

(2010) 12 MAD CK 0239

In the Madras High Court

Case No : Writ Petition No. 10652 of 2009 and M.P. No's. 2 and 3 of 2009

Machine Tools and Accessories (P) Ltd.

APPELLANT

Vs

The Debts Recovery Appellate Tribunal and Others

RESPONDENT

Date of Decision : 03-12-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 141
Constitution of India, 1950 — Article 14
Customs Act, 1962 — Section 129(1)
Debts Recovery Tribunal (Procedure) Rules, 1993 — Rule 7
Debts Recovery Tribunal Act, 1993 — Section 22
Debts Recovery Tribunal Regulation of Practice Rules, 1997 — Rule 8(5)
Income Tax (Certificate Proceedings) Rules, 1962 — Rule 57(2), 62
Income Tax Act, 1961 — Section 63(1)
Income Tax Rules, 1962 — Rule 61
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 17
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 17(7)

Citation : (2010) 12 MAD CK 0239

Hon'ble Judges : M. Venugopal, J; Elipe Dharma Rao, J

Bench : Division Bench

Advocate : S. Parthasarathy for Sai Bharath and Ilan, for the Appellant; Om Prakash, for Ramalingam Associates for R5 and John Acquinas, for R6, for the Respondent

Judgement

M. Venugopal, J.—The Petitioner has filed the Writ of Certiorari in calling for the records from the Respondents pertaining to the order dated 03.01.2007 of the Fourth Respondent (The Recovery Officer, The Debts Recovery Tribunal-I, Chennai) in D.R.C. No. 175 of 2004 in O.A. No. 152 of 2003, the order dated 16.06.2008 of the second Respondent (The Debts Recovery Tribunal-III, Chennai) in Appeal No. 38 of 2007, the order dated 23.04.2009 of the First Respondent (The Debts Recovery Appellate Tribunal, Chennai) in M.A. No. 76 of 2009 and to quash the same and consequently to direct the Respondents 1 to 4 to set aside the sale in favour of the sixth Respondent of the Petitioner's

property described in the Schedule to the Writ petition and also to direct the sixth Respondent to put the Petitioner in possession of the Petitioner's property.

2. The case of the Petitioner is that it has availed financial facilities from the Fifth Respondent/Bank and the said borrowings have been secured by the Petitioner's immovable property situate in Ambattur Industrial Estate wherein the Petitioner's unit has been located.

3. Due to default committed by one major customer in taking delivery of the machines manufactured by the Petitioner, the Petitioner has fallen into financial difficulty and the Fifth Respondent/Bank projected Original Application O.A. No. 152 of 2003 before the Debts Recovery Tribunal, Chennai wherein Exparte Final Order has been passed on 31.08.2004 in regard to sum of Rs. 1,29,37,540.11p along with simple interest at 11% p.a. from the date of filing of the Original Application and resultantly, D.R.C. No. 175 of 2004 has been issued.

4. According to the Petitioner, there has been no proper service of summons on the Petitioner in O.A. No. 152 of 2003 and that the Fifth Respondent/Bank has obtained an Exparte Decree and sought to enforce the same through the Fourth Respondent (Recovery Officer, Debt Recovery Tribunal I, Chennai). The Petitioner's land and factory measuring an extent of 16.52 grounds at 10/9, Third Main Road, Ambattur, Chennai has been brought to the auction by the Fourth Respondent and that the auction has been taken place on 23.03.2006 and that no proper auction has been held and further, no publicity and advertisement has been issued regarding the intended auction.

5. Added further, the Sixth Respondent has been the successful auction bidder for bid amount of Rs. 4,10,00,000/-which is grossly lower than the market value of the property and as per the Rules of auction, the sixth Respondent has been required to pay 25% of sale amount immediately and the balance 75% within 15 days.

6. Admittedly, the Fourth Respondent has refused to default information in regard to the payment details made by the Sixth Respondent inspite of repeated demands by the Petitioner as per his Letter dated 28.08.2006 and 29.08.2006 under the provisions of the Right to Information Act and the Fourth Respondent has been issuing orders against the Petitioner in furtherance of an alleged sale in favour of the sixth Respondent.

7. The Petitioner filed W.P. No. 40034 of 2006 praying for certiorarified mandamus to quash the order dated 31.08.2006 of the Fourth Respondent (Recovery Officer, Debts Recovery Tribunal No. 1, Chennai) by which he has directed the Appellant to deliver the vacant possession and to direct him to furnish particulars pertaining to the alleged sale to the Petitioner as per Letter dated 28.08.2006. This Court passed an order in the aforesaid Writ Petition on 20.12.2006 by observing that the Petitioner has remedy by way of preferring an Appeal against the Fourth Respondent before the Debts Recovery Tribunal and further, this Court directed the Fourth Respondent to furnish the particulars of

payment made by the bidder to the Petitioner within four weeks.

8. The Fourth Respondent (The Recovery Officer, Debts Recovery Tribunal I, Chennai) has not furnished the particulars in regard to the payments made by the sixth Respondent but issued a letter dated 02.01.2007 mentioning that the sixth Respondent made the entire sale consideration without informing the dates on which the payments have been made. Also, by an order dated 03.01.2007, the Petitioner has been directed to hand over the possession of the property on or before 17.01.2007. On 06.01.2007, the Petitioner has issued a Letter to the Fourth Respondent specifically asking for the details as to when the 25% of the sale paid by the sixth Respondent and as to when the balance 75% sale amount has been paid.

9. The plea of the Petitioner is that the sale itself is not according to law and that the details of payments made by the sixth Respondent have been withheld from the Petitioner deliberately since the sixth Respondent has not made the payments within the time prescribed by law and hence, the sale itself is null and void. The Petitioner has come to know that the balance payment has been made by the sixth Respondent beyond the stipulated time of 15 days, only from the submissions made by the Respondents before this Court in the aforesaid Writ Petition and that the sale itself is not in accordance with law, etc.,

10. After the establishment of Debts Recovery Tribunal No. III, when the Fourth and Third Respondents to whom the proceedings have been transferred, proceeded with the proceedings against the Petitioner in regard to delivery of the possession of the property and that the Petitioner filed Appeal No. 38 of 2007 before the Second Respondent as against the order of the Fourth Respondent directing delivery of possession. The Second Respondent has been pleased to pass an order of stay dated 04.05.2007 directing the Fourth Respondent to furnish a Report as to the payments made by the Sixth Respondent.

11. Accordingly, the Fourth Respondent furnished a Report in and by which it is mentioned that the balance sum of Rs. 3,11,16,010/-has been paid by the Sixth Respondent only on 23.06.2006 i.e., for a period of three months from the sale date. The balance payment has not been made within 15 days period as mentioned in Rule 57(2) of Schedule II of the Income Tax Act. Therefore, the sale itself is not valid.

12. The plea of the Petitioner is that the Fourth Respondent has no authority to receive any payment from the sixth Respondent beyond the stipulated period of 15 days. No one has been put on notice that the Fourth Respondent/Recovery Officer has any discretion to extend the time beyond 15 days. The extension of time after the conduct of auction is certainly prejudicial to the Petitioner's interest since for the conduct of free and fair auction and to realise the best possible price for the property, an opportunity has been lost and if such a condition has been made known to the prospective bidders, there is a possibility to the property could have fetched a much higher sum.

13. The stand of the Petitioner is that no proper stamp duty has been paid in regard to the Sale Certificate issued in favour of the Sixth Respondent and hence, no further proceedings can be taken in furtherance of such invalid Sale Certificate. Therefore, the Appeal A.S. No. 38 of 2007 should have been allowed by the Second Respondent, but the same has been dismissed on 16.06.2008 based on erroneous grounds and on a wrong interpretation that the provisions of Second Schedule to the Income Tax Act have been made applicable only "as far as possible" to the recovery proceedings as per the provisions of the Recovery of Debts due to Banks and Financial Institutions Act, 1993 and also, as if the Recovery Officer has the discretion to extend the time even without any such specific power being conferred upon him. That apart, it has been held wrongly that the sale has not been challenged by the Petitioner by filing Application to set aside the sale as per Second Schedule to the Income Tax Act.

14. Feeling aggrieved against the order of the Second Respondent, the Petitioner preferred M.A. No. 176 of 2008 before the First Respondent and the same has been dismissed by order dated 23.04.2009. Now, the First Respondent has passed orders directing delivery of possession of the property by the Advocate Commissioner appointed for that purpose, to the Sixth Respondent and pending Appeal, the valuable machinery of the Petitioner have been removed hastily from the property of the Petitioner and dumped in undisclosed location by the Advocate Commissioner without any protection from the sun and rain. The machinery has not been the subject matter of the sale. The Second Respondent has issued far-reaching directions in favour of the sixth Respondent by exceeding his jurisdiction while dismissing the Appeal.

15. According to the Learned Counsel for the Petitioner, the details of payment have not been given to the Petitioner by the Fourth Respondent and only as per the directions of this Court and only by the Report dated 08.05.2007, filed by the Debts Recovery Tribunal, the said details have been furnished by the Fourth Respondent and inasmuch as the Petitioner has been kept in dark, it could not be found fault with in regard to the non filing of an application for setting aside the sale as per Rule 61 of Schedule II of the Income Tax Act.

16. It is the further contention on the side of the Petitioner that 1 and 2 Respondents have wrongly held that the Appeals are not maintainable notwithstanding the fact that the sale is null and void totally since the Petitioner has not filed an Application under Rule 61 and also, the further observation that the Petitioner has not raised any objection, in regard to the alleged sale therefore, is estopped from questioning the sale, is not a correct one.

17. The Learned Counsel for the Petitioner urges before this Court that the Judgments of the First Respondent and this Court in regard to the maintainability of Appeal without recourse to Rules 60 & 61 of the ITCP (Income Tax Certificate Proceedings) in cases wherein the sale itself is void having completely overlooked by Respondents 1 and 2 while dismissing the Appeal.

18. As regards the observation that the Appeal is barred by *res judicata*, it is to be pointed out that the Petitioner has not furnished with the particulars at all and on 08.05.2007 only, the Petitioner has come to know of the delay by virtue of the Report filed by the Fourth Respondent and as such, the Appeals cannot be dismissed as barred by the principles of *res judicata*.

19. The Learned Counsel for the Petitioner strenuously contends that the alleged sale is an illegal one and no proper auction has been conducted and a very valuable property has been sold for a lower price and even assuming that the Recovery Officer is vested with discretion for extension of time for payment of the balance amount, the same is to be exercised judiciously and for the reasons recorded in writing and such a power cannot be exercised even in the absence of any such request from the bidder, the borrower must put on notice and an opportunity must be given to him as to why the prayer ought not to be granted and in short, without following any such procedure, the Recovery Officer cannot extend the time and as such, the orders passed by the Respondents 1 and 2 are unsustainable. In pursuance of the order dated 23.04.2009 of the First Respondent, the Third Respondent has passed an order on 09.06.2009 stating that the possession has been handed over to the sixth Respondent on 28.05.2009 even without any notice to the Petitioner inasmuch as the Learned Counsel for the Petitioner prays for allowing the Writ Petition in furtherance of substantial cause of justice.

20. The Learned Counsel for the Fifth Respondent/Bank contends that the Petitioner cannot ask for a consequential relief of directing the Respondents to set aside the sale of the property in favour of the sixth Respondent because such a power is unknown to law and indeed, the property has been sold on 23.03.2006 and also that the Petitioner has not questioned the auction sale dated 23.03.2006 and as such, he cannot seek for the said relief as a consequential one on this amount.

