

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 28.03.2018

CORAM

THE HONOURABLE MR. JUSTICE S.MANIKUMAR
AND
THE HONOURABLE MR.JUSTICE M.GOVINDARAJ

W.P.NO.29230 OF 2014

E.Sathyaseelan ... Petitioner

VS.

- 1.The Recovery Officer
Debts Recovery Tribunal
Trichy Road, Coimbatore.
- 2.The South Indian Bank
I.F.Branch
Trichy Road, Sungm,
Coimbatore - 18.
Rep. By its Chief Manager
- 3.Etiland Products (Pvt.) ltd.,
88, Palaghat Road,
Pollachi, Coimbatore District.
- 4.V.Venkittaram
(R-4 deleted as per order dated
27.10.2015 in M.P.No.1 / 2015
in W.P.No.29230 / 2014)

- 5.Mohamed Anzar
- 6.R.Sadiqullah
- 7.K.A.Sulfeekar Ali
- 8.N.Abdul Nazar

.. Respondents

PRAYER: Writ Petition filed under Article 226 of the Constitution of India praying for issuance of Writ of Certiorari, to call for the records of the 1st respondent pertaining to orders passed by him in I.A.No.654/13 and 655/13 in R.P.No.47/2008 in DRC No.47/2008 dated 29.04.2012 and sale certificate dated 18.03.2009 registered as document No.1557 of 2009 on the file of Sub - Registrar, Pollachi, as the same is obtained by fraud and collusion and quash the same.

For Petitioner : Mr.P.H.Aravind Pandian
Senior Counsel for Mr.S.Rajmakesh
For Respondent-2: Mr.V.Bhiman
for M/s.Sampathkumar Associates
For Respondents
5 to 8 : Mr.A.R.L. Sundaresan
Senior Counsel

O R D E R
(ORDER OF THE COURT WAS MADE BY M.GOVINDARAJ, J.)

Challenging the order dated 29.04.2012 passed by the first respondent in I.A.Nos.654/13 and 655/13 in R.P.No.47/2008 in DRC No.47/2008 and the sale certificate dated 18.03.2009, registered as Document No.1557 of 2009, on the file of Sub - Registrar, Pollachi, the present writ petition has been filed.

2. The second respondent Bank has filed an application in O.A.No.323 of 2004, before the Debts Recovery Tribunal, Coimbatore, against the petitioner, for recovery of a sum of Rs.28,18,604.45, for the loan facilities availed by M/s.Etiland Products Private Limited / third respondent, in which, the petitioner was one of the Directors. On 07.06.2007, an exparte decree came to be passed. The petitioner could receive the exparte decree, only after filing an application on 06.03.2008. Thereafter, the petitioner preferred an appeal before the Debts Recovery Appellate Tribunal, with a petition to condone the delay in filing the appeal. The application was numbered as I.A.No.823 of 2008 in IN No.244 of 2008 and the same was dismissed with cost of Rs.5,000/-. During the pendency of the condone delay petition, the second respondent Bank sold the property.

3. The petitioner has challenged the order dated 10.02.2009 passed in I.A.No.823 of 2008, before this Court, by filing a writ petition in W.P.No.6571 of 2009. This Court, vide order dated 17.04.2009, directed the petitioner to pay a sum of Rs.25 Lakhs, pending disposal of the writ petition. In the meanwhile, the second respondent Bank had informed that the respondents 5, 6, 7 and 8 in the present writ petition were the auction purchasers of the property. Therefore, the above said private respondents 5, 6, 7 and 8 were also impleaded as parties. After hearing the parties, this Court set aside the order dated 10.02.2009 passed in I.A.No.823 of 2008 and directed the Debts Recovery Appellate Tribunal to number the appeal and further directed to maintain status-quo in respect of the property, till the disposal of the appeal, by the Debts Recovery Appellate Tribunal.

4. The Debts Recovery Appellate Tribunal had taken up the appeal on file in R.A.No.112 of 2010 and the same is pending. During the pendency of the appeal, the petitioner was given to understand that there were certain infirmities in the auction conducted by the second respondent Bank. Only after obtaining the certified copies, he came to know that the sale of the subject property was conducted without following the procedures. Therefore, the petitioner has moved the Recovery Officer, Debts Recovery Tribunal, Coimbatore, in I.A.No.654 of 2013 in R.P.No.47 of 2008 seeking to set aside the sale certificate issued in favour of the respondents 5 to 8.

5. The petitioner further states that originally one Vijayalakshmi was found to be the bidder and respondents 5 to 8 were interpolated in the bid. The sale proceedings extract would reveal that the tender application was submitted by only Ms.Vijayalakshmi and R.Sadiqullah, wherein, the names of respondents 5, 7 and 8 were not at all found. From the sale proceedings extract, it could be noted that only one tender was received and an unsigned certificate of sale dated Nil March 2009 reflects the names of Ms.Vijayalakshmi and R.Sadiqullah alone. Subsequently, the sale certificate dated 18.03.2009 was registered as Document No.1557 of 2009 and names of respondents 6 to 8 have been shown. The entire event clearly indicates the collusion between the respondents 1 and 2 and respondents 5 to 8 in conducting the auction. According to the petitioner, he is still in possession of the property and the respondents have tried to interfere with the peaceful possession and it was stalled by the petitioner.

6. Respondents 5 to 8 have filed a suit in O.S.No.485 of 2010 along with an application in I.A.No.1405 of 2010 for injunction before the District Munsif, Pollachi. However, the District Munsif, Pollachi, having found that both the parties to the suit claimed that they are in possession of the property and only after the full fledged trial, a finding could be given, has dismissed the interlocutory application, by order dated 08.08.2011. The petitioner states that the suit was for a bare injunction.

