejudice to the modes of recovery specified in that section, recover the tax by any one or more of the modes provided in this section.]

(2) If any assessee is in receipt of any income chargeable under the head "salaries", the (Assessing) Officer (or Tax Recovery Officer) may require any person paying the same to deduct from any payment subsequent to the date of such requisition any arrears of tax due from such assessee, and such person shall comply with any such requisitions and shall pay the sum so deducted to the credit of the Central Government or

as the Board directs;

Provided that any part of the salary exempt from attachment in execution of a decree of a civil Court under Section 60 of the Code of Civil Procedure, 1908 (5 of 1908), shall be exempt from any requisitions made under this sub-section.

(3) (i) The [Assessing] Office [or Tax Recovery Officer] may, at any time or from time to time, by notice in writing require any person from whom money is due or may become due to the assessee or any person who holds or may subsequently hold money for or on account of the assessee to pay to the [Assessing] Officer [or Tax Recovery Officer] either forthwith upon the money becoming due or being held or at or within the time specified in the notice (not being before the money becomes due or is held) so much of the money as is sufficient to pay the amount due by the assessee in respect of arrears or the whole of the money when it is equal to or less than that amount.

(ii) A notice under this sub-section may be issued to any person who holds or may subsequently hold any money for or on account of the assessee jointly with any other person and for the purposes of this sub-section, the shares of the joint holders in such account shall be presumed, until the contrary is proved, to be equal.

(iii) A copy of the notice shall be forwarded to the assessee at his last address known to the [Assessing] Officer [or Tax Recovery Officer], and in the case of a joint account to all the joint holders at their last addresses known to the

[Assessing] Officer [or Tax Recovery Officer].

- (iv) Save as otherwise provided in this sub- section, every person to whom a notice is issued under this sub- section, shall be bound to comply with such notice, and, in particular, where any such notice is issued to a post office, banking company or an insurer, it shall not be necessary for any pass book, deposit receipt, policy or any other document to be produced for the purpose of any entry, endorsement or the like being made before payment is made, notwithstanding any rule, practice or requirement to the contrary.
- (v) Any claim respecting any property in relation to which a notice under this sub- section has been issued arising after the date of the notice shall be void as against any demand contained in the notice.
- (vi) Where a person to whom a notice under this sub- section is sent objects to it by a statement on oath that the sum demanded or any part thereof is not due to the assessee or that he does not hold any money for or on account of the assessee, then, nothing contained in this sub-section shall be deemed to require such person to pay any such sum or part thereof, as the case may be, but if it is discovered that such statement was false in any material particular, such person shall be personally liable to the Assessing] Officer or Tax Recovery Officer] to the extent of his own liability to the assessee on the date of the notice or to the extent of the assessee' s liability for any sum due under

this Act, whichever is less.

(vii) The [Assessing] Officer [or Tax Recovery Officer] may, at any time or from time to time, amend or revoke any notice issued under this sub-section or extend the time for making any payment in pursuance of such notice.

(viii) The [Assessing] Officer [or Tax Recovery Officer] shall grant a receipt for any amount paid in compliance with a notice issued under this sub-section, and the person so paying shall be fully discharged from his liability to the assessee to the extent of the amount so paid.

(ix) Any person discharging any liability to the assessee after receipt of a notice under this sub-section shall be personally liable to the [Assessing] Officer [or Tax Recovery Officer] to the extent of his own liability to the assessee so discharged or to the extent of the assessee's liability for any sum due under this Act, whichever is less.

(x) If the person to whom a notice under this sub-section is sent fails to make payment in pursuance thereof to the [Assessing] Officer [or Tax Recovery Officer], he shall be deemed to be an assessee in default in respect of the amount specified in the notice and further proceedings may be taken against him for the realisation of the amount as if it were an arrear of tax due from him, in the manner provided in sections 222 to 225 and the notice shall have the same effect as an attachment of a debt by the Tax Recovery Officer

in exercise of his powers under section 222.

4. The [Assessing] Officer [or Tax Recovery Officer] may apply to the court in whose custody there is money belonging to the assessee for payment to him of the entire amount of such money, or, if it is more than the tax due, an amount sufficient to discharge the tax.

5. The [Assessing] Officer [or Tax Recovery Officer] may, if so authorised by the [[Principal Chief Commissioner or] Chief Commissioner or [Principal Commissioner or] Commissioner] by general or special order, recover any arrears of tax due from an assessee by distraint and sale of his movable property in the manner laid down in the Third Schedule.]

Recovery of tax in pursuance of agreements with foreign countries.