21. Continuing further, it is the submission of the Learned Counsel for the Fifth Respondent that the Bank has filed O.A.152/2003 on the file of the Debts Recovery Tribunal-1, Chennai against the Petitioner for a recovery of an amount of Rs. 1,29,37,540.11p in regard to the default committed by the Petitioner as to the facilities availed by it. As a matter of fact, the Petitioner has not appeared before the Court and the Debts Recovery Tribunal-I has passed an Exparte final order dated 31.08.2004.

22. According to the Learned Counsel for the Fifth Respondent, the Petitioner has not taken any steps to set aside the Exparte final Order and to contest the matter and that the Petitioner has brought the secured asset for a public auction sale through the Fourth Respondent/Recovery Officer, (Debts Recovery Officer I, Chennai) on 23.03.2006 and that the Managing Director has been personally present during the auction proceedings and that the Sixth Respondent has been declared as a higher bidder and the Sale Certificate has been issued in its name on 30.06.2006. Thereafter, the Fourth Respondent/Recovery Officer, (Debts

Recovery Officer I, Chennai) has passed an order dated 18.07.2006 under Rule 39 of the Income Tax (Certificate Proceedings) Rules 1962 read with Section 29 of the Debts Recovery Tribunal Act informing about the sale of property to the sixth Respondent and directing the Petitioner to vacate the Petitioner within seven days.

23. Expatiating his admissions, the Learned Counsel for the Fifth Respondent contends that the Petitioner by means of its Letter dated 28.08.2006 has accepted the auction sale and also on 29.08.2006, it has sought further time to remove all the machinery and to hand over the possession of the property and from the said sale, it is clear that the Petitioner has not challenged the auction sale but only seeking time to hand over possession of the property and by virtue of an order dated 18.07.2006, vide an order dated 31.08.2006, the Fourth Respondent has given a further time to the Petitioner to vacate the property and as against this, the Petitioner filed W.P. No. 40034 of s006 to quash the order dated 31.08.2006 of the Fourth Respondent and also seeking a Reply to its letter dated 28.08.2006 and the said writ petition stands dismissed by this Court observing that without questioning the earlier order dated 18.07.2006, the Petitioner cannot challenge the subsequent order dated 31.08.2006, 24. The plea of the Fifth Respondent/Bank is that the Petitioner has not questioned the auction sale of the property and thereby admitting the sale of the property and as such, it cannot seek for a direction much less consequential direction to set aside the sale of the property in favour of the sixth Respondent and in the order dated 03.08.2007 of the Fourth Respondent granting viz., one final opportunity to the Petitioner to hand over the vacant possession of the property to the Fifth Respondent on or before dated 17.01.2007 failing which it has been ordered that the entire property along with machinery and movables will be handed over to the Sixth Respondent at his risk and cost. To the said order, the Petitioner sent a reply dated 06.01.2007 to the Fourth Respondent asking for particulars about the sale proceeds but he has not mentioned about the sale of the property to the sixth Respondent.

25. Proceeding further, it is the contention of the Learned Counsel for the Fifth Respondent/Bank that the Petitioner filed A.S.38 of 2007 on the file of the Second Respondent seeking to set aside the order of the Fourth Respondent dated 03.01.2007 and obtained an interim order and even in this Appeal, the Petitioner has not questioned the auction of the property and the Fourth Respondent has filed a detailed Report in the aforesaid Appeal with reference to the entire facts of case and on receipt of the Report filed by the Fifth Respondent, the second Respondent has dismissed A.S. No. 38 of 2007 on 16.06.2008 as not maintainable holding that the Petitioner has filed the said Appeal without following the procedures enjoined in Rule 61 of the Income Tax (Certificate Proceedings) Rules and that apart, the Second Respondent has issued directions to the Fourth Respondent to take expeditious steps for getting delivery of the possession of the property to the sixth Respondent by employing police force if necessary, without any further loss of time and that the Petitioner

has preferred further Appeal in M.A.76 of 2009 before the First Respondent and the First Respondent by order dated 23.04.2009 has dismissed the Appeal thereby confirming the order of the Second Respondent.

26. The contention of the Learned Counsel for the Fifth Respondent/Petitioner is that the Third Respondent has passed an order confirming the handing over of the property to the Sixth Respondent and also, allowing the prayer of the Petitioner for release of portion of sale proceeds towards the outstanding dues and that the Petitioner has requested only for extension of time to hand over the property and also seeking for the details of payments made by the sixth Respondent and as to the amount that has been lying with the Fourth Respondent as a surplus one and all action of the Petitioner goes to show that it admitted the auction of the sale to the Sixth Respondent and now by means of consequential relief, the Petitioner cannot seek a direction to set aside the sale of the property in favour of the Auction Purchaser.

27. The Learned Counsel for the Fifth Respondent/Bank submits that the Petitioner without challenging the auction sale dated 23.03.2006 as per law within the time framed, after a lapse of more than 3 years from the sale date, it is challenging the same in this writ petition, which is not legally a valid one.

28. The core contention advanced on behalf of the Fifth Respondent/Bank is that the subsequent proceedings included the auction sale of the property in favour of the sixth Respondent have been done properly by following the Rules.

29. The Learned Counsel for the Fifth Respondent/Bank submits that only after waiting for years together, the vacant possession has been taken and handed over to the Sixth Respondent and all the Respondents have acted only within the Rules and regulations and that the sale cannot be construed as null and void after more than three years and without challenging the same in the manner known to law and in short, the Petition is a misconceived one. Also, the Petitioner has acquiesced the auction sale of the property and therefore, now is estopped from raising the plea of the validity of the sale.

30. The Learned Counsel for the Sixth Respondent submits that the Sixth Respondent is a bonafide Auction Purchaser in the public auction conducted by the Recovery Officer, Debts Recovery Tribunal I, Chennai pursuant to a Recovery Certificate issued by the Hon'ble Presiding Officer and further, the impugned order in the writ petition is the order of the Fourth Respondent/Recovery Officer, Debts Recovery Tribunal 1, Chennai and that the Petitioner has been represented by the Managing Director S. Kannan, has been granted one final opportunity to hand over the land and building to the Manager of the Fifth Respondent/Bank on or before 17.01.2007 failing which the possession of land and building along with the machinery and other movables are to be handed over to the Auction Purchaser at the risk and cost of the Petitioner/Company and since the property has been sold in auction to the Sixth Respondent, who is the successful bidder in the Auction on 23.03.2006 and after removing the movables by due process of

law, the possession has been handed over to the Sixth Respondent and as such, the relief against the said order dated 03.01.2007 does not survive.

31. It is the contention of the Learned Counsel for the Sixth Respondent that the Petitioner in W.P. No. 40034 of 2006 has challenged the order dated 31.08.2006 passed by the Recovery Officer for handing over possession of the property mentioned in the Schedule of the writ petition and this Court has dismissed the said writ petition on 20.12.2006 and as such, the Petitioner cannot challenge a consequential order dated 03.01.2007 passed by the Fourth Respondent/ Recovery Officer, Debts Recovery Tribunal I, Chennai.

32. According to the Learned Counsel for the Sixth Respondent, by the original order dated 18.07.2006 passed by the Fourth Respondent/Debts Recovery Tribunal, the Petitioner has been directed to hand over the possession of the writ schedule property and further directed by the order dated 01.08.2006 and subsequent orders have been passed by the Recovery Officer and the Petitioner without challenging the original order initial orders relating to handing over of the possession of the property, it cannot challenge the consequential order dated 03.01.2007 passed by the Fourth Respondent and in fact, the Petitioner is making an endeavour to circumvent or nullify the previous order of the Fourth Respondent in regard to the handing over of the possession which cannot be permitted in law.

33. The plea of the sixth Respondent is that the Petitioner is attempting to set aside the sale and confirmation of sale in favour of the Sixth Respondent even without challenging the same before the Second Respondent (Debts Recovery Tribunal III) and indeed, the prayer in Appeal 38 of 2007 is only to set aside the sale dated 03.01.2007 passed by the Recovery Officer and not the auction sale and confirmation sale in favour of the sixth Respondent.

34. The principal contention of the Learned Counsel for the Sixth Respondent is that what the Petitioner cannot achieve directly he cannot achieve the same indirectly.

35. The Learned Counsel for the Sixth Respondent submits that Rule 60 and 61 II Schedule to the Income Tax Act is a condition precedent for filing any application to set aside the sale and an application to set aside the sale is to be filed within 30 days from the date of sale and on deposit of the amount as required under the Rules and only to get over the aforesaid rules, the Petitioner has opted to challenge the order of Recovery Officer in handing over possession of the property, knowing fully well that the auction is in pursuance of a Recovery Certificate by means of a final order in O.A.152 of 2003 for recovery of the Bank dues.

36. It is the contention of the Learned Counsel for the Sixth Respondent that a wide publicity has been given for public auction and only after repeated bidding, the Sixth Respondent has been declared to be the successful bidder for the highest bid amount of Rs. 4,10,00,000/-and the Petitioner paid 25% of the bid

amount immediately and paid the balance 75% as per the order of the Recovery Officer and added further, on payment of entire sale consideration, the sale has been confirmed and the Sale Certificate has been issued as per the order dated 30.06.2006.

37. The Learned Counsel for the Sixth Respondent takes a plea that the Petitioner in his Letter dated 28.08.2006 has not only sought for the details of payment made by it to know the balance amount to be paid after adjusting the Bank dues and also asked for one month time to vacate the schedule property from the date of receipt of the amount due and even in the letter dated 29.09.1996, the Petitioner has prayed for time in handing over possession.

38. Apart from the above, the Learned Counsel for the Sixth Respondent submits that the Petitioner has not taken any steps as per Rule 26 of the Debts Recovery Tribunal Regulation of Practice Rules 1997 for inspection of records and proceedings pending before the Respondents and the Petitioner to obtain necessary information has not taken steps as per Rules and moreover, the non furnishing of information will not in any way affect the rights of the Petitioner.

39. The Learned Counsel for the sixth Respondent contends that the Petitioner paid the entire auction amount along with the poundage fees to the Fourth Respondent by 23.06.2006 and further, it paid 25% of the bid amount on 23.03.2006 (being the date of auction) and at the behest of the Sixth Respondent, the Fourth Respondent extended time for payment of the balance sum upto 30.06.2006 and it paid the balance amount on 23.06.2006 (being the date of auction) and therefore, Rule 57(2) of the Schedule-II of the Income Tax Act has not been violated because the Fourth Respondent has extended time for payment of balance amount upto 3 months even on the date of auction itself and that the Recovery Officer as per Recovery Debts due to Bank and Financial Institutions, 1993 has discretionary power in applying the provisions of II Schedule of the Income Tax Act and the delay in payment of remaining sale consideration will not make the sale void or non-est in law.

40. The Learned Counsel for the sixth Respondent submits that the improper stamping of the Sales Certificate will not affect the sale because of the fact that the Petitioner is not saying the matter and by a detailed order Appeal No. 38 of 2007 has been rightly dismissed by the second Respondent and the Petitioner has only challenged the order of handing over possession dated 03.01.2007 passed by the Fourth Respondent in the aforesaid Appeal and not either the sale or confirmation of the sale and the Appeal has been dismissed by the Second Respondent since the condition specified under Rule 61 of the Second Schedule to Income Tax Act has not been followed in entirety.

41. The Learned Counsel for the sixth Respondent projects an argument that the First Respondent has correctly held that the Recovery Officer has been given the discretion under the recovery of debts due to Banks and Financial Institutions Act 1993 to extend the time for payment of balance consideration.

42. Finally, it is the submission of the Learned Counsel for the Sixth Respondent that the Sixth Respondent has paid the full consideration of Rs. 4,10,00,000/- together with poundage charges and that it is made to run from pillar to post to ascertain its rights and till date, the Petitioner has not taken any steps to set aside the Exparte order passed in O.A.152 of 2003 and hence, prays for dismissal of the writ petition.

