

IN THE HIGH COURT OF JUDICATURE OF MADRAS

DATED: 18.04.2017

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
and
THE HONOURABLE MR.JUSTICE D.KRISHNAKUMAR

Writ Appeal No.95 of 2016
and
C.M.P. No. 1111 of 2016

1. The Tax Recovery Officer-I
Company Range 1
"Aayakar Bhavan"
No.121, Mahatma Gandhi Road
Nungambakkam
Chennai - 600 034. ... Appellant/Respondent 1

-vs-

1. M/s. Sree Foundation
rep. by its Partner Mr. Chimanlal
11, Ekambareshwar Agraharam Street
Park Town, Chennai - 600 003. ... Respondent 1/Petitioner
2. The Sub Registrar
No.11, Davidson Street
Sowcarpet, Chennai - 600 079.
3. M/s. Cosmo Foundation Limited
"Cosmo Nest" No.16, Bank Street
Halls Road, Kilpauk
Chennai - 600 010. ... Respondents 2 & 3/
Respondents 2 & 3

Writ Appeal filed under Clause 15 of the Letters Patent,
against the order dated 13.10.2015 in W.P.No.12540 of 2013.

W.P. Prayer: Petition filed under Article 226 of the
Constitution of India, to issue a Writ of Mandamus, directing
the First Respondent to remove the charge and lift the
attachment created in respect of immovable Property at
Old.No.510, New No.6, Mint Street, Sowcarpet, Chennai-79, and
Comprised in old Survey No.6072, 6073 and 6075 and re survey
No.602 measuring an extent of 8 grounds and 1290 sq.ft.

For Appellant : Mr. T. Ravikumar
For Respondent -1 : Mr. R. Gopinath
Respondent-2 : Mr. N. Muralikumaran
Respondent-3 : Mr. A. Thiyagarajan, Sr. Counsel
for Mr. S.Nagarajan &
Mr. S. Meenakshisundara Pandian

JUDGMENT

[Judgment of the Court was made by D. KRISHNAKUMAR, J.]

Before the Writ Court, the first respondent herein filed a writ petition to issue a writ of Mandamus, directing the first respondent/ the appellant herein, to remove the charge and lift the attachment created in respect of immovable property at Old No.510, New No.6 Mint Street, Sowcarpet, Chennai-79 and comprised in old Survey No.6072, 6073 and 6075 and re-survey No.602 measuring an extent of 8 grounds and 1290 sq.ft. By order dated 13.10.2015, Writ Court allowed the writ petition and lifted the order of attachment, after considering the submissions of the learned counsel for all the parties. Challenging the same, Department has filed the instant Writ Appeal before this Court.

2. It is the case of the appellant that the 3rd respondent Firm, M/s. Cosmo Foundation Limited, Chennai entered into an agreement of sale with the 1st respondent, M/s.Sree Foundation, Chennai, with respect to the vacant land measuring 8 grounds and 1290 sq.ft., situated at Old No.510, New No.6 Mint Street, Sowcarpet, Chennai-79 and comprised in old Survey No.6072, 6073 and 6075 and re-survey No.602 and registered with the Sub Registrar Office, Sowcarpet, under Document No.101 of 2010 on 20.01.2010. At the time of agreement, there were only the following two encumbrances over the aforesaid property :

- a) Mortgage Deed registered in Document No.109/2007 dated 01.02.2007, and
- b) Mortgage Deed registered in Document No.883/2007 dated 28.08.2007 with M/s.Hitech Projects Private Limited.

