
(2012) 12 AHC CK 0175

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 13595 of 2003

Lal Bai Patel

APPELLANT

Vs

Central Bank of India

RESPONDENT

Date of Decision : 18-12-2012

Acts Referred:

Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 17, 17A, 18, 19(25), 20

Citation : (2012) 12 AHC CK 0175

Hon'ble Judges : Sabhajeet Yadav, J

Final Decision : Allowed

Judgement

Sabhajeet Yadav, J.—Heard learned counsel for the parties.

2. By this petition, the petitioner has sought relief in the nature of certiorari for quashing the orders, dated 10.1.2003 passed by the Presiding Officer, Debt Recovery Tribunal, Allahabad in D.R.C. No. 96 of 2002 (Central Bank of India Vs. M/s Sanjeev Traders and others), dated 11.3.2003 passed by the Chairperson, Debt Recovery Appellate Tribunal, Allahabad in Appeal No. 279 of 2003 (Smt. Lal Bai Patel Vs. Central Bank of India & others), and order dated 29.1.2003 passed by the Recovery Officer, Debt Recovery Tribunal, Allahabad in D.R.C. No. 96 of 2002 (Central Bank of India Vs. M/s Sanjeev Traders and others) contained in Annexures No. 7,10 and 8 respectively to the writ petition. Further she has sought relief in the nature of mandamus directing the confirmation of the sale of the property in favour of the petitioner.

3. It is stated that the Debt Recovery Tribunal, Allahabad in exercise of the powers under the Recovery of Debt Due to Banks and Financial Institutions Act, 1993, herein after referred to as 1993 Act, issued a Recovery Certificate on 19.3.2002 against the respondents no.3 to 6 for recovery of sum of Rs. 13,70,220=00, in pursuant thereto the Recovery Officer, Debt Recovery Tribunal, Allahabad initiated the recovery proceedings against the respondents no. 3 to 6, under the provisions of 1993 Act. In furtherance of said Recovery proceedings

the Recovery Officer attached the immovable property of respondent no.5 being House No.B37/115, Birdopur, Rathyatra, Varanasi under Rule 48 of the Second Schedule of the Income Tax Act, 1961 read with Section 29 of the 1993 Act. On 12.12.2002 a public notice was published in the newspaper "Hindustan" in respect of the sale of the aforesaid immovable property of respondent no.5 by auction sale. As per programme, terms and conditions of the sale, the aforesaid property of respondent no.5 was to be auctioned in an open public auction on 18.12.2002 by the Recovery Inspector, Debt Recovery Tribunal, Allahabad. The reserve price of the aforesaid property was fixed by the Recovery Officer, Debt Recovery Tribunal, Allahabad as Rs. 4 lakhs. It is stated that on 18.12.2002 auction sale was held by following all the necessary formalities in accordance with the Act and the Rules, and the petitioner also participated in the auction proceedings alongwith several bidders, but the bid of the petitioner was found to be the highest to the tune of Rs. 11,15,000/, consequently the same was accepted. As per the terms and conditions of the Auction, the petitioner deposited 25% of the bid amount immediately and the balance amount on 31.12.2002. In the result Provisional Sale Certificate was issued to the petitioner by the Recovery Inspector, Debt Recovery Tribunal, Allahabad on 18.12.2002. The copy of the Provisional Sale Certificate dated 18.12.2002 is enclosed as Annexure4 to the writ petition.

