IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On	09.02.2021
Pronounced On	18.03.2021

CORAM

THE HON'BLE MR.JUSTICE C.SARAVANAN

W.P.No.5986 of 2017
and
W.M.P.No.6418 of 2017
(Through Video Conferencing)

K.Ilango ... Petitioner

Vs.

1.The Principal Commissioner of Income Tax - 6,
121, Mahatma Gandhi Road,
Chennai - 600 034.

2.The Tax Recovery Officer - VII,
Income Tax Company Range - IV,
121, Mahatma Gandhi Road,
Chennai - 600 034.

3.Sally Thermoplastics India Ltd.,
Represented by its Managing Director,
Mohammed Hariss,
229, C/2, 3rd Floor, Raahat Plaza,
172, Arcot Road, Vadapalani,
Chennai 600 024.

Regd. Office at 33, Survey No.80/4, 516,
Karanodai Main Road,
Thazambur Village,
Chengalpattu District, Kancheepuram 603 103.

4.The Sub-Registrar Joint 1,
District Registrar Office,
Chennai South,
Saidapet, Chennai 600 015.

5.The Deputy Commissioner of Income Tax,
Company Circle - IV (1),
Chennai. ... Respondents
(R5 is suo moto impleaded by this oder)

Writ Petition filed under Article 226 of the Constitution of India, to issue a Writ of Certiorarified Mandamus to call for the records of the First Respondent in C.No.6126/PCIT/6/2016-17 dt. 26.10.2016 and quash the impugned order and consequently direct the first and second respondents and to remove the charge and lift the attachment created in respect of the immovable property at Plot No.10 A, Door No.10 C, Achuthan Nagar, 2nd Street, Ekkaduthangal, Chennai 600 032.

For Petitioner : Mr.R.Sivaraman

For 1st and 2nd Respondents: Mr.A.P.Srinivas
Senior Standing Counsel

For 3rd and 4th Respondents: No appearance

O R D E R

Heard learned counsel for the petitioner and learned senior standing counsel for the first and second respondents income tax department. There is no representation on behalf of the third and fourth respondents.

2. The present Writ Petition has been filed for a writ of certiorarified mandamus to call for the records of the proceedings of the first respondent Principal Commissioner of Income Tax-6, Chennai-34 in C-No 6126/PCIT/6/2016-17 dated 26.10.2016 and to quash the same and consequently to direct the first and second respondents to remove the charge and lift the attachment created in respect of the immovable property at Plot No.10A, Door No.10C, Achuthan Nagar, 2nd Steet, Ekkaduthangal, Chennai 600 032.

3. By the impugned order, the first respondent has declined to lift the order of attachment in Form 16 of the property purchased by the petitioner from M/s.Sally Thermo Plastic India Limited purportedly contrary to Section 281 of the Income Tax Act, 1961 vide order dated 28.11.2013 passed by the second respondent Tax Recovery Officer. In the impugned order, it has been concluded that the attachment of the property still exists in the name of the said company and the tax arrears was still outstanding in the case of the said company. The impugned order further states that in order to protect the interest of the revenue, the attachment made by Tax Recovery Officer under Section 221(1)(b) of the Income Tax Act, 1961 cannot be lifted.

4. The case of the petitioner before this court is that the petitioner purchased the property on 06.05.2011 from the third respondent M/s.Sally Thermoplastics India Limited vide registered sale deed No.3603 of 2011 unaware of the income tax proceedings against the said company. It is submitted that prior to purchase, the petitioner examined the records of the Sub-Registrar's office and obtained an Encumbrance Certificate.

5. It is submitted that at the time of purchase of the property, there was only a mortgage in favour of Axis Bank Ltd. The petitioner thereafter mortgaged the property with the City Union Bank on 09.11.2012.

6. It is submitted that long after the petitioner purchased the aforesaid house property, Deputy Commissioner of Income Tax by a communication dated 31.03.2013 attached the same as the third respondent was in arrears of Rs.1,52,66,841/- for the Assessment Year 2010-2011 and that since the third respondent had failed to pay the amount, said property was being provisionally attached. Earlier, an attachment order dated 31.03.2013 was issued. It was extended for a further period up to 31.12.2013 under Section 281B of the Income Tax Act, 1961 vide order dated 25.09.2013.

