

(2014) 07 MAD CK 0274

In the Madras High Court

Case No : Writ Appeal (MD) Nos. 600 to 602 of 2008, 46 to 48 of 2009 and Writ Petition (MD) Nos. 754 to 764 of 2013

The District Collector

APPELLANT

Vs

K.K. Dinakaran

RESPONDENT

Date of Decision : 04-07-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 21, Order 21 Rule 90
Constitution of India, 1950 — Article 300A
Madras Revenue Recovery Act, 1864 — Section 35, 36, 37, 37A, 38
Tamil Nadu Sales Tax (Settlement of Arrears) Act, 2010 — Section 12(1), 12(1), 4, 5(1), 6(1)

Citation : (2014) 5 LW 64

Hon'ble Judges : V.M. Velumani, J;V. Ramasubramanian, J

Bench : Division Bench

Judgement

V. Ramasubramanian, J.—A Company by name M/s. Varuni Biomass Energy Products Private Limited started an industry for the manufacture of sulfuric acid and elemental sulphur. The company took on lease, a land owned by four brothers by name K.K. Surendranath, K.K. Dinakaran, K.K. Gnanaprabhakaran and K.K. Karunakaran. All of them were shareholders in the company and the land was of the extent of an about 3.82 acres in Survey No. 235/6B of Kullallkundu Village. The Company was granted the facility of deferred payment of sales tax by the Government of Tamil Nadu, for the period from 29.05.1994 to 28.05.2003. The facility was governed by an agreement dated 27.09.2004 entered into between the Company and the Assistant Commissioner of Commercial Taxes (East).

2. After the advent of Sterlite Industries in the locality, the aforesaid company went into severe financial crisis and it made an application in the year 2001 to the Government for rehabilitation under the Tamil Nadu Industrial Undertakings (Rehabilitation) Act.

3. However, the Commercial Tax Officer, issued a notice on 09.01.2002 to the

Company stating that it had become ineligible for the continuance of the deferral scheme, in view of the stoppage of production for six months continuously. The Company gave a reply dated 25.01.2002 pointing out that it had become a sick industrial undertaking and that it had applied to the Government for rehabilitation.

4. However, the Commercial Tax Officer, made a demand on 22.10.2002 for payment of arrears of sales tax to the tune of Rs. 45,67,264/-. Since the Company could not pay the amount, the Deputy Commercial Tax Officer, initiated revenue recovery proceedings by issuing a sale notice dated 30.07.2004 in form VII-A.

5. The sale notice was challenged by the Company by way of a writ petition in W.P(MD)No. 1964 of 2004.

6. A fresh notice was issued on 01.11.2004 by the Assistant Commissioner (CT), seeking to cancel the agreement facilitating the deferral payment of tax, on the ground of stoppage of production for six months. This notice was challenged in another writ petition in W.P(MD)No. 4842 of 2004.

7. However, on 09.07.2007, the first writ petition in W.P(MD)No. 1964 of 2004 was dismissed. But the second writ petition in W.P(MD)No. 4842 of 2004 was disposed of on 21.07.2007 directing the Company to file objections to the notice within four weeks.

8. Since the Company did not submit objections within the time, a sale notice was issued by the Deputy Commercial Tax Officer on 12.03.2008. On the 7th day namely, 19.03.2008, an auction was conducted. On the 14th day namely, 26.03.2008, the Deputy Commissioner (Commercial Taxes) approved the highest bid of one K. Govindaraj and the Sale Certificate was issued on 21.04.2008.

9. Immediately, a writ petition in W.P(MD)No. 3847 of 2008 was filed by the Company, challenging the sale notice dated 12.03.2008. Subsequently, a second writ petition was filed in W.P. (MD)No. 4378 of 2008 challenging the order of approval of the auction dated 26.03.2008 and the Sale Certificate dated 21.04.2008.

10. While both the above writ petitions were filed by the Company, yet another writ petition was filed in W.P(MD)No. 5324 of 2008 by one of the shareholders of the Company by name K.K. Dinakaran, challenging the sale notice, sale confirmation and sale certificate. This was on the ground that his personal property, which was not the property of the Company, had also been sold in public auction, without the authority of law.

