
(2015) 06 BOM CK 0299
In the Bombay High Court
Case No : Writ Petition No. 3742 of 2012

Hotel Paras Garden

APPELLANT

Vs

Central Bank of India

RESPONDENT

Date of Decision : 10-06-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 19, Order 21 Rule 22, Order 21 Rule 54(1A), Order 21 Rule 54(1-A), Order 21 Rule 66(2)
Constitution of India, 1950 — Article 226, 227
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 17, 19, 19(22), 20, 25
State Financial Corporations Act, 1951 — Section 29

Citation : (2015) 6 MhLj 152 : (2015) 131 SCL 725

Hon'ble Judges : B.P. Dharmadhikari and S.B. Shukre, JJ.

Bench : Division Bench

Advocate : P.S. Sadavarte and K.P. Sadavarte, Advocates, for the Appellant;
N.W. Almelkar and S.S. Ghate, Advocates, for the Respondent

Final Decision : Dismissed

Judgement

B.P. Dharmadhikari, J.—This Court has issued notice for final disposal on 29/08/2012. Accordingly, we have heard Shri Sadavarte, learned counsel for the petitioners, Shri Almelkar, learned counsel for respondent Nos. 1 & 2 and Shri Ghate, learned counsel for respondent No. 3 finally, by issuing Rule and making it returnable forthwith. We have also perused the orders dated 14/02/2013 and 27/06/2013 passed by us in this matter. Petitioner No. 1 - a Hotel establishment and Petitioner No. 2, its proprietor, question before this Court, recovery of loan by Respondent No. 1 - Secured creditor in Recovery Proceedings No. 9 of 2006. The prayer is, as Bank and Recovery Officer failed to comply with the mandatory provisions of Rules 48, 49, 50 and 52 of Second Schedule appended with the Income-tax Act, 1961, and did not adopt fair and proper procedure, the sale of subject property by auction, be quashed and set aside and property should be restored back to the petitioners. In the alternative, prayer is to condone delay in

preferring an application under Rule 61 of the above mentioned Second Schedule and to direct the Recovery Officer to accept the said application for setting aside of sale dated 28.03.2012 and to set it aside. The petitioners also seek a direction to allow it to deposit the amount in terms of said provision within a period of 30 days of issuance of appropriate writ, order or direction by this Court. Respondent No. 3 before this Court claims to be the auction purchaser and is placed in possession by Respondent Nos. 1 & 2.

2. Petitioner No. 2 borrowed sum of Rs. 15 lakh from Respondent No. 1 and mortgaged the property as described in para 2 of writ petition i.e. Survey No. 7/4 located at Mouza - Kastakhed, Tahsil - Balapur, District - Akola, which holds a Hotel building of Hotel Paras Garden, in favour of Respondent No. 1 - Bank. Said property is mentioned as subject property hereafter. Petitioner No. 2 claims that he met with an accident and became paralysed, therefore, he was required to close down the establishment and shifted to his native place i.e. District - Jalgaon. He had notified this change in address to Respondent No. 1-Bank. He never received notice of Recovery proceedings or any other notice at his Jalgaon address. For the first time he got a notice dated 01.05.2012 on 18.05.2012. By this notice, he was called upon to hand over possession after auction.

3. Shri Sadavarte, learned counsel submits that as per knowledge of the petitioner, first public notice for sale of property was issued on 20.09.2006 and it was not forwarded to Petitioner No. 2 at his Jalgaon address. After this sale proclamation, there were 9 more sale proclamations and none was received by the petitioners. Last such proclamation is dated 15.02.2012. This proclamation was published in Marathi and in English daily. The petitioners got this proclamation only. He points out that in Recovery proceedings, address of petitioner at Jalgaon finds mention. According to him, Order 21, Rule 54(1A) of the Civil Procedure Code, are applicable and as there is no proof of service of notice on the petitioner at Jalgaon, the auction and sale must fall to ground. He placed reliance upon the judgment in the case of Mahakal Automobiles and Another Vs. Kishan Swaroop Sharma, , to substantiate his contention. He points out that the provisions of Rules 49, 50 and also Rule 68(b) are violated in the matter. He submits that the authorities which conducted sale are quasi judicial and, therefore, they should have taken due care to find out whether the petitioner has been served with auction notice and the sale is being held within stipulated time. He draws support from the judgment in the case of Manchhabhai Fakirbhai Vs. Tax Recovery Officer, , Boeing Company Vs. R.M. Investment and Trading Co. Pvt. Ltd., . He also attempts to point out that subject property was never mortgaged by the petitioner with the Central Bank of India.

4. Our attention is invited to pleadings as amended to show that story of Bank of equitable mortgage is unsustainable as document relied upon by the Bank does not show that any equitable mortgage as such, was executed by the petitioner in favour of the Bank. He submits that the document at the most shows that the petitioner was called upon and he deposited with Bank the title deeds but then

the said document does not bear any signature of the petitioner and there are no terms and conditions of alleged mortgage. He is relying upon the judgment in the case of State of Haryana and Others Vs. Navir Singh and Another, . He also submits that without attachments, sale cannot take place. For said purpose, he places reliance on the judgment of in the case of Tikaram and Sons P. Ltd. Vs. Commissioner of Income Tax and Others, . The terms and conditions of sale were also changed by Central Bank of India and its Recovery Officer from time to time. It has not been conducted in fair and transparent manner. Reserved price was also altered on several occasions and despite specific challenge, Respondent Nos. 1 & 2 have not produced any documents to show how it was arrived at. He points out from records, the determination of reserved price varying from Rs. 11,77,500/- to Rs. 25 lakh. He points out that as per Government valuer, valuation of land was Rs. 37,41,900/- and valuation of Hotel building was Rs. 18,23,700/-. As per ready reckoner in the office of Sub-Registrar, valuation was not less than Rs. 44,95,500/-. Hence, sale in favour of Respondent No. 3 for Rs. 18,42,500/- is far too low consideration.

5. The petitioner obtained loan in 2002 and at that time Government valuer had arrived at said figure of Rs. 16,75,000/-. Thereafter land was converted for Non-agricultural purposes and then a building came to be constructed on it. Hence, its valuation could not have been Rs. 16,75,000/- only.

