

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO.16626 of 2017
FOR APPROVAL AND SIGNATURE:

HONOURABLE MS.JUSTICE HARSHA DEVANI Sd/-
 and

HONOURABLE MR.JUSTICE A.S. SUPEHIA Sd/-

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	NO
2	To be referred to the Reporter or not ?	NO
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	NO

NITABEN HARISHBHAI SHAH....Petitioner(s)
 Versus

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

Appearance:

MR SN SOPARKAR, SENIOR ADVOCATE, with MR JAIMIN R DAVE, ADVOCATE for Petitioner(s) No. 1

MR MR BHATT, SENIOR ADVOCATE, WITH MRS MAUNA M BHATT, ADVOCATE for Respondent(s) No. 1

CORAM: HONOURABLE MS.JUSTICE HARSHA DEVANI
 and

HONOURABLE MR.JUSTICE A.S. SUPEHIA

Date : 20/12/2017

CAV JUDGMENT

(PER : HONOURABLE MR.JUSTICE A.S. SUPEHIA)

(1) In the present writ petition, the petitioner has challenged the order dated 26.05.2017 passed by the respondent-Tax Recovery

Officer under rule 16 of the Second Schedule of the Income Tax Act, 1961 whereby the property acquired by the petitioner by registered sale deed dated 25.03.2008 is sought to be declared null and void.

- (2) The brief facts, which are culled out from the record of the petition are as under:
- (3) The petitioner acquired property being 4, Golden Tulip Bungalows (Town Planning Scheme No.21/Final Plot No.198A), Shreyas Foundation, Ellis Bridge, Ahmedabad vide registered sale deed dated 25.03.2008 for a consideration of Rs.1,15,00,000/-. It was acquired from Shri Harishbhai F. Shah, Shri Bharatbhai F. Shah and Dairy Den Limited and the sale deed is duly registered with the Sub-Registrar, Ahmedabad (4-Paldi). The petitioner purchased the property after verifying the title thereof and that no encumbrances were recorded in the Sub-Registrar's Office at the time when the petitioner executed the sale deed.
- (4) On 04.01.2005, an order of attachment was passed under rule 48 of the Second Schedule of the Income Tax Act with respect to the property in dispute for the outstanding tax

demand of Shri Harishbhai F. Shah arising out of assessment order dated 27.09.2004 passed under section 158BC(d) of the Income Tax Act, 1961 (the Act). It is the case of the petitioner that the petitioner was completely unaware about the said order dated 04.01.2005, and she acquired knowledge about the said order only on 26.08.2009 when a letter was issued by the Tax Recovery Officer to the President of Golden Tulip Co-operative Housing Society Limited requesting to provide certain documents for valuation purpose. The said letter was forwarded to Shri Harishbhai Shah, who, in turn, brought it to the notice of the petitioner. Since the letter was addressed to the Housing Society and only sought certain documents, the petitioner did not feel it appropriate to respond to the Tax Recovery Officer.

- (5) Thereafter, the petitioner received order dated 28.09.2015 passed by the respondent declaring the sale in respect of the said property as null and void under rule 16 of the Second Schedule to the Act. The petitioner challenged the same before this Court by filing Civil Application No.17280 of 2015. During the pendency of the petition, Shri Harishbhai F. Shah made

payment of a sum of Rs.1,19,95,598/-. In view of the aforesaid fact, this Court vide judgment and order dated 02.02.2017 quashed and set aside the order dated 28.09.2015 thereby upholding the sale transaction. Pursuant to the said order, vide letter dated 26.05.2017, the respondent released the attachment over the property.