11. All the three writ petitions namely, W.P(MD) Nos. 3847, 4378 and 5324 of 2008, were taken up together and they were allowed by a learned Judge by a common order, dated 17.09.2008. The grounds on which the learned Judge allowed the writ petitions were (i) that there was a total violation of Section 36 of the Tamil Nadu Revenue Recovery Act, 1864 inasmuch as the sale took place

within a period of seven days from the date of the sale notice, as against the statutory prescription of 30 days (ii) that the sale confirmation took place within 30 days contrary to the prescription contained in Section 38 of the Tamil Nadu Revenue Recovery Act, 1864 and (iii) that valuable property rights of an individual shareholder of the Company, stood violated, by the sale of his property for the dues of the Company.

12. Even while allowing the writ petitions, the learned Judge took into account the interests of the State. Therefore, the learned Judge called upon the Company as to how, they propose to discharge the dues to the State. In response to the said query, one of the shareholders of the Company appears to have filed an affidavit of undertaking, agreeing to pay a sum of Rs. 45,67,264/- together with poundage (wrongly mentioned as interest) at 5%, as a pre-condition for setting aside the sale. The learned Judge directed the Company also to deposit, as per the undertaking within four weeks. At the same time, the learned Judge left it open to the Company to move the Government for waiver of interest due to the declaration of sickness of the industry. The learned Judge made it clear that if the Company failed in its commitments or if the Government did not grant any relief, within eight weeks, it was open to the Department to bring the property for sale once again.

13. To appreciate the manner in which the directions with which the writ petitions were disposed of, it is necessary to extract the operative portion of the judgment of the learned Judge dated 17.09.2008 passed in W.P(MD) Nos. 3847, 4378 and 5324 of 2008. Paragraphs 36 to 40 of the judgment read as follows:--

"36. On the basis of the rival submissions and the precedents the following propositions emerge:--

"(i) The procedure under the Revenue Recovery Act for selling the property of the judgment-debtor must be strictly followed.

(ii) The illegalities in procedure will vitiate the sale.

(iii) The land owner whose property illegally sold is entitled to move this Court notwithstanding the remedy of the suit under Section 59.

(iv) In an auction sale the properties of the company can be brought to sale and not the properties of the Directors of the Company.

(v) In case of sale of third parties, they are entitled for the notice.

37. In the present case, the procedure for selling the properties by revenue recovery proceedings, the legal procedure was not followed. No wide publicity was given. The time gap provided under Sections 36 and 38 TNRR Act was not followed. The right of the independent owners including the petitioner in W.P. No. 5234 of 2008 was infringed as no notice was given to him and his brother who were no way connected with the company. (Though such a notice was given to them when auction notice was issued during the year 2004).

38. In the light of the same, these writ petitions are liable to succeed and the impugned notices are bound to set aside. In the present case, on behalf of the company, one Director K.K. Gnanaprabhakaran had filed an affidavit of undertaking to pay Rs. 45,67,264/- together with 5% interest as a precondition for setting aside the sale. Therefore, the petitioner company in W.P. Nos. 3847 and 4378 of 2008 are directed to deposit as undertaken by them vide undertaking dated 25.08.2008 within a period of four weeks from the date of receipt of a copy of this order.

39. The sale made in favour of K. Govindaraj the successful auction purchaser is hereby set aside and the Commercial Tax Department is directed to refund the amount taken from the auction purchaser within two weeks from the date of receipt of a copy of this order. It is open to the petitioner Company to move the Government for waiver of interest due to sickness faced by the company. If such a relief is not given by the Government, within 8 weeks from the date of receipt of the order, it is open to the department to bring the properties of the company for sale by invoking Revenue Recovery proceedings in accordance with law.

40. In the light of the above, all the writ petitions are disposed of accordingly. No costs. All the Miscellaneous Petitions will stand closed".

14. As against the said common order in the aforesaid three writ petitions, the auction purchaser filed three writ appeals in W.A(MD) Nos. 600 to 602 of 2008. The Government filed three writ appeals in W.A (MD) Nos. 46 to 48 of 2009. Interestingly, the Company also filed two appeals with regard to one portion of the order directing them to make payment. These appeals namely, W.A(MD) Nos. 632 and 633 of 2008 were later withdrawn by the Company.

15. Therefore, we have on hand three writ appeals filed by the auction purchaser and three writ appeals filed by the State against the common order passed by the learned Judge in three writ petitions.