6. He points out that as per auction notice, no bids were received by Respondent Nos. 1 & 2 even on 23.03.2012. Auction was to be conducted on 28.03.2012 and Respondent No. 3, who had not responded to proclamation of sale by submitting his offer on or before 23.03.2012, after seeing this position, requested Bank authorities and Respondent No. 2 for permission to participate. He offered an amount of Rs. 18,42,500/-. There was no other bidder and Respondent No. 2 has recorded accordingly in bidder sheet. The receipt of part payment of purchase money through Demand draft for Rs. 1,67,500/- dated 27.03.2012 was accepted by the Recovery Officer on 28.03.2012. On that date, Respondent No. 3 sought time till 29.03.2012 evening to deposit balance amount of 15% and that time was given by the Recovery Officer.

7. Shri Sadavarte, learned counsel invites attention to Receipt dated 29.03.2012 which acknowledges payment of Rs. 2,93,125/- through D.D. dated 28.03.2012. His argument is, the Branch of Central Bank of India functions only up to 2.00 P.M. while auction was scheduled at 3.00 P.M. at the office of Debts Recovery Tribunal (DRT). He therefore draws inference that demand draft was obtained before even commencement of auction proceedings. The pleadings in para 6 of writ petition are pressed into service to urge that there is racket established in the office of Respondent No. 2 for conducting such auctions and to make properties available at throw away prices to persons like Respondent No. 3. Shri Sadavarte, learned counsel argues that the petitioner was never communicated anything about attachments and as per provisions of Rule 68(b)(i), auction has to be within three years of said attachment. Here, auction has been held after

several years and as attachment in such situation lapses, auction is illegal.

8. The Recovery Certificate is dated 01.02.2006 and proclamation came to be issued on 20.09.2006 i.e. in assessment Year 2006-07, as such, the auction and sale in favour of Respondent No. 3 is liable to be quashed and set aside. He is relying upon unreported judgment of the High Court in Writ Petition No. 4036 of 2003 dated 16.07.2004 (R.B. Shriram Durga Prasad (HUF) v. Tax Recovery Officer and judgment in the case of Karnataka State Industrial Investment and Development Corporation Ltd. Vs. Cavalet India Ltd. and Others, ; Pravin Gada and Another Vs. Central Bank of India and Others, ; Mahesh Chandra Vs. Regional Manager, U.P. Financial Corporation and others, ; Jammigumpula Sivaiah v. A.P. State Financial Corpn. [2004] 13 SCC 653 ; Smt. Laxmi Devi Vs. Sethani Mukand Kanwar and Others, ; Satyanarain Bajoria and another Vs. Ramnarain Tibrewal and another, ; Desh Bandhu Gupta Vs. N.L. Anand and Rajinder Singh, . Ram Kishun and Others Vs. State of U.P. and Others, ; T.P. Vishnu Kumar Vs. Canara Bank P.N. Road, Tiruppur and Others, . He contends that the market value of the property is now in excess of Rs. One crore and Respondent No. 1 is attempting to recover balance amount from Petitioner No. 2. If this sale at ridiculously low price is not set aside, the petitioner and his family members would be thrown on street.

9. Shri Almelkar, learned counsel appearing on behalf of the Central Bank of India submits that Section 30(1) of Debts Recovery Tribunal Act gives remedy of appeal to the petitioners and petitioners, therefore, must first avail that statutory remedy. Respondent No. 1 - Bank got decree ex parte on 06.01.2006 and with great difficulty could sale property in 2012. He submits that the petitioner's claim on affidavit that he was never served with any notice, is incorrect. He invites attention to counter affidavit filed by Central Bank of India thereto. At least three acknowledgements of service of notice upon the petitioner at Jalgaon are on record and that service is established. The petitioner was also aware of auction proposed on 27.03.2012 as it was duly published in local Newspapers in Marathi & English languages at Akola and notice was forwarded to the petitioner by R.P.A.D. Notice was also displayed on mortgaged property by the Bank officials. After 27.02.2012, fresh valuation was called for and hence reserved price got enhanced from Rs. 11,75,000/- to Rs. 16,75,000/-. He denies all allegations of mala fides and submits that all legal provisions have been fully complied with. Petitioner submitted the title document to the Bank and the document supporting it has been duly registered by paying necessary stamp duty. The petitioner, therefore, cannot contend that there is no creation of equitable mortgage by deposit of title deeds in favour of Respondent No. 1-Bank. The Newspapers in which advertisement was published, are also shown to this Court.

10. Section 28 of DRT Act is read out to demonstrate that it permits recovery by resorting to "other modes" and attachment by itself is not the only manner of recovery. In present facts, the petitioner is not entitled to any relief as sale is

complete. He also adds that Branch of Respondent No. 1 - Bank at Station Road, Nagpur, functions up to 3.30 P.M. and Respondent No. 3 had sought D.D. by making a request on telephone call. He also submits that he may have deputed somebody to collect D.D. Two provisions of Rule 68(B) of Second Schedule of Income-tax Act are also relied upon by him to show that sale here is a continuous process. To point out how the legal provisions of DRT Act have been complied with, he relies upon Sections 19(22) , 25 , 29 and 28(X) of said Act.

11. Shri Ghate, learned counsel appearing on behalf of Respondent No. 3 begins by placing reliance upon the judgment of Delhi High Court in the case of Unified Agro Industries (India) Ltd. and Others Vs. Debts Recovery Tribunal and Others, . He points out that ex-parte decree and, therefore, liability fastened upon the petitioners is not questioned by them anywhere. He also submits that Sections 25 to 28 contain different modes of recovery and Section 30 gave petitioner remedy of filing an appeal against the order dated 20.06.2012 passed by the Recovery Officer. The petitioner has misled this Court by making a statement in paragraph 13 of writ petition that he has no alternate remedy. He states that as the petitioner has misled this Court and has also not pointed out any valid reason for not availing such remedy, writ petition is liable to be dismissed.

