**(2008) 08 KL CK 0061**

**In the High Court Of Kerala**

**Case No :** WP (C) No. 22552 of 2006 (I)

Lucy Vincent and Another APPELLANT

Vs

Dist. Collector and Others RESPONDENT

**Date of Decision :** 08-08-2008

**Acts Referred:**

Kerala General Sales Tax Act, 1963 — Section 26A, 26B

**Citation :** (2008) 3 KLJ 881

**Hon'ble Judges :** C.N. Ramachandran Nair, J

**Bench :** Single Bench

**Advocate :** N. Muraleedharan Nair and V.K. Shamsudheen, for the Appellant; Jawahar Jose and Abraham Philip, for the Respondent

## Judgement

C.N. Ramachandran Nair

1. The petitioners are challenging Ext. P11 and P12 orders whereunder the property purchased by the petitioners were held to be subject to sales tax liability due from the original owner of the properties by virtue of Section 26A of the KGST Act. The owner of the properties namely, 7th respondent is admittedly in arrears of sales tax to the tune of Rs. 12,38,443/-. Since default continued after assessment, the property was sold in revenue auction on 14.6.1996 and the purchasers had in fact deposited 50% of the bid amount. However, since assessments were set aside and remanded in appeal proceedings on 25.6.1996, sale was revoked. Without noticing sales tax liability due from the defaulter, the civil court in execution proceedings, sold the very same properties on 17.11.1997, 11.12.1997 and 26.12.1998 respectively. In court auction, the properties were purchased by respondents 4 to 6, who in turn sold the same to petitioners vide Exts. P1 to P3 sale deeds. According to the petitioners, the properties are free from charge towards sales tax liability and therefore, sale in court auction and their subsequent purchase confer valid title for the properties free of charge. When the matter came up in the first round, this court directed the Tahsildar to consider the claim petition made by the petitioner, which was

disposed of vide Exts. P11 and P12. It is these orders that are under challenge in this W.P. I heard counsel for the petitioner and Government Pleader for respondents 1 to 3. The first contention raised is that Section 26A has no application and the other provision namely, Section 26B has come into force only on 1.4.1999. The contention raised by respondents 1 to 3 is that Section 26A is in force with effect from 1.4.1993 and therefore, all the transfers made including the sale made by the court in execution proceedings are hit by Section 26A of the Act. In order to appreciate the contentions raised, the scope of relevant Sections have to be looked into and for easy reference, Sections 26A and 26B are extracted hereunder:

26A. Certain transfers to be void:- (1) Where, during the pendency of any proceedings under this Act or after the completion thereof, 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 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 under this Act.

26B. Tax payable to be first charge on the property:- Notwithstanding anything to the contrary contained in any other law for the time being in force, any amount of tax, penalty, interest and any other amount, if any, payable by a dealer or any other person under this Act, shall be the first charge on the property of the dealer, or such person.

While the case of the petitioner is that Section 26A has no application, Government Pleader submitted that Section 26A applies to all cases where transfers are made during pendency of any proceeding under the KGST Act. He has also relied on Division Bench judgment of this Court in Hamsa v. Asst. Commissioner 2008 (3) KLT 180 where this court held that Section 26A has application even if assessment is not completed and it is enough assessment is pending at the time of transfer. This court has further held that bonafide purchase for valid consideration is not a defence available against Section 26A of the Act. Counsel for the petitioners contended that defaulter has not created any charge in respect of the property and therefore, Section 26A has no application in this case. However, it is obvious that the property was subject to charge created by decree and the execution court attached and sold debtor''s property in execution proceedings. The judgment debtor''s property happened to be sold by the court in execution proceedings because he failed to discharge the decree debt. I do not think there is any difference between sale of property by the judgment debtor or by the civil court in execution proceedings because but for the sale in execution proceeding, such sale would have been hit by Section 26A of the Act. If execution proceeding leading to sale of defaulter''s property is not covered by Section 26A, then the provision can be circumvented by parties to a suit by getting collusive civil court decree and getting the property sold in execution proceeding. To my mind, there is no distinction between Sections 26A and 26B and both the provisions seek to achieve the same purpose of creating a prior charge on the property of the defaulter to recover arrears of sale tax as a first charge on the property. While for the purpose of Section 26A, pendency of any proceeding such as assessment, proposal for levy of tax, penalty etc. only is required, Section 26B applies when there is specific demand already raised. In this case admittedly much before the sale in execution proceeding, the property was attached in recovery proceedings for recovery of arrears of sale tax and it was in fact sold. However, sale was withdrawn for the interim period i.e. during the period the assessments stood remanded for re-assessment. In fact the defaulter-judgment debtor should have brought to the notice of the execution court, the pendency of sales tax proceedings and recovery steps taken earlier, which go to show that there is complicity on his side in the execution court selling the property without noticing the sale tax liability. Apparently there is collusion between the parties in the civil court proceedings. In any case I am of the view that sale of defaulter''s property by the civil court in execution proceedings is also covered by Section 26A of the KGST Act and since revised assessment proceedings were pending at the time of sale, the said sale by civil court in execution proceedings to respondents 4 to 8 is void/Consequently subsequent sale to the petitioners are also void. Exts. P11 and P12 are accordingly upheld and W.P. is dismissed. However, I give freedom to the petitioners to settle liability of the defaulter under the amnesty scheme and if petitioners settle liability, they can hold the property. If petitioners make application for amnesty benefit along with copy of this judgment, recovery will be withheld until time for payment is over and will be continued only if liability is not settled. I make it clear that even though petitioners are not liable as defaulters, amnesty benefit should be granted to them for settlement of liability of the defaulter by virtue of the directions contained above.

 