

(2003) 11 AP CK 0094

In the Andhra Pradesh High Court

Case No : Writ Petition No. 26599 of 1999 21 November 2003

P. Mohanreddy

APPELLANT

Vs

Debts Recovery Appellate Tribunal

RESPONDENT

Date of Decision : 21-11-2003

Acts Referred:

Constitution of India, 1950 — Article 226
Income Tax Act, 1961 — Section 25, 29, 295, 61

Citation : (2004) 135 TAXMAN 339

Hon'ble Judges : Devinder Gupta, C.J.; Ms. G. Rohini, J; G. Rohini, J

Bench : Full Bench

Advocate : K. Rama Krishna Reddy, S. Ashok and Ananda Kumar, for the Assessee, for the Appellant; T. Suryakaran Reddy, K.G. Sastry and C.V. Nagarjuna Reddy, for the Revenue, for the Respondent

Judgement

Devinder Gupta, C.J.

Petitioners in this petition filed under article 226 of the Constitution of India on 22-11-1999 are seeking to have the sale by public auction, held on 30-12-1998 with respect to land situated in Survey Nos. 32/1, 32/2, 32/3, 33/1, 92 and 93 of Jeedimetla village and Pet Basheerabad village (hereinafter referred to as the land in question) by the 3rd respondent and the consequential confirmation made on 27-1-1999, set aside as illegal, violative of provisions of the Recovery of Debts due to Banks and Financial Institutions Act, 1993 (Act No. 51 of 1993), (hereinafter referred to as the Act), without authority of law and against the directions of this court.

2. In order to understand the points urged and raised before us, it will be necessary to mention the background facts in which the petitioner filed the writ petition and the other facts and circumstances which were brought to our notice : The petitioners allege that on 10-10-1991 respondent No. 5 Society through its Managing Director entered into an agreement with the petitioners for sale of the property in question for a total consideration of Rs. 90,00,000, out of

which Rs. 22,53,000 was paid on the date of agreement and after adjusting subsequent payments of Rs. 18,19,850, balance amount payable was Rs. 49,27,130. As the society did not discharge its obligation under the agreement, the petitioners filed suit (O.S. No. 454 of 1994) on 7-10-1994 in the court of Additional Subordinate Judge, Rangareddy District seeking decree for specific performance of the agreement to sell. Pending the suit interim injunction was obtained restraining respondent No. 5 and their officers from alienating the suit properties.

3. Before the aforesaid suit was filed, respondent No. 4 bank (Syndicate Bank) had filed a suit (O.S. No. 81 of 1993) for recovery of Rs. 4 crores in the court of Additional Subordinate Judge, Rangareddy against the society inter alia on the ground that the bank had advanced amounts towards loan which the defendants have failed to repay. Writ petitioners 3 and 7 were also impleaded as defendants in the suit. On constitution of Debt Recovery Tribunal at Bangalore, the suit was transferred to the said Tribunal and was numbered as O.A. No. 406 of 1996. Debt Recovery Tribunal (DRT) on 11-7-1997 allowed the claim of the bank with direction to the society and other defendants to pay Rs. 4,01,90,485.85 with incidental expenses and future interest. Pursuant to the order of recovery, the bank sought to have the property in question, beside the other properties auctioned. The Debt Recovery Officer issued auction notice and the same was published in Deccan Chronicle on 23-3-1998. The petitioners case is that they had no knowledge of the claim of the bank being allowed by the Debt Recovery Tribunal and were surprised to see the auction notice and thus on 16-3-1998 filed a claim petition before the Debt Recovery Officer claiming that the property in question was not liable to be attached and sold in auction for recovery of the amount due to the Syndicate Bank since the petitioners had interest in the property on the basis of the aforementioned agreement to sell. Petitioners also prayed for stay of auction. Stay was not granted. Considering the urgency and the impending auction, scheduled to be held on 23-3-1998, the petitioners filed W.P. No. 7487 of 1998 along with W.P.M.P. No. 9127 of 1998. The court disposed of the Writ Petition on 20-3-1998 by staying the auction and directed the Debt Recovery Officer to consider the claim petition filed by the petitioners and to pass appropriate orders thereupon.

4. It is further alleged that the claim petition was heard by the Debt Recovery Officer but was dismissed on 15-4-1998. The petitioners challenged the said order by filing Writ Petition No. 13926 of 1998, which was also dismissed by this court on 22-5-1998 reserving liberty to the petitioners to prefer an appeal before the Debt Recovery Appellate Tribunal, and in the meanwhile the auction proceedings were stayed. The petitioners thus preferred an appeal (302 of 1998) on 7-7-1998 before the DRT, Mumbai which was dismissed on 31-7-1998 holding that as agreement holders the petitioners had no locus standi in the property and as such cannot question the sale.