4. It is stated that on 30.12.2002 the petitioner deposited the remaining balance amount alongwith poundage fees but no application for setting aside the sale held on 18.12.2002 was made within 30 days from the date of auction sale before the Recovery Officer, Debt Recovery Tribunal, Allahabad, therefore, the auction sale in favour of the petitioner, held on 18.12.2002 ought to have been confirmed as envisaged by rule 63 of the Schedule II of the Income Tax Act. The respondent no.2 subsequently made a communication to the Presiding Officer, Debt Recovery Tribunal, Allahabad on 19.12.2002 challenging the validity of the auction sale held on 18.12.2002 and also offering a sum of Rs.15.00 lacs requesting that the property in question be given to him. The copy of the application of respondent no.2 dated 19.12.2002 is enclosed as Annexure7 to the writ petition. It is stated that the Presiding Officer, Debt Recovery Tribunal, Allahabad on the same letter of respondent no.2 passed an order on 10.1.2003 whereby the Recovery Officer, Debt Recovery Tribunal, Allahabad was directed not to confirm the auction sale held in favour of the petitioner instead thereof the respondent no.2 was directed to deposit the offered amount by 27.1.2003 and said offer was directed to be kept open. In compliance of the said order of Presiding Officer, Debt Recovery Tribunal, Allahabad the Recovery Officer by means of order dated 29.1.2003 set aside the auction sale held on 18.12.2002 in favour of the petitioner and the property was directed to be put to fresh public auction, in furtherance thereto the Recovery Officer has fixed 12.3.2003 as the date for reauction of the property in question.

5. It is stated that the petitioner being aggrieved by the order dated 10.1.2003 passed by the Presiding Officer, Debt Recovery Tribunal, Allahabad and the

consequential order dated 29.1.2003 passed by the Recovery Officer, Debt Recovery Tribunal, Allahabad in D.R.C. No. 96 of 2002 (Central Bank of India Vs. M/s Sanjeev Traders and others) preferred an appeal under section 20 of the 1993 Act, before the Debt Recovery Appellate Tribunal, Allahabad. The aforesaid appeal was registered as Appeal No. R279 of 2003 and was dismissed vide judgement dated 11.3.2003 passed by Appellate Tribunal, Allahabad holding it to be not maintainable. The copy of the judgement dated 11.3.2003 is enclosed as Annexure10 to the writ petition.

6. It is submitted by the learned counsel for the petitioner that the impugned order dated 10.1.2003 is an order passed in gross violation of principle of natural justice and as such is violative of Section 22 of 1993 Act. No opportunity whatsoever was given to the petitioner prior to the passing of the impugned order dated 10.1.2003 and the impugned order dated 10.1.2003 is passed completely without jurisdiction. No power is vested with the Presiding Officer, Debt Recovery Tribunal to cancel the auction sale held on 18.12.2002 and to interfere with auction sale proceeding except by way of an appeal under Section 30 of 1993 Act.

7. It is further submitted that the respondent no.2 has no locus standi to offer a bid separately, as respondent no.2 did not participate in the auction sale held on 18.12.2002. No application for setting aside the auction sale dated 18.12.2002 was preferred before the Recovery Officer. Once the auction sale was held after public notice to all the concerned and statutory initial deposit of 25% and balance amount was deposited within time, there was nothing in law to prevent confirmation of sale and issuance of sale certificate to the petitioner.

8. It is further submitted that the Appellate Tribunal failed to consider that the order dated 10.1.2003 passed by the Presiding Officer, Debt Recovery Tribunal, which directs the nonconfirmation of the sale in favour of the petitioner, perpetually, amounting cancellation of auction sale held in favour of the petitioner in public auction. The Appellate Tribunal failed to consider the fact that the order dated 29.1.2003 is an order passed by the Recovery Officer in compliance of the order dated 10.1.2003 passed by the Presiding Officer, Debt Recovery Tribunal, Allahabad, which virtually deemed to have been passed by the Tribunal itself so as to become appealable under Section 20 of 1993 Act before the Appellate Tribunal. It was not an independent order of the Recovery Officer so as to file appeal before the Tribunal under Section 30 of the Act.

9. Whereas contrary to it, learned counsel for respondents Sri Manish Goyal has contended that the right to appeal is statutory right. In so far as provisions regarding the recovery of debt determined by the Tribunal are concern, they are enumerated in Chapter V of the Act. Section30 of 1993 Act deals with the right of appeal and further the authority before whom the appeal will lie. Section30 of the Act was amended by Section12 of Act No.2000 with retrospective effect from 17.1.2000. As per amended section appeal against the order passed by the Recovery Officer shall lie before the Presiding Officer, Debt Recovery Tribunal.

