(2012) 03 MAD CK 0024

In the Madras High Court

Case No : Writ Petition No. 17328 of 2004 and W.P.M.P. No. 20576 of 2004

Dr. Meera Thinakaran APPELLANT

Vs

State of Tamil Nadu and Others RESPONDENT

Date of Decision : 14-03-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 89, Order 21 Rule 90, Order 21 Rule 91, Order 21 Rule 92, Order 21 Rule 94
Registration Act, 1908 — Section 17(1), 17(2)(xii), 89, 89(2)
Stamp Act, 1899 — Section 2, 35, 49, 57

Citation : AIR 2013 Mad 73 : (2013) 3 BC 150 : (2013) 1 BC 421 : (2012) 2 CTC 759 : (2012) 5 MLJ 36

Hon'ble Judges : S. Nagamuthu, J

Bench : Single Bench

Advocate : P.N. Radhakrishnan, for the Appellant; A. Navaneethakrishan, Advocate General Assisted by R. Rajeswaran, Special Government Pleader and N. Sakthivel, Government Advocate, for the Respondent

Final Decision : Dismissed

Judgement

S. Nagamuthu, J.—""Whether surcharge, on the duty imposed under the Indian Stamp Act on the sale Certificate issued by the Recovery

Officer under Chapter V of the Recovery of Debts due to Banks and Financial Institutions Act 1993 read with Rule 65 of the II Schedule to the

Income Tax Act 1961, can be levied""?. This is, precisely, the question, which needs to be answered in this writ petition. The property bearing flat

No. 1079-A (ground floor), at Anna Nagar in Villivakkam village was brought for sale by the Recovery Officer attached to the Debt Recovery

Tribunal No. II, Chennai as per the provisions of the Recovery of Debts Due to the Banks and Financial Institutions Act 1993 in D.R.C. No. 456

of 2001, as per the order made in T.A. No. 434 of 1997. Public auction was held by the Recovery Officer on 28.9.2001, in order to recover the

amount due to the Federal Bank, Thirumangalam, Chennai, from its erstwhile owner Mr. B.S. Jeyapandian. The petitioner was the successful

bidder. The petitioner paid the entire sale consideration of Rs. 8,50,000/- and the sale was confirmed in his favour. Thereafter, the Recovery

Officer issued a Sale Certificate dated 29.10.2001 as provided in Rule 65 of the II Schedule to the Income Tax Act.

2. According to the petitioner, the said Sale Certificate was forwarded to the third respondent for filing the same as required u/s 89 of the

Registration Act. Strangely, along with the Sale Certificate, the Recovery Officer forwarded a Deed of sale also. Admittedly, the Sale Certificate

was levied with stamp duty as provided in Article 18(c) of the Indian Stamp Act. Thereafter, the third respondent, who is vested with the powers

of Collector, as per the Indian Stamps Act, impounded the said document by his proceedings in impounding No. 1 of 2002 and kept the document

without registration. He demanded stamp duty as per Article 23 of the Indian Stamp Act and surcharge u/s 116-A of the Tamil Nadu District

Municipalities Act. The petitioner submitted an objection for the same in his letter dated 5.8.2002. In the said letter, the petitioner had informed the

third respondent that he had rightly paid the stamp duty at 8% as per Article 18(c) of the Indian Stamp Act as the document is only a Sale

Certificate and not a Sale Deed. He further contended that except the stamp duty, no other amount, such as surcharge, could be levied.

3. But, the third respondent, by his proceedings dated 29.10.2002, rejected the said explanation and held that Article 18(c) of the Indian Stamp

Act is applicable only to a Certificate of Sale, whereas, what was produced before him was a Sale Deed and so the same is liable for Stamp duty

under Article 23 of the Act and surcharge u/s 116-A of the Tamil Nadu District Municipalities Act. The Recovery Officer also sent a letter dated

4.2.2002 stating that what was forwarded by him was only a Sale Certificate and not a Sale Deed, which was also not considered. Thereafter,

against the above stated order of the third respondent, the petitioner preferred an appeal to the second respondent. The second respondent by his

proceedings in P.M. No. 12096-P-1/2003 dated 6.11.2003 rejected the said appeal. Challenging the same, the petitioner is before this Court with this writ petition.