5. Fresh auction notice was issued by Syndicate bank on 10-12-1998 fixing

30-12-1998 to be the date of auction of the property in question. In order to stall the auction, the petitioners filed an application (I.A. No. 1733 of 1998) in O.S. No. 454 of 1994 seeking impleadment of Syndicate bank and bank of Baroda as parties to the suit for specific performance and also filed another application (I.A. No. 1734 of 1998) seeking interim injunction against the bank in proceeding to have the property in question auctioned. The said application was dismissed on 29-12-1998. The order was challenged in appeal (C.M.A. No. 2 of 1998) filed in this Court. Miscellaneous application (C.M.R No. 40 of 1998) was also filed. On 31-12-1998 this court granted stay of confirmation of sale of the auction held on 30-12-1998.

6. On 30-12-1998 land in question was put to sale by public auction in which the 6th respondent was declared to be the highest bidder having offered Rs. 5.41 crores for the property in question, i.e., at the rate of Rs. 14.50 lakhs per acre. The other property (mortgaged property) could not be sold in view of the obstacles alleged to have been caused by the factory workers. In this case, we are concerned only with the property in question, which was put to auction on 30-12-1998 wherein 6th respondent was declared to be the highest bidder. Rs. 1.39 crores, being one fourth of the sale consideration was not paid by the 6th respondent on the date of auction but was paid through a demand draft on 7-1-1999.

7. On 18-1-1999, the petitioners filed W.P. No. 668 of 1999 in this court seeking to have the order passed on 31-12-1999 in Appeal No. 302 of 1998 by the Debt Recovery Appellate Tribunal, Mumbai set aside and consequently sought direction against the respondents not to proceed against the properties in question. In the meanwhile, on 23-2-1999, respondent No. 6 and others paid an additional amount of Rs. 1.02 crores through demand draft and also furnished bank guarantee for the balance amount of Rs. 3 crores. On the same day Debt Recovery Tribunal confirmed the sale in favour of the 6th respondent and others and possession of the land was also delivered. On 24-2-1999, this court in W.P. No. 668 of 1999 passed an order of status quo. On 7-4-1999 the other mortgaged properties situated at Moulali were sold for Rs. 9 crores. On 22-4-1999, C.M.A. No. 2 of 1998 filed by petitioners was dismissed. On 27-12-1999 W.P. No. 668 of 1999 was also dismissed by a Division Bench of this court holding that the petitioners have no locus standi to raise objections; they being only agreement holders and cannot be termed as persons interested within the meaning of rule 11 of Second Schedule to Income Tax Act, 1961 which are applicable to recover the debt due under the Act. On the same day (27-12-1999) the W.P. No. 668 of 1999 was dismissed, the petitioners filed the instant W.P. No. 26599 of 1999 questioning the action of the Debt Recovery Officer in auctioning the property on 30-12-1998 and the consequential order of confirming the sale and sought to have the said orders quashed and set aside.

8. Writ Petition was admitted for hearing on 29-12-1999. The court also ordered encashment of the bank guarantee for Rs. 3 crores, furnished by the Auction

Purchasers towards the balance sale price. The bank guarantee was thus encashed on 19-1-2000 and the amount was transferred to the Bank. While the writ petition was pending sale certificate was issued on 25-5-2000 in favour of the 6th respondent and others.

9. On 31-12-2001 the suit for specific performance of agreement to sell (O.S. No. 454 of 1994) filed by the petitioners was dismissed on merits and needless to add that no further appeal has so far been filed by the petitioners against the judgment and decree passed in the said suit. It also deserves to be noticed that the bank has already appropriated the entire amount of sale consideration. Sale has not been questioned by the society, being the principal debtor or by anybody else except by the petitioners, who in order to question the legality and validity of the sale qua the property in question filed this writ petition on 27-12-1999 without resorting to the remedy provided in the Second Schedule to the Income Tax Act, 1961 and Income Tax (Certificate Proceedings) Rules, 1962. In the aforementioned background, we will have to notice the grounds on which the petitioners have come forward to question the legality and validity of the sale.

