IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18.10.2019

CORAM

THE HONOURABLE DR. JUSTICE ANITA SUMANTH

W.P.Nos.5849 of 2014
MP.No.2 of 2014

C.Somasundaram ...Petitioner

--Vs--

1.The Assistant Commissioner (CT) (FAC),
Sankagiri
2.Mr.Nagarathinam (A) Kannammal
R2 dismissed on 26.02.2019 ... Respondents

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Prayer: Writ Petition filed under Article 226 of the Constitution of India, to issue a Writ or order of direction or any other Writ in the nature Writ of Certiorari, calling for the records of the 1st respondent in its proceedings Form No.4 (Section 25 deemed prior to attachment of Land) in Roc/A3/818/2000 dated 08.11.2013 and quash the same.

For Petitioner : Mr.S.Rajasekar
For Respondents : Mr.V.Haribabu, AGP
Senior Standing Counsel for R1
R2 Dismissed on 26.02.2019

O R D E R

The petitioner is the owner of property situated at S.No.1070-Patta No.18 & 19, Agraharam by-pass Road, J.K.K. Nataraja Colony, Komarapalayam, Namakkal District ('property'/'property in question'), having become entitled to the same under a settlement deed executed by his father, A.Chandrasekaran on 22.06.2009. The property had initially been purchased by one Nagarathinam alias Kannamal arrayed as the 2nd respondent, ('R2'), she having purchased the same in 1990, on the strength of a power of attorney executed by one Muthappa Gounder, to one C.Mohanasundaram. She later sold the same to A.Chandrasekaran Chettiar, the petitioners' father who settled the same upon the petitioner in 2009, under Document No.3303 dated 22.06.2009.

2. The petitioner, claiming to be a bonafide purchaser, states that he has been in continuous possession and ownership of the property till 2012. On 28.09.2012, the Assistant

Commissioner, Commercial Taxes/R1 raised a demand of arrears of sales tax pertaining, admittedly, to R2 pursuant to commercial taxes assessments framed upon her in terms of the Tamil Nadu General Sales Tax Act, 1959 (in short 'TNGST Act'). The demands were again reiterated on 15.10.2012. It is only at that juncture that the petitioner came to be aware that R2 and her husband had been assessed to sales tax on the file of the first respondent and had become liable for certain dues of sales tax raised upon an entity known as Sarathy Engineering Works under the name and style of which business was being carried on by them. The arrears related to the periods 1993-94 to 1997-98 and amounted to a sum of Rs.6,74,550/-.

3. R1 called upon the petitioner to remit the aforesaid sum under threat of bringing the subject property to public auction in terms of the Tamil Nadu Revenue Recovery Act, 1864 (in short 'RR Act').

4. The petitioner objected to the proceedings, despite which, R1 issued a demand prior to attachment of land in prescribed Form No.4 on 08.11.2013. This is the trigger for the present writ petition.

5. Heard Mr.S.Rajasekar, learned counsel for the petitioner and Mr.V.Haribabu, learned Additional Government Pleader for the 1st respondent.

6. Notice was issued to R2 and the cover returned by the postal authorities available on file reveals the endorsement thereupon as 'not known'.

7. There is no dispute with regard to the sequence of events by which the present property has come to devolve in the hands of the petitioner. The case of the petitioner is that he is a bonafide owner and his father from whom the property devolved upon him, a bonafide purchaser, who was wholly unaware of any charge upon the property in question. He points out that due diligence had been exercised prior to purchase of the property, by specifically examining whether there was any encumbrances upon title to the same. It was only upon finding that there were no encumbrances listed that the property had been purchased. Thus the demand now raised by the official respondents is wholly contrary to law.

8. Learned counsel for the petitioner relies upon the following judgments/decisions in support of his stand.

(i) A.Senthil Kumar and another Vs. Assistant Commissioner (CT) [(2011) 1 CTC 828];

(ii) Gupta & Company rep. by its Managing Partner, Dr.S.K.Gupta Vs. Commercial Tax Officer, Alandur Assessment Circle [(2018) 3 CTC];

(iii) S.Dilli and Others Vs. Commercial Tax Officer, Celachery Assessment Circle Chennai and Another [(2009) 19 VST 393];

(iv) Varuni Biomass Energy Products Private Ltd. Vs. District Collector, Dindigul [19 VST 484]

9. R1 has filed a counter and his case revolves entirely on the provisions of Section 24 of the Act in terms of which an automatic charge is created upon the assets/properties of any person or persons liable to pay tax or interest. The respondent also avers in counter that the property in question had been offered as security to the Commercial Taxes Department and hence it is the Department that has priority over the same to the exclusion of any others.

