IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 11.09.2018

CORAM
THE HONOURABLE Mr.JUSTICE R.SURESH KUMAR

W.P.No.41724 of 2002

Shantha Vinayagamurthy (deceased)

1.K.Vinayagamoorthy
2.V.Uma
3.V.Bharah Babu
(P2 to P4 substituted as Lrs. of deceased P1 (Shantha Vinayagamurthy) as per order dated 30.08.2018 in WMP.No.24771/18

.. Petitioners

- vs -

Tax Recovery Officer XVII,
Range IV,
Income Tax Department,
Government of India,
Room No.401, Annexe 4th floor,
No.121, Nungambakkam High Road,
Chennai 600 034. .. Respondent

This Writ petition is filed under Article 226 of the Constitution of India seeking to issue a writ of Certiorari calling for the records relating to order of attachment dated 12.03.2002 in T.R.No.227/01-02 in Form No.I.T.C.P. 16 passed by the respondent, attaching the property bearing Old No.31 (New No.73), Melpadi Muthu Street, Nungambakkam, Chennai 34, and quash the same.

For Petitioners : Mr.N.Devanathan

For Respondent : Mr.J.Narayanasamy

O R D E R

This writ petition has been filed seeking to issue a writ of Certiorari, calling for the records relating to order of attachment dated 12.03.2002, in T.R.No.227/01-02 in Form No.I.T.C.P. 16, passed by the respondent, attaching the property bearing Old No.31 (New No.73), Melpadi Muthu Street, Nungambakkam, Chennai 34, and quash the same.

2. The short facts which are required to be noticed for the

disposal of this Writ Petition are as follows :-

(i) The respondent Revenue in order to recover the tax due to the extent of Rs.8,28,514/- as on 12.03.2002, had issued an order of attachment of immovable property, situated at 31, Melpadi Muthu Street, Nungambakkam, Chennai-34, in the name of Mrs.Muruvammal, wife of K.Narasimhalu, who was the assessee/defaulter, by impugned order dated 12.03.2002. The original petitioner, one Shantha Vinayagamurthy, being one of the legal heir of the original assessee namely, Narasimhalu Naicker filed this writ petition, challenging the said order of attachment dated 12.03.2002 on the ground that, the property, which was the subject matter in the impugned attachment order, was not inherited by the original writ petitioner, who was one of the grand children of the assessee Narasimhalu Naicker, by way of inheritance from her father Narasimhalu Naicker but, directly from her grand father, one Mylai Krishnasamy Naicker, who by Will dated 25.03.1929, settled all his properties to the grand children, however, restricting life estate to his children.

(ii) In this regard, the family tree also has been filed before this Court on behalf of the petitioner.

(iii) The original petitioner Shantha Vinayagamurthy, since deceased, during the pendency of the writ petition, her legal heirs i.e., petitioners 2 to 4 had been implicated as party petitioners herein. This Court, at the time of admitting the writ petition has passed an interim order of stay of the impugned order of attachment, by order dated 20.11.2002, whereby, the impugned order of attachment has been stayed on condition that, the petitioner shall not create any encumbrance over the property.

(iv) The said interim order has been made absolute, by the orders of this Court dated 22.09.2003, of course, with the same condition. Therefore, the facts remains that, the impugned order of attachment has been stayed. However, the petitioner has been prevented from alienating or encumbering the property under attachment, by the orders of this Court, and the said position has been continued till date.

3. Mr.N.Devanathan, learned counsel appearing for the petitioner raised a ground of attack stating that, since the property in question, which is the subject matter of the impugned order of attachment, is not belong to the original assessee namely, Narasimhalu Naicker, as he got the right of life estate only under the Will, dated 25.03.1929 from the original owner of the property, one Mylai Krishnasamy Naicker,

who is none other than the grand father of the original petitioner, Shantha Vinayagamurthy, the Revenue cannot proceed against the original writ petitioner, particularly, in respect of the property in question.

4. In this regard, the learned counsel would further submit that, as per the family tree, even though, there are seven grand children for the said Mylai Krishnasamy Naicker, through one of his son Narasimhalu, as per the Will, since the property had come to all the grand children, by a subsequent oral partition between the grand children, the property in question had been given to the original petitioner Shantha Vinayagamurthy and that is how, she become the absolute owner of the property directly by way of a Will and subsequent oral partition and not by way of inheritance from her father Narasimhalu Naicker, who was the assessee.

