IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.R.RAMACHANDRA MENON

THURSDAY, THE 9TH DAY OF APRIL 2015/19TH CHAITHRA, 1937

WP(C).No. 1070 of 2006 (B)

PETITIONER:

NIMMY JOHN, AGED 51 YEARS,
W/O.SRI.LATE JOHN CHAKOLA, RESIDING AT
CHAKOLA'S COLONY, PERUMANNUR,
KANAYANNUR TALUK, ERNAKULAM.

BY ADVS.SRI.PAUL ABRAHAM VAKKANAL
SRI.SIVASANKAR PANICKER

RESPONDENT(S):
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1. **CATHOLIC SYRIAN BANK,**
   MARKET ROAD BRANCH, ERNAKULAM,
   REPRESENTED BY ITS BRANCH MANAGER.

2. **RECOVERY OFFICER, DEBT RECOVERY TRIBUNAL**
   (KERALA), HOUSING BOARD BUILDINGS,
   PANAMPALLY NAGAR, KOCHI-36.

3. **SUDHAKARA K.PRABHU, SWARAJ, 48/2368 J,**
   SWARAJPADI ROAD, SANTHI NAGAR, ELAMAKKARA.

4. **SABITA S.PRABHU, 48/2368 J,**
   SWARAJPADI ROAD, SANTHI NAGAR, ELAMAKKARA.

5. **A.F.VARGHESE, COTTAGE NO.6,**
   CHOICE PARK, ELAMAKKARA.

6. **USHA VARGHESE, COTTAGE NO.6,**
   CHOICE PARK, ELAMAKKARA.

7. **DEBT RECOVERY TRIBUNAL KERALA,**
   HOUSING BOARD BUILDING, PANAMPALLY NAGAR,
   KOCHI-36.

8. **THE DEBT RECOVERY APPELLATE TRIBUNAL,**
   4TH FLOOR, INDIAN BANK CIRCLE OFFICE,
   55 ETHIRAJ SALAI, CHENNAI-600 008.

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WP(C).No. 1070 of 2006 (B)

ADDL. R9 & R10 IMPLEADED

R9. ANNAH CHAK' VENOT,
D/O.SRI.LATE JOHN J.CHAKOLA,
AGED 28 YEARS, RESIDING AT 6011,
GASTON AVENEUE, APT.115, DALLAS,
TEXAS - 75214, US.A., REPRESENTED BY
POWER OF ATTORNEY HOLDER
SRI.GEORGE KOLLANNOOR, THRISSUR.

R10.JOSEPH JOHN CHAKOLA(JR) ALIAS OUSEPH,
S/O.SRI.LATE JOHN CHAKOLA, RESIDING AT
CHAKOLA'S COLONY, PERUMANNUR,
KANAYANNUR TALUK, ERNAKULAM.

ADDL.R9 & R10 IMPLEADED AS PER ORDER
DATED 16.8.2007 IN IA.10986/2007.

R1 BY SRI.M.PATHROSE MATTHAI (SENIOR ADVOCATE)
ADV. SRI.RONY J.PALLATH
R3 & R4 BY SRI.R.D.SHENOY (SENIOR ADVOCATE)
ADVS. SRI.S.VINOD BHAT
SRI.LEGITH T.KOTTAKKAL
R5 & R6 BY ADVS. SRI.GEORGE KARITHANAM VARGHESE
SRI.C.I.ABRAHAM
SRI.JOSE KURIAKOSE (VILANGATTIL)
SRI.V.J.JOHN
ADDL. R9 & R10 BY SMT.I.SHEELA DEVI

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 24-02-2015, THE COURT ON 09-04-2015 DELIVERED THE FOLLOWING:

mbr/

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APPENDIX

PETITIONER'S EXHIBITS:

EXHIBIT P1 : TRUE COPY OF THE ORDER DATED 22.2.1999 ISSUED BY THE DEBTS RECOVERY TRIBUNAL, CHENNAI.

EXHIBIT P2 : TRUE COPY OF THE DEMAND NOTICE DATED 24.9.99 ISSUED BY THE RECOVERY OFFICER, DEBT RECOVER TRIBUNAL CHENNAI.

EXHIBIT P3 : TRUE COPY OF THE MODIFIED DEMAND NOTICE DATED 7.11.2001 ISSUED BY THE 2ND RESPONDENT.

EXHIBIT P4 : TRUE COPY OF THE STATEMENT OF REMITTANCES DATED NIL ISSUED BY THE CERTIFICATE HOLDER BANK.

EXHIBIT P5 : TRUE COPY OF THE REPRESENTATION DATED 22.4.2002 BY THE PETITIONER TO THE CHAIRMAN OF 1ST RESPONDENT.

EXHIBIT P6 : TRUE COPY OF THE NOTICE DATED 8.3.2002 BY THE RECOVERY OFFICER.

EXT.P6(A) : TRUE COPY OF THE NOTICE DATED 23.4.2002 BY THE RECOVERY OFFICER.

EXHIBIT P7 : TRUE COPY OF THE ORDER DATED 10.4.02 PASSED BY THE DEBT RECOVERY TRIBUNAL IN I.A.NO.447 OF 2002.

EXHIBIT P8 : TRUE COPY OF THE PROCLAMATION OF SALE DATED 18.7.02 PUBLISHED BY THE 2ND RESPONDENT.

EXHIBIT P9 : TRUE COPY OF THE APPLICATION DATED 14.11.02 FILED BY THE PETITIONER TO SET ASIDE THE SALE.

EXHIBIT P10 : TRUE COPY OF THE ORDER DATED 15.11.02 IN CMP.NO.57465/02 BY THIS HON'BLE COURT.

EXHIBIT P11 : TRUE COPY OF THE VALUATION REPORT DATED 23.7.04 PREPARED BY THE LICENSED VALUER.

EXHIBIT P12 : TRUE COPY OF THE AFFIDAVIT SWORN TO BY SRI.MATHEW L.CHACOLA EXPRESSING HIS WILLINGNESS TO PURCHASE THE PROPERTY @ 8 LAKHS/CENT.