4. In this writ petition, the prayer of the petitioner is ""for a mandamus to direct the second respondent to state the case relating to the petitioner''s

appeal bearing P.M. No. 12096-P-1/2003 before him culminating in his impugned order dated 6.11.2003, and refer the same to this Court u/s 57

of the Indian Stamp Act II of 1899 for a decision on the stamp duty leviable upon the document concerned in the case.

5. A detailed counter has been filed by the second respondent wherein it is stated that what was presented before the third respondent was only a

sale deed and it is not a Sale Certificate. Therefore, the impugned order does not require any interference at the hands of this Court, it is

contended.

6. Before going into the factual aspects of the case, let us consider the legal issues involved. Undoubtedly, a Certificate of Sale granted to the

purchaser of any property held by public auction by a Civil or Revenue Court or Collector or Revenue Officer, is liable to be charged with duty

under Article 18 of the Indian Stamp Act, 1899. If it is a conveyance (Sale Deed) it is chargeable with stamp duty as per Article 23 of the Indian

Stamp Act. As per Section 116(A) of the Tamil Nadu District Municipalities Act, surcharge is leviable on the duty imposed by the Indian Stamp

Act on every sale of immovable property. The method of assessment of surcharge is also provided in Section 116(A) of the Tamil Nadu District

Municipalities Act. A perusal of the said provision would go to show that specifically, there is no mention about the Sale Certificate in respect of

immovable property sold by public auction by a Civil or Revenue Court or Collector or other Revenue Officer.

7. For quite some time, it was contended before Courts of Law that a Sale Certificate is also a Deed of Conveyance. The counter argument was

that a Sale Certificate, by itself, does not convey the title relating to the immovable property and it is only a document evidencing the conveyance,

which had already taken place and therefore, the same is not a Deed of Conveyance. The said debate has come to a close after the judgment of

the Hon''ble Supreme Court in Municipal Corporation of Delhi v. Pramod Kumar Gupta AIR 1991 SC 401: (1991) 1 SCC 633. That was a case

relating to demand for surcharge by the Delhi Municipal Corporation. u/s 147

Delhi Municipal Corporation Act, duty is leviable on sale of

immovable property. Sub section 2 of Section 147 of the said Act reads as follows:

(2) The said duty shall be levied:

(a) in the form of a surcharge on the duty imposed by the Indian Stamp Act 1899, as in force for the time being in the Union Territory of Delhi, on

every instrument of the description specified below, and

(b) at such rate as may be determined by the Corporation not exceeding five per cent, on the amount specified below against such instruments:

Description of Instrument Amount on which duty should be levied

Sale of immovable property The amount or value of the consideration for the sale as set forth in the

instrument.

Exchange of immovable property The value of the property of the greater value, as set forth in the instrument.

Gift of immovable property The value of the property, as set forth in the instrument.

Mortgage with possession of The amount secured by the mortgage as set forth in the instrument.

immovable property

Lease in perpetuity of immovable The amount equal to one-sixth of the whole amount or value of the rent

property which would be paid or delivered in respect of the first fifty years of the

lease as set forth in the instrument.

8. As per the said provision, duty is payable ''on every instrument of sale''. The question before the Hon''ble Supreme Court was as to whether a

Certificate of Sale issued by a Civil Court under Order 21 Rule 94 C.P.C. is an instrument of sale in terms of the above provision. In paragraphs 4

and 5 of the said judgment, answering in the negative, the Hon''ble Supreme Court has held as follows:

The expression ""instrument"" in Section 147 of the Act has the same connotation as the word has under the Stamp Act, the reference to which has

been expressly made. Clause 14 of Section 2 of the Stamp Act gives an inclusive definition of the expression as referring to any document by which any right or liability is purported to be created, transferred, limited, extended, extinguished or recorded. Clause 10 of the said Section states

that ""Conveyance"" includes a conveyance on sale and every instrument by which property, whether movable or immovable, is transferred inter

vivos. The expression ""instrument of sale of immovable property"" u/s 147 of the Act must, therefore, mean a document effecting transfer. The title

to the property in question has to be conveyed under the document. The document has to be a vehicle for the transfer of the right, title and interest.

