

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT**DATED: 07.03.2018****CORAM :****THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN**

W.P (MD) Nos.2932 to 2938 of 2018
and
W.M.P (MD) Nos.3088 to 3101 of 2018

W.P.(MD)No.2932 of 2018 :

D.S.Senthilvel

... Petitioner

Vs.

Tax Recovery Officer-2
 Income Tax Offices,
 Madurai 625 002.

... Respondents

PRAYER: Writ Petition is filed under Article 226 of the Constitution of India, to issue a Writ of Certiorari to call for the records in the matter of attachment of the petitioner's property in Form No.ITCP 16 dated 21.12.2015 (a copy of which is not supplied to the petitioner though admitted in his order dated 27.10.2017) and the order dated 27.10.2017 holding the sale in the petitioner's favour as null and void which has been passed without jurisdiction and quash the same.

For Petitioner

: Mr.R.Srinivasan

For Respondents

: Mrs.S.Srimathy
Standing Counsel****

COMMON ORDER

One S.Rajendran proprietor of Inland Real Estate, Madurai – 14 was served with notices of demand under Section 156 of the Income Tax Act, 1961 on 30.05.2012 and 12.06.2012 in respect the assessment year 2005-06 to 2011-12. It was finally quantified that he was liable to pay a sum of Rs.4,04,56,280/- and notice of demand was served on him on 05.01.2013 under Rule 2 of II Schedule to the Income Tax Act 1961 in the relevant form. The petitioners herein purchased the properties that are the subject matter of these writ petitions from the said defaulter-assessee thereafter. Subsequent to the said purchases, orders of attachment were made on 21.12.2015. The petitioners lodged their objections with the Tax Recovery Officer for raising the attachment. Since the said objections were not considered by the Tax Recovery Officer, the petitioners herein filed W.P(MD)Nos.19829 to 19840 of 2016 before this Court. This Court by order dated 18.10.2016 directed the Tax Recovery Officer II, Madurai to conduct enquiry in accordance with Rule 11 of the Second Schedule to the Income Tax Act. Pursuant to the aforesaid direction, the orders impugned in these writ petitions came to be passed. The respondent not only declined to vacate the attachment earlier made but also declared the sale transactions effected by the said Rajendran in their favour as null and void.

2.The learned counsel appearing for the petitioners contended

that the issue on hand is no longer *res integra*. He drew the attention

of this Court to Section 281 of the Income Tax Act, 1961. This Section was considered by the Hon'ble Supreme Court in the decision reported in **(1998) 6 SCC 658 (Tax Recovery Officer II, Sadar, Nagpur vs. Gangadhar Vishwanath Ranade)**. It was held therein that the Tax Recovery Officer will not have the jurisdiction to declare the transaction that according to him falls under Section 281 of Income Tax Act as null and void. The Tax Recovery Officer has to examine who is in possession of the property and in what capacity. He can only attach the property in possession of the assessee in his own right, or in possession of a tenant or a third party on behalf of or for the benefit of the assessee. This decision was followed by the Madras High Court in **Sancheti Leasing Company Ltd., and another vs. Income Tax Officer and another [2000] 246 ITR 814 (Mad)**. The Madras High Court specifically observed that it is only the Civil Court that can make a declaration that a transaction is void.

3.Placing reliance on the decision of the Gujarat High Court in **Tax Recovery Officer v. Industrial Finace Corporation of India and another [346 ITR 11 (Guj)]** and a similar decision of the Karnataka High Court in **Commissioner of Income Tax and another v.Karnataka State Industrial Development Corporation Ltd. [378 ITR 234 (Kar)]**, the learned counsel for the petitioners contended that the proviso to section 281 of the Income Tax Act clearly protects bonafide purchasers of properties for adequate consideration and without notice of the tax arrears of the transferor.

He further pointed out that the Revenue did not dispute the petitioners' claim that the properties purchased by the petitioners were for adequate consideration and that the petitioners had no notice of the arrears of Income Tax. The properties stood in the name and possession of the petitioners even before the attachment was effected by the respondent.

