IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 20.08.2019

CORAM:

THE HONOURABLE MR. JUSTICE M.SUNDAR

W.P.No.24419 of 2019
and
W.M.P.Nos.24155 & 24157 of 2019

Jayapal ...Petitioner

Vs.

1. The Principal Secretary,
   Government of Tamil Nadu,
   Commercial Taxes and Registration Department,
   Fort St.George, Secretariat,
   Chennai - 600009.

2. The Secretary,
   Government of Tamil Nadu,
   Revenue and Disaster Management Department,
   Fort St.George, Secretariat,
   Chennai - 600009.

3. The State Tax Officer,
   136-137, 2nd Floor,
   J.N.Street,
   Tindivanam - 604001.

4. The Tahsildar,
   Vanur Taluk,
   Villupuram District.

5. The Village Administrative Officer,
   Vanur Village,
   Villupuram District. ..Respondents

Prayer : Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari, to call for the records of the 3rd respondent in his proceedings dated 26.07.2019 in Na.Ka.A3/131/2015 and quash the same and grant such further or other reliefs as this Hon'ble Court may deem fit in the facts and circumstances of this Writ Petition.

For Petitioner : Mr.P.Sankaranarayanan
For Respondents: Mr.Mohammed Shaffiq
Special Government Pleader [R1 & 3]

Mr.R.P.Pratap Singh
Government Advocate [R2, 4 & 5]

O R D E R

Mr.P.Sankaranarayanan, learned counsel on record for writ petitioner is before this Court. This matter was mentioned in the forenoon and was permitted to be brought up for admission by way of lunch motion.

2. Mr.R.P.Pratap Singh, learned Government Advocate accepts notice on behalf of respondents 2, 4 and 5 and Mr.Mohammed Shaffiq, learned Special Government Pleader accepts notice on behalf of respondents 1 and 3.

3. Considering the nature of the submissions made by both sides, the main writ petition itself is taken up and disposed of.

4. Instant writ petition has been filed assailing an auction notice issued by the third respondent bearing 'auction notice dated 26.07.2019 bearing reference No. Na.Ka.A3/131/2015' (hereinafter 'impugned notice' for brevity). Vide impugned notice, third respondent has brought to auction an immovable property being land [admeasuring an extent of 1200 sq.ft., or thereabouts] with superstructure thereon situated in survey No.133/10 in Boonmaiyarpalayam Village, Boonmaiyarpalayam Village Panchayat, Vanur Taluk, Villupuram District which shall hereinafter be referred to as 'said property' for the sake of brevity, clarity and convenience.

5. As already mentioned supra, impugned notice has been issued by third respondent. What is of significance, is date, day and time for auction is 21.08.2019, Wednesday, 11:00 A.M. As already mentioned supra, this writ petition has been brought up for admission by way of lunch motion.

6. Be that as it may, learned counsel for petitioner submitted that said property was purchased by the writ petitioner in and by a registered sale deed dated 01.12.2014 from one S.Aruljothi and that the said sale deed is registered as Document No.6390/2014 in the jurisdictional Sub-Registrar Office i.e., Sub-Registrar, Vanur. To be noted, this Court is informed that said property was originally purchased as vacant land, superstructure was put up by the writ petitioner and possession is with writ petitioner from date of purchase.

7. Notwithstanding, very many averments in the affidavit filed in support of the writ petition/contentions raised/grounds canvassed, in the hearing, the matter was focused on one pivotal point and that pivotal point is that the writ petitioner was not put on notice prior to the impugned notice.

