IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 21.03.2019

Delivered on : 26.03.2019

CORAM:

THE HONOURABLE MR. **JUSTICE SENTHILKUMAR RAMAMOORTHY**

W.P.No.36469 of 2006
and
M.P.No.2 of 2006

R.Dakshinamoorthy ... Petitioner

Vs.

The Deputy Commercial Tax Officer,
Tirupur (Bazaar Street),
Tirupur. ... Respondent

PRAYER: Writ petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorari, calling for the records on the file of the Respondent in his Notice in Na Ka 2252/93-A3 dated 23.06.2006 and quash the same.

For Petitioner : Mr.U.Sriram
for Mrs.R.Hemalatha

For Respondent : V.Haribabu

O R D E R

This Writ Petition is filed for a Writ of Certiorari to quash the Notice dated 23.6.2006 of the Respondent. The said notice was issued under Section 24 of the Tamil Nadu General Sales Tax Act, 1959 (the TNGST Act), calling upon the Petitioner to remit the sales tax arrears with interest thereon of the former owner of the immovable property currently owned by the Petitioner within seven days from the date of receipt of the notice failing which steps would be taken to bring the property to sale under the Tamil Nadu Revenue Recovery Act.

2.The relevant facts of this case are simple. From the Impugned Notice dated 23.6.2006, it appears that M. Bhagyavathi was the Sole Proprietrix of Abirami Chemicals, which was registered as a dealer under the TNGST Act. It also appears that the said dealer had not paid sales tax dues in respect of the assessment years 1993-94 and 1994-95 and that the said dues aggregated to a sum of Rs.7,48,698/- with interest thereon as of the date of notice from the respondent to the petitioner.

3.As per the above mentioned notice, a security bond was provided on 06.04.1992 at the time of issuance of the registration certificate and the immovable property of the dealer at Chellapuram, Thirupur, admeasuring 975 sq. ft. with a built-up area of 420 sq. ft. was offered as security (the said Property). It is stated in the counter affidavit of the Respondent that the Assessment Order dated 29.03.1996 in TNGST No.272355/93-94 was served on the assessee/ dealer on 16.04.1996 and that in Assessment Order dated 31.05.1996 in TNGST No. 272355/94-95 was served on the said assessee/dealer on 10.06.1996. Consequently, as per Section 24(2) of the TNGST Act, the statutory charge would operate 21 days after receipt of the aforesaid notices.

4.Thereafter, it appears that the dealer entered into negotiations for the sale of the said Property and the Petitioner evinced interest in purchasing the said Property. Accordingly, the Petitioner issued a notice in a Tamil daily on 12.10.1998 calling upon the public to raise claims/objections, if any, to the proposed purchase of the said property within one week from the date of publication of the notice. The public were also put on notice that the original title deeds were missing and that the Petitioner would not be responsible for any claims made in respect of the said Property after purchase thereof in the event of non-receipt of objections. Subsequently, by Sale Deed dated 09.11.1998, which was registered in the office of the Sub- Registrar, Thirupur, as Document No.2774/1998, the petitioner acquired the said property from M.Bhagyavathi for a total sale consideration of Rs.3 lakhs. The Petitioner appears to have obtained an encumbrance certificate dated 02.12.1998 for the period November 1996 to December 1998 and the encumbrance certificate shows "nil" encumbrance during the aforesaid period. The Impugned Notice, as is evident from the notice, was sent to the Petitioner about eight years later.

5.The learned counsel for the Petitioner adverted to the facts set out above and contended that the Respondent cannot claim sales tax dues of the erstwhile owner from the Petitioner. He further contended that the charge against the property cannot be enforced against the Petitioner because the Petitioner is a *bona fide* purchaser for value without notice of the prior charge.

6.In response, the learned counsel for the Respondent submitted that the sale of the said Property by the erstwhile owner is void in terms of Section 24-A of the TNGST Act. In this connection, he invited the attention of the court to section 24 A, which reads, *inter alia*, as under:

> *"Where, during the pendency of any*

proceedings under this Act or after the completion thereof, any dealer 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 person, with the intention to defraud the revenue, such charge or transfer shall be void as against any claim in respect of any tax, or any other sum payable by the dealer as a result of the completion of the said proceeding or otherwise:

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

(i) for adequate consideration and without notice of the pendency of such proceeding under this Act or, as the case may be, without notice of such tax or other sum payable by the dealer; or

(ii) with the previous permission of the assessing authority"

7.He also submitted that the erstwhile owner of the property and the petitioner reside in the same area and that, therefore, the sale is not *bona fide* but collusive. He therefore concluded his arguments by contending that the charge could be enforced against the property in order to realise the sales tax dues of the dealer.

8.The affidavit, counter affidavit, documents and oral submissions of both parties were considered carefully.

