

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

TUESDAY, THE 6TH DAY OF MARCH 2018 / 15TH PHALGUNA, 1939

WP(C).No. 876 of 2018

PETITIONER(S)

MOHAMMED NIYAS
AGED 51 YEARS, S/O.LATE YAHIYA KOYA,
RESIDING AT NIYAS MANZIL, KANNIMALCHERRY,
KILIKOLLOOR (P.O), KOLLAM DISTRICT, PIN-691004.

BY ADVS.SRI.JAWAHAR JOSE
SMT.CISSY MATHEWS
SRI.SARUN RAJAN

RESPONDENT(S) :

1. THE COMMISSIONER OF INCOME TAX
AAYAKAR BHAVAN, KOWDIAR, THIRUVANANTHAPURAM,
PIN-695003.
2. THE TAX RECOVERY OFFICER,
INCOME TAX DEPARTMENT, AAYAKAR BHAVAN, KOWDIAR,
THIRUVANANTHAPURAM, PIN-695003.

R1-R2 BY ADV. SRI.CHRISTOPHER ABRAHAM, SC, INCOME TAX DEPARTMENT

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 06-03-2018,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

PETITIONER(S) ' EXHIBITS

- EXHIBIT P1 TRUE COPY OF THE ATTACHMENT ORDER DATED 29.11.2017.
- EXHIBIT P2 TRUE COPY OF THE ORDER DATED 24.2.1987.
- EXHIBIT P3 TRUE COPY OF THE SALE NOTICE DATED 9.1.1987.
- EXHIBIT P4 TRUE COPY OF THE JUDGMENT DATED 24.2.1998 IN O.S.NO.32/1987 ON THE FILES OF ADDITIONAL SUB COURT, KOLLAM.
- EXHIBIT P4 (a) TRUE COPY OF THE JUDGMENT DATED 10.9.2012 OF THIS HON'BLE COURT IN A.S.NO.468/1998.
- EXHIBIT P5 TRUE COPY OF THE JUDGMENT DATED 11.8.2016 IN W.P.(C) NO.27423/2013 OF THIS HON'BLE COURT.
- EXHIBIT P5 (a) TRUE COPY OF THE ORDER DATED 9.11.2016 IN R.P.NO.886/2016 IN W.P.(C) NO.27423/2013 OF THIS HON'BLE COURT.
- EXHIBIT P6 TRUE COPY OF THE JUDGMENT DATED 15.3.2017 IN W.A.NO.391/2017 OF THIS HON'BLE COURT.
- EXHIBIT P7 TRUE COPY OF THE NOTICE DATED 8.12.2017 ISSUED BY THE 2ND RESPONDENT.
- EXHIBIT P7 (a) TRUE COPY OF THE NOTICE DATED 11.12.2017 ISSUED BY THE 2ND RESPONDENT.
- EXHIBIT P8 TRUE COPY OF THE JUDGMENT OF THE BOMBAY HIGH COURT REPORTED IN (2006) 281 I.T.R. 281 [CORRESPONDING TO (2006) 1 MAH.L.J 95].

RESPONDENTS EXHIBITS:

NIL

/TRUE COPY/

VPS

PS TO JUDGE

C.R.

P.B.SURESH KUMAR, J.

W.P.(C) No.876 of 2018

Dated this the 6th day of March, 2018

JUDGMENT

The pivotal question in this matter relates to the interpretation of clause (iii) of sub-rule (2) of Rule 68B of the Second Schedule to the Income Tax Act ("the Act").

2. The facts relevant are the following: Large amounts were due from a company called Sreerama Cashews Private Limited in terms of their assessments under the Act for the years 1977-'78 and 1978-'79. Pursuant to the Recovery Certificates issued in this regard by the Assessing Officer, the Tax Recovery Officer served demand notices to the assessee in respect of the assessment years referred to above on 21.5.1982 and on 8.7.1983 respectively, directing the assessee to pay a total sum of Rs.45,91,888/- with interest. The assessee did not comply with the demands. Consequently, on 16.10.1985, an item of property measuring 2.05 acres owned by the assessee has been attached in terms of Rule 48 of the Second Schedule.