7. In the meanwhile, respondents 5 to 8 have filed Crl.O.P.No.23656 of 2013 for a direction to register a case against the petitioner and also filed Crl.O.P.No.27575 of 2013 seeking police protection. Respondents 5 to 8 have suppressed the material fact of status-quo order passed by this Court, wherein the petitioner was not added as a party.

8. The petitioner would further state that as per the directions of this Court, the petitioner has remitted a sum of Rs.25,00,000/- (Rupees Twenty Five Lakhs Only). But the respondents 1 and 2, in collusion with the respondents 5 to 8 have played fraud to defeat the rights of the petitioner. The first respondent without hearing the petitioner, has passed an

order on 09.07.2013 and thereafter, again restored the application. After that, the second respondent Bank has filed a counter on 07.10.2013 and the respondents 5 to 8 filed their counter on 22.10.2013 and the matter was heard and orders were reserved on 22.10.2013.

9. Since the first respondent has not passed orders, the petitioner approached this Court, by way of a writ petition in W.P.No.33995 of 2013, seeking for a direction to direct the first respondent to pass orders in I.A.No.654 of 2013 in R.P.No.47 of 2008. In the said writ petition, an interim order came to be passed by this Court directing the auction purchaser not to alienate the property. Subsequently, the writ petition was dismissed on 04.02.2014.

10. Thereafter, the first respondent vide order dated 29.04.2014 has dismissed I.A.Nos.654 and 655 of 2013 in R.P.No.47 of 2008 in D.R.C.No.47 of 2008 and no communication was received regarding the same.

11. The property auctioned by the second respondent Bank is about 12.60 acres. The market value of the property, at that time, was around Rs.1.5 Crores, whereas, the second respondent has auctioned it, only for a sum of Rs.39,60,000/-. In the said property, the petitioner has cultivated coconut trees for the past 30 years. The respondents 5 to 8 having failed in their attempt to take possession, entered into sale agreement on the strength of the fraudulent sale certificate. Challenging the order dated 29.04.2012 passed by the first respondent in I.A.Nos.654/13 and 655/13 in R.P.No.47/2008 in DRC No.47/2008 and the sale certificate dated 18.03.2009, which was registered as Document No.1557 of 2009, on the file of Sub - Registrar, Pollachi, the petitioner has come up with the present writ petition.

12. The second respondent Bank has filed a counter affidavit controverting inter-alia the averments of the petitioner stating that the writ petition is not maintainable. As per the rules set out under Schedule II of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, the sale was conducted following the procedures scrupulously and the sale certificate was issued to the respondents 5 to 8. After issuance of sale certificate, no application either under Rules 60 or 61 of the II Schedule was filed and the writ petitioner did not choose to challenge the same, until the sale certificate was issued in favour of respondents 5 to 8. Only with a view to protract the proceedings, the present writ petition has been filed. Further, an appeal before the Debts Recovery Appellate Tribunal was also filed, with a delay of 230 days.

13. The Bank has contended that from the narration of above facts, it is clear that the contention of the petitioner that he was closely following the matter before and after the auction

proceedings and that his statement that he came to know about the irregularities only during the pendency of the appeal is incorrect. Even during the pendency of W.P.No.6571 of 2009, the sale had taken place on 20.01.2009 and the sale certificate was issued on 18.03.2009, whereas the writ petition was disposed of on 25.08.2009 only. The petitioner, ought to have challenged the sale within 30 days. Having failed in doing so, the petitioner has preferred a time barred application in I.A.No.654 of 2003.

14. The second respondent would further contend that the name of Ms.Vijayalakshmi and the names of respondents 5 to 8 were found in the tender form and the allegation of interpolation is a fallacy, and therefore is untenable. The allegation of collusion between the respondents 1 and 2 and respondents 5 to 8 is not correct and the allegation of fraud is unsubstantiated. Thus, the order of the first respondent Recovery Officer is proper and does not suffer from any infirmity. The petitioner having failed in taking appropriate action by challenging the sale, has come before this Court, on conjunctures and surmises. The statement that the petitioner is in possession of the property is misleading. Pursuant to the sale certificate issued by the first respondent, respondents 5 to 8 are in possession and the same is evidenced by the report dated 12.06.2009 of the Advocate Commissioner.

15. In so far as the suit in O.S.No.485 of 2010 filed for bare injunction is concerned, the Civil Court, have not given any finding and directed the parties to maintain status-quo. While passing the order of status-quo, this Court did not deal into the factual position and therefore, sought for dismissal of the writ petition.

16. The sixth respondent has filed a counter controverting the averments made by the petitioner. While reiterating the factual averments made by the second respondent in so many words, would submit that the Advocate Commissioner has handed over possession of the subject property to the respondents 5 to 8 with the assistance of Police Official on 12.06.2009. Even though the petitioner has remitted a sum of Rs.25,00,000/-, he has no right over the property and this baseless petition is filed only to prolong the proceedings and to snatch the property from the respondents 5 to 8. The writ petitioner has not assigned any reason for his non appearance and without filing application under Rule 60 or 61, within the stipulated time, has approached this Court on misleading facts. The sale conducted by the first respondent on 20.01.2009 was not illegal as well as not against law.

