IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 09.01.2020

PRONOUNCED ON : 30.01.2020

CORAM

THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P.NO.29253 OF 2016
AND
W.M.P.NO.25291 OF 2016

C.D.Gajendran ... Petitioner

vs

1. Assistant Commissioner (CT),
   Ambattur Assessment Circle,
   No.127, First Floor,
   Yadhaval Street, Padi,
   Chennai - 600 050.

2. Sub-Registrar,
   Registration Department,
   Gopala Samy Street,
   Ramnagar, Ambattur,
   Chennai - 600 053. ... Respondents

Prayer:
Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorarified Mandamus, to call for the impugned notice dated 29.04.2016 of the First Respondent issued in Form-4 pertaining to demand prior to attachment of land under Section 25 of the Tamil Nadu Revenue Recovery Act, 1881 and to quash the same and further direct the First Respondent to issue necessary communication to the Second Respondent to remove the encumbrance.

For Petitioner : Mr.N.Murali

For R1 : Mr.R.Swarnavel
Govt.Advocate (Tax)

For R2 : Mr.T.M.Pappiah
Special Government Pleader

ORDER

The Petitioner has challenged the impugned notice dated 29.04.2016 passed by the First Respondent in Form-4 r/w Section 25 of the Tamil Nadu Revenue Recovery Act, 1881.

2. The Petitioner had purchased property which originally belonged to one M.Latha who was a registered dealer under the Tamil Nadu General Sales Tax Act, 1959 (in short the TNGST Act, 1959) and Central Sales Tax Act, 1956 (in short the CST Act, 1956) and was in arrears of tax due to the Commercial Tax Department. Though under Section 42 of the TNVAT Act, 2006 a charge was created in respect of the property belonging to the said Latha, she however proceeded to sell the property to one K.Kamalanathan on 04.08.2011 vide registered sale deed in Document No.7260 of 2011. It appears that the said Kamalanathan had also obtained an encumbrance certificate from the Registration Department on 19.04.2012 for the period from 01.01.1987 to 18.04.2012. and sold the property to the Petitioner on 18.10.2012 vide registered Document No.10664 of 2012.

3. The Petitioner earlier applied for an encumbrance certificate on 12.10.2012 i.e. 6 days prior to the purchase of the property from the said Kamalanathan. It did not reflect any charge in favour of the respondent Commercial Tax Depatment. After the property was purchased by the Petitioner on 18.10.2012, the First Respondent issued the impugned notice dated 29.04.2016 seeking to recover the dues from the defaulting asseessee namely M.Latha who was in arrears of tax for a total sum of Rs.47,46,216/- to the First Respondent (Commercial Tax Department).

4. The Petitioner had given a representation to the impugned notice on 04.07.2016 explaining the position stating that the Petitioner was a bona fide purchaser of the property and that in both the Encumbrance Certificates obtained by the Petitioner's vendor and in Encumbrance Certificate obtained by the Petitioner, there was no charge was reflected as having created in favour of the Commercial Tax Department. On the other hand, the Respondents would submit that the charge had already been created as early as July 2011 and the same was reflected in the encumbrance certificate.

5. The learned counsel for the Respondents would refer to an encumbrance certificate which is printout of Online encumbrance certificate wherein the charge in favour of the Commercial Tax Department is reflected.

6. The learned counsel for the Petitioner would submit that

in 2011 and 2012 when two encumbrance certificates were obtained by the Petitioner's vendor and thereafter by the Petitioner there was no Online facility and such facility of obtaining Encumbrance Certificate came to be introduced only with effect from 11.06.2014. The learned counsel for the Petitioner has enclosed a copy of a webpage from the Website of the Registration Department which indicates that only with effect from 11.06.2014 Online form for Encumbrance Certificate was in vogue.