Later, the attached property was brought for sale by the Tax Recovery Officer on 25.2.1987. In the meanwhile, 90 cents, out of the attached property was sold by the defaulter to the father of the petitioner by two separate sale deeds and 60 cents out of the remaining was sold to the petitioner. The said sale deeds were executed on 10.9.1985, 13.9.1985 and 10.10.1985 respectively. On coming to know of the proceedings for sale of the property, the petitioner along with his father preferred a claim petition invoking Rule 11 of the Second Schedule. The said claim petition was rejected by the Tax Recovery Officer as per Ext.P2 order on 24.2.1987, holding among others, that the attachment over the property relates back to the dates on which the notices to pay the arrears have been served on the defaulter and that the petitioner and his father had no right over the property on the dates on which demand notices were served on the defaulter. Consequent on the dismissal of the claim petition, the property was again brought for sale on 25.2.1987 and in the said proceedings, one N.H.Sherief had offered to purchase the property and remitted 25% of the sale consideration. In the meanwhile, the petitioner and his father challenged Ext.P2 order in O.S.No.32 of 1987 before the Subordinate Judge's Court,

Kollam, invoking sub-rule (6) of Rule 11 of the Second Schedule and obtained an order restraining the Tax Recovery Officer from confirming the sale. The purchaser of the property did not pay the balance sale consideration in view of the said interim order. The suit was later dismissed on 24.2.1998. In the meanwhile, the father of the petitioner transferred the property purchased by him from the defaulter to the petitioner on 13.6.1991. Despite the said transfer, both the petitioner and his father together filed A.S. No.468 of 1998 before this Court, challenging the decision in the suit and the said appeal was dismissed by this Court on 10.9.2012. Though the petitioner and his father filed R.P. No.678 of 2013 before this Court seeking review of the judgment in A.S. No.468 of 1998, the review petition was also dismissed by this Court on 9.10.2013.

3. It is seen that steps have been taken thereupon by the Tax Recovery Officer to confirm the sale by collecting the balance sale consideration from the auction purchaser. The petitioner then preferred W.P.(C) No.27423 of 2013 before this Court alleging that since the auction purchaser did not pay the balance sale consideration, despite there being no stay interdicting the confirmation of the sale for a considerably long

period in between after the disposal of the suit, he is not entitled to obtain the conveyance of the property. It is specifically undertaken by the petitioner in the said writ petition that if it is found that the auction purchaser is not entitled to obtain conveyance of the property, he is prepared to pay the entire tax arrears of the defaulter for saving the property purchased by him. By the time when the said writ petition was filed, the auction purchaser died. The legal representatives of the auction purchaser who were impleaded as respondents 5 to 8 in the writ petition resisted the writ petition contending that the balance sale consideration was not paid by their predecessor on account of the interim order passed in the suit interdicting confirmation of sale and that they are prepared to pay the balance sale consideration for the purpose of obtaining conveyance of the property. This Court held that the successors of the auction purchaser are not entitled to obtain conveyance of the property in the light of the provisions contained in Rule 58 of the Second Schedule and consequently disposed of the writ petition in terms of Ext.P5 judgment, permitting the petitioner to liquidate the tax arrears of the defaulter. It was, however, made clear by this Court that if the petitioner fails to liquidate the tax arrears of the

defaulter, the Tax Recovery Officer will be at liberty to proceed against the property. Immediately thereupon, the Tax Recovery officer called upon the petitioner to pay the tax arrears of the defaulter. The petitioner then filed R.P.No.886 of 2016 seeking review of Ext.P5 judgment contending that what was agreed to be paid by him was the tax arrears of the defaulter, for the recovery of which the property was attached, and they are now being called upon to pay not only the said arrears, but also the arrears of the defaulter accrued after the attachment of the property. This Court dismissed the said review petition with certain clarifications, as per Ext.P5(a) order. Ext.P5 judgment, as clarified in Ext.P5(a) order, has been challenged by the petitioner in W.A. No.391 of 2017 and the said writ appeal was disposed of by this Court as per Ext.P6 judgment as follows:

“(i) Without prejudice to the contentions of the appellant, the appellant should satisfy the demand of the revenue within the time frame as ordered by the learned single judge.

(ii) If there is any failure on the part of the appellant in doing so, revenue would be entitled to proceed further in the manner as permitted in the judgment under appeal.

(iii) Remittance of the amount as above, shall be without prejudice to the right of the appellant to question the legality of the demand of the Revenue and to seek remedies thereon.