5. Therefore, the learned counsel appearing for the petitioner would submit that, under Section 222 of the Income Tax Act, [hereinafter referred as 'the Act'] such proceedings cannot be issued by the Revenue, as the original petitioner is no way liable to pay any tax payable by the said Narasimhalu, the assessee and therefore, even though the impugned order was issued in the name of the wife of the assessee i.e., Muruvammal, since, the property actually belongs to the original petitioner, Shantha Vinayagamurthy, she moved this writ petition, challenging impugned attachment order.

6. Per contra, Mr.J.Narayanasamy, learned Standing Counsel appearing for the Revenue has made the submission that, it is the fact that the said Narasimhalu, the assessee was a defaulter in paying tax and therefore, in order to recover the tax due from the said Narasimhulu, the property in question for which, according to the department, the said Narasimhalu, was the owner and after him, his wife Muruvammal, was the legal heir, the property since had to be attached by invoking Provisions of Section 222 of the Act, the impugned attachment order was issued.

7. The learned standing counsel would further submit that, challenging the impugned order, even though the writ petition was filed, there had been subsequent development under which, the Revenue by invoking Rule-11 of Schedule-II, has issued a proceedings on 13.09.2002, whereby, the Revenue proposed to refer the property for valuation and therefore, that communication was issued to the original writ petitioner, to co-operate with the valuation engineer. The learned standing counsel would further submit that, this was issued in fact, in pursuance to and also on consideration of the request made by

the original writ petitioner, by his request dated 10.03.2002. Under which, the original writ petitioner has made the following request to the Revenue and for clarity, the same is extracted herein:

> "With respect to your letter dated 28.02.2002, I wish to add the following lines:
>
> The house I am presently staying at my above address belonged to my Grandfather Mr. Krishnaswamy who had left a Will that his sons will have life interest in his assets and that they will have no rights to sell or mortgage the same and that their children shall eventually have all the rights over his assets. The copy of his Will is enclosed for your perusal and reference. Hence my father, Mr.Narasimhalu, against whom the recovery proceedings are initiated, had no right over this property which is the subject matter of your letter. Hence I request you to stop your proceedings against this property and relieve me of the liability of the arrears contemplated."

8. In respect of the said request made by the original writ petitioner, the Revenue sent this communication dated 13.09.2002 which reads thus:

> "Kindly refer to the order of attachment of the house property situated at No.31 Melpadi Muthu Street.
>
> In this connection it is proposed to refer the property for valuation. Our departmental Valuation Engineer will be visiting the above premises within a fortnight. Hence you are requested to provide him all assistance to enable him to supervise the entire building and thereby arrive at the valuation of the building.
>
> Since the matter is very urgent you are requested to co-operate with the department in this regard."

9. By relying upon these two communications, the learned standing counsel for the Revenue would submit that, assuming that, there had been an objection to the impugned attachment on the ground that the property not belongs to the original assessee and it had been independently inherited by way of original Will and subsequent partition by the original writ petitioner, whether that objection is sustainable or not, had also to be decided by the department. That apart, assuming

that, only life estate alone was given to the original assessee, during the life time, based on the right of life estate, whether the original assessee had exploited the property for any income, had also to be assessed and that is the reason why, the said valuation process had been commenced by the Revenue and the notice was issued to that effect.

10. The learned Standing Counsel for Revenue would very much rely upon Rule 11 of Schedule-II for the purpose of investigation of tax recovery officer and in order to appreciate the said argument, the Rule 11 in entirety, is extracted herein for better appreciation:

> 11. (1) Where any claim is preferred to, or any objection is made to the attachment or sale of, any property in execution of a certificate, on the ground that such property is not liable to such attachment or sale, the Tax Recovery Officer shall proceed to investigate the claim or objection : Provided that no such investigation shall be made where the Tax Recovery Officer considers that the claim or objection was designedly or unnecessarily delayed. (2) Where the property to which the claim or objection applies has been advertised for sale, the Tax Recovery Officer ordering the sale may postpone it pending the investigation of the claim or objection, upon such terms as to security or otherwise as the Tax Recovery Officer shall deem fit. (3) 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 possessed66 of, the property in question. (4) Where, upon the said investigation, the Tax Recovery Officer is satisfied that, for the reason stated in the claim or objection, such property was not, at the said date, in the possession of the defaulter or of some person in trust for him or in the occupancy of a tenant or other person paying rent to him, or that, being in the possession of the defaulter at the said date, it was so in his possession, not on his own account or as his own property, but on account of or in trust for some other person, or partly on his own account and partly on account of some other person, the Tax

