(2000) 02 BOM CK 0095

In the Bombay High Court

Case No : Writ Petition No. 3060 of 1999

Aditya Kumar Kedia APPELLANT

Vs

Tax Recovery Officer and Others RESPONDENT

Date of Decision : 29-02-2000

Acts Referred:

Income Tax Act, 1961 — Section 281
Income Tax Rules, 1962 — Rule 11, 11(1), 86

Citation : (2001) 168 CTR 385 : (2001) 248 ITR 659 : (2002) 120 TAXMAN 291

Hon'ble Judges : S.H. Kapadia, J;A.P. Shah, J

Bench : Division Bench

Advocate : Arun P. Sathe, for the Appellant; B.M. Chatterjee, for the Respondent

Judgement

1. The short point which arises for determination in this petition is whether the Tax Recovery Officer was right in refusing to adjudicate upon the claim of the petitioner under Rule 11 of the Second Schedule to the Income Tax Act, 1961, on the ground that the Assessing Officer has declared the gift deed dated December 2, 1986, as void u/s 281 of the Act. The gift deed is in favour of the petitioner. It pertains to Flat No. 23, "Belle View", Bhulabhai Desai Road, Mumbai.

2. The brief facts of the case are as under :

The Tax Recovery Officer (TRO), Ward No. 24, Mumbai, vide order dated November 17, 1989, attached the above flat under Schedule II to the Income Tax Act, 1961, on account of tax arrears outstanding in the case of the assessee by name Vinod Bhatia. The attachment has since been continued. By letter dated March 31, 1994, addressed by the advocate on behalf of the petitioner to the Assessing Officer, it was pointed out that the assessee has gifted the above flat to the petitioner herein under the gift deed dated December 2, 1986. Accordingly, the petitioner called upon the Assessing Officer to furnish a copy of the order attaching the flat. A similar letter was also addressed to the Tax Recovery Officer calling upon him to forward the prohibitory order to the petitioner. By letter dated April 15, 1994, the petitioner forwarded to the Tax

Recovery Officer a copy of the gift deed, copy of the application made for membership to the society and copy of the computation of income and wealth-tax returns by the petitioner. However, by order dated February 11, 1993, the Assessing Officer treated the gift as null and void u/s 281 of the Income Tax Act. Hence, by letter dated October 12, 1994, the Assessing Officer was requested to furnish to the petitioner details of the proceedings pending in the case of the assessee-Vinod Bhatia (donor) at the time of making the above gift on December 2, 1986, and the date of the filing of the return of Vinod Bhatia in order to enable the petitioner to ascertain the validity of the said order dated February 11, 1993, passed u/s 281 of the Act. By letter dated January 5, 1995, the Assessing Officer informed the natural guardian of the petitioner herein that there was no provision under the Income Tax Act to furnish information asked for in the above letter. By letter dated February 15, 1995, addressed by the Tax Recovery Officer to the petitioner, it was stated that the gift of the flat is treated void u/s 281 of the Income Tax Act by the Assessing Officer and since the flat stands in the name of Vinod Bhatia, the petitioner was not entitled to be furnished with copies of the documents sought for by the petitioner. Being aggrieved by the order of the Tax Recovery Officer, the petitioner preferred a petition under Rule 86 of the Second Schedule to the appellate authority. By order dated May 10, 1999, the appellate authority ruled that the decision of the Tax Recovery Officer was conclusive and the only remedy of the petitioner is to institute a suit and the appeal was misconceived. Hence, the appeal came to be dismissed. Being aggrieved by the said order, the present petition has been filed.

Mr. Sathe, learned counsel appearing on behalf of the assessee, contends that on the petitioner coming to know that the flat in question stood attached, the petitioner moved the Tax Recovery Officer with a request to furnish to the petitioner all the relevant documents so that the petitioner could file objections under Rule 11(1) of the Second Schedule to the income tax Act. Mr. Sathe further contended that in the present matter, the Tax Recovery Officer has refused to give the documents. He further contended that the petitioner has forwarded to the Tax Recovery Officer the gift deed, the wealth-tax return, the Income Tax return and other connected documents to show that the petitioner was in possession of the flat and the petitioner was the owner under the above gift deed. However, the Tax Recovery Officer has not adjudicated upon the claim of the petitioner. On the contrary, in view of the decision of the Assessing Officer declaring the gift deed to be void, the Tax Recovery Officer has not adjudicated upon the claim of the petitioner under Rule 11 of the Second Schedule to the Act. Mr. Sathe further contended that even u/s 281 of the Income Tax Act, the petitioner was entitled to a show-cause notice before issuance of a declaration that the gift deed was void. He contends that an ex parte order has been passed u/s 281 of the Income Tax Act without giving any opportunity to the petitioner. He further contends that in the present matter there is nothing to indicate that the assessee-Vinod Bhatia was in arrears of tax on the date when he executed the gift deed. Mr. Sathe, therefore, contends that the declaration that the gift deed is void should be set aside.