(iv) The order in R.P.No.886/2016, is hereby set aside.”

4. Earlier while dismissing the review petition filed

in the writ petition, this Court observed that if the property is worth more than the liability and there are other amounts remaining due from the defaulter, then the Tax Recovery Officer would be entitled to make a fresh attachment over the property. It appears that on the basis of the said observation, after Ext.P6 judgment, the Tax Recovery Officer issued a fresh order of attachment over the property for Rs.2,83,31,257/- due from the defaulter as on the date of attachment. Ext.P1 is the said order of attachment. Later, the Tax Recovery Officer issued Exts.P7 and P7(a) notices to the petitioner requiring him to handover the property to the department so as to enable the department to proceed against the same. The writ petition is filed challenging Ext.P1 order of attachment as also Exts.P7 and P7(a) notices on the ground that the property cannot now be proceeded against, in the light of the interdiction contained in Rule 68B of the Second Schedule.

5. A statement has been filed by the Tax Recovery Officer supporting Ext.P1 order of attachment and Exts.P7 series notices.

6. Heard the learned counsel for the petitioner as also the learned Standing Counsel for the Revenue. The judges papers

of W.P.(C).No.27423 of 2013 and W.A.No.391 of 2017 were also called for and perused.

7. As noted above, the only point raised in the writ petition is that the property cannot now be proceeded against under the Second Schedule in the light of the interdiction contained in Rule 68B. According to the learned counsel for the petitioner, the said Rule prohibits sale of immovable property under the Second Schedule, after the expiry of three years from the end of the financial year in which the order giving rise to the demand for the recovery of which the immovable property has been attached has become conclusive. It was pointed out by the learned counsel that the order giving rise to the demands in the instant case became conclusive, when the appeals preferred by the defaulters against the assessment orders were finally decided on 12/10/1989 and therefore, the period provided for in sub-rule(1) of Rule 68B has to be reckoned from 31.3.1990 and since the sale of the property did not take place within three years from 31.3.1990, the sale cannot now be made in the light of Rule 68B.

8. The learned Standing Counsel for the Revenue did not dispute the fact that in the normal course of events, the

three year period provided for in sub-rule (1) of Rule 68B of the Second Schedule has to be reckoned from 1.4.1990. But, according to the learned Standing Counsel, under clause (iii) of sub-rule (2) of Rule 68B, the period commencing from the date of presentation of any appeal against an order of the Tax Recovery Officer under the Second Schedule and ending on the day the appeal is decided is liable to be excluded in the matter of computing the period provided for under sub-rule (1) of Rule 68B; that all proceedings instituted by the petitioner challenging directly or indirectly Ext.P2 order passed by the Tax Recovery Officer rejecting the claim petition preferred by the petitioner and his father including the suit, the appeal, the review petition filed in the appeal, the writ petition filed by the petitioner thereafter, the review petition filed in the writ petition and the writ appeal filed by the petitioner challenging the decision in the writ petition as clarified in the order passed in the review petition, are to be treated as proceedings falling within the scope of the expression 'appeal' contained in clause (iii) of sub rule (2) of Rule 68B and that if the word 'appeal' contained in clause (iii) of sub rule (2) of rule 68B is construed in the aforesaid fashion, the proceedings now initiated is not hit by Rule 68B of the Second Schedule.

9. It is beyond dispute that if the writ petition filed by the petitioner after the disposal of A.S.No.468 of 1998, the review petition filed in the writ petition, as also the writ appeal challenging the decision in the writ petition are reckoned as proceedings falling within the scope of the expression 'appeal' contained in clause (iii) of sub-rule (2) of Rule 68B of the Second Schedule, the proceedings now initiated by the Tax Recovery Officer is not hit by Rule 68B. The question therefore, is whether the word 'appeal' contained in clause (iii) of sub rule (2) of Rule 68B, can be given an interpretation as suggested by the Revenue. In order to consider the said question, it is necessary to refer to Rule 68B, which reads thus:

“68B Time limit for sale of attached immovable property:- (1) No sale of immovable property shall be made under this Part after the expiry of three years from the end of the financial year in which the order giving 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 under the provisions of section 245-I or, as the case may be, final in terms of the provisions of Chapter XX.