The aforesaid mortgage and entire dues of the third respondent were cleared by the first respondent, from and out of the sale consideration. Necessary receipts have been obtained from the mortgagees, towards the clearance of dues. As the first respondent purchaser paid the entire sale consideration, the third respondent handed over vacant possession and all the

original documents pertaining to the subject property. Thereafter, a Power of Attorney was executed in favour of the writ petitioner/ first respondent and registered on 11.02.2010 to enable the first respondent to execute and register sale deeds in their favour or in favour of their nominees, as and when required. A supplement agreement of sale dated 18.02.2010 was also executed, evidencing all the above stated facts. Therefore, according to the writ petitioner/first respondent, the entire sale transaction was completed on 18.02.2010 itself, as per Section 2(47) of the Income Tax Act, 1961. The writ petitioner/ first respondent and the third respondent presented the sale deed in Document No.87/2011 before the Sub Registrar's Office, Sowcarpet, to be registered in favour of the writ petitioner/ first respondent. But, the said document was not registered by the Sub Registrar, Sowcarpet.

3. Subsequent to the presentation of sale deed documents before the Sub Registrar Office, Sowcarpet, they came to know that the appellant department had initiated action against the third respondent, under Section 147 of the Income Tax Act, 1961 and an order has also been passed by the Assistant Commissioner of Income Tax, Company Circle I (3), Chennai on 31.12.2009, alleging that the assessee has concealed taxable income, thereby calling upon the third respondent to pay a sum of Rs.1,63,08,463/- towards arrears of Income Tax for the assessment year 2006-2007. On 08.04.2011, the appellant department created a charge and attached the subject property, through intimation to the second respondent stating that M/s. Cosmo Foundations Ltd./ the third respondent, had failed to pay tax in time and therefore the subject property is attached. The writ petitioner/ first respondent herein filed the writ petition, to issue a writ of Mandamus, directing the first respondent/ appellant herein, to remove the charge and lift the attachment created in respect of the subject property. Learned counsel for the appellant department submitted that writ petition is not at all maintainable, since the proceedings dated 08.04.2011 was not challenged by the writ petitioner/ first respondent. Department further submitted that even on merits of the case, contention of the writ petitioner/ first respondent is that the entire sale transaction has been completed on 18.02.2010 itself and that they have become the owner of the said property and only thereafter notice in Form No.57/ITCP-I dated 31.07.2010 was issued to the third respondent M/s. Cosmo Foundations Limited, to pay a sum of Rs.162.86 lakhs, within 15 days from the date of receipt of the said notice. The said notice was duly served on the third respondent. But, the third respondent has failed to pay the income tax dues to the department, in time. Therefore, an order of attachment was passed on 08.04.2011.

4. As per Section 281 of the Income Tax Act, it is very clear that though during the pendency of any proceedings under this Act or after the completion thereof, but before the service of notice under Rule 2 of the II 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 proceedings or otherwise; Provided that such charge or transfer shall not be void, if it is made for adequate consideration and without notice of the pendency of such proceedings or, as the case may, without notice of such tax or other sum payable by the assessee or with the previous permission of the Assessing Officer. Hence, the action of the appellant/ first respondent is valid in law. Further, it was informed to the third respondent, by the appellant/ first respondent vide their letter dated 03.05.2012, to pay the entire arrears together with interest, in order to consider their request for lifting the attachment of the subject property. Whiles, the writ petitioner/ first respondent made a request to the Revenue authority that the property at No.512 Mint Street, measuring to an extent of 8992 sq.ft. bearing RS No.600 comprised in Collector Certificate No.750 itself is sufficient to discharge the tax arrears. But the said request made by the writ petitioner/ first respondent was not accepted by the appellant department. Therefore, attachment was not lifted. Further, it is submitted that there was no sale deed registered on the date of the issuance of notice. Therefore, the claim of the writ petitioner/ first respondent that he is the absolute owner of the property is incorrect and cannot be accepted. Therefore, the contention of the writ petitioner/ first respondent is baseless and that the same is liable to be dismissed.