12. The application for setting aside sale was filed by the petitioners on 22.05.2012 and in prayer clause of said application, they sought time to complete payment as required by law. That prayer is repeated even in present writ petition. He invites attention to the provisions of Rule 16 of Schedule II of Income-tax Act to point out two conditions which the petitioner ought to have fulfilled. He contends that lacunae in said application are attempted to be filled in by moving this writ petition. The application moved by the petitioner does not satisfy ingredients either of Rule 60 or Rule 61 of Second Schedule. The petitioner's application itself, therefore, was not maintainable and its rejection as such by Respondent No. 2 - Recovery Officer does not cloth the petitioner with any additional right. He also points out that Rule 86 of Second Schedule permits an appeal and it was not availed of. As before holding of sale on 28.03.2012 notice was served upon the petitioners and no material irregularity is shown by them, sale cannot be set aside under Rule 61. Our attention is invited by him to Ground No. 12 of said application to urge that the petitioner No. 2 only pleads ill-health and bed ridden condition as a ground to set aside sale, he nowhere pleads that earlier notices were not served upon him or any legal provision was violated. The challenge to valuation contained in Ground No. 2 thereafter is also read out to show that it is too vague.

13. The order dated 20.06.2012 passed by the Recovery Officer on said application is also pressed into service to show how all relevant factors have been looked into and there is no jurisdictional error by the Recovery Officer. He argues that auction has been conducted in most transparent and fair manner. The findings of fact recorded by said officer are not shown to be perverse. He,

therefore, reiterates availability of alternate remedy to bar intervention in writ jurisdiction. The support is being taken from the judgment in the case of Bajirao Vs. Sanjay Prakashchand Kothari--> .

14. Recent cases of Mathew Varghese Vs. M. Amritha Kumar and Others, & Vasu P. Shetty Vs. Hotel Vandana Palace and Others, are pressed into service by him to show that there the provisions of Rule 8 & 9 of the Security Interest (Enforcement) Rules, 2002, are looked into and as present auction is under Second Schedule & DRT Act, provisions of Sections 25 to 28 which prescribe various modes of recovery are sufficient to distinguish the law as laid down therein. He concludes by pointing out that Respondent No. 3 is in possession since March 2012 and is doing business there.

15. Shri Sadavarte, learned counsel, in reply arguments accepts that provisions of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, (SARFAESI ACT) and Rules made thereunder are not relevant in present matter. He fairly states that it is only Sections 25 to 28 of DRT Act which must be looked into. Due to provision of Rule 60 in Second Schedule, remedy of appeal under Rule 60 is not available in present matter. He points out that though Respondent Nos. 1 & 2 have alleged service of notice upon the petitioner, they have not produced any acknowledgement of such service either before Respondent No. 2 or before this Court. He submits that Respondent No. 2 - Recovery Officer is not competent to look into application of the petitioner for setting aside sale after 30 days as he has no power to condone delay. As such, there is no question of preferring any appeal under Rule 60 in this matter.

16. Shri Almelkar, learned counsel submits that he has personally verified files and seen acknowledgements of three notices served upon the petitioner at Jalgaon, which are available on record. He relies upon the affidavit sworn by Shri Harish Nilkanthrao Bante, on 02.04.2013 & filed here for this purpose.

17. The provisions relating to recovery are contained in Chapter-V of DRT Act i.e. 1993 Act. It is titled as "Recovery of Debt Determined by Tribunal". Section 25 therein is about modes of recovery of debts. As per the said provision, Recovery Officer appointed by the Central Government under Section 7(1) for each Tribunal has to commence recovery proceedings after receipt of a certificate under Section 19 thereof. Section 19 is about the procedure of Tribunals and the certificate specifies the amount of debt. That amount can be recovered by one or more of the modes stipulated in Section 25 . First one is, attachment and sale of movable or immovable property of the defendant. Second one is, his arrest and detention in prison, while the last one is by appointing a receiver for the management of the movable or immovable properties of the defendant. Section 26 is about Validity of certificate and amendment thereto. While Section 27 is about stay of recovery proceedings under certificate or amendment or withdrawal thereof. Section 28 is about other modes of recovery. Its sub-section (1) permits recovery officer to proceed to recover the amount of debt by any one or more of

the modes provided under Section 28 , and it is without prejudice to the above mentioned three modes of recovery specified in Section 25 . Here the recovery officer has not taken recourse to Section 28 . Section 28 in short enables the recovery officer to claim and adjust the amount which is payable by any other person, by the defendant towards the debt amount. Suffice to say, that it does not deal with the recovery by attachment or sale of immovable property of defendant. Its sub-section (5) also permits recovery by distress and sale of defendants movable property in the manner laid down by the third Schedule to the Income-tax Act, 1961. Section 29 is about application of certain provisions of Income-tax Act. It stipulates that the provisions in Second and Third Schedule of the Income-tax Act, 1961 and Income-tax (Certificate Proceeding) Rules, 1962 as in force from time to time shall, as far as possible, apply with necessary modifications as if the said provision and rule referred to amount of debt due under the 1993 Act, instead of Income-tax. It is also not in dispute that the recovery officer here has proceeded under said second schedule against the petitioner. Perusal of the certificate under section 19(22) , which is sought to be executed in present matter reveals that it is signed by the presiding officer on 01.02.2006 with a direction to recovery officer to recover the amount as per the said certificate in the manner and mode prescribed under Sections 25 and 28 of the Recovery of Debts Due to Banks and Financial Institution Act, 1993. The certificate is for recovery of Rs. 17,61,291/-.

18. It is therefore, apparent that the provisions of second schedule of the Income-tax Act, 1961 need to be referred to. Second schedule provides for recovery of tax - here recovery of debt. The Tax Recovery Officer has to serve upon the defaulter notice requiring said defaulter to pay amounts specified in a certificate for recovery. Here the Debt Recovery Officer therefore has to serve such notice upon the debtor, after he receives the recovery certificate under Section 19(22) of the 1993 Act. Said notice has to give defaulter time of 15 days from its receipt and the recovery officer has to intimate that otherwise steps to realize the amount would be taken in second schedule, as per Rule 3. No steps in execution of certificate can be taken until period of 15 days has elapsed. Rule 4 provides for mode of recovery and if the amount is not paid within a period of 15 days, the recovery officer can proceed to realize the amount by one or more of the modes prescribed therein. First one is by attachment and sale of debtors movable property. Second is, by attachment and sale of his immovable property. Third one is by arrest of debtor and his detention in prison, while the last one is by appointing a receiver for the management of defaulter's movable and immovable properties. Part-II of the Second Schedule is about attachment and sale of movable property. Part-III is about attachment and sale of immovable property. In present matter we are concerned with the provisions of Part-III.