10. The petitioners alleged that they are the purchasers of the property in question under an agreement of sale, dated 10-10-1991 from the society having agreed to pay total sale consideration of Rs. 90 lakhs and having made part payment. After narrating some of the facts leading to the dismissal of their claim petition and dismissal of W.P. No. 668 of 1999, the petitioners questioned the act of respondent No. 3 in having sold the property to be in complete violation of rules 57 and 58 of the Second Schedule to Income Tax Act, 1961 and confirmation of sale to be in violation of rule 63(1) of the Second Schedule to Income Tax Act, 1961, hereinafter referred to as the Rules. The challenge inter alia is on the ground that as per rule 57(1) of the Rules, the purchaser has to deposit 25% of the purchase money immediately after the declaration and in default of such payment; the property shall forthwith be resold. As per rule 57(2), the auction purchaser has to pay the remaining 75% of sale amount on or before 15th day from the date of the sale of the property. In default of payment under rule 57(2), the Recovery Officer has got power to forfeit the amount in favour of the Government after defraying the expenses of the sale and the property has to be resold. The language in rule 57(1) and (2) is identically worded as that of order 21 Rules 84 and 85 of Code of Civil Procedure. The language in rule 58 is also identically worded as that of Order 21 rule 86 of Code of Civil Procedure. In view of identical language followed in the said rules, the principles laid down in various decisions of the Supreme Court on order 21 Rules 84, 85 and 86 of the CPC squarely apply to the Rules 57 and 58 of the Rules.

11. The petitioners further alleged that the auction was conducted on 30-12-1998. The auction purchaser deposited 25% of the sale amount on 7-1-1999, i.e., on the 9th day from the date of auction. Therefore, there is a delay of 8 days. In spite of said delay, the recovery officer failed to resell the property. Out of remaining 75% of the sale amount, the auction purchaser

deposited Rs. 1.2 crores by demand draft and for remaining amount gave bank guarantee on 23-2-1999, after 55 days from the date of auction. Thus, there is a delay of 40 days in payment. Bank guarantee is not a payment. The delay has vitiated the proceedings in view of rule 57(2) of Rules. In spite of the same, the Recovery Officer proceeded to accept the amount and confirmed the sale in favour of the auction purchaser. Therefore, the said auction is null and void and is non est. The Recovery Officer instead of selling the property under rule 58, has proceeded to issue sale certificate under rule 65 during the pendency of writ petition. Thus, the Recovery Officer has totally exceeded his jurisdiction in contravention of Rules 57, 58 and 65 of Rules.

12. Needless to add that the petitioners approached this court to have the auction conducted by Respondent No. 3 set aside including confirmation of sale in the capacity as agreement holders and not in any other capacity. Their claim to the property that it was not liable to be attached and sold in execution of the recovery proceedings was negated when their claim petition was dismissed. The appeal was also dismissed by respondent No. 1 and the challenge to the said order passed in appeal came to an end on 27-12-1999 when W.P. No. 668 of 1999 was dismissed by this court. These orders have become final and have not been questioned further. Even the suit filed by the petitioners for a decree to specifically perform the agreement to sell has been dismissed and the said decree has become final. After the claim of the petitioners was negated, the instant writ petition was filed on 27-12-1999, i.e., almost on completion of one year of the date of auction on the ground of violation of the provisions contained in Rules 57, 58 and 63(1) of Second Schedule to Income Tax Act, 1961. The said Rules and rule 61 read :

"57. Deposit by purchaser and resale in default.(1) On every sale of immovable property, the person declared to be the purchaser shall pay, immediately after such declaration a deposit of twenty five per cent on the amount of his purchase money, to the officer conducting the sale; and, in default of such deposit, the property shall forthwith be resold.

(2) The full amount of purchase money payable shall be paid by the purchaser to the Tax Recovery Officer on or before the fifteenth day from the date of the sale of the property.

58. Procedure in default of payment-In default of payment within the period mentioned in the preceding rule, the deposit may, if the Tax Recovery Officer thinks fit, after defraying the expenses of the sale, be forfeited to the government, and the property shall be resold, and the defaulting purchaser shall forfeit all claims to the property to any part of the sum for which it may subsequently be sold.

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61. Application to set aside sale of immovable property on ground of non-service of notice or irregularity. Where immovable property has been sold in execution of

a certificate, (such Income Tax Officer as may be authorised by the Chief Commissioner or Commissioner in this behalf) the defaulter or any person whose interests are affected by the sale, may, at any time within thirty days from the date of the sale, apply to the Tax Recovery Officer to set aside the sale of the immovable property on the ground that notice was not served on the defaulter to pay the arrears as required by this Schedule or on the ground of a material irregularity in publishing or conducting the sale :

Provided that

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

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

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63. Confirmation of sale.(1) Where no application is made for setting aside the sale under the foregoing rules or where such an application is made and disallowed by the Tax Recovery Officer, the Tax Recovery Officer shall (if the full amount of the purchase money has been paid) make an order confirming the sale, and, thereupon, the sale shall become absolute.