4. The learned counsel for the petitioners further contended that the Judgment of the Nagpur Bench of the Bombay High Court reported in **1979 Mah. L.J.514, 122 ITR 227 (Bom) (Inayat Hussain Fakhruddin v. UOI)** which is relied upon by the Revenue is a judgment of a Single Judge and that therefore this Court must prefer the Division Bench decision of the Gujarat High Court which is more on the point. It is his further contention that it is a golden rule of fiscal jurisprudence that if there are two conflicting decisions, the decision which is in favour of the assessee should be preferred (**(1973) CIT v. Vegetable Products Ltd [88 ITR 192 (SC)]**.) These principles have been followed by the High Courts of Madras, Bombay and Delhi. (1. **(CIT v. G.V.Venugopal Para 20 (2005) 145 Taxman 784 (Mad)**. 2. **DI (Int. Taxation v. Krupp Udme GMBH Para 5 (2013) 354 ITR 173 (Bom)**. 3. **CIT v. Kamal Wahal Para 6 (2013) 351 ITR 4 (Del)**.) He therefore prayed that the orders passed by the respondent under Rule 11(6) of the Second Schedule to the Income Tax should be quashed.

5. Per contra, the learned standing counsel appearing for the respondent submitted that Rules 11, 16, 48 and 51 of the second schedule to the Income Tax Act must be read together and that the orders impugned in these writ petitions ought to be sustained. She would also point out Section 281 of the Income Tax Act and Rule 11 and 16 of the second schedule to the Income Tax Act operate in distinct fields.

6. This Court carefully considered the rival contentions. Two facts are not in dispute. The vendor of the writ petitioners herein is a defaulter-assessee and that he alienated the subject properties only after receipt of notice under Rule 2 of the Second Schedule to the Income Tax Act. Secondly, the orders of attachment were issued by the respondent only after such purchase by the writ petitioners herein.

7. Section 281(1) of the Income Tax Act, 1961 reads as follows:-

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 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."

8. While the Revenue would place emphasis on the main provision, the learned counsel appearing for the petitioners would rely on the proviso. Going by the plain language of the said section, it is clear that the main provision is concerned only with those transactions executed by the assessee during the pendency of any proceedings under the Income Tax Act or after the completion thereof, but before the service of notice under Rule 2 of the second schedule. In this case, it is evident from the face of the record and it is again not in dispute that notice under Rule 2 of second schedule was served on the defaulter on 05.01.2013 and that the sale transactions executed by the said defaulter-assessee took place thereafter. Therefore, this Court is of the view that it would not be open to the purchasers to claim the benefit of the proviso to Section 281(1) of the Act. It may not be out of place to mention here that in the decision reported in **1998-2-L.W.288 (Abdul Jamil and 5 others vs. The Secretary, Income Tax Department and 2 others)** it was held that the person referred to in the proviso to

Section 281(1) of the Act is only the “assessee” and not the purchaser. The Division Bench of Punjab and Haryana High Court in the decision reported in **(2011)245 CTR (P&H) 437 [Karnail Singh vs. Union of India]** observed as follows:-

“ 12.We, may, however, notice the contention raised on behalf of the petitioner that in TRO vs. Gangadhar Vishwanath Ranade (Dead) (supra), the Hon'ble Supreme Court held that the TRO cannot declare any transfer by the assessee in favour of a third party to be void. The TRO can only examine who is in possession and in what capacity. He can attach property in possession of the assessee in his own right or in possession of a tenant or third party on behalf of or for the benefit of the assessee. The contention is no doubt borne out from the judgment but it is explained on behalf of the Revenue that even if declaration by the TRO that the transfer was void is ignored, the statutory declaration of the transaction being void cannot be ignored. No doubt, it may be open to the Revenue to file a suit to seek such a declaration but the Revenue can also rely upon statutory declaration under S.281 though the TRO cannot grant such a declaration. We may also notice the statutory change in s.281 on account of amendment vide Taxation Laws (Amendment) Act, 1975 w.e.f 1st October 1975. In the amended provision, the words, “with the intention to defraud the Revenue” have been deleted. The Judgment of the Hon'ble Supreme Court was rendered on unamended provision. *Bona fide* transferee is protected from the effect of voidness of the transaction. The question for Revenue to file suit would have arisen if it was required to be established that the transfer was to defraud the Revenue which is no longer the requirement. Moreover, voidness of the transaction *qua* the claim of the Revenue

is statutorily declared which is different from the transaction itself being declared void. Thus, in our view, after the amendment of s.281, the judgment of the Hon'ble Supreme Court is no bar to the Revenue invoking s.281 in the circumstances mentioned therein and proceedings under s.222 by way of attachment and sale of assessee's property ignoring transfer in violation of s.281 subject of course to the statutory remedies of the affected party to raise objections or to file suit."

9. Rule 2 of second schedule of the Income Tax Act reads as under:-

"2. [When a certificate has been drawn up by the Tax Recovery Officer] for the recovery of arrears under this Schedule, the Tax Recovery Officer shall cause to be served upon the defaulter a notice requiring the defaulter to pay the amount specified in the certificate within fifteen days from the date of service of the notice and intimating that in default steps would be taken to realise the amount under this Schedule."