43. The Learned Counsel for the Petitioner cites the decision of the Hon'ble Supreme Court in Karnataka State Financial Corporation Vs. N. Narasimahaiah and Others, , it is held that "Right to property, although no longer a fundamental right, is still a constitutional right. It is also human right. In the absence of any provision either expressly or by necessary implication, depriving a person therefrom, the court shall not construe a provision leaning in favour of such deprivation, etc.,

44. Also, the Learned Counsel for the Petitioner seeks in aid of the order of this Court dated 29.07.2009 in W.P. No. 9729 of 2009 (DB) between K. Raamaselvam And 2 Ors. v. Indian overseas bank, rep. By its chief manager and authorised officer, aminjikai branch, chennai-30 whereby and whereunder at paragraph No. 28, it is held thus:

Even though Section 141 of the CPC (CPC) specifically makes the provisions of the CPC are inapplicable to proceeding under Article 226 of the Constitution of India, there cannot be any dispute that the basic principles contained in CPC including the principle of res judicata and constructive res judicata are to be applied to the writ proceedings as a matter of public policy. The previous round of litigation was relating to the question as to whether stay should be granted or not during pendency of the proceedings u/s 17 of the Act. The Division Bench in view of the peculiar facts and circumstances, set aside the order of stay granted by the Debts Recovery Tribunal. The Division Bench, however, nowhere finalised the matter relating to confirmation of sale. The question which is now specifically raised was neither directly or even indirectly raised in the earlier round of litigation and keeping in view the fact that the writ petition has been filed by the Bank against the order of interim stay granted by the Debts Recovery Tribunal, the question now raised also could not have been and need not have been raised. Therefore, the principles of res judicata or constructive res judicata are not applicable. As a fact the Division Bench had specifically gave liberty to proceed according to law. If the confirmation is contrary to law it cannot be upheld.

Also, in the aforesaid decision, at paragraph No. 22, it is held as follows:

A fair reading of the provisions contained in Rule 9 makes it clear that if the highest bid is higher than the upset price, such highest bid shall be confirmed by the authorised officer in favour of the highest bidder, which, however, is subject to confirmation by the secured creditor. This provision is apparent from the provisions contained in Rule 9(2). At that stage, obviously a discretion is given to

the secured creditor to accept the highest bid or even go in for a fresh bid.

For example, if the secured creditor, on the basis of the relevant materials, comes to a conclusion that the highest bid offered, even though higher than the reserve price, does not reflect the true market value and there has been any collusion among the bidders, the secured creditor in its discretion may refuse to confirm such highest bid notwithstanding the fact that the highest bid is more than the upset price. This is because the secured creditor is not only interested to realise its debt, but also expected to act as a trustee on behalf of the borrower so that the highest possible amount can be generated and surplus if any can be refunded to the borrower. The first proviso in no uncertain terms makes it clear that no sale can be confirmed by the authorised officer, if the amount offered is less than the reserve price specified under the Rule 8(5). However, the subsequent proviso gives discretion to the authorised officer to confirm such sale even if the bid is less than the reserve price, provided the borrower and the secured creditor agree that the sale may be effected at such price which is not above the reserve price. This is obviously so because the property belongs to the borrower and as security for the secured creditor and both of them would be obviously interested to see that the property is sold at a price higher than the reserve price. However, if both of them agree that the property can be sold, even it has not fetched a price more than the reserve price, the authorised officer in its discretion may confirm such auction.

45. Apart from the above, the Learned Counsel in the aforesaid order in W.P. No. 9729 of 2009 dated 29.07.2009 places reliance on the observation made by this Court in paragraph No. 26, which runs as follows:

Though it may appear as if there was an alternative remedy, in our considered opinion, existence of alternative remedy may not be considered as a bar in the present case inasmuch as the present case does not require the determination of any disputed question of fact and the matter is being decided purely on interpretation of the statutory provisions and the rules and to relegate the parties to pursue their remedy under the Act before the Debts Recovery Tribunal and thereafter at the Debts Recovery Appellate Tribunal would ultimately be an exercise in futility, which would unnecessarily prolong the matter.

46. The Learned Counsel for the Petitioner places strong reliance on the observation made by this Court in W.P.9729 of 2009 vide order dated 29.07.2009, wherein at paragraph 17, it is held thus:

It is a well entrenched concept, that when the manner of exercising power is laid down, such power is to be exercised in the manner prescribed or not at all as observed in the decision of the Supreme Court in *Indian Banks' Association, Bombay and Others Vs. Devkala Consultancy Service and Others*, :

It is well settled that when a procedure is laid down statutory Authority must exercise its power, in the manner prescribed or not at all." and in *Vimalben Ajitbhai Patel Vs. Vatslaben Ashokbhai Patel and Others*, .

The right to property is no longer a fundamental right, but still it is constitutional right. Apart from constitutional right it is also a human right. The procedures laid down for deprivation must be scrupulously complied with.

A bare analysis of the statutory provisions and more particularly the statutory rules framed under such provisions clearly evince the intention to provide procedural safeguards while enabling the secured creditors to adopt speedier methods. When the statutory rules contemplate a specific provision, it does not lie in the mouth of the secured creditor to contend that even though the Rules lay down a particular procedure, the secured creditor or the Debts Recovery Tribunal or the Authorised Officer, while discharging their duties under the Act and the Rules, is not required to follow the procedure contemplated merely on the ground that violation is "technical", according to the Bank. It is no doubt true that a borrower's property is put to auction only because there is default on the part of the borrower, but that does not give right to the Bank or the Debts Recovery Tribunal or the Authorised Officer to flout the mandatory statutory provision.

47. According to the Learned Counsel for the Petitioner, the principles of Res judicata are not applicable to the present case because of the fact that in earlier round of litigation, the relief of cancelling the auction sale dated 23.03.2006 has not been raised.

48. The pith and substance of the Learned Counsel for the Petitioner is that since the available of alternative remedy is not a bar to the filing of the present Writ Petition. The subject matter involved in the present writ petition is to be decided purely on interpreting the statutory provisions and the Rules made thereunder and therefore, it may not be necessary to direct the parties to prosecute the remedy under the Act before the Debts Recovery Tribunal, etc., which will only be an otiose one.

49. The Learned Counsel for the Petitioner draws the attention of this Court to the decision of the Hon''ble Supreme Court in Balram Vs. Ilam Singh and others, , wherein it is held that "Order 21 Rule 85 of the CPC being mandatory, its non-compliance renders the sale proceedings a complete nullity requiring the Executing Court to proceed under Rule 86 and property has to be resold unless the Judgment-Debtor satisfies the Decree by making the payment before the resale. The argument that it is only a material irregularity in the sale to attract Rule 90 instead of Rule 85 cannot be accepted."

50. The Learned Counsel for the Petitioner cites the decision of the Hon''ble Supreme Court in Rao Mahmood Ahmed Khan Vs. Sh. Ranbir Singh and others, wherein the Hon''ble Supreme Court has held as follows:

Rule 285-D casts an obligation on the purchaser to deposit 25 per cent of the bid amount immediately and if he fails to do so the property shall be resold forthwith. The word "immediately" connotes and implies that the deposit should be made without undue delay and within such convenient time as is reasonably

requisite for doing the thing same day with all convenient speed excluding the possibility of rendering the other associated corresponding act and duty cast upon the officer/authority conducting the sale as envisaged by Rule 285-D is to put up the property for resale "forthwith" on the failure of the declared purchaser to deposit 25 per cent of the bid amount. The word "immediately" therefore, connotes proximity in time to comply and proximity in taking steps to resell on failure to comply with the requirement of deposit as first condition that is to take place within relatively short interval of time and without any other intervening recurrence. The meaning of the word "forthwith" is synonymous with the word "immediately" which means with all reasonable quickness and within a reasonably prompt time. The intention of the legislature is that as soon as it becomes known that the purchaser has failed to deposit 25 per cent immediately after he is declared as purchaser, the property shall be put to resale forthwith without any loss of time or postponement of the date of resale. The provisions of Rules 285-D and 285-E, which are similar in terms of the corresponding provisions of Order 21, Rules 84, 85 and 86 of the Code of Civil Procedure, are mandatory and sale in non-compliance with Rule 285-D is a nullity.

Manilal Mohanlal Shah and Others Vs. Sardar Sayed Ahmed Sayed Mahamad and Another, , relied on was not encashed on the date on which the person was declared purchaser but on a later date, there was no compliance of Section 285D. Deposit of 25 percent of the bid amount by cheque will not be a valid tender within the meaning of Rule 285-D. The rule does not contemplate any payment by cheque but a cash deposit of 25 per cent of the bid amount has to be made in accordance with the requirement of the rule, otherwise the very purpose of the mandatory Rule 285-D would be frustrated and rendered nugatory.

51. To lend support to the contention that as per Rules of auction, the Sixth Respondent is required to pay 25% of sale amount immediately and balance 75% within 15 days and since the balance amount of 75% has not been paid within 15 days time required by law, in the instant case, the sale is null and void and non est in law, the Learned Counsel for the Petitioner relies heavily on the decision of the Hon"ble Supreme Court in Sardara Singh (Dead) by Lrs. and Another Vs. Sardara Singh (Dead) and Others, , wherein it is laid down as follows:

The requirement of deposit contained in Sections 85, 86 and 88 of the Punjab Land Revenue Act, which are substantially the same as Order 21 Rules 84 and 85 of the CPC Code, are mandatory and failure to comply with either of them renders the entire sale null and void and non-est. Once the effect of non-payment of the amount is to render the sale non-existent, it becomes the imperative duty of the authority to re-sell the property as the purchaser forfeits all claim to the property for default of payment. Where there is no sale in the eye of law, there can be no question of applying for setting aside the sale on the ground of material irregularity u/s 91 of the Act which is analogous to Order 21 Rule 90 of the Code. No right, title or interest passes to the auction-purchasers

under the sale certificate. The owner of the land was, however, required to file a suit to protect his possession as there was an imminent threat to dispossess him on the strength of the sale certificate. During the pendency of his appeal he was dispossessed and, therefore, he was required to amend the plaint and claim possession also. The suit was, therefore, clearly de hors the provisions of the Act and hence ordinarily the Civil Court was entitled to hear and decide the same.

Manilal Mohanlal Shah and Others Vs. Sardar Sayed Ahmed Sayed Mahamad and Another, , relied on Rai Radha Krishna v. Bisheshar Sahai 40 IA 312 cited

Once it is held that the sale was rendered null and void on the failure of the auction-purchasers to comply with the requirements of Section 88 of the Land Revenue Act, it was the imperative duty of the authorities to put the property to re-sale for the law did not confer any discretion in the concerned authorities to extend the time for the payment of the balance amount. The authority, therefore, had no jurisdiction to accept the balance money after the expiry of the period prescribed by Section 88.

He also cites yet another decision of the Hon''ble Supreme Court in Gangabai Gopaldas Mohata Vs. Fulchand and others, , wherein it is inter alia held hereunder:

The sale was conducted by the Municipal Council as per the Maharashtra Municipalities (Sale of Distrained or Attached Moveable and Immovable Property) Rules, 1967. A reading of Rule 8(2) in association with Sub-rule (3) and Rule 13 would show that the requirement to pay the balance 75 per cent within 15 days is mandatory. The consequence of non-payment of the balance amount within the fixed period must peremptorily visit the purchaser. Neither the Chief Officer nor even the Municipal Council has power to relax or even condone the delay and accept a delayed payment. If any officer accepted the money after the period fixed under sub rule (2), the action of the officer has no support of law and no legal effect would flow therefrom. The sale consequently becomes void. Rules relating to court sale provided in Order 21 Rules 84 and 85 are analogous and non-compliance with Rules 84 and 85 of Order 21 would render the sale void in the eye of law.