(2) Where such application is made and allowed, and where, in the case of an application made to set aside the sale on deposit of the amount and penalty and charges, the deposit is made within thirty days from the date of sale, the Tax Recovery Officer shall make an order setting aside the sale :

Provided that no order shall be made unless notice of the application has been given to the persons affected thereby."

The Writ Petition is vehemently opposed by respondent-Bank as well as by the auction purchasers.

13. Preliminary objection has been raised by the respondents as to the locus standi of the petitioners to file the writ petition and to challenge the auction proceedings on the ground that in view of the dismissal of Writ Petition No. 668 of 1999 and rejection of their claim petition by Debt Recovery Officer, which orders have since become final, there is absolutely no cause to the Petitioners to challenge the said proceedings. The petitioners were claiming interest in the property on the basis of an agreement to sell, which claim was negated. Challenge to the said order failed when their writ petition was dismissed also on the ground that only a person having interest in the land or who has suffered substantial injury can challenge sale proceedings.

14. Faced with the above objection, learned counsel for the petitioners submitted that the petitioners did have locus standi to challenge the sale proceedings being

the judgment debtors. Petitioner Nos. 3 and 7 were also the directors of the society and were impleaded by the bank as respondents in the claim petition filed before the Debt Recovery Tribunal. Being the judgment debtors the petitioners have every locus standi to challenge the sale proceedings. This plea was taken on behalf of the petitioners when objection was raised by the respondents about their locus standi in their counter-affidavit. The petitioners in the writ petition nowhere claimed that they were filing the writ petition in the capacity as judgment debtors. They claimed interest in the property only as agreement holders and thus had not challenged the sale proceedings in the capacity as judgment debtors. On such a plea being taken during the course of arguments, we asked the petitioners to elect and specify whether they were trying to agitate their right as judgment debtors or in the capacity as agreement holders. Learned counsel for the petitioners submitted that the petitioners would like to challenge the proceedings only in the capacity as judgment debtors.

15. Thus, we have to proceed on the basis that petitioner Nos. 3 and 7 were directors of the Managing Committee and members of the respondent society and were impleaded as defendants-respondents in the recovery proceedings before the Debt Recovery Tribunal. They are questioning the sale proceedings as judgment debtors. Other petitioners thus have no claim to challenge the auction proceedings and Writ Petition on their behalf is not maintainable. Even such stand now taken by petitioner Nos. 3 and 7 is seriously resisted by the respondents on the ground of maintainability of the petition. Learned counsel for the Auction Purchasers and of the bank submitted that rule 61 of Second Schedule to Income Tax Act, 1961, clearly stipulate that where any immovable property has been sold in execution of certificate, the defaulter or any person whose interests are affected by the sale may approach the Tax Recovery Officer within thirty days from the date of sale to have the sale set aside on the grounds as enumerated in section 61. Such a right can be exercised within thirty days of the date of sale provided the defaulter or the person having interest in the property deposits the amount recoverable in the execution of the certificate. Even on fulfilling such conditions, the sale will not be set aside unless the Recovery Officer is satisfied that the applicant has sustained substantial injury by reason of non-service of notice of sale or by any irregularity in the conduct of sale proceedings. Since the petitioners are aggrieved by the sale as defaulters, they could have questioned the sale before the Debt Recovery Officer, as stipulated in rule 61 by complying these conditions. Having failed to do so, it was argued that they cannot now be permitted to challenge the same by invoking the extraordinary jurisdiction of this Court, almost one year of the date of sale.

16. The respondents also raised an objection about maintainability of the writ petition on the ground that the petitioners were precluded from challenging the auction proceedings on the grounds as alleged in the writ petition because of operation of the doctrine of constructive res judicata. To the knowledge of the petitioners, auction had taken place on 30-12-1998, pursuant to the sale notice dated 10-12-1998. They filed W.P. No. 668 of 1999 on 18-1-1999. The objection