5. According to the learned counsel for the writ petitioner/ first respondent, the writ petitioner executed a registered sale agreement with the third respondent in Document No. 101/2010 before the Sub Registrar, Sowcarpet towards purchase of the scheduled property. The writ petitioner/ first respondent has discharged all the dues of the third respondent. As per the sale agreement, the total sale consideration has been paid on the following dates :-

- a) Rs.19,00,000/- paid by cheque No.589552 dated 20.01.2010 drawn on Bank of Baroda, Sowcarpet at the time of execution and registration.
- b) Rs.5,50,00,000/- paid by Pay Order No.447004 dated 27.01.2010 issued by Bank of Baroda, Sowcarpet to discharge the loan vide Mortgage Deed dated 28.08.2007 registered as Document No.883 of 2007.

- c) Rs.5,29,91,128/- paid by cheque No.589557 dated 30.01.2010 drawn on Bank of Baroda, Sowcarpet to discharge the loan availed under Memorandum of Deposit of title deeds dated 01.02.2007 registered as Document No.109 of 2007.
- d) Rs.1,08,872/- paid by cheque No.589558 dated 10.02.2010 drawn on Bank of Baroda, Sowcarpet.

On receipt of the total sale consideration amount of Rs.11 Crores and by virtue of Power of Attorney dated 11.02.2010, executed by the third respondent, the writ petitioner / first respondent became eligible to execute a registered sale deed in their favour or his nominees, as and when required by them. Therefore, after completion of the sale agreement on 18.02.2010, the writ petitioner/ first respondent became the absolute owner of the subject property.

6. Learned counsel for the writ petitioner/ first respondent further submitted that after a span of one year, the department has attached the said property on 08.04.2011, which is illegal since the property does not belong to the third respondent. It is further submitted that the writ petitioner / first respondent, on enquiry from the third respondent, came to know that the Income Tax Department initiated action against the third respondent M/s. Cosmo Foundations Limited under Section 147 of the Income Tax Act, 1961 and the Assistant Commissioner of Income Tax, Company Circle I (3), Chennai has passed an order dated 31.12.2009 alleging that the third respondent is liable to pay a demand of Rs.1,63,08,463/- towards arrears of Income Tax for the assessment year 2006-2007, and against the aforesaid order of the Assessment Officer, the third respondent preferred an appeal and the same is pending before the Commissioner of Income Tax. Further, it is submitted that the factum was not disclosed to the writ petitioner/ first respondent and the third respondent had sold the aforesaid property to them. The writ petitioner/ first respondent is a bonafide purchaser of the said property. Therefore, the writ petitioner/ first respondent should not be penalised for the non-disclosure of the said fact by the third respondent. Even the revenue records would reveal that there is no encumbrance, as issued by the Sub Registrar, Sowcarpet, as on the date of the sale agreement. Hence, the petitioner has filed the writ petition for issuance of a Writ of Mandamus, against the appellant department. According to learned counsel for the writ petitioner/ first respondent, the third respondent is not the owner of the said property, for the reason that the entire sale consideration has been paid by the writ petitioner/ first respondent and therefore the first respondent firm is the owner of the property and therefore the order of the appellant department is not binding and should be lifted.

7. Heard Mr. T. Ravikumar, learned counsel for the appellant, Mr. R. Gopinath, learned counsel for the first respondent, Mr. N. Muralikumaran learned counsel for the second respondent and Mr. A. Thiagarajan, Senior Counsel for the third respondent and perused the material available on records.

8. It is an admitted fact that the writ petitioner/ first respondent firm entered into an agreement of sale dated 20.01.2010 and registered on the file of the Sub Registrar, Sowcarpet towards purchase of the immovable property situated at Old No.510, New No.6 Mint Street, Sowcarpet, Chennai-79 and comprised in old Survey No.6072, 6073 and 6075 and re-survey No.602, from the third respondent, namely, M/s Cosmo Foundations Limited. For discharge of the mortgage dues to the mortgagees, the writ petitioner/ first respondent, from and out of the sale consideration, has entered in the sale agreement between them and had paid the entire sale consideration, towards purchase of the scheduled property on various dates. On payment of the sale consideration to the third respondent, vacant land of the subject property and all the original documents pertaining to the said property, was handed over by the third respondent to the writ petitioner/ first respondent. However, a Power of Attorney dated 11.02.2010 was executed in favour of the writ petitioner/ first respondent and registered as Document No.41/2010 on the file of the Sub Registrar, Sowcarpet to enable the writ petitioner/ first respondent to register as and when required by them. Therefore, as per Section 2(47) of the Income Tax Act, 1961 the entire sale transaction was completed on 18.02.2010 and the writ petitioner/ first respondent has become the owner of the aforesaid property. Section 2(47) of the Income Tax Act, 1961 is extracted below :-