However, prior to the amendment the order of Recovery Officer by fiction was treated to be an order passed by Tribunal, therefore, the appeal was permissible before the Appellate Tribunal against the order of Recovery Officer but after such amendment under Section 30 of the Act, against the order of Recovery Officer the appeal shall lie before the Tribunal itself and the order of Recovery Officer cannot be straightway challenged under Section 20 before the Appellate Tribunal.

10. Further submission of learned counsel for the respondent no.2 is that the Presiding Officer of Tribunal is vested with the power of general superintendence in respect of discharge of functions by Recovery Officer under Section 7(2) and under Section 19(25) of the Act, Presiding Officer can issue certain orders and under Section 27 of the Act Presiding Officer can stay the recovery or can give further time for payment of the amount sought to be recovered, as such the order passed by Debt Recovery Tribunal on 10.1.2003 is treated to be order in guidance and superintendence of the functioning of Recovery Officer and cannot be taken to be final order of the Tribunal in respect of the proceeding in question. Thus, the order of Recovery Officer dated 29.1.2003 cannot be construed to be an order of Presiding Officer so as to entitle the petitioner to prefer an appeal against the said order of Recovery Officer before Appellate Tribunal under Section 20 of the 1993 Act.

11. However, on merits too learned counsel for respondents has submitted that auction sale could be set aside on certain circumstances mentioned in the IIInd Schedule of Income Tax Act and in given facts and circumstances of the case, it can not be said that the application moved by respondent no.2 offering higher bid for reauction of the property is beyond the scope of authority under law. At any rate, equity does not favour the petitioner to enable this Court to exercise its extraordinary equitable writ jurisdiction in favour of petitioner for the reason that the auction sale held in favour of petitioner was for less amount than the amount sought to be recovered from the borrower/debtor and the property in question could fetch more price and in the second auction also the answering respondent has offered a sum of Rs.15,60,000=00 whereas the petitioner did not participate in the auction. Besides this, the answering respondent is ready to pay the petitioner interest @ 15% per annum from the date of deposit made by the petitioner on the amount of Rs. 11,15,000=00 till date in order to adjust the equities with the petitioner and further in case, the writ petition is to be allowed then answering respondent is also entitled for payment of interest @ 15% per annum with effect from the date of deposit made by answering respondent before the Debt Recovery Tribunal till date. In support of his aforesaid submissions learned counsel for respondent concern has placed reliance upon several reported decisions.

12. Having considered the rival submissions of learned counsel for the parties and on perusal of record, first question arises for consideration is that as to whether the appeal against the order dated 10.1.2003 passed by Presiding Officer, Debt Recovery Tribunal and the order dated 29.1.2003 passed by

Recovery Officer, Debt Recovery Tribunal in case in question could be filed by the petitioner before Appellate Tribunal under Section 20 or it could be filed before the Debt Recovery Tribunal, Allahabad itself under Section 30 of the 1993 Act?

13. In order to answer these questions it would be useful to refer the provisions of Sections 17, 17A, 18, 20 and Section 30 of 1993 Act, which are relevant for the purpose of the case as under :

"17. Jurisdiction, powers and authority of Tribunals (1)A Tribunal shall exercise, on and from the appointed day, the jurisdiction, powers and authority to entertain and decide applications from the banks and financial institutions for recovery of debts due to such banks and financial institutions.

(2) An Appellate Tribunal shall exercise, on and from the appointed day, the jurisdiction, powers and authority to entertain appeals against any order made, or deemed to have been made, by a Tribunal under this Act.

{17A. Power of Chairperson of Appellate Tribunal. (1) The Chairperson of an Appellate Tribunal shall exercise general power of superintendence and control over the Tribunals under his jurisdiction including the power of appraising the work and recording the annual confidential reports of Presiding Officers.

(2) The Chairperson of an Appellate Tribunal having jurisdiction over the Tribunals may, on the application of any of the parties or on his own motion after notice to the parties and after hearing them, transfer any case from one Tribunal for disposal to any other Tribunal.}

18. Bar of Jurisdiction. On and from the appointed day, no court or other authority shall have, or be entitled to exercise, any jurisdiction, powers or authority (except the Supreme Court, and a High Court exercising jurisdiction under Articles 226 and 227 of the Constitution) in relation to the matters specified in section 17.