16. It appears that during the pendency of the above writ appeals, the State of Tamil Nadu enacted the Tamil Nadu Sales tax (Settlement of Arrears) Act, 2010, providing for the settlement of arrears of tax, penalty or interest pertaining to sales tax and the matters connected therewith. Under Section 4 of the said Act, a defaulter was made eligible to make an application for settlement of arrears of tax, penalty or interest, in respect of which, assessment has been made, prior to the first of April 2007 and against which no appeal or revision was pending, before any Court on the date of filing the application. This application is to be made to the Designated Authority and upon receipt of such application, the Designated Authority is obliged to verify the particulars and determine the amount payable by the applicant, in terms of Section 6(1).

17. Thereafter, the amount so determined has to be paid by the applicant and upon such payment, a certificate should be issued by the Designated Authority under Section 8(1) about the discharge of liability. Upon coming to know of the said Act and by making use of the liberty granted by the learned single Judge,

the Company filed an application under the said Act in Form I on 30.12.2010. Upon being satisfied in terms of Section 8(1), the Designated Authority issued a certificate of settlement by proceedings, dated 16.03.2011. Therefore, the entire tax together with the penalty and other charges as determined under Section 6(1) of the Tamil Nadu Sales Tax (Settlement of Arrears) Act, 2010, was also paid by the Company.

18. But unfortunately what happened thereafter deserves to be treated as a suspense thriller. The Joint Commissioner of Commercial Tax, after almost 21 months of the issuance of the certificate of settlement, issued a series of show cause notices dated 27.12.2012 (for each assessment year), for the revocation of the certificates of settlement, in terms of Section 12 (1) of the Tamil Nadu Sales tax (Settlement of Arrears) Act, 2010. This appears to have been done at the instigation of the auction purchaser. Therefore, the Company has been forced to come up with a fresh set of writ petitions in W.P(MD) Nos. 754 to 764 of 2013 challenging the show cause notices on the ground that they have been done with malicious intention to help the third party auction purchaser. Therefore, these writ petitions were also taken up together for disposal.

19. We have heard Mr. Vijay Narayan, learned Senior Counsel for the auction purchaser who is the appellant in three writ appeals, Mr. M. Alagadevan, learned Special Government Pleader appearing for the State which is the appellant in three writ appeals, Mr. A.R.L. Sundaresan, learned Senior Counsel appearing for the shareholder of the company whose property was sold and Mr. K. Govindarajan, learned counsel for the Company.

Writ Appeals

20. As we have seen in the narration of facts, what were under challenge before the learned Judge were (i) the auction notice dated 12.03.2008 (ii) the approval of the highest bid dated 26.03.2008 and (iii) the confirmation of sale dated 21.04.2008. There is no dispute about the crucial dates around which the fulcrum of the case revolves. They are (i) the auction sale notice was published on 12.03.2008, (ii) the auction was held on 19.03.2008 and (iii) the approval of the highest bid took place on 26.03.2008.

21. There is also no dispute about the fact that the Commercial Taxes Department brought both the properties of the Company as well as the property of an individual shareholder to sale, through public auction, in accordance with the procedure under the Tamil Nadu Revenue Recovery Act, 1864. Therefore, it is necessary to have a look at some of the relevant provisions of the Act.

22. Section 36 of the Act reads as follows:

"36. Procedure in sale of immovable property:- In the sale of immovable property under this Act the following Rules shall be observed:--

1st: Public auction:- The sale shall be public auction to the highest bidder. The time and place of sale shall be fixed by the Collector of the District in which the

property is situated, or other officer empowered by the Collector in that behalf. The time may be either previous to or after the expiration of the fasli year.

2nd : Notification one month before sale:-Previous to the sale, the Collector, or the other officer empowered by the Collector in that behalf, shall issue a notice thereof in English and in the language of the district, specifying the name of the defaulter; the position and extent of land and his buildings thereon; the amount of revenue assessed on the land, or upon its different sections; the proportion of the public revenue due during the remainder of the current fasli; and the time, place and conditions of sale. This notice shall be fixed up one month at least before the sale in the Collector's office and in the Taluk Cutchery, in the nearest police station-house, and on some conspicuous part of the land.