- (6) Thereafter, by the impugned order dated 26.05.2017 the respondent declared the sale in favour of the petitioner as null and void for the alleged outstanding tax demand of Rs.1,74,05,860/- against Shri Harishbhai F. Shah arising out of penalty order dated 17.03.2006.
- (7) A notice dated 04.09.2017 came to be served upon Shri Harishbhai F. Shah, wherein the property is sought to be auctioned on 11.09.2017, which was communicated to the petitioner by Shri Harishbhai F. Shah on 05.09.2017. The petitioner is, therefore, constrained to approach this Court.
- (8) At the outset Learned Senior Counsel Mr.Soparkar for the petitioner has submitted that the Tax Recovery Officer has no jurisdiction, power or authority to declare

the sale as void, and the only remedy available to the Revenue is to approach the Civil Court for such declaration. In support of his contention, he has relied on the decisions reported in the cases of Tax Recovery Officer-II, Sadar, Nagpur Vs. Gangadhar Vishwanath Ranade, 1998 LawSuit (SC) 902 and Karsanbhai Gandabhai Patel Vs. Tax Recovery Officer, [2014] 3 taxmann.com 415 (Gujarat).

- (9) He has also further submitted that the order dated 26.05.2017 is liable to be quashed and set aside on the short ground that it is passed in contravention of rule 16 of the Second Schedule. It was submitted that on a bare perusal of the said rule it becomes crystal clear that sub-rule (1) of rule 16 is applicable only when a notice is served upon the defaulter under rule 2. It was submitted that in the present case notice under rule 2 came to be issued only on 23.05.2017, as against that the sale transaction took place on 25.03.2008 and at the time when the sale deed was executed notice under rule 2 qua this demand did not exist. It was further submitted that it is not open to the respondent to take shelter of notice under rule 2 issued for the

recovery of earlier dues inasmuch as those proceedings are already quashed and set aside vide order dated 02.02.2017 passed in Special Civil Application No.17280 of 2017.

- (10) Per contra, Mr.M.R.Bhatt, learned Senior Counsel appearing on behalf of the respondent-Tax Recovery Officer has submitted that pursuant to the judgment dated 02.02.2017, the property in question was released vide office order dated 26.05.2017 and a fresh Form No.57 was issued to the assessee on 23.05.2017 for the penalty demand (with interest) of Rs.1,74,05,869/- since this Court in the said judgment had left open for the revenue to initiate appropriate proceedings to recover the amount due and payable under penalty order dated 17.03.2006 from the very property. He has further contended that as per section 281 of the Act 'certain transfers are void' and the transfer in question will fall under the same. In the present case penalty proceeding under section 158BFA(2) has been initiated by issuing notice under section 158BFA(3) of the Act on 27.09.2004 and the assessee – Shri Harishbhai F. Shah was aware of the

pendency of the penalty proceedings and hence, the assessee is required to take previous permission from the Assessing Officer, however, the assessee did not take any such permission. It was also submitted that it was a case of *mala fide* transfer by the defaulter – assessee and the transfer was effected in favour of the present petitioner solely with a view to defraud the revenue as such transfer was between the wife (petitioner) and her husband. He has stated that in such circumstances, the Tax Recovery Officer is justified in declaring the transaction as null and void and there was no need to approach the Civil Court for such declaration. Mr. Bhatt has made an endeavour to distinguish the judgements quoted by the learned counsel for the petitioner by submitting that the same will not apply in the facts of the present case as penalty proceeding were already initiated against the husband of the petitioner Shri Harishbhai Shah by issuing notice on 27.09.2004. He has also contended that in the decision in the case of **Gangadhar Vishwanath Ranade** (supra), the Apex Court has dealt with section 281 read with Rules 11(4), (5) and (6) of the Second Schedule to the Act, which mandates the Tax Recovery

Officer, hence the same will not apply to the facts of the present case. Reliance is also placed upon the decision in the case of Tax Recovery Officer Vs. Industrial Finance Corporation of India, 2011 LawSuit (Guj) 651. In view the aforesaid, he has urged that the present petition deserves to be dismissed.