20. Appeal to the Appellate Tribunal.(1) Save as provided in subsection (2), any person aggrieved by an order made, or deemed to have been made, by a Tribunal under this Act, may prefer an appeal to an Appellate Tribunal having jurisdiction in the matter.

(2) No appeal shall lie to the Appellate Tribunal from an order made by a Tribunal with the consent of the parties.

(3) Every appeal under subsection (1) shall be filed within a period of fortyfive days from the date on which a copy of the order made, or deemed to have been made, by the Tribunal is received by him and it shall be in such form and be accompanied by such fee as may be prescribed:

Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of fortyfive days if it is satisfied that there was sufficient cause for not filing it with in that period.

(4) On receipt of an appeal under subsection (1), the Appellate Tribunal may, after giving the parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.

(5) The Appellate Tribunal shall send a copy of every order made by it to the parties to the appeal and to the concerned Tribunal.

(6) The appeal filed before the Appellate Tribunal under subsection (1) shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal finally within six months from the date of receipt of the appeal.

30. Appeal against the order of Recovery Officer. (1) Notwithstanding anything contained in section 29, any person aggrieved by an order of the Recovery Officer made under this Act may, within thirty days from the date on which a copy of the order is issued to him, prefer an appeal to the Tribunal."

14. From a plain reading of Sections 17 (2) and 20 (1) of the 1993 Act it is clear that any person aggrieved by an order made or deemed to have been made by the Tribunal under the aforesaid Act, may prefer an appeal to the Appellate Tribunal under Section 20 of the Act and any person aggrieved by an order of Recovery Officer made under the Act may prefer an appeal to the Tribunal under Section 30 of the 1993 Act. Thus, an appeal shall lie to the Appellate Tribunal against an order passed by the Tribunal and/or an order deemed to have been passed by the Tribunal at instance of any person who is aggrieved by such orders of the Tribunal. It is immaterial as to whether such order of the Tribunal is final or interim in nature for the simple reason that Act does not make any difference between final and interim order of the Tribunal.

15. In this connection, it is to be noted that the phrase "an order deemed to have been made by a Tribunal" used under Sections 17 (2) and 20(1) of 1993 Act appears to have some significance as such it is not easy to understand the content and true import of the aforesaid phrase by mere reading of the aforesaid provisions of the Act without any foreign assistance. The meaning, content and import of expression "deemed" used in the statute would be clear from the statement of law contained at page 307 and 308 in IV Edition of Legislation and interpretation by Late Jagdish Swarup, wherein it is observed that the word "deemed" is used a great deal in modern legislation in different senses and it is not that a deeming provision is every time made for the purpose of creating a fiction. A deeming provision might be made to include what is obvious or what is uncertain or to impose for the purpose of a statute an artificial construction of a word or phrase that would not otherwise prevail but in each case it would be question as to with what object the legislature has made such a deeming provision. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give comprehensive description that includes what is obvious, what is uncertain and what is, in

ordinary sense, impossible. Similarly in the words and phrases the word "deemed" is also used to mean "regarded as being", it is equivalent to "shall be taken to be." When a statute enacts that something shall be deemed to have been done which in fact and truth was not done, the court is entitled and bound to ascertain for which purpose and between what persons the statutory fiction is to be resorted to and full effect must be given to the statutory fiction and it should be carried to its logical conclusion.

