

(2001) 07 KAR CK 0019

In the Karnataka High Court

Case No : Writ Petition No. 12994 of 1999 (GM - DRT)

Kunhambu K.

APPELLANT

Vs

Presiding Officer, Department Recovery Tribunal

RESPONDENT

Date of Decision : 06-07-2001

Acts Referred:

Citation : (2003) 131 TAXMAN 842

Hon'ble Judges : V. Gopala Gowda, J

Bench : Single Bench

Advocate : P.S. Dinesh Kumar, D. Srinivasa and N.M. Ashok, for the Appellant;
Mallikarjunaiah, K. Manjunath and S. Vamshi Krishna, for the Respondent

Final Decision : Allowed

Judgement

V. Gopala Gowda, J.—Petitioners in this case have sought for a declaratory relief to declare that the auction proceedings held on 30-3-1999 by the second respondent in respect of the immovable property bearing TS No. 666/100 RS. No. 95/100 of Ward No. 6 known as "Laxmi Nilaya" situated opposite Gandhinagar Park, Gandhinagar, Mannagudda, Mangalore, measuring about 30 cents relating to patta No. 192 pursuant to the order dated 8-5-1998 passed by the first respondent in O.A. No. 977/1997 as illegal and further sought for a direction to declare that the order dated 8-5-1998 made in the abovesaid original application by the Debt Recovery Tribunal as illegal vide Annexures "A" and "B". Further reliefs sought for at prayer Columns (b), (c) and (d) are not all required to be considered in this writ petition, as the same cannot be granted having regard to the facts and circumstances of this case. Certain relevant facts, which are necessary for the purpose of considering and answering the rival contentions of the parties are briefly stated as hereunder:-

At the instance of the first petitioner, the third respondent Bank had issued a Bank Guarantee to the tune of Rs. 15 lakhs to three different financiers. First petitioner had sought for issuance of a Bank Guarantee in order to purchase timber to improve his business. The private financier though invoked the said

bank guarantee did not ensure supply of the timber to the first petitioner.

2. The second petitioner who is the Land Lady of property bearing TS No. 66/100 RS No. 95/100 of Ward No. 6 known as "Laxmi Nilaya", situated opposite Gandhinagar Park, Gandhinagar, Mannagudda, Mangalore stood as Guarantor to the first petitioner in respect of the said transaction.

3. The third respondent Bank filed original suit in OS No. 371/1985 on the file of the First Additional Civil Judge, Mangalore. Same came to be decreed by judgment and decree dated 22-4-1989 as per Annexure "A". Pursuant to decree, third respondent bank filed an execution petition in EP No. 94/92. During pendency of the execution of the decree, the first petitioner deposited a sum of Rs. 10 lakhs towards the debt due to the Bank. In the judgment and decree passed vide Annexure "A" payment of Rs. 3,59,135 made by the first petitioner had been ordered for due deduction from the claim made by the third respondent bank. In the meanwhile, pursuant to the recovery of the Debts Due to the Banks and Financial Institutions Act, 1993 (in short "A") came into force. The execution proceedings transferred on the file of the first respondent and were renumbered in O.A. No. 977/97. The proceedings culminated in ex parte order dated 8-5-1998 vide Annexure "B". It is the case of the first petitioner that as on the date of transfer of the proceedings Execution petition from the Court of the Second Additional Civil Judge, Mangalore to the First Respondent Tribunal nearly Rs. 13 lakhs were paid. The total amount covered under the Bank Guarantee is Rs. 15 lakhs. The claim of the bank was Rs. 60,70,562.36. The Tribunal first respondent has allowed the ex parte proceedings without considering the payments made by the first petitioner during pendency of the execution petition including the bank guarantee. Pursuant to the said order, the second respondent who is the Recovery Officer published three public notices in Udaya Vani Kannada Daily dated 28-2-1999, 22-3-1999 and 27-3-1999 vide Annexures "C", "D" and "E" respectively. It is alleged that in the first publication it does not contain any details regarding the reserved price, place of auction and the time of auction. What is mentioned in the said first notice the date of auction as 29-3-1999. In the second notice, it is shown as place of auction as Vijaya Bank, Vijaya Towers, LHH Road, Bangalore, date of auction was shown as 30-3-1999. In the said notice also the reserved price and the time of auction are not mentioned. In the third notice, the date of auction was shown as 30-3-1999 and the place of auction was shown as Vijaya Bank, Vijaya Towers, LHH Road, Mangalore. It is alleged that lack of furnishing relevant information as contemplated under the rule 52(2) in Part III of the Second Schedule regarding procedure for recovery of tax framed under sections 292 and 276 of the income tax Act, 1961 (hereinafter called as "Rules" in short), which rules are required to be applied for recovery of the money due to the Banks and Corporations and pursuant to the recovery certificate issued u/s 29 of the Act of 1993 by the Tribunal. Therefore, the prospective purchasers were not in a position to dissuade them to purchase the property pursuant to the said notices referred to supra and further contended that notices published by the second respondent have not been in accordance