3rd: Deposits by purchaser:- A sum of money equal to fifteen per cent of the price of the land shall be deposited by the purchaser in the hands of the Collector, or other officer empowered by the Collector in that behalf, at the time of the purchase, and where the remainder of the purchase-money may not be paid within thirty days, the money so deposited shall be liable to forfeiture.

4th: Resale in default of payment:- Where the purchaser may refuse or omit to deposit the said sum of money, or to complete then payment of the remaining purchase-money, the property shall be re-sold at the expense and hazard of such purchaser, and the amount of all loss or expense which may attend such refusal or omission shall be recoverable from such purchaser in the same manner as arrears of public revenue. Where the lands may, on the second sale, sell for a higher price than at then first sale, the difference Or increase shall be property of him on whose account the said first sale was made.

5th: Agents to name Principals:- All persons bidding at a sale may be required to state whether they are bidding on their own behalf or as agents, and, in the latter case, to deposit a written authority signed by their principals. If such requisition be not complied with, their bids may be rejected".

23. A careful look at Section 36 would show that the notice for the sale of the property should be fixed up at least one month before the sale in the Collector's Office and in the Taluk Office and in the nearest Police Station-House as well as in some conspicuous part of the land.

24. This time limit is of great significance in view of the right conferred upon the defaulter under Section 37. Section 37 enables a defaulter to tender all the arrears together with the penalty as well as the charges incurred by the State, before sunset on the day previous to that appointed for the sale. This right to make payment which flows out of Section 37, is conferred not merely upon the defaulter or the owner of the property but also upon any tenant, or bona fide mortgagee, or other encumbrancer or any person bona fide claiming an interest in the estate adverse to the interest of the defaulter. Section 37 reads as follows:--

"37. Tender of arrears up to sunset on day before sale:- It shall be competent to the defaulter or to any person acting on his behalf, or claiming an interest in the land, to tender the full amount of the arrears of revenue with the penalty thereon, and all charges, which have been incurred in demanding the arrears, or in attaching or managing the estate or in taking the steps necessary for sale, and thereupon the sale shall be stayed:

Provided always that such tender must be made before sunset on the day previous to that appointed for the sale, and all sums paid under this or the next succeeding section by any tenant, or bona fide mortgagee, or other encumbrancer or any person bona fide claiming an interest in the estate adverse to the defaulter may be recovered in the manner provided in Section 35".

25. The right conferred upon the borrower, the tenant or encumbrancer or any person bona fide claiming an adverse interest cannot be made illusory by reducing the period of one month fixed under Section 36.

26. Section 38 confers a right to seek to set aside the sale. It reads as follows:

"38. Application to set aside sale: (1) At any time within thirty days from the date of the sale of immovable property, application may be made to the Collector to set aside the sale on the ground of some material irregularity, or mistake, or fraud, in publishing or conducting it; but, except as otherwise hereinafter provided, no sale shall be set aside on the ground of any such irregularity or mistake unless the applicant proves to the satisfaction of the Collector that he has sustained substantial injury by reason thereof.

(2) If the application be allowed, the Collector shall set aside the sale and may direct a fresh one.

(3) Order confirming or setting aside the sale:- On the expiration of thirty days from the date of the sale, if no application to have the sale set aside is made under Section 37-A or under clause(1) of this Section or if such application has been made and rejected, the Collector shall make an order confirming the sale, provided that, if he shall have reason to think that the sale ought to be set aside notwithstanding that no such application has been made or on grounds other than those alleged in any application which has been made and rejected, he may, after recording his reasons in writing, set aside the sale.

(3-A) No sale shall be set aside by the Collector under sub section (2) or sub section (3), unless the purchaser has had a reasonable opportunity of making his representations.

(4) Refund of deposit or purchase-money when sale set aside:- Whenever the sale of any lands is not so confirmed or is set aside, the deposit or the purchase-money, as the case may be, shall be returned to the purchaser.

(5) On confirmation of sale Purchaser's name to be registered:- After the confirmation of any such sale, the Collector shall register the lands sold in the

name of the person declared to be the purchaser and shall execute and grant a certificate of sale bearing his seal and signature to such purchaser.