16. It is also observed by the author of the said book that the deeming provision creates legal fiction. The effect of such legal fiction is that a position which otherwise would not be obtained is deemed to be obtained under certain circumstances. A legal fiction is one which is not an actual reality but which the law requires the Court to accept it as a reality. In construing the scope of legal fiction, it would be proper and even necessary to assume all those facts on which alone the fiction can operate. Where a deeming provision is made in a statute, the state of things will have to be assumed, though such things do not exist, and the rights of the parties will have to be determined on such imaginary things. Therefore in case of legal fiction, the Court believes something to exist which, in reality, does not exist. In other words, it is nothing but a presumption of the existence of a state of affairs which in actual reality is nonexistent. When viewed from this context there is not much difference between a legal fiction and a presumption. However, it cannot be said that legal fiction and a presumption are wholly identical in all respects. A presumption may be conclusive or it may be rebuttable. It is conclusive, if no evidence can be permitted to be led to deny it. In case of a presumption which is rebuttable, unless the contrary is established, fictitious state of affairs is presumed to exist as if it is a reality.

17. In the light of aforesaid legal position, it is to be seen that as to whether the petitioner can be said to be an aggrieved person by the order dated 10.1.2003 passed by the Presiding Officer, Debt Recovery Tribunal, Allahabad on an application of respondent no.2, and as such as to whether the said order is appealable before the Appellate Tribunal under Section 20 of the Act or not?

18. In this connection, it is to be noted that the property in question of respondent no. 5 was to be auctioned in an open public action on 18.12.2002 by the Debt Recovery Tribunal, Allahabad, for realising a sum of Rs. 13,70,220/ from the respondents no. 3 to 6. The reserved price of the aforesaid property was fixed by the Recovery Officer, Debt Recovery Tribunal, Allahabad as Rs. 4.00 lacs. As per programme and terms and conditions of sale, the auction was held on 18.12.2002 and the petitioner along with several persons, participated in the auction proceedings. In the said auction, the bid of the petitioner, was found to be highest to the tune of Rs. 11,15,000/ and consequently, the same was accepted. It is also not in dispute that as per terms and condition of the auction, the petitioner deposited 25% of the bid amount immediately and balance amount on 31.12.2002 and provisional sale certificate was issued to the petitioner by the Recovery Inspector, Debt Recovery Tribunal, Allahabad on 18.12.2002. It is

further not in dispute that no application for setting aside of the auction sale held on 18.12.2002 was made within 30 days before the Recovery Officer from the date of auction instead of respondent no.2 made a communication to the Presiding Officer, Debt Recovery Tribunal, Allahabad vide his letter dated 19.12.2002 contained in annexure no. 7 to the writ petition, whereby he had offered a sum of Rs. 15.00 lacs for the said auctioned property, and prayed for handing over the said property to him. On the said application, the Presiding Officer, Debt Recovery Tribunal had passed the impugned order on 10.1.2003 observing as under:

"Case No. D.R.C. 96/2002

O R D E R

10.01.2003

R.O. Let sale be not confirmed. An offer of the amount shown be given to author of this letter will deposit the amount proposed as sale consideration upto 27.01.2003 and the offer be kept open. record shows that no order has been passed after 30.12.2002.

Sd./ A.S. Chaudhary,

P.O.,D.R.T.,Allahabad."

19. The submission of the learned counsel for the respondent no.2 that the order dated 10.1.2003 passed by the Presiding Officer of the D.R.T. is not final and has been passed in exercise of power of general superintendence in respect of the functioning of Recovery Officer purporting to be under Sections 7(2) and 19(25) of the Act for guidance of the Recovery Officer as such the order dated 10.01.2003 passed by the Tribunal should not be construed to be a final order so as to entitle the petitioner to prefer an appeal under Section 20 of 1993 Act appears to be without any substance for the reason that by the said order, Presiding Officer has directed the Recovery Officer not to confirm the auction sale held on 18.12.2002 in favour of the petitioner and Respondent no.2 was directed to deposit the proposed amount as sale consideration by 27.1.2003, in compliance of the said order the Recovery Officer vide his order dated 29.1.2003 has set aside the sale held on 18.12.2002 in favour of the petitioner and proceeded to hold fresh auction of the said property on 12.3.2003 and further the provisions contained under Section 20 of the 1993 Act, does not make any difference between final order or interlocutory order passed by the Tribunal to enable the aggrieved person to prefer appeal against such order. The only thing which is to be seen is that as to whether such order adversely affects the rights of person challenging such order or not. In my opinion, by the order dated 10.1.2003 passed by the Tribunal earlier auction of the same property held on 18.12.2002 stood automatically cancelled with further direction to hold a fresh auction of the same property. Therefore, in given facts and circumstances of the case, there can be no scope for doubt to hold that the right of the petitioner has been