raised by the petitioners is that on the date of sale, the auction purchasers did not deposit 25% of the sale proceeds; therefore, it was incumbent on the part of the Tax Recovery Officer to have re-auctioned the property. The Recovery Officer ought not to have proceeded further in the matter and ought not to have accepted further amount from the auction purchaser. According to the respondents, such an objection was very much available to the petitioners on 18-1-1999 when W.P. No. 668 of 1999 was filed, but they failed to object to the auction proceedings on this ground. May be that in the said Writ Petition No. 668 of 1999, they had only questioned the legality and validity of the order passed in Appeal No. 302 of 1998 by the Debt Recovery Tribunal affirming the order of the Tax Recovery Officer, but the objection that because of non-compliance of the provisions of rule 57 the sale had become null and void and the Tax Recovery Officer ought not to have proceeded further rather ought to have resold the property was available to the petitioners. It was not taken up as a ground of attack in the said writ petition. During the pendency of the said writ petition all facts as regards deposits were disclosed by the Bank. Sale having been confirmed and sale certificate as required under rule 65 having been issued were also disclosed in the reply affidavit filed by the Bank. Despite that, the petitioners waited and did not challenge the sale on that ground. Writ Petition No. 668 of 1999 was dismissed on 27-12-1999, which order has become final. Therefore, the petitioners having failed to take a plea about the legality and validity of the sale on the ground of violation of provisions of rule 57 of Second Schedule to Income Tax Act, 1961, in the earlier Writ Petition No. 668 of 1999, which was very much available to them, in view of the principle of constructive res judicata they are now estopped from challenging the sale proceedings in subsequently instituted petition filed after the dismissal of the earlier writ petition.

17. Learned counsel for the petitioners in reply to the above objection vehemently submitted that the doctrine of constructive res judicata has no application herein and the petitioners are not debarred from filing the writ petition inasmuch as the writ petitioners earlier filed W.P. No. 668 of 1999 questioning the order of Respondent No. 1 in O.A. No. 302 of 1998 dated 31-7-1998 which arose out of petitioners application for deleting of property out of auction proceedings, therefore, it is a separate cause of action and separate issue and it has nothing to do with the present writ petition. Further in W.P. No. 668 of 1999 this court did not adjudicate anything about the issue involved in the present writ petition; as such, the writ petition is not barred on the ground of res judicata or constructive res judicata. The petitioners are now agitating on a different cause of action. On the date W.P. No. 668 of 1999 was filed, the petitioners had no knowledge that whether or not the auction purchasers had on the date of auction deposited 25% of the sale proceedings, which fact they came to know only during the pendency of W.P. No. 668 of 1999. As such, the doctrine of constructive res judicata would not debar the petitioners from questioning the legality and validity of the sale proceedings and, more over, the sale being a nullity due to non-compliance of the provisions of rule 57, it is always open for

any person affected, to set up the plea of nullity.

18. Learned counsel for the petitioner further urged that despite the fact that the auction proceedings became nullity and void due to operation of rule 57, thereafter also the auction purchasers did not pay the balance amount in time and therefore there was no jurisdiction vested with the Debt Recovery Officer in having proceeded to confirm the sale or issue sale certificate.

19. Learned counsel for the respondents submitted that as a matter of fact, the entire effort of the petitioners had been to stall the auction proceedings qua the property in question by any means. Their claim on the basis of agreement of sale stood negatived. Even their suit for specific performance stands dismissed. Judgment and decree of dismissal of the suit had become final. Any challenge now made to sale proceedings on behalf of the petitioners thus has to be negatived. There is also no equity in their favour since the entire sale proceeds stands deposited and possession of the property stands delivered to the auction purchaser who have become absolute owners by virtue of the sale certificate issued in their favour. The bank has also adjusted the sale proceeds towards satisfaction of the decretal amount. Only two of the petitioners had claimed that they are also the judgment debtors, being parties to the proceedings for recovery and that they were also the directors of the respondent-society. Even in that case, they ought to have resorted to the remedy available to them under rule 61. Having failed to resort to the said statutory remedy, it was submitted that the writ petition would not be maintainable. Sale could be set aside by the Recovery Officer only on the petitioners depositing the amount recoverable under the certificate and that the objections were filed within the stipulated period of thirty days. Only on satisfaction of the Recovery Officer that substantial injury had been occasioned that sale could be set aside.

20. From the submissions made at the bar, it would emerge that the petitioners are challenging the sale proceedings on the ground that auction proceedings became void due to operation of rule 57 when auction purchasers failed to deposit 25% of the amount of purchase money on the date of auction after the declaration of the successful bidder. In default of such deposit on the date of auction, Recovery Officer was bound to resale the property forthwith. Therefore, all further proceedings or further action in accepting money from the auction purchaser, confirming the sale, issuance of sale certificate and delivery of possession are also null and void.