EXHIBIT P13 : TRUE COPY OF THE AFFIDAVIT SWORN TO BY SRI.K.ANIL KUMAR EXPRESSING HIS WILLINGNESS TO PURCHASE THE PROPERTY @ 7 LAKHS/CENT.

EXHIBIT P14 : TRUE COPY OF THE DATA PREPARED BY THE AUDIT BUREAU OF CIRCULATIONS SHOWING THE AVERAGE NET PAID CIRCULATION OF THE VARIOUS DAILIES.

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EXHIBIT P15 : TRUE COPY OF THE JUDGMENT DATED 28.3.2003 IN O.P.NO.33965 OF 2002 BY THIS HON'BLE COURT.

EXHIBIT P16 : TRUE COPY OF THE COMMON JUDGMENT DATED 16.3.05 IN W.A.NO.1154 AND 1093 OF 2003 BY THIS HON'BLE COURT.

EXHIBIT P17 : TRUE COPY OF THE COMMON ORDER DATED 18.5.05 PASSED BY THE 2ND RESPONDENT ON I.A.NO.48 OF 2002 AND I.A.NO.881 OF 2005.

EXHIBIT P18 : TRUE COPY OF THE MEMORANDUM OF APPEAL NO.7 OF 2005 FILED BY THE PETITIONER BEFORE THE DEBT RECOVERY TRIBUNAL.

EXHIBIT P19 : TRUE COPY OF THE ORDER DATED 29.8.05 IN APPEAL NO.7 OF 05 ON THE FILES OF THE DEBT RECOVERY TRIBU' (KERALA).

EXHIBIT P20 : TRUE COPY OF THE MEMORANDUM OF APPEAL IN M.A.173/0 FILED BY THE PETITIONER BEFORE DEBTS RECOVERY APPELLATE TRIBUNAL, CHENNAI.

EXHIBIT P21 : TRUE COPY OF THE ORDER DATED 30.12.05 PASSED BY THE DEBT RECOVERY APPELLATE TRIBUNAL CHENNAI.

EXHIBIT P22 : TRUE COPY OF THE RECEIPT GIVEN BY THE SENIOR MANAGER, CATHOLIC SYRIAN BANK, M.G.ROAD,, ERNAKULAM.

EXHIBIT P23 : TRUE COPY OF THE AFFIDAVIT SWORN TO BY MR.MATHEW CHAKOLA.

RESPONDENT'S EXHIBITS:

EXT.R1(A) : TRUE COPY OF LETTER DATED 25.2.2010 SENT BY SMT.ANNAMMA CHAKOLA AND SRI.MATHEW L CHAKOLA TO THE 1ST RESPONDENT.

EXT.R1(B) : TRUE COPY OF LETTER DATED 2.6.2009 FROM THE PETITIONER TO THE 1ST RESPONDENT.

EXT.R3(1) : TRUE PHOTOSTAT COPY OF THE COUNTER AFFIDAVIT DATED 9.12.2002 TOGETHER WITH EXHIBITS FILED BY THE RECOVERY OFFICER, DEBTS RECOVERY TRIBUNAL IN O.P.NO.33965/2002.

EXT.R3(1A) : TRUE PHOTOSTAT COPY OF THE COUNTER AFFIDAVIT DATED 20.1.2003 TOGETHER WITH EXHIBITS FILED BY THE RECOVERY OFFICER, DEBTS RECOVERY TRIBUNAL TO THE AMENDED ORIGINAL PETITION.

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EXT.R3(2) : TRUE PHOTO COPY OF THE ORDER OF CONFIRMATION OF SALE DATED 28.10.2002 BY THE RECOVERY OFFICER, DEBTS RECOVERY TRIBUNAL, ERNAKULAM.

EXT.R3(3) : TRUE PHOTOSTAT COPY OF THE CERTIFICATE OF SALE DATED 28.10.2002.

EXT.R3(4) : TRUE PHOTO COPY OF THE ORDER OF DELIVERY DATED 5.11.2002.

EXT.R3(5) : TRUE PHOTOSTAT COPY OF ENCUMBRANCE CERTIFICATE NO.9880/2002 DATED 26.11.2002 OF THE SUB REGISTRY OFFICE, ERNAKULAM.

EXT.R3(6) : TRUE PHOTOSTAT COPY OF BASIC TAX RECEIPT NO.4746907 DATED 21.5.2005.

EXT.R3(7) : TRUE PHOTO COPY OF THE POLICE COMPLAINT DATED 30.11.2002 FILED BY THE 4TH RESPONDENT.

EXT.R3(8) : TRUE COPY OF THE LETTER DATED 12.12.2002 ISSUED BY LORD KRISHNA BANK LTD., M.G.ROAD, ERNAKULAM.

/TRUE COPY/

P.S. TO JUDGE

mbr/

P.R. RAMACHANDRA MENON, J.

W.P.(C) No.1070 of 2006

Dated this the 9th day of April, 2015

JUDGMENT

Rejection of the application preferred by the petitioner for setting aside the sale (mainly because of the irregularities and for want of notice) and the petition to set aside the same by accepting the amount payable to the respondent Bank, as ordered by the Recovery Officer, which stands confirmed as per the verdict passed by the DRT, Ernakulam and affirmed by the Debt Recovery Appellate Tribunal, Chennai, is the subject matter of challenge in this writ petition. The main contention is that, rejection of the petition on the ground of delay in filing the same and the process of merit rating are not in conformity with the mandate/purpose of remand ordered by this Court as per Ext.P15 and Ext.P16 verdicts (passed by the Single Bench and the Division Bench respectively).

2. The sequence of events is as follows: The financial

assistance availed from the 1st respondent Bank was not cleared by the borrower, which led to filing of O.S. No.449 of 1997 before the Sub Court, Ernakulam. The petitioner herein is the widow of the 4th defendant in the suit, and the additional respondents 9 and 10 are their children. The suit was decreed on 27.09.1989 for a sum of Rs.16.17 lakhs + interest and cost, with charge on the plaint A to C schedule immovable properties and also the D and E schedule movable properties. An Execution Petition was filed before the Sub Court, Ernakulam and proclamation of sale of 5 items of properties charged in the decree was settled by the Sub Court as per order dated 16.01.1992, notifying the sale to be held on 22.04.1992. On challenging the said proceeding by the judgment debtors, by way of CRP 7899/1992, this Court set aside the order and remanded the matter for considering the objections raised by the judgment debtors.