52. Added further, the Learned Counsel for the Petitioner relies on the decision of the Hon''ble Supreme Court in Sankaranarayanan Potti (Dead) By L.R.S. Vs. K. Sreedevi and Others, wherein it is laid down as follows:

Where in a Civil Suit for partition and redemption of mortgage, a preliminary decree was passed and the suit was pending at the stage of passing of final decree and the Amending Act of 1969 came into force, the direct approach made by the Defendant claiming himself to be deemed purchaser on ground that he was otti mortgagee, to the Land Tribunal under the Amending Act must be held to be premature and incompetent and it must also be further held that consequently the orders obtained by him from the Land Tribunal giving him purchase certificate were rendered by a tribunal which had no jurisdiction to pass

such orders and they were nullities and no question of res judicata would arise in connection with such orders of an incompetent authority.

53. Lastly, the Learned Counsel for the Petitioner cites the decision of the Hon'ble Supreme Court in Himadri Coke & Petro Ltd. v. Soneko developers (p) ltd. And Ors. (2005) 12 SCC 364 , wherein at paragraphs 9 and 10, it is held hereunder:

As far as Respondent 1 is concerned, we are of the view that it was bound by the terms and conditions of sale as was the authority concerned. It was not up to them to extend the dates for submission of the balance price when there was no clause in the terms and conditions of the sale allowing the authority to extend the time beyond the period specified in the advertisement for making the initial deposit or the balance price.

Consequently, we are of the view that the entire sale should be set aside. We note that the Appellant has offered now to purchase the property for Rs 1 crore. Although we will not accept the offer of the Appellant at this stage but we will use it as a benchmark for the purpose of directing a fresh sale to be held by the Recovery Officer. The sale shall be advertised in two newspapers, one having circulation throughout the country and one having circulation in the local area. The advertisements may be made in local language for the local newspaper but the advertisements in the national newspaper shall be made only in English. The terms and conditions of sale shall specify that the lowest acceptable offer for the purchase of the property in question is Rs 1 crore. Both the parties before us will also be entitled to participate and bid for the property. If there are bids over and above Rs 1 crore, the sale will be made to the highest bidder. If on the other hand the bids do not reach Rs 1 crore, the Appellant shall be obliged to purchase the property at a price of Rs 1 crore. The parties are at liberty to withdraw any amount which they may have already deposited with the authorities concerned, if they so desire. As far as Respondent 1 is concerned, the earnest money deposited shall be returned, after defraying the cost of the sale. The advertisements shall be made within a period of three weeks.

54. However, the Learned Counsel for the Fifth Respondent cites the decision of the Hon'ble Supreme Court in Dharendra Nath Gorai and Subal Chandra Shaw and Others Vs. Sudhir Chandra Ghosh and Others, , wherein at paragraph No. 14, it is held as follows:

We agree with this reasoning. Another Division Bench of the Calcutta High Court, consisting of Guha and Banerjee, JJ., in Maniruddin Ahmed Vs. Umaprasanna Mukherjee, , considered the entire case law on the subject, including the decision now under appeal, and differed from the view expressed by S.R. Das Gupta and Mallick, JJ., in the decision now under appeal and agreed with the view expressed by Akram and Chakravartii, JJ., in Mahindra Chandra V. Jagadish Chandra 50 C.W.N.266 . The said decisions are in accord with the view we have expressed earlier. The contrary view is sustained by the High Court in the present case on

the principle that the sale held in contravention of the provisions of Section 35 of the Act was a nullity and, therefore, no question of setting aside the sale within the meaning of O.XXI, R.90 of the CPC would arise. This raises the question whether such a sale is a nullity. If a provision of a statute is only directory, an act done in contravention of the provision is manifestly not a nullity. Section 35 of the Act is couched in a mandatory form and it casts in terms a duty on the court to comply with its provisions before a sale is held. Prima facie the provision is mandatory; at any rate, we shall assume it to be so for the purpose of these appeals.

Continuing further, in the aforesaid decision at paragraph 22, it is observed thus:

Where the Court acts without inherent jurisdiction, a party affected cannot by waiver confer jurisdiction on it, which it has not. Where such jurisdiction is not wanting, a directory provision can obviously be waived. But a mandatory provision can only be waived if it is not conceived in the public interests, but in the interests of the party that waives it. In the present case, the Executing Court had inherent jurisdiction to sell the property. We have assumed that Section 35 of the Act is a mandatory provision. If so, the question is whether the said provision is conceived in the interests of the public or in the interests of the person affected by the non-observance of the provision. It is true that many provisions of the Act were conceived in the interests of the public, but the same cannot be said of Section 35 of the Act, which is really intended to protect the interests of a Judgment -Debtor and to see that a larger extent of his property than is necessary to discharge the debt is not sold. Many situations may be visualized when the Judgment-Debtor does not seek to take advantage of the benefit conferred on him u/s 35 of the Act; for instance, if the part of the property carved out by the Court for sale is separated from the rest of his property, the value of the remaining property may be injuriously affected by the said carving out, in which case the judgment Debtor may prefer to have his entire property sold so that he may realize the real value of the property and pay part of the sale price towards the decretal amount. He cannot obviously be compelled to submit to the sale of a part of the property to his disadvantage. A provision intended for his benefit cannot be construed in such a way as to work to his detriment. But it is said that the proviso to Section 35 of the Act indicates a contrary intention. Under that proviso, "if the highest amount bid for the property so specified is less than the price so specified, the Court may sell such property for such amount, if the decree-holder consents in writing to forego so much of the amount decreed as is equal to the difference between the highest bid and the price so specified." This is only an option given to the Decree-holder: he may exercise this option, if he does not like to go through the entire sale proceedings over again. In one contingency this proviso also works for the benefit of the judgment Debtor, for he will be relieved of part of his indebtedness. But anyhow this does not show that the main provision is not intended for the benefit of the Judgment-Debtor. We are, therefore, satisfied, on a true construction of Section 35 of the Act, that it is intended only for the benefit of the judgment-

Debtor and, therefore, he can waive the right conferred on him u/s 35 of the Act.

He also relies on the decision of the Hon"ble Supreme Court in Nirbhai Kumar v. Maya Devi And Ors. 2009 (3) AWC 2233 (SC), whereby and whereunder it is among other things laid down as follows:

... Consequently it must be held that the provision for six months" notice before initiation of proceedings u/s 21(1) of the Act, though is mandatory and confers protection on the tenant concerned, it can be waived by him. On the facts of the present case there is no escape from the conclusion that the Appellant, for reasons best known to it, consciously and being alive to the clear factual situation that the suit was filed on that ground prior to the expiry of six months" notice, did not think it fit to pursue that point any further and on the contrary joined issues on merits expecting a favourable decision in the suit and having lost therein and got an adverse decision did not think it fit even to challenge the decision on the ground of maintainability of the suit while filing an appeal and argued the appeal only on merits and only as an afterthought at the stage of writ petition in the High Court such a contention was sought to be taken up for the first time for consideration. On the facts of the present case, therefore, it must be held that the Appellant had waived that contention about the suit being premature having been filed before the expiry of six months from the date of suit notice.

55. The Learned Counsel for the Fifth Respondent places reliance on the decision of the Hon"ble Supreme Court in Saheb Khan Vs. Mohd. Yusufuddin and Others, , wherein at paragraphs 10 to 12, it is laid down as follows:

We are unable to sustain the reasoning of the High Court. Order XXI Rule 90 of the CPC allows inter-alia any person whose interests are affected by the sale to apply to the Court to set aside a sale of immovable property sold in execution of a decree on the ground of "a material irregularity or fraud in publishing or conducting" the sale. Sub-section (2) of Order XXI Rule 90 however places a further condition on the setting aside of a Court sale in the following language:

No sale shall be set aside on the ground of irregularity or fraud in publishing or conducting it unless, upon the facts proved, the Court is satisfied that the Applicant has sustained substantial injury by reason of such irregularity or fraud.

Therefore before the sale can be set aside merely establishing a material irregularity or fraud will not do. The applicant must go further and establish to the satisfaction of the Court that the material irregularity or fraud has resulted in substantial injury to the Applicant. Conversely even if the Applicant has suffered substantial injury by reason of the sale, this would not be sufficient to set the sale aside unless substantial injury has been occasioned by a material irregularity or fraud in publishing or conducting the sale. (See: Dharendra Nath Gorai and Subal Chandra Shaw and Others Vs. Sudhir Chandra Ghosh and Others, ; Jaswantlal Natvarlal Thakkar Vs. Sushilaben Manilal Dangarwala and others, ; Kadiyala Rama Rao Vs. Gutala Kahna Rao (Dead) By Lrs. and Others, .

A charge of fraud or material irregularity under Order XXI Rule 90 must be specifically made with sufficient particulars. Bald allegations would not do. The facts must be established which could reasonably sustain such a charge. In the case before us, no such particulars have been given by the Respondent of the alleged collusion between the other Respondents and the auction purchaser. There is also no material irregularity in publishing or conducting the sale. There was sufficient compliance with the orders of Order XXI Rule 67(1) read with Order XXI Rule 54(2). No doubt, the Trial Court has said that the sale should be given wide publicity but that does not necessarily mean by publication in the newspapers. The provisions of Order XXI Rule 67 clearly provide if the sale is to be advertised in the local newspaper, there must be specific direction of Court to that effect. In the absence of such direction, the proclamation of sale has to be made under Order XXI Rule 67(1) "as nearly as may be in the manner prescribed by Rule 54, Sub-rule (2)" Rule 54 Sub-rule (2) provides for the method of publication of notice and reads as follows:

(2) The order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode, and a copy of the order shall be affixed on a conspicuous part of the property and then upon a conspicuous part of the Court-house, and also where the property is land paying revenue to the Government, in the office of the Collector of the district in which the land is situate (and, where the property is land situate in a village, also in the office of the Gram Panchayat, if any, having jurisdiction over that village).

The proclamation of the sale by beat of drum was not mandatory, so long as the sale notice was proclaimed at or adjacent to the property. Admittedly, the Advocate Commissioner distributed the pamphlets advertising the sale in the locality several days prior to holding of the sale and also affixed a copy of the sale notice on the property itself.

56. Further, the Learned Counsel for the Fifth Respondent refers to the orders of this Court in W.P. No. 13210 of 2008 and C.R.P. No.3144 of 2008 dated 29.04.2009 between Nazims Continental, Rep. By Its Partners And Ors. v. The Indian Overseas Bank, Triplicane Branch, Madras 5 And Ors., wherein this Court held in paragraphs 22 and 23 thus:

Mode of recovery of debt is prescribed u/s 25 of DRT Act, as quoted hereunder:

25. Modes of recovery of debts:

The Recovery Officer shall, on receipt of the copy of the certificate under Sub-section (7) of Section 19, proceed to recover the amount of debt specified in the certificate by one or more of the following modes, namely:

- (a) attachment and sale of the movable or immovable property of the Defendant;
- (b) arrest of the Defendant and his detention in prison;
- (c) appointing a receiver for the management of the movable or immovable

properties of the Defendant.

