

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 16.12.2015

CORAM:

THE HONOURABLE MR.JUSTICE R.MAHADEVAN

WP.No.37309 of 2002

M/s.Sri Bakgyam Engineering Corporation,
by its Managing Partner A.Radhakrishnan,
Coimbatore 641 037.

..Petitioner

Vs

The Deputy Commercial Tax Officer,
Avrampalayam Circle, Coimbatore.

..Respondent

Prayer:- This Writ Petition is filed under Article 226 of the Constitution of India to issue a Writ of Certiorari to call for the records of the Respondent in proceedings No.2768/98/A3, dated 9.7.2002 and 11.9.2002 and to quash the same.

For Petitioner : Mr.V.Ragavachari
For Respondent : Mr.S.Kanmani Annamalai, AGP

ORDER

In this Writ Petition, the Petitioner has challenged the proceedings of the Respondent dated 9.7.2002 and 11.9.2002, demanding the Petitioner to pay the arrears of tax and proceeding on the property in question.

2. The Petitioner, who is the manufacturer of automobile, purchased the property in question from M/s.Auto Spin Machinery P Limited in the year 1997. The Petitioner received a notice dated 10.9.2001, alleging that the vendor of the Petitioner was in arrears of sales tax for the periods 1993-94 and 1994-95 and hence, proposing to proceed on the property to recover the arrears of sale tax and also directing the Petitioner to pay the amount. Another notice dated 1.10.2001 was also issued to the same effect and then, the Petitioner issued a notice dated 24.1.2002, denying the liability. However, the impugned notice dated 9.7.2002, has been issued, directing the Petitioner to settle the arrears, alleging that the Petitioner is holding the property of the defaulter and thereafter, the impugned distraint order dated 11.9.2002 under Section 8 has been filed. Hence, this Writ Petition has been filed.

3. According to the Petitioner, the Petitioner is the bona fide purchaser for value and no opportunity of hearing was given to the Petitioner and the right of the bona fide purchaser for value is protected under Section 24A of the Tamil Nadu General Sales Tax Act and relied on the decisions of the Division Bench of this Court in (i) Deputy Commercial Tax Officer, Thudiyalur Assessment Circle, Coimbatore and another v. R.K.Steels reported in 1998 (I) CTC 124 and (ii) A.Senthil Kumar and another v. Assistant Commissioner (CT) and others reported in 2011 (1) CTC 828.

4. On the other hand, it is the case of the Respondent that as per Section 24(2) of the Act, any due under this Act shall be subject to the claim of the Government in respect of the land revenue and the claim of the Land Development Bank in regard to the property mortgaged to it, have priority over all the other claims against the property of the said dealer.

5. This Court heard and considered the submissions made by the learned counsel on either side and also perused the materials placed on record.

6. It is the main contention of the petitioner that the petitioner had purchased the property in question during December 1997 and thereafter, on 10.09.2001, he received a notice from the respondent stating that the vendor of the petitioner was due to pay arrears of sales tax for the period 1993-1994 and 1994-1995, to the tune of Rs.6,93,325/- (Rupees Six Lakhs Ninety Three Thousand Three Hundred and Twenty Five only). Further, the respondent stated that the petitioner is holding the properties of a defaulter and hence, he is liable to be proceeded under Section 24 of the TNGST Act, 1959.

7. On a plain reading of the materials available on record, this Court finds that the respondent issued a notice for the period 1993-1994 and 1994-1995 claiming arrears of sales tax from the vendor of the petitioner. Since the petitioner had purchased the said property, now, he is put to pay the said arrears. Impugning the same, the petitioner has approached this Court stating that he is a bona fide purchaser for value without notice of the charge over the property and hence, his interest should be protected.

8. In Deputy Commercial Tax Officer, Thudiyalur Assessment Circle, Coimbatore and another v. R.K.Steels reported in 1998 (I) CTC 124, the Division Bench of this Court followed the decision of the Honourable Supreme Court in Ahmedabad Municipal Corporation of the City of Ahmedabad v. Haji Abdul Gafur Haji Hussennbhai reported in AIR 1971 SC 1201 and held that unless a provision is made in any statute contrary to the rule of Section 100 of the Transfer of Property Act, a bona fide purchaser for

consideration without notice of the charge is protected. The relevant paragraphs are extracted hereunder:

"14. We will now refer to the said judgment of the Supreme Court which is reported in Ahmedabad Municipal Corporation of the City of Ahmedabad v. Haji Abdul Gafur Haji Hussenhbai. In that case before the Supreme Court, the party was in arrears of property tax due under the Bombay Provincial Municipal Corporation Act. The said Act imposed a charge over the property held by a defaulter. The same was brought to sale in execution of a mortgage decree. When the municipality purported to exercise their charge over the property, the purchaser in court auction filed a suit for a declaration that he was the owner of the property and that therefore, the arrears of municipal taxes due by the transferor were not recoverable by attachment and sale of the property in the hands of the purchaser. A Division Bench of the Gujarat High Court accepted the case of the purchaser and decreed the suit, holding that the charge created in favour of the municipal corporation was not enforceable against the property. The apex Court upheld the said judgment and while doing so, referred to Section 100 of the Transfer of Property Act, which is as follows:

"Section 100: "Where immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provision hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge.

Nothing in this section applies to the charge of a trustee on the trust property for expenses properly incurred in the execution of his trust, and save as otherwise expressly provided by any law for the time being in force, no charge shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge."

The Supreme Court proceeded to say that the Municipal Corporation Act which created a charge does not provide that the charge is enforceable against the property in the hands of a transferee for consideration without notice of the charge. The Supreme Court, however, discussed the issue of constructive notice and came to the conclusion that the purchaser in that case could not be fixed with any constructive notice of the arrears of municipal tax. It was further pointed out that a pertinent and reasonable man was bound to make enquiries regarding arrears of municipal tax and that in any event, the question of constructive knowledge or notice has got to be determined on the facts and circumstances of each case. In view

of the finding that the purchaser could not be fixed with any constructive notice, the Supreme Court upheld the view of the Division Bench that the purchaser cannot be made liable for the municipal taxes. In our considered view, the judgment of the Supreme court is comprehensive in all respects and the same should have been taken note of by this Court, while dealing with cases of transferee for value without constructive notice of the sales tax arrears. We are compelled to make the above observation because there is a subsequent Division Bench judgment of this Court in Coramandel Indag Products India Ltd. v. commercial Tax Officer, 1993 (3) MTCR 8, dated October 29, 1992. Before the division Bench of this Court, the very same point was agitated and the judgment of the Supreme Court above referred to was also cited. All the same, the Division Bench has again chosen to follow the earlier Division Bench judgment of this Court in Dy. Commercial Tax Officer v. Asha Kumari, 1985 (14) STL (Mad.) 164. The latter Division Bench Judgment was rendered on October 29, 1992 in W.A.No.1019 of 1989 and the facts are almost identical to the facts of the present case. In that case, the assessee-company had tax arrears. They sold a property belonging to them on April 14, 1980, when the statutory charge had been fastened on them. When the Revenue proceeded against the transferee and a Form No.7 notice was issued the transferee filed a writ petition against the recovery proceedings. The transferee contended that they are the bona fide purchasers for value without notice of the charge. When the decision of the Supreme Court in Ahmedabad Municipal Corporation of the City of Ahmedabad v. Haji Abdul Gafur Haji Hussenhbai, was brought to the notice of the Division Bench, they purported to distinguish the same by the following observation:

"Section 141(1) of the Bombay Provincial Municipal Corporation Act, 1949 merely creates a charge for the property tax. There is no provision in the Bombay Provisional Municipal Corporation Act, similar to section 24(2) of the Tamil Nadu General Sales Tax Act, 1959, providing for enforcement of the charge created under section 141(1) of the Bombay Provisional Municipal Corporation Act. Therefore, the ratio of the decision of the Supreme Court in Ahmedabad Municipal Corporation of the City of Ahmedabad v. Haji Abdul Gaful Haji Hussenhbai, cannot be applied to the facts of the present case. We are inclined to follow the decision of the Division Bench of this Court in Deputy Commercial Tax Officer v. Asha Kumari, 1985 WLR 240 and hold that the charge created for arrears of sales tax over the properties of the defaulter under section 24(1) of the Act can be enforced in the hands of the transferee by invoking the provisions of the Revenue Recovery Act as provided in Section 24 (2) of the Act."