3. Pursuant to the above verdict, the Sub Court settled the proclamation for sale of 1 item of the schedule properties on 02.11.1993 and the sale was ordered to be held accordingly. In the meanwhile, Debt Recovery Tribunal came into existence and hence the Execution Petition was transferred to the DRT,

Chennai, where it was numbered as T.A.1295/1997. While so, the 4th defendant/judgment debtor took his last breath, pursuant to which, the petitioner and her children came to be impleaded as addl. judgment debtors 8 to 10 in T.A.1295/1997.

4. The DRT, Chennai passed Ext.P1 order dated 22.02.1999 directing issuance of a Recovery Certificate for recovery of a sum of Rs.27,35,787.04 with interest @16.5% per annum from 17.12.1990, ie. the date of E.P., till realisation and cost. Liability of the petitioner and her children was to meet the same, to the extent they had inerted assets from the deceased 4th judgment debtor. Pursuant to the said order, Debt Recovery Certificate was given, based on which, Ext.P2 demand notice issued on 24.09.1999. Subsequently, by the formation of the DRT in Kerala, T.A.1295/1997 pending before the DRT, Chennai came to be transferred to the DRT, Ernakulam. On pointing out some mistakes in the Recovery Certificate and Ext.P2 demand notice (where the demand was for an extent of Rs.60,63,740.42), the errors were corrected and Ext.P3 modified notice dated 07.11.2001 was issued by the Recovery Officer demanding a sum of Rs.45,76,398.30. Ext.P6/P6(a) notices dated 08.03.2002 and

23.04.2002 were issued by the 2nd respondent for settling the sale proclamation. The petitioner filed two applications before the DRT; one for the benefit of interest, based on the decision of the Apex Court in **AIR 2001 SC 3095** and the other one for stay of the notice for settling the sale proclamation. Since these applications were not considered, the petitioner was constrained to approach this Court by filing O.P. No.7779 of 2002, which was disposed of, directing the 7th respondent Tribunal to consider the same. Even though, the Tribunal directed the 1st respondent vide Ext.P7 order dated 10.04.2002 in I.A. No.447 of 2002 to give credit to the vouched payments, it was not given effect to. While so, the 1st respondent Bank filed I.A. No.39 of 2002 in DRC 123 in T.A.181 of 1998, which was in relation to another Recovery Certificate issued in favour of the Bank, against the establishment by name 'Smitha Exclusive Saree Shop', in which the petitioner was a partner, seeking to adjust the excess amount realised by the Recovery Officer in the auction sale of the petitioner's property in DRC 594 in T.A.1295/1997. It is stated that, only on serving a copy of the said I.A. on 02.11.2002, that the petitioner came to know that her property had already been sold by the concerned respondent in the auction held on 27.09.2002, allegedly without proper proclamation or publication. The petitioner collected a copy of the sale proclamation (produced as Ext.P8), wherein the sale was scheduled to be held on 29.08.2002. The material particulars regarding the property having an extent of 43.808 cents, as to the location near the Revenue Towers, Boat Jetty, Ernakulam, with direct access to the Cannon Shed Road situated on the south were not given in the said proclamation and the 'reserve price' was shown as just Rs.76.70 lakhs. In fact, the sale did not take place on 29.08.2002 as there were no bidders, allegedly for want of sufficient publicity, as the publication was effected in English, in the Kottayam Edition of 'Mangalam Daily', irrespective of the fact that the property is situated in Ernakulam. The sale was adjourned to different dates and on all the four occasions, there were no bidders. The adjournments were without proper notice and finally on the 5th occasion, ie. on 27.9.2002, the respondents 3 to 6 appeared (who, allegedly were doing some real estate business in their individual names) and the property was sold to them for just Rs.10,000/- (Rupees Ten thousand only) above the 'reserve price', ie. for a total sum of Rs.76.80 lakhs.

5. Immediately on coming to know about the proceedings as above, the petitioner filed I.A. No.48 of 2002 on 14.11.2002 before the concerned respondent to set aside the sale, because of serious irregularities in the sale, alleging that the property was having a value of nearly 3 Crores, but sold for a paltry amount of Rs.76.80 lakhs. Various other aspects were also pointed out, including that the total liability was around Rs.45 lakhs, whereas the sale of just a portion of the property would have met the requirement. The said petition was filed under Rule 61 of the 2^{nd} schedule to the Income Tax Act and then, the petitioner approached this Court by filing O.P. No.33965 of 2002, seeking to intercept the coercive proceedings. As per Ext.P10 interim order dated 15.11.2002 in CMP No.57465 of 2002 filed in the said Original Petition, this Court stayed all further proceedings to confirm the sale, subject to satisfaction of a sum of Rupees 'Five lakhs' within three months, which is stated as satisfied. A copy of the said order was served by registered post, despite which, registration of the conveyance was effected in favour of the respondents 3 to 6, but the possession is stated as still with the

petitioner.

6. During the pendency of the proceedings before this Court, the relevant files were called for and examined (in the earlier round of litigation). After hearing both the sides and also after perusing the file, it was specifically observed by a learned Judge of this Court, that there were several irregularities in the sale conduced by the concerned respondent and that no evidence was discernible to have effected publication of the notice of adjournment of sale, at least in the notice board of the Tribunal. Though the course and proceedings were deprecated, it was observed by this Court that, in view of the availability of alternative remedy to the petitioner, the matter was to be considered by the 1st respondent and passed a speaking order, in the light of the above observations as contained in Ext.P15 judgment dated 28.03.2003. Being aggrieved of the said verdict, both the Bank and the successful bidders took up the matter in appeal and after hearing both the appeals, a Division Bench of this Court, as per Ext.P16 judgment dated 16.03.2005, held that since the learned Single Judge had relegated the petitioner to avail the statutory remedy, it was for the 1st respondent, to have

taken an independent decision untrammeled by the observations and findings recorded in the judgment, simultaneously ordering 'status quo' to be continued till such time.