- (11) Heard the learned counsel appearing on behalf of respective parties at length and perused the record of the case.
- (12) The core issue which falls for consideration is whether the Tax Recovery Officer has jurisdiction to declare the transaction of transfer of property as null and void under section 281 in the proceedings under rule 16 of the Second Schedule to the Act.
- (13) The facts established from record are that, the earlier order dated 28.09.2015 of declaring the sale as void was quashed and set aside vide judgment dated 02.02.2017 since during the pendency of the writ petition being Special Civil Application No.17280 of 2015, the original assessee Mr.Harish F Shah had already paid the entire

amount of Rs.1,09,08,485/- due and payable under Certificate bearing No.TRO.Central-II/RC/-4/04/05 dated 16/12/2004, along with interest payable under section 220(2) of the Act. However, liberty was reserved in favour of Revenue to initiate appropriate proceedings to recover the amount due and payable under penalty order dated 17.03.2006 if permissible under law. Pursuant to the aforesaid observation the Tax Recovery Officer issued notice dated 23.05.2017 under rule 2 of the Second Schedule to the Act to Mr.Harish F. Shah. Thereafter, he has again declared the same transaction as null and void vide impugned order dated 26.05.2017 for the alleged outstanding tax demand arising of the penalty order dated 17.03.2006 against Mr.Harish F. Shah after releasing the attachment vide Letter dated 23.05.2017. Section 281 of the Act, provides certain transfers as void. The same reads thus:

"SECTION 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.]"

(14) Rule 16 of the Second Schedule to the Act, provides for private alienation to be void in certain cases which reads as under:

"16. (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.

(2) Where an attachment has been made under this Schedule, any private transfer or delivery of the property attached or of any interest therein and any payment to the defaulter of any debt, dividend or other moneys contrary to such attachment, shall be void as against all claims enforceable under the attachment. "

Thus, sub-rule (2) of rule 16 presupposes "attachment" made under schedule 2 of the Act. It is evident from the facts that in the present case the order of attachment dated 04.01.2005 was not in existence when the Notice under rule 2 was issued on 23.05.2017. It is pertinent to note that the property in question was released vide letter dated 23.05.2017. Thereafter, vide the impugned order dated 26.05.2017, the property in question was attached and the transaction of transfer of the property was declared as null and void by the Tax Recovery Officer by resorting to proceedings under rule 16 of the Second Schedule to the Act. In our considered opinion, the issue involved in the present case is squarely covered by the decision of the Supreme Court

in the case of **Gangadhar Vishwanath Ranade** (supra) and the decision of this Court in the case of **Karsanbhai Gandabhai Patel** (supra), wherein after examining the provisions of section 281 which provides certain transfers to be void and rule 11 of the Second Schedule, it is held that the Tax Recovery Officer has no power to declare transfer as void and the status of the Department being a creditor, will have to file a suit for a declaration that the transaction of transfer is void under section 281 of the Act. Correspondingly, the Tax Recovery Officer cannot declare the transactions as void under the proceedings envisaged in rule 16 of the Second Schedule to the Act. The decision reported in 2011 LawSuit (Guj) 651, relied upon by the respondent-department cannot come to its rescue in the given facts of this case and in wake of the aforesaid judgements. The Revenue has to institute a suit seeking such declaration from a civil court. The contention raised by learned advocate Mr.Bhatt that the Tax Recovery Officer was justified in declaring the transfer as null and void as the same was made between husband and wife to defraud the Bank does not merit acceptance in view of the law

enunciated in the aforesaid judgments. As observed by this Court in the decision rendered in the case of **Karsanbhai Gandabhai Patel** (supra), section 281 does not create any machinery for the Revenue authorities to entertain dispute and declare the transaction to be void for which purpose, only civil suit would lie.

- (15) We, therefore, unhesitatingly, set aside the impugned order dated 26.05.2017. However, the right of the respondent authorities to seek the declaration of the transfer as null and void under section 281 of the Income Tax Act, is not taken away and if they so desire, initiate appropriate proceedings in accordance with law seeking such declaration. The petition is allowed accordingly. Rule made absolute to the aforesaid extent.

Sd/-

[HARSHA DEVANI, J]

Sd/-

[A. S. SUPEHIA, J]

Bhavesh-[pps]*