Rule 11(3) reads follows:-

"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."

Rule 16(1) reads as follows:-

"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.”

Rule 51 reads as follows:-

“Where any immovable property is attached under this Schedule, the attachment shall relate back to, and take effect from, the date on which the notice to pay the arrears, issued under this Schedule, was served upon the defaulter”.

10. There cannot be any doubt that a sale is a contractual transaction. For a contract to be valid, it must be made by the free consent of parties competent to contract. Section 11 of the Contract Act, 1872 reads as under:-

“11. Who are competent to contract- Every person is competent to contract who is of the age of majority according to the law to which he is subject and who is of sound mind and is not disqualified from contracting by any law to which he is subject.”

11. Thus, there are three ingredients in section 11 of the Contract Act 1872. This Court is concerned with the third ingredient. The person executing the contract must not be disqualified from contracting by any law to which he is subject. In Pollack & Mulla on the Indian Contract & Specific Relief Acts (15th Edition by R. Yashod Vardhan and Chitra Narayan), the following commentary is found :

"Persons Otherwise Disqualified by Law :

Certain classes of persons may be disqualified under certain enactments from entering into contracts in respect of matters specified in those enactments. A person in Oudh declared as 'disqualified proprietor' under the provisions of the Oudh Land Revenue Act, 1876 was not competent to alienate his property, and the same incapacity extended to contracts entered into by him, though they related to property situated outside the Province of Oudh. (Lachmi Narain v. Fateh Bahadur Singh, (1902) 25 All 195 at 202; Shah Jethalal Lalchand v. Darbar Shri Amarwala Laxmanwala, AIR 1953 Sau 177.) A person whose estate was under the Court of Wards, was incompetent to enter into any contract involving pecuniary liability under s.31 of the Central Provinces Court of Wards Act, 1899. (Lal Chandradwaj Deo v. Lal Artraran Deo, AIR 1936 Nag 15.)

Certain classes of persons may be disqualified from contracting in respect of certain types of contracts which would, if allowed, place them in a position in which they may be tempted to use influence or information which they have acquired by virtue of their possible connection with the business involving such transactions. No judge, legal practitioner or officer connected with any court of justice shall buy or traffic in, stipulate for or agree to receive any share of, or interest in any actionable claim. (The Transfer of Property Act, 1882, s.136) Officers and employees of the patent office are incapable, during the period in which they hold their appointments, to acquire or take any right or interest in any patent issued by that office. (The Patents Act, 1970, s.75 (except by inheritance or bequest). No forest officer shall, as principal or agent,

trade in timber or forest produce, or be or become interested in, any lease of any forest or in any contract for working in any forest, except with the permission of the state Government in writing. (The Indian Forest Act, 1927, s.75.)”

12.In this case, the property belonged to the defaulter-assessee. He had been served with notice under Rule 2. The moment such a notice was served on the defaulter-assessee, by virtue of Rule 16(1) of the second schedule, he became incompetent to deal with the property. In Rule 16(1), it is expressly stated that the defaulter assessee shall not be competent to deal with the property. If the vendor was not competent to deal with the property, he could not have passed any valid or legal title to the purchaser. Thus, the issue has to be approached through the prism of Section 11 of the Contract Act, 1872.

13.The learned counsel for the petitioners laid considerable emphasis on the fact that on the date when attachment was made, the assessee ceased to have any interest in the subject matter and that the writ petitioners herein were absolute owners of the properties in question. He would therefore call upon this Court to be guided by the ratio set out in the Ranade case (cited supra). Though on the face of it the submission of the learned counsel appearing for the petitioners is formidable, on a closer scrutiny, the legal position is totally otherwise. As per Rule 11(3) of the second schedule, the objector or claimant must adduce evidence to show that in the case of immovable

property on the date of the service of the notice issued under this schedule to pay arrears, he had some interest in or was possessed of the property in question. The “notice” referred to in Rule 11(3)(a) is obviously the notice under Rule 2. It cannot be disputed that on the said date the present writ petitioners did not have any interest in the property in question and they were also not in possession of it.