7. After passing the said verdict, the petitioner filed I.A. No.881 of 2005 to accept a sum of Rs.34,87,306.40 in compliance with the requirement of the relevant rules and to have the sale set aside accordingly. The said I.A. along with I.A. No.48 of 2002 already filed by the petitioner (but kept pending in view of pendency of the proceedings before this Court) were considered by the 2nd respondent, who passed a common order vide Ext.P17. As observed in 'paragraph 6' of the said order, the respondents in the I.A. raised preliminary objection as to the maintainability of the concerned I.A. under Rule 61 of the relevant Rules, w.r.t. the bar of limitation, for not having preferred within 30 days. Based on the said contention, it was held by the 2nd respondent that the IAs were barred by limitation and hence not maintainable, for not having preferred within 30 days from the date of sale and also for not having effected deposit of the entire amount covered by the Recovery Certificate.

8. The petitioner had a contention that, in terms of Section

17 of the Limitation Act, the petition was admissible/ maintainable and that the limitation would start running only from the date of knowledge of sale, which in the instant case was only on filing of IA No.39 of 2002 by the Bank in DRC 123 in TA 181 of 1998 on 02.11.2002 (vide Ext.P8), in connection with another transaction. In order to repel the said contention and also the contention of the petitioner that, no attachment of the property was effected in terms of Rule 52 of the Income Tax (Certificate Proceedings) Rules 1962, the second respondent observed (with reference to Section 29 of **RDDB Act),** that the provisions of the 2nd and 3rd Schedules to the Income Tax Act and Income Tax (Certificate Proceedings) Rules 1962 would not apply as such, to the proceedings under the Recovery of Debts due to Banks and Financial Institutions Act and that the said Rules would apply only **'as far as possible'** with necessary modifications. The second respondent also observed that the provisions of the 2nd schedule, in relation to the recovery proceedings under the RDDB Act, were only 'directory' and not mandatory. But, departing from the said logic, to deny the benefit of Rule 61 of the very same Rules to the petitioner, both on the ground of limitation and

also as to the question of deposit for entertaining the application under Rule 61, the 1st respondent has held in paragraph 7 and elsewhere, that the application was barred by limitation as per the mandate of the Rule; thus displaying an instance of double standards.

9. Challenging Ext.P17 order, the petitioner approached the 7th respondent DRT, Ernakulam by way of Ext.P18 appeal, wherein interference was declined and the appeal was dismissed as per Ext.P19 order. Though the petitioner took up the matter further, by approaching the 8th respondent/Appellate Tribunal as per Ext.P20 appeal, the same also did not turn to be fruitful and the appeal was dismissed as per Ext.P21 order. This made the petitioner to approach this Court by filing the present writ petition, challenging Exts.P17, P19 and P21.

10. The writ petition was admitted on 16.01.2006, also granting an interim order staying all further proceedings for dispossession of the petitioner from the property.

11. A Counter Affidavit has been filed by the 3rd respondent, also on behalf of the respondents 4,5 and 6. It is stated that, they bid the property on 27.09.2002 for a sum of Rs.76,80,000/-

and remitted an amount of Rs.19,96,810/- including EMD, being 25% of the bid amount, plus poundage charges, subsequently satisfying the balance 75% (Rs.57,60,000/-) on 11.10.2002. On satisfaction of the full amount, the sale was confirmed on 28.10.2002 as per Ext.R3(2), ie. after expiry of 30 days from the date of sale, as there was no application to set aside the sale within the said time. A Sale Certificate was issued vide Ext.R3(3) on filing application under Rule 39(1) of the Income Tax (Certificate Proceedings) Rules 1962 for delivery of the property, which was ordered on 05.11.2002, vide Ext.R3(4). The Sale Certificates were forwarded to the Sub Registry, Ernakulam on 28.10.2002 and thereafter, mutation was effected in the revenue records, in terms of the Transfer of Registry Rules and tax was remitted as per the relevant provisions of the Kerala Land Tax Act, as borne by Ext.R3(6) tax receipt dated 21.05.2005. It is contended by the said respondents that, they were put in possession of the property on 05.11.2002 and thereafter, some materials stored in the property were set to fire by the petitioner and some others, leading to the complaint dated 30.11.2002 preferred before the Police vide Ext.R3(7). The other averments and allegations raised by the petitioner in the writ petition are also sought to be rebutted in the Counter Affidavit. It is however conceded in paragraph 16, that the said respondents on getting information about sale of the property from the advertisement published in 'Mangalam Daily', enquired with the respondent Bank and also in the office of the DRT and thereafter they visited the property, when they found that it could be used for constructing residential flats. But, <u>due to insufficiency of funds, they could not take part in the auction scheduled on 29.08.2002</u>. It is also stated that, when the 3rd respondent visited the 1st respondent Bank later, it was noticed from the notice published in <u>the Bank's notice board,</u> that the sale of the concerned property was adjourned to 27.09.2002 and it was thereafter, that they approached the Lord Krishna Bank, M.G. Road, Ernakulam for availing Rs.49,50,000/- as loan, which was sanctioned as discernible from Ext.R3(8) letter dated 12.12.2002 issued by the said Bank, arranging funds for the purchase.

