

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

WRIT PETITION NO. 3815 OF 2021

Nitin Nagarkar, }
401, B Wing, Two Roses, }
Dr. Ambedkar Road, }
Opp. HDFC, Pali Naka, }
Bandra (West), }
Mumbai – 400050 } .. Petitioner

Versus

Income-tax Officer, }
Ward-23(2)(6), Mumbai, }
Room No. 107, 1st Floor, }
Matru Mandir, Tardeo Road, }
Mumbai – 400007 & Ors. } .. Respondents

Mr. Madhur Agrawal a/w Mr. Fenil Bhatt i/b Mr. Atul K. Jasani, Advocates
for the Appellant.

Mr. Akhileshwar Sharma, Advocate for the Respondents.

**CORAM : DHIRAJ SINGH THAKUR AND
VALMIKI SA MENEZES, JJ.**

DATE : 19th JULY, 2022

(PER DHIRAJ SINGH THAKUR, J.):

. With the consent of learned Counsel for both the parties, the petition
is taken up for final disposal at the admission stage.

2. The Petitioner has challenged *inter alia* the order dated 27th June,
2007 passed by Respondent No. 2 in purported exercise of power under

Section 281 of the Income Tax Act, 1961 (The Act, 1961).

3. Briefly stated the material facts are as under:

The Petitioner claims that he purchased a property being land and farm house situated at village Bawdhan in District- Pune, vide deed of conveyance dated 05th August, 1997. According to the deed of conveyance, Vendor No. 1 transferred the land in favour of the Petitioner whereas Vendor No. 2 namely Mr. K. K. Mistri transferred the farm house in the name of the Petitioner for an agreed consideration.

4. It is submitted that after about 10 years of purchase of the said land by the Petitioner, Respondent No. 2 passed the impugned order dated 27th June, 2007, purportedly in exercise of powers under Section 281 of the Act, 1961, on the ground that the assessee i.e. K. K. Mistri had created a charge on the said property and parted with the possession by way of sale deed in favour of the Petitioner during the pendency of the assessment proceedings against the assessee and was, therefore, void in terms of Section 281(1) of the Income Tax Act, which reads as under:

“281. Certain transfers to be void.-(1) Where, during the pendency of any proceeding under this Act or after the completion thereof, but before the service of notice under rule 2 of the Second Schedule, 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 other 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 as a result of the completion of the said proceeding or otherwise:

Provided that such charge or transfer shall not be void if it is made-

- (i) for adequate consideration and without notice of the pendency of such proceeding or, as the case may be, without notice of such tax or other sum payable by the assessee ; or
- (ii) with the previous permission of the [Assessing] Officer.”

5. Learned Counsel for the Petitioner urged that the order impugned passed by Respondent No. 2 was contrary to the ratio of the judgment of Supreme Court in the case of **Tax Recovery Officer V/s. Gangadhar Vishwanath Ranade**¹.

The Supreme Court in the judgment (supra), while confirming the Division Bench judgment of the Bombay High Court held that the Tax Recovery Officer (for short “TRO”) could not have examined, whether the transfer was void under Section 281 and that his adjudication of the transfer as being void under Section 281, was without jurisdiction and that the jurisdiction of TRO relates to examining possession, and only incidentally, any question of right to possession as claimed by the objector.

It was held :

“12. In the light of this discussion about the provisions of Order XXI rules 58 to 63, if we examine rule 11(4) of the Second Schedule to the Income-tax Act, it is clear that the TRO is required to examine whether the possession of the third party is of a claimant in his own right or in trust for the assessee or on behalf of the assessee. If he comes to a conclusion that the transferee is in possession in his or her own right, he will have to raise the attachment. If the department desires to have the transaction of transfer declared void under section 281, the department, being in the position of a creditor, will have to file a

¹ (1998) 100 Taxman 236 (SC).

suit for a declaration that the transaction of transfer is void under section 281.”

6. Incidentally, a Division Bench of this Court in the case of ***Ms. Ruchi Mehta V/s Union of India***² considered the same order dated 27th June, 2007 which is also impugned in the present petition, followed the ratio of the judgment in Gangadhar’s case and declared the order passed by the TRO in terms of Section 281 of the Act, 1961 as void and without jurisdiction. The order was also held to be bad on the ground that no opportunity was at all given to the Petitioner in the said case before exercising jurisdiction under Section 281, which was thus held to be in violation of principles of the natural justice.

7. Be that as it may, following the ratio of the Supreme Court judgment in the case of *Tax Recovery Officer V/s. Gangadhar Vishwanath Ranade* as also the view already expressed by the co-ordinate bench in the case of *Ms. Ruchi Mehta V/s Union of India*, we hold that the order impugned in declaring the transfer of the property in favour of the Petitioner as void in terms of Section 281 of the Act, 1961, is without jurisdiction and is, accordingly, set aside.

8. We however make it clear that the Respondents would be entitled to proceed in the matter by following the due procedure.

(VALMIKI SA MENEZES, J.)

(DHIRAJ SINGH THAKUR, J.)

² [2008] 170 Taxman 289 (Bombay).