7. The learned counsel for the Petitioner relies on the decision of the Hon'ble Supreme Court in the case of State of Karnataka and Another Vs Shreyas Papers Pvt. Ltd and others, (2006)144 SCC 331. It is submitted that the Petitioner is bona fide purchaser of the property and that the issue is squarely covered by the above decision of the Hon'ble Supreme Court. Learned counsel for the petitioner relied on the following decision of the Court:-

> ''i) Deputy Commercial Tax Officer, Thudiyalur Assessment Circle, Coimbatore and another vs. R.K.Steels (1998) 108 STC 161 (Mad)
>
> ii) D.Senthil Kumar and others vs. Commercial Tax Officer Erode and another (2006) 148 STC 204 (Mad)
>
> iii) M.R.F.Limited vs. Assistant Commissioner (Assessment) Sales Tax Special Circle, Kottayam and Others, (2006) 148 Stc 212 (Ker.)
>
> iv) B.Suresh Chand vs. State of Tamil Nadu and another (2006) 148 STC 477 (Mad) (FB)
>
> v) Sri Bekgyam Engineering Corporation vs. Deputy Commercial Tax Officer, Avrampalayam Circle, Coimbatore, (2016) 93 VST 190 (Mad)
>
> vi) Noor M.Saied vs. Commercial Tax Officer, Chennai 2018(9) G.S.T.L.63(Mad.)
>
> vii) M/s.Gupta Company Rep.by its Managing Partner vs. The Commercial Tax Officer and 4 Others, W.P.No.6267 of 2006
>
> viii) M.Thirumaran vs. The Commercial Tax Officer, Sengottai Assessment Circle, Sengottai and one Other, W.P.(MD)No.866 of 2015 ''

8. Per contra, learned counsel for the 1st Respondent submits that the first respondent had registered the charge as early as July 2011 with the 2nd respondent. In any event, Encumbrance Certificate obtained by the petitioner was much prior to the purchase of the property by the Petitioner on 18.10.2012. Therefore, the Petitioner cannot plead ignorance

and bonafide purchase.

9. The learned counsel for the 1st respondent would also submit that apart from getting Encumbrance Certificate, the Petitioner ought to have made a physical search of records at the 2nd respondent Registration Department about the property before taking a decision to purchase the said property, which was the subject matter charge. Having failed to take these steps, the Petitioner cannot rely on the Encumbrance Certificate by pleading that he is a bona fide purchaser of the property.

10. I have heard the arguments advanced on behalf of the learned counsel for the petitioner and learned Government Advocate (Tax). I have also produced the documents filed by the petitioner and the case laws submitted on behalf of the petitioner in support of the relief in the present writ petition. I have also considered the counter filed by the respondent No. 1.

11. The facts are not in dispute that the registered dealer was in arrears of tax and therefore by virtue of section 24 of the Tamil Nadu General Sales Tax Act, 1959 and Section 42 of the TNVAT Act, 2006, a charge over the property of such defaulting dealer stood created in favour of the 1st respondent Commercial Tax Department Further as per Section 100 of the Transfer of Property Act, 1882 also a charge is said to have been created in favour of the 1st respondent as if the dealer had created simple mortgage in favour of the 1st respondent.

12. The Honourable Supreme Court in Ahmedabad Municipal Corporation of the City of Ahmedabad versus Haji AbdulGafurHusseinbhai, AIR 1971 SC 12 concluded that the purchaser could not be fixed with any constructive notice of arrears of municipal tax. It further pointed out that a prudent and a reasonable man was bound to make enquiries regarding arrears of municipal tax and, the question of constructive knowledge or notice has got to be determined on the facts and circumstances of each case. On fact, the Hon'ble Supreme Court held as follows:

> In any event the plaintiff could not reasonably have thought that the municipal corporation had not cared to secure payment of the taxes due since 1949. On the facts and circumstances of this case, therefore, we cannot hold that the plaintiff as a prudent and reasonable man was bound to enquire from

the municipal corporation about the existence of any arrears of taxes due from the receivers. It appears from the record, however, that he did in fact make enquiries from the receivers but they did not give any intimation. The plaintiff made a statement on oath that when he purchased the building in question it was occupied by the tenants and the rent used to be recovered by the receivers. There is no rebuttal to this evidence. Now, if the receivers were receiving rent from the tenants, the reasonable assumption would be that the municipal taxes which were a charge on the property and which were also given priority under Section 61 of the Provincial Insolvency Act, 1920, had been duly paid by the receivers out of the rental income. The plaintiff could have no reasonable ground for assuming that they were in arrears. From the plaintiff's testimony it is clear that he did nevertheless make enquiries from the receivers if there were any dues against the property though the enquiry was not made specifically about municipal dues. Apparently he was not informed about the arrears of municipal taxes. This seems to us explainable on the ground that the receivers had, after securing appropriate orders, for some reason not clear on the record, omitted to pay the arrears of municipal taxes and they were, therefore, reluctant to disclose the lapse on their part. On these facts and circumstances we do not think that the plaintiff could reasonably be fixed with any constructive notice of the arrears of municipal taxes since 1949.

13. The law as discussed by the Hon'ble Supreme Court in the context of Section 3 and Section 100 of T.P.Act, 1882, is as follows :

'' Section 100 of the Transfer of Property Act dealing with “charges” provides:

“100. 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 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 the person to whom such property has been transferred for consideration and without notice of the charge."

4. This section in unambiguous language lays down that no charge is enforceable against any property in the hands of a transferee for consideration without notice of the charge except where it is otherwise expressly provided by any law for the time being in force. The saving provision of law must expressly provide for enforcement of a charge against the property in the hands of a transferee for value without notice of the charge and not merely create a charge ''

10. According to Section 3 of the Transfer of Property Act which is described as interpretation clause, 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. There are three explanations to this definition dealing with three contingencies when a person acquiring immovable property is to be deemed to have notice of certain facts. Those explanations are:

"Explanation I.—Where any transaction relating to immovable property is required by law to be and has been effected by a registered instrument any person acquiring such property or any part of, or share or interest in such property shall be deemed to have notice of such instrument as from the date of registration or, where the property is not all situated in one sub-district, or where the registered instrument has been registered under sub-section (2) of Section 30 of the Indian Registration Act, 1908, from the earliest date on which any memorandum of such registered instrument has been filed by any Sub-Registrar within whose sub-district any part of the property which is being acquired, or of the property wherein a share or interest is being acquired, is situated:

Provided that—

(1) the instrument has been registered and its registration completed in the manner prescribed by the Indian Registration Act, 1908, and the rules made thereunder,

(2) the instrument or memorandum has been duly entered or filed, as the case may be, in books kept under Section 51 of that Act, and

(3) the particulars regarding the transaction to which the instrument relates have been correctly entered in the indexes kept under Section 55 of that Act.

Explanation II.—Any person acquiring any immovable property or any share or interest in any such property shall be deemed to have notice of the title, if any, of any person who is for the time being in actual possession thereof.

Explanation III.—A person shall be deemed to have had notice of any fact if his agent acquires notice thereof whilst acting on his behalf in the course of business to which that fact is material:

Provided that, if the agent fraudulently conceals the fact, the principal shall not be charged with notice thereof as against any person who was a party to or otherwise cognizant of the fraud."