7. By a further communication, the second respondent Tax Recovery Officer-VII restrained the third respondent from transferring or creating a charge over the property though it had already been sold to the petitioner by the third respondent on 06.05.2011.

8. Under the circumstances, the Assessing Officer referred the case to the second respondent Tax Recovery Officer-VII. The second respondent vide proceedings dated 28.11.2013 in T.R.No.S2/2013-2014, attached the said property belonging to the petitioner and also sent a copy to the third respondent vendor.

9. On 18.12.2013, the petitioner filed detailed objection before the second respondent Tax Recovery Officer and informed the second respondent that the petitioner purchased the property in question from the third respondent vide a registered sale deed dated 06.05.2011 for a valid consideration before the prohibitory order is passed. The petitioner sent representations dated 04.01.2014, 07.01.2014, 24.01.2014, 04.11.2014, 28.07.2015, 07.08.2015 to the Income Tax Officer and to the second respondent Tax Recovery Officer-VII.

10. As the representation of the petitioner to the second respondent Tax Recovery Officer-VII and to the Income Tax Officer did not evoke any response, the petitioner approached the Income Tax Ombudsman on 07.03.2016. By a communication dated

28.06.2016, the Assistant Commissioner of Income Tax informed the Income Tax Ombudsman that the third respondent was in arrears of tax for the Assessment Years 2005-2006, 2006-2007, 2007-2008, 2008-2009, 2009-2010 and 2010-2011 and the outstanding amount of Rs.2,87,99,555/- was due from the third respondent and therefore same was certified by the second respondent Tax Recovery Officer-VII vide Attachment Order dated 28.11.2013 .

11. By another communication dated 11.07.2016, the second respondent Tax Recovery Officer-VII also informed the Income Tax Ombudsman that enquiries were being conducted to verify the facts of the case and how the interest of the revenue can be protected with respect of arrears of tax to be collected from the third respondent.

12. The Income Tax Ombudsman by a communication dated 14.07.2016 thereafter merely forwarded the response of the Assistant Commissioner of Income Tax, Non-Corporate Circle 15(1) dated 28.06.2016 and that of Tax Recovery Officer-VI dated 11.07.2016 to the petitioner.

13. Under these circumstances, the petitioner approached the first respondent to direct lifting of the provisional order of attachment of the property purchased by the petitioner on 06.05.2011 from the third respondent.

14. It is pursuant to the aforesaid representation, the impugned order has been passed by the first respondent.

15. Assailing the impugned order, the learned counsel for the petitioner submitted that the provisional or final attachment of the property long after the completion of sale was contrary to Section 281 of the Income Tax Act, 1961. The learned counsel for the petitioner submitted that at the time of purchase and registration of sale deed on 06.05.2011, there was no pending proceeding against the third respondent as is evident from the impugned order dated 26.10.2016. It is further submitted that the assessment orders were passed under Section 144 r/w 147 of the Income Tax Act, 1961 for the third respondent in respect of these Assessment Years 2005-2006 to 2008-2009 only on 30.03.2013, the Assessment Year 2009-2010 on 30.12.2011 and the Assessment Year 2010-2011 on 31.03.2013.

16. It is therefore submitted that no assessment proceedings were pending at the time of purchase of the property and on the date of registration of sale deed on 06.05.2011. It is therefore submitted that subsequent attachment of the property on 31.03.2013 followed by further extension of provisional attachment vide order dated 25.09.2013 up to 31.12.2013 were

illegal and contrary to the provisions of the Income Tax Act, 1961. It is further submitted that even otherwise, the petitioner was a bonafide purchaser of the property and the purchase of the petitioner fell within the four corners of the proviso to Section 281 of the Income Tax Act, 1961.

17. The learned counsel for the petitioner further relied on certain decisions rendered by this court in the context of the Tamil Nadu General Sales Tax Act, 1959 and Tamil Nadu Value Added Tax Act, and 2006 wherein reliefs were given to the bonafide purchasers. He submits that the provisions under these enactments read almost identically and therefore as per these decisions also, the petitioner was entitled for the relief. He relies on the following decisions:-