A document merely stating as a fact that transfer has already taken place cannot be included within this expression. A paper which is recording a

fact or is attempting to furnish evidence of an already concluded transaction under which title has already passed cannot be treated to be such an

instrument. The question, therefore, is as to whether a Certificate issued by a Court under Rule 94 of Order 21 can be said to be such an

instrument so as to attract the provisions of Section 147 of the Act or not.

An examination of the relevant provisions of Order 21 of the CPC will show that the tile to the property put on auction-sale passes under the law

when the sale is held. The owners and certain other interested persons are afforded opportunity under the Code to make a prayer for setting aside

the sale on enumerated grounds and after all such matters are disposed of without disturbing the sale, the sale is confirmed under Rule 92. The

relevant part of Rule 92 reads as follows:

92. Sale when to become absolute or be set aside:(1) Where no application is made under Rule 89, Rule 90 or Rule 91, or where such application

is made and disallowed, the Court shall make an order confirming the sale, and thereupon the sale shall become absolute

The stage for issuing a Certificate of Sale arises only thereafter, and Rule 94 states:

94. Certificate to purchaser Where a sale of immovable property has become absolute, the Court shall grant a certificate specifying the property

sold and the name of the person who at the time of sale is declared to be the purchaser. Such certificate shall bear date the day on which the sale

became absolute

It is manifest that the title passes under the auction-sale by force of law and the transfer becomes final when an order under Rule 92 confirming it is made. By the Certificate issued under Rule 94, the Court is formally declaring the effect of the same and is not extinguishing or creating title. The

object of issuance of such a Certificate is to avoid any controversy with respect to the identity of the property sold, and of the purchaser thereof as

also the date when the sale becomes absolute. The use of past tense in the rule stating that the sale ""became"" absolute, is consistent with this

interpretation. The Certificate, therefore, cannot be termed to be an instrument of sale so as to attract duty u/s 147 of the Delhi Municipal

Corporation Act.

(Emphasis supplied)

9. Now let us have a look into Section 116-A of the Tamil Nadu District Municipalities Act. A cursory comparison of Section 147(2) of the Delhi

Municipal Corporation Act and Section 116(A) of the Tamil Nadu District Municipalities Act would make it ipso facto clear that both the

provisions are in pari materia. More particularly, under Entry I of Section 147(2) of the Delhi Municipal Corporation Act, ""an instrument of sale of

immovable property"" is liable for surcharge. Similarly, under entry I of Section 116-A(b) of the Tamil Nadu District Municipalities Act, ""an

instrument of sale of immovable property"" is liable for surcharge on the duty imposed by the Indian Stamps Act. Thus, as has been held by the

Hon''ble Supreme Court, a Certificate of Sale in respect of immovable property granted to the purchaser by public auction by a Civil or Revenue

Court or Collector or other Revenue Officer is not an instrument of sale of immovable property as mentioned in Entry I of Section 116-A(b) of the

Tamil Nadu District Municipalities Act and therefore, such a Certificate of Sale is not liable for surcharge u/s 116-A of the Tamil Nadu District

Municipalities Act.

10. But, the learned Advocate General appearing for respondents would contend that a Sale Certificate issued by the Recovery Officer under the

Recovery of Debts due to Banks and Financial Institutions Act, 1993"" does not fall within the ambit of Article 18 of the Indian Stamp Act.

According to him, the Recovery Officer under the above said Act is neither a Collector nor a Revenue Officer as envisaged under Article 18 of the

Indian Stamps Act. Therefore, according to him, the Sale Certificate issued by him conveys title to the purchaser and thus, it is an instrument of

Sale falling within the ambit of Article 23 of the Indian Stamp Act and so it is liable for surcharge u/s 116-A of the Tamil Nadu District

Municipalities Act.