19. Rule 48 in Part-III is about attachment. As stipulated therein, attachment shall be made by an order prohibiting the debtor from transferring or charging the immovable property in any way and by prohibiting all persons from taking any benefit under such transfer or change. Rule 49 mandates that copy of such

order of attachment shall be served on debtor. Rule 50 mandates that order of attachment shall be proclaimed at some place on or adjacent to the property attached by beat of drums or other customary mode and copy of the order shall be affixed on a conspicuous part of the property and on the notice board of the office of Recovery Officer. As per Rule 51, such attachment relates back to and takes effect from the date on which notice to pay the debt was served upon the debtor.

20. Rule 52 of Second Schedule then deals with the sale and its proclamation. Recovery Officer can direct attachment of the immovable property or portion thereof, as may be necessary to satisfy the certificate, to be sold. Proclamation of intended sale is required to be made in the language of the district. As per Rule 53, proclamation of sale needs to be drawn up after notice to defaulter and has to state time and place of sale and specify the property to be sold, revenue assessed on it, amount for recovery of which sale is ordered, reserved price and any other fact which the recovery officer considers material. Rule 54 is about mode of making proclamation. Such proclamation for sale is to be made at some place on or near such property by beat of drums or other customary mode. Copy of proclamation shall be affixed on a conspicuous part of the property and conspicuous part of office of the recovery officer. As per Rule 55, except without consent of the debtor, no sale of immovable property can take place, until after expiration of at least 30 days calculated from the date on which copy of proclamation of sale has been affixed on property or in the office of the recovery officer, whichever is later. As per Rule 56, sale has to be by public auction to the highest bidder and subject to confirmation by the recovery officer. Rule 57 after such sale, requires the purchaser who has been declared as purchaser to deposit 25% of the amount of his purchase money immediately and in default of such deposit, property must be resold. Part amount of purchase money shall be paid by the purchaser on or before 15th day from the date of sale of property. In case of default by the purchaser, the recovery officer after defraying the expenses of sale, forfeit the remaining amount to Government and property must be resold. Rule 59 permits the Authority which has to recover money to participate in the auction in certain contingencies. Said Rule is not relevant in this matter.

21. Rule 60 of the Second Schedule is about application to set aside the sale of immovable property on deposit. The debtor has been given option to apply to the recovery officer to set aside the sale within 30 days from the date of sale, on his depositing the amounts specified in the proclamation of sale and for payment to purchaser as penalty, a sum equal to 5% of the purchase money. Rule 61 enables the debtor to file an application to set aside the sale on the ground of non-service of notice or irregularity. Such application needs to be filed by the debtor within a period of 30 days from the date of sale, alleging that notice was not served on him to pay arrears or on the ground of material irregularity in publishing or conducting sale. Sale cannot be set aside on these grounds till the recovery officer is satisfied that the debtor has sustained substantial injury by reason of non-service or irregularity. The application made by the debtor is to be

disallowed unless the debtor deposits amount recoverable from him in execution of the certificate. Rule 63 is about confirmation of sale. When no application for setting aside this sale is made, or such application is disallowed, if purchaser has paid full amount, the recovery officer has to make an order confirming the sale and thereby sale becomes absolute. It is not in dispute before us that the sale in favour of the Respondent No. 3 has become absolute.

22. It is in this background that the arguments advanced above need appreciation. Question is - Whether notice for recovery, as contemplated by Rule 2 was served upon the debtor? and Whether immovable property was attached at any point of time as prescribed in the Rules. Before that, it will be proper to deal with the contention of petitioner that as DRT granted recovery certificate on 01.02.2006, the sale as held on 28.03.2012 and confirmed in favour of respondent No. 3 is un-sustainable, as it violates provisions of Rule 68B of the Second Schedule to Income-tax Act. The said provision has been inserted by the Finance Act 1992 w.e.f. 01.06.1992 and time limit of 3 years stipulated therein has been extended to 4 years on 01.03.1996. These developments are therefore, before coming into force of the 1993 Act, which adopted said Second Schedule for recovery. Perusal of Rule 68B shows that immovable property cannot be sold under Part-III of Schedule II, after expiry of 4 years from the end of financial year in which the order giving rise to demand of any debt for recovery of which immovable property has been attached, has become conclusive. Here the recovery certificate is dated 01.02.2006 i.e. in financial year 2005-06. Period of 4 financial years from the end of said financial year therefore expired on 31.03.2010. Sale has been conducted on 28.03.2012, obviously after expiry of said period. Though this contention has been raised by the petitioner, no serious arguments on it have been advanced by any of the parties. Powers under Section 29 of DRT Act, show that the provision of Second Schedule as in force from time to time apply with necessary modifications, as far as possible. These words "as far as possible" and "with necessary modifications", have been interpreted by the Division Bench of Madras High Court in a ruling J.N. Krishnan v. Canara Bank 2011 (4) CTC 698. The Hon"ble Madras High Court has held that this time limit and therefore Rule 68B in Second Schedule is not attracted to recoveries under 1993 Act, as the 1993 Act itself does not recognize any such limitation. In this situation, as no arguments have been advanced on this aspect, we find no hesitation in adopting the view of Hon"ble Madras High Court. The objection raised by the petitioner about expiry of period of limitation is, therefore, rejected.

23. The Division Bench of this Court has in Keshrimal Jivji Shah and Another Vs. Bank of Maharashtra and Others, observed:--

"31. Considering the importance of the matter and as the issue frequently crops up for consideration we proceed to answer question No. 2 as well. In our view, we cannot ignore the plain words of the Statute. Section 29 in clearest terms states that provisions of second and third schedule of I.T. Act and 1962 Rules, as in force from time to time, shall far as possible, apply with necessary

modifications as if, the said provisions and Rules refer to the amount of debt due under this Act instead of Income-tax Act. Whenever Legislature uses words such as "as far as possible" "as far as practicable" etc., the intent is not to apply the provisions in their entirety.

