(2008) 06 MAD CK 0032

In the Madras High Court

Case No : Writ Appeal No. 2066 of 2004

Tarapore and Co. APPELLANT

Vs

Tax Recovery Officer and Another RESPONDENT

Date of Decision : 13-06-2008

Acts Referred:

Constitution of India, 1950 — Article 19
Income Tax Act, 1961 — Section 16(1), 201, 281
Income Tax Rules, 1962 — Rule 11, 11(6), 86

Citation : (2008) 218 CTR 697

Hon'ble Judges : P.P.S. Janarthana Raja, J;K. Raviraja Pandian, J

Bench : Division Bench

Advocate : Ramachandran, for Anita Sumanth, for the Appellant; None, for the Respondent

Final Decision : Dismissed

Judgement

K. Raviraja Pandian, J.—The writ appeal is filed against the order of the dismissal of the writ petition in Writ Petn. No. 14198 of 2000,

wherein, the relief of issuance of a writ of declaration, declaring Rule 11 of the Second Schedule to the IT Act, 1961, as ultra vires and

unconstitutional and consequently to strike down the said rule, has been sought for. The said relief was sought on the ground that the TRO, being a

statutory creation, cannot decide the issue as to the bona fide of the transfer made in respect of the property owned by the alleged defaulter under

the IT Act. Even to find out as to whether any transfer of property was made with the intention to defraud the Revenue, some enquiry has to be

conducted under Rule 11(6) of the Act. Such enquiry can only be carried out by a competent Civil Court. Such power vested with the TRO to

conduct an enquiry is illegal and against the Article 19 of the Constitution of

India.

2. The above writ petition came to be filed in the following circumstances:

One late Loganatha Mudaliar is defaulter in payment of Income Tax and in order to recover the same, his 50 per cent of the share in immovable

property called Dhun Building, Mount Road, Chennai, was attached on 1st Feb., 1998 by issuance of an order of attachment. Pursuant to the

same, the TRO has asked the managing director of the appellant/writ petitioner company to furnish copies of the title deeds and sketch of the

superstructure for their record purpose. The appellant made a representation objecting that. When the TRO proposed to settle the proclamation of

sale on 12th Feb., 1996, the appellant challenged the settlement proclamation by filing a writ petition in Writ Petn. No. 1919 of 1996. After the

sale, he filed another writ petition challenging the proclamation itself in Writ Petn. No. 2480 of 1996. Those two writ petitions were filed on the

ground that the settlement of proclamation and proclamation were made without following due process of law contemplated under Rule 11 of the

IT Rules, i.e., no enquiry, as required under the rules, has been conducted. The said writ petitions came to be disposed of by setting aside the

proclamation directing the TRO to hold the enquiry after giving opportunity to the appellant and investigate the appellant''s claim under Rule 11 of

the Second Schedule. Further, the TRO was directed to consider all such evidence as the appellant might choose to place before him in support of

his said claim. After that, the writ petition, which is the subject-matter of the appeal came to be filed challenging the very provision itself. The said

writ petition was dismissed by observing as follows:

7. I am not able to accept the submission of the learned senior counsel so as to declare the said Rule 11 as ultra vires. Even to find out as to

whether any transfer of property is made with intention to defraud the Revenue, some enquiry has to be conducted under the Rule 11(6).

Moreover, the observation of the apex Court is only in cases, where the property is transferred with intention to defraud the Revenue, such suit has

to be filed by the Department and not in other cases. Merely because such observation is made, it cannot be said that the Rule 11(6), in which the

parties are directed to file suit, has to be declared as unconstitutional.

8. The next submission made by the learned senior counsel for the petitioner is

that the officer, belongs to the Department cannot decide his own

case, and so the said provision cannot be sustained. But unfortunately, this issue has not been raised in the said writ petitions in Writ Petn. Nos.

1919 and 280 of 1996. In the said writ petitions, the learned Judge has directed the TRO, to proceed further after giving due notice to the

petitioner to hold an enquiry. So, at this stage, the petitioner cannot challenge the said provision, on the ground that the TRO is a Departmental

officer. Even if any order is passed by the TRO against the interest of the petitioner, it can always file an appeal before the Chief CIT or CIT under

Rule 86 to the Schedule.