9.In view of the fact that the Respondent claims to have an enforceable charge and not a mortgage in respect of the property, it is pertinent to advert to Section 100 of the Transfer of Property Act, 1882 (the TPA), which reads as under:

> *"Charges-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 of the property; and all the provisions herein before 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 for 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 the person to whom such property has been transferred for consideration and without notice of the charge."***
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> *(emphasis added)*

10.From a perusal of Section 100 of the TPA, it is clear that, unless expressly provided otherwise by any law for the time being in force, unlike a mortgage, a charge can be enforced against the property in the hands of a transferee only if the transferee had notice of the prior charge and was not a *bona fide* purchaser. In the instant case, the learned counsel for the Respondent admitted that the Sub-Registrar concerned was not informed about the existence of the charge in favour of the Respondent. It is also clear from the encumbrance certificate, which was obtained by the Petitioner in December 1998, that no charge was reflected in respect of the said property up to December 1998. The allegation that the Petitioner and the erstwhile owner colluded in effecting the sale is not based on actionable evidence and such an inference cannot be countenanced purely on the basis that the parties concerned reside in the same area or even because the original title deeds were missing as per the public notice. Therefore, it cannot be said that the Petitioner had prior notice, either actual or constructive, of the existing charge. The Hon'ble Supreme Court in **AHMEDABAD MUNICIPAL CORPORATION Vs. HAJI ABDUL GAFUR HAJI HUSENBHAI reported in AIR 1971 SC 1201,** held that a charge cannot be enforced against a *bona fide* purchaser without prior notice unless the relevant statute confers an express right to enforce the charge against a transferee without notice.

11.This leads to the next question as to whether Section 24-A of the TNGST Act contains a stipulation that the charge can be enforced even against a transferee without notice. For this purpose, it is necessary to also set out Section 24 (1), i.e. the charge creating section, which reads as under:

> *"Save as otherwise provided for in sub-section (2) of section13, the tax payable under this Act from a dealer or person and any other amount due from him under this Act shall be paid in such manner and in such installments, if any and within such time as may be specified in the notice of assessment, not being less than twenty one days from the date of service of the notice. The tax under sub-section (2) of section 13 shall be paid without any notice of demand.* ***In default of such payment the whole of the amount outstanding on the date of default shall become immediately due and shall be a charge on the properties of the person or persons liable to pay tax or interest under this Act****.*
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> *(emphasis added).*

12.From the language of Section 24(2), it is clear that a statutory charge is created in favour of the sales tax department upon failure to pay sales tax within 21 days of the date of receipt of a notice of assessment. Therefore, from the counter affidavit, it appears that a statutory charge was created over the property on or about 31.06.1996. More importantly, when the language of Section 24-A is examined, there is nothing therein that suggests that the statutory charge would be enforceable against a transferee without notice. On the contrary, it states that the transfer would not be void if made for adequate consideration and without notice of the pendency of proceedings under the TNGST Act. In fact, this question has already been considered and answered by a Division Bench of this Court in **DEPUTY COMMERCIAL TAX OFFICER Vs. RK STEELS, reported in 1998 108 STC 161 (DB-Mad)** wherein the Court followed the decision of the Hon'ble Supreme Court in **AIR 1971 SC 1201** (cited supra) and held that the decisions of earlier Division Benches of this Court in **DEPUTY COMMERCIAL TAX OFFICER Vs. ASHA KUMARI reported in 1985 WLR 240** and **COROMANDEL INDAG PRODUCTS PVT LTD Vs. COMMERCIAL TAX OFFICER reported in 1993 (3) MTCR 8** did not consider the judgment of the Hon'ble Supreme Court reported in **AIR 1971 SC 1201** and that, therefore, the said decisions could not be followed. Subsequently, in a recent judgment of the Division Bench of this Court in **GUPTA Vs. COMMERCIAL TAX OFFICER, W.P.No.6267 of 2006,** decided on

09.03.2018, the earlier Division Bench Judgment in **R.K.STEELS CASE** (cited above) was followed.

13.From the aforesaid discussion and the precedents adverted to above, the principles of law that can be gleaned in respect of the enforcement of charges, including statutory charges, are as under:

> (i)A mortgage is a transfer of interest in property and, therefore, attaches itself to and moves with the property. Accordingly, it would be enforceable in the hands of a transferee without notice, including the ultimate transferee in case of multiple transfers.
>
> (ii)By contrast, there is no transfer of interest in a charge and, therefore, as per Section 100 of the TPA, notwithstanding the fact that a charge holder has the same rights as a simple mortgagee, a charge is enforceable against the property in the hands of a transferee only if the transfer was not *bona fide* and the transferee had either actual or constructive notice of the prior charge.
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> (iii)If the relevant statute provides that the charge can be enforced against the property in the hands of a transferee without notice, it can be enforced notwithstanding the fact that the transferee is a *bona fide* purchaser for value without notice of the prior charge.
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> (iv)Section 24 A of the TNGST Act does not stipulate that the charge can be enforced against the property in the hands of a transferee without notice of the prior charge.

14.Based on the aforesaid discussion, binding decisions of the Hon'ble Supreme Court and the Division Bench of this Court in **1998 108 STC 161** and the principles of law set out above, the Impugned Notice cannot be sustained. As stated earlier, there is no evidence that there was collusion between the Petitioner and the erstwhile owner. Equally, from the documents on record, the Petitioner appears to be a *bona fide* purchaser without notice, either actual or constructive, of the prior charge in favour of the Respondent.

15.Accordingly, this Writ Petition is allowed and the Impugned Notice of the Respondent is quashed. Needless to say, this will not preclude the Respondent from taking action against the dealer as per law. The parties are left to bear their respective costs. Consequently, the connected miscellaneous petition is closed.

26.03.2019

Index : Yes
Internet : Yes
Speaking Order/Non speaking order
rrg

To

The Deputy Commercial Tax Officer,
Tirupur (Bazaar Street),
Tirupur.

SENTHILKUMAR RAMAMOORTHY, J.,
rrg

Pre Delivery Order in

W.P.No.36469 of 2006

26.03.2019