32. The provisions do not get themselves incorporated completely. They have to be read into as far as possible and subject to such modification, as the context as well as object and purpose of the Act, require. The setting in which the words occur, the Statute in which they appear, the object and purpose for which the Statute has been enacted and the mischief that is sought to be taken care of and remedied, are factors which would be extremely relevant in determining such issues. In the case of N.K. Chauhan and Others Vs. State of Gujarat and Others, the Supreme Court has held that these words are to be assigned one and the same meaning. Whenever, the Legislature says as far as practicable, as far as possible it conveys one and the same meaning. If the purpose of RDB Act is to expediently recover public monies in a summary manner then an interpretation which would advance this purpose should be placed on Section 29 of R.D.B. Act. So interpreted and considered, in our view, it will not be possible to read provisions of Second Schedule and more particularly Rule 11 in their entirety in section 29 . They will have to be read as far as possible and with such modifications as the facts and circumstances of a case and the nature of an investigation require. Though it is not possible or advisable to lay down a general rule in this behalf. However. Rule 11 need not be completely adhered to by the Recovery Officer always. If the contentions of Shri Naphade are accepted, it would result in investigation of claim or objection to attachment and sale never achieving any finality in proceedings under R.D.B. Act. If outcome of such investigation is made subject to another round of litigation by way of civil suit, then the very purpose of establishing Tribunals and creating machinery for speedy and expeditious recovery of public monies would be defeated. If Banks and financial institutions are made to face another round of litigation in the form of civil suit-after consideration of the claim to attachment and sale then it will become impossible for them to recover and realise their dues.

Even otherwise, in the case of Gopalpur Tea Co. Ltd. Vs. Corporation of Calcutta, , it has been held that non-following of procedure of seizure strictly in accordance with the provisions made in that behalf, would not vitiate the seizure itself once the Legislature does not make it obligatory and mandatory to follow the same. Similar analogy can be applied here. The Parliament does not make it mandatory nor compulsory for the recovery officer to apply the second and third Schedule of IT. Act and 1962 Rules, advisedly because the Legislature has provided safeguards after investigation of claims and objections by recovery officer. This investigation can be challenged in Appeal under section 30 of the Act which has been substituted with effect from 17th January, 2000. Even proceedings in such appeal are not final because section 20 of R.D.B. Act provides for a further appeal by person aggrieved against any order made or deemed to have been made by a Tribunal under R.D.B. Act. Such an appeal lies

to the Debt Recovery Appellate Tribunal. To compel banks or financial institutions to either institute or defend proceedings after all this before a civil court is defeating and frustrating the Legislative Intent completely. Investigation and adjudication cannot be endless. That apart, the remedy to approach this Court in appropriate cases by invoking its jurisdiction under Articles 226 and 227 of the Constitution of India is always available. Hence, question No. 2 is answered in these terms that it is not obligatory to apply second and third schedule of I.T. Act and 1962 rules while investigating a claim of objection to attachment and sale during the course of execution of recovery certificate under R.D.B. Act. We are supported in these conclusions by a Division Bench decision of A.P. High Court reported in P. Mohanreddy and Others Vs. Debts Recovery Appellate Tribunal and Others, ."

24. In present matter, when the subject property is already mortgaged by deposit of title deeds & is encumbered, it is obvious that it need not be attached again. DRT has also allowed recovery by sale of mortgaged property. To read such a requirement of attachment into the scheme of DRT Act would be to overlook the legislative intent to expedite the recovery.

25. Here the petitioners were aware of loan & its non-payment. They do not plead & prove efforts made to verify the loan position. They do not point out any intimation of the accident suffered by the petitioner No. 2 to the Bank. They are also not aggrieved by the ex-parte adjudication by DRT on 06.01.2006. They also obtain loan from a Cooperative Bank at Jalgaon for very business on security of same property i.e. subject property. They are neither disputing the loan nor the liability to clear the certificate amount. If they had any objection to the auction or then to the determination of the reserved price, they never voiced it at the earliest possible opportunity. But in the light of Madras High Court judgment & the Division Bench judgment of this Court mentioned supra, we find that Rule 68(B) of the Second Schedule prescribing the limitation is not attracted here. However, though the petitioners expressly plead & argue absence of attachment, the Bank or auction purchaser have not urged that an order of attachment is not necessary. On the contrary, the Bank has pleaded that there is a legal & valid order of attachment, in this case. It is obvious that the Bank has to prove the attachment & it has not produced any such order or even pointed out its date. Public notice of sale or its proclamation does not constitute attachment of the subject property as required in the scheme of Second Schedule.

26. On the basis of recovery certificate dated 01.02.2006, Recovery Proceedings No. 9/2006, were initiated before the respondent No. 2 Recovery Officer by certificate holder - respondent No. 1 against the certificate debtor i.e. present petitioner. Notice dated 20.09.2006, issued by the respondent No. 2 shows that it is addressed to M/s. Hotel Paras Garden through its proprietor i.e. petitioner No. 1 at its address at Balapur, Akola. It is also addressed to petitioner No. 2 personally at his address at Jalgaon. Names of two guarantors resident of Balapur are also shown there at Sr. Nos. 3 and 4. After describing the property

put to sale, the Recovery Officer has stated that he has ordered for sale of property mortgaged/attached, on as is, where is basis. There is no dispute between the parties about identity of the property. Later public notice dated 28.02.2007 shows petitioner No. 1 and in it name of petitioner No. 2 with his address at Jalgaon is added by hand. Again the property has been mentioned as "Mortgaged/Attached". In notice for extension of time for submission of bids dated 27.06.2007, it is shown that it is addressed to both the petitioners as also to their guarantors at their respective addresses, already mentioned supra. In this notice, it is pointed out that it is in furtherance of public notice dated 16.05.2007, published in a daily newspaper "Deshonnati" on 08.06.2007. This notice of extension of time to submit bid does not use either the word "Mortgage" or "Attached". Public notice dated 11.03.2008, is addressed to petitioners as also their guarantors, and it uses the word "mortgaged/attached". Public notice dated 15.09.2008 is addressed to all 4 and uses very same word. Public notices dated 15.06.2009 and 03.09.2009 are again addressed to all 4 on their respective addresses and uses the word "mortgaged/attached". Thereafter there is a proclamation of sale dated 14.03.2011, which is addressed to all 4 persons mentioned supra on same addressed. There it is mentioned that the Recovery Officer [who has signed the notice], has ordered sale of mortgaged properties. Other proclamation of sale dated 15.02.2012 is identical. Its Marathi version published in daily "Deshonnati" on 23.03.2012 is, again identical, but it does not carry name of Shri Prabhakar Nivrutti Patil-a guarantor. It again mentions the subject property as mortgaged property. English version published in "Nagpur Times" dated 23.02.2012, does not use the word "mortgaged". Thus, these are the documents produced on record by the petitioners and not in dispute. Respondents have not pointed out any other public notice or proclamation of sale.