"(47) "transfer", in relation to a capital asset, includes,-

(i) the sale, exchange or relinquishment of the asset ; or

(ii) the extinguishment of any rights therein; or

(iii) the compulsory acquisition thereof under any law ; or

(iv) in a case where the asset is converted by the owner thereof into, or is treated by him as, stock-in-trade of a business carried on by him, such conversion or treatment ; or

(iva) the maturity or redemption of a zero coupon bond; or

(v) any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act, 1882 (4 of 1882) ; or

(vi) any transaction (whether by way of becoming a member of, or acquiring shares in, a co-operative society, company or other association of persons or by way of any agreement or any arrangement or in any other manner whatsoever) which has the effect of transferring, or enabling the enjoyment of, any immovable property.

Explanation 1.—For the purposes of sub-clauses (v) and (vi), "immovable property" shall have the same meaning as in clause (d) of section 269UA.

Explanation 2.—For the removal of doubts, it is hereby clarified that "transfer" includes and shall be deemed to have always included disposing of or parting with an asset or any interest therein, or creating any interest in any asset in any manner whatsoever, directly or indirectly, absolutely or conditionally, voluntarily or involuntarily, by way of an agreement (whether entered into in India or outside India) or otherwise, notwithstanding that such transfer of rights has been characterised as being effected or dependent upon or flowing from the transfer of a share or shares of a company registered or incorporated outside India;

9. Subsequently, the Commissioner of Income Tax, passed an order dated 11.06.2014, revising the assessment order and computing the final demand payable as Rs.10,50,259/- inclusive of interest under Section 234 B & 234 C. The said amount was paid by the third respondent on 02.01.2015. The decision of the Hon'ble Supreme Court rendered in the case of Mysore Minerals Ltd., vs. CIT reported in 1999 (1) Supp. SCR 192), wherein it has been held that a person who had taken possession and made payment of the consideration, was the owner though he had not obtained the deed of conveyance. In the case on hand, the writ petitioner/ first respondent having purchased the property under question, by paying the entire sale consideration became the absolute owner of the property in question. The Calcutta High Court in the case of Electro Zavod (India) Pvt. Ltd., vs. Commissioner of Income Tax & anr. reported in (2005) 199 CTR Cal.612, has held that on the date of passing the order of attachment, the property in question did

not belong to the assessee and on that date, there was no interest because such interest has already been passed on to the petitioner therein and accordingly, held that the order of attachment of the property claimed and held by the petitioner was not sustainable under the law. Taking into consideration the subsequent orders passed by the Commissioner of Income Tax, the appeal filed by the Revenue before the Income Tax Appellate Tribunal and the decisions cited supra, the Writ Court disposed of the writ petition with the following observations :-

" 14. Since the 3rd respondent failed to pay the dues to the department on time, the property in question has been attached. In the proceedings between the Department and the 3rd respondent, the tax liability was reduced by CIT (Appeals) and the same was also paid by the 3rd respondent. By virtue of the completion of the entire sale transaction and registration of the same, the petitioner became the absolute owner of the property in question. While so and when the 3rd respondent was not the owner of the property and when on the date of passing the order of attachment, the property in question did not belong to the assessee, namely, the 3rd respondent, the attachment of the property in question, which has been in absolute possession and enjoyment of the petitioner by virtue of the completion of the entire sale transaction, made by the 1st respondent for the dues payable by the 3rd respondent, is not binding on the petitioner and hence, unsustainable and accordingly, the impugned attachment has to be lifted and consequently, the sale deed has to be released, after numbering the same. If at all the 1st respondent can proceed on the other property of the 3rd respondent for the tax liabilities if any payable by the 3rd respondent.