"228A. (1) Where an agreement is entered into by the Central Government with the Government of any country outside India for recovery of income-tax under this Act and the corresponding law in force in that country and the Government of that country or any authority under that Government which is specified in this behalf in such agreement sends to the Board a certificate for the recovery of any tax due under such corresponding law from a person having any property in India, the Board may forward such certificate to any Tax Recovery Officer within whose jurisdiction such property is situated and thereupon such Tax Recovery Officer shall-

(a) proceed to recover the amount specified in the certificate in the manner in which he would proceed to

recover the amount specified in a certificate received from an Income-tax Officer; and

(b) remit any sum so recovered by him to the Board after deducting his expenses in connection with the recovery proceedings.

Where an assessee is in default or is deemed to be in default in making a payment of tax, the Tax Recovery Officer may, if the assessee has property in a country out side India (being a country with which the Central Government has entered into an agreement for the recovery of income-tax under this Act and the corresponding law in force in that country), forward to the Board a certificate drawn up by him under Section 222 and the Board may take such action thereon as it may deem appropriate having regard to the terms of the agreement with such country.

(2) Notwithstanding the issue of a certificate under section 222 to the Tax Recovery Officer, where an assessee is in default or is deemed to be in default in making a payment of tax, the Income-tax Officer may, if the assessee has property in a country outside India (being a country with which the Central Government has entered into an agreement for the recovery of income-tax under this Act and the corresponding law in force in that country), forward to the Board a certificate specifying the amount of arrears due from the assessee and the Board may, take such action thereon as it may deem appropriate having regard to the terms of the agreement with such country."

12. The following dates and events are relevant to adjudicate the issues involved in these writ appeals:

19.01.1987	A certificate under Section 227 of the Income Tax Act was issued by the Assessing Officer to the Tax Recovery Officer.
24.02.2007	Notice of demand to the defaulter under Rule 2 of the Second Schedule of the Income Tax Act.
18.12.1987	Order of attachment of immovable property in respect of the premises bearing Door No.27, Toovipuram, 5 th street, Tuticorin, which was purchased by the writ petitioner.
18.06.2008	A Registered sale deed bearing document No. 2212/2008 executed by the legal representative of the original assessee in favour of the writ petitioner pertaining to the above said property.

13. The legal representatives of the original assessee viz., P.Jeyappan in respect of the assessment made under Section 143(3) read with Section 147 of the Income Tax Act pertaining to the assessment years 1978-1979 to 1983-1985, filed appeals before the Commissioner of Income Tax (Appeals) and vide orders, dated 12.12.1988, the said Authority had confirmed the majority of the additions and remanded back to the same Assessing Officer in respect of some points for reconsideration. The legal representatives of the assessee filed Second Appeal before the Income Tax Appellate Tribunal and the Income Tax Appellate Tribunal, vide order dated 23.05.1995 in ITA Nos.283, 626 and 628/Mds/89, had set aside the assessment with direction to allow

the legal representatives of the assessee to inspect all the seized documents and to re-do the assessment after giving reasonable opportunity and accordingly, fresh adjudication was done and after doing so, the Income Tax Officer, Ward I(2), Tuticorin, has adjusted the excess payments towards interest charged under Section 220(2) of the said Act and also communicated that the penalty proceedings under Sections 271(1)(a), 271(1)(c) and 273 have to be initiated separately.

14. The Tax Recovery Officer, Tuticorin, who is the second respondent in W.A.(MD)No.1186 of 2017 and the second appellant in W.A.(MD)No.1150 of 2017, has sent a communication dated 22.02.2010 to the legal representatives of the original assessee by pointing out that they have illegally transferred the attached property, which was, as per proceedings dated 18.12.1987, attached on 06.01.1988 in favour of the appellant in writ appeal in W.A.(MD)No.1186 of 2017/writ petitioner and they are calling upon to show cause as to why the illegal transaction made by them should not be declared as null and void as per Rule 16(1) of the Second Schedule of the Income Tax Act.

15. The appellant/writ petitioner submitted a representation dated 23.09.2010 to the Commissioner of Income Tax, Madurai,

narrating the events that had happened and claimed that they are innocent and *bona fide* purchasers for valid and consideration without any notice of prior encumbrance and therefore, prayed for appropriate direction to direct the Assessing Officer to drop any further proceedings pertaining to the said property and raise the attachment and also enclosed the supporting documents.