with rules.

4. It is the case of the first petitioner that on his part he was actively trying to negotiate the matter with the bank for full and final settlement. It is finally reduced to a sum of Rs. 36.25 lakhs and he was informed that the Chairman of the Bank has accorded his approval for one time settlement. Since the first petitioner had desired to save the house property belongings to the second petitioner he was compelled by the circumstances to agree for the said proposal of the bank.

5. It is the case of the first petitioner that he was attacked with Paralytic Stroke during the month of March 1998 and therefore he was hospitalised. He could not actively attend to his normal work. After recovery from his Paralytic Stroke, he met with an accident in Chennai during September 1998 where he had gone to arrange some finance to settle the matter. He had suffered severe injury and for that he was again hospitalised at Chennai for sometime. Later shifted to Shushrutha Nursing Home at Ernakulam and Shekhar Nursing Home, Bangalore. On account of the said ailment and accident he was immobilised for quite sometime and he was required to take compulsorily rest. In support of the said contention, he has produced Medical Certificates vide Annexures "F-1" to "F-9".

6. It is the case of the petitioners that they had filed application in IR No. 29/99 before the first respondent for setting aside the ex parte order dated 8-5-1998 because of the proposal for settlement and they wanted to settle the matter. They did not prosecute the miscellaneous application. The second respondent pursuant to the notifications at Annexures "C" to "E" referred to supra, conducted auction in respect of the property in question on 30-3-1999 and accepted the fourth respondent's bid. The amount offered by the fourth respondent is about Rs. 44.75 lakhs in respect of the land, which measures about 30 cents situated in the prime locality of Mangalore. The claim of the petitioners is that in that locality, the market value of the said land is Rs. 2 lakhs percent and that amount does not include the value of building. The petitioners are aggrieved of the order of the Tribunal and the public auction notice issued by the second respondent and the sale of the property in public auction for inadequate market value of the property. Petitioner's counsel Mr. Ponnappa who had appeared on behalf of their counsel submits that the sale of the property in question is in contravention of the provisions of the Act of 1993 and rule 52(2) as Tribunal has proceeded to pass ex parte proceedings in the execution case for attachment of the property and the sale of the same in public auction without following the mandatory rules referred to supra and also in violation of the principles of natural justice as there was no notice served upon the petitioners after the execution proceedings were transferred to the Tribunal and therefore he had prayed for grant of the reliefs in favour of the petitioners. Further it is urged that the action of the second respondent auctioning the property by issuing the impugned notifications referred to supra strictly not complying with the mandatory rule 52(2) in not showing the place of public auction in the first notice and the time of auction and

the second and third notifications issued by the second respondent, and showing the different dates at different places thereby there is no proper auction of the property by him strictly in conformity with the rules referred to supra, therefore, the learned counsel submits that the petitioners are entitled for the reliefs sought for in this writ petition.

