

(2009) 04 MAD CK 0515

In the Madras High Court

Case No : W.A. No. 2097 and W.A.M.P. No's. 3855 and 3856 of 2005

S. Kumar

APPELLANT

Vs

Commercial Tax Officer and Others

RESPONDENT

Date of Decision : 22-04-2009

Acts Referred:

Tamil Nadu General Sales Tax Act, 1959 — Section 24, 25
Transfer of Property Act, 1882 — Section 58

Citation : (2011) 40 VST 374

Hon'ble Judges : M. Duraiswamy, J;K. Mohan Ram, J

Bench : Division Bench

Advocate : Rita Chandrasekar, for Aiyar and Doha, for the Appellant; R. Tholgappian, Government Advocate (Taxes) and A. Arumugam, Special Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

K. Mohan Ram, J.—The above writ appeal is directed against the order of the learned judge dated July 14, 2005 (S. Kumar v. Commercial Tax Officer, Udumalpet), passed in W. P. No. 5155 of 2003.

2. The writ Petitioner is the Appellant in the above appeal.

3. The brief facts which are necessary for the disposal of the above appeal are set out below:

It is the case of the Appellant that he purchased a house from the third Respondent under a registered sale deed dated May 29, 2002, under a registered document No. 2194 of 2002 in the office of the Sub-registrar, Udumalpet, for a sale consideration of Rs. 4,50,000. According to the Appellant, before purchasing the property, he obtained an encumbrance certificate for the period from January 1, 1971 to June 9, 2002 which revealed only a mortgage and redemption dated May 23, 2002 in favour of Udumalpet Co-operative House Ltd., and except that no other encumbrance was revealed. While so, the Appellant received a notice

dated October 8, 2002 from the first Respondent informing him that the second Respondent was carrying on the business on proprietorship basis in the name and style of M/s. Kumaran Traders and he is in arrears of sales tax to the tune of Rs. 9,34,382 for the assessment years 1996-97 and 1997-98. Further, the Petitioner was called upon to pay the same within 30 days, failing which the property sold by the third Respondent will be attached and sold in auction. In response to that, the Appellant sent a legal notice dated November 18, 2002 contending that he is a bona fide purchaser for valuable consideration and he had purchased the property from the third Respondent and not from the second Respondent. But inspite of the reply, another demand notice dated December 13, 2002 was received from the first Respondent u/s 25 of the Tamil Nadu General Sales Tax Act. In the demand order, it is stated that third Respondent has given the property as security to the second Respondent.

4. It is contended by the Appellant that he had no knowledge about the sales tax arrears of the second Respondent and the security given by the third Respondent and he was not put on notice about the sales tax arrears of the second Respondent and the security given by the third Respondent. Aggrieved by the aforesaid demand raised, the Appellant filed the above writ petition, seeking for the issue of a writ of certiorari to quash the order of the first Respondent dated December 13, 2002.

5. The writ petition was dismissed by an order dated July 14, 2005 by the learned judge basing reliance on the decision of the Division Bench of this Court confirming the decision in *N. Padma Coffee Works v. Commercial Tax Officer, Tricky* [1999] 114 STC 494 (TNTST), giving liberty to the Petitioner to agitate all the issues before the appropriate civil court. Being aggrieved by that, the above writ appeal has been filed.

5. Heard both.

7. The learned Counsel for the Appellant submitted that the decision in *N. Padma Coffee Works v. Commercial Tax Officer, Trichy* [1999] 114 STC 494 (TNTST), which has been upheld by the Division Bench judgment of this Court, is not applicable to the facts of the present case because inasmuch as the third Respondent who is vendor was not an Assessee in default at the time when the property was sold to the Appellant. The learned Counsel submits that it was the second Respondent who was the Assessee on the file of the first Respondent and he had not sold the property and as such the property bona fide purchased by the Appellant for valuable consideration and without notice of any arrears of sales tax cannot be proceeded against him.

8. Though no contention has been raised in the memorandum of grounds to the effect that the third Respondent had not created any equitable mortgage in favour of the first Respondent as guarantor of her husband-the second Respondent, such an argument was advanced by the learned Counsel for the Appellant. The learned Counsel submitted that admittedly even according to the

first Respondent, only a letter dated April 2, 1996 was given by the third Respondent stating that she has no objection for her husband to run the business and also has no objection to lease the property belonging to her, bearing SF No. 79 and site No. 422 to her husband. It has been further stated in the said letter that if any default is committed in the payment of sales tax, she had undertaken to pay the same.