16. The Commissioner of Income Tax, Madurai, vide proceedings in C.No.TRC/CIT-I/2010-11, dated 03.03.2011, has taken into consideration the said representation and noted that on a perusal of the Assessing Officer's and the Tax Recovery Officer's report and other evidence, the attachment of the said property was made on 18.12.1987 and it was duly intimated to the Sub-Registrar's Office by the Tax Recovery Officer on 28.09.2007 and it was served on 03.10.2007 and only after the said information, the transfer of property had taken place and in the light of the Rule 16(1)(2) of the Second Schedule, the defaulter or his legal representative is not competent to alienate any property except with the permission of the Tax Recovery Officer and since the Tax Recovery Officer has acted within his jurisdiction in the light of the said Rule, the representation/petition submitted by them is to be rejected and accordingly, the same is rejected on the ground of no merits.

17. As already pointed out, the Tax Recovery Officer in his order dated 09.08.2011 has noted that the property has been illegally transferred by way of a registered sale deed dated 18.06.2008 and since it has been sold after service of the demand notice, it has to be declared as null and void as per the provisions of the Income Tax Act.

18. In ***Tax Recovery Officer Vs. Gangadhar Viswanath Ranade (Decd.,)*** reported in ***AIR 1999 SC 427***, the scope of Section 281 of the Income Tax Act and Rule 11 of the Second Schedule came up for consideration. The question arose for consideration before the Honourable Supreme Court of India is whether in a proceedings under Rule 11 of the Second Schedule of the Income Tax, the Tax Recovery Officer can declare a transfer as void under Section 281. The Honourable Supreme Court of India has noted that Rule 11 of the Second Schedule is analogous to those of Order 21, Rules 58 to 61 and 63 of the Code of Civil Procedure, 1908, as they stood prior to the amendment of the Civil Procedure Code in the year 1976.

19. In the above said decision, the Honourable Supreme Court of India has observed as follows:

“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 the possession of the assessee in his own right, or in the 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."

20. The Honourable Supreme Court of India, on the facts of the case, found that the Tax Recovery Officer could not have examined whether the transfer was void under Section 281 of the Income Tax Act and his adjudication of the transfer as void under Section 281 is without jurisdiction and granted liberty to the Income Tax Department to take appropriate proceedings in accordance with law for having the transfer declared as void under Section 281 of the Income Tax Act.

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21. The said decision was followed by a Division Bench of Gujarat High Court in ***A.R.C.I. Ltd., Vs. Commissioner of Income-Tax, Range & Others*** reported in ***2012(1) D.R.T.C. 361 (Gujarat) (DB)***. The question arose for consideration is as to the

priority over dues of the Securitisation and Reconstruction of

Financial Assets and Enforcement of Security Interest Act, 2002 (SRFAESI Act) and the Income Tax Act.

22. The Division of Gujarat High Court, in the above said decision, has considered the scope of Sections 222, 281 and Second Schedule, Rule 11(6) of the Income Tax Act. The earlier decision rendered by the Gujarat High Court, in ***Tax Recovery Officer Vs. Industrial Financial Corporation of India*** reported in **2011(3) G.L.R. 2342**, has also taken into consideration, wherein the Division Bench held that *"the transfer of property was made for valuable consideration without notice of proceeding of recovery of arrears of income – tax held that the Financial Institution was entitled to protection under the proviso to Cl.(1) of sub-section (1) of Section 281 of the Income Tax Act against the arrears of income tax dues of the revenue."*

23. In paragraph No.18 of the said decision, the Division Bench of Gujarat High Court has taken into consideration the decision rendered by the Honourable Apex Court in ***Tax Recovery Officer Vs. Gangadhar Viswanath Ranade (Decd.,)*** reported in **AIR 1999 SC 427** [cited supra] and held that the revenue cannot raise a plea of transfer being void under Section 281 of the Income Tax Act and this writ petition was filed by the third party and the

suit has to be filed by the revenue to get the transfer declared as void.

24. The learned Counsel appearing for the revenue/appellants in W.A.(MD)No.1150 of 2017 placed reliance upon the decision rendered by a single Bench of Bombay High Court in ***Inayat Hussain Fakhruddin and another Vs. Union of India and another*** reported in **1979 Maharashtra L.J. 514**. The Single Bench of Bombay High Court in paragraph No.16 has observed that *"As I pointed out, the heart of Section 281 is the intention to defraud and if the intention to defraud the Revenue is absent or is not claimed to be present, Section 281 cannot be invoked."*

25. The Single Bench of Bombay High Court has also considered the Rules 2, 16, 48 and 51 of the Second Schedule of the Income Tax Act and observed that *"as per sub-rule (2) of Rule 16, all transfer of immovable properties void as against claims enforceable under the attachment. No question of bona fide transfer with value or any other question as contemplated in Section 281 or an intention to defraud the Revenue arises at all and by the force of attachment itself the property becomes open to be taken and sold for satisfaction of the claim of the attaching department and the two provisions of the Act do not operate on the*

same field." The matter decided by the Bombay High Court pertains to the grant of interim order and despite the said finding, the order of interim injunction was granted subject to certain conditions.