17. Learned Senior Counsel appearing for the petitioner would submit that the tender form submitted by the auction

purchasers by itself would prove the fraud committed by them. As per the the tender sale notice in RP No.47/2008 in DRC No.47/2008, the last date and time for submission of the tender form was on 08.01.2009 up to 04.00 p.m., and the date and time for opening of the tender was on 09.01.2009 at 11.30 a.m., at the Office of the Recovery Officer, Debts Recovery Tribunal, Coimbatore. As per condition No.2 of the terms and conditions of sale, the tender form in a sealed cover should be submitted along with 10% of the Earnest Money Deposit of the upset price, on or before 04.00 p.m., on 08.01.2009. The upset price was fixed as Rs.39,00,000/-. The tender form should be submitted on or before 04.00 p.m. On 08.01.2009, along with Earnest Money Deposit, as stated above. If demand draft is not drawn, as quoted in condition No.2, the tender form will be rejected summarily.

18. According to the learned Senior Counsel, the tender form was submitted by one Vijayalakshmi and R.Sadiqullah. The PAN Number of Vijayalakshmi was given along with address, whereas the demand draft No.117517, for a sum of Rs.3,90,000/- was drawn only on 19.01.2009. Even though the said Vijayalakshmi was a bidder, the names of respondents 5 to 8 came to be interpolated in the tender form, under the caption name and address of the bidder. Under column "f", PAN number of the sixth respondent came to be interpolated and the signature of the bidder was shown as the signature of the sixth respondent. The respondents 5 to 8 have not given their addresses as mandated in the tender form and the interpolation of the names of respondents 5 to 8 is evident.

19. Since serious allegation of forgery had been made, we have directed the Debts Recovery Tribunal as well as the second respondent Bank to produce the original files. Accordingly, original files were produced.

20. The learned Senior Counsel appearing for the petitioner would draw our attention to the sale proceedings in R.P.No.47 of 2008 dated 20.01.2009. The contents of the sale proceedings would reveal that only one sealed tender was received. The sealed tender was submitted by Ms.Vijayalakshmi and Mr.R.Sadiqullah. The sixth respondent alone participated in the tender and quoted a sum of Rs.39,20,000/- as offer price. Since the sixth respondent was the only bidder and had offered to increase the amount by Rs.40,000/-, the sale was confirmed in favour of Ms.Vijayalakshmi and Mr.R.Sadiqullah, for a sum of Rs.39,60,000/-, wherein, Mr.R.Sadiqullah has acknowledged the same, by affixing his signature. The word that the sixth respondent was the only bidder raises doubt, as according to the learned Senior Counsel for the petitioner, there were two bidders, namely Ms.Vijayalakshmi and Mr.R.Sadiqullah.

21. The learned Senior Counsel for the petitioner would also draw the attention of this Court to the certificate of sale of

immovable property wherein it is certified without any date and signature of the Recovery Officer. The sale registered in favour of respondents 5 to 8 proves they are residents of Kerala State, except that of the sixth respondent. According to him, the nomination issued in favour of third party is illegal and exposes collusion between the first respondent and respondents 5 to 8. Since the tender form does not contain the full address of the bidders and the absence of the name of the original bidder namely, Vijayalakshmi shows that there was fraud and collusion in awarding the sale certificate.

22. The learned Senior Counsel would further state that since the claim of the second respondent itself was Rs.37,00,000/- and the petitioner has deposited a sum of Rs.20,00,000/- on 13.06.2009 and Rs.5,00,000/- on 18.06.2009, as directed by this Court in its order dated 12.06.2009, in W.P.No.6571 of 2009, the second respondent Bank ought to have waited and issued the demand notice. However, during the pendency of the writ petition itself, the first respondent has conducted the auction and confirmed the sale in favour of strangers. This itself would stand testimony to the hasty and fraudulent action of the first respondent.

23. He also produced a certified copy of the sale certificate dated Nil March 2009. The name of Ms.Vijayalakshmi was struck off and Mr.R.Sadiqullah was shown as first bidder and serial numbers 2, 3 and 4 has been written without any names. It was also declared that the purchasers at a sale by public action held on 20.01.2009 as confirmed.

24. He would compare the certified copy filed by the petitioner with the copy filed by the second respondent Bank in their typed-set. He would contend that the manipulation is at the edge and the action of the first respondent is not above board and therefore, there is fraud and collusion in conducting the auction sale. He would further contend that the tender sale notice clearly specifies the date of last submission of the tender as 08.01.2009 and the opening of the tender was scheduled to be held on 09.01.2009 at 11.30 a.m. As per condition no.1 of the terms and conditions of sale, the Earnest Money Deposit of 10% of the upset price, if not drawn, and submitted on or before 08.01.2009, the tender would be rejected summarily. The tender form would clearly show that the demand draft no.117517 dated 19.01.2009 was drawn much later than the scheduled date. The auction should have been conducted on 09.01.2009, whereas without any materials to show that it was adjourned to 19.01.2009 or 20.01.2009, the sale was given in favour of respondents 5 to 8 on 20.01.2009.

25. The learned Senior Counsel would further submit that in the event of conducting a fresh sale, on a subsequent date, the first respondent ought to have issued a fresh notification. Whereas interpolation in the tender form submitted by

Ms.Vijayalakshmi and R.Sadiqullah by including the names of the respondents 5, 7 and 8 with the signature of respondent no.6 would create suspicion in the proper procedure of conducting auction sale. According to him, even assuming that tender forms were submitted by both Ms.Vijayalakshmi and Mr.R.Sadiqullah, PAN number of R.Sadiqullah should be written next to Ms.Vijayalakshmi, whereas, the PAN number was inserted above the PAN number of Ms.Vijayalakshmi. Further, even the address of Ms.Vijayalakshmi is taken as the address of Mr.R.Sadiqullah, there is no answer to the addresses of respondents 5, 7 and 8, who are natives of Kerala State, in the tender form. Therefore, it is very clear that the tender form has been manipulated to suit the convenience of respondents 5 to 8.