12. A Reply Affidavit has been filed from the part of the petitioner, asserting that, physical possession of the property still remains with the petitioner and denying the averments/

allegations levelled against the petitioner as contained in the Counter Affidavit filed by the respondents 3 to 6. It is also pointed out that, the sale originally notified on 29.08.2002 by way of public auction **was postponed to 04.09.2002, 11.09.2002 and 17.09.2002 and on all these occasions, there were no bidders** and it was thereafter that, the same was held on 27.09.2002. It is stated that no intimation whatsoever was sent to the petitioner as to the sale at any point of time, which has caused substantial prejudice to the petitioner and heavy monetory loss, adding that it was a collusive affair. It is also stated in paragraph 11 of the Reply Affidavit that, as per Clause 6 of the conditions of sale, the intending bidder was to pay 10% of the upset price by way of Demand Draft in favour of the Recovery Officer before 11 am on the date of auction, which condition was not satisfied by the respondents 3 to 6 and this aspect has been simply brushed aside by the 2nd respondent as well as the respondents 7 and 8. It is stated that, as per Clause 7 of the sale conditions, the successful bidder was to deposit 25% of the bid amount including EMD already paid and all the poundage fee, immediately after the closure and the balance within 15 days thereafter. **It was a case of 'single bid' without proper publication**, finalised in favour of the respondents 3 to 6 extending undue favours to them at the cost of the petitioner. Payment of certain amounts effected by the petitioner and the deposit made in the first respondent Bank with a lien against final settlement in the present writ petition, is sought to be asserted by filing an affidavit dated 16.12.2014, also producing a certificate issued by the Bankers in this regard.

13. A Counter Affidavit dated 02.01.2015 has been filed by the first respondent, followed by an additional Counter Affidavit dated 02.02.2015 pointing out that the very same property was offered as security in respect of the loan extended to 'M/s.Smithas Silk House' and that the said property was attached in DRC 123 for realisation of the defaulted and decreed amount of Rs.22,346.53 with interest and costs. It is stated that one of the certificate debtors by name Annamma Chakola, vide Annexure R1(b) letter dated 02.06.2009, had requested the Bank for adjustment of the surplus amount of Rs.11,34,640/- generated from the sale of the assets in DRC 594, against the liability of 'M/s.Smitha's Exclusive Saree Shop' as well and agreed

to keep Rupees Fifteen lakhs as Fixed Deposit with the Bank. This being the position, the version of the petitioner that there was a 'wrongful clubbing' of two accounts is no more liable to be entertained. It is stated during the course of hearing, that the liability of 'M/s.Smitha's Exclusive Saree Shop' in TA No.181/1998 stands settled by availing the benefit of 'one-time settlement'.

14. The petitioner has filed Reply Affidavit in response to the Counter Affidavit filed by the 1st respondent, also producing a copy of the affidavit dated 13.01.2015 of one Mathew Chakola as Ext.P23, so as to meet the contentions raised by the first respondent in their Counter Affidavit dated 02.01.2015.

15. Mr. Raman, the learned Senior Counsel addressed the Court on behalf of the petitioner initially, and it was followed on the subsequent dates of hearing by Mr. Sivasanker. This Court heard Mr. Pathrose Mathai, the learned Senior Counsel appearing for the first respondent, Mr. R.D. Shenoy, the learned Senior Counsel appearing for the respondents 3 and 4 and Mr. George Varghese Karithanam on behalf of the respondents 5 and 6 in detail.

16. The basic question to be considered is, whether rejection of the applications filed by the petitioner before the 2nd respondent for setting aside the sale with reference to **Rule 61 of the Second Schedule to the Income Tax Act** (for want of notice and in view of the procedural irregularities resulting in substantial prejudice) and the petition filed to accept the amount sought to be deposited by the petitioner towards the amount covered by Recovery Certificate and to set aside the sale, relying on the ground of limitation, having not filed the same within 30 days from the date of and for not having effected the deposit on time, is liable to be sustained.

17. In the earlier round of litigations, the petitioner had approached this Court by filing WP(C) No.33965 of 2002, which culminated in Ext.P15 judgment, whereby the petitioner was relegated to pursue the alternative remedy. The specific case projected by the petitioner was that, no notice of sale was given to the petitioner at any point of time, particularly as to the adjournments on four occasions for want of bidders, which was not satisfactorily explained/answered by any of the respondents. The irregularities in the sale were specifically noted by a learned

Judge of this Court and the files were called for. On perusal of the files, a finding was rendered that, there were irregularities in the sale proceedings and it was after making such observations, that the 2nd respondent was directed to consider the matter and pass final orders in the light of the above observations, relegating the petitioner to pursue the matter by way of the alternative remedy contemplated under the Rules.

18. It is true that, a Division Bench of this Court, as per Ext.P16 judgment, gave a free hand to the 2nd respondent to consider the matter and to take an 'independent decision' untrammeled by the observations/directions of the Single Judge in Ext.P15 judgment. It obviously points out the necessity to have the matter considered on merits. Had it been the other way round, the matter could have been simply dismissed by the learned Single Judge or even by the Division Bench, holding that the petition filed by the petitioner was belated or that necessary deposit was not made so as to maintain/sustain the petition under Rule 61 of the relevant Rules. This is more so since, the petitioner has got a contention that there is a vital distinction with regard to the time and deposit under Rule 61(b), that as it

is not a 'pre-condition' for filing the petition, in view of the specific wording under the Rule. The Rule does not say in so many words that, no application can be filed, unless the deposit is made. The Rule also does not say that the application cannot be entertained, unless deposit is made. The Rule only says such application <u>shall be disallowed</u>, if no deposit is made. This means, the particular instance under Rule 61(b) is of much importance. The two grounds for sustaining an application under Rule 61(b) are want of notice of sale or irregularity in conducting the sale/ proclamation to be established by raising necessary pleadings in the petition and by adducing evidence. The question of <u>'allowing</u>' such application comes, only if the pleadings are substantiated by adducing evidence and this stage will come only much later. Only when the duty cast upon the petitioner to establish the above vital fact is satisfied, will it proceed to the next stage so as to have the application allowed. So, all stages till allowing the application, can very well be proceeded and if only there is a failure on the part of the petitioner to meet the deposit, shall the application be disallowed. In other words, there has to be a failure on the part of the petitioner, in effecting the deposit, to have had his application allowed. There is black and white difference between the said Rule (R.61) and the situation envisaged under Rule 60, wherein the sale has to be set aside on effecting the deposit of the amount covered by the Recovery Certificate, as specified.