26. The Division Bench of Bombay High Court in ***Shamim Bano G.Rathi and another Vs. Oriental Bank of Commerce Ltd., and Others*** reported in **(2008) Vol.306 ITR 234 (Bombay)** has taken into consideration the decision in ***Tax Recovery Officer Vs. Gangadhar Viswanath Ranade (Decd.,)*** reported in ***AIR 1999 SC 427 : (1998)149 CTR (SC) 90: (1998)234 ITR 188(SC)*** and held that unless it is found that the property of the assessee is transferred by him to the third party with intention to defraud the revenue, the remedy open to them is to file a suit under Rule 11(6) to have the transfer as to declare as void as per Section 281 of the Income Tax Act.

27. The facts projected would also lead to the incidental question as to whether the sale by the legal representatives of the deceased in favour of the appellant/writ petitioner was done with a view to defraud the revenue. It is the categorical case of the appellant/writ petitioner that before purchasing the property, they got the legal opinion and also obtained encumbrance certificates and any entries therein have not declared any succeeding

encumbrance including the attachment of the said property by the Income Tax Department.

28. In ***S.S.Karthikeyan Vs. Sivasalam and Another*** reported in ***(2009)2 MLJ 473 (Single Bench)***, the revision petitioner prays for stay of execution of the proceedings pending pertaining to an immovable property pending adjudication of the claim under Order 21 Rule 58 of the Code of Civil Procedure by contending that he was *bona fide* purchaser of the property after verifying the encumbrance and the order of attachment was not reflected in the said encumbrance.

29. The learned Single Judge, after taking into consideration the various decisions and on appraisal of the facts, in paragraph No.10, observed as follows:

“..... the order of attachment over the petition mentioned property is based on the Encumbrance Certificate; if it is not reflected, then the Court has to consider the matter by taking into account the material evidence.”

30. The learned Judge further held that as per Order 21 and Rule 58-A of the Code of Civil Procedure, the order of attachment as well as the order raising the attachment by removal, determination or removal passed under Rule 55 shall be communicated to the

Registering Officer within the local limits whose jurisdiction the whole or any part of the immovable property comprised in such order is situated.

31. Now, coming to the facts of the case, the order of attachment was made on 18.12.1987 and as per the additional affidavit of the second appellant, dated 12.12.2011, filed in W.P.(MD)No.10885 of 2011, the intimation was sent to the Joint Sub-Registrar, Tuticorin, on 28.09.2007 and it was acknowledged by him on 03.10.2007 and notice for settling a sale proclamation under Section 53 of the Second Schedule of the Income Tax Act was served on the legal heirs of the original assessee as such the sale of the property to the writ petitioner was to be held as null and void on 09.08.2011 which was the subject matter of challenge in the writ petition.

32. Admittedly, the entry relating to attachment is not reflected in the encumbrance certificates issued by the Joint Sub-Registrar, Tuticorin and the stand taken by the writ petitioner in W.P. (MD)No.10885 of 2011 that he has purchased of the said suit property, vide a registered sale deed bearing Document No. 2212/2008, dated 18.06.2008, after verifying the encumbrance and was not seriously disputed by the revenue in their counter affidavit,

but they would contend the operation of law, alienation by the legal representatives of the deceased assessee is declared as null and void.

33. In the light of the *ratio* laid down by the Honourable Supreme Court of India in ***Tax Recovery Officer Vs. Gangadhar Viswanath Ranade (Decd.,)*** reported in ***AIR 1999 SC 427***, it is not open to the Tax Recovery Officer to declare the said sale as null and void. The above said decision also held 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.*" [emphasis supplied.]