26. In support of his contention that there is illegal sale transaction, the learned Senior Counsel for the petitioner would rely on a judgment of this Court in HEMALATHA RANGANATHAN VS. THE AUTHORISED OFFICER, INDIAN BANK CIRCLE OFFICE [2012 (5) CTC 1]. According to the learned Senior Counsel for the petitioner, the tender form does not provide for nominating a person to take the property after paying the balance amount and confirmation of the sale in favour of third party stranger, who had not at all participated in the sale process, and therefore, the sale is illegal. It is further observed in the judgment that the Authorised Officer had acted as real estate agent without making any attempt to get the best price and thereby to protect the interest of the Bank. Learned Senior Counsel submitted that in the above referred judgment, the sale was set aside and transaction was declared as illegal.

27. He would also rely on a judgment of the Supreme Court in MEGHMALA AND OTHERS VS. G. NARASIMHA REDDY AND OTHERS [2010 (8) SCC 383] wherein it is observed that fraud / misrepresentation of Court is always viewed seriously and the collusion or conspiracy with a view to deprive the rights of others in relation to a property would render the transaction void ab-initio. In such circumstances, if non-exhaustion of the statutory remedies are not attracted, the order of sale would become non-est in the eyes of law.

28. The learned Senior counsel for the petitioner would rely on yet another judgment of the Supreme Court in SADASHIV PRASAD SINGH VS. HARENDAR SINGH AND OTHERS [2015 (5) SCC 574]. In the said judgment, it has been held that the rights of an auction purchaser in the property purchased by him, cannot be extinguished, except in cases where the said purchase can be assailed, on the grounds of fraud or collusion. According to the petitioner, the present sale is a combination of fraud and collusion and therefore, the illegal sale shall be interfered with.

29. Further, a Hon'ble Division Bench of this Court in AUTHORISED OFFICER, INDIAN BANK, MYLAPORE BRANCH VS.

M/S.TETRAHEDRON LTD., AND OTHERS [2013 (1) L.W. 711] while confirming the judgment in Hemalatha Ranganathan's case (cited supra) has recorded the report of the Chairman and Managing Director of the Bank wherein he had given an undertaking that such infirmities of sale confirmation in favour of nominee and other lapses that occurred therein are deeply regretted and in future, such incident would not recur. Whereas, in the present case, such an incident had taken place. Therefore, according to the learned Senior Counsel appearing for the petitioner, the sale certificate issued by the first respondent is smacked with fraud and collusion and thereby, the illegal transaction should be declared as void ab-initio.

30. Per contra, learned counsel appearing for the second respondent Bank would submit that the sale was conducted in accordance with the procedure laid down in the statute and that writ petition is filed with malafide intention to protract the proceedings and to defeat the valid rights of auction purchasers. He would further submit that the petitioner having failed in filing appropriate application before the first respondent has erroneously filed the present writ petition with misleading statements. Therefore, the writ petition is not maintainable for non-exhaustion of alternative remedy.

31. The learned counsel appearing for the respondents 5 to 8 would submit that the sale conducted by the first respondent is absolutely fair and proper. According to him, the sixth respondent was also the original bidder along with Ms.Vijayalakshmi. He has affixed his signature in the tender form and paid 25% of the sale consideration within 15 days and the balance of 75% of sale consideration within the stipulated time. The petitioner has closely watched all the proceedings of the Bank and has full knowledge of day today affairs of the Bank. He has filed a suit before the Civil Court instead of challenging the sale within 30 days before the first respondent. The petitioner, ought to have filed an application either under Rule 60 or 61 of the Rules specified in II Schedule of Income Tax Rules. Without filing such an application, he has come before this Court with an ulterior motive to postpone the benefit accrued in favour of the respondents 5 to 8.

32. The petitioner cannot raise the allegations of fraud or collusion. At the most, he could aver only the irregular procedures, if any adopted. Even those allegations would not stand scrutiny, as it is belated and the right to challenge the same had lapsed, by efflux of time. There is no allegation of fraud against the respondents 1 and 2 that the property was taken away illegally. A demand notice under Section 13(2) of the Act was issued and possession notice under Section 13(4) of the Act was also issued. The Original Application came to be filed before the Tribunal, wherein the petitioner remained exparte.

After following due procedure, sale was conducted by issuing a public notice in newspapers, as contemplated under the provisions of the Act. The petitioner has neither challenged the sale proceedings nor filed any application in time to set aside the same. After having noticed the judgment rendered by a Hon'ble Division Bench of this Court in Hemalatha Ranganathan's case (cited supra) has conveniently has filed the present writ petition.

33. The petitioner has slept over his right and in the order dated 09.07.2013 itself, it is clearly mentioned that the interlocutory application is not maintainable and the said application was subsequently dismissed. However, on the representation made by the learned counsel for the petitioner, it was taken on file and an order was passed on 29.04.2014. Since an order came to be passed on 09.07.2013 itself, the petitioner ought to have challenged the same, but made a representation to restore the same. Such action will not stop limitation and the impugned order challenged in the writ petition is barred by limitation and in any event, sale is not liable to be set aside.

34. Further, the petitioner has not deposited the sale amount as specified in the proclamation of sale. Without depositing the amount, defaulting borrower is not entitled to seek for any prayer to set aside the sale. Therefore, sale cannot be set aside. According to the learned Senior Counsel for respondents 5 to 8, the petitioner had entered appearance in the Original Application filed by the second respondent Bank and remained exparte. For setting aside the exparte decree, on the grounds that it was obtained by fraud and misrepresentation, the same has to be pleaded and proved. In so far as the present writ petition is concerned, no fraud has been pleaded and proved. Further, since application for redemption was not filed within 30 days from the date of proclamation of the sale of the schedule property by the judgment debtor and he is not entitled to exercise his right to set aside the sale and he is entitled only for the refund of amount deposited with accrued interest, and that too, in compliance with the directions of this Court, if any issued.