(6) Certificate of Sale:- Such certificate shall state the property sold and the name of the purchaser, and it shall be conclusive evidence of the fact of the purchase in all Courts and Tribunals, where it may necessary to prove the same; and no proof of the Collector's seal or signature shall be necessary, unless the authority before whom it is produced shall have reason to doubt its genuineness".

27. This right is also a very valuable right which has more sanctity than even a right of redemption. Therefore, it is clear that the period of 30 days fixed under Section 36, first for the period of sale notice and then for the confirmation of auction, cannot be rendered otiose or useless by the authorities carrying out things in haste. The date of the auction sale notice, the date of the auction and the date of confirmation clearly show that the respondents violated the clear mandate of the law without a wink of the eyes. This is why the learned Judge held that the entire auction sale was completely vitiated and that when the Statute prescribes something to be done in a particular manner, it had to be done in the same manner and not otherwise. In the case on hand, the statutory prescription in Sections 36 and 38 were not ornamental in nature but they were substantial in view of the fact that any sale under the Act, was intended to take away the valuable property rights of the owners. The right to property recognised by Article 300-A of the Constitution is not merely a property right but also held to be a human right. Therefore, if the deprivation of the said valuable human right is required to be done in a particular manner as per law, it shall be done only in that manner and not otherwise.

28. Mr. Vijay Narayan, learned Senior Counsel appearing for the auction purchaser appellant in W.A.(MD)Nos. 600 to 602 of 2008, relied upon the following decisions:--

"(i) Calcutta Chromotype Ltd. Vs. Collector of Central Excise, Calcutta, ,

(ii) Singer India Ltd. Vs. Chander Mohan Chadha and Others, and

(iii) Saheb Khan Vs. Mohd. Yusufuddin and Others, ."

29. In Calcutta Chromotype Ltd., the Supreme Court considered the question of lifting the corporate veil, when the identity of the individual and the Company or the identities of two Companies are not so distinct and different. This decision is relied upon by the learned Senior Counsel, for attacking the claim made by the individual shareholder about his own property being sold. But we do not think that we need to go into the said issue as we have found that there has been very clear violation of the statutory prescriptions.

30. The decision in Singer India Ltd., is also to the same effect that the Courts in appropriate cases can lift the corporate veil and find out the real identity of parties. Therefore, the said decision is also of no assistance.

31. In *Saheb Khan*, the Supreme Court was concerned with a sale made by the Executing Court, in terms of Order 21 Rule 90 of the Civil Procedure Code. Since sub Rule (2) of Rule 90 of Order 21, contains a restriction with regard to the ground on which a sale can be set aside, the Supreme Court found fault with the High Court in setting aside the sale, especially in view of the fact that the sale itself was in execution of a decree in terms of Order 21 itself. But here, the sale was in exercise of the power conferred by Section 36 of the Tamil Nadu Revenue Recovery Act, 1864. The mandate contained in the Act, has been violated very clearly by the respondents. Therefore, no analogy can be drawn from Order 21 Rule 90 of the Code of Civil Procedure, when the Statute under which the sale took place in this case, has different prescriptions.

32. In *Vasu P. Shetty Vs. Hotel Vandana Palace and Others*, , the Supreme Court held very clearly that the moment we find that the mandatory requirement of the Rules had not been waived by the borrower, the consequences in law have to follow. When there is a breach of the mandatory requirement, the sale is to be treated as null and void.

33. In *Mathew Varghese Vs. M. Amritha Kumar and Others*, which was what was cited with approval in *Vasu P. Shetty*, the Supreme Court held that though the recovery of public dues should be made expeditiously, it should be in accordance with the procedure prescribed by law and that it should not frustrate a Constitutional Right, as well as the Human Right of a person to hold a property. Consequently, if a fundamental procedural error had occurred in a sale, the same has to be necessarily set aside.

34. Therefore, it is clear that the learned Judge was perfectly justified in setting aside the sale. Hence, there are no merits in the writ appeals. Accordingly, the writ appeals are dismissed.