10. The revenue relies on the decision of the Full Bench of this Court in B.Suresh Chand Vs. State of Tamil Nadu and Another [2006 4 LW 409] and a decisions of a learned Single Judge of this Court in Mrs.Meenakshi J.Ganesh Kumar Vs. Deputy Commercial Tax Officer, Srivilliputhur and Another [(2011) 41 VST 150].

11. The petitioner, for its part and in response, points out that the provisions of Section 24 have to be read in tandem with the provisions of Section 24A of the Act that renders void all transfers that are effected to defraud the revenue.

12. My attention is specifically drawn to the proviso under Section 24A, which carves out a category of transfers that shall not be void if they are made for consideration and without notice of pendency of proceedings under the Act or as the case may be without notice of tax or any other sum to be paid by the dealer.

13. Heard learned counsels.

14. The issue that arises for consideration before me relates to the ambit, scope and width of recovery that may be initiated by the Commercial Taxes Department invoking powers under Section 24(2) of the Act. For this purpose, it becomes necessary to extract both Sections 24(1) and (2) as well as Section 24-A, which I do below:

> Section 24.Payment and recovery of tax.- (1) Save as otherwise provided for in sub-section (2) of section 13, the tax assessed or has become 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 instalments, 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 th person or persons liable to pay the tax or interest under this Act.

Sec.24(2) Any tax assessed on or has become payable by, or any other amount due under this Act from a dealer or person and any fee due from him under this Act, shall, subject to the claim of the Government in respect f land revenue and the claim of the Land Development Bank in regard t the property mortagaged to it under section 28(2) of the Tamil Nadu Co-operative Land Development Banks Act, 1934 (Tamil Nadu Act X of 1934), have priority over all other claims against the property of the said dealer or person and the same may without prejudice to any other mode of collection be recovered,-

(a) as land revenue, or

(b) on application to my Magistrate, by such Magistrate as if it were a fine imposed by him:

Provided that no proceedings for such recovery shall be taken or continued as long as he has, in regard to the payment of such tax, other amount or fee, as the case may be, complied with an order by any of the authorities to whom the dealer or person has appealed or applied for revision, under Sections 31, 31-A, 33, 35,36, 37 or 38.

Section 24-A. Transfers to defraud revenue void.- Where, during the pendency f 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 other 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.

Explanation.-In this section, "assests" means land, building, machinery, plant, shares, securities and fixed deposits in banks to the extent to which any of the assets aforesaid does not form part of the stock-in-trade of the business of the dealer.

15. Section 24 which deals with payment and recovery of tax provides that where tax is assessed and becomes payable under the Act, it shall be paid within 21 days from date of service of a demand notice. In cases of default, then the entire outstanding shall become a charge on the properties of the assessee or the person upon whom the liability vests. Thus, to this extent, the argument of the revenue that an automatic charge is created upon the assets of the defaulting assessee is correct

16. However, they cannot rest content with this entitlement in the light of the stipulation under Section 24(2), which goes on to say that recovery of such outstanding amounts shall be in the manner stipulated under the RR Act as land revenue. For this purpose, it becomes necessary for us to go into the relevant provisions of the RR Act that stipulates, in great detail, the procedure to be adopted and followed by the authority for recovery of outstanding dues. The procedure set out in Sections 26 and 27 thereof are in the following terms:

> 26. Procedure when defaulter neglects to pay.- When the amount due shall not have been paid pursuant to the terms of the demand, and no arrangement for securing the same shall have been entered into to the satisfaction of the Collector, or other officer empowered by the Collector in that behalf, he shall proceed to recover the arrear by the attachment and sale of the defaulter's land in the following manner.
>
> 27.Mode of attachment.-The attachment shall be effected by affixing a notice thereof to some conspicuous part of the land. The notice shall set forth that unless the arrear, with penalty and expenses be paid within the date the therein mentioned, the land will be brought to sale in due course of law. The attachment shall be notified by public proclamation on the land, and by publication of the notice in the District Gazette.