The correctness of the said order is now canvassed in this writ appeal.

3. The learned Counsel appearing for the appellant submitted that the writ petition came to be filed in the year 2000. During the pendency of the

writ petition as well the writ appeal, there was no interim order granted and tax might have been recovered by the first respondent. In those

circumstances of the case, he required some time to get instructions to proceed with the case.

4. We heard the argument of the learned Counsel appearing on either side and perused the material.

As narrated in the summation of facts, on 2nd Feb., 1996, the TRO intimated the legal representatives of Loganatha Mudaliar, as also the

appellant firm, which had been constituted prior to the demise of the said Loganatha Mudaliar and which owns the property, that he proposed to

settle the proclamation of sale on 12th March, 1996. That communication has been challenged by the appellant in Writ Petn. No. 1919 of 1996.

Despite the interim order made by this Court in that writ petition, a proclamation of sale having been issued by the TRO on 26th Feb., 1996 and

that proclamation was challenged in Writ Petn. No. 2480 of 1996. Before this Court, the appellant submitted that both u/s 16(1) (sic) and u/s 201,

the TRO has no power to declare what is otherwise a valid transaction as invalid and void. Those writ petitions were disposed of by this Court on

20th Nov., 1998 by observing that the ""Rule 11 of the rules in the Second Schedule to the Act is a rule, which confers a valuable right to the

persons, who claim rights in the properties, which are sought to be attached or sold by the authorities for recovery of dues under the Act. The rule requires that an enquiry be held with regard to such claim and in cases, where it is found that he is not in possession of the property in his own

right, the attachment be withdrawn. It is only when it is found that the assessee in default is someone acting on his behalf or holding it in trust for him

is in possession, further proceedings are to be taken. Rule 11 seeks to render the order of the TRO as final, subject to the right of aggrieved

person to file a suit. In the rules, even the TRO is required to file a suit, if he chooses to record as otherwise a valid transaction as void on account

of contravention of Section 281 of the Act."" The right under Rule 11 being a valuable right, that rule cannot be bypassed in the manner done by the

TRO.

5. While that being so, the assessee, by filing this writ petition challenges the very provision of Rule 11 as ultra vires without any cause of action.

The rule requires an enquiry to be held with regard to any claim and in cases, where it is found that the person is not in possession of the property

in his own right, attachment be withdrawn. It is only when it was found that the assessee in default or someone acting on his behalf or holding in

trust for him is in possession, further orders are to be passed. That order is also subject to the right of the aggrieved party to file a suit. There is no

arbitrariness in this provision. On the other hand, it only safeguards the interest of the parties. The other contention that the Department cannot

decide its own case cannot be a ground for declaring the provision as invalid. Any dispute in the tax law cannot be regarded as adversarial one.

The authorities under the Act are vested with the power to see whether the tax has been paid as required under law and adjust the same in

accordance with the statutory provisions. The statutory authorities under the Act, who are vested with the power to see that the assessee has paid

the tax in accordance with law, cannot be regarded as persons acting adversarial to the interest of the assessee and thus they cannot be treated as

deciding their own case. If the appellant is not satisfied with the enquiry conducted by the TRO, it is open to him either to file a suit or challenge the

same in the procedure known to law.

6. The appellant filed earlier writ petition as stated already by Contending that the settlement of proclamation is not in accordance with Rule 11 and

obtained a favourable order. Then once again he sought to challenge the very provision with which he has taken umbrage in the earlier

proceedings, by taking a different stand now, which is impermissible in law and the attitude of the appellant reveals that the appellant filed repeated

writ petitions in desperation in order to prevent the recovery officer from proceeding against the property. In the impugned order, it has been

stated that the appellant cannot go on filing writ petition after writ petition without raising all the points in the earlier writ petition. Such sort of

repeated filing of writ petitions has been deprecated by the latest decision of the Supreme Court in the case of Udyami Evam Khadi Gramodyog

Welfare Sanstha and Another Vs. State of U.P. and Others, in which the Supreme Court observed that the person who comes for equitable

remedy must come with clean hands and should not take recourse to the legal proceedings over and over again, which amounts to abuse of

process of law.

7. In terms of the above judgment and for the reasons stated supra, the writ appeal is dismissed. No costs.