35. We have heard the submissions made on either side and perused the materials available on record.

36. Considering the factual background as stated above, it has to be found as to whether the allegation of fraud has been made out to interfere with the judgment dated 29.04.2012 rendered by the Debts Recovery Tribunal, Coimbatore, in I.A.Nos.654/13 and 655/13 in R.P.No.47/2008 in DRC No.47/2008 and to set aside the sale certificate dated 18.03.2009,

registered as Document No.1557 of 2009, on the file of Sub - Registrar, Pollachi. It is also necessary to consider as to whether the writ petition is maintainable, in view of non exhaustion of the alternative remedy and delay.

37. Admitted facts are that the subject property belonging to the petitioner was brought for sale by the first respondent in R.P.No.47/2008 in DRC No.47/2008. The tender sale notice was published by the first respondent. The last date and time for submission of tender was on 08.01.2009 up to 04.00 p.m., and the date and time of opening tender was on 09.01.2009 at 11.30 a.m. at the office of the Recovery Officer, Debts Recovery Tribunal, Coimbatore. Upset price was fixed as Rs.39,00,000/-. One of the terms and conditions of sale was that 10% of the upset price shall be submitted as Earnest Money Deposit, by way of demand draft drawn in favour of the first respondent and the quotation shall be submitted in a sealed cover on or before 08.01.2009. The tenderers who had submitted the tender along with Earnest Money Deposit alone are entitled to attend the same on 09.01.2009 at 11.30 a.m. and the tender quoted below the upset price and submitted without demand draft would be rejected summarily.

38. Admittedly, there was only one tender submitted before the first respondent. The petitioner has made an allegation of fraud and collusion, in the sale. The first and foremost allegation is that the original bidders were Ms.V.Vijayalakshmi and R.Sadiquallah. The tender form submitted by them was left blank and the DRC number was also not filled up. In the original tender form, the rate quoted by the bidder was corrected by applying whitener. It appears that originally a sum of Rs.40,00,000/- was quoted, which has been corrected as Rs.39,00,000/-. The date of drawal of the demand draft appears to be entered as 07.01.2009 at the first instance and later, it appears to have been corrected as 19.01.2009. As regards the correction of the rate quoted and the demand draft, this Court is not inclined to go into those aspects, as it is not clear as to whether the corrections were made prior or after submission of the tender form. However, the date of the drawal of the demand draft, as stipulated in the tender sale notice has to be considered. Initially, the last date for drawal of demand draft has been notified as 08.01.2009 and the sale must have been conducted on 09.01.2009. But a perusal of the records nowhere discloses the reason for not conducting the auction on 09.01.2009.

39. Further, the records also do not reveal any proceedings for postponing the sale from 09.01.2009 to 20.01.2009. Admittedly, proclamation of sale dated 04.12.2008 remains the same and the sale proceedings dated 20.01.2009 also affirm that there was no fresh sale notice and there is no reason for

changing the date from 09.01.2009 to 20.01.2009. The postponement of sale without any further notification is unusual. The second point to be noted as pointed out by the learned Senior Counsel for the petitioner is that the name of V.Vijayalakshmi with address has been entered and the PAN number, which is a mandatory requirement has also been entered in the relevant column. On perusal, it is seen that the name of the first bidder, namely, Ms.Vijayalakshmi has been written in Tamil, whereas, the names of four other persons, viz., respondents 5 to 8 have been added by a different pen, in English. The tender form contains different sets of handwritings, which is again unusual.

40. Further allegation of the petitioner is that the PAN number of the sixth respondent alone came to be written above the PAN number of the first bidder namely Ms.Vijayalakshmi. PAN numbers of others are not filled up, even though it is mandatory to fill up the PAN numbers. It is contended that Ms.Vijayalakshmi and Mr.R.Sadiqullah alone were the bidders. There is no explanation as to why the names of the other auction purchasers were entered without their addresses. The sixth respondent has signed the tender form and thereafter, the said Ms.Vijayalakshmi is nowhere in the picture.

41. Sale proceedings issued by the first respondent on 20.01.2009 states that the sale is confirmed in favour of Ms.Vijayalakshmi and Mr.R.Sadiqullah leaving out the other bidders and that the same was accepted by the sixth respondent alone. As stated above, the original bidder Ms.Vijayalakshmi has not affixed her signature anywhere, thereafter.

42. It is seen from the terms and conditions of the tender sale notice that submission of PAN number and furnishing of address of the bidders are mandatory. The first respondent has conveniently flouted all the mandatory requirements, conducted the sale and confirmed the same in the name of third parties. Even assuming that the respondents 5 to 8 were originally joined with Ms.Vijayalakshmi in submitting the tender form, they should have given their PAN numbers, addresses. But the sale certificate dated 20.01.2009 confirms that it was in favour of Ms.Vijayalakshmi and Mr.R.Sadiqullah, the sixth respondent herein. There is no explanation as to why the other bidders were left out. Further, there is no explanation with respect to the mandatory requirement of PAN numbers at the time of registering the sale certificate in favour of the so called bidders. The sale proceedings are tampered as it could be seen by the documents submitted by the second respondent Bank and the certified copy issued to the petitioner by the Debts Recovery Tribunal.