From the aforesaid provision it will be evident that apart from attachment and the sale of movable or immovable property of the Defendant, the recovery officer, under the said provision, may proceed to recover the amount of debt by arresting the Defendant and his detention in prison or by appointing a receiver for the management of the movable or immovable properties of the Defendant. Those two provisions made under Clauses (b) and (c) of Section 25 cannot be challenged before the Recovery Officer under II or III Schedule of Income Tax Act. Therefore, except by preferring an application (appeal) u/s 30 against the order of recovery officer, any aggrieved person has no other option. It cannot be said that for sale of movable or immovable property as made under II Schedule to Income Tax Act, including Rules 60 or 61 or 62 of Part-III of II Schedule, then by way of appeal only u/s 30 could be preferred and no such appeal could be preferred directly against the order of attachment and sale of movable or immovable property of the Defendant, if recovery officer pass such order u/s 25. Therefore, we hold that against the order of attachment and sale of movable or immovable property of Defendant, who are the Defendants before the Tribunal, an aggrieved person, instead of moving application under Rule 60 of 61 or 62, may also prefer an application (appeal) u/s 30 of the Act, 1993. Therefore, there being a concurrent jurisdiction, DRT u/s 30 and recovery officer under Rules 60, 61 and 62 of Part III of II Schedule of Income Tax Act in regard to movable property and jurisdiction of Tribunal under Part-II of II Schedule of Income Tax Act in regard to movable property, application of any Defendant cannot be entertained by Tribunal u/s 30 without pre-deposit of the amount in terms with Rules 60 or 61 bypassing the jurisdiction of the Recovery Officer under the aforesaid provisions of II Schedule of Income Tax Act. Further, the auction purchaser being not a Defendant in the original application u/s 19, cannot file an appeal u/s 30 against the order of recovery officer, if it intends to prefer an application, if under the provision of Rule 62 of Part-III of II Schedule to Income Tax Act.

So far as W.P. No. 13210/08 is concerned, the borrower is the Petitioner. He raised the question of upset price of valuation of property and jurisdiction of the recovery officer under Rules 60 and 61 of Part III of II Schedule to Income Tax Act. They preferred application under Rule 61 of Part-III of II Schedule to Income Tax before the recovery officer to set aside the sale without compliance of pre-deposit amount. For the said reason, amount having not deposited as per Rule 61, the application to set aside was dismissed against which they preferred appeal before the Debts Recovery Appellate Tribunal, which has also been dismissed by the Appellate Tribunal vide impugned order dated 6th May, 2008.

First of all, it is the Appellant, who preferred appeal under Rule 61 and, therefore, they cannot say the recovery officer has no jurisdiction to pass order under Rule 61 and the appeal to set aside the sale is only maintainable u/s 30 of the Act, 1993.

We have already held that an application to set aside sale is also maintainable under Rule 61, but we have also held that a defaulter, such as borrower, is required to pre-deposit the amount in view of proviso to Rule 61. The Petitioners being the Defendant-borrowers, as they failed to comply by pre-depositing the amount, we hold that the recovery officer rightly rejected the application under Rule 61 preferred by borrowers and the Appellate Tribunal rightly affirmed the same.

Also, in the aforesaid common order in W.P. No. 13210 of 2008 and C.R.P. No.3144 of 2008 dated 29.04.2009 between Nazims Continental, Rep. by its Partners and Ors. v. The Indian Overseas Bank, Triplicane Branch, Madras 5 and Ors., in paragraphs 24 to 26, it is held as follows:

So far as CRP No. 3144/08 is concerned, the revision application has been preferred by Indian Bank against interim order of Debts Recovery Tribunal, Coimbatore, passed u/s 19(25) of Act, 1993. In this case, one time settlement was agreed between the parties and sale, which was fixed was conducted. The matter moved up on appeal before the Appellate Tribunal, wherein certain orders were passed and being aggrieved, the bank moved a petition before the High Court on the ground that the appeal before the Appellate Tribunal was not maintainable, but appeal against sale should have been preferred before the recovery officer. The High Court passed order in favour of the Bank as appeal against sale was not maintainable before the Appellate Tribunal. Thereafter, an appeal was preferred u/s 30 against order of recovery officer, but it was not filed within 30 days because of the pendency of the writ petition and after disposal of the writ petition before preferring the application u/s 30, the recovery officer confirmed the sale. Against the said order, the Respondent-borrowers preferred appeal, wherein an application u/s 19(25) was filed by the borrowers and prayed for staying the proceeding. The Bank appeared and brought to the notice of the Tribunal that sale has been confirmed on 13th Aug., 2008 and time was sought for to file reply and in that view of the matter, the Tribunal passed interim order on 19th Aug., 2008 in I.A. No. 2039/08 u/s 19(25) of the Act, 1993 in Appeal No. 7/08, (appears to have been filed u/s 30)

There is nothing on the record that for setting aside the sale the borrowers deposited any amount as pre-deposit as required under Rules 60/61 r/w Section 30 as required under the law and held by us in the preceding paragraph. In absence of such deposition of amount as pre-deposit to set aside the sale or confirmation of sale, the impugned order dated 19th Aug., 2008, cannot be upheld. However, if pre-deposit amount is deposited within 30 days, it will be open to the Tribunal to pass final order in the appeal u/s 30 made to set aside the sale, if found illegal or against law or if perverse.

In view of our finding, while we dismiss W.P. No. 13210/08, but set aside the order dated 19th Aug., 2008 in I.A. No. 2039/08 in Appeal No. 7/08 and allow C.R.P. (PD) No. 3144/08 preferred by Indian Bank. However, there shall be no order as to costs. Consequently, connected miscellaneous petitions are closed.

57. It is seen from the letter dated 28.08.2006 of the Petitioner addressed to the First Respondent/Tribunal's Recovery Officer that the Petitioner has stated that its Bankers informed them that the last date for vacating their premises is fixed as 31.08.06 and that they have not received any communication from the First Respondent's office and also that inspite of their address for correspondence being know to the first Respondent, the last notice has been addressed to their residence, even though it is belated and the above reason has been the main cause for the Ex-parte judgment issued by the First Respondent/Debts Recovery Tribunal I, Chennai, against them, etc.,

58. The Petitioner in the Letter dated 28.08.2006 addressed to the First Respondent, the Recovery Officer has also proceeded to state the following:

We are in the process of locating an alternative place for shifting, the difficulties being-Location, Size of Plant, Power Requirement, Finance for Advance towards the same and subsequent agreements thereafter, in addition to the Technical difficulties expressed in our earlier letter, as we want to continue our business, in that location, for manufacturing Special Purpose Machines.

We fail to understand the delay of 5 months, from the date of Auction and Bidding on 23.3.06, for payment of the balance due to us after deducting the Bank dues from the BID AMOUNT, as other statutory dues are to be paid by the Bidder.

With reference to vacating our factory premises we request to provide us a minimum of ONE MONTH from the Date of Receipt of the amount due to us, in one lot, by way of Demand Draft in our favour.

Under the Right to Information Act, we request you to provide us with the details of the payments made by the bidder in our favour in the format below, by Return Post without fail.

SI. NO.

Date of receipt of DD/Cheque

Date of Deposit

Date of Credit in DRT-1 A/c

Bank, Branch & Acc Details

All this is WITHOUT PREJUDICE to our efforts to retrieve the possession of our property, as we were denied of an opportunity of being heard which is against the Principles of Natural Justice enshrined in Section 22 of the Debt Recovery Act.

59. Again, the Petitioner has sent a Letter dated 29.08.2006 addressed to the Recovery Officer of the First Respondent in and by which a request has been made to grant them time till 31.10.2006 for arranging temporary finance facilities of a few Crores and other requirements explained in detail in their earlier letters.

60. In W.P. No. 40034 of 2006 filed by the Petitioner against the First Respondent/Debts Recovery Tribunal's Recovery Officer and the Respondents 5 and 6, this Court on 20.12.2006 has directed the First Respondent to issue a proper reply to the letter of the Petitioner dated 28.08.2006 in regard to the seeking particulars of the details of payment made by the bidder and the balance repayable to them, etc., and allowed the writ petition to that extent and as regards the prayer of the Petitioner to quash the order of the First Respondent dated 31.08.2006, the same has been dismissed.

61. The Fourth Respondent/Recovery Officer, DRT-1, Chennai by his order dated 03.01.2007 addressed to the Managing Director of the Petitioner's company has granted one final opportunity to the Petitioner Company represented by its Managing Director S. Kannan (Second Defendant therein) to hand over possession of land and building to the Fifth Respondent/Manager of the State Bank of India, Ambattur Industrial Estate Branch, Chennai on or before 17.01.2007 failing which the possession of land and building along with the machinery and other movables are to be handed over to the auction purchaser at the risk and cost of the Petitioner Company.

62. The Petitioner's Company has addressed a Letter dated 06.01.2007 to the Fourth Respondent/Recovery Officer, Debts Recovery Tribunal -1, Chennai wherein it has asked for the approximate surplus amount that the Fourth Respondent will be retaining in his hands after the proceedings to complete, etc., In the said letter, it is also mentioned that the details sought for is to when the initial amount of 25% has been paid and that when the Fourth Respondent accepted the balance payment and it has also goes on to add that the reply of the Fourth Respondent is absolutely vague without any letting the Petitioner to know when the entire sale consideration has been paid.

63. On 04.05.2007, the Second Respondent/Debts Recovery Tribunal-III) represented by the Recovery Officer, Chennai has passed an interim order by inter alia observing that the basic issue of making payment beyond the prescribed period of 15 days has not been disputed either by the Respondent Bank or by the Auction Purchaser, etc., and granted stay of all further proceedings in R.P. No. 1 of 2007 in DRC. No. 175 of 2004 and the Bank viz., the Fifth Respondent and the Advocate Commissioner have been restrained to proceed further till further orders from the Tribunal.

64. On 08.05.2007, the Fourth Respondent/Recovery Officer, Debts Recovery Tribunal I, Chennai has given a Report mentioning among other things as follows:

... Consequent on the establishment of Debts Tribunal Recovery III, Chennai w.e.f. 16.1.2007, the above proceedings was transferred to this Tribunal for further proceedings. The Auction Purchaser, vide his letter dated 29.01.2007 prayed for issue of orders so as to enable them to get the physical possession of the property. A notice was issued to all persons affected directing them to appear before the undersigned on 16th February, 2007 at 11.00 a.m. to show cause why

the obstruction being caused by them or any one else acting on their behalf should not be removed with the assistance of police for putting the auction purchaser into possession of the said property, under Rule 39 of the Income Tax (Certificate Proceedings) Rules, 1962. On the said date of hearing i.e., 16.2.2007, Shri K. Vivekanandan, Advocate representing Shri K.S. Natarajan, Advocate for the Defendant Company submitted that they have taken up the issue of payment of court fee on appeal before the Hon''ble High Court, Madras by way of W.P. No. 5489 of 2007, therefore prayed to await the orders of the Hon''ble High Court by another week. Applicant Bank was represented by one Shri S. Kalyanasundaram. After hearing the respective parties, the case was reserved for orders. Shri K.S. Natarajan, Advocate for the Defendant Company vide his Letter dated 20.02.2007 informed about the orders of the stay granted by the Hon''ble High Court on 16.2.2007 in M.P. No. 1/2007 in W.P. No. 5849 of 2007. In view of the stay granted by the Hon''ble High Court, further proceedings in the matter was deferred. On 26th April, 2007, the Auction Purchaser i.e. M/s. Saravana Foundations Ltd., informed that the Hon''ble High Court, Madras has dismissed the W.P. No. 5489 of 2007 & M.P. No. 1 of 2007 and therefore prayed to arrange to hand over the possession immediately.

Since the W.P. No. 5489 of 2007 & M.P. No. 1 of 2007 has been dismissed by the Hon''ble High Court, Madras vide its order dated 17.4.2007, and there is no legal impediment for the undersigned to proceed further, the undersigned on perusing the records and keeping in view specifically the observations made the Hon''ble High Court, Madras in para 31 of the order dated 20.12.2006 passed in W.P. No. 40034/2006, the undersigned passed an order on 27th April, 2007 appointing an Advocate Commissioner to take inventory/valuation of the movables lying in the suit premises and file a report before the undersigned.

Appeal u/s 30 of RDDB & FI Act, 1993 has been filed to stay the order of RO, DRT-I, Chennai dated 3.1.2007 in DRC No. 175/2004 in O.A. No. 152 of 2003.