14. Rule 11(3) of the Second Schedule to the Income Tax Act deals with two categories. One is immovable property and the other is movable property. Rule 11(3)(a) pertains to immovable property while Rule 11(3)(b) relates to movable property. In the case of movable property, the claimant or objector must adduce evidence to show that on the date of attachment he had some interest in or was possessed of the property in question. On the other hand, in the case of immovable property, the claimant or objector must adduce evidence to show that at the date of service of the notice issued under this schedule to pay the arrears he had some interest in or was possessed of the property in question. Thus, there is a significant distinction between the language used in the case of immovable property on the one hand and movable property on the other. In the case of movable property, the relevant date is the date of attachment. But, in the case of immovable property, the material date is the date of service of Rule 2 Notice. This Court is of the view that failure to note this difference in the language has led to conceptual confusion vitiating the entire process of reasoning.

15.More than anything else, as rightly pointed out by the learned standing counsel for the respondent Department, any attachment of an immovable property made under the second schedule would relate back to and take effect from the date on which the notice to pay the arrears issued under II schedule was served on the defaulter. This legal effect of Rule 51 of second schedule cannot be overcome. In this case, this Court therefore comes to the conclusion that the attachment made subsequent to the purchase by the writ petitioner would relate back to and take effect from 05.01.2013 onwards.

16.It is true that as strongly contended by the learned counsel for the petitioners, if two interpretations are possible, the one that is beneficial to the assessee must be preferred. But in this case, this Court has absolutely no doubt that on a plain reading of the relevant provisions, only one interpretation is possible and that one is in favour of the Revenue.

17.The learned counsel for the petitioners would submit that Rule 11(3)(a) of the second schedule cannot have an over-riding effect over the proviso to Section 281 of the Income Tax Act. But as held by the learned single Judge of this Court in **1998-2-L.W.288** (cited supra), the Section 281 and Rule 11 of the second schedule operate distinctly and independent of each other.

18.The learned counsel appearing for the petitioners would further contend that Rule 16(2) of second schedule clearly states that where the attachment was made under the schedule, any alienation that takes place thereafter alone shall be void. But then Rule 16(2) cannot be read in isolation. It is not a standalone provision. It must be read together and in conjunction with Rule 51. Hence, the submission of the learned counsel appearing for the petitioners cannot be accepted.

19.The learned counsel appearing for the petitioners also emphasised that this Court should defer to the decision rendered by the Division Bench of the Gujarat High Court. But this Court is unable to agree with the said submission. It is true that the Division Bench of this Court in the decision reported in **[1986]159 ITR 646 (Mad)** observed that it is an acceptable principle in the matter of construction of an Indian statute as far as possible that there must be uniformity of construction and if the provision of law which falls for consideration before the Court has already been construed by another High Court, normally that construction should be accepted. But then the Honourable Division Bench also added a caveat that if there are compelling reasons to depart from the view taken by the other High Court, the said construction need not be accepted. This Court is of the considered opinion that there are compelling reasons to depart from the view taken by the Division Bench of the Gujarat High Court.

<http://www.judis.nic.in> Again as already pointed out, this Court is treading the path taken by the Hon'ble Division Bench of the Punjab and Haryana High Court.

20. Yet the orders impugned in these writ petitions cannot be sustained as such. The Hon'ble Supreme Court in **(1998) 6 SCC 658** has held that it is the function of the civil court to declare a transactions to be null and void and that the Tax Recovery Officer cannot exercise the said function. Therefore, the respondent clearly erred in declaring the transactions to which the petitioners are parties as null and void. Therefore, the orders impugned in these writ petitions stand quashed to that extent. It would certainly be open to the petitioners herein to avail the remedy set out in Rule 11(6) of the second schedule of the Income Tax Act. If the respondent authority wants to have the transactions nullified, it is the respondent who must go to the civil court to seek declaration to that effect. If the writ petitioners want the attachment to be lifted, it is for them to move the civil Court and obtain relief as provided in Rule 11(6) of the second schedule of the Income Tax Act.