19. Rules 60 and 61 of the Second Schedule to the Income Tax Act are extracted below:

> "***60. Application to set aside sale of immovable property on deposit***-*(1) Where immovable property has been sold in execution of a certificate, the defaulter, or any person whose interests are affected by the sale, may, at any time within thirty days from the date of the sale, apply to the Tax Recovery Officer to set aside the sale, on his depositing-*
>
> *(a) the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered with interest thereon at the rate of [one and on-fourth per cent for every month or part of a month], calculated from the date of the proclamation of sale to the date when the deposit is made; and*
>
> *(b) for payment to the purchaser, as penalty, a sum equal to five per cent of the purchase money, but not less than one rupee.*
>
> *(2) Where a person makes an application under rule 61 for setting aside the sale of his immovable property, he shall not, unless he withdraws that application, be entitled to make or prosecute an application under this rule.*
>
> ***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 [Principal Chief Commissioner or] Chief Commissioner or [Principal 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."*

The petitioner or the aggrieved party is not required to plead or establish anything with regard to the lapse occurred and once the entire amount is deposited, no further questions are asked and the sale has to be set aside under Rule 60. This is not the position when it comes to Rule 61, where the only two circumstances/grounds, on which such petition can be sustained, are the 'absence of proper notice' and the 'irregularities in the sale/proclamation'. As such, petition filed under Rule 61 stands on a different footing and this Court declares that 'pre-deposit' of the due amount is not a condition for filing the application.

20. It is seen that the petitioner had effected various deposits on different dates including a sum of Rupees Five lakhs, pursuant to the interim order passed by this Court on 15.11.2002. Since the petitioner was pursuing the matter before the 2nd respondent pursuant to Ext.P15 judgment passed by the Single Bench and Ext.P16 judgment passed by the Division Bench, the deposits so made by the petitioner and the filing of the I.A. ought to have been taken to a logical conclusion, instead of non-suiting the petitioner referring to the ground of limitation or maintainability. This is more so since, no such plea was ever raised from the part of the respondents at any point of time, when the matter was pending consideration before this Court, till it was finalised as per Ext.P15 judgment, nor before the Division Bench when the writ appeals were disposed of as per Ext.P16 judgment. Such a contention was raised for the first time only during the course of hearing before the 2nd respondent as mentioned in paragraph 6 of Ext.P17 order dated 18.05.2005. It is true that, limitation is a question of law, which can be raised at any time. But it still remains to be a mixed question of fact and

law, in so far as the issue involved in the present case is concerned. That apart, disposal of the cases by this Court vide Ext.P15 by the Single Bench and Ext.P16 by the Division Bench was with a specific purpose, to have the merits dealt with, but for which, it could have entailed a summary dismissal, holding that it was barred by limitation and no further exercise was necessary. This Court finds that the observations made by the 2nd respondent/Recovery Officer in Ext.P17 to the contrary and confirmed by the 7th respondent vide Ext.P19 and affirmed by the 8th respondent Appellate Tribunal vide Ext.P21, are not correct or sustainable and are liable to be set aside.

21. Coming to the merits of the case, as to the lack of notice and irregularity in the proclamation and sale as mentioned already, absence of proper notice to the petitioner with regard to the sale is not satisfactorily explained by the respondents. It has been observed by the 7th respondent in paragraph 30 of Ext.P19 order that the notice dated 08.03.2002 was served to the petitioner by registered post, as reflected from the proceedings/ file and hence the plea that there was no notice is not liable to be entertained, does not serve the purpose. In fact, the case of the

petitioner was that no notice of sale was issued to the petitioner. There is no dispute with regard to the receipt of notice for settling the sale proclamation. But the date of sale was never mentioned in such notice, which came to be shown only as per Ext.P8. Admittedly, this was published only in the in the Kottayam Edition of 'Mangalam' Daily. The petitioner contended that, there was no vide publicity at all and there was no rhyme or reason for having effected the publication of sale of the property lying in Ernakulam, in the Kottayam Edition of Mangalam Daily, that too in English. It is also pointed out that, the said daily is having a total circulation of less than 'one lakh' and the factual particulars have been sought to be substantiated with reference to the data furnished by the 'Audit Bureau' of Circulations as per Ext.P14. Copy of the sale proclamation published in the 'Mangalam' Daily dated 27.09.2002 was produced as Ext.R1(5) along with the Counter Affidavit of the Recovery Officer in O.P. No.33965/2002 (which forms part of Ext.R3(1) produced along with the Counter Affidavit of the Respondents 3 to 6 herein). The description of the property reads as follows:

"Land admeasuring 43 cents 808 sq. links

> *in Survey No.816, Sub Division No.2, in Desom Karithala, Village-Ernakulam, Taluk-Kanayannur, Sub-District-Ernakulam,District-Ernakulam within Cochin Corporation. The upset price for the property is Rs.76.70 lakhs, below which the property shall not be sold."*

The crucial question to be considered is whether there was proper description of the property in the schedule of sale proclamation, so as to have had conveyed sufficient information to the prospective bidders to have turned up for the auction sale and if so, whether the publication was adequate enough. If the publication was not enough to attract any bidder, then it was for the 2nd respondent to have it adjourned. It was accordingly, that the auction was adjourned for want of bidders on several occasions (not less than four times). As it stands so, the point to be considered is whether the sale could have been effected without any further publication, though done within a calender month, in terms of Rule 15 of the Second Schedule to the Income Tax Act; dealing with adjournment or stoppage of sale.