43. Secondly, the other allegation placed on the side of the petitioner is that the sale certificate issued by the first

respondent and the registration of the same, lapsed. In the first place, the name of the original bidder Ms.Vijayalakshmi is not found. On the other hand, the sale certificate came to be registered in favour of respondents 5 to 8. The sixth respondent has been shown as the second purchaser, whereas, the fifth respondent has been shown as the first bidder. From the registration details, it could be seen that the fifth respondent has not given the PAN number. Respondents 5, 7 and 8 have not given any PAN details, but given the Voter Identity Card for identification. But the records produced by the Debts Recovery Tribunal reveal that respondent nos.5 and 7 do have PAN number, but it is not clear as to why it was not furnished before the first respondent, which is a mandatory requirement. Therefore, the argument of the learned Senior Counsel for the petitioner that sale has been conducted in an improper manner and records were altered for the convenience of the parties in collusion with the first respondent is not without force. The said allegation is fortified from the perusal of the certificate of sale issued by the first respondent dated Nil March 2009.

44. Certified copy of the sale certificate produced by the petitioner shows the names of Ms.Vijayalakshmi and Mr.R.Sadiqullah, as having paid the amount of Rs.39,60,000/- and being declared the purchasers, at a sale by public auction on 20.01.2009. On the other hand, the typed set filed by the respondent Bank shows that the name of Ms.V.Vijayalakshmi has been struck off and there are entries in respect of Serial numbers 2, 3 and 4. Original records produced, as per the directions issued by this Court, does not contain this particular document in original. Corrections are found in the first page as well as in the second page of the document. The certified copy neither bear any date nor any signature of the Recovery Officer.

45. On this aspect, when a specific question was put to the learned counsel for the second respondent Bank, it was submitted that documents were filed as given by the Bank. But the documents produced by the Bank does not contain the said sale certificate either in original or duplicate. Therefore, the contention of the petitioner that there is fraud and collusion in the conduct of sale deserves consideration.

46. Respondents 1 and 2 acting under the statute, in all fairness should come before this Court with clean hands. But on the other hand, in spite of the directions issued by this Court, deliberately have withheld the documents, that too after the lapses were pointed by the learned counsel before this Court. Upon perusal of the file containing the documents produced by the Bank as well as the Debts Recovery Tribunal, it is surprising to note as to why the crucial documents, appears to have been manipulated and specifically directed to be produced

are missing from the files of the respondents 1 and 2. Going by the date of sale, other than the scheduled date, interpolation in the tender form and registration of the sale certificate after material discrepancies extracted supra, makes it clear that all is not well with the first respondent Recovery Officer. No fruitful answers were forthcoming other than pointing pillars on each and every aspect, from respondent nos.1 and 2.

47. Therefore, this Court has no hesitation hold that the auction and issuance of the subsequent sale certificate were done in collusion with the respondents 5 to 8. An act of fraud on Court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of others in relation to a property would render the transaction void ab initio.

48. In the judgment of the Supreme Court in MEGHMALA AND OTHERS VS. G.NARASIMHA REDDY AND OTHERS [2010 (8) SCC 383] it has been observed as under:

"32. The ratio laid down by this Court in various cases is that dishonesty should not be permitted to bear the fruit and benefit to the persons who played fraud or made misrepresentation and in such circumstances the Court should not perpetuate the fraud. (See District Collector & Chairman, Vizianagaram Social Welfare Residential School Society, Vizianagaram & Anr. Vs. M. Tripura Sundari Devi (1990) 3 SCC 655; Union of India & Ors. Vs. M. Bhaskaran (1995) Suppl. 4 SCC 100; Vice Chairman, Kendriya Vidyalaya Sangathan & Anr. Vs. Girdharilal Yadav (2004) 6 SCC 325; State of Maharashtra v. Ravi Prakash Babulalsing Parmar (2007) 1 SCC 80; Himadri Chemicals Industries Ltd. Vs. Coal Tar Refining Company AIR 2007 SC 2798; and Mohammed Ibrahim & Ors. Vs. State of Bihar & Anr. (2009) 8 SCC 751).

33. Fraud is an intrinsic, collateral act, and fraud of an egregious nature would vitiate the most solemn proceedings of courts of justice. Fraud is an act of deliberate deception with a design to secure something, which is otherwise not due. The expression "fraud" involves two elements, deceit and injury to the person deceived. It is a cheating intended to get an advantage. (Vide Dr. Vimla Vs. Delhi Administration AIR 1963 SC 1572; Indian Bank Vs. Satyam Fibres (India) Pvt. Ltd. (1996) 5 SCC 550; State of Andhra Pradesh Vs. T. Suryachandra Rao AIR 2005 SC 3110; K.D.

Sharma Vs. Steel Authority of India Ltd. & Ors. (2008) 12 SCC 481; and Regional Manager, Central Bank of India Vs. Madhulika Guruprasad Dahir & Ors. (2008) 13 SCC 170).

34. An act of fraud on court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of the others in relation to a property would render the transaction void ab initio. Fraud and deception are synonymous. Although in a given case a deception may not amount to fraud, fraud is anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine including res judicata. Fraud is proved when it is shown that a false representation has been made (i) knowingly, or (ii) without belief in its truth, or (iii) recklessly, careless whether it be true or false. Suppression of a material document would also amount to a fraud on the court. (Vide S.P. Changalvaraya Naidu (supra); Gowrishankar & Anr. Vs. Joshi Amba Shankar Family Trust & Ors. AIR 1996 SC 2202; Ram Chandra Singh Vs. Savitri Devi & Ors. (2003) 8 SCC 319; Roshan Deen Vs. Preeti Lal AIR 2002 SC 33; Ram Preeti Yadav Vs. U.P. Board of High School & Intermediate Education AIR 2003 SC 4628; and Ashok Leyland Ltd. Vs. State of Tamil Nadu & Anr. AIR 2004 SC 2836).