21. The second point urged by the petitioners is that since the auction purchaser had failed to deposit the balance purchase money within a period of fifteen days, the proceedings are violative of rule 57(2) of the Second Schedule to Income Tax Act, 1961 and further that the amount had to be paid in cash and not by way of bank guarantee.

22. In order to appreciate the submissions made before us and before we take up the points for consideration, it will be necessary for us to examine the

procedure laid down in the Act for recovering the amount of debt due. Section 29 of the Act makes Second and Third Schedules to Income Tax Act, 1961 and the Income Tax (Certificate Proceedings) Rules, 1962 applicable to recover the amount of debt due under the Act. Income Tax (Certificate Proceedings) Rules, 1962 have been framed by the Central Board of revenue in exercise of the powers conferred by section 295(1) of the Income Tax Act, 1961 and Rules 91 and 92 of the Second Schedule to the Income Tax Act. These rules lay down the procedure to be followed on receipt of a certificate to recover the amount of tax due. Part III of the Rules deals with attachment and sale of property. Rule 22 has provided various forms to be used for carrying out the purpose of rules with such variations as circumstances may require. As per rule 16, for the purpose of ascertaining the matters to be specified in a proclamation of sale, the Recovery Officer is entitled to summon any person whom he thinks necessary to summon in respect of any matters relevant to the proclamation. There is a form prescribed for issuing proclamation of sale and issuing public notice for the sale. In exercise of these powers, auction notice was issued details of which we will consider subsequently.

23. It is not necessary to deal with the rules elaborately except making brief reference to Second Schedule to the Income Tax Act, which lays down procedure for recovery of tax. Rules 57 and 58 of the Rules have been heavily relied upon by the learned counsel for the petitioners to have the sale set aside for breach of the said rules. The language used in rules 57(1) and (2) is identically worded as that of rules 84 and 85 of order XXI of the CPC and similarly rule 58 is identically worded as that of rule 86 of order 21 of the Code of Civil Procedure. There is no manner of doubt that in case Rules 57 and 58 of the Second Schedule to Income Tax Act, 1961 have to apply as they are, the principles and decisions interpreting Rules 84,85 and 86 of Order XXI of the CPC would squarely apply. Rules 84, 85 and 86 of CPC were interpreted by Supreme Court in Manilal Mohanlal Shah and Others Vs. Sardar Sayed Ahmed Sayed Mahamad and Another, and it was held that the provisions of the rules requiring the deposit of 25% of the purchase money immediately, on the person being declared as a purchaser and the payment of the balance within fifteen days of the sale are mandatory and upon non-compliance with the said provisions, there is no sale at all. The rules do not contemplate that there can be any sale in favour of a purchaser without depositing 25% of the purchase money in the first instance and balance amount within fifteen days. It was further held that when there is no sale within the contemplation of the rules there can be no question of material irregularity in the conduct of the sale. Nonpayment of the price on the part of the defaulting purchaser renders the sale proceedings as a complete nullity. Supreme Court also held that the very fact that the court is bound to resale the property in the event of default in payment of 25% of the amount immediately on the person being declared as purchaser shows that the proceedings for sale are completely wiped out as they do not exist in the eye of law. This decision of the Supreme Court holds the field till date and has been followed in numerous judgments

subsequently including in Balram Vs. Ilam Singh and others, and Gangabai Gopaldas Mohata Vs. Fulchand and others, .

24. A Division Bench of Allahabad High Court in Pishori Lal Sethi and Another Vs. Tax Recovery Officer and Others, has also held that Rules 57,58 and 60 of the Second Schedule are mere reproduction of relevant rules in the CPC and since rule 86 of order 21 of CPC and rule 58 of Second Schedule to Income Tax Act are identically worded, the decisions rendered interpreting rule 86 of order 21 of the CPC would squarely apply.

25. In view of the aforementioned decisions, there will be no dispute that the proposition urged on behalf of the petitioners that in the absence of 25% of sale consideration having been paid on the date of the auction purchaser being declared as the highest purchaser, the sale became null and void and the Recovery Officer thereafter was bound to resell the property. Any proceedings conducted thereafter in accepting the amounts from the purchaser and confirming the sale and issuing sale certificates are non est and in such an eventuality there will be no need to have the sale set aside on the ground of material irregularity in the conduct of sale. But, position is not so simple as has been tried to be projected on behalf of the petitioners. Phraseology used in section 29 of the Act, which makes the Second Schedule to Income Tax Act applicable for recovery of debt due, has made all the difference.