11. Though attractive, I find no force in the said contention of the learned Advocate General. The expression of ''Recovery Officer'' is defined in

Section ''2k'' of ""Recovery of Debts due to Banks and Financial Institution Act, 1993"", which reads as follows:

Recovery Officer"" means a Recovery Officer appointed by the Central Government for each Tribunal under sub-section (1) of Section 7.

12. u/s 19 of the Recovery of Debts due to Banks and Financial Institution Act, 1993, the Tribunal shall pass a final order including the order for

payment of interest. u/s 19(22) of the Recovery of Debts due to Banks and Financial Institution Act, 1993, the Presiding Officer shall issue a

certificate under his signature on the basis of the order passed by the Tribunal to the Recovery Officer for recovery of the amount of debt specified

in the Certificate. Chapter V of Recovery of Debts due to Banks and Financial Institution Act, 1993 deals with Recovery of debt determined by

the Tribunal. Section 25(a) of the said Act states that the Recovery Officer shall, on receipt of a copy of the Certificate u/s 19, proceed to recover

the amount of debt specified in the Certificate, in one or more modes enumerated in the said provision. One of the modes is by means of

attachment and sale of movable or immovable properties.

13. The procedure to be followed by the Recovery Officer to attach and sell a movable or immovable property as per the Recovery Certificate

has not been provided specifically in the said Act itself. Instead, Section 29 envisages that certain provisions of Income Tax Act are applicable to

the Recovery of Debts due to Banks and Financial Institution Act, 1993. The said provision reads as follows:

The provisions of the Second and Third Schedules to the income tax 1961 and the Income Tax (Certificate proceedings) Rules 1962, as in force

from time to time shall, as far as possible, apply with necessary modifications as if the said provisions and the rules referred to the amount of debt

due under this Act instead of to the income tax. Provided that any reference under the said provisions and the rules to the ""assessee"" shall be

construed as a reference to the defendant under this Act.

14. A conjoint reading of Section 25 and 29 of the Recovery of Debts due to Banks and Financial Institutions Act, would show that the Recovery

Officer has to follow the procedure contemplated in the Second and third Schedules of the Income Tax Act 1961 and the Income Tax procedures

in the matter of attachment of sale of immovable properties.

15. Part III of the Second Schedule to the Income Tax deals with attachment and sale of immovable property. Clause 56 of the Second Schedule

states that the Sale to be by auction, which reads as follows:

The sale shall be by public auction to the highest bidder and shall be subject to confirmation by the Tax Recovery Officer. (Provided that no sale

under this rule shall be made if the amount bid by the highest bidder is less than the reserve price, if any, specified under clause (cc) of Rule 53).

Clause 57 speaks of deposit by purchaser and resale in default. Clause 58 deals with the procedure in default of payment. Clause 59 deals with

the authority to bid and Clause 60 deals with application to set aside the sale of immovable property on deposit. Clause 61 deals with application

to set aside sale of immovable property on the ground of non service of notice or irregularity. Clause 62 deals with setting aside sale where

defaulter has no saleable interest. Clause 63 deals with confirmation of sale, which reads as follows:

63(1) Where no application is made for setting aside the sale under the foregoing rules or where such an application is made and disallowed by the

Tax Recovery Officer, the Tax Recovery Officer shall (if the full amount of the purchase money has been paid) make an order confirming the sale,

and, thereupon, the sale shall become absolute.

(Emphasis supplied)

(2) Where such application is made and allowed, and where in the case of an application made to set aside the sale on deposit of the amount and

penalty and charges, the deposit is made within thirty days from the date of the sale, the Tax Recovery Officer shall make an order setting aside the

sale: (provided that no order shall be made unless notice of the application has been given to the persons affected thereby.)

Clause 64 deals with return of purchase money in certain cases.

Clause 65 deals with Sale Certificate which reads as follows:

65(1) Where a sale of immovable property has become absolute, the Tax Recovery Officer shall grant a certificate specifying the property sold

and the name of the person who at the time of sale is declared to be the purchaser. Such certificate shall state the date on which the sale became

absolute.