In our view, the above reasons given by the Division Bench to steer clear of the Apex Court judgment does not appear to be justified. The emphasis laid down by the Supreme Court to avoid section 100 of the Transfer of Property Act was to have an

express provision, providing for the contrary. The mere enforcement of the charge by resorting to the Revenue Recovery Act as provided for in section 24(2) of the Sales Tax Act is not an answer to section 100 of the Transfer of Property Act. In other words, section 24(2) of the Sales Tax Act does not provide anything contrary to section 100 of the Transfer of Property Act. Similarly, the Division Bench held that section 24A of the Sales Tax Act had no application because the sales tax arrears were sought to be recovered by proceeding against the charged property by invoking section 24(2) of the Sales Tax Act, read with the relevant provisions of the Revenue Recovery Act. Thirdly, the Division Bench held that even if the transferee is not taken as a defaulter, the properties in his hands can be proceeded against the relevant provisions of the Revenue Recovery Act in view of the statutory directions contained in section 24(1) read with section 24(2) of the Sales Tax Act. In this connection, they purported to follow the Division Bench judgment of this court in Dy. Commercial Tax Officer v. Asha Kumari, 1985 (14) STL 164 (Mad.) : 1985 WLR 240. We have already pointed out that the earlier Division Bench judgment in Asha Kumari's case, 1985 (14) STL 164 (Mad.) had not adverted to section 100 of the Transfer of Property Act or the judgment of the Supreme Court in Ahmedabad Municipal Corporation of the City of Ahmedabad v. Haji Abdul Gafur Haji Hussenhali.

15. Having regard to the clear and categorical views expressed by the Supreme Court in Ahmedabad Municipal Corporation of the City of Ahmedabad v. Haji Abdul Gafur Haji Hussenhali, , we are not inclined to accept the two Division Bench judgments of this Court in Dy. Commercial Tax Officer's case, 1985 (14) STL 164 (Mad.) and Coramandel Indag Products India Ltd's case 1993 (3) MTCR 8, we would have normally referred the issue for decision by a Full Bench, but for the fact that the judgment of the Supreme Court is crystal clear. To repeat unless a provision is made in any statute contrary to the rule of section 100 of the Transfer of Property Act, a bona fide purchaser for consideration without notice of the charge is protected. This proposition of law is too very clear and so categorically emphasised by the Supreme Court in Ahmedabad Municipal Corporation case. We therefore with respect differ from the views expressed by the two Division Bench judgments referred to above and propose to follow the judgment of the Supreme Court.

16. We are not inclined to go into the other question raised by the learned counsel for the respondent relating to the institution of the suit and the technical defects in the notices issued by the appellants. No doubt, we accept the stand of the revenue that the respondent/petitioner could have filed a civil suit and challenged the revenue recovery proceedings. Inasmuch as the writ petition had already been entertained and the writ appeal has also been entertained at this belated stage, we do

not want to reject the plea of the respondent that they are the bona fide purchasers for value without notice of the sales tax arrears. Since the appellants have nowhere stated that the respondents had notice of the charge over the property by virtue of the sales tax arrears, we are inclined to accept the stand of the respondent that they had no notice of the charge or sales tax arrears. To be more precise the affidavit says:

"As per section 100 of the Transfer of Property Act, the petitioners who have bona fide purchased for consideration are protected. This protection has been upheld and held applicable even against revenue arrears in Ahmedabad Municipal Corporation of the City of Ahmedabad v. Haji Abdul Gafur Hank Hussenbhai, . There is no provision under the Tamil Nadu General Sales Tax Act, 1959 or the Central Sales Tax Act, 1956 by which tax clearance certificate or no objection certificate is required to be taken before registering a conveyance as under section 230A of the Income-tax Act, 1961. The petitioners obtained 'no encumbrance' certificate from the sub-registrar, and they only purchased the property. In the circumstances, the property of the petitioner cannot be proceeded against and the recovery measures on the property are illegal."

The counter-affidavit does not deny the factual allegation but pleads a legal contention as follows:

"The respondent most respectfully submits that there was no question of bona fide purchase would rise under section 100 of the Transfer of Property Act when once valid demand notices had been issued which were far anterior in point of time to the sale deed in view of the ratio of decision of this Honourable Court in Balakrishna Goenka v. State of Tamil Nadu, 1981 (2) SISC 43." In other words, out of the four points raised by us, we are not deciding the first two points as well as the fourth point. It is only on the third point we hold, following the Supreme Court judgment in Ahmedabad Municipal Corporation of the City of Ahmedabad v. Haji Abdul Gafur Hani Hussenbhai, that the respondent is a bona fide purchaser without notice of the charge under section 24(2) of the Sales Tax Act and therefore, his property cannot be proceeded against for the recovery of sales tax arrears. In this view of the matter, the appellants cannot proceed against the property of the respondent for the alleged arrears of sales tax due from a fresh vendor, viz., Ramkumar Gogia. We do not decide the question whether under the Revenue Recovery Act only the property of a defaulter can be brought to sale. We also do not want to decide the question whether the technical defects in the notices issued by the appellants would vitiate the proceedings. We therefore, confirm the judgment of the learned single Judge though for different reasons." (emphasis added.)