adversely affected by the said order, thus, the petitioner can be said to be aggrieved by the same so as to challenge before the Appellate Tribunal by preferring an appeal under Section 20 of the 1993 Act. It is immaterial as to whether the order dated 10.1.2003 passed by the Presiding Officer, Debt Recovery Tribunal is final in nature or it is interlocutory or conditional order.

20. Now next question arises for consideration is that as to whether the order dated 29.1.2003 passed by the Recovery Officer, Debt Recovery Tribunal, Allahabad is consequential order of Presiding Officer, Debt Recovery Tribunal dated 10.1.2003 and deemed to have been passed by the Presiding Officer, Debt Recovery Tribunal and appeal could lie before Appellate Tribunal under Section 20 of the Act or it is an independent order of Recovery Officer under the Act and appeal could lie before the Tribunal itself under Section 30 of the Act.

21. In order to answer these questions it would be necessary to examine the legal position in this regard. Section 29 of the 1993 Act deals with application of certain provisions of Income tax Act, which reads as under:

29. Application of certain provisions of Income tax Act. The provisions of the Second and Third Schedules to the Income tax Act, 1961 (43 of 1961) and the Income tax (Certificate Proceedings) Rules, 1962, as in force from time to time shall, as far as possible, apply with necessary modifications as if the said provisions and the rules referred to the amount of debt due under this Act instead of to the Income tax:

Provided that any reference under the said provisions and the rules to the "assessee" shall be construed as a reference to the defendant under this Act."

22. Thus, from a plain reading of Section 29 of 1993 Act, it is clear that the provisions of Second and Third Schedules of Income tax Act 1961 and the Income tax (Certificate Proceedings) Rules 1962 have been adopted by the 1993 Act by way of reference with necessary modification, therefore, the aforesaid provisions of Second and Third Schedules of Income tax Act 1961 and Income tax (Certificate Proceedings) Rules 1962 as amended from time to time are fully applicable.

23. The procedure for recovery of tax has been provided in Second Schedule of Income tax Act. Part Third of Second Schedule deals with attachment and sale of immovable property. Rules 48 to Rule 59 of provided detail procedure for attachment and sale of immovable property by public auction. Rule 60 and Rule 61 of Second Schedule of Income tax Act deal with the circumstances under which the sale can be set aside. For ready reference the provisions of Rules 60 and 61 of Second Schedule of Income tax Act are quoted as under:

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 fifteen per cent per annum, 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.

61. Application to set aside sale of immovable property on ground of nonservice 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 nonservice or irregularity; and

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

24. Thus, from a plain reading of Rules 60 and 61 of Second Schedule of Income tax Act, it is clear that the defaulter, or any person whose interests are affected by the sale, may, at any time, within thirty days from the date of sale, apply to the Tax Recovery Officer, herein in this case, the 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 fifteen per cent per annum, calculated from the date of 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. Such sale can also be set aside on the ground that notice was not served on the defaulter to pay the arrears as required by Second Schedule or on the ground of a material irregularity in publishing or conducting the sale provided the Recovery Officer is satisfied that the applicant has sustained substantial injury by reason of the nonservice or irregularity but such application of defaulter shall be disallowed unless the applicant deposits the amount recoverable from

him in execution of certificate.

25. From the material on record there can be no dispute that no application for setting aside the sale was either moved by defaulter or the respondent no.2 before the Recovery Officer on the aforesaid grounds instead thereof a letter dated 19.12.2002 was sent by the respondent no.2 to the Presiding Officer, Debt Recovery Tribunal, offering a sum of Rs. 15 Lacs as sale consideration with request that the auctioned property may be handed over to him, whereupon he had passed aforesaid order dated 10.1.2003. In compliance of said order the Recovery Officer has passed the order dated 29.1.2003, whereby the auction sale held in favour of the petitioner was set aside and fresh auction of the same property was scheduled to be held on 12.3.2003, therefore, in my considered opinion, the order dated 29.1.2003 passed by the Recovery Officer cannot be held to be his independent order under Rules 60 and 61 of Second Schedule of Income Tax Act.