15. In view of the discussions and reasons and in the light of the decisions cited supra, the impugned attachment of the property in question is directed to be lifted forthwith and the concerned Registering Authority is directed to number the impugned sale deed executed in respect of the property in question and release the sale deed, if it is otherwise in order. However, it is open to the 1st respondent Department to proceed against the other property of the 3rd respondent for the tax dues if any payable by the 3rd respondent, in accordance with

law, by keeping the attachment of the other property, pending disposal of the appeal preferred by the 3rd respondent as well as the 1st respondent."

10. The writ petitioner/ first respondent herein, filed the above writ petition, after coming to know about the notice issued by the appellant department to the third respondent on 08.04.2011, intimating that the third respondent, namely, M/s. Cosmo Foundations Limited had failed to pay the dues to the department in time and the property being attached for the demand payable to the department, as per the assessment order issued by the appellant department. The order of attachment of the subject property dated 05.08.2010 issued by the Tax Recovery Officer, Chennai to the third respondent under sub-section (1) of Section 222 of the Income Tax Act, 1961 prohibiting transferring or charging the subject property, has been received on 08.04.2011 by the Sub Registrar, Sowcarpet. The said notice in Form No.1 T.C.P 16 was not challenged by the writ petitioner in the above said writ petition. According to this Court, the said writ petition is not maintainable for not challenging the order of attachment dated 05.08.2010. According to the writ petitioner, he is a bonafide purchaser of the subject property and that the said factum of proceedings initiated by the Assessing Officer for demand of tax against the third respondent by various proceedings was not disclosed. He further submitted that as per the sale agreement entered between the third and first respondent, the entire sale consideration was paid to the third respondent vendor and the said vendor had handed over the property to the writ petitioner/ first respondent. Hence, he has become the owner of the subject property. Section 281 of the Income Tax Act, reads as follows :-

" (1) Where during the pendency of any proceedings 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 proceedings or otherwise;

Provided that such charge or transfer shall not be void, if it is made :

1. For adequate consideration and without notice of the pendency of such proceedings or, as the case may, without notice of such tax or other sum payable by the assessee or 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."

As per the above said proviso, it is clear that any assessee creates a charge, 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 proceedings. Against the third respondent, assessee, the department has initiated the proceedings. Therefore, Section 281 of the Act provides for certain transfers during the pendency of any proceedings.

11. As far as the instant case is concerned, the sale of property as defined under the Transfer of Property Act, 1882, was not completed at the time of order of Attachment was issued by the appellant department. At that time, only a sale agreement was entered into between the parties. The contention of the writ petitioner/ first respondent that the entire sale consideration was paid to the third respondent and the relevant documents have been handed over to the writ petitioner/ first respondent by the third respondent, would itself be sufficient to show that the writ petitioner/ first respondent is deemed to be the owner of the subject property. If there is any sale of the immovable property, the Transfer of Property Act, would apply. On perusal of the sale agreement, under Clause 11 of the Agreement, the vendor has declared as follows :-

" 11. The Vendor declares that they have absolute marketable title over the said property and there are no charges, liens, lis pendences, attachments, mortgages, acquisition proceedings or otherwise over the said property except the encumbrance mentioned in clause 6 above and the Vendor have not entered into any agreement of sale of the said property with anyone else. The vendor undertakes to indemnify the purchaser against the breach of this declaration. "

Therefore, the above said clause shows that for any charges against the vendor, namely, M/s. Cosmo Foundations Limited, the third respondent herein, the vendor is liable for the same. The writ petitioner/ first respondent is not the owner of the property as on the date of the order of attachment issued by the appellant department. The third respondent who is the vendor, is the owner of the subject property.