22. Coming to Ext.P8 sale proclamation, notifying the sale to be held on 29.08.2002, description of the property (verbatim translation) is in the following terms:

> *"The property is having an extent of 43*

> *cents and 808 sq. links comprised in Sub-Division No.2 of Survey No.816 of Ernakulam Village, Kanayannur Taluk, Ernakulam Sub District of Ernakulam District, situated at* ***Karithala Desom/Cochin Corporation****. The minimum price/fixed price for the said property is Rs.76.70 lakhs. This property will not be sold for any price less than the said amount. ”*

There is no dispute with regard to the fact brought out from the materials on record and in the course of arguments, that the property is situated <u>**next to the Revenue Tower near the Boat Jetty at Ernakulam, hardly 40 meters from Junction, towards the east and on the left side of the Cannon Shed Road**</u>. It is also seen from the description of the boundaries (as discernible from Ext.P11 and elsewhere) that, on the eastern and western sides, are the properties belonging to the 'Chakola family', while the Cannon Shed Road is bordering the property on the south, with direct road access. The <u>location of the property is never given in Ext.P8 sale proclamation and no description is there with regard to whether the property is having any access to the Main Road or as to the commercial importance of the locality or the close proximity to the Revenue Tower/the Boat Jetty Junction, so as to have it properly identified by the prospective</u>

bidders and to have taken part in the auction. The description given in Ext.P8 proclamation only gives an idea that the property is situated somewhere in 'Karithala Desom/Corporation of Cochin' in Ernakulam Village of Ernakulam District and that is all. This is totally inadequate to have incited a desire in the minds of prospective bidders, to have come forward or responded to the notification. This by itself is sufficient to hold that the proceedings pursued by the concerned respondent are not correct or proper, to have effected the sale generating maximum income, to have the liability satisfied and to return the balance amount, if any, to the owner of the property.

23. The ground raised by the petitioner in the writ petition with reference to Rule 52 of the Second Schedule to the Income Tax Act that, the proceedings pursued by the respondents are bad in so far as the property concerned was never attached before sale does not impress this Court, as no law does say that attachment is a pre-requisite to conduct sale. Attachment only helps the sale proceedings to be conducted in an appropriate manner, safeguarding the rights and interests of the parties concerned without the threat of alienation or such other adverse

circumstances. Similarly, there is no force in the contention raised by the petitioner that the sale originally notified to be held on 29.08.2002 could not have been conducted on 27th of September, 2002 as it fell in a 'different calender month'. The said proposition does not gather any momentum, in so far as adjournment can be made by the concerned officer, subject to the rider that the sale has to be conducted 'within one month' from the date of sale proclamation, failing which, fresh proclamation has to be effected. What is contemplated is a 'calender month' and the Rule does not say that the sale, on adjournment, has to be conducted in the 'same month'. The sale was originally notified to be held on 29.08.2002 and after the different adjournments, it was finally held on 27.09.2002. As such, the alleged defect in this regard is not correct or sustainable.

24. With regard to the valuation of the property, the petitioner has sought to rely on Ext.P.11, which is the report of a private valuer. This Court finds that, the valuation effected by the said valuer reflects only the 'present market value', ie. on the date of issuance of the certificate in 2004, which could not have

been the market value at the time of sale in the year 2002. But, if the properties lying on the eastern and western side are the family properties and the southern boundary is Cannon Shed Road, whether an access could have been provided if the property was to be sold by separate lots, may be a relevant matter to be considered, which however is not intended to be probed into by this Court, in view of the finding already rendered that there is material omission as to the mentioning of the location, direct road access and the other relevant particulars in Ext.P8 sale proclamation, to have attracted sufficient bidders.

25. Admittedly, despite the publication effected, nobody turned up for the sale scheduled on 29.08.2002 and there was nobody on the subsequent three occasions as well (when no further publication was effected), but for the notice allegedly put on the notice board of the Tribunal, for which no evidence is produced before this Court. No evidence in this regard was produced in the earlier round of litigation as well; when WP(C) No.33965 of 2002, was disposed of as per Ext.P15 judgment. It is important to note that, in the earlier round of litigation, all the relevant files were called for by a learned Judge of this Court and

some specific observations were made as to the irregularities in the matter of publication of notice, inadequacy of evidence with regard to such publication, at least as to the notice allegedly published on the notice board of the Tribunal and various other aspects. The said findings have not been set aside by the Division Bench while passing Ext.P16 judgment. Since the learned Single Judge directed the matter to be considered by the 2nd respondent in the light of the above observations in the petition filed under Rule 61 of the Second Schedule to the Income Tax Act, the Division Bench only observed that, since such a course was permitted to be pursued, an independent decision had to be taken by the 2nd respondent untrammelled by the observations in Ext.P15 judgment. This Court finds considerable force in the submission made from the part of the petitioner that the 2nd respondent ought to have considered the matter independently, with reference to the position as reflected from the proceedings/file in view of the insinuating circumstances mentioned by the learned Single Judge, which exercise has not been done satisfactorily. This Court does not find any reason to doubt the observations made by the another learned Judge of this Court with reference to the contents of the file produced before the learned Judge; which appears to be the reason why it was never intercepted by the Division Bench, while passing Ext.P16 judgment.

26. Coming to the question of adjournment of auction for want of bidders, undisputedly, there was no bidder, despite the publication effected solely in the Kottayam Edition of 'Mangalam Daily' on the original date of sale notified to be held on 29.08.2002. The sale was adjourned to 04.09.2002, 11.09.2002 and 17.09.2002 and on all these occasions, admittedly, there were no bidders. It was only on the next occasion, ie. on 27.09.2002, that the respondents 3 to 6 turned up, quoting the price of Rs.76.80 laks, ie. 10% over the reserve price. Admittedly, no notice of adjournment was given to the petitioner and no fresh publication was effected. The version of the 2nd respondent is that, publication is only a matter of 'discretion', as given in Ext.P17 order. Rule 54 of the Second Schedule to the Income Tax Act reads as follows:

> *"54. Mode of making proclamation - (1) Every proclamation for the sale of immovable property shall be made at some place on or near such property by beat of drum or other customary*

> *mode, and a copy of the proclamation shall be affixed on a conspicuous part of the property and also upon a conspicuous part of the office of the Tax Recovery Officer.*
> *(2) Where the Tax Recovery Officer so directs, such proclamation shall also be published in the Official Gazette or in a local newspaper, or in both; and the cost of such publication shall be deemed to be costs of the sale.*
> *(3) Where the property is divided into lots for the purpose of being sold separately, it shall not be necessary to make a separate proclamation for each lot, unless proper notice of the sale cannot, in the opinion of the Tax Recovery Officer, otherwise be given."*