11.Now the circumstances which by a deeming fiction impute notice to a party are based, on his wilful abstention to enquire or search which a person ought to make or, on his gross negligence. This presumption of notice is commonly known as constructive notice. Though originating in equity this presumption of notice is now a part of our statute and we have to interpret it as such. Wilful abstention suggests conscious or deliberate abstention and gross negligence is indicative of a higher degree of neglect. Negligence is ordinarily understood as an omission to take such reasonable care as under the circumstances is the duty of a person of ordinary prudence to take. In other words it is an omission to do something which a reasonable man guided by considerations which normally regulate the conduct of human affairs would do or doing something which normally a prudent and reasonable man would not do. The question of wilful abstention or gross negligence and, therefore, of constructive notice considered from this point of view is generally a question of fact or at best mixed question of fact and law depending primarily on the facts and circumstances of each case and except for cases directly falling within the three explanations, no inflexible rule can be laid down to serve as a straight-jacket covering all possible contingencies. The question one has to answer in circumstances like the present is not whether the purchaser had the means of obtaining and might with prudent caution have obtained knowledge of the charge but whether in not doing so he acted with wilful abstention or gross negligence. Being a question depending on the behaviour of a reasonably prudent man, the Courts have to consider it in the background of Indian conditions. Courts in India should, therefore, be careful and cautious in seeking assistance from English precedents which should not be blindly or too readily followed. ''

14. A Division Bench of this Court in Deputy Commercial Tax officer versus Asha Kumari [1985] 14 STC 161 (Mad) held that “If the tax assessed remained unpaid for a period of 21 days after a notice of demand has been served, that charge can be enforced by invoking the provisions of the Revenue Recovery Act, under section 24 (2) of the Tamil Nadu General Sales Tax Act, 1959. A similar view was expressed in Coromandel Indag Products vs. Commercial Tax Officer 1993) 3 MTCR 8.

15. A Division Bench of this Court in Deputy Commissioner of Commercial Taxes Versus RK Steels (1998) 108 STC 161, however observed that the decision of the Division Bench of this Court in Deputy Commercial Tax Officer versus Asha Kumari [1985] 14 STC 164 (Mad) and the decisions of the Division Bench of this

Court in Coromandel Indag Products(1993) 3 MTCR 8 referred to supra have not considered the decision of the Honourable Supreme Court in Ahmedabad Municipal Corporation of the City of Ahmedabad vs Haji AbdulGafurHusseinbhai, AIR 1971 SC 12.

16. It was held that section 24 (2) of the Tamil Nadu General Sales Tax Act, 1959 does not provide anything contrary to section 100 of the Transfer of Property Act, 1882 and unless a provision is made in any statute contrary to the rule in Section 100 of the aforesaid Act, a bona fide purchaser for consideration without notice of charge is protected. Accordingly, the Division Bench of this Court concluded that the petitioner therein namely RK Steels was a bona fide purchaser.

17. The Full Bench of this Court in D.Senthil Kumar and others Versus Commercial Tax Officer, (2006) 148 STC 204 considered the issue as to whether charge created under TNGST Act was enforceable against transferee of the property. The Division Bench of this Court referred to proviso to Section 100 of the Transfer of Property Act, 1882 and concluded that charge may not be enforced against transferee if he/she had no notice of the same unless, by law the requirement of such notice has been waived. There the properties were auctioned through bank in a bank recover proceedings. Under those circumstances, it was observed that the appellant therein had already paid entire sale consideration on 25/03/2003 and the sale was confirmed in their favour on 23/04/2003 and for the 1st time by letter dated 25/06/2004, the Commercial Tax Officer required the 2nd respondent to create a charge encumbrance with regard to the property and consequently to make an entry in the encumbrance register.

18. On facts it was concluded that the appellant had no notice prior to the transfer. It also held that there was no material to show that the appellants had constructive notice of the charge and no submissions were made by the respondent on this issue. Under those circumstances, the Division Bench of this Court took a view that the property in the hands of the appellants for a value above consideration without notice of the sales tax arrears of the defaulting company or the subsequent charge created over the property was free in the hands of the appellant therein.

19. The Full Bench of this Court in B.Suresh Chand versus State of Tamil Nadu (2006) 148 STC 477 while dealing disposing Letters Patent Appeal No.100 of 1999 on reference in view of conflicting views of different decisions of this Court referred to supra answered the issue against the appellant therein. The court considered the averments in the plaint and found that the appellant had not made any averment as to the fact that he was not aware of the arrears of tax payable by the registered dealer from whom he purchased the property. The appellant there in was

held to have failed to discharge the initial burden. Following these decisions, several other decisions have been passed.