12. The appellant department relied upon the decision in the case of Suraj Lamp and Industries Pvt. Ltd., vs. State of Haryana and anr. vs. [2012] 340 ITR 1 (SC), wherein the Hon'ble Supreme Court, referring to the case of Rambhau Namdeo Gajre v. Narayan Bapuji Dhotra [2004] 8 SCC 614, has observed that a transfer of immovable property by way of sale can only be by a sale deed and in the absence of a deed, no right, title or interest in an immovable property can be transferred. Paragraphs 17 to 21 are extracted below :-

" 17. In Rambhau Namdeo Gajre v. Narayan Bapuji Dhotra [2004] (8) SCC 614] this Court held (page 619):

"Protection provided under Section 53A of the Act to the proposed transferee is a shield only against the transferor. It disentitles the transferor from disturbing the possession of the proposed transferee who is put in possession in pursuance to such an agreement. It has nothing to do with the ownership of the proposed transferor who remains full owner of the property till it is legally conveyed by executing a registered sale deed in favour of the transferee. Such a right to protect possession against the proposed vendor cannot be pressed in service against a third party."

18. It is thus clear that a transfer of immoveable property by way of sale can only be by a deed of conveyance (sale deed). In the absence of a deed of conveyance (duly stamped and registered as required by law), no right, title or interest in an immoveable property can be transferred.

19. Any contract of sale (agreement to sell) which is not a registered deed of conveyance (deed of sale) would fall short of the requirements of sections 54 and 55 of TP Act and

will not confer any title nor transfer any interest in an immovable property (except to the limited right granted under section 53A of TP Act). According to TP Act, an agreement of sale, whether with possession or without possession, is not a conveyance. Section 54 of TP Act enacts that sale of immoveable property can be made only by a registered instrument and an agreement of sale does not create any interest or charge on its subject matter.

Scope of Power of Attorney :

20. A power of attorney is not an instrument of transfer in regard to any right, title or interest in an immovable property. The power of attorney is creation of an agency whereby the grantor authorizes the grantee to do the acts specified therein, on behalf of grantor, which when executed will be binding on the grantor as if done by him (see section 1A and section 2 of the Powers of Attorney Act, 1882). It is revocable or terminable at any time unless it is made irrevocable in a manner known to law. Even an irrevocable attorney does not have the effect of transferring title to the grantee. In State of Rajasthan vs. Basant Nehata - 2005 (12) SCC 77, this Court held :

"A grant of power of attorney is essentially governed by Chapter X of the Contract Act. By reason of a deed of power of attorney, an agent is formally appointed to act for the principal in one transaction or a series of transactions or to manage the affairs of the principal generally conferring necessary authority upon another person. A deed of power of attorney is executed by the principal in favour of the agent. The agent derives a right to use his name and all acts, deeds and things done by him and subject to the limitations contained in the said deed, the same shall be read as if done by the donor. A power of attorney is, as is well known, a document of convenience.

Execution of a power of attorney in terms of the provisions of the Contract Act as also the Powers-of-Attorney Act is valid. A power of attorney, we have noticed hereinbefore,

is executed by the donor so as to enable the donee to act on his behalf. Except in cases where power of attorney is coupled with interest, it is revocable. The donee in exercise of his power under such power of attorney only acts in place of the donor subject of course to the powers granted to him by reason thereof. He cannot use the power of attorney for his own benefit. He acts in a fiduciary capacity. Any act of infidelity or breach of trust is a matter between the donor and the donee."

21. An attorney holder may however execute a deed of conveyance in exercise of the power granted under the power of attorney and convey title on behalf of the grantor. "

13. Therefore, as per the provisions of the Act, unless the property is transferred in the name of the purchaser, the writ petitioner herein cannot claim that he is the owner of the property. Hence, the writ petitioner has no locus standi to question the order of attachment in the present appeal, as the writ petitioner is not the owner of the property and the vendor who is the assessee cannot question the order of attachment.

