IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 19.08.2016

CORAM:

THE HON 'BLE MR. JUSTICE T.S.SIVAGNANAM

Writ Petition No.29038 of 2016

M/s. Kamalesh Kumar Sheth (HUF),
Represented by its Karta, Mr. Kamlesh Kumar Sheth,
42 Ranganathan Avenue,
Uthandi, Chennai - 600 119 ... Petitioner

Versus

1. The Tax Recovery Officer - 5,
   O/o. The Principal Commissioner of Income Tax -5,
   Room No.526, D Cabin, 5th Floor,
   Wanparthy Block, 121 Mahathma Gandhi Road,
   Nungambakkam, Chennai 600 034
2. The Assistant Commissioner of Income tAx,
   Non-Corporate Circle - 3,
   Room No.623A, New Block, 6th Floor,
   121 Mahathma Gandhi Road,
   Nungambakkam, Chennai 600 034 .. Respondents

Prayer:- Petition filed under Article 226 of the Constitution of India, seeking for a Writ of Certiorarified Mandamus to call for the records on the file of the first respondent and quash the impugned order of attachment of immovable property in T.R.No.1236/2015-16, AAJFR4948R, dated 25.01.2016, passed by the first respondent under Rule 48 of the Second Schedule to the Income Tax Act, 1961, and direct him to consider the request made by the firm, M/s.RJK Investments, for accepting two properties offered as securities, in respect of its dues.

For Petitioner : Mr. N.V.Balaji

For Respondents : Mr. T.Ravikumar, assisted by,
Mrs. Hema Muralikrishnan

O R D E R

Heard the learned counsel appearing for the petitioner and the learned Senior Standing Counsel appearing for the respondents / Department. Since the issue involved in this writ petition lies on a narrow campus, with the consent of the learned counsel for both sides, the writ petition is taken up for final disposal at the admission stage itself.

2. This writ petition is filed by the petitioner, challenging the order of attachment passed by the first respondent, invoking the power under Rule 48 of the Second Schedule to the Income Tax Act, 1961 (hereinafter will be referred to as “the Act”), thereby attaching the property being Flat Nos.3A & 3B, Third Floor, Lalah Towers, No.72, Nelson Manickam Road, Aminjikarai, Chennai – 600 029, together with 8,940 sq.ft., of undivided share of land, out of 90,726 sq.ft., comprised in Survey Nos.12/1, 12/2, 17/2A in Vada Agaram Village, Chennai (hereinafter will be referred to as “the subject-property”).

3. The attachment is on account of the failure on the part of M/s.RJK Investments, a partnership firm, in clearing the Income Tax Arrears. The petitioner herein was one Mr.Kamlesh Kumar Sheth, a partner of the said firm. The petitioner's case is that the property, which is the subject matter of attachment, is the property owned by a Hindu Undivided Family (HUF), of which, he is the Kartha. Therefore, it is submitted that the subject-property cannot be attached for the dues of the firm.

4. The learned counsel for the petitioner, referred to Section 222 of the Act and submitted that the Tax Recovery Officer is entitled to draw a statement in the prescribed form satisfying the amount of arrears due from the Assessee and shall proceed to recover from such assessee the amounts specified in the Certificate by one or more sums, mentioned in accordance with the Rules laid down in the Second Schedule. The learned counsel laid emphasize on the expression “from such assessee” and submitted that such recovery could be initiated by the first respondent only as against the assessee and the owner of the subject-property, being the HUF and not the assessee, recovery cannot be made and subject property cannot be attached.

5. Referring to the definition of “the defaulter”, as defined under Rule 1 (b) of the Second Schedule to the Act, it is submitted by the learned counsel for the petitioner that the defaulter, under the said chapter, would mean the Assessee mentioned in the Certificate. Further, by referring to Rule 4 of the said Rules, which provides for the mode of recovery, it is pointed out that the recovery could be done only by attachment of sale of the defaulter's movable and immovable properties, apart from exercising the power to arrest and detain the person, in-prison, etc., Therefore, it is submitted by the learned counsel for the petitioner that the impugned order of attachment has to be quashed.

6. The learned counsel for the petitioner further pointed out that the petitioner has submitted a representation on 26.07.2016, pointing out the above facts and sought for raising the attachment. In the said representation, the petitioner brought to the notice of the first respondent about the properties owned by one Thiru.Venkatramanan, who is the partner of the firm and who is liable to pay the tax. It is, therefore, submitted that the first respondent has not considered the petitioner's representation and till date, it has not been acted upon.

7. The learned Senior Standing Counsel appearing for the respondents would submit that the representation has been given only on 26.07.2016 and the Rules provide a complete set of procedure to be followed by the Tax Recovery Officer. In this regard, attention of this Court was invited to Rule 11 of the Rules, which empowers the Tax Recovery Officer to investigate into any claim, which is preferred objecting to an attachment or sale of the property. Further, it is submitted that as against the orders passed by the Tax Recovery Officer under Rule 11 of the Rules, an appeal lies to the Commissioner, in terms of Rule 86 of the said Rules.

8. After hearing the learned counsel appearing for both parties and after perusing the materials placed on record, it is seen that the petitioner has raised an objection to the attachment of the subject-property. In such circumstances, it has to be seen as to what has to be done by the Tax Recovery Officer. Rule 11 of the Rules provides for the procedure to be adopted by the Tax Recovery Officer and he is required to investigate the claim or objection. Therefore, it is incumbent upon the first respondent to take note of the objection raised by the petitioner, vide representation dated 26.07.2016 and proceed to investigate into the matter.

9. One another issue, which would also fall for consideration of the first respondent is with regard to the property, which has been mentioned by the petitioner in the representation, said to be belong to another partner of the firm. Therefore, under the scheme and the Rules, the first respondent is bound to take note of the petitioner's objection and proceed in accordance with Rule 11 of the Rules, by investigating into the objection.

10. In the light of the above, the writ petition stands disposed of, by directing the first respondent to investigate the claim / objection made by the petitioner, dated 26.07.2016, on merits and in accordance with law, after affording an opportunity of personal hearing, and pass orders within a period of eight weeks from the date of receipt of a copy of this order. It is needless to state that the petitioner should cooperate in the process of investigation

and if any details or documents are called for by the first respondent, the same shall be produced by the petitioner. No costs.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

srk / pvs

To
1. The Tax Recovery Officer - 5,
O/o. The Principal Commissioner of Income Tax -5,
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Nungambakkam, Chennai 600 034

1 cc to Mr.N.V.Balaji, Advocate, sr.47441
1 cc to Mr.T.Ravikumar, Advocate, sr.47346

W.P.No.29038 of 2016

ca co
kra 02.09.2016