26. Section 25 of the Act lays down the modes of recovery of debt from the defaulters. One of the modes provided is attachment and sale of immovable property of the judgment debtors. The Recovery Officer shall no other provision proceed to recover the sale proceeds on behalf of the certificate holder by either of the modes mentioned in section 25. There is no other provision in the Act laying down the method and manner of conduction sale of the property except section 29, which reads

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

Provided that any reference under the said provisions and the rules to tile assessee shall be construed as a reference to the defendant under this Act." (Emphasis herein italicised in print supplied)

27. Aforementioned provision in the Act makes the Second and Third Schedules to the Income Tax Act, 1961 and the Income Tax (Certificate Proceedings) Rules, 1962 as in force from time to time applicable to the extend possible with necessary modifications, as if the said provisions and the rules referred to the amount of debt due instead of amount of Income Tax. Section 29 of the Act thus authorises the Debt Recovery Officer to follow the Second and Third Schedules to

Income Tax Act, 1961 as far as Possible with necessary modifications. The phrase "as far as possible" can be interpreted in various ways. Keeping in view the intent and object of the Act, in our view, use of this phraseology "as far as possible" in section 29 does not impose an obligation on the Recovery officer to meticulously follow the provisions of Second and Third Schedules. Section 29 does provide liberty to Recovery Officer to follow the provisions of Second and Third Schedules with necessary modifications. It gives him enough discretion that he has to follow the provisions of Second and Third Schedules as far as possible and may make necessary modifications. The language employed is such that there is flexibility and not mandate to follow the rules as they are. The Rules no doubt have to be followed but as far as possible with necessary modifications. Section 29 clarifies that the said rules may be followed with necessary modifications and wherever it refers to recovery of tax, the same be read as amount of debt due. Therefore, the amount due under the Act has to be recovered by the Recovery Officer by sale of the property for which he would follow the provisions of Second and Third Schedules to the Income Tax Act, 1961 as far as possible with necessary modifications wherever necessary. It nowhere enjoins upon the Recovery Officer to follow the provisions of Second and Third Schedules as they stand but as far as possible.

28. In exercise of his powers, the Debt Recovery Officer issued auction notice which notified that the sale will take place in accordance with the Second Schedule to the Income Tax Act, 1961; further notifying that the successful bidder has to deposit 25% of the bid amount within seven days and the balance on or before 16-1-1999. Thus, by the auction notice the Recovery Officer informed the general public that auction of the immovable property will be conducted under the Act to recover the debt due and the sale will be in accordance with the Rules. Thus, the Debt Recovery Officer while issuing auction notice deviated from what is provided in rule 57 which says that deposit of 25% of the amount shall be made by the purchaser immediately after declaration of the successful bidder, by incorporating in the auction notice that deposit of 25% of bid money shall be paid within seven days. Can it be said that the Recovery Officer was not justified in making this deviation/modification requiring the successful bidder to deposit 25% of the bid amount within seven days instead of the same day. Had the words as far as possible not been incorporated in section 29, there was no option with the Recovery Officer except to notify that time Schedule referred to in Rules 57 and 58 of the Rules will be followed. But incorporation of the said words in section 29 has made all the difference. This phrase has been made and understood by the Recovery Officer that the sale proceedings will be conducted as per the procedure for recovery of tax contained in the Second Schedule to Income Tax Act but the Debt Recovery Officer will follow the rules contained in the Second Schedule as far as possible and with necessary modification to the extent necessary.

29. In the instant case, the Debt Recovery Officer, having regard to the discretion conferred on him by section 29 of the Act, instead of providing that 25% of the

amount will be deposited immediately on declaration of the successful bidder as is provided in rule 57(1), fixed a period of seven days from the date of auction to deposit 25% of the bid amount. In view of the phraseology employed in section 29 of the Act, the discretion exercised by the Debt Recovery Officer while following the rule 57, in our considered view, would not vitiate the auction proceedings. This modification thus cannot make the sale as illegal and without authority of law. In case this interpretation as opined by us is given to the Rules that section 29 of the Act makes rule 57 as directory only, the argument of the learned counsel for the petitioners that auction proceedings became null and void would fail and for the same reason the ratio of the decisions relied upon will not apply to the facts of the case.