(Emphasis supplied)

16. Now let us have a look into the relevant provisions in the CPC which have been dealt with by the Hon''ble Supreme Court in the Municipal

Corporation of Delhi v. Pramod Kumar Gupta (supra). Order 21 Rule 94 deals with the procedures to be followed by the Court while selling an

immovable property in public auction. Order 21 Rule 89 deals with application to set aside the sale on deposit. Order 21 Rule 90 deals with

application to set aside sale on ground of irregularity or fraud. Order 21 Rule 91 deals with application by purchaser to set aside sale on ground of

judgment debtor having no saleable interest and Order 21 Rule 92 states as to when the sale shall become absolute or be set aside where no

application is made under Rule 89, Rule 90 and Rule 91 or where such application is made and disallowed and the Court shall make an order

confirming the sale and thereupon, the sale shall become absolute. Rule 94 speaks of certificate to purchaser, which reads as follows:

Certificate to purchaser: Where a sale of immovable property has become absolute, the Court shall grant a certificate specifying the property sold

and the name of the person who at the time of sale is declared to be the purchaser. Such certificate shall bear date the day on which the sale

became absolute

17. A careful comparison of the above provisions of the Income Tax Act and the CPC would go to show that under Order 21 Rule 92 C.P.C. a

sale becomes absolute, the moment an order confirming the sale is passed by the Court under Order 21 Rule 92 of C.P.C. Similarly, the sale made

by the Recovery Officer under the Income Tax Act becomes absolute, the moment an order of confirmation of sale is made under Clause 63 of the

II Schedule to the Income Tax Act.

18. The Hon''ble Supreme Court has held in the above judgment that the title is conveyed by an order of confirmation made by the Court under

Order 21 Rule 92. Thus, a Certificate issued to the purchaser subsequently under

Order 21 Rule 94 is only a document of evidencing the

conveyance, which had already taken place. Similarly as per the provisions of Income Tax Act, the title is conveyed, the moment an order of

confirmation of sale is made under Clause 63 of the Second Schedule to Income Tax Act Thereafter, a sale Certificate issued under Clause 65 is

only a document evidencing the conveyance which had already taken place. Therefore, I have no doubt in my mind to hold that a sale Certificate

issued by the Recovery Officer as provided in Clause 65 of the II Second Schedule to the Income Tax Act is not an instrument of conveyance

(Sale Deed) and it is only a document evidencing conveyance which had already taken place. In view of all the above conclusion, as has been held

by the Hon''ble Supreme Court, Certificate of sale issued by the Recovery Officer under the Recovery of Debts due to Banks and Financial

Institutions Act 1993 is not liable for surcharge as per Section 116-A of the Tamil Nadu District Municipalities Act.

19. Now, coming to the next contention of the leaned counsel that the Recovery Officer appointed under the Recovery of Debts due to Banks and

Financial Institutions Act cannot be construed as a Revenue Officer as contemplated in Article 18 of the Indian Stamps Act needs to be

considered. A similar question arose before a Division Bench of this Court as to whether the Sale Certificate issued by the Recovery Officer under

the SARFAESI Act will fall within the ambit of Article 18 of the Indian Stamps Act. The Division Bench in K. Chidambara Manickam v.

Shakeena and Others AIR 2008 Mad 108 : LNIND 2007 Bmm 873 has clearly held that such a Sale Certificate issued by the Recovery Officer

under SARFAESI Act would squarely fall within the ambit of Article 18 of the Indian Stamps Act. In view of the said law laid down by the

Division Bench, the argument of the learned Advocate General deserves only to be rejected. Thus, I hold that the Recovery Officer under

Recovery of Debts due to Banks and Financial Institutions Act will fall within the meaning of a Revenue Officer as enumerated under Article 18 of

the Indian Stamp Act. Thus, a Certificate of Sale issued by him will squarely fall within the said provision.