7. Learned Counsel for the contesting respondents contended placing reliance upon the statement of counter filed by the bank stating that writ petition is not maintainable as the petitioners have got an effective alternative remedy as provided under rule 60(1) of the Rules as the petitioners have the right of filing application to set aside the sale of immovable property in favour of the fourth respondent either on the ground of non-service of notice or irregularity committed by the Recovery Officer in selling the property in public auction and further third respondent's bank counsel has produced certain documents such as list of fair market value in Mangalore City, the valuation report of a Registered valuer Mr. Dharmapal Shetty to justify the valuation of the property in conformity with the market value and also by another memo dated 17-12-2000 the proclamation of sale in Form No. 13 as required under Rule 38 and Rule 52(2) of Second Schedule to the income tax Act, 1961 produced to show that the proclamation of the sale of the property dated 18-12-1999 in question has been made in accordance with the rules. Further Learned Counsel for the respondent-Bank has placed reliance upon the two judgments of the Apex Court in the case of United Bank of India Vs. Naresh Kumar and others, in support of the proposition that "the suits instituted by the Banks and Corporations the public interest should not be permitted to be defeated on a mere technicality and procedural defects which do not go to the root of the matter and therefore it should not be permitted to defeat a just cause" and also placed reliance upon the judgment of the Delhi High Court in the case of New Bank of India v. Smt. Pushpa Ahuja 1997 AIHC 2232 for the proposition of law that the Court should not move and examine the matter on procedural technicalities. "The Court should keep in mind the ultimate analysis that would suffer by the banks and corporations where the public interest is involved". Therefore Learned Counsel for the respondent-bank submits that this Court need not interfere with the impugned orders and sale of the property in exercise of its extraordinary power under Article 227 of the Constitution of India as the petitioners were the defaulters in not settling debt amount due to the bank, despite the fact that there was a judgment and decree and the Recovery Certificate issued by the Tribunal in favour of the Bank.

8. Further learned Counsel appearing on behalf of the fourth respondent purchaser Mr. Vamshi Krishna submits that the second respondent Officer after following the mandatory procedure as contemplated under the Second Schedule to income tax Act, 1961, after issuing the proclamation of sale notice giving wide publicity in the District as per Annexures "C" to "E" the sale of property has been made in the public auction and the sale is confirmed in favour of the fourth respondent. Fourth respondent was the highest bidder of Rs. 44.75 lakhs and he

has been put in possession and enjoyment of the same. The highest bid in respect of the property of the fourth respondent is in conformity with the market value determined and fixed in the District of Mangalore City on the basis of the valuation committee under the Chairmanship of Mangalore City Valuation Committee. The proceedings came into effect from 1-7-1999 and also in conformity with the valuation report of the registered valuer referred to supra. Therefore Counsel for the fourth respondent prayed for dismissal of the writ petition.

9. After hearing the Learned Counsel for the petitioners at length, the following points would arise for consideration and determination of this Court:

1. Whether the writ petition filed by the petitioners is not maintainable in view of the alternative remedy of filing application for setting aside the sale made in favour of the fourth respondent?

2. Whether the sale of property has been made by the second respondent in favour of the fourth respondent after following the rules 52 to 56 of the Rules framed in Schedule II of the income tax Act, 1961?