65. In the Appeal filed by the Writ Petitioner A.S.38 of 2007 in DRC 175/2004 in O.A.112 of 2007 dated 16.06.2008, the Second Respondent, the Debts Recovery Tribunal-III, Chennai has passed an order of dismissing the Appeal with the following directions being issued to the Recovery Officer:

1. The First Respondent is directed to take expeditious steps for getting delivery of possession of the vacant land and building to the Third Respondent by employing police force if necessary without any further loss of time.
2. The Recovery Officer may release the amount due to the Second Respondent and withhold the surplus amount in the sale proceeds as per the direction dated 14.03.2008 of Hon''ble High Court of Madras passed in I.A. No. 1409 of 2008 in C.S. No. 288 of 2008 (in M/s. Kali Steel & Engineering Industries (P) Ltd. v. Machine Tools & Accessories (P) Ltd.) until further orders of the Hon''ble High Court.
3. The Recovery Officer is directed to furnish complete details of the sale,

recoveries made and disbursements caused, to the Appellant Company under due acknowledgment.

4. The above exercise must be completed by the Recovery Officer immediately on receipt of copy of this order and submit compliance report forthwith.

5. The I.A.22/2008 is closed in view of my opinion expressed in the order dated 23.11.2007 in I.A. No. 129/2007 filed by Centurion Bank of Punjab Limited.

6. The Registry is directed to communicate a free copy of this order to all the parties in this appeal.

66. The Petitioner has filed M.A.76 of 2008 against A. No. 38 of 2007 in DRC. No. 175 of 2004 in O.A.112/2007 on the file of the Debts Recovery Tribunal - III, Chennai u/s 20 of the Recovery of Debts Due to the Banks and Financial Institutions Act, 1993 and an interim order in IN.531 of 2008 has been passed by the Debts Recovery Appellate Tribunal, Chennai in A.S.38/2007 in D.R.C.175/2004 in O.A.112/2007 on the file of the Debts Recovery Tribunal - III, Chennai wherein an Advocate Commissioner has been appointed by the Fourth Respondent/Recovery Officer, Debts Recovery Tribunal I, Chennai and he has been directed to keep the possession of the schedule property with him, till further orders.

67. On 23.04.2009, in M.A.76 of 2009, the Debts Recovery Appellate Tribunal, Chennai has dismissed A.S. No. 38 of 2007 filed by the Petitioner with costs among other things observing that on account of the request made by the Auction Purchaser, the Third Respondent (Sixth Respondent in the Writ Petition) on the date of sale itself i.e., 23.03.2006, the First Respondent/Recovery Officer has exercised the discretion and allowed the time upto 30.06.2006 for payment of the balance 75% of sale price but the Third Respondent therein (Sixth Respondent in the Writ Petition) paid the same on 23.03.2006 itself, etc., and further, since the Appellant Company (Writ Petitioner) makes out a case that loss or damage has been caused on account of the procedure involved in the conduction of the auction, it cannot be heard to contend that the exercise of discretion by the First Respondent in granting time for payment of balance sale price is irregular and resultantly, confirmed the order passed by the Debts Recovery Tribunal III, Chennai in A.S. No. 38 of 2007 in DRC 175/2004 in O.A.112/2007 dated 16.06.2008 and vacated the interim stay already granted.

68. On 09.06.2009, the Third Respondent/Recovery Officer, the Debts Recovery Tribunal III, Chennai has passed an order in the matter of State Bank of India, Ambattur Industrial Estate Branch, Chennai-58 v. Machine Tools and Accessories P Ltd. and 2 Ors. among other things mentioning that the prayer of the Certificate Holder i.e., City Case Officer, State Bank of India, Stressed Assets Resolution Centre, Chennai State Bank of India for release of Rs. 1,76,27,464/-is hereby allowed and as regards the release of surplus amount from and out of sale proceeds, has further stated that the same shall be subject to the disposal of C.S.288 of 2008 by this Court.

69. It is to be pointed out that Section 17 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 speaks of Jurisdiction, Powers and Authority of the Tribunals. As a matter of fact, Section 17 of the Act enjoins that the Tribunal is to decide the applications of Banks and Financial Institutions for recovery of debts due to them. Section 17(1) of the Act specifies that 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. Sub-section (2) of Section 17 of the Act deals with the Jurisdiction, Powers and Authority of the Debts Recovery Appellate Tribunal mentioning that such Appellate Tribunal shall exercise, on and from the appointed day, the jurisdiction, powers and Authority to entertain an Appeal against any order made or deemed to have been made by the Debt Recovery Tribunal under the Act. In short, the adjudication of liability and the recovery of the amount by execution of the Certificate are respectively within the exclusive jurisdiction of the Tribunal and the Recovery Officer and no other Court or Authority much less the Civil Court or the Company Court can go into the said question relating to the liability and the recovery except as mentioned in the Act as per decision of the Hon"ble Supreme Court in Allahabad Bank v. Canara Bank AIR 2000 S.C. 1535. The Tribunals are established as a substitute to the Civil Courts to try the suits filed by the Bank and all the applications arising out of the same, etc., as per decision Venkateswara Textiles Traders and Printers Vs. Canara Bank and Another, .

70. Section 18 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 deals with "Bar of Jurisdiction". The ouster of jurisdiction is by virtue of Section 18 of the Act which sets out that no Court or other Authority can try matters for recovery of debts. However, in regard to the reliefs which do not relate to debts on a plain reading of Section 17 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 are concerned, there can be no doubt that the Civil Court will still retain jurisdiction as per decision Centurion Bank limited Vs. Indian Lead Limited and Another, .

71. Admittedly, the Recovery of Debts Due to Banks and Financial Institutions Act is a special statute. It overrides the provisions of general law. The Tribunal is competent to pass interim orders as per Section 19(6) of the Act. The Tribunal and the Appellate Tribunal are not tied down by the procedure prescribed under the CPC Code. However, they shall be guided by the principles of Natural Justice. Indeed, the Tribunal and the Appellate Tribunal are empowered to regulate their own procedure of course subject to the provisions of the Act and the Rules.

72. The issue of insufficiency of stamp duty cannot be agitated before the Tribunal or the Appellate Tribunal as per decision Asset Reconstruction Company (India) Limited v. Kumar Meterlurgical Corporation of India (2005 3 B.C. 44) (DRAT/DRT) CHENNAI.

73.A Reading of Section 18 of the Act goes to show that the Debts Recovery Tribunal shall exercise the powers of all the Courts except the Hon"ble High Court

and the Supreme Court under Article 226 and 32 of the Constitution of India. To put it precisely, the Tribunal is a substitute for Civil Courts in the matters relating to Debts due to Banks and Financial Institutions.

74. The Tribunal is constituted under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 in substitution of the Civil Court but without the trappings of the Civil Court. Therefore, a Tribunal can pass any kind of final or interim order to achieve the object of the Act without any procedural ramifications but it has to follow the principles of Natural Justice as per Section 19(6) of the Act. Of course, a Tribunal may also pass an ad interim orders without hearing the other side and later on, it can give a subsequent hearing to the other side and pass final orders as per decision Allahabad Bank, Calcutta Vs. Radha Krishna Maity and Others,

75. A scrutiny of the ingredients of Sections 17 - 20 of the Act will clearly point out that any order passed by the Tribunal is an appealable one before the Appellate Tribunal, except the order passed by the Tribunal with the consent of the parties. Even against a preliminary order passed by the Tribunal under the Act, there is a remedy of preferring an Appeal. Therefore, filing of the writ Petition is not maintainable for challenging the order passed by the Debts Recovery Tribunal.

76. Moreover, in the decision Smt. Smithaben H. Patel and others Vs. Industrial Credit and Development Syndicate and another, , it is held that "the mere fact that an Appellate Tribunal is situated at a distance place, cannot be a ground for holding that Appeal is not an efficacious alternative remedy.

77. In Ganga Narayan Mishra v. State Bank of India 2001) 1 M.P.L.J 27, it is observed that "the remedy of Appeal before the Appellate Tribunal is an adequate and efficacious remedy and the Petitioner cannot be permitted to abandon to resort the statutory remedy of an Appeal and to invoke the extraordinary jurisdiction of the Hon"ble High Court as per Article 227 of the Constitution of India.

78. In Om Kant Aggarwal and Another Vs. Punjab National Bank and Others, , the contention raised to the effect that the provisions of Section 21 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 were ultra vires as it enjoined upon the Appellant to deposit 75% of Debt as a condition precedent and that the pre-condition deposit of 75% is onerous and thus, violative of Article 14 of the Constitution of India has been negated and it is held that "an Appeal is a creature of statute. If no grouse can be made for not providing an Appeal, obviously no grouse can equally be made if conditions are imposed for filing the same.

79. Continuing further, in Kavita Pigments and Chemicals (Pvt.) Ltd. and Others Vs. Allahabad Bank and Others, , confirmed in Kavita Pigments and Chemical (P) Ltd. and Others Vs. Allahabad Bank and Others, , the requirement of pre-deposit as per Section 21 of the Recovery of Debts Due to Banks and Financial

Institutions Act, 1993 does not militate against the maintainability of Appeal against an Interlocutory order.

80. Section 22 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 prescribes the procedure and powers of the Tribunal and that of the Appellate Tribunal. Even though a Tribunal is clothed with the powers as is possessed by a Court of law, yet the powers of the Tribunal are undoubtedly limited. Its jurisdiction area is clearly specified and within the limits of its jurisdiction, it has all the necessary express and implied powers. The implied grant is limited by the express grant and as such, it can only be powers that are ancillary/incidental for performing necessary acts or using all such means as are essentially and reasonably necessary to make the grant effective and an efficacious one.

81. In the decision *Sushil Kumar Jaiswal and another Vs. Bank of India*, , it is held that "Writ Petition is not maintainable for bypassing the provisions of Section 21 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 in regard to the deposit, as alternative remedy of Appeal is available, etc., In *Times Guarantee Limited, Mumbai v. Branch Manager, Industrial Development Bank of India, Chennai* 2007 (1) DRTC 39 (MAD)), it is observed that "When the Petitioner has an alternative statutory remedy of Appeal provided under the Act, the writ petition is not maintainable.

82. In *Om Kant Aggarwal and Another Vs. Punjab National Bank and Others*, , it is held as follows:

4. The Court would have probed the issues raised by Mr. Mohanta if an alternative remedy was not available to the Petitioners. It would be recalled that the Petitioners did avail of an alternative remedy but did not pursue the same after the Appellate Tribunal had passed an interim order directing the Petitioners to deposit a sum of Rs. 5 lacs as pre-condition for hearing appeal on merits. It is thus a case where not only an alternative remedy was available to the Petitioners, but the same was also availed of. The appeal preferred by the Petitioner was not heard by the Appellate Tribunal as concededly an amount of Rs. 5 lacs as ordered by the Appellate Tribunal vide interim order was not deposited. In the facts fully detailed above, the Petitioners cannot be permitted to challenge the orders passed by the Civil Court or by the Tribunal at Jaipur, having availed of an alternative remedy of filing an appeal which as referred to above, was not taken to its logical ends. Faced with this situation Mr. Mohanta, the Learned Counsel appearing for the Petitioners then urged that the orders passed by the Appellate Tribunal directing the Petitioners to deposit Rs. 5 lacs as condition precedent was illegal and without jurisdiction. He is, however, unable to support his contention either from the provisions of the statute i.e. The Act of 1993 or from any judicial precedent. On the contrary the order of the Appellate Tribunal can well be supported from the provisions of the statute i.e. The Act of 1993 which requires deposit of 75% of the amount of debt as a condition precedent for filing an appeal provided the Appellate Tribunal reduces the

amount to be deposited. Section 21 of the Act reads as follows:

Deposit of amount of debt due, on filing appeal:

Where an appeal is preferred by any person from whom the amount of debt is due to a bank or a financial institution or a consortium of banks or financial institutions, such appeal shall not be entertained by the Appellate Tribunal unless such person has deposited with the Appellate Tribunal seventy-five per cent of the amount of debt so due from him as determined by the Tribunal u/s 19.