35. In kinch Vs. Walcott (1929) AC 482, it has been held that "...mere constructive fraud is not, at all events after long delay, sufficient but such a judgment will not be set aside upon mere proof that the judgment was obtained by perjury."

Thus, detection/discovery of constructive fraud at a much belated stage may not be sufficient to set aside the judgment procured by perjury.

36. From the above, it is evident that even in judicial proceedings, once a fraud is proved, all advantages gained by playing fraud can be taken away. In such an eventuality the questions of non-executing of the statutory remedies or statutory bars like doctrine of res judicata are not attracted. Suppression of any material fact/document amounts to a fraud on the court. Every court has an inherent power to

recall its own order obtained by fraud as the order so obtained is non est."

In such an eventuality, the questions of non-exhaustion of alternate remedy or statutory bar like doctrine of res-judicata, are not attracted.

49. The other aspect that as to whether sale certificate can be issued to a nominee, it is seen from the auction notification that it does not contain any provision for successful bidder to nominate a person. In fact, the successful bidder Ms.Vijayalakshmi is nowhere seen in any of the proceedings after submitting the tender form.

50. In a similar circumstances, a Hon'ble Division Bench of this Court in HEMALATHA RANGANATHAN VS. THE AUTHORISED OFFICER, INDIAN BANK CIRCLE OFFICE [2012 (5) CTC 1] has observed as follows:

"20. The auction notification issued by the Bank does not contain any provision permitting the successful bidder to nominate a person to take the property after paying the balance amount. Similarly, there was no provision giving discretion to the Authorised Officer to extend the time for deposit of 75% of the bid amount.

21. There were only five bidders including Thiru B.Subramani. Thiru S. Manisekaran was not at all in the picture. The bid submitted by Thiru B.Subramani was found to be the highest and therefore Thiru B.Subramani was declared as the highest bidder. The Authorised Officer received 25% of the earnest money from him. It was only thereafter and that too during the currency of the order of stay, the Authorised Officer received a letter from Thiru B.Subramani and issued the letter of confirmation in the name of Thiru S.Manisekaran.

22. The conditions of auction, more particularly, clause 23 provides that no time extension for making payment after the stipulated period will be granted nor shall the successful bidder be allowed to make part payments.

23....

24...

27. The sale in question was confirmed in

favour of Thiru.S.Manisekaran not withstanding the fact that he was not a bidder. As per the terms of auction and the order of confirmation, Thiru S.Manisekaran was bound to pay 75% of the amount on or before 22 January 2011. The Authorised Officer very clearly stated in the letter of confirmation that in case the balance bid amount of 75% is not deposited on or before 22 January 2011, 25% of the bid amount already deposited will be forfeited without further notice. Therefore, it is clear that the Authorised Officer has not reserved any right to extend the time limit for deposit of balance 75% of the bid amount. Even though the order of confirmation was given in favour of Thiru S.Manisekaran on 7 January 2011 and he was directed to pay the balance amount by 22 January 2011, the fact remains that the amount was deposited only on 11 June 2012 and that too after identifying a person to purchase the property.

30. The fact that the auction purchaser failed to deposit 75% of the bid amount on or before 22 January 2011 would result in forfeiture of 25% of the bid amount paid by Thiru B.Subramani and it would give a cause of action to the Bank to issue a notification once again for sale.

31. The Authorised Officer has committed one more illegality by issuing the sale certificate in the name of Mrs. V.Padmavathy, who was not a bidder at all. The fact that Thiru S.Manisekaran paid a sum of Rs.1,20,00,000/- on 11 June 2012 accompanied by a letter nominating Mrs. V.Padmavathy to receive the Sale Certificate in her name, indicates that the payment was made by none other than Mrs. V.Padmavathy. This clearly proves the undue interest shown by the Authorised Officer.

38. The transfer of property to the third party purchaser was made under Section 13(6) of the SARFAESI Act. The Authorised Officer made a false statement before the Chief Metropolitan Magistrate that the property was sold to Thiru S. Manisekaran, without divulging the fact that he was not a bidder. The property, after taking possession, was given to a total stranger to the auction proceedings. While considering the correctness of the order passed by the Chief

Metropolitan Magistrate in the present case, these basic facts must necessarily be taken note of.

41. We make the position clear that the Authorised Officer has no authority to accept the request from the highest bidder to issue the Sale Certificate in favour of a third party. The sale should be confirmed in the name of the highest bidder and not in the name of his nominee. The privity of contract would only be between the successful bidder and the Bank. The sale certificate should be issued only in the name of the successful bidder in whose favour the letter of confirmation was issued. The question of further sale of the property would arise only after registration of the sale certificate by the Bank in the name of the successful bidder. The purchaser from the successful bidder cum sale certificate holder must necessarily pay stamp duty for registration. In short, the Authorised Officer has no authority to recognise a person as the nominee of the successful bidder.

47. In the case on hand, the Authorised Officer conducted the auction proceedings and later issued an order of confirmation, in total violation of the order passed by this Court. As observed by the Supreme Court in All Bengal Excise Licensees' Association, it is the duty of the Court to set the wrong right and not allow the perpetration of the wrong doing. We, therefore, by following the Full Bench judgment of this Court in Century Flour Mills v. S. Suppiah (AIR 1975 Madras 217) and the judgment of the Supreme Court in All Bengal Excise Licensees' Association (2007(1) SCC 374), cancel the auction held on 7 January 2011.

48. Since the Authorised Officer of the Bank violated the mandatory provisions of the SARFAESI Act and the Rules made thereunder and suppressed material particulars and made false statements to take possession of property stating that it was sold to Mr.S.Manisekaran notwithstanding the fact that he was not a bidder and obtained an order against a dead person, the impugned order passed by the learned Chief Metropolitan Magistrate on such factual background also must be set aside.