26. Now next question arises for consideration as to whether the order dated 29.1.2003 passed by Recovery Officer is in compliance of direction of Presiding Officer, Debt Recovery Tribunal in general superintendence of the functioning of Recovery Officer or is in compliance of the order dated 10.1.2003 passed by the Tribunal?.

27. In order to examine the aforesaid controversy, it would be useful to extract the order dated 29.1.2003 passed by Recovery Officer as under :

" Case taken up today.

The following order was passed on 10.11.2002 (correct date was 10.1.2003) by the Hon"ble Tribunal, Allahabad on an application dated 19.12.2002 received from S. Ranjan and Company, Chartered Accountants, D47/178, Luxa Road, Varanasi.

In compliance of the above order an offer was issued to applicant for depositing Rs.15.00 lacs as proposed by him as Sale consideration upto 27.1.2003.

In response to this offer the applicant S. Ranjan and Company deposited the amount of Rs.15.00 lacs on 24.1.2003.

As per the provisions in Rule 56 of Second Schedule of Income Tax Act, 1961 read with Section 29 of Recovery of Debts Due to Banks & Financial Institutions Act, 1993 the sale of immovable property shall be by public auction.

Since the offer has to be kept open, the applicant or any other person has to be offer his bid only in a public auction.

No terms of proclamation of sale has been offered by the parties.

The Jds have till date not liquidated their debt.

i). In view of the above, and in compliance of the order passed by Hon"ble Tribunal on 10.1.2003 in the instance case, the auction sale held at Varanasi on

18.12.2002 is hereby set aside. The auction purchaser Smt. Lal Bai Patel is hereby directed to receive the purchase money deposited with the undersigned.

ii) S. Ranjan and Company or any other person, is required to offer his bid in the public auction scheduled to be held on 12.3.2003 on the following terms and conditions:

iii) The immovable property already been attached by the DRT, Allahabad by its order dated 02.09.2002 shall be sold by Recovery Inspector, DRT, Allahabad by public auction on 12.3.2003 at 11.00 A.M. onwards at the premises of Central Bank of India, Mahanagar Palika Branch, Varanasi.

iv) The property shall be sold in one lot.

Lot No.1

House/Plot No.B 37/115, Birdopur, Rathyatra, Varanasi admeasuring 3600 sq. ft. owned by Smt. Luxmi Devi (JD No.3).

Reserve Price 15.00 lacs

v) The proclamation of sale shall be made in the following manners by Recovery Inspector, DRT, Allahabad.

a) Proclamation of sale shall be made at some place on or near such property by beat of drum or other customary mode and a copy of the proclamation shall be affixed at conspicuous part of the property and also upon a conspicuous part of the office of the Tribunal at Allahabad.

b) Proclamation for sale shall also be published in a local newspaper and the cost of such publication shall be deemed to be cost of sale.

c) The proclamation shall be made in the presence of independent witnesses and also in the presence of senior officers of the applicant bank and defendants.

vi) The applicant bank and the defendant shall assist in execution of this order of proclamation.

vii) A copy of proclamation of sale be sent to the concerned defendants and the bank by registered post with acknowledgment due.

viii) Let a copy of this order be sent by Registered post to all concerned.

Fix on 25.3.2003 for further order.