i. Tax Recovery Officer Vs. Gangadhar Vishwanath Ranade, (1998) 234 ITR 188.
ii. Noor M. Saied Vs. Commercial Tax Officer, Chennai, MANU/TN/4731/2017.
iii. Rukmani Vs. Deputy Commercial Tax Officer I, MANU/TN/2674/2012
iv. D.Senthil Kumar & Others Vs. The Commercial Tax Officer & Others, 2006-3-L.W.627.
v. C.D.Gajendran Vs. Assistant Commissioner (CT) & Others, order dated 30.01.2020 passed by this Court in W.P No.29253 of 2016.
vi. Tvl.K.Senthamil Selvan Vs. The Deputy Commercial Tax Officer, order dated 28.02.2020 passed by this Court in W.P No.39939 of 2005 and batch.
vii. ICICI Bank Ltd., vs Tax Recovery Officer (2019) 105 taxmann.com 257 (Andhra Pradesh and Telengana)
viii. T.Senthil Kumar vs Commissioner of Income Tax (2015) 57 taxmann.com 177(Madras)

18. The learned Senior Standing Counsel for the first and second respondents submitted that the attachment was perfectly in order in as much as the third respondent was in arrears of payment of tax for the Assessment Years 2005-2006 to 2010-11 for a total amount of Rs.2,87,99,555/-. It is submitted that the purchase of the property by the petitioner was not bonafide even otherwise.

19. The learned Senior Standing Counsel for the first and second respondents further submitted that the decision of the Hon'ble Supreme Court in Tax Recovery Officer Vs. Gangadhar Vishwanath Ranade, (1998) 234 ITR 188 was distinguishable in as much as the law has changed after 1975. He submitted that the provisions as it stood for the period when the above decision

was rendered was different from the provision as it stands today. It is no longer required for the revenue to prove an intention to defraud by an assessee.

20. He further submits that a very same issue was considered by this Court in Abdul Jamil Vs. Secretary, IncomeTax Department 1998 (101) Taxman 332 (Madras), wherein, this Court has concluded that Section 281 of the Income Tax Act, 1961 was to be read in conjunction with Section 53 of the Transfer of Property Act, 1872.

21. The learned Senior Standing Counsel for the first and second respondents submitted that the Court in the above case rejected the contention of the plaintiff that he was a bonafide purchaser of a property without notice of pendency of the proceeding and/or for valuable consideration and was therefore not entitled to protection. He submitted that the Court specifically held that "But in this provision, i.e Section 281, the section deals with the transfer made by the assessee. The said section deals with the transaction made by the assessee during the pendency of the proceedings. Hence, the provision should only refer to the assessee alone and not the transferee, which means that if the assessee has created any charge or transferred the property for valuable consideration without notice of the pendency of the proceedings, then such transaction would fall under the proviso. But in the case on hand, it is very clear that the assessee had made the transfer only three years subsequent to the recovery proceedings initiated against him.". Hence, it is submitted that the petitioner cannot claim the benefit under Section 281 of the Income Tax Act, 1961.

22. The learned Senior Standing Counsel for the first and second respondents further placed reliance on the following cases:-

i. Abdul Jamil vs Secretary, Income Tax Department (1998) 101 Taxman 332 (Mad).
ii. Jaymaclasertron (P.) Ltd vs Commissioner of Income Tax (2001) 116 Taxman 231 (Calcutta).
iii. Karnail Singh vs Union of India (2011) 200 Taxman 31(Punjab & Haryana).
iv. Sri Sivalaya Advances vs Tax Recovery Officer, Madurai, (2018) 93 Taxman.com 143 (Madras).

23. The learned Senior Standing Counsel for the first and second respondents further submitted that in the said decision, it was held that Section 281 deals with different circumstances and Rule 16 deals with a different situation. He further submitted that Rule 16 of the Schedule-II to the Income Tax Act, 1961 declares sale made by a defaulter to be void after receipt of the notice under Rule 22. Hence, proviso to the aforessaid

Section deals with the alienation made by the assessee without notice of the proceeding against him under the Act. Hence, question of harmonizing Section 281 read with Rule 61 does not arise under the circumstances. The learned Senior Standing Counsel for the first and second respondents submitted that as against an order of attachment, remedy is available for the petitioner to approach the second respondent Tax Recovery Officer-VII under Rule 11 of the Schedule-II to the Income Tax Act, 1961 and therefore the Writ Petition is liable to be dismissed.

24. I have considered the arguments advanced by the learned counsel for the petitioner and the learned Senior Standing Counsel for the first and second respondents.

25. Question to be addressed in the present case is whether the first and second respondents were justified in passing the provisional order of attachment of the property purchased by the petitioner on 06.05.2011 long after the purchase.