27. At this stage, it will be appropriate to consider the arguments of petitioners that subject property was never mortgaged by them with the respondent No. 1 Bank. In prayer clause 3 of the memo of writ petition, there is request to direct the Bank to release mortgaged property in favour of the petitioners. In paragraph No. 3 of the petition, petitioners have stated that the property described by them in paragraph No. 1, and in their possession and of their ownership, was mortgaged with respondent No. 1 Bank for disbursement of principal loan amount of Rs. 15 lacs. Though the memo of writ petition has been amended later, these portions have been retained as it is. They have stated that they have continued in possession and enjoyment of that property. Petitioner had sought loan on 01.01.2002 and availed it. Before that he gave an affidavit, which is also dated 01.01.2002. Petitioner No. 1 in that affidavit has described subject property, his ownership and possession over it. He has also asserted that it is unencumbered. He has declared that if bank sanctions him loan, he would mortgage it with the Bank. Bank has produced before this Court a document by which title documents of subject property were deposited with it. This document is on stamp paper of Rs. 5,000/- purchased in the name of petitioner No. 2 -

Prabhakar. It is signed by Senior Manager of respondent No. 1 Bank on 19.03.2002. After giving description of the property, it observes that Prabhakar having been called upon on that date, deposited with the Bank original title deed of his agricultural land, with search report in relation to that property from Advocate H.N. Mohta of Shegaon. Stamp paper of Rs. 5,000/- purchased by him and sanction letter of Balapur Branch have been accepted. It is also stated that he deposited all papers with the Bank with an intention to create equitable mortgage for securing loan of Rs. 15 lacs sanctioned to him by Balapur Branch of respondent No. 1. It is declared that thus equitable mortgage to secure that loan has been created. Petitioners have urged that this document is not signed by them. However, the fact that title deeds were with the Bank and that he purchased stamp paper of Rs. 5000/- is not in dispute. Disbursement of loan i.e. working capital of Rs. 3 lacs and term capital of Rs. 12 lacs, totaling to Rs. 15 lacs on very same date is also not in dispute. These documents therefore, establish that petitioners created an equitable mortgage by deposit of title deed of subject property in favour of respondent No. 1.

28. Original Application No. 14/2005 filed by the respondent No. 1 was decreed ex-parte by the Tribunal on 06.01.2006. There in the Tribunal has recorded that loan is secured by mortgage of subject property. The operative part also stipulates that charge for recovery of Rs. 17,30,591/- with future interest @ 15 p.a. from the date of application till recovery is kept on properties mortgaged/hypothecated in favour of the Creditor/Bank. The bank has been given liberty to sell the mortgaged property for realizing the dues two months after the date of said order. This order of DRT has neither been challenged or assailed in the arguments. Therefore, it cannot lie in the mouth of the petitioner that the subject property was never mortgaged with respondent No. 1 Bank.

29. In Mahesh Chandra Vs. Regional Manager, U.P. Financial Corporation and others, , relied upon by Shri Sadavarte, learned counsel, the Hon''ble Apex Court has considered the provisions of Section 29 of the State Financial Corporation Act and laid down the guidelines for exercise of powers under its Section 29 , if there is default in repayment of loan. The Hon''ble Supreme Court has stated that sale of unit has to be by public auction. Valuation of unit for the purpose of determining the adequacy of offer should always be intimated to the unit holder to enable him to file objection. When ever highest offer in tender is accepted, it must be intimated to the unit holder, and if the unit holder offers same price, then he should be given preference. If he brings third party with higher offer, his bona fides can be tested and then highest offer can be accepted. Here, as we have already noted above, the field is occupied by the provisions of 1993 Act and Second Schedule II of the Income-tax Act, as such there is no scope for considering the guidelines laid down by the Hon''ble Apex Court unless and until some lacunae or vacuum is pointed out in existing procedure. Karnataka State Industrial Investment and Development Corpn. Ltd. (supra) is the other judgment of Hon''ble Apex Court which considers same law. Jammigumpula Sivaiah (supra) is again on the same enactment.

30. Satyanarain Bajoria (supra) relied upon by the petitioners considers the provision of Order 21 Rule 19 and 22 of Code of Civil Procedure. The Hon''ble Apex Court has held that service of notice of execution application as per Rule 22 on judgment debtor must be equally proved and mention thereof in order sheet is not sufficient. Desh Bandhu Gupta (supra), considers the provision of Order 21 Rule 66[2] and 54[1-A] of Civil Procedure Code. It is held that service of notice on judgment debtor is mandatory and sale without service is nullity. The Hon''ble Apex Court has held that the judgment debtor must have an opportunity to give his estimate of property, and therefore, service of notice under Order 22 Rule 66[2] is mandatory. Order 21 Rule 54[1-A] obliges the court to require the judgment debtor to attend on a specific date to take notice of the date to fix for settling the terms of proclamation of sale. Mahakal Automobiles (supra), considers the very same provision of Civil Procedure Code and stipulates that notice to judgment debtor is necessary at every stage. When attachment of property and issuance of sale proclamation was done without notice to him, and valuation of property was also not done, the Hon''ble Apex Court has found sale to be vitiated. In Narvir Singh (supra), the Hon''ble Apex Court has declared that when a memorandum is prepared to evidence handing over of deposit of title deeds by borrower to creditor, it does not require registration. However, if the memorandum/instrument in question constitutes transaction, it's registration is compulsory. The Hon''ble Apex Court has stated that when such title deeds are deposited, it becomes a mortgage by deposit of title deeds and no instrument is required to be drawn for said purpose, if such delivery is in notified town. In Tikaram and Sons (supra), the Hon''ble Allahabad High Court has held that Tax Recovery Officer is duty bound to sale attached immovable property within a reasonable time. In T.P. Vishnu Kumar (supra), the Hon''ble Apex Court has considered the provisions of DRT Act, particularly Section 17 and availability of remedy under Article 226 . It has been held that Article 226 of the Constitution of India cannot be resorted to unless there is violation of any statutory provisions resulting into prejudice to the party or where such proceedings or auction is wholly arbitrary, unreasonable and unfair. In Ram Kishun (supra), the Hon''ble Apex Court has held that there has to be application of mind to the valuation report by the court while approving/accepting the report of the approved valuer and fixing reserved price. The Hon''ble Apex Court cautioned that failure to do so may cause substantial injury to the borrower/guarantor and it would amount to material irregularity and ultimately vitiate the subsequent proceedings.