Provided that the Appellate Tribunal may, for reasons to be recorded in writing, waive or reduce the amount to be deposited under this Section.

5. Mr. Mohanta, however, contends that the provisions of Section 21 are ultra vires as it enjoins upon the Appellant to deposit 75 per cent of debt as a condition precedent. The pre-condition of deposit of 75 per cent is onerous and thus violative of Article 14 of the Constitution of India. We find no merit in this contention. Appeal is creature of statute. If no grouse can be made for not providing an appeal obviously no grouse can be equally be made if conditions are imposed for filing the same. In *The Anant Mills Co. Ltd. Vs. State of Gujarat and Others*, the Apex Court observed as under at page 1249 of AIR:

The right of appeal is the creature of statute. Without a statutory provision creating such a right the person aggrieved is not entitled to file an appeal. We fail to understand as to why the legislature while granting the right of appeal cannot impose conditions for the exercise of such right. In the absence of any special reasons there appears to be no legal or constitutional impediment to the imposition of such conditions. It is permissible, for example, to prescribe a condition in criminal cases that unless a convicted person is released on bail, he must surrender to custody before his appeal against the sentence of imprisonment would be entertained. Likewise, it is permissible to enact a law that no appeal shall lie against an order relating to an assessment of tax unless the tax had been paid.

6. The Apex Court in *Navinchandra Chotelal Vs. Central Board of Excise and Customs and Others*, while dealing with Sub-section (1) of Section 129 of the Customs Act, 1962 held that "the said Section makes it obligatory on Appellant to deposit duty or penalty pending the appeal or to comply with the order passed under the Proviso. On failure of the Appellant to comply with either requirement, the Appellate Authority is competent to dismiss appeal though dismissal is not expressly provided for in Section 129."

7. The last contention of Mr. Mohanta is that even though the appeal was competent and the same was filed, this Court is not debarred from entertaining a petition under Article 226 of the Constitution of India. Once the orders complained of are without jurisdiction, despite the fact that an alternative remedy is available, the Petitioners can yet file a Writ Petition under Article 226 of the Constitution of India. He further contends that when the orders of the

Appellate Tribunal directing the Petitioners to deposit a sum of Rs. 5 lacs was earlier challenged in this Court by way of Revision Petition under Article 227 of the Constitution of India, the Learned Single Judge of this Court held that scope of Article 227 is limited and, therefore, petition under Article 226 should have been filed. The operative part of the order dated 3-4-1998 passed by single Judge of this Court read as under:

I am of the opinion that the Petitioners cannot invoke Article 227 of the Constitution of India. The Revision Petition is, therefore, dismissed with liberty to the Petitioners to file a Writ Petition, if so advised under Article 226 of the Constitution of India.

83. In *Ramco Super Leathers Ltd., Rep. by its Director, Mr. S. Ramaswamy, Chennai And Ors. v. Uco Bank, Rep. by Its Authorised Officer, International Banking Branch, Chennai and Anr.* (2007) 5 MLJ 986, the Division Bench of this Court has held that "There is no specific provision u/s 17 or any other provision of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interests (SARFAESI) Act empowering the Tribunal to pass an interim order, but under Sub-section (12) of Section 19 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 a Tribunal is empowered to pass an interim order. Further, if Sub-section (7) of Section 17 of SARFAESI Act is read along with Sub-section (12) of Section 19 of the RDDB & FI Act and Rule 7 framed thereunder (Debt Recovery Tribunal (Procedure) Rules, 1993) it will be evident that the DRT has also jurisdiction to pass interim order u/s 17 of the SARFAESI Act in appropriate cases."

84. In this connection, this Court relevantly points out that as per Section 22 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 a Tribunal can travel beyond the CPC and Tribunal's fetter put on its powers is to observe the principles of Natural Justice. Also, that a Tribunal cannot pass orders over and above what has been enjoined by the statute.

85. In *B. Sampath Kumar Vs. The Recovery Officer and Others*, , this Court has held that "To escape the liability under Rule 61(b) of the Second Schedule to Income Tax Act, 1961, to pay the deposit and contest the matter, the Petitioner has filed the Writ Petition, without exhausting his remedy by way of an Appeal and therefore, there is no "loco standi" for him to file the Writ Petition." Also in the aforesaid decision, it is held that "The provisions of Second and Third Schedule to the Income Tax Act, 1961 and Income Tax (Certificate Proceedings) Rules 1962 are applicable to recovery proceedings as far as possible with necessary modifications."

86. In *Janardhanan Pillai Vs. Indian Overseas Bank*, , in paragraphs 5 and 6, it is held as follows:

5. The Act has been primarily enacted to secure public funds. A summary procedure has been provided to ensure that adjudication of proceedings for recovery of debt due to Banks and other financial institutions is expedited. The

obvious purpose is to ensure that one party does not retain the funds for ever so as to deprive others from getting the financial help. Even while providing for the remedy of appeal, a provision has been made in Section 21 that such an appeal "shall not be entertained by the Appellate Tribunal unless such person has deposited.... seventy five percent of the amount of debt so due from him as determined by the Tribunal... Thus, the statute postulates a pre-deposit. Still further, by adding the proviso, the Parliament has conferred a discretion on the Appellate Tribunal to "waive or reduce the amount to be deposited....". However, this discretion has to be exercised in a judicial manner. The Tribunal is required to record the reasons in writing. Thus, the exercise of discretion under the proviso has to be for good reasons. What is the position in the present case?

6. The Tribunal, on examination of the relevant factors, had come to the conclusion that the Appellants had, in collusion with the Bank Officers, managed to evade the payment for more than a decade since 1990. Yet, the Tribunal has not totally rejected the petition for waiver. It has granted partial relief and permitted the Appellants to file appeals on deposit of 60% of the decretal amount. The exercise of discretion is not shown to be arbitrary. Relevant factors have been noticed. Thereafter, the Tribunal had passed the impugned order. The reasons given by the Tribunal are germane to the issue. We find no infirmity in the order.

87. In *Western Exports India (P) Ltd. v. Indian Overseas Bank And Ors.* (2003) 117 Comp Cas 319, this Court has held hereunder:

Where an auction sale has been notified in accordance with the recovery certificate issued by the Debt Recovery Tribunal in exercise of powers conferred under Chapter v of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 read with the provisions of the Second and Third Schedules to the Income Tax Act, 1961, and the income tax (Certificate Proceedings) Rules 1962, remedy if any against the proceedings of the Tribunal or the action of the Recovery Officer, has to be exhausted under the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, and not by way of judicial review under Article 226/227 of the Constitution.

88. In *Hanu Reddy Realty India Pvt. Ltd. Vs. Jignesh, R.K. Mayur and Global Trust Bank, Mylapore Branch,* , this Court has held as follows:

The Recovery Officer being a creature of the statute is obliged to act fairly and in a reasonable manner, while dealing with the property of the defaulters. As per the provisions of Act 51 of 1993, wide powers are given to the Recovery Officer including power of distraint and sale of property and when there are enormous powers conferred on an authority, the law expects much more responsibility from such authorities. The function of the Recovery Officer is not to sell the property for a paltry sum, but he should see that the property is sold for its maximum value which would otherwise be termed as market price and if there is any balance after discharging the dues to the bank or financial institutions, it should

go to the defaulter. Merely because the defaulter is in arrears to the bank or financial institutions, it cannot be said that his property has to be sold irrespective of its worth, and he should not have the benefit of the balance sale consideration after meeting the liabilities. Therefore, utmost care has to be taken by the Recovery Officer in the matter of sale of the property of the defaulters and due publicity should be given for such sale as otherwise the property will be snatched away by the real estate agents by forming cartel, and there will be still balance to be paid to the bank and the defaulter will continue to be debtor through out his life. On the other hand, if an attempt is made by the Recovery Officer to get the maximum price for the property, it will be in the interest of both the Bank as well as the defaulter. As noted earlier, the Recovery Officer is empowered to effect recovery by various modes as made mentioned u/s 25 of the Act and the said power coupled with the relevant provisions of the Income Tax Act, 1961 made applicable to recovery proceeding under Debts Recovery Tribunal Act, the Recovery Officer enjoins wide powers in the matter of sale of property. As per Section 63(1) of Schedule to the Income Tax Act which is made applicable to the recovery proceedings under the Debts Recovery Tribunal Act, the confirmation of sale is also to be made by the Tax Recovery Officer.

89. In *Punjab National Bank Vs. O.C. Krishnan and Others*, , the Hon"ble Supreme Court has held as follows:

The order passed by the Tribunal directing sale of the mortgaged property was appealable u/s 20 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (for short "the Act"). The High Court ought not to have exercised its jurisdiction under Article 227 in view of the provision for alternative remedy contained in the Act. The correctness of the High Court's decision is not examined herein. Whether the order passed by the Tribunal was correct or not has to be decided before an appropriate forum.

The Act has been enacted with a view to provide a special procedure for Recovery of Debts due to the banks and Financial Institutions. There is a hierarchy of appeal provided in the Act, namely, filing of an appeal u/s 20 and this Fast-Track procedure cannot be allowed to be derailed either by taking recourse to proceedings under Article 226 and 227 of the Constitution or by filing a Civil suit, which is expressly barred. Even though a provision under an Act cannot expressly oust the jurisdiction of the Court under Articles 226 and 227 of the Constitution, nevertheless, when there is an alternative remedy available, judicial prudence demands that the Court refrains from exercising its jurisdiction under the said constitutional provisions.

90. In the decision *Union of India And Anr. v. Delhi High Court Bar Association And Ors.* (2002) 2 M.L.J. 122 , the Hon"ble Supreme Court has held that "Sections 25, 28, 29 and 30 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 are not bad in law" and it is also held that "the Tribunals and the Appellate Tribunals will be independent and that the legislation is a valid one."

91. Rule 52 of Second Schedule to the Income Tax Act, 1961 empowers the concerned Officer to attach and then to proceed to sell the property and in this regard, he can issue proclamation. Rule 53 enjoins as to what ought to be the contents of proclamation. One of the necessary ingredients in the proclamation is the Upset Price/Reserve Price. As per Rule 56, the sale is to be by means of a public auction and the highest bidder will be given the opportunity of taking the property.

92. As per Section 30 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, any person aggrieved by an order of Recovery Officer passed under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 has a right of preferring an Appeal to the Tribunal. As such, a person has an alternative, effective and efficacious remedy before the Tribunal itself. In short, the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 provides for forum of preferring an Appeal and therefore, one is not supposed to by-pass the procedure by taking recourse to relevant proceeding with a view to avoid and evade the same, in the considered opinion of this Court. Indeed, the procedural wrangle cannot be allowed to be shaken or shackled with, in the considered opinion of this Court.

93. It is not in dispute that the Petitioner has not taken necessary steps to set aside the Exparte Order dated 31.08.2004 passed in O.A.152 of 2003 on the file of the Debts Recovery Tribunal I, Chennai. As per Section 22(2)(g) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, there is a remedy to a party to file an Application in regard to setting aside any order of dismissal of any application for default or any order passed by the Tribunal or Appellate Tribunal Exparte. In the instant case on hand, the Petitioner has taken necessary steps to set aside the Exparte Final order dated 31.08.2004 passed in O.A.152/2003 by the Debts Recovery Tribunal-I, Chennai. The impugned order in the present Writ Petition relates to the order of the Fourth Respondent/the Recovery Officer, Debts Recovery Tribunal-I, Chennai dated 03.01.2007 in and by which the Petitioner/Company represented by Managing Director S. Kannan has been granted one final opportunity to hand over possession of land and building to the Fifth Respondent/Branch Manager, State Bank of India, Ambattur Industrial Estate Branch, Chennai on or before 17.01.2007 failing which it has been mentioned that the possession of land and building along with machinery and other movables will be handed over to the Auction Purchaser at the risk and cost of the Petitioner Company.