3. The short point which arises for determination is :

Whether the Tax Recovery Officer was right in refusing to adjudicate the petitioner''s claim/object ion under Rule 11 on the ground that the Assessing Officer has declared the gift deed as void u/s 281 of the Income Tax Act ?

4. In the case of Gangadhar Vishwanath Ranade (No. 1) and others Vs. Income Tax Officer, , the question regarding the scope, validity and operation of Section 281 of the Income Tax Act arose for determination. In that matter, the facts were as follows. The assessee was doing business. His assessments for the years 1962-63 to 1964-65 were reopened. The assessee had executed a mortgage in favour of a bank on December 2, 1967, after obtaining a certificate from the Income Tax Department u/s 230A. In 1969, he declared a trust in respect of the property in favour of his wife and other persons as beneficiaries. The house property was subsequently transferred to the assessee''s wife in February, 1969. In January, 1972, some of the properties of the assessee were attached. Subsequent to the attachment, a show-cause notice was issued u/s 281 of the Income Tax Act. The Income Tax Officer was of the opinion that the transfer of property was with an intention to defraud the Revenue during the pendency of the proceedings under the Income Tax Act. By order dated May 9, 1974, the transfer was declared void as against the Department u/s 281 of the Act. This order was challenged by the writ petition. It was held that Section 281 of the Income Tax Act and Section 53 of the Transfer of Property Act arc pari materia. That Section 281 only states what the law of the land is. It does not say that any conclusion or declaration by an authority entrusted with the functions to be performed under the Income Tax Act will operate as conclusive or adjudicatory. It merely has the character of an expression of an intention or opinion on the part of such authority that it intends to treat the transfers as affected by Section 281 as void and therefore, not standing in the way of recovery proceedings to be taken by the Tax Recovery Officer. That the jurisdiction of the Tax Recovery Officer as contemplated by Rule 11 is not taken away by the expression of any opinion or intention by the Income Tax Officer expressed u/s 281. That the adjudicatory process under Rule 11 still survives and can be availed of by the claimant to claim that the transfer was not made during the pendency of proceedings. Therefore, it has been held that Section 281 merely declares the intention of the Assessing Officer. It is merely a step to recover the dues of the State from the defaulter. That the jurisdiction of the Tax Recovery Officer under Rule 11 is not taken away by the expression of any opinion or intention of the Assessing Officer expressed u/s 281 of the Income Tax Act.

5. In the case of the The Tax Recovery Officer II, Sadar, Nagpur Vs. Gangadhar Vishwanath Ranade (Dead) Through Mrs. Shobha Ravindra Nemiwant, , the facts were as follows. The assessee was assessed for the assessment years 1962-63, 1963-64 and 1964-65. The amount of tax so assessed became final on August 7, 1967. Accordingly, the Tax Recovery Officer served notices on the assessee under