30. The entire emphasis of the learned counsel for the petitioners was that rule 57 is mandatory which is also the interpretation given to this rule by Supreme Court. But as already observed by us this rule has to be read only with section 29 of the Act, which makes this rule applicable as far as possible and with necessary modifications. Supreme Court interpreted the corresponding provisions of the Code of Civil Procedure, which are similarly worded, but had no occasion to deal with the phraseology as is used in section 29 of the Act. We are, therefore, of the view that section 29 of the Act does not enjoin upon the Recovery Officer, DRT to follow the provisions for recovery of Tax Rules provided in Second Schedule to Income Tax Act, 1961 in letter and spirit but gives him discretion to follow the same as far as possible. Having notified to the public that 25% of the bid amount had to be deposited in seven days and the auction purchaser having deposited Rs. 1,39,00,000 (25% of the bid amount) within the stipulated period, there is no force in the submission made by the learned counsel for the petitioners.

31. Since the Legislature has made it explicitly clear in section 29 that the Rules regarding recovery of tax would be applicable as far as possible with necessary modifications and discretion vests in the Recovery Officer, the fact that 25% of the bid amount was not paid by the auction purchaser immediately but was paid subsequently as per the auction notice, will not affect the legality and validity of the sale and acceptance of the amount thereafter also would not vitiate the auction proceedings. The Respondents case is that there was no delay in making payment. Balance amount of Rs. 4,02,00,000 comprising Rs. 1,02,00,000 by way of Demand Draft and Rs. 3,00,00,000 by way of Demand Draft was paid by 23-2-1999. In view of the interim order of status quo obtained by the petitioner on 24-2-1999, the Recovery Officer was disabled to encash the bank Guarantee. Consequent on the dismissal of the said writ petition on 27-12-1999 and in pursuance of the interim directions granted by the court in the present Writ Petition on 29-12-1999, the bank guarantee was encashed. In this view of the matter, it is not open for the petitioner to challenge the proceedings on the ground of there being irregularity in conduct of sale. In any case, such objection was available to the petitioners, which could have been raised by them when W.P. No. 668 of 1999 was filed after the sale had been conducted. The petitioners

knew about the auction proceedings and terms and conditions contained therein. It was not a separate cause of action but only a ground of attack, which was available to the petitioners to save the property from being sold in auction. Having failed to raise this plea in Writ Petition No. 668 of 1999, they are precluded from challenging the sale proceedings due to operation of the principles of constructive res judicata.

32. We have noticed earlier that the petitioners are not questioning the auction proceedings as agreement holders. Petitioner Nos. 3 and 7 being the judgment debtors claim that they are aggrieved by the auction proceedings, therefore, they are entitled to challenge the same. The only right available to them under the statute was to invoke provisions of rule 61 to have the sale set aside on the ground of material irregularity. Such a right could have been invoked within thirty days from the date of sale. The petitioners knew about the date of sale even on the day they filed Writ Petition No. 668 of 1999, which was filed after the date of sale on 18-1-1999. Therefore, it will not be permissible for us to exercise the extraordinary jurisdiction in favour of the petitioners who failed to avail of the statutory remedy in time. Valuable rights have accrued both in favour of the bank and Auction Purchasers. Not only the petitioners would have to deposit the entire amount due, but sale could not be set aside even if the court would come to the conclusion that there is some material irregularity in conduct of sale and the court is satisfied that the petitioners had sustained substantial injury. In the instant case, there is no question of the petitioners sustaining any substantial injury because of the alleged material irregularities. The petitioners were trying to lay their claim to the property on the ground that they had right to purchase the property on the basis of an agreement to sell for a total consideration of Rs. 90 lakhs, which claim is no more available to them since their suit for specific performance of agreement to sell has been dismissed. It is not their case that the property would have fetched more than the amount for which it was sold in the auction. Property was sold for a consideration of Rs. 5.41 crores. In other words, the property was sold six times the amount for which the petitioners were trying to get the property. Entire amount stands paid by the auction purchasers and has been adjusted by the Bank. The bank is not aggrieved. Even the society is not aggrieved; rather the society has been benefited. Had the claim of petitioners been allowed, the society would have been deprived of the property only for a meagre sum of Rs. 90 lakhs whereas by sale of the property in favour of the auction purchasers the society has been able to get relief to the extent of Rs. 5.41 crores.

33. Considering the case set up by the petitioners, we are of the view that the very act of filing Writ Petition was nothing but a mala fide act to stall the sale proceedings. Having failed to avail the statutory remedy available to them within the period of limitation, they cannot be permitted to agitate the matter again and again. Since we have come to the conclusion that sale was conducted in accordance with the provisions of law, there is no ground on which we would invoke our jurisdiction under article 226 of the Constitution of India. The Writ

Petition is, therefore devoid of any merit and is accordingly dismissed, leaving the parties to bear their respective costs.