20. The learned Advocate General would nextly contend that if the sale Certificate is to be registered, necessarily registration charges are to be

paid. But, the learned counsel for the petitioner would submit that the Sale Certificate in question does not require to be registered. According to

him, the purpose of forwarding the Sale Certificate to the Sub Registrar is only to enter the same in Book No. 1 or to get it scanned. Section 89(2)

of the Registration Act reads as follows:

89(2) Every Court granting a certificate of sale of immovable property under the Code of Civil Procedure, 1908 (V of 1908), shall send a copy of

such certificate to the registering officer within the local limits of whose jurisdiction the whole or any part of the immovable property comprised in

such certificate is situate, and such officer shall file the copy in his Book No. 1 or get it scanned.

In view of Section 89(2) of the The Tamil Nadu Registration Manual Act, I am of the view that it would be suffice if the Sale Certificate in question

is entered by the third respondent in Book No. 1 and he need not register the same. Section 17(2)(xii) of the Registration Act, 1908 specifically

provides that a Certificate of Sale granted to any purchaser of any property sold by a public auction by a Civil or Revenue Officer does not fall

under the category of non-testamentary documents, which require compulsory registration under sub-sections (b) and (c) of Section 17(1) of the

said Act. Thus, the registration is purely optional in respect of a Certificate of Sale issued by a Civil or Revenue Officer. The only legal implication

is, if the Certificate of Sale is not registered, it is not admissible in evidence u/s 35 of the Indian Stamp Act and Section 49 of the Registration Act,

in view of the law laid down by the Hon''ble Supreme Court in Raghunath v. Kedar Nath, AIR 1969 SC 1316 : (1969) 1 SCC 497. In the instant

case, the learned counsel for the petitioner would submit that the petitioner has opted not to get the Sale Certificate registered. Therefore, in this

case, question of paying registration charges does not arise at all.

21. Nextly, the learned Advocate General would contend that what was forwarded to the third respondent by the Recovery Officer was, in fact, a

Deed of conveyance (Sale Deed) and not a Certificate of Sale. But the learned counsel for the petitioner would refute the same. The petitioner has

produced a copy of the Certificate of Sale of immovable property, which is found in page 1 and 2 of the typed set of papers. But, curiously, in

pages 3 to 7 of the typed set of papers, another document is found with a caption ""Deed of Sale"". A careful reading of the same would show that

the said document is pure and simple a Deed of Conveyance. It is on this basis, the third respondent claims that the petitioner is liable to pay stamp

duty under Article 23 of the Stamp Act. In my considered opinion, the so-called Deed of Sale which has been forwarded to the third respondent

by the Recovery Officer along with Certificate of Sale is void in law. As I have already concluded, even before the issuance of Sale Certificate, the

title had been conveyed to the purchaser. Such conveyance is made by an order of confirmation of sale by the Recovery Officer. Once such an

order of confirmation is passed and the Sale becomes absolute, there is no question of again conveying title by the Recovery Officer by executing a

sale deed. Thus, the document found at pages 3 to 7 under the caption ''Deed of Sale'' is a void document because it will not convey title to the

petitioner since title had already been conveyed to the petitioner by the order of confirmation of Sale. Therefore, this document, which has been

accompanied with the Sale Certificate is void in law and the same has to be returned by the third respondent to the Recovery Officer. Now what

remains is only the Certificate of Sale dated 29.10.2001 forwarded by the Recovery Officer to the third respondent, and as I have already held,

the said Certificate shall be entered in Book No. 1 by the third respondent.

22. Though the prayer made in the writ petition has not been couched properly, I am of the view that on that score, the legal remedy for which the

petitioner is entitled to, cannot be denied on such technical ground. The relief needs to be moulded. In view of all the above, the writ petition is

disposed of in the following terms.

(i) The third respondent, Sub Registrar shall file the Certificate of Sale dated 29.10.2001 forwarded by the Recovery Officer in his Book No. 1 as

required u/s 89(2) of the Registration Act after verifying whether the petitioner has paid necessary stamp duty as required under Article 18 of the

Indian Stamp Act.

(ii) The third respondent shall return the so-called Deed of Sale which was sent along with Sale Certificate back to the Recovery Officer as the

same is void.

(iii) It is further directed that the above exercise shall be completed by the third respondent within four weeks from the date of receipt of a copy of this order.

Connected miscellaneous petition is closed. No costs.