50. The factual matrix of this case clearly indicates the role played by the Authorised Officer as a real estate agent without making an attempt to get best price and thereby to protect the interest of the Bank. The Authorised Officer appears to have acted on extraneous reasons and helped the real estate lobby to make illegal gain. The provisions of the SARFAESI Act was not intended for such purpose. The Bank is entitled to take recovery action by invoking the provisions of the Act. However, the action should not be for the purpose of assisting the real estate agents to enrich themselves. "

51. Facts and circumstances of the above judgment is applicable to the case on hand also. The above judgment was followed by a Hon'ble Division Bench of this Court in THE AUTHORISED OFFICER, INDIAN BANK, MYLAPORE BRANCH VS. M/S.TETRAHEDRON LTD. AND OTHERS [2013 (1) L.W. 711] wherein it is observed that the Authorised Officers of the Banks should not behave like property dealers and dispose of the secured assets in any unreasonable or arbitrary manner in flagrant violation of the statutory provisions.

52. In the instant case, it is an admitted fact that as per the direction of this Court in W.P.No.6571 of 2009, the borrower had deposited a sum of Rs.25,00,000/-, whereas the outstanding is only Rs.37,00,000/-. The appeal against the order passed in O.A.No.323 of 2004, which gives rise to the sale of the property is still pending before the Debts Recovery Appellate Tribunal. When the balance amount that has to be collected is only Rs.12,00,000/-, without resorting to recover the balance amount from the borrower or even making an attempt towards the same or without waiting for disposal of the appeal, the first respondent has acted in a clandestine manner, which clearly shows the fraudulent intention on the part of the first and second respondents to deprive the valuable right of the petitioner in collusion with respondents 5 to 8.

53. The contention of the respondents 5 to 8 that right of the third party auction purchaser cannot be interfered with on the basis of success or failure of parties to the proceedings, if the auction purchaser had bonafidely purchased the property, cannot be countenanced on the facts and circumstances of this case. The interest of the property, offered as security by the borrower, continues to be protected, till a finality is reached, on the issue of sale and sale certificate. But the Hon'ble Supreme Court in SADASHIV PRASAD SINGH VS. HARENDAR SINGH AND OTHERS [2015 (5) SCC 574] have given an exemption that it can be interfered with in cases where the said purchase substantiated

on the grounds of fraud or collusion.

54. On the facts and circumstances of the case on hand and on the light of Sadashiv Prasad's Case (cited supra) this Court has no hesitation to reject the contention of the respondents 5 to 8 that their right in the property purchased by them by way of public auction, does not extinguish. The other contention of the respondents 5 to 8 also cannot be sustained in view of the fraud and collusion played in the instant sale by manipulating the tender form and withholding the documents by the respondents 1 and 2.

55. Considering the overall facts and circumstances, files, documents contained typed set of papers, filed by all parties, writ petition cannot be dismissed on the ground of non-exhaustion of other remedy available under Rules 60 and 61 of the II Schedule of the Income Tax Rules and the statutory bar pleaded by the respondents 5 to 8 does not stand scrutiny before Law. In deserving cases, this Court can always exercise the extraordinary jurisdiction under Article 226 of the Constitution of India. Contention of the respondents 5 to 8 to the contra is rejected for the reasons recorded in the foregoing paragraphs. Contention of the petitioner that the subject property worth more than Rs.1.5 Crores, whereas it was sold for a song also merits consideration.

56. In a similar circumstances, the Hon'ble Supreme Court in J.RAJIV SUBRAMANIYAN AND ANOTHER VS. PANDIYAS AND OTHERS [Civil Appeal No.3865 of 2014 - decided on 14.03.2014] has observed as follows:

"17. It must be emphasized that generally proceedings under the SARFAESI Act, 2002 against the borrowers are initiated only when the borrower is in dire-straits. The provisions of the SARFAESI Act, 2002 and the Rules, 2002 have been enacted to ensure that the secured asset is not sold for a song. It is expected that all the banks and financial institutions which resort to the extreme measures under the SARFAESI Act, 2002 for sale of the secured assets to ensure, that such sale of the asset provides maximum benefit to the borrower by the sale of such asset. Therefore, the secured creditors are expected to take bonafide measures to ensure that there is maximum yield from such secured assets for the borrowers. In the present case, Mr. Dhruv Mehta has pointed out that sale consideration is only Rs.10,000/- over the reserve price whereas the property was worth much more. It is not necessary for us to

go into this question as, in our opinion, the sale is null and void being in violation of the provision of Section 13 of the SARFAESI Act, 2002 and Rules 8 and 9 of the Rules, 2002. "

57. Therefore, we are of the considered opinion that the sale which had taken place on 18.03.2009 and registered as Document No.1557 of 2009 on the file of Sub-Registrar, Pollachi are null and void and the order dated 29.04.2012 passed in I.A.Nos.654 and 655 of 2013 in R.P.No.47/2008 in DRC No.47/2008 is illegal.

58. In the result, the order impugned in this writ petition is quashed and the writ petition is allowed as prayed for. However, there shall be no order as to costs.

59. The Registry is directed to return the original files to the concerned officer.

Sd/-
Asst.Registrar (CCC)

/true copy/

Sub Asst. Registrar

TK

To

1.The Recovery Officer
Debts Recovery Tribunal
Trichy Road, Coimbatore.

+ 2 cc to M/s.P.Valliappan Advocate,SR.24207

+ 4 cc to M/s.S.Rajmakesh, Advocate,SR.24142

+ 1 cc to M/s.Sampath Kumar Associates, Advocate,SR.23713

W.P.NO.29230 OF 2014

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