34. In the light of the ratio laid down in the above cited decision, it is not open to the Tax Recovery Officer to declare the said transfer/alienation as null and void as per the provisions of the Income Tax Act. It is also brought to the knowledge of this Court by

the learned Counsel appearing for the appellant/writ petitioner that he also sought information under the Right to Information Act, from the Public Information Officer - the Joint Sub-Registrar, Tuticorin, as to the order of attachment by the Income Tax Officer in respect of the property concerned in registered document No.2212/2008, dated 18.06.2008 and vide communication dated 24.05.2011 bearing No.2099/அயர்/2011இ, the said official informed that no such document is available on file. Therefore, this Court is of the considered view that it is for the Income Tax Department, to file a suit to hold the transaction declared as null and void as per the *ratio* laid down by the Honourable Supreme Court of India reported in ***Tax Recovery Officer Vs. Gangadhar Viswanath Ranade (Decd.,)*** reported in ***AIR 1999 SC 427.***

35. In the result,

(i) W.A.(MD)No.1186 of 2017 is partly allowed and the order of the learned Judge in granting liberty to the writ petitioner to move the Tax Recovery Officer under Rule 11 of the Second Schedule seeking adjudication of his claim is set aside and the Revenue is granted liberty to file a civil suit to declare the sale transaction/sale deed in favour of the writ petitioner as null and void;

(ii) W.A.(MD)No.1150 of 2017 filed by the revenue is

dismissed in the light of the judgment made in W.A.(MD)No.1186 of 2017.

(iii) However, considering the facts and circumstances of the case, there shall be no order as to costs.

(iv) Consequently, all the connected civil miscellaneous petitions are closed.

Index :No (M.S.N.,J) (R.H.,J.)
Internet :Yes 13.04.2018
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To

1.The Commissioner of Income Tax – I (i/c),
2, V.P.Rathinasamy Nadar Road,
Bibikulam,
Madurai – 02.

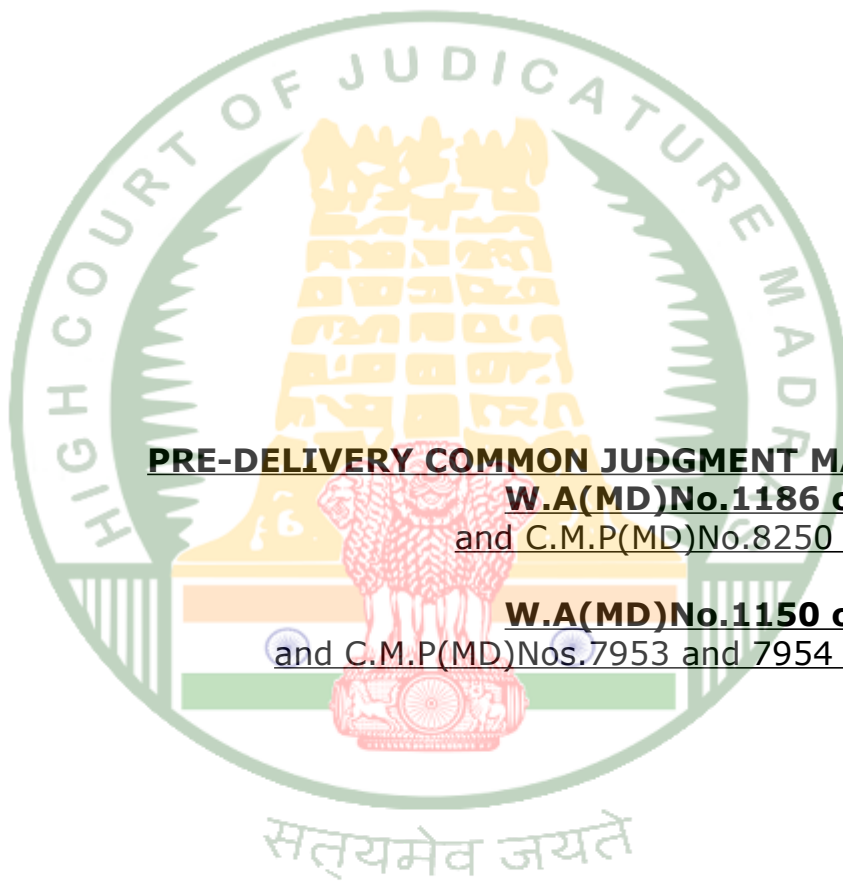
2.The Tax Recovery Officer,
Income Tax Office,
WGC Road,
Tuticorin.

3.The Secretary/Commissioner Registration,
Government of Tamil Nadu,
St.George,
Chennai.

4.The Sub Registrar Joint – I,
District Registrar Office,
Tuticorin.

M.SATHYANARAYANAN,J.
AND
R.HEMALATHA,J.

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PRE-DELIVERY COMMON JUDGMENT MADE IN
W.A(MD)No.1186 of 2017
and C.M.P(MD)No.8250 of 2017
AND
W.A(MD)No.1150 of 2017
and C.M.P(MD)Nos.7953 and 7954 of 2017

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13.04.2018