Provided that where the immovable property is required to be re-sold due to the amount of highest bid being less than the reserve price or under the circumstances mentioned in rule 57 or rule 58 or where the sale is set aside under rule 61, the aforesaid period of limitation for the sale of the immovable property shall stand extended by one year.

2. In computing the period of limitation under sub-rule (1), the period-

i) during which the levy of the aforesaid tax, interest, fine, penalty or any other sum is stayed by an order or injunction of any court; or

ii) during which the proceedings of attachment or sale of the immovable property are stayed by an order or injunction of any court; or

iii) commencing from the date of the presentation of any appeal against the order passed by the Tax Recovery Officer under this Schedule and ending on the day the appeal is decided, shall be excluded.

Provided that where immediately after the exclusion of the aforesaid period, the period of limitation for the sale of the immovable property is less than 180 days, such remaining period shall be extended to 180 days and the aforesaid period of limitation shall be deemed to be extended accordingly.

3) Where any immovable property has been attached under this Part before the 1st day of June, 1992, and the order giving 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 also become conclusive or final before the said date, that date shall be deemed to be the date on which the said order has become conclusive or, as the case may be, final.

4) Where the sale of immovable property is not made in accordance with the provisions of sub-rule (1), the attachment order in relation to the said property shall be deemed to have been vacated on the expiry of the time of limitation specified under this rule.

As noted above, the claim petition preferred by the petitioner and his father invoking Rule 11 of the Second Schedule was rejected by the Tax Recovery Officer as early as on 24.2.1987. Sub-rule (6) of Rule 11 provides that where a claim petition or an objection is preferred, the party against whom the order is made may institute a suit in a civil court to establish the right which he claims to the property in dispute and that the order of the Tax Recovery Officer would become final and conclusive, subject to the result of such suit. In the light of sub-rule (6) of Rule 11, there may not be any difficulty in holding that the suit which a person who is aggrieved by an order passed by the Tax Recovery Officer institutes would fall within the scope of the expression 'appeal' under Clause (iii) of sub-rule (2) of Rule 68B. If the suit instituted by the petitioner and his father invoking sub Rule (6) of Rule 11 is reckoned as a proceedings that falls within the expression 'appeal' as contained in clause (iii) of sub-rule (2) of rule 68B, necessarily the appeal preferred against the decision in such a suit and the petition filed seeking review of the decision in such an appeal would also fall within the expression 'appeal' as contained in clause (iii) of sub-rule (2) of rule 68B. As noted

above, the petition filed by the petitioner seeking review of the judgment in A.S.No.468 of 1998 was dismissed by this Court on 9.10.2013. It is seen that immediately after the disposal of the said review petition, on 06/11/2013, the petitioner instituted W.P. (C).No. 27423 of 2013 before this Court seeking, among others, directions restraining the Tax Recovery Officer from proceeding further in the matter of sale of the property and obtained an interim order on 7/11/2013 to the effect that transactions in respect of the property over which the petitioner claims right will be subject to the outcome of the writ petition. The said writ petition was disposed of only on 11/8/2016. It is seen that immediately thereafter, as directed by this Court in terms of the judgment in the writ petition, the Tax Recovery Officer has called upon the petitioner to pay the tax arrears of the defaulter, which the petitioner undertook to pay in the writ petition. Annexure A1 in the review petition is the communication issued by the Tax Recovery Officer in this connection. Immediately on receipt of the said communication, the petitioner filed the petition seeking review of the judgment. It is seen that in the said review petition, the petitioner sought stay of all further proceedings pursuant to Annexure A1 notice and on 19/10/2016, this Court granted the

stay sought for by the petitioner. The review petition was dismissed on 9/11/2016. Immediately thereupon, the petitioner challenged the decision in the writ petition as clarified in the review petition in writ appeal and the writ appeal was disposed of on 15/3/2017. The facts aforesaid would indicate beyond doubt that the writ petition filed by the petitioner after the disposal of A.S.No.468 of 1998, the review petition filed in the writ petition as also the writ appeal challenging the decision in the writ petition, were proceedings in essence challenging the decisions of the Tax Recovery Officer under the Second Schedule. It is seen that the purpose of sub-rule (2) of Rule 68B is to exclude the period during which the Tax Recovery Officer is prevented from continuing the proceedings for realisation of the tax arrears by virtue of orders passed by Courts as also the period during which it is inappropriate for the Tax Recovery Officer to continue the proceedings for realization of the tax arrears on account of the pendency of the proceedings challenging the decisions taken by the Tax Recovery Officer, irrespective of the fact as to whether there is any interim order in such proceedings or not, while computing the outer time limit provided for under sub-rule (1) of Rule 68B. Looking at the issue in the above perspective, I have