14. In support of the contention, learned counsel for the writ petitioner/ first respondent relied on the following decisions :-

1. Decision of the Division Bench of Allahabad High Court in the case of Raghuram Grah P. Ltd. & anr. vs. Income Tax Officer & Ors. Reported in (2006) 281 ITR 147 (AH), wherein it is held that the documents seized by the Central Excise Department and also requisitioned by the Income Tax Department did not relate to the business activities of either of the petitioners. As a matter of fact, the enquiries on the basis of these documents were directed by the Department against certain persons other than the petitioners. The action of the Department in provisionally attaching the bank accounts of the petitioner under Section 281B of the Act by the impugned order and its extension by the Commissioner were unwarranted in law and were liable to be quashed. In the instant case, the property does not belong to the writ petitioner/ first respondent and therefore the decision relied above, is not relevant to the facts of the present case.
2. In the decision of the Gwalior Bench of Madhya Pradesh High Court in the case of OM Prakash Gupta & Ors., vs. Income Tax Officer, Ward 1, Gwalior & Ors., reported in 251 ITR 714, it is held that since the assessment proceedings were

pending it would be appropriate that the assessing authority pass orders for releasing the property from attachment on taking a bank guarantee from the petitioners for the sum which may become due against the petitioners when the assessment was made. In the present case on hand, the assessee has not made any application before the concerned authority for releasing the property from attachment by furnishing a bank guarantee for the payment to be made, to the appellant department.

3. In the other decision in the case of KDH Properties P. Ltd., vs. Assistant Commissioner of Income Tax & Ors., reported in (2013) 356 ITR 1 (Mad.), this Court has held that if the petitioner were able to establish the valuation of the property as stated, by cogent and proper materials acceptable to the Department subject to final assessment, the property could continue to be under provisional attachment as per section 281B and all other debts and security deposits due from third parties could be released from the provisional attachment. In the case on hand, the writ petitioner is only an agreement holder and is not the owner of the property as stated in the earlier paragraph. Hence, this decision would not apply to the facts of this case.
4. In the case of Gandhi Trading vs. Assistant Commissioner of Income Tax & Ors., reported in 239 ITR 337, Division Bench of Bombay High Court has held that two properties of the assessee, which have been attached under Section 281B of the Act, having been valued even by the departmental valuer at Rs.2.66 crores against the anticipated liability of Rs.2.68 crores there was no justification for allowing the continuation of attachment on the bank accounts and FDRs. In the instant case, the assessee has not challenged the order of attachment. Further, the decision relied by the writ petitioner/ first respondent would not apply to the facts, where the immovable properties were not attached to the department and that it was only the bank accounts and FDRs as stated in the above said judgment.
5. In the case of Karsanbhai Gandabhai Patel vs. Tax Recovery Officer, reported in (2014) 362 ITR 374 (Guj), the Division Bench of Gujarat High Court has passed an order. The facts of the case is the petitioners in the above said case purchased different units in a constructed building and the construction was completed in the year 1991-1992. The petitioners took the respective shops in the said building and they were put in possession in the year 1992. The Tax Recovery Officer, Mumbai attached the said property on May 22, 1995 and by order dated 08.11.2005 the Tax Recovery Officer declared all the sales mentioned therein including those in favour of the petitioners therein as void in terms of Section 281 of the Act. Holding the sales transaction

as void by the Tax Recovery Officer, was the subject matter in that case. The Gujarat High Court held that by allowing the petition the Revenue cannot proceed with the auction sale of the properties under attachment to recover the dues of the defaulter, and that there is no power to declare the sale transactions as void and that only civil suit would lie, under the Income Tax Act 1961. However, the aforesaid decision would not apply to the facts of the present case.