Sd/(Manoj Sinha)

Recovery Officer

Debts Recovery Tribunal

Allahabad"

28. Thus, from a careful reading of the order dated 29.1.2003 passed by the

Recovery Officer, Debt Recovery Tribunal, Allahabad, it appears that aforesaid order was passed by him in compliance of the order dated 10.1.2003 passed by the Presiding Officer of the Tribunal, whereby the Recovery Officer has set aside the auction sale held at Varanasi on 18.12.2002 and the petitioner was asked to receive purchase money and a fresh auction of same property was scheduled to be held on 12.3.2003. By order dated 10.1.2003 the Tribunal had directed the Recovery Officer not to confirm the auction sale held on 18.12.2002 in favour of the petitioner and the respondent no.2 was directed to deposit the offered amount as sale consideration upto 27.1.2003. The Recovery Officer was further directed to keep the aforesaid offer open. Therefore, in my opinion, the decision with regard to reauction of the property in question and nonconfirmation of auction sale was already taken by the Presiding Officer Debt Recovery Tribunal, Allahabad. However, the aforesaid decision was given effect to by the Recovery Officer vide his order dated 29.1.2003, whereby earlier auction held on 18.12.2002 was set aside and a fresh auction of the property in question was scheduled to be held on 12.3.2003, as such it cannot be said that the Recovery Officer, has passed the order dated 29.1.2003 on his own motion independently bereft from the order dated 10.1.2003 passed by the Presiding Officer, Debt Recovery Tribunal, Allahabad or it was passed in general superintendence or guidance of the Presiding Officer of the Tribunal rather the order dated 29.1.2003 was passed by the Recovery Officer to effectuate the order dated 10.1.2003 passed by the Presiding Officer, Debt Recovery Tribunal, Allahabad and as such the same is treated to have been passed by the Presiding Officer, Debt Recovery Tribunal under the Act as contemplated by Section 17 (2) and Section 20(1) of the Act under legal fiction created by Legislature by using deeming provisions under aforesaid Sections so as to entitle the petitioner to file appeal under Section 20 (1) of 1993 Act. Any other interpretation made by the Appellate Tribunal contrary to the interpretation given by this court appears to be wholly misconceived and cannot be sustained.

29. The observation of Appellate Tribunal that it has no jurisdiction in the matter also appears to be wholly erroneous and misconceived for the reason that by virtue of Sections 17 (2) and 20 (1) of 1993 Act, an appeal shall lie, against any order made, or deemed to have been made by Tribunal under this Act, before the Appellate Tribunal and under Section 20(4) the Appellate Tribunal is empowered to pass such orders thereon as it thinks fit by confirming, modifying or setting aside the order appealed against. Therefore, it is wholly incorrect to say that against such orders passed by Tribunal, the Appellate Tribunal has no jurisdiction to hear the appeal. It is also necessary to make it clear that under Section 17A the power of Chairperson of Appellate Tribunal appears to be of administrative in nature and it has no material bearing with the judicial powers. The judicial power has been conferred upon the Chairperson of Appellate Tribunal under Sections 20 of 1993 Act, therefore, the view taken by Appellate Tribunal that petitioner has her remedy elsewhere and not before it under the provisions of Section 20 of the Act is wholly erroneous and cannot be sustained. In my view, the Appellate

Tribunal has jurisdiction to entertain and decide the appeal on merit under Section 20 of the Act against the order dated 10.1.2003 passed by Tribunal and order dated 29.1.2003 passed by the Recovery Officer by treating the same to have been passed by Presiding Officer, Debt Recovery Tribunal under the Act as contemplated by Sections 17 (2) and 20(1) of 1993 Act. Accordingly, the order dated 11.3.2003 passed by the Chair Person, Debt Recovery Appellate Tribunal, Allahabad in Appeal No. 279 of 2003 (Smt. Lal Bai Patel Vs. Central Bank of India and others), can not be sustained and the same is hereby quashed.

30. The appeal is restored to the file of Chair Person, Debt Recovery Appellate Tribunal, Allahabad with the direction to him to decide the appeal on merit in accordance with law and in the light of observations made hereinbefore after hearing the parties by dealing with their contention raised before this Court and to be raised before the Appellate Tribunal within a period of two months from the date of production of a certified copy of this order before the Appellate Tribunal. It is made clear that I have not decided the lis on merit. The observations made herein before should be confined to the question of maintainability of appeal against impugned orders before the Appellate Tribunal.

31. With the aforesaid directions/observations, the writ petition succeeds and is allowed to the extent indicated hereinbefore.