Writ Petitions

35. Under normal circumstances, we would not interfere with the show cause notices and we would never entertain the plea of mala fide against the statutory authorities when show cause notices are issued in exercise of a specific power conferred under the statute. But in this case, the auction purchaser, has come up with applications for impleading himself in the writ petitions, thereby exposing the tacit understanding and the tacit collusion that he has had with the authorities. Keeping aside the allegations of mala fide, despite the fact that the things speak more eloquently for themselves, we have examined the correctness of the show cause notices. The show cause notices are issued on three grounds namely (a) that the principal amount of Rs. 45,67,264/- was not paid but only kept in deposit by the Company and hence, it did not satisfy the requirement of Section 5(1); (b) that the Company was ineligible for settlement in terms of Section 4 since no appeal or revision should have been pending before any Court on the date of filing application and (c) that whenever there was any suppression of material information, the certificate of settlement could be revoked under

Section 12(1) of the Tamil Nadu Sales tax (Settlement of Arrears) Act, 2010.

36. But all the above three grounds appear to be completely misconceived and wholly arbitrary. The fact that the Company has deposited Rs. 45,67,264/- with the Assistant Commissioner (Commercial Taxes) is not in dispute. The respondent claims that since it has been deposited in the form of a fixed deposit renewable from time to time, it cannot be taken to be a valid payment under Section 5(1).

37. But we do not think so. The fixed deposit was made in pursuance of the orders of this Court. Therefore, when an application under Section 5(1) is filed along with an authorisation for encashing the sale proceeds of the fixed deposits the same amounts to valid tender and payment. Hence, the first ground on which the certificate of settlement is sought to be revoked cannot be approved.

38. The second ground on which the respondent seeks to revoke the certificate of settlement is that the Company was not eligible for invoking the benefit of the Act in view of the prescription contained in Section 4 of the Tamil Nadu Sales tax (Settlement of Arrears) Act, 2010. Section 4 of the Act reads as follows:--

"4. Eligibility for settlement:- Subject to the other provisions of this Act, an applicant may make an Application for settlement of arrears of tax, penalty or interest in respect of which assessment has been made under the relevant Act, prior to the 1st day of April 2007, against which an Appeal or Revision is not pending before any Court on the date of filing Application".

39. A careful look at Section 4 of the Act would show that the applicant should satisfy two conditions. They are (i) the assessment should have been made prior to 01.04.2007 and (ii) no appeal or revision should be pending before any Court against such assessment.

40. The fact that the assessment in these cases, was made prior to 01.04.2007 is not in dispute. But according to the respondent, the second condition is not satisfied in this case inasmuch as the writ appeals arising out of the auction sale were pending on the file of this Court. But we do not think that this is a correct reading of the second condition prescribed in Section 4 of the Act.

41. The second condition prescribed in Section 4 is that no appeal or revision "against assessment" should have been pending on the date of the application. In this case, no appeal or revision was pending against the assessment. What were pending were writ appeals arising out the auction sale. These writ appeals did not challenge the assessment orders. Therefore, the respondent is under a complete misconception in thinking that the pendency of the writ appeals arising out of the auction sale, tantamounted to the pendency of appeals arising against the assessments.

42. The third ground that there was suppression of material information in terms of Section 12(1) of the Tamil Nadu Sales tax (Settlement of Arrears) Act, 2010 is also not borne out by records. According to the respondents, the mere deposit of

the amount in the fixed deposits, would not tantamount to a payment under Section 5(1) of the Act and hence, they contend that there was misrepresentation. But we do not think so. Section 5(1) does not prescribe any particular method of payment. The fact that the fixed deposit receipts were entrusted with the Department is not in dispute. Therefore, all the grounds on which the show cause notices are issued, are wholly unsustainable and arbitrary. The fact that these notices were issued after 21 months and the fact that the auction purchaser has come up with an application for impleading himself as a party to these writ petitions, is ample proof to show that there is something more than what meets the naked eye. Therefore, the writ petitions are allowed. The impleading petition is dismissed as the third party auction purchaser has nothing to do with the settlement reached between an assessee and the Commercial Taxes Department. In the result, all the writ appeals of the auction purchaser and all the writ appeals of the State arising out of the auction sale are dismissed. The writ petitions filed by the assessee are allowed and the impugned notices are set aside. The Company and the owner of the property are permitted to take actual physical possession. The Department as well as the Police shall render necessary assistance, to enable owners to take possession of the property, within a week of receipt of a copy of this order. The Department shall refund to the auction purchaser, the amount deposited by him, after deducting the value of the machinery, which he is stated to have taken away forcibly. No costs. Consequently, connected miscellaneous petitions are closed.