31. Grounds relevant for setting aside the sale & question whether "prejudice", if any, play any role in the scheme of DRT Act also assume importance. Second Schedule Rule 60 of the Income-tax Act deals with the application to set aside sale of immovable property on deposit. It reads:--

"60. Application to set aside sale of immovable property on deposit.--(1) Where immovable property has been sold in execution of a certificate, the defaulter, or any person whose interests are affected by the sale, may, at any time within thirty days from the date of the sale, apply to the Tax Recovery Officer to set

aside the sale, on his depositing-

(a) the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered with interest thereon at the rate of 1 1/4 (one and one-fourth per cent for every month or part of a month), calculated from the date of the proclamation of sale to the date when the deposit is made; and

(b) for payment to the purchaser as penalty, a sum equal to five per cent of the purchase-money, but not less than one rupee.

(2) Where a person makes an application under Rule 61 for setting aside the sale of his immovable property, he shall not, unless he withdraws that application, be entitled to make or prosecute an application under this rule."

Thus this provision nowhere expects the debtor to show any "injury" & gives him absolute right to expunge his loan liability without any obstacles, if he is ready & willing to pay the amounts as prescribed therein. It gives him one more opportunity to clear the liability, before finally sealing his fate.

Rule 61 of Schedule 2 is about the application to set aside sale of immovable property on ground of non-service of notice or irregularity. It reads as under:--

"61. Application to set aside sale of immovable property on ground of non-service of notice or irregularity.-Where immovable property has been sold in execution of a certificate, such Income-tax Officer as may be authorised by the Chief Commissioner or Commissioner in this behalf, the defaulter, or any person whose interests are affected by the sale, may, at any time, within thirty days from the date of the sale, apply to the Tax Recovery Officer to set aside the sale of the immovable property on the ground that notice was not served on the defaulter to pay the arrears as required by this Schedule or on the ground of a material irregularity in publishing or conducting the sale:

Provided that--

(a) no sale shall be set aside on any such ground unless the Tax Recovery Officer is satisfied that the applicant has sustained substantial injury by reason of the non-service or irregularity; and

(b) an application made by a defaulter under this rule shall be disallowed unless the applicant deposits the amount recoverable from him in the execution of the certificate."

Rule 61 therefore provides an opportunity not only to the debtor but also to any other person whose interests are affected by that sale to have it set aside on his satisfying 3 conditions. If such an application is by the borrower, he must deposit the amount recoverable from him in execution of the recovery certificate. In either case, applicant has to establish that either (1) notice to pay the arrears was not served upon the defaulter as per the Second Schedule or then, (2) there has been a material irregularity in publishing or conducting the sale. These requirements are made more stringent in as much as the proviso mandates

reaching of a satisfaction by the recovery officer & hence, (3) obliges applicants to demonstrate a "substantial injury" in the case falling under (1) & (2). Most peculiar ingredient is Condition No. (4) which gets attached in this matter, as the debtors here are defaulters i.e. the petitioners before us. In addition to showing compliance with the above three, petitioners must also deposit the amount for recovery of which the entire exercise was undertaken by the respondent No. 2 recovery officer. Language employed in second proviso & use of word "disallowed" assumes significance. An application which otherwise could have been allowed because the three ingredients noted supra are satisfied, stands rejected i.e. disallowed if the deposit as stipulated in proviso (b) is not made.

32. Latest judgment of Hon''ble Apex Court Vasu P. Shetty (supra) also considers its little earlier judgment in Mathew Varghese (supra). In Vasu P. Shetty (supra) the Hon''ble Apex Court has observed:--

"18. It can, thus, be seen that there is no conflict between the two sets of judgments, namely, Mathew Varghese case followed in J. Rajiv Subramaniyan case on the one hand and Ikbal case on the other hand. In the first set of cases the interpretation given to Rules 8 and 9 of the Rules hold that these Rules are mandatory. It is so held even in Ikbal case. However, Ikbal case proceeds further to lay down the principle that since these provisions are for the benefit of the borrower, borrower can always waive those procedural requirements. This latter aspect never fell for consideration in the earlier two judgments. Therefore, we see no force in the contention of the learned Senior Counsel of the appellant that the judgment in Mathew Varghese goes contrary to the law laid down in Ikbal case.

19. The only question, therefore, is as to whether it can be held that the borrower in the present case had also waived the mandatory provisions of Rules 8 and 9 of the Rules. We may remark that it is expressly clarified in Ikbal case itself that the question whether there is a waiver or not depends on the facts of each case and no hard-and-fast rule can be laid down in this regard."

These observations show that a it is always open to the borrower like petitioner to waive the benefit of a mandatory provision. In the instant matter. Rule 61 of the Second Schedule is decisive. The non-service of a notice by itself or an irregularity is not fatal in the scheme of Second Schedule. Proviso (a) to the Rule 61 postulates a "substantial injury" due to non-service of notice or alleged irregularity. Proviso (b) adds one more element or factor i.e. deposit of the amount. We, therefore find substance in the contention of Adv. Ghate that ipso facto, these judgments of the Hon. Apex Court cannot be used here.