26. The petitioner has produced a copy of the Encumbrance Certificate regarding the immovable property purchased from the third respondent. There was no encumbrance/charge over the property at the time of purchase of the property on 06.05.2011. Thus, prima facie, the case of the petitioner is covered by the proviso to Section 281 of the Income Tax Act, 1961.

27. The decision of the Supreme Court in Tax Recovery Officer Vs. Gangadhar Vishwanath Ranade, (1998) 234 ITR 188 : (1998) 6 SCC 658 dealt with the provision as it stood prior to the amendment to Section 281 of the Income Tax Act, 1961 in 1975. The provision as it stood when the above decision was rendered and as it stands today read differently. They are reproduced below:-

"281. Transfers to defraud revenue void.- Where, during the pendency of any proceeding under this Act, any assessee creates a charge on or parts with the possession by way of sale, mortgage, 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 assessee as a result of the completion of the said proceeding: Provided that such charge or transfer shall not be void if made for valuable consideration and without notice of the pendency of the proceeding under this Act"	"281.Certain transfers to be void.- (1)Where, during the pendency of any proceeding under this Act or after the completion thereof, but before the service of notice under rule 2 of the Second Schedule, any assessee 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, such charge or transfer shall be void as against any claim in respect of any tax or any other sum payable by the assessee 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 or, as the case may be, withoutnotice of such tax or other sum payable by the assessee; or ii.with the previous permission of the [Assessing] Officer. (2) This section applies to cases where the amount of tax or other sum payable or likely to be payable exceeds five thousand rupees and the assets charged pr transferred exceed ten thousand rupees in value. Explanation.—In this section, "assets" 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 assessee.

28. In Tax Recovery Officer Vs. Gangadhar Vishwanath Ranade, (1998) 234 ITR 188 : (1998) 6 SCC 658 the court held as under:-

> 8. Section 281 declares as void any transfer made by the assessee during the pendency of proceedings under the Act, with the intention to defraud the Revenue. The powers of the Tax Recovery Officer, however, under Rule 11 of the Second Schedule to the Income Tax Act are somewhat different. Under Rule 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. Under Rules 11(4), (5) and (6), it is provided as follows:
>
> "11. (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 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.”

29. In the facts of the present case, it is noticed that the petitioner had approached both the Income Tax Officer and the second respondent Tax Recovery Officer-VII. However, both the officers remained mute and therefore the petitioner was compelled to approach the first respondent to intervene and invited an adverse order though the petitioner had purchased the property prior to the impugned provisional attachment. The petitioner was compelled to approach the first respondent who has passed impugned order. The impugned order deserves to be set aside as it has not considered any of the pleas of the petitioner.

30. At the same time, when law mandates a particular thing to be done in a particular manner, it has to be done in the said manner. This principle is recognized by the Hon’ble Supreme Court in State of Uttar Pradesh Vs. Singhara Singh and Others, AIR 1964 SC 358. This principle has been reiterated by the Hon’ble Supreme Court in several decisions.

31. Rule 11 of the Schedule-II of the Income Tax, Act 1961 prescribes a method for a proper redressal of all the issues by a Tax Recovery Officer-VII, namely the second respondent herein. Therefore, the claim of the petitioner that the provisional attachment and the consequential final attachment pursuant to assessment orders dated 30.03.2013, 30.12.2011 and 31.03.2013 purportedly passed under Section 144 read with Section 147 for the Assessment Years 2005-2006 to 2008-2009 and under Section 144 of the Income Tax Act for the Assessment Years 2009-2010 and 2010-11 are required to be seen.

32. The machinery prescribed under the provisions of the Income Tax Act, 1961 to deal with situation arising out of wrongful attachment of property for the buyer is to approach Tax Recovery Officer-VII under Rule 11 of the Schedule-II to the Income Tax Act, 1961. Therefore, it is the second respondent Tax Recovery Officer-VII who was the competent authority to pass proper order under the circumstances.

33. Further, as per Section 281 of the Income Tax Act, 1961, where an assessee creates a charge or parts with possession by way of sale, mortgage, gift, exchange or any other mode of transfer whatsoever of any asset by an assessee in favour of any other person during the pendency of any proceeding under the Act is void.