Recovery Officer shall make an order releasing the property, wholly or to such extent as he thinks fit, from attachment or sale. (5) Where the Tax Recovery Officer is satisfied that the property was, at the said date, in the possession of the defaulter as his own property and not on account of any other person, or was in the possession of some other person in trust for him, or in the occupancy of a tenant or other person paying rent to him, the Tax Recovery Officer shall disallow the claim. (6) Where a claim or an objection is preferred, the party against whom an order is made may institute a suit in a civil court to establish the right which he claims to the property in dispute; but, subject to the result of such suit (if any), the order of the Tax Recovery Officer shall be conclusive."

11. By relying upon Rule-11, learned standing counsel would further submit that, since the power is vested in the Revenue to investigate the issue, if any objection has come from any one with regard to the ownership, as well as the liability, ultimately, if the Revenue comes to the conclusion that the property cannot be attached, the same can be released from the attachment, otherwise, the objection to be made by any interested person can be disallowed. In that case, under sub rule-6 of Rule-11 as extracted above, a claim or objection is preferred, the party against whom an order is made, may institute a suit in the Civil Court to establish the right. Therefore, by relying upon these provision under Rule-11, the learned standing counsel would further submit that, at any rate, the power of Revenue under Rule 11, is not denuded and therefore, by virtue of mere challenge of the impugned order of attachment, the petitioner cannot seek any permanent restriction against the Revenue to proceed in accordance with law, especially under Rule 11 as quoted above.

12. However, the learned counsel appearing for the petitioner, by way of reply would submit that, once the property is not belong to the original assessee and if the original writ petitioner or her legal heirs, who are the present petitioners herein, are able to establish that the property in question is the absolute property of the petitioners alone, not by way of inheritance from her father or grandfather, but independently by way of execution of Will, directly made by the original owner of the property i.e., Krishnasamy Naicker and the life estate of the assessee Narasimhulu Naicker, would no way alter the situation, the very liability on the part of the petitioners would go and therefore, on that basis, they can very well seek

exemption from attachment of the property, under Section 159 of the Act. Even the said liability, would not occur or devolve on the heads of the present petitioner and therefore, at any rate the impugned attachment cannot be sustained.

13. This Court has considered the said rival submissions made by the learned counsel appearing for both sides and perused the materials placed before this Court carefully.

14. It is the consistent case on the part of the petitioner that the original writ petitioner, one Shantha Vinayagamurthy (deceased), is one of the grand children of the Krishansami Naicker, who was the owner of the entire estate, including the property in question. The said Krishasami Naicker, claim to have bequeathed a Will, dated 12.03.2002, under which, various properties have been settled, out of which, the property in question had been settled in favour of the grand children of Krishnasami Naicker through one of the son, namely, Narasimmhulu Naicker, the present assessee. Under the Will, only life estate was restricted to Narasimmhulu and after his death automatically, the property would come as an absolute property to all the legal heirs that is the grand children of Krishnasami Naicker through Narasimmulu Naicker.

15. It is also the case of the petitioner that the original petitioner, Shantha Vinayagamurthy is one among the seven grand children of Krishnasami Naicker through Narasimmhulu Naicker and after the property came to all the seven grand children, it was claimed that, there had been an oral partition between brothers and sisters and the said grand children, pursuant to the oral partition, given the property in question to the original writ petitioner i.e., V.Santha Vinayagamurthy, as an absolute property.

16. Though it was claimed by the petitioner's side, there is no proof to show that, subsequent partition had been made and pursuant to the partition, this Shantha had become the absolute owner of the property.

17. On the legal side, Section 222 of the Act made it clear that, when an assessee is a defaulter or is deemed to be a defaulter in making the payment of tax, the tax recovery officer may draw up statement specifying the amount of arrears due from the assessee and shall proceed to recover from such an assessee, the amount specified in the certificate by one or more method. Out of four methods, under clause b of Sub-section (i) of Section 222 attachment and sale of the assessee's immovable property has been shown as one of the method. Only by invoking the said provision, the Revenue has issued the order of

attachment, which is impugned herein.