33. Inconsistent stand on mortgage by the petitioners is already noted by us above. Respondent No. 1 Bank has denied knowledge of the accident suffered by the petitioner No. 2 or then the consequential closure of the business. Despite this, the petitioners have not produced any supporting material to show the accident or fact that the petitioner No. 2 was thereafter bedridden. It is no doubt

true that the public notices or the proclamations for sale carry different figures of reserve price varying from Rs. 25 Lac to 11,77,500/- & lastly Rs. 16,75,000/-. On one occasion, auction was notified without any reserved price but it could not materialise. The public exercise on all occasions is supported by the valuation reports & not arbitrary. It was made known to all well in advance & petitioners could have objected to it & pressed their valuation report. Copy of valuation report dated 10/04/2013 prepared by Navin Dhotarkar, Govt. Approved Valuer is produced before this Court with a pursis & without any affidavit on 05.03.2015, Petitioners have not placed before this Court any offer even exceeding the price quoted by Respondent No. 3, though they got period of about three years. In affidavit dated 02/05/2013, petitioners state that they never mortgaged the subject property with the respondent No. 1 Bank & said property is already attached 7 to 8 years back by Shri Mahavir Urban Cooperative Society Ltd., Jalgaon for recovery of Rs. 15,28,614/-. They also submit that said mortgage was in force when property was sold by the Respondent No. 1 Bank to Respondent No. 3. They also plead that said sale is not known to Mahavir Bank. This state of affairs itself shows that deposit of title deeds with Respondent 1 was not pointed out to the Mahavir Bank by the petitioners. The petitioners enjoyed loan from both the Banks & kept them in dark about it. In affidavit dated 22/05/2012 filed before the recovery officer for setting aside the sale dated 28/03/2012 as confirmed on 30/04/2012, valuation of subject property at Rs. 1 Crore & ill health or being bed-ridden are the only grounds canvassed by the Petitioners. In impugned order dated 20/06/2012, the recovery officer has rejected the contentions of petitioners about non-service of notices as "factually incorrect". Respondent No. 3 also offered his bid at 11th hour without first offering any earnest money. But in the light of large number of previous unsuccessful attempts to auction, the acceptance of his offer which is above the reserved price can not be said to be abuse of his position or power by the recovery officer. Keeping in mind the ingredients of Rule 61 noted by us above, as no "substantial injury" has been pleaded, there is no need to delve into it. As the petitioners did not deposit amount as per mandate of proviso "b" to Rule 61, their application was & is liable to be "disallowed". Petitioners before us did not raise any objection at suitable stage though they could have taken it & did not inform the creditor Bank about other loan borrowed against the subject property from Shri Mahavir Urban Cooperative Society Ltd., Jalgaon. Thus, they themselves did not abide by the scheme of the DRT Act or the Second Schedule & waited or permitted third party interest to be created. In this situation, they can not now turn around, rely on said grounds & attempt to undo all that which is done by the Respondent No. 2. Hence, no exception can be taken to the impugned order dated 20/06/2012 passed by the respondent No. 2 Recovery Officer by the Petitioners at this juncture.

34. In this case, the petitioners did not move any application within time of thirty days though they could have done so. They have approached this Court in its extraordinary jurisdiction directly, that too without making any deposit. In prayer

clause of the petition, they seek time to deposit, but till date have not chosen to deposit a single naya paisa. Period for which such an extension was sought is also not clearly spelt out. Pleadings in petition show that petitioners were always having knowledge of the public notices for sell or of proclamations of sale or of reserved price fixed therein. They do not prove that they became aware for the first time in February or March, 2012. They never raised objections either to fixation of the reserved prices or public notices/proclamations for sale. Scheme of Second Schedule as modified by the DRT Act reveal legislative intent to give the defaulter as much latitude as possible till end. He can, under Rule 60, without assigning any cause but after depositing the sum as mentioned therein within the stipulated time, avoid auction & protect his property. Process becomes difficult & he is asked to meet the ingredients of Rule 61 only thereafter. Thus after stage of Rule 60 is over, right of petitioners/borrowers get diluted & primacy is given to the creditor Bank & interest of the auction purchaser like respondent No. 3 herein. Legislature has till Rule 60 shown some inclination to lean in favour of the borrower who wants to save his property or business. But then it has envisaged an equilibrium & defaulting borrower can not thereafter lightly unsettle the auction. It is apparent that after this stage also if any favour is shown to the borrower, the creditors like respondent No. 1 Bank may not get the bidders & persons desirous of participating in auction process will be discouraged. Lending Institutes may stop releasing the loan without rigorous securities & sureties. This may affect other genuine innocent borrowers. Any intervention by this Court not fore-seen in the scheme of DRT Act & Second Schedule may create difficulties in future advances & recoveries. Hence, while approaching this Court directly under Art. 226 of the Constitution of India, it is axiomatic that the petitioners will have to make out an exceptional case. They will have to plead & prove their diligence & also steps taken to warn the bidders of their grievances or of status of subject property. They must see that irregularity, if any, is cured at the earliest & can not indulge in fence-sitting or wait till the proceedings are over & then jump in, in an attempt to unsettle it or to frighten the bidders away. When they want financial institutes like the Respondent No. 1 Bank to give loan to them, they also owe an obligation to it & public to see that in the unfortunate event of forced recovery, it is not unnecessarily obstructed. They must raise objections at the earliest possible opportunity & cannot take recourse to any roving tactics to indefinitely delay recovery forcing the buyer to back out. Here, the petitioners have revealed same attitude which is unbecoming on their part. Moreover, their conduct & act of securing another loan from Mahavir Urban Cooperative Bank on the basis of same property dis-entitles them to any relief in extraordinary jurisdiction under Art. 226 of the Constitution of India. There is no justification to warrant dispensing with the fetters employed in the scheme of Rule 61 of the Second Schedule of the Income-tax Act. The intervention by this Court under Art. 226 is neither possible nor desirable in this matter. Hence, we discharge the Rule & dismiss writ petition with total costs of Rs. 6,000/- on the Petitioners. Rs. 3,000/- out of it are payable each to respondent 1 Bank & respondent 3 auction

purchaser.