It is settled law that, any sale, whether it be under the Code of Civil Procedure or under other relevant statutes, has to be done (in conformity with the Rules) with wide publicity to see that maximum income is generated, so that the liability can be discharged to the maximum possible extent and the balance, if any, could be returned to the owner/defaulter. It is true that, Rule 54(2) of the Second Schedule to the Income Tax Act confers some 'discretion' on the officer concerned with regard to publication. Keeping the same in mind, it is seen that such discretion was exercised by the 2nd respondent, who found it necessary to effect 'paper publication' and it was accordingly, that the notification was published in the 'Mangalam' Daily, Kottayam Edition. There was no bidder on the date notified for sale, ie. on 29.08.2002, which necessitated adjournment to 3 or 4 occasions. The fact that there was no bidder, in spite of the publication effected in 'Mangalam' Daily, Kottayam Edition, only reflects the inadequacy of the extent of publication. It naturally leads to the irresistible conclusion that, there ought to have been wider publicity, in some other mode/daily or in more editions, so as to have attracted sufficient prospective bidders. It is also an indicator, as to the lack of material/relevant particulars as to the description of the property as given in Ext.P8 without mentioning the location, existence of direct access to the Cannon Shed Road, proximity of the same to the Revenue Tower/Boat Jetty junction; which otherwise could have attracted more bidders. Having exercised the discretion to have effected 'paper publication', and having found that no bidder had turned up despite such publication, the further discretion exercised by the 2nd respondent, on adjournment of auction by restricting such publication only to be on the notice board of the Tribunal, instead of making more/wider publication in dailies having more circulation/editions only reflects the improper or arbitrary exercise of the discretion vested with the 2nd respondent. In short, the discretion vested with the 2nd respondent has not been used in a judicious manner. This aspect has not been properly considered by the 7th respondent DRT or the 8th respondent DRAT while passing Ext.P19/P21 orders.

27. Another important aspect is to be noted is that respondents 3 to 6 have admitted in paragraph 16 of their Counter Affidavit dated 02.07.2009 that, they did not have money on the date of sale originally notified vide Ext.P8, ie. on 29.08.2002. They did not have money on the subsequent occasions as well, till 27.09.2002. It is stated by the said respondents in their affidavit (para 16) that, they got information of the sale scheduled on 27.09.2002 from the notice published on the notice board of the Bank, when the 3rd respondent had gone to the Bank for some financial transaction. No material is brought to the notice of this Court as to the dealings between the petitioner and the first respondent Bank, with regard to the said transaction, or the date on which the 3rd respondent visited the Bank. Any how, the said respondents do not have a case that they came across such fixation of sale on 27.09.2002 from the notice stated as published in the notice board of the Tribunal, as

put forth by the 2nd respondent. No evidence is produced before this Court as to the publication of any such notice in the Notice Board of the Tribunal, in spite of the clear observations made in this regard by another learned Judge of this Court, in the earlier round of litigation, while passing Ext.P15 judgment. It only persuades this Court to hold that the factual finding made by the learned Judge of this Court in Ext.P15 after calling for and perusing the file is not rebutted successfully by the concerned respondents.

28. The learned counsel for the petitioner had submitted during the course of hearing, that the petitioner had identified some prospective buyers, who have already filed Exts.P12 and P13 affidavits before this Court, intending to purchase the property for a price of Rs. 8 lakhs per cent and Rs.7 lakhs per cent respectively. As one of the said persons is a near relative of the petitioner, bonafides of the said version was disputed by the respondents. The learned counsel for the petitioner submitted that, the entire amount payable to the Bank has already been satisfied and if any further amount is there, they are ready to satisfy the same; simultaneously expressing willingness to pay

the interest and cost and also to compensate the respondents 3 to 6 in connection with the amounts already deposited by them, to have it returned by the Bank and to have the sale set aside. Since this Court has found that the rejection of the IAs filed by the 7th respondent pursuant to Exts.P15 and P16 judgments with reference to Rule 61 of the Second Schedule to the Income Tax Act on the ground of delay, maintainability and merit (with reference to inadequacy of publication and the undue advantage given to the respondents 3 to 6 who admittedly did not have money to participate in the bid originally notified to be held on 29.08.2002) was not correct and proper, this Court finds that, an opportunity has to be given to the petitioner to satisfy the entire liability, subject to which, the sale could be set aside.

29. In the above circumstances, the impugned orders are set aside. The first respondent Bank is directed to inform the petitioner as to the total liability to be cleared towards interest, cost and the balance, if any, after giving credit to the amount already deposited, which shall be done, at the earliest, at any rate, within 'two weeks' from the date of receipt of a copy of this judgment. On receipt of the communication as above, the said

amount shall be deposited by the petitioner within 'one month' thereafter. This Court finds that, the entire sale consideration has been satisfied by the respondents 3 to 6, which requires to be returned by the Bank on getting the amounts from the petitioner. Since the said deposit was made by the respondents 3 to 6 years back, they have to be reasonably compensated; more so in the light of the assurance and undertaking made by the learned counsel for the petitioner. This Court finds that interest @ of 9% per annum from the date of deposit made by the respondents 3 to 6 till repayment is effected, will be an adequate compensation. The said amount shall also be worked out by the Bank and intimated to the petitioner while issuing communication as mentioned above. It will be for the petitioner to satisfy the said amount as well. Subject to satisfaction of the entire amount as above, the sale will stand set aside. On this event, necessary clearance certificate shall be issued to the petitioner by the respondent Bank, and on production of the same along with a copy of this judgment, the registration of the Sale Certificate and mutation effected in terms of the Transfer of Registry Rules will stand cancelled. It will be for the Revenue Authorities to effect necessary corrections in the Revenue records and accept the tax from the petitioner in respect of the property concerned, thereafter. Necessary corrections/endorsement shall made by the concerned Sub Registrar in the relevant records of the Registry.

The petitioner shall produce a copy of this judgment before the concerned Sub Registrar for effecting necessary changes/ corrections, which shall be effected, subject to other legal requirements, if any, to be satisfied by the petitioner. The Registry of the Court shall also communicate the position to the concerned Sub Registrar.

The writ petition stands allowed as above. No costs.

Sd/-
P.R. RAMACHANDRA MENON,
JUDGE

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