8. Adverting to paragraph No.4 of the affidavit filed in support of the instant writ petition, it was submitted that the writ petitioner got a message from his tenant on 02.08.2019 and that the message was to the effect that the sixth respondent has come to the said property and was attempting to paste an auction notice. It may be appropriate to extract entire paragraph No.4 of the affidavit filed in support of the writ petition and the same reads as follows:

> "4) I state that while this was the case I was shocked to receive a message from my tenant on 02.08.2019 that the 5th respondent had come to the aforesaid property and was attempting paste an auction notice for sale of the property. I rush to the spot immediately and on verification with the 5th respondent I was informed that the 5th respondent had instruction from the 4th respondent to paste the aforesaid auction notice (Impugned notice) in the property. I had immediately obtained the photocopy the same from him and on a perusal the same I understand that the same was issued by the 3rd respondent for recovery arrears of commercial tax from my erstwhile vendor S.Aruljothi from whom I had purchased the property. "

9. Mr.Mohammed Shaffiq, learned Special Government Pleader, who has accepted notice on behalf of respondents 1 and 3 (to be noted, impugned notice has been issued by third respondent) submitted that the impugned notice has been issued owing to tax liability and arrears of writ petitioner's vendor S.Aruljothi and that the tax liability pertains to Assessment Year 2013-14, which is prior to the date of purchase (01.12.2014) of said property by writ petitioner.

10. Furthering his submission in this direction, learned Revenue counsel submitted that an assessment order came to be passed on 30.10.2014 and there were proceedings of the third respondent office, after which the impugned notice came to be passed.

11. With regard to the provision of law under which the impugned notice has been made, learned Special Government Pleader adverted to Section 42 (2)(a) of the 'Tamil Nadu Value Added Tax Act, 2006 (Tamil Nadu Act 32 of 2006)' hereinafter TNVAT for brevity and submitted that the impugned notice has been issued in exercise of powers under Section 42 (2)(a) of TNVAT Act.

12. This Court deems it appropriate to extract sub-sections (1) and (2) of Section 42 of TNVAT Act and the same read as follows:

> 42. Payment and recovery of tax, penalty, etc.
>
> (1) Save as otherwise provided for in section 21, 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 thirty days from the date of service of the notice. The tax under section 21 shall be paid without any notice of demand. In default of such payment, the whole of the amount outstanding on the date of the default shall become immediately due and shall be a charge on the properties of the person or persons liable to pay the tax or penalty or interest under this Act.
>
> (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 of land revenue and the claim of the Agriculture and Rural Development Bank in regard to the property mortgaged to it under sub-section (2) of section 28 of the Tamil Nadu Co-operative Societies Act, 1983, 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 any 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 51,52,54,57,58,59, or 60.

13. Learned State Counsel, adverted to Section 43 of TNVAT Act and submitted that the writ petitioner is vendee qua said property, his vendor was in tax arrears and the attachment was operating on the date of sale. In this regard, learned State Counsel pressed into service a judgment of Hon'ble Full Bench of this Court in 'B.Suresh Chand Vs. State of Tamil Nadu reported in 2006-4-L.W.409'.

14. Learned counsel submitted that vide B.Suresh Chand case, Hon'ble Full Bench of this Court dealt with Sections 24 and 24 A of TNGST Act, 1956 (TNGST for brevity) which are akin to Sections 42 and 43 of TNVAT Act

15. It was submitted that the Suresh Chand principle is to the effect that remedy in a case of this nature can only be under Section 100 of 'Transfer of Property Act, 1882' ('TP Act' for brevity). Relevant paragraphs in the judgment of the Full Bench are paragraph Nos.21, 22 and 25 and the same read as follows:

> 21. Now in the light of the law laid down in 2006 (1) S.C.C. 615 (referred to supra) we have to see, in the present case, whether the plaintiffs are bonafide purchasers of the suit property without notice.
>
> 22. To decide the said issue, it will be useful to refer to the relevant provisions of the Act and the Transfer of Property Act.
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> (i) Sections 19 and 24 of the Act read as follows:
>
> "19. Liability of firms. - (1) Where any firm is liable to pay any tax or other amount under this Act, the firm and each of the partners of the firm shall be jointly and severally liable for such payment.
>
> (2) Where a partner of a firm liable to pay any tax or any amount under this Act retires, he

shall, notwithstanding any contract to the contrary, be liable to pay the tax or other amount remaining unpaid at the time of his retirement and any tax or other amount due up to the date of retirement, though unassessed".

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 the person or persons liable to pay the tax or interest under this Act.

(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 of land revenue and the claim of the Land Development Bank in regard to the property mortgaged 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 any 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."