17. Thus, the manner in which Section 24 of the Act is to be construed is that while an automatic charge is provided for under the provision, that by itself would not suffice to protect the interests of the Department. The requirement under Section 24(2) is specifically to bring to the notice of the public the fact that such encumbrance has been created upon a specific property, pursuant to statutory dues outstanding either by public proclamation on the land or by publication of such notice in the District Gazette.

18. In the present case, let us assume for a moment that an automatic charge has been created by operation of Section 24(1). Such charge, once created has remained within the domain of knowledge of only the Assessing Authority of the defaulter not having been conveyed to the public at large or converted into a tangible and enforceable charge by registration of an encumbrance with the Sub-Registrar. The orders of assessment passed upon R2 in the present case are dated 22.11.1999 for four periods of assessment, 1994-95 to 1997-98. The first move that the Commercial Taxes Department has made to consolidate their so-called claim upon the property is by issuance of letter to the office of the Sub-Registrar (SRO) on 20.03.2013. On 08.05.2013, the SRO replies confirming the creation of a charge on 24.04.2013 and enclosing an encumbrance certificate. Thereafter on 08.11.2013, a notice in Form 4 was issued to the defaulter. Thus, for the period 31.12.1999 to 20.03.2013 the Commercial Taxes has rested content with the charge stated to have been created by operation of Section 24(1). This charge has no value whatsoever unless it has been followed up by the specific procedure set out under Sections 26 and 27 of the RR Act.

19. This Court in Varuni Biomass Energy Products Private Ltd. (supra), considers the auction of a property for recovery of commercial tax arrears after considering the procedure contemplated under the RR Act and states at para 36 and 37, as follows:

> 36.On the basis of the rival submissions and the legal precedents the following proposition emerge:
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> (i) The procedure under the Revenue Recovery Act for selling the property of the judgment-debtor must be strictly followed.
>
> (ii) The illegalities in procedure will vitiate the sale.
>
> (iii) The land owner whose property illegally sold is entitled to move this court notwithstanding the remedy of the suit under section 59.
>
> (iv) In an auction sale the properties of the company can be brought to sale and not the properties of the directors of the company.
>
> (v) In case of sale of properties of third parties, they are entitled for the notice.
>
> 37. In the present case, the procedure for selling the properties by revenue recovery proceedings, the legal procedure, was not followed. No wide publicity was given. The time

gap provided under section 36 and 38 of the TNRR Act was not followed. The right of the independent owners including the petitioner in W.P.No. 5324 of 2008 was infringed as no notice was given to him and his brother who were no way connected with the company. (Though such a notice was given to them when auction notice was issued during the year 2004).

20. The procedure set out under the RR Act, which is applicable to auctions under the Commercial Tax Act, has been enacted bearing in mind the interests of all parties. The interests of the Commercial Taxes Department have been protected under Section 24(1) by providing for the creation of an automatic charge. It is further protected by Section 24-A that envisages a situation where a defaulting assessee may transfer its properties to a third party merely to defraud the interests of the revenue. In such an event, the provisions of Section 24-A would kick in and render any such transfer, which has been effected merely to defraud the revenue, void.

21. The proviso to section 24-A, however, protects an assesee who has not been intimated about the pendency of proceedings for assessment or any other proceeding pursuant to which a demand has been made or who has not been issued notice of a demand of tax or any other sum payable by it, from the rigor of Section 24-A.

22. A holistic reading of both Section 24 and 24A of the TNGST and Section 26 & 27 of the RR Act sets out a scheme for recovery that takes into account, and protects the interests of all concerned parties, the Commercial Taxes Department, the assessee, and an innocent purchaser. Having issued the orders of assessment as early as in December 1999, the Commercial Tax Department has neglected to protect its interests by not resorting to the procedure set out under 24(2). Had the procedure only been complied with, as contemplated under both the TNGST as well as the RR Acts, then the public would have been put to notice of creation of encumbrance and the interests of both the general public and the commercial taxes Department would have been adequately protected.