9. Similarly, the another Division Bench of this Court in A.Senthil Kumar and another v. Assistant Commissioner (CT) and others reported in 2011 (1) CTC 828 has also laid down the same proposition of law.

10. Also, this Court in Rukmani v. The Deputy Commercial Tax Officer - I, Pattukottai - I, Assessment Circle, Pattukottai, Thanjavur District [W.P(MD)No.2736 of 2006, decided on 08.10.2012], while dealing with an identical issue, has held as under:

"26. In the case on hand, the contention of the learned counsel for the petitioner is that prior to the purchase of the property in the year 2004, the petitioner had verified with the encumbrance details in the Registration Department and finding that there was no encumbrance over the property, she had purchased the same, which would show that she had made bona fide efforts to find out as to whether there was any encumbrance over the property. Though the assessment of tax had already been finalised in the year 1995 - 1996 by the orders, on the appeal preferred by the dealer, the Recovery Officers have not reported the charge over the property to the Registration Department. Even though a reference has also been made in Paragraph No.2 of the counter affidavit that the demand notice was duly served on the defaulter - assessee, no specific date is mentioned. As rightly contended by the learned counsel for the petitioner, there is no specific averment, rebutting the contention of the petitioner that the purchase was made bona fide. Establishment of fact arises only when there is a dispute. When the respondent has not even made any averments disputing the fact of bona fide purchase, and proved that the sale effected by the first purchaser - Mr.S.Prabhakaran was to defraud the revenue, this Court is of the view that it would not be appropriate to drive the petitioner, the second purchaser, to approach the civil court of competent jurisdiction to prove her bona fide. In normal circumstances, when a sale is made immediately, after the finalisation of an assessment, the attempt to defraud the revenue by the defaulting dealer, who is in arrears of tax, can be presumed. But, in the case on hand, the sales effected are not in quick succession. The second sale has been made, after six years from the date, on which the assessment has been finalised. The tax officials have not reported the charge over the property, held by the dealer to the Registration Department. Even assuming that there is a charge, by virtue of the statutory provision, the bona fides of the petitioner in purchasing the property, after six years from the date of assessment, cannot be doubted, as it is the case of the petitioner that she had verified the encumbrance. On the contra, the contention of the respondent that the demand notices have been issued to the dealer has not been substantiated. At this juncture, this Court deems it fit to extract a decision of the Apex Court, which has

distinguished the pleadings and proof required in a writ proceeding and a civil suit. In *Bharat Singh and Others Vs. State of Haryana and Others*, reported in 1988 (4) SCC 534, at paragraph 13, the Supreme Court held as follows:

".... In our opinion, when a point which is ostensibly a point of law is required to be substantiated by facts, the party raising the point, if he is the writ petitioner, must plead and prove such facts by evident which must appear from the writ petition and if he is the respondent, from the counter-affidavit. If the facts are not pleaded or the evidence in support of such facts is not annexed to the writ petition or to the counter-affidavit, as the case may be, the court will not entertain the point. In this context, it will not be out of place to point out that in this regard there is a distinction between a pleading under the Code of Civil Procedure and a writ petition or a counter-affidavit. While in a pleading, that is, a plaint or a written statement, the facts and not evidence are required to be pleaded, in a writ petition or in the counter-affidavit not only the facts but also the evidence in proof of such facts have to be pleaded and annexed to it."

27. Going through the judgments relied on by both parties, this Court is inclined to accept the submissions of the learned counsel for the petitioner that the decision rendered in *R.K.Steels's case* (cited supra) has been approved in *D.Senthilkumar's case* (cited supra) following *Shreyas Papers P.Ltd.*, (cited supra) and this Court is inclined to follow the same.