no doubt that the proceedings up to the decision in W.A. No.391 of 2017 are liable to be treated as proceedings falling within the scope of the expression 'appeal' contained in Clause (iii) of sub-rule (2) of Rule 68B of the Second Schedule. Any other interpretation of the said provision would go against the principle that he who prevents a thing from being done shall not avail himself of the non-performance he has occasioned. The question aforesaid is thus answered accordingly.

10. That apart, according to me, the writ petition is not maintainable on various other reasons as well. As noted above, the contention based on Rule 68B of the Second Schedule is taken by the petitioner on the premise that the order giving rise to the liability, for the recovery of which the immovable property has been attached, has become conclusive on 31.3.1990 and that therefore, the three year period specified in sub-rule (1) of Rule 68B expired on 31.3.1993. If that be so, that was a ground available to the petitioner in the suit that was pending at the relevant time as also in all the subsequent proceedings instituted by the petitioner. The petitioner having not raised such a contention in any of the proceedings, he is not entitled to institute a writ petition solely on that ground.

11. Further, as noted above, the defaulter was called upon to pay the tax arrears by virtue of two separate notices issued to them by the Tax Recovery Officer as early as in the years 1982 and 1983. In the light of the provision contained in Rule 51 of the Second Schedule, the attachment effected over the property relates back to, and takes effect from the date of notice. In other words, the attachment over the property purchased by the petitioner has taken effect from 21.5.1982, the date on which the defaulter was served with the notice of demand by the Tax Recovery Officer for the period 1977-'78. Admittedly, the sale deeds in respect of the property in favour of the petitioner and his father were of the year 1985. The sale deeds relied on by the petitioner and his father are therefore documents executed violating the provisions of sub-rule(1) of Rule 16, which interdicts the defaulter from alienating the properties. In terms of the said rule, the documents, on the basis of which the petitioner traces title of the property are void as against all claims enforceable under the attachment. If that be so, the petitioner is not entitled to file a writ petition challenging the proceedings under the Second Schedule on the basis of the said void documents, for it is implicit in the exercise of the

extraordinary jurisdiction of this Court under Article 226 of the Constitution that the relief asked for must be one to enforce a legal right [See **State of Orissa v. Madan Gopal Rungta** (AIR 1952 SC 12) and **Calcutta Gas Company (Proprietary) Ltd. v. State of W.B. and Ors.** (AIR 1962 SC 1044)].

12. Further, it is well established that the remedy of writ under Article 226 is extraordinary and discretionary and that the exercise of discretion to issue a writ shall be for the purpose of granting an equitable relief to the party. It is equally well established that the power under Article 226 may not be exercised by the court to strike down an illegal order or action although it would be lawful to do so, if the exercise of the jurisdiction in a given matter would resurrect a grave illegality or would work out injustice to others. In other words, the High Court cannot be oblivious of the conduct of the party invoking the remedy while exercising the said jurisdiction. In the instant case, as noted above, W.P.(C) No.27423 of 2013 was instituted by the petitioner with an undertaking that he would liquidate the entire tax arrears of the defaulter. Had the petitioner not made such an undertaking when the said matter was taken up for hearing, this Court would not have entertained the said writ

petition in exercise of the discretionary power and in that event, the Revenue would have at least received the balance sale consideration from the successors of the auction purchaser who were willing to pay the same as indicated in the judgment in the writ petition. Having obtained a favourable order in the writ petition, the petitioner changed his stand and refused to liquidate the tax arrears of the defaulter. In the aforesaid circumstances, I am of the view that this is not a fit case at all for exercise of the discretionary jurisdiction of this Court under Article 226 of the Constitution.

For all the aforesaid reasons, this writ petition is devoid of merits, and the same is, accordingly, dismissed.

Sd/-

**P.B.SURESH KUMAR,
JUDGE**

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PS to Judge