23. There is no allegation by the Department that the purchase of the property in question by the father of the petitioner from R2 was a collusive transaction. In any event, the petitioner being the third in line of ownership to the property, the question of collusion would not arise in this case and neither is this the case of the Department. The decision in the case of Meenakshi J.Ganesh Kumar (supra) relied upon is distinguishable on facts, since in the aforesaid order the learned Single Judge, holds at para 7, that the transaction as

between the petitioner in that case and the defaulting assessee, was collusive in nature.

24. A Full Bench in the case of B.Suresh Chand Vs. State of Tamil Nadu and another [(2006) 4 LW 409], considered the case of a bonafide purchaser in a Letters Patent Appeal. The Suit had been filed by plaintiffs claiming to be bonafide purchasers of the suit property, who had not been put to notice of a third party/statutory claim over the suit property. The question referred to the Full Bench was as follows:

> 'What is the extent a bonafide purchaser for value is bound by the change for payment of arrears of sales Tax created under Section 24 of the TNGST Act, 1959.'

25. The Bench examined the provisions of Section 24(1) and (2) of the Act holding that property purchased by a bonafide purchaser without notice of the charge created under Section 24 (1) cannot be proceeded against for the recovery of sales tax arrears. Thus, while Section 24(1) creates a charge on the properties of a defaulter to the extent of the dues, sub-section (2) of Section 24 states that those dues would have priority over all other claims against those properties except land revenue and claims of the Land Development Bank in regard to the property mortgaged to it.

26. The priority as above, would come into effect only in the event the authority, in this case, the Commercial Tax Department, had been vigilant enough to put into motion the procedure set out under the RR Act and not otherwise. The meaning of the term 'charge on the property' which is also found in Section 100 of the Transfer of Property Act, 1882 (in short 'T.P.Act') is, a simple mortgage. Section 100 of the T.P. Act reads as follows:

> ' 100.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 on the property; and all the provisions hereinbefore contained (which 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 any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge).'

27. Section 100 provides that in the absence of a specific provision in any law, 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 such charge.

28. In summation, Section 24(1) of the Act equates commercial tax dues with a simple mortgage over the properties of a defaulter. Section 24(2) elevates the charge to the status of an enforceable priority over all other claims against any property except claims for land revenue and of the Land Development Bank subject to the procedure for recovery of such dues as set out under the RR Act, having been followed scrupulously by the Commercial Taxes Department.

29. The files were called for and it has been specifically ascertained that the procedure set out under the applicable provisions of RR Act have not been followed in this case. Compilation dated 04.10.2019 filed by the respondent contains a statement of R2 (serial no.1), pre-assessment notices for the four periods of assessment at serial Nos.2 to 5, orders of assessment from serial nos.6 to 9, letter to the Sub-Registrar, Kumarapalayam dated 20.03.2013, letter from the Sub-registrar creating an encumbrance and enclosing the Encumbrance Certificate dated 08.05.2013 at Serial nos.10 and 11. It is only on 08.11.2013 that Notice in Form 4 of the Revenue Recovery Act was issued to the defaulter, i.e., R2, for collection of arrears. Form Nos.5,7 and 7A of the Revenue Recovery Act attaching the property have been issued on 08.11.2013 and 30.12.2013 and the publication of the attachment in the Namakkal District Gazette has been on 21.03.2014 at Serial nos.12, 13 and 14 of the compilation. The affixation of notice conspicuously upon the property in question and the notification of such attachment by proclamation have, admittedly not been carried out. Moreover, the events at serial nos.12 onwards have transpired long after purchase of the property by the father of the petitioner on 29.03.2002 and settlement of the property in question in favour of the petitioner on 22.06.2009.

30. In the light of the discussion and sequence of events as noticed by me above, the impugned order of attachment is set aside and the Writ Petition is allowed. Connected M.P. is closed with no order as to costs.

ska

Sd/-
Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

To
The Assistant Commissioner (CT) (FAC),Sankagiri
+1 cc to Spl Government Pleader Taxes Sr.No.87869
+1cc to Mrs.R.Hemalatha , Advocate SR.No. 84594

W.P.Nos.5849 of 2014
MP.No.2 of 2014

A.SK(28/01/2020)