28. Even in *N.Padma Coffee Works's case* (cited supra) the Special Tribunal has clearly observed that the legislative intent in engrafting proviso to section 24-A of the Act, is to protect a honest person, who had purchased the property from a seller and further observed that there should not be any collusion with the seller, but the necessary ingredients of Section 24-A of the Act should be there, i.e., the sale effected should be for adequate consideration and want of notice. Taking note of Section 3 of the Transfer of Property Act, the Special Tribunal in *N.Padma Coffee Works' case* has also observed that if there was any wilful absentism or gross negligence in making any enquiry, that would tantamount to notice of fact, by the purchaser of the property, upon which a charge is created by operation of law. As per the version of the petitioner, she had purchased the property from a subsequent purchaser in the year 2004 and it was not a direct purchase from the defaulter. There is nothing on record to indicate that action has been taken against the vendor of the purchaser. There are no averments to suggest collusion of the petitioner with the defaulting dealer. On the contra, there are clear averments made by the petitioner to the effect that she had verified the encumbrance details from

the Registration Department, in the year 2004, when she had purchased the property. When the subsequent sale has been effected after six years from the first sale, it is incumbent on the respondent to prove collusion, with the defaulting dealer. There can be a presumption of collusion with the defaulting dealer, if the transactions are in quick succession. But, if there is a long gap of six years between the first sale and the subsequent sale, without there being any action by the Revenue to realise the arrears of tax from the defaulter or against the immediate subsequent purchaser on the facts of this case, this Court is of the view that even collusion cannot be presumed. In the absence of any rebuttal to the bona fides of the purchase, absentism or negligence, in making due enquiry with the Registration Department, prior to purchase, the conduct of the subsequent purchaser cannot be doubted by making any allegation of fraud, being played on the revenue.

29. Though the respondent has contended that the petitioner ought to have obtained a 'No Objection' from the revenue before purchasing the property, no provisions have been quoted by the respondent in the counter affidavit. Needless to say that a purchaser in normal course would only verify from the Registration Department as to whether the property to be purchased has any encumbrance. Unless the charge is duly registered in the Registration Department, it would not be possible for any prospecting buyer to know whether there is any charge over the property, for any arrears of tax or any statutory dues to be paid to the Government or statutory body. As stated supra, no materials have been produced before this Court to prove that notice demanding arrears of tax, has been served on the defaulter. No materials have been placed before this Court to prove that steps have been taken under the provisions of the Revenue Recovery Act, against the defaulter or the subsequent first purchaser, from whom the petitioner has purchased the property in the year 2004, after six long years, since the date of finalisation of the assessment. In the absence of any specific plea of collusion, rebuttal of even doubting the bona fide of the purchase, the action taken in the year 2005, after seven years, from the date of finalisation of the assessment, against the second purchaser, who has taken diligent steps to verify from the Registration Department, before purchasing the property cannot be approved. That apart, there are no materials to indicate that the petitioner had any constructive notice of the charge. There is no pleading to the effect and rightly, no arguments have been advanced, and therefore, this Court is of the view that the case on hand would squarely also fall within the ambit of the Apex Court in Ahmedabad Municipal Corporation's case reported in 1971 (1) SCC 757 also. On the facts and circumstances of this case, this

Court is of the view that the legislative protection has to be extended to the petitioner.

30. For all the reasons stated above and in the light of the decisions and the discussion on facts, this Court is of the view that the petitioner is a bona fide purchaser and is entitled to protection under the proviso to Section 24(A) of the Act. Hence, the impugned distraint order dated 13.02.2006 issued by the respondent is liable to be set aside and accordingly set aside. The Writ Petition stands allowed. No costs. Consequently, connected Miscellaneous Petition is closed."

11. Here, it is, no doubt, clear that the petitioner had purchased the property in question without notice of the charge over the same from his vendor and the same has also not been reflected in the Encumbrance Certificate issued by the Registration Department. In such circumstances, this Court is of the view that the impugned order passed by the respondent is vitiated in law.

12. In the light of the aforesaid decisions of the Division Bench of this Court, this Court holds that the petitioner, being a bona fide purchaser for consideration without notice of the charge over of the property, cannot be proceeded against insofar as the arrears of sales tax of his vendor. Therefore, the impugned proceedings of the respondent are liable to be quashed and they are quashed accordingly.

13. In the result, this writ petition is disposed of as above. No costs.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

To:

The Deputy Commercial Tax Officer
Avrampalayam Circle, Coimbatore.

WP.No.37309 of 2002

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srg(04/03/2016)