9. The learned Government Advocate (Taxes) submitted that along with the said letter dated April 2, 1996, the third Respondent had submitted a copy of the sale deed pertaining to the said property with an intention to give the property as security for payment of any tax arrears that may be due from the second Respondent. The learned Government Advocate further submitted that the contents of the letter dated April 2, 1996 and the deposit of the copy of the sale deed if cumulatively considered then it could be inferred that an equitable mortgage has been created by the third Respondent, who is the wife of the second Respondent. Once equitable mortgage is created then automatically a charge is created over the same as per the provisions of Section 24 of the TNGST Act and only to enforce such a charge, the demand order was passed. If the Petitioner claims to be a bona fide purchaser for valuable consideration without notice of any charge on the property, it is for him to establish the same in a suit and such a disputed question of fact cannot be gone into in a writ petition.

10. Rebutting the contention of the learned Counsel for the Respondents, the learned Counsel for the Appellant submitted that when admittedly the original title deed pertaining to the property sought to be proceeded against has not been deposited with the first Respondent with an intention to create an equitable mortgage, it cannot be contended by the first Respondent that the mere deposit of the copy of the sale deed will create an equitable mortgage, in favour of the first Respondent.

11. The learned Government Advocate submitted that it is not necessary always that an original title deed alone should be deposited for creating an equitable mortgage, but, if a registration copy or a copy of sale deed is deposited and if it is established by acceptable evidence that there was an intention on the part of depositor to create an equitable mortgage, then it is sufficient. In support of the said contention, the learned Government Advocate based reliance on the Division Bench of the Kerala High Court in *C. Assiamma Vs. State Bank of Mysore and Others*, . In the said decision, after considering the provisions contained in Section 58 of the Transfer of Properties Act, 1882, the Kerala High Court has held that it could not be said that merely because the original title deed was not filed, no equitable mortgage was created. It is further held that it could not be said that only in cases where the original title deed is lost the deposit of a registration copy can validly create an equitable mortgage.

12. The learned Government Advocate also relied upon the decision of the Full Bench of this Court in *The Chief Controlling Revenue Authority, Madras Vs. Pioneer Spinners Private Ltd.*, , wherein the Full Bench has held as under:

A mortgage by deposit of title deeds does not require any writing in law. Besides the deeds and the deposit, what is required is an intention that the deeds shall be security for the debt. The existence of the intention is a matter for inference from facts. The existence of the intention may be established by written documents alone, or coupled with oral evidence, or oral evidence only. In a particular case, the circumstances may warrant the inference of a deposit for security from the very fact of deposit. The question whether oral evidence is admissible to explain or establish a deposit of title deeds, would depend on, whether the writing itself has constituted the bargain between the parties. Oral proof cannot be substituted for the written evidence of any agreement, which the parties have put into writing. If the writing evidences the agreement, it must be taken that the parties themselves have tacitly considered the writing as the repository and appropriate evidence of the agreement.

13. Basing reliance on the aforesaid decision, the learned Government Advocate submitted that the question as to whether the third Respondent had deposited the copy of the sale deed with an intention to create an equitable mortgage or not is a disputed question of fact, which could not be gone into in a writ petition, whereas the same can be decided and adjudicated only on evidence to be adduced by either side and that can be done by a properly instituted civil suit and that has also been laid down by the Tamil Nadu Taxation Special Tribunal in the decision in *N. Padma Coffee Works v. Commercial Tax Officer, Trichy* [1999] 114 STC 494 (TNTST), which was subsequently upheld by the Division Bench of this Court and that was the reason why the learned judge has not entertained the writ petition, but has given liberty to the writ Petitioner to file a civil suit.

14. We have considered the above submissions made on either side and we are of the considered view that the issue as to whether any equitable mortgage was created by the third Respondent or not is a question of fact to be pleaded in a suit and decided on the basis of the evidence to be adduced in the suit. Such disputed questions of fact cannot be gone into in the writ petition. Hence, we do not find any error or infirmity in the reasoning of the learned judge and accordingly, as stated above, the writ appeal fails and the same is dismissed and there will be no order as to costs. Consequently, connected miscellaneous petitions are closed.