3. If the answer is against the respondents 2, 3 and 4, for what relief the petitioners are entitled in this petition?

10. To answer the abovesaid point No. 1, it is necessary for this Court to refer to certain undisputed facts namely that the writ petition was filed by the petitioners before this Court on 9-4-1999 seeking for issuance of a declaration to declare that the auction proceedings held on 30-3-1999 in respect of the immovable property belonging to the second petitioner is not legal and valid. This Court on 13-4-1999 issued notice regarding rule, passed a conditional interim stay and further that the condition of interim stay has not been complied with by them. Since the petitioners did not comply with conditions of interim stay the stay order would not enure to the benefit of the petitioners. The interim order granted by this Court was vacated vide its order dated 14-2-2000 on the application filed I.A. No. 6 and I.A. No. 7 for recalling the order dated 31-1-2000 to direct the office for early hearing of the matter was also reflected and this Court on 25-1-2000 "issued rule nisi". No doubt there is an alternative remedy provided to the petitioners as contemplated under rule 61 of the Rules, the question of setting aside the sale of the property would arise after confirmation of the sale of the property u/s 63 of the Rules, immediately after the sale of the property in question that is within 9 days the petitioners have approached this Court complaining that the procedure required to be followed by the second respondent in auctioning the property is bad in law as there is blatant violation of the rules referred to supra by him and therefore they have prayed for the reliefs. This Court on examination of the contentions urged in the writ petition "issued rule nisi" as this Court felt that there is a good case on merits for its consideration. Therefore this Court is required to decide the rights of the parties on merits is the view taken by the Division Bench of this Court which is reported in the case

of Krishnegowda Vs. Karnataka State Co-operative Apex Bank Ltd., following the judgments of the Apex Court in Miss Raj Soni Vs. Air Officer in Charge Administration and another, and Assam Sillimanite Ltd. and another Vs. Union of India and others, The Division Bench of this Court at para 5 has clearly laid down the law with regard to non-availing of the alternative remedy by the party, which paragraph is extracted as hereunder for considering the case of the parties and answer the question raised in this case:

5. There appears to be considerable force in each of these contentions. In order to appreciate the last two contentions, it appears to be pertinent to note certain dates. Soon after announcement of the result of the interview, as per Annexure "C", the appellant preferred the Writ Petition in the month of October, 1982, in which notice of admission was issued for the first time on 4-3-1983. Later, the matter having come up in "B" group on 10-4-1985, Rule Nisi was issued and the petitioner was being listed for hearing in due course. On 8-11-1990 when the petition came up for final hearing, the Writ Petition was dismissed on the ground of availability of alternative remedy as stated earlier. The short question for consideration is whether having regard to the efflux of time during the pendency of the Writ proceedings, it is just and expedient in the circumstances to drive the appellant to seek the alleged alternative remedy available to him u/s 70 of the Act. On this point, strong reliance is placed upon the decision in Raj Soni v. AIR Officer in Charge Administration. A similar contention regarding maintainability of a petition under article 32 of the Constitution having been raised in the said case, the Supreme Court has observed thus:-

"It is not necessary and we do not propose to go into the question in this case as to whether the petition is maintainable under Article 32, of the Constitution, because this petition has been pending in this Court since 1981. The petitioner's claim is just. It will, therefore, be a travesty of justice to send her to any other forum at this stage"....

In this connection, we may also refer to a similar Ruling of the Apex Court in Assam Sillimanite Ltd.'s case (supra). The question for consideration in the said case appears to be regarding the relief to be granted to the petitioner therein in respect of a lease. The contention was that if the petitioners are aggrieved because of the premature termination of the leases, it is open to them to file a suit or seek other appropriate remedies for obtaining compensation in respect of the unlawful termination. Meeting this contention, the Learned Judges have observed thus:-

... We do not think that this is a fair course to be adopted in this case. The writ petition was filed by the petitioner-company as early as in February, 1973 and has been pending in this Court for about 17 years. It is true that the petitioner could have filed a suit for the same purpose with a prayer for additional relief by way of compensation or damages. But we do not think that it should now be asked to go back to file a suit for compensation or damages which may be barred by limitation. After the lapse of such a long time, in our opinion, the proper

course is to adopt some method for deciding the quantum of relief that could be granted to the petitioner by way of compensation and damages, which can at once be simple and expeditious and which will avoid further unnecessary litigation...." (p. 1422)

In that view of the matter, it appears to us that the dismissal of the petition on the ground of maintainability in view of the availability of alternative remedy, in the circumstances, is erroneous.