(ii) With regard to the aspect of notice, the interpretation clause- Section 3 of the

Transfer of Property Act 1882 reads as follows:-

"a person is said to have notice" of a fact when he actually knows that fact, or when, but for wilful abstention from an enquiry or search which he ought to have made, or gross negligence, he would have known it".

iii) Section 100 of the Transfer of Property Act 1882 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 a simple mortgage shall, so far as may be, 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 force, 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 the charge)."

25. A reading of Section 3 of the Transfer of Property Act, 1882 leads to the conclusion that, not only a wilful abstention from an enquiry which a person ought to have made, but the gross negligence to make enquiry also would amount to notice of a fact to him. When the prudence of a person requires him to make an enquiry, but due to his own negligence he failed to make enquiry, he falls in the category of a person, with notice. A purchaser of the property who claims the transaction to be bona fide without notice, the yardstick to be applied for the "notice" is given in Section 3 of the Transfer of Property Act, 1882 and only by the application of this provision, a purchaser who seeks protection is to be identified, whether he is a purchaser for value without notice. The necessity of the purchase, the intention of the transfer, the relationship between the vendee and vendor are all vital factors to find out the reasonableness of the

person in purchasing the property. Sometimes unexplained secrecy or the haste in the transactions may also throw some light on the bona fides or mala fides. To decide whether a transaction was genuine or bona fide or mala fide, all facts relating to the conduct of the parties to the transaction have to be weighed as a whole.

16. This Court has carefully considered the submissions made by both sides. This Court has also carefully examined the trajectory of this matter.

17. From what has been alluded to thus far, it comes out clearly that the writ petitioner has knowledge about the impugned notice on 02.08.2019 itself but examination of the case file reveals that the writ petitioner has presented this writ petition in this Court only on 14.08.2019. Furthermore while date of presentation is 14.08.2019 date of filing is 19.08.2019 only.

18. The date and time of auction is 21.08.2019 (tomorrow 11 A.M.). Therefore, this writ petition being moved by way of lunch motion today is clearly an eleventh hour endeavor. In the considered opinion of this Court it is not merely eleventh hour but can be described as 59th minute of eleventh hour and comes across as an attempt to derail the auction.

19. Another aspect that has been noticed by this Court is, based on impugned notice, the writ petitioner has sent a communication dated 07.08.2019 to the third respondent and a perusal of the communication reveals that the writ petitioner has inter alia mentioned that the tax department has erroneously calculated the tax liability on the basis of incorrect documents. Therefore, it comes out clearly that the writ petitioner is aware of vendor's tax liability. Relevant part of writ petitioner's said communication dated 07.08.2019 reads as follows:

"`வணிகவரித்துறையினர் தவறாக கணக்கிட்ட தவறான ஆவணங்கள் மூலம் ஏலம் அறிவித்திருக்கிறீர்கள்"

20. In the light of all that have been set out supra particularly in the light of peculiar facts and circumstances of this case, this Court is not inclined to interfere qua impugned notice in this writ petition.

21. However, as mentioned supra, there is protection available to the writ petitioner inter alia by way of Section 100 of TP Act in accordance with Suresh Chand principle (Hon'ble Full Bench of this Court) which has been alluded to supra. Those rights are preserved and to that extent if the writ petitioner choses to resort to such proceedings, questions raised in this writ petition are left open to be agitated in such legal proceedings which the writ petitioner is open to pursue.

22. Instant Writ Petition fails and therefore, the same is dismissed. Consequently, connected miscellaneous petitions are dismissed. No costs.

Sd/-
Assistant Registrar(co)

//True Copy//

Sub Assistant Registrar

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To

1. The Principal Secretary,
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5. The Village Administrative Officer,
Vanur Village,
Villupuram District.

+1cc to Mr.P.Sankaranarayanan , Advocate SR.No. 70955
+1 cc to Spl Government Pleader Sr.No. 71561
+1 cc to Government Pleader Sr.No. 71143

W.P.No.24419 of 2019

vba A.SK(25/09/2019)