94. The Upset Price for the sale of property has been fixed at Rs. 1 Crore and 3 Lakhs. 30 bidders have participated in the auction sale held on 23.03.2006. The Sixth Respondent/Auction Purchaser has been the successful bidder in the auction sale held on 23.03.2006, by purchasing it at Rs. 4 Crores and 10 Lakhs. After removing the movables, the Sixth Respondent has been handed over of the possession of the property in issue. On the date of auction sale held on 23.03.2006, time for payment of balance purchase money has been granted till

30.06.2006. The Petitioner's Managing Director has been present on 30.06.2006. The Petitioner filed W.P.40034 of 2006 challenging the order dated 31.08.2006 passed by the Recovery Officer in regard to the Writ Schedule property and the said writ petition has been dismissed by this Court and 20.12.2006 and further, this Court has directed the Petitioner to hand over possession of the Writ Schedule property. In fact, the Petitioner in W.P.40034 of 2006 has challenged the order dated 31.08.2006 passed by the Recovery Officer and that it has not challenged the earlier order dated 18.07.2006. The order dated 18.07.2006 has been passed by the Fourth Respondent/Recovery Officer, Debts Recovery Tribunal I, Chennai as per Rule 39 of the Income Tax (Certificate Proceedings) Rule 1962 read with Section 29 of the Debts Recovery Tribunal Act informing the Petitioner about the sale of the property to the Sixth Respondent and directing the Petitioner to vacate the property within seven days. In short, the Petitioner has challenged the order dated 18.07.2006 passed by the Fourth Respondent but only assailed the letter dated 31.08.2006 passed by the Recovery Officer and in sum and substance, the Petitioner has only challenged the consequential order sent in reply to the request of the Petitioner requiring time asking for explanation.

95. The order passed in W.P.40034 of 2006 has become final. It is to be remembered that the Petitioner filing the present Writ Petition W.P.10652 of 2009 seeking inter alia one of the reliefs that the order of the Fourth Respondent dated 03.01.2007 is an invalid one, is hit by the principle of constructive Res judicata because of the simple fact that it is not open to the Petitioner as it likes to urge one or two points every time and this type of the Petitioner's conduct is clearly in violation of the public policy on which the principle of res judicata has been founded and certainly it will mean hardship to the other side.

96. At this juncture, this Court worth recalls the decision *Devilal Modi v. Sales Tax Officer, Ratlam And Ors.*, wherein in paragraphs 10 to 12, it is laid down as follows:

Though the Courts dealing with the questions of the infringement of fundamental rights must consistently endeavour to sustain the said rights and should strike down their unconstitutional invasion, it would not be right to ignore the principle of Res judicata altogether in dealing with writ petitions filed by citizens alleging the contravention of their fundamental rights. Considerations of public policy cannot be ignored in such cases, and the basic doctrine that judgment pronounced by the Supreme Court are binding and must be regarded as final between the parties in respect of matters covered by them must receive due consideration.

Assessee challenged the validity of sales tax imposed upon him for a particular year by a petition under Article 206. The petition was rejected upon merits. An appeal also was dismissed by the Supreme Court upon merits. The Assessee had attempted to raise two more additional grounds before the Supreme Court. But the Supreme Court did not allow them on the ground that they had not been

specified in the writ petition before the High Court and had not been raised at an earlier stage. Subsequently by writ petition under Art, 226 before the High Court the Assessee once again challenged the same assessment order but on grounds which the Supreme Court had not permitted to be raised by the Assessee in the appeal before them in the previous writ petition. The High Court rejected the petition on merits. On an appeal to the Supreme Court:

Held that the second writ petition was barred by constructive res judicata. (Para 12)

The result of the decision of the Supreme Court in the earlier appeal brought by the Assessee before it was clear and unambiguous and that was that the Assessee had failed to challenge the validity of the impugned order which had been passed against him. In other words, the effect of the earlier decision of the Supreme Court was that the Assessee was liable to pay the tax and penalty imposed on him by the impugned order. It would be unreasonable to suggest that after this judgment was pronounced by the Supreme Court, it should still be open to the Assessee to file a subsequent writ petition before the High Court and urge that the said impugned order was invalid for some additional grounds. In case the high Court had upheld these contentions and had given effect to its decision, its order would have been plainly inconsistent with the earlier decision of the Supreme Court, and that would be inconsistent with the finality which must attach to the decisions of the Supreme Court as between the parties before it in respect of the subject-matter directly covered by the said decision. If constructive res judicata were not applied to such proceedings. A party could file as many writ petitions as he liked and take one or two points every time. That clearly was opposed to considerations of public policy on which Res judicata was based and would mean harassment and hardship to the opponent. Besides, if such a course were allowed to be adopted, the doctrine of finality of judgments pronounced by the Supreme Court would also be materially affected. *Daryao and Others Vs. The State of U.P. and Others*, . Distinguished.

97. The Petitioner has to follow Rule 60 and 61 of the Second Schedule to the Income Tax Act which is a condition precedent for projecting any application to set aside the auction sale in favour of the Sixth Respondent. As per Rule 60 of the Second Schedule to the Income Tax Act, 1960(1), an application to set aside the sale of an immovable property on deposit has to be filed by a party within 30 days, from the date of sale and as per Rule 61 of the Second Schedule to the Income Tax Act, an application to set aside the sale of immovable property on ground of non service of notice or irregularity can be challenged and as per Rule 60(1) (a) of the Second Schedule to the Income Tax Act, an amount specified in the proclamation of the sale as that for recovery of which the sale was ordered with interest thereon at the rate of 15% p.a. calculated from the date of proclamation of sale to the date when the deposit is made and further, as per (b) proviso for payment to the Purchaser has penalty a sum equivalent to three but not less than the one Rupee, etc., will have to be deposited as a pre-condition

before projecting any application to set aside the sale but the Writ Petitioner has not adhered to Rule 60(1)(a) and (b) and Rule 61 of the Second Schedule to the Income Tax Act but it has projected the present writ petition by making an endeavour to by pass the said Rules and in fact, the Petitioner has remained silent after knowing the factum of auction sale, etc.,

98. Even when the Fourth Respondent has passed an order on 03.08.2007 by giving one final opportunity to the Petitioner in regard to the handing over of vacant possession of the property to the Fifth Respondent on or before 17.01.2007, etc., the Petitioner has only sent a letter dated 06.01.2007⁶ calling for certain particulars about the sale proceeds but it has not made mention of about the sale of property to the Sixth Respondent.

99. In this connection, we deem it appropriate to point out that the Petitioner's relief in Appeal No. 38 of 2007 before the Second Respondent is only to set aside the order dated 03.01.2007 passed by the Recovery Officer and the Petitioner has not sought either the relief of auction sale or the confirmation of the sale in favour of the Sixth Respondent. As per Rule 57(1) of the Second Schedule to the Income Tax Act, 25% of the purchase money has to be paid by the Purchaser of the immovable property and as per Rule 57(2) of the Second Schedule to the Income Tax Act, the full amount of the purchase money shall be paid by the Purchaser to the Tax Recovery Officer on or before 15th day from the date of sale of the property. In the present case, the Sixth Respondent has remitted 25% of the bid amount on date of auction sale on 23.03.2006 but the Fourth Respondent/ Recovery Officer, Debts Recovery Tribunal I, Chennai granted time upto 30.06.2006 in regard to the payment of the balance amount. The fact remains that the Sixth Respondent has paid 75% of the balance amount of purchase money on 30.06.2006, long beyond 15 days from the date of sale of the property viz., 23.03.2006.

100. It is true that a Tribunal or the Appellate Tribunal can exercise its discretion for reasons to be recorded in writing but the Fourth Respondent/Recovery Officer, Debts Recovery Tribunal I, Chennai has extended the time limit for payment of the balance amount upto 30.06.2006 and although the Sixth Respondent has remitted the balance purchase money together with poundage fees on 23.06.2006 itself, yet the discretion is to be exercised by the Fourth Respondent/ Recovery Officer, Debts Recovery Tribunal I, Chennai in accordance with Rule 57(2) of the Second Schedule to the Income Tax Act by exercising its incidental or ancillary powers enjoined under the statute.

101. To put it precisely, the Rule 57(2) of the Second Schedule to the Income Tax Act refers to full amount of purchase money to be paid on or before 15th day from the date of sale of property and the same must be within the purview of Rules conferred by a Statute though a Tribunal is entitled to regulate its own procedure.

102. Though on the side of the Sixth Respondent, it is contended that the

Recovery Officer/Fourth Respondent has discretionary powers in applying the provisions of the Second Schedule to the Income Tax Act, 1961 such discretion in our opinion must be exercised in conformity of Rules. Even in M.A.76 of 2009, the Writ Petitioner has challenged in Appeal No. 38 of 2007 in DRC.175/2004 in O.A.112/2007 dated 16.06.2008. Here again, the Petitioner has no grievance about either the bid amount or the public auction.

103. In view of the fact that the Petitioner has not followed Rule 60 and 61 of the Second Schedule to the Income Tax Act, 1961 in not filing an application to set aside the auction sale dated 23.03.2006 is not entitled to project the present writ petition seeking to quash the order of the Fourth Respondent dated 03.01.2007 in D.R.C. No. 175 of 2004 in O.A. No. 152 of 2003 on the file of the Debts Recovery Tribunal-I, Chennai, the order of the second Respondent dated 16.06.2008 in Appeal No. 38 of 2007 on the file of the Debts Recovery Tribunal-III, Chennai, the order of the First Respondent dated 23.04.2009 in M.A. No. 76 of 2009 on the file of the Debts Recovery Appellate Tribunal, Chennai and consequently to direct the Respondents 1 to 4 in setting aside the sale in favour of the Sixth Respondent of the Petitioner's property mentioned in the schedule of the present Writ Petition, etc., Moreover, the Petitioner has an alternative, effective remedy of questioning the auction sale held on 23.03.2006 under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. Without exhausting the said remedy, it is not open to the Petitioner to project the present Writ Petition after a gap of more than 3 years and 3 months from the date of conduct of an Auction sale dated 23.03.2006. Even in respect of an Auction sale dated 23.03.2006 (which is said to be a void one on the side of the Petitioner) the strict adherence to the Rule 60 and 61 of the Second Schedule to the Income Tax Act, 1961 is to be complied with by the Petitioner. Admittedly, the Petitioner cannot derail the fast track procedure enunciated under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. The validity or invalidity of Auction Sale dated 23.03.2006 or what is the effect of Auction sale dated 23.03.2006 and what right has accrued to the Sixth Respondent/Auction Purchaser are all these points are only to be raised by either of the parties under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, the Rules framed thereunder and also as per Rule 60 and 61 of the Second Schedule to the Income Tax Act, 1961. Looking at from point of view, the Writ Petition filed by the Petitioner is not per se maintainable. Viewed in that perspective, the Writ Petition fails.

104. In the result, the Writ Petition is dismissed leaving the parties to bear their own costs. It is made clear that the dismissal of the present writ petition will not preclude the Petitioner to agitate the auction sale held on 23.03.2006 before the competent forum as per the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and the Rules framed thereunder and also by complying with the Rule 60 and 61 of the Second Schedule to the Income Tax Act, 1961 and seek appropriate remedy thereto in the manner known to law, if so advised. The connected miscellaneous petitions are closed.