In view of the law laid down by the Division Bench of this Court, merely because the petitioners had alternative remedy under the Rules after issuing the "rule nisi" in this case this Court cannot dismiss the writ petition on the ground of the availability of the alternative remedy to the petitioners under the Rules. Therefore the first point has to be answered in favour of the petitioners. Accordingly the first point is answered in favour of the petitioners and this Court holds that this writ petition is maintainable.

11. To answer the second point, having regard to the contentions urged by the petitioners with reference to the proclamation notice produced by the third respondent bank in Form No. 13 dated 18-12-1999 what is required under sub-rule 52 is "where any immovable property is ordered to be sold, the Tax Recovery Officer shall cause a proclamation of the intended sale of the property to be made in the language of the District". Therefore, as could be seen from the proclamation notice produced along with the memo by the third respondent bank, which is in English language. It is not in accordance with rule 52(2) of the Rules and further the contents of the proclamation must be strictly in conformity with the aspects which are enumerated under rule 53 of the Rules such as the sale of immovable property shall be drawn up after notice to the defaulter, and shall state the time and place of sale, and shall specify, as fairly and accurately as possible,-

- (a) the property to be sold;
- (b) the revenue or any part thereof;
- (c) the amount for the recovery of which the sale is ordered;
- (cc) the reserve price, if any, below which the property may not be sold; and
- (d) any other thing which the Tax Recovery Officer considers it material for a purchaser to know, in order to judge the nature and value of the property.

12. As could be seen from Form No. 13 proclamation notice issued by the second respondent, no doubt these particulars are mentioned in the said notice but the said proclamation notice is not in the District Language of Dakshina Kannada District as it is Kannada Language. Therefore, I have to answer that the proclamation notice is not in conformity with rule 53.

13. Further rule 54 contemplates the mode of making proclamation sub-rule (2) of the rule contemplates that the Tax Recovery Officer so directs, such

proclamation shall also be published in the Official Gazette or in a local newspaper, or in both; and the cost of such publication shall be deemed to be costs of the sale. Having regard to the nature of sub-rule (2) the second respondent was required to publish the entire proclamation in the District Language in the local newspaper. What is published in the local newspaper as could be seen in the newspaper at Annexures "C" to "E" are in Udaya Vani Daily newspaper dated 28-2-1999. The particulars as required under rule 53 are not mentioned and the said notice is in English Language, but not in the Kannada language which is the District Language where the property was sold in public auction. In the first notice date of auction is mentioned as 29-3-1999 and the place of auction has not been mentioned. Annexure "D" is also the notification published on 22-3-1999 in Udaya Vani. The place of auction is shown as Vijaya Bank, Vijaya Towers, LHH Road, Bangalore, the date of auction is shown as 30-3-1999 and further in both the said notices the reserved price has not been mentioned. Annexure "E" is dated 27-3-1999 published in Udaya Vani. Public Notification is in English, the reserved amount has been mentioned as Rs. 25 lakhs. The date of auction is shown as 30-3-1999 at 3.00 p.m. the place of auction is mentioned at Vijaya Bank, Mangalore, Ph. 48173. Notices at Annexures "D" and "E" with regard to the place of auctions are inconsistent with each other apart from the fact that the said notices are not in conformity with the Rule as the second respondent was required to give 30 days' notice to auction the property inviting the prospective purchasers. Therefore, I have to record a finding of fact on the basis of the aforesaid public notices keeping in view the law laid down on this question, the Apex Court in the case reported in Babu Verghese and Others Vs. Bar Council of Kerala and Others, and 32, with reference to the relevant provisions of Advocates Act, 1961 and with reference to the various judgments of the Apex Court and also the Privy Council, law has been succinctly laid down by the Apex Court as hereunder:

31. It is the basic principle of law long settled that if the manner doing a particular act is prescribed under any statute, the act must be done in that manner or not at all. The origin of this rule is traceable to the decision in Taylor v. Taylor [1875] 1 Ch.D. 426 which was followed by Lord Roche in AIR 1936 253 (Privy Council) who stated as under:

"Where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all."