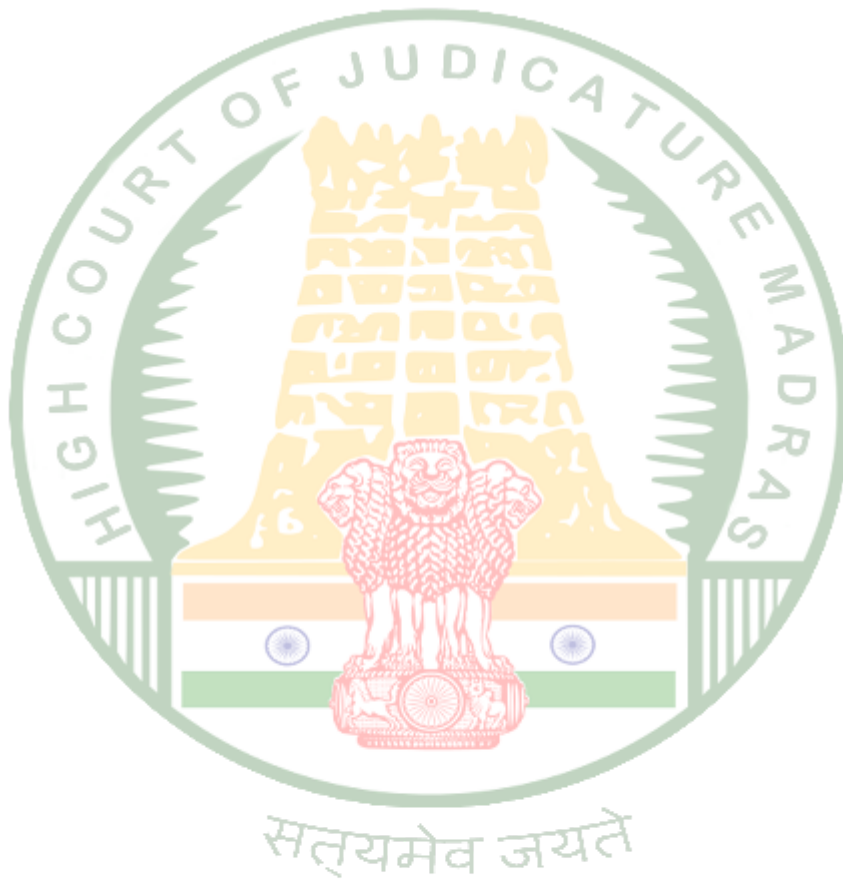
21. The orders impugned in these writ petitions are quashed to the extent indicated above. The stand of the respondent in declining to lift the attachment already made is sustained. The order of the respondent declaring the transactions in question as null and void is quashed.

22. These writ petitions are partly allowed. No costs. Consequently, connected miscellaneous petitions are closed.

07.03.2018

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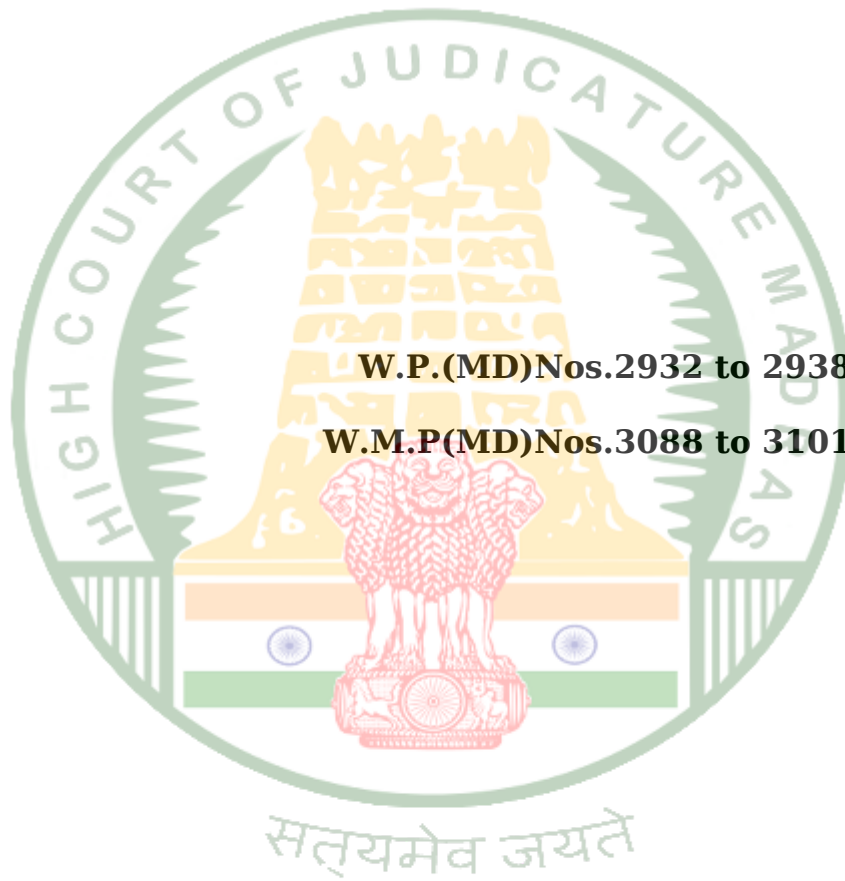
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