20. Coming to the facts of the present case, it is noticed that the vendor of the property from whom the petitioner's vendor purchased the property was in arrears of sales tax to the 1st respondent. Though the property had been subject matter of encumbrance as early as 2011, at the behest of the 1st respondent Commercial Tax Department, it was not reflected in the encumbrance certificate obtained by the petitioner's vendor on 19.4.2012 or by the petitioner himself on 12.10.2012 and on 6.12.2012. Only in the encumbrance certificate issued by the second respondent through online portal dated 24.6.2016 the charge has been reflected in favour of the 1st respondent.

21. No doubt a purchaser purchasing a property without notice of charge and for valuable consideration is protected under a proviso to section 24-A of the TNGST, 1959, nevertheless, it requires to be proved whether such plea is available on facts of each case.

22. In my view, this can be established only before a Civil Court particularly in the light of the fact that already a prior charge was registered during July 2011 by the 1st respondent even before the petitioner's vendor purchased the property on 4.8.2011 vide registered document No. 7260/2011.

23. In this case, the 1st respondent have taken categorical stand that a charge was created in their favour as early as July 2011 and therefore the petitioner's vendor's purchase on 4.8.2011 was itself not a bonafide purchase and the fact that the property changed hands within a period of 14 months in favour of the petitioner shows that the purchase by the petitioner may or may not be bonafide purchase.

24. If the purchase by the petitioner's vendor was not bonafide, subsequent purchase by the petitioner from the said vendor may or may not be a bonafide. Therefore, it would require a proper trial and finding by a Civil Court. Further, mere reliance on the encumbrance certificate by itself is not sufficient to absolve a purchaser of his responsibility while purchasing the property.

25. In my view, it is incumbent on the petitioner as purchaser to have also made a physical search in the records before taking a final decision as to whether the property was free from any encumbrance or not. Encumbrance certificate, is merely one of the document which would aid a purchaser to take a decision as to whether to purchase the property or not. However,

it is not a substitute for actual physical verification of the register at the Sub Registrar's Office.

26. Therefore, I am of the view that the present writ petition is liable to be dismissed as the decisions of the court referred to supra do not squarely apply to the facts of the present case. The fact that there was a pre-existing charge/ encumbrance registered as early as July 2011 is the distinguishing factor and therefore the decisions relied by the petitioner cannot be applied to four corners of the facts of the present case. Therefore, while dismissing the present writ petition, liberty is given to the petitioner to initiate appropriate proceedings within a period of three months from date of receipt of this order to declare that his purchase was bonafide and without notice of charge in favour of 1st respondent.

27. Needless to state, the petitioner has to array not only the respondents herein but also his vendors and the registered dealer who was in arrears of the tax to establish his bona fide in the said proceeding. Therefore, a limited protection is being given to the petitioner upto a further period of six months from date of receipt of this order. The petitioner may file appropriate application for interim relief before the concerned jurisdictional court to extend the protection given by this order on merits for the subsequent period which will otherwise expire on the last date of the 6th month from date of receipt of this order.

28. Writ petitions stands dismissed with the above observation and protection to the petitioner for the aforesaid period. Consequently connected miscellaneous petition is closed. No costs.

Sd/-
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

kkd

To

1. Assistant Commissioner (CT),
   Ambattur Assessment Circle,
   No.127, First Floor,
   Yadhaval Street, Padi,
   Chennai - 600 050.

2. Sub-Registrar,
   Registration Department,
   Gopala Samy Street,
   Ramnagar, Ambattur,
   Chennai - 600 053.

+1cc to Mr.N.Murali, Advocate, S.R.No.7164
+1cc to the Special Government Pleader(T), S.R.No.7745

W.P.No.29253 of 2016
and W.M.P.No.25291 of 2016

SJ(CO)
CS/11/03/2020