32. This rule has since been approved by this Court in Rao Shiv Bahadur Singh and Another Vs. The State of Vindhya Pradesh, and again in Deep Chand Vs. The State of Rajasthan, These cases were considered by a three-Judge Bench of this Court in State of Uttar Pradesh Vs. Singhara Singh and Others, and the rule laid down in Nazir Ahmed's case (supra) was again upheld. The rule has since been applied to the exercise of jurisdiction by courts and has also been recognised as a salutary principle of administrative law." (p. 1288)

14. By reading the law laid down in the aforesaid case extracted supra, it is the

basic principle of law long settled that if the manner doing a particular act is prescribed under any statute, the act must be done in that manner or not at all. Having regard to the nature of the rules upon which the second respondent was required to discharge the statutory duty in selling the immovable property of the petitioners, the second respondent was required to strictly follow the rules. That has not been done in the case. Therefore the public auction and the sale made in respect of the property in question by the second respondent has to be held as null and void as the second respondent has blatantly violated the rules 52 to 55. Therefore this Court has to consider what relief has to be granted in favour of the petitioners keeping in view the observations made by the Division Bench of this Court in the appeal filed by the petitioner against the order passed on I.A. No. 6 in this writ petition. At para 3 of the judgment of this Court in W.A. No. 1753/2000 dated 14-11-2000 it has been observed that "the auction of the property and the sale were confirmed during pendency of the writ petition. The confirmation of the sale of the property pursuant to the auction and delivery of possession would be subject to the result of this writ petition". In view of the observations made above, despite the fact that the delivery of the property has been given to the fourth respondent petitioner is entitled for the relief to quash the sale made in favour of the fourth respondent by the second respondent, to recover the debt due to the third respondent bank for the reason that the second respondent has blatantly violated the statutory rules referred to supra. Thereby the serious civil consequences had entailed upon the rights of the second petitioner as he had lost valuable right of fetching marketable price in respect of the property in question from the purchasers, as the second respondent has not given proclamation notice giving wide publicity in the recognized language in the Dakshina Kannada District and the place of auction, time, as required under the Rules referred to supra has not been specifically mentioned in the notification published in the newspapers at Annexures "C" to "E". The confirmation of sale of the property in question by the second respondent in favour of the fourth respondent is also bad in law for the reason that as per the rule 57(2) within 15 days from the date of sale of the property the entire bid amount should have been deposited to the second respondent by the fourth respondent as he was the highest bidder. It is an undisputed fact as the third respondent's counsel has submitted that the fourth respondent could not deposit the sale amount within 15 days as the second respondent was not available at that relevant point of time. He has not produced any document to show in the absence of the second respondent what steps the fourth respondent had taken to deposit the said amount is not explained in the counter statement. Therefore, there is also violation of rule 57(2) of the Rules. Therefore second respondent has committed an illegality in confirming the sale of the property in question even though fourth respondent has not deposited the sale amount within 15 days" time as required under the abovesaid rule. For this reason also the confirmation of sale of the property is bad in law. Therefore for the aforesaid reasons, the petitioners must succeed in this case having regard to the findings and the points formulated by this Court are answered in favour of the petitioners. Petitioners are entitled for

the following reliefs.

Writ petition is allowed. Rule made absolute. Public auction that was held on 30-3-1999 by the second respondent at Mangalore is hereby quashed. Confirmation of sale of the property in question made in favour of the fourth respondent is also hereby quashed. Direction is given to the fourth respondent to deliver the possession back to the second petitioner within six weeks from the date of receipt of the order and further the second respondent is at liberty to proceed in the matter if the petitioner does not clear the debt due to the third respondent bank as per the Recovery Certificate issued by the first respondent. The petitioner shall not alienate the property in question either repaying the debt amount due to the bank or obtaining permission from the second respondent.

Petition allowed.