34. Proviso to the said Section contains an exception. That

exception provided in clause (i) applies to a situation where there is transfer for adequate consideration and without notice of the pendency of such proceedings or, as the case may be, without notice of such tax or sum payable by the assessee. Use of the expression "without notice of such tax or sum payable by the assessee" indicates the absence of the knowledge of a third party.

35. The language in the clause (i) to the said proviso can apply only to a bona fide purchaser and not the assessee himself. The impugned order also does not state that there were any pending proceedings on the date when the sale was made and completed in favour of the petitioner on 06.05.2011. The assessments were completed only on 30.03.2013, 31.12.2011 and 31.03.2013 under Section 144 read with Section 147 of the Income Tax Act, 1961 for the Assessment Years 2005-2006 to 2010-2011.

36. The impugned order of the first respondent seems to indicate that the third respondent had either failed to make returns required under Sub-Section (1) to Section 139 or had failed to file a revised written under Sub-Section (4) or 5 of these aforesaid Section or had failed to comply with all the terms of notices issued under Sub-Section (1) to Section 142 or failed to comply with the directions issued under Sub-Section (2A) of Section 142 or having filed a return, failed to comply with all the terms of the notice issued under Sub-Section (2) of Section 143 of the Act. Copies of these assessment orders are also not available for perusal. Therefore, without seeing the content of these orders and the background, the relief claimed by the petitioner cannot be granted in this writ petition contrary to the mandate of Rule 11 of the Schedule-II of the Income Tax Act, 1961.

37. The issue as to whether the case of the petitioner would fall within the proviso to Section 281 of the Income Tax Act is also to be decided by the second respondent Tax Recovery Officer-VII. Therefore, while setting aside the impugned order and the observation contained therein, I remit the case back to the said second respondent Tax Recovery Officer to pass appropriate orders on merits in accordance with Rule 11 of the Schedule-II to the Income Tax Act, 1961.

38. The petitioner would require copies of the assessment orders dated 30.03.2013 purportedly passed under Section 144 read with Section 147 for the Assessment Years 2005-2006 to 2008-2009 and order dated 31.12.2011 under Section 144 for the Assessment Year 2009-2010 order dated 31.03.2013 under Section 144 for the Assessment Year 2010-2011.

39. Therefore, the Deputy Commissioner of Income Tax,

Company Circle - IV(1), Chennai within whose jurisdiction the third respondent was assessed is suo motu impleaded as fifth respondent.

40. In the result, the impugned order dated 26.10.2016 bearing reference C.No.6126/PCIT-6/2016-17 passed by the first respondent Principal Commissioner of Income Tax-6 is quashed and the case is remitted back to the second respondent Tax Recovery Officer to pass appropriate orders on merits.

41. For a proper adjudication of the dispute, the fifth respondent Deputy Commissioner of Income Tax, Company Circle-IV (1), Chennai who has been suo moto impleaded is directed to furnish the copies of the assessment orders passed for the period in dispute for which the third respondent is in arrears of tax, to the petitioner, within a period of thirty days from the date of receipt of a copy of this order.

42. The petitioner, at his discretion, if advised, may thereafter file an additional representation before the second respondent Tax Recovery Officer-VII, within a period of thirty days from the date of receipt of such assessment orders.

43. The second respondent Tax Recovery Officer shall thereafter pass final orders on merits after considering the representation of the petitioner within a period of ninety days thereafter. The second respondent Tax Recovery Officer shall also comply with all the procedural requirements and safeguards prescribed under the provisions of the Income Tax Act, 1961 and the Rules made thereunder before passing such orders on merits, within the aforesaid period. Needless to state, the petitioner shall be heard before any orders are passed.

44. Accordingly, this Writ Petition stands allowed. No cost. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS-III)

//True Copy//

Sub Assistant Registrar

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To

1.The Principal Commissioner of Income Tax - 6,
121, Mahatma Gandhi Road,
Chennai - 600 034.

2.The Tax Recovery Officer - VII,
Income Tax Company Range - IV,
121, Mahatma Gandhi Road,
Chennai - 600 034.

3.The Sub-Registrar Joint 1,
District Registrar Office,
Chennai South, Saidapet,
Chennai 600 015.

4.The Deputy Commissioner of Income Tax,
Company Circle - IV (1), Chennai.

+1cc to Mr.A.P.Srinivas, Advocate, S.R.No.17912

W.P.No.5986 of 2017 and
W.M.P.No.6418 of 2017

GPL(CO)
CB(19/04/2021)