18. If the arguments on the side of the petitioner that the property in question, that is the immovable property under attachment is not the assessee's property, is accepted then Section 222 cannot be invoked. However, at the same time, whether the property in question was not belong to the assessee is the matter of fact which has to be ascertained. In this regard, it has been rightly pointed out by the learned Standing Counsel appearing for the Revenue that, under Rule 11 to Schedule-II under the procedure for recovery of tax, it has been specifically mentioned and the power has been given to the Revenue to investigate the issue, when there had been an objection or claim with regard to the liability as well as the ownership of the property and there has been a detailed procedure as complemented under Rule 11 where the Revenue has to investigate the matter for attachment of the property or for sale. Once the Revenue comes to the conclusion that the property can be released, they can do so, under sub-rule (iv), instead, if the Revenue comes to the conclusion that the objection can be disallowed, they can also do the same under sub Rule (v).

19. Ultimately, if the claim or objection preferred by the assessee/party against whom, an order is made, that party can also institute the suit in Civil Court, to establish their right as has been provided under sub rule VI.

20. When an exhaustive procedure has been given under the rule, whereby, power and authority is vested with the Revenue to proceed in the manner as contemplated therein, this Court is of the considered view that, such a power and authority conferred on the Revenue cannot be taken away or denied by the orders of this Court. The law is well settled in this regard and when the statute prescribe that certain acts to be done in a particular manner, the same has to be done only in that manner and not otherwise.

21. In this regard, it was also pointed out by the learned standing counsel appearing for the Revenue that, the Revenue had already initiated process of investigation and in this regard, the proposal given by the Revenue to value the property, as per the notice dated 13.09.2002 is the initiation, pursuant to which, whatever objection, the present petitioners or any legal heirs of the original assessee want to make out, they can do so and that would be considered or taken care of, by the Revenue and ultimately, a decision would be taken as contemplated under

Rule 11.

22. No doubt, the Revenue has got power to investigate the matter under Rule 11, however, before making such investigation, if the order of attachment impugned herein dated 12.03.2002, is given effect to, and the property is attached and further proceedings is permitted to go on, then, it would be a fiat accompli which would infringe such valuable right of the petitioners, even if it is ultimately established pursuant to the investigation tobe done by the Revenue under Rule-11. Therefore, this Court is of the view that, the entire exercise under Section 222 and Rule-11 of Schedule-II as quoted above, has to be re-done by the Revenue and in this regard, in order to pave the way towards that direction, the impugned attachment order shall not stand in the way.

23. In the result, this Court is inclined to pass the following order:

(i) The impugned order of attachment dated 12.03.2002 is set aside and the matter is remitted back to the Revenue to start the reprocess of investigation under Rule-11 of Schedule II.

(ii) In the process of investigation, the Revenue shall issue notice to all the legal heirs of the assessee, including the present writ petitioners. On receipt of said notice from the Revenue, the petitioners and other legal heirs/noticee, can appear in person and raise objection or they can send objection in writing to the Revenue. On consideration of the same objectively, including the claim of the petitioners, that the property in question is their absolute property and not belong to the original assessee, Narasimmahulu, the Revenue shall decide the issue in accordance with law.

(iii) It is made clear that if ultimately, the Revenue comes to the conclusion that the original assessee, who was the defaulter in paying the tax, had to pay the tax due and for whom, the legal heirs have to pay the same under section 159 of the Act, the Revenue shall calculate the tax due with interest. However, on the part of the interest, a lenient view can be taken by the Revenue, as this proceedings was pending before Court for all these years.

(iv) The needful as indicated above, shall in entirety be undertaken and completed, within a period of three months, from the date of receipt of copy of this order.

(v) It is made clear that since time bound order has been passed, the petitioner shall co-operate with the Revenue.

(vi) By virtue of the setting aside of the impugned order of attachment, neither the writ petitioner herein nor any legal heir or any person claiming to be the owner or person having the interest over the property in question, shall have any right to encumber the property in any manner, till the final decision is made by the Revenue, as indicated above.

With these directions, this writ petition is ordered as indicated above. No costs.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

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To

Tax Recovery Officer XVII, Range IV,
Income Tax Department,
Government of India,
Room No.401, Annexe 4th floor,
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Chennai 600 034.

W.P.No.41724 of 2002

SJ(CO)
CSL/27.03.2019