Rule 2 of the Second Schedule to the Income Tax Act on October 21, 1972. On October 23, 1972, an immovable property came to be attached by the Tax Recovery Officer. In the objections filed by the assessee, he stated that on December 2, 1967, he had executed a mortgage in favour of the Bank of Maharashtra for raising a loan. That on February 21, 1969, he has executed a trust deed in respect of same property in favour of his wife and daughter and on February 27, 1969, he had conveyed the said property to his wife and his daughter. Similar objections were filed on behalf of his wife and daughter claiming title to the property. It was contended by the claimants that on the day when the notice under Rule 2 came to be issued and on the day when the property was attached, the property belonged to the wife and the daughter. Thereafter, a show-cause notice came to be issued on January 21, 1974, u/s 281 on the original assessee. The Assessing Officer held an enquiry, recorded evidence and passed an order on May 9, 1974, declaring that the transfer in favour of the wife and the daughter was void against the Department u/s 281 of the Income Tax Act. This decision was a subject-matter of challenge in the earlier proceedings before the High Court. In that earlier judgment, it was held that the proceedings taken pursuant to the declaration by the Assessing Officer u/s 281 was a mere prelude to the procedure for the recovery of tax and that the order u/s 281 did not. in any way, affect the rights of the parties pertaining to the said properties, which could be considered under the proceedings under Rule 11. By order dated September 17, 1981, the Tax Recovery Officer in the proceedings under Rule 11 overruled the objections filed by the assessee, his wife and his daughter and declared the mortgage and the trust deed as also the conveyance as void. This order was challenged by a writ petition. The High Court upheld the contention of the claimants that the Tax Recovery Officer had no power under Rule 11 to declare the transfer of property as void u/s 281 of the Act. The matter was carried in appeal to the Supreme Court by the Department. Under the above facts, the Supreme Court held that the order, u/s 281, merely declared the intention of the Department to treat the transfer as void u/s 281 and it did not take away the right of the claimants to raise objections under Rule 11. It was also held by the Supreme Court that the powers of the Tax Recovery Officer under Rule 11 are different from the powers of the Assessing Officer u/s 281. That under Rule 11(1), where any claim is preferred to, or where any objection is made to the attachment or sale of any property on the ground that such property is not liable to such attachment or sale, the Tax Recovery Officer shall proceed to investigate the claim. That the Tax Recovery Officer has to examine who is in possession of the property and in what capacity. That he can attach the property in the possession of the assessee if it is held in his own right. That, if the property attached is claimed by a third party, who has evidence to show that he possessed the property under title, then the property will have to be released from attachment. That the Tax Recovery Officer is required to examine that the possession of the third party is of a claimant in his own right or whether it is on account of the assessee. It was held by the Supreme Court on the facts that the Tax Recovery Officer could not have examined whether the transfer was void u/s

281 of the Income Tax Act and, therefore, his adjudication in that regard was without jurisdiction. That the declaration u/s 281 cannot affect, in any event, the legal rights of the parties under Rule 11. That the Department cannot proceed on the assumption that the transaction is void u/s 281.

6. In the present case, the petitioner claims to be in possession of the property in his own right under the gift deed. According to the petitioner, the donor was not in arrears of taxes when the order dated February 11, 1993, came to be passed. The petitioner has not filed an application under Rule 11 till today. However, he has sought inspection of the documents from the Assessing Officer which were not furnished. The petitioner has forwarded all documents, to show that the petitioner was in possession in his own right, to the Tax Recovery Officer. In view of the above judgments, notwithstanding, the declaration u/s 281 declaring the gift as null and void, the Tax Recovery Officer is duty bound to adjudicate the claim of the petitioner under Rule 11. Under the above circumstances, we are directing the Tax Recovery Officer to adjudicate the claim of the petitioner under Rule 11. It would be open to the petitioner in the said adjudication to raise the contention before the Tax Recovery Officer that the gift deed was not executed during the pendency of the proceedings as held by the Bombay High Court in The Tax Recovery Officer II, Sadar, Nagpur Vs. Gangadhar Vishwanath Ranade (Dead) Through Mrs. Shobha Ravindra Nemiwant, Gangadhar Vishwanath Ranade (No. 1) and others Vs. Income Tax Officer, . The. Tax Recovery Officer will furnish all relevant documents on which the Department seeks to place reliance in the said enquiry under Rule 11. It is expressly made clear that all contentions raised by the petitioner in this petition are expressly kept open. Accordingly, the above issue is answered in the negative. Under the above circumstances, without disturbing the declaration of the gift deed as void u/s 281, we direct the petitioner to file his claim/objection under Rule 11 of the Second Schedule to the Act within two weeks. The Tax Recovery Officer shall take steps to adjudicate upon the claim of the petitioner herein under Rule 11 of the Second Schedule to the Income Tax Act. The Tax Recovery Officer shall consider the requisite documents which are produced by the petitioner herein showing his possession on the relevant date. The Tax Recovery Officer shall examine as to whether the petitioner was in possession in his own right and that the transfer was not made during the pendency of the proceedings. On the merits all the contentions of the petitioner are kept open. Attachment to continue till the adjudication is done as directed above.

7. Accordingly, the writ petition is disposed of. No order as to costs.