6. The decision of the Hon'ble Supreme Court in the case of Sanjeev Lal & Ors. vs. Commissioner of Income Tax, Chandigarh & anr., reported in (2015) 5 SCC 775, relates to interpretation of definition of the term "transfer" as defined under Section 2(47) for the purpose of allowing the benefit under Section 54 of the Income Tax Act, 1961, to the assessee. But so far as the present case is concerned, under the provisions of Section 281 of the Act, it deals with certain charge or transfers to be void under Chapter XIII of the Income Tax Act. Here, the sale deed was not registered nor the title is fixed. Hence, the decisions of the Hon'ble Supreme Court cited supra, is not relevant to the case on hand.
7. The other decisions relied on by the writ petitioner/ first respondent are, the case of Blue Star Limited vs. Union of India, reported in 2009 SCC Online Bombay 1632 by the Bombay High Court ; Surrendra Overseas Limited vs. Commissioner of Income Tax, West Bengal, reported in 120 ITR 872, passed by the Division Bench of Calcutta High Court ; and the decision of Division Bench of Gujarat High Court in the case of Saheli Synthetics P. Ltd., vs. Commissioner of Income Tax, reported in 302 ITR 126 ; However, the said decisions also would not apply to the facts of the instant case.

15. During the course of arguments, it is brought to the notice of this Court, the order passed by the Income Tax Appellate Tribunal dated 31.12.2015 in the appeal preferred by the appellant department, in ITA No.1469/Mds/2014. The relevant portion in paragraph 5, of the order passed by the Tribunal is extracted below :-

"5. We have heard both the sides and perused the material on record. As per the sale deed of property dated 17th March 2006 the sale consideration was Rs.5.6 crores. As per sale deed Smt.Vimalamma received full sale consideration of Rs.5.6 crores and there was no mention about the allotment of share in lieu of share consideration. Further, on few occasions, she narrated in earlier para that she had denied

making any investment in assessee company. However, the Commissioner of Income Tax (Appeals) gave a finding that Rs.2.85 crores was made as investment by Smt. Vimalamma. In our opinion, the assessee shall furnish all details to prove the transaction. The onus to prove the identity, credit worthiness and genuineness of transaction is on assessee as the entire facts are in her knowledge. Mere production of confirmation letter from Smt.Vimalamma is not sufficient in this case. She has given different statements at different stages. We do not know whether she is truthful and honest to disclose the correct fact. Being so, her statements are not reliable when surrounding and attending facts brought on record by the A.O indicate and reflect paper work and documentation. But genuineness, creditworthiness and identity are deeper, it shall require to be established by documents. Being so, the Commissioner of Income Tax (Appeals) has taken just cursory look at the entire things and deleted the addition which is improper. Hence, the matter is remitted back to the file of the Assessing Officer for conducting detailed inquiry and decide the issue afresh. The assessee has to file bank account details of Smt.Vimalamma to prove the transaction. The appeal of the Revenue is partly allowed for statistical purposes."

16. Therefore, it is clear from the aforesaid decision of the Hon'ble Supreme Court that the transfer of immovable property can only be, by way of a sale deed. In the absence of a deed of conveyance, duly stamped and registered, no right, title or interest in an immovable property can be transferred. However, the contention of the writ petitioner/ first respondent that he is deemed to be the owner of the property cannot be accepted in the light of the Transfer of Property Act and as per the law laid down in the decision of the Hon'ble Supreme Court, cited supra.

17. In the light of the decisions rendered by the Hon'ble Supreme Court cited supra, the order passed by the Tribunal, cannot be accepted.

18. Based on the above facts and circumstances of the case and considering the decisions cited supra, the order passed

by the writ court is set aside and the Writ Appeal filed by the Revenue is allowed. Consequently, the connected Miscellaneous Petition is closed. No costs.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

avr

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+1cc to Mr.S.Nagarajan , Advocate, S.R.No.23886

Writ Appeal No.95 of 2016
and
C.M.P. No. 1111 of 2016

NMI (CO)
CS/05/07/17

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