IN THE HIGH COURT OF JUDICATURE AT HYDERABAD FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH

****

WRIT PETITION NO.26383 OF 2013

Between:

Ramakanth Inani … Petitioner

and

Madhukar R. Bhangay and others … Respondents

DATE OF JUDGMENT PRONOUNCEMENT: 19th JANUARY, 2018

SUBMITTED FOR APPROVAL:

THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE MS. JUSTICE J.UMA DEVI

1. Whether Reporters of Local newspapers may be allowed to see the judgment? Yes/No

2. Whether copies of the judgment may be marked to Law Reporters/Journals Yes/No

3. Whether His Lordship wishes to see the fair copy of the judgment? Yes/No

SANJAY KUMAR, J

J.UMA DEVI, J

***THE HON'BLE SRI JUSTICE SANJAY KUMAR**
AND
THE HON'BLE MS. JUSTICE J.UMA DEVI

+ <u>WRIT PETITION NO.26383 OF 2013</u>

% DATED 19th JANUARY, 2018

Between:

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and

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<Gist:

>Head Note:

! Counsel for petitioner : Sri Vedula Venkata Ramana and Sri Poosarla Vikram

^Counsel for respondent No.1 : Sri D.V.Seetharama Murty and Sri K.Mohan

^Counsel for respondent Nos.2 to 5 : --

^Counsel for respondent No.6 : Sri M.Narender Reddy and Sri M.Srikanth Reddy

? CASES REFERRED:

1. (2013) 9 SCC 460
2. AIR 1954 SC 349
3. (1990) 4 SCC 90
4. (1996) 5 SCC 705
5. (2004) 1 SCC 287

THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE MS. JUSTICE J. UMA DEVI

WRIT PETITION NO.26383 OF 2013

O R D E R
(*per* Justice Sanjay Kumar)

Challenge in this writ petition is to the order dated 22.05.2013 passed by the Debts Recovery Appellate Tribunal, Mumbai, in M.A.No.142 of 2010, holding for the Debts Recovery Appellate Tribunal, Chennai. A consequential direction is sought to uphold the auction sale in favour of the petitioner.

By order dated 20.09.2013, this Court directed the parties to maintain *status quo* with regard to the property in question. This direction was continued until further orders on 04.02.2014.

Heard Sri Vedula Venkata Ramana, learned senior counsel representing Sri Poosarla Vikram, learned counsel for the petitioner; Sri D.V.Seetharama Murthy, learned senior counsel appearing for Sri K.Mohan, learned counsel for the first respondent; and Sri M.Narender Reddy, learned senior counsel appearing for Sri M.Srikanth Reddy, learned counsel for the State Bank of India, the sixth respondent.

The facts, to the extent relevant, are as follows: The second respondent company obtained a working capital loan to the tune of Rs.3,79,00,000/- from the State Bank of India. Pursuant to the guarantee offered by him for this loan, the first respondent mortgaged Plot No.623/3 admeasuring 1593 square yards in Survey No.40/1 of Shaikpet Village, presently Jubilee Hills, Hyderabad, as security therefor. Default having been committed in repayment of this loan, recovery proceedings in O.A.No.123 of 1997 were initiated by the bank before the Debts Recovery

Tribunal, Hyderabad, for recovery of Rs.1,78,48,687.80 ps., with interest thereon, against, amongst others, the third, fourth and fifth respondents, directors of the second respondent company, and also the guarantor for the loan, the first respondent herein. Despite service of notice, respondents 1 to 5 herein failed to contest the said O.A. By *ex parte* final order dated 14.05.1999, the Tribunal allowed the O.A. and Recovery Certificate dated 20.03.2002 was issued pursuant thereto, for a sum of Rs.4,69,51,295.80 ps. R.P.No.33 of 2002 was then filed by the bank for realization of these dues and a proclamation of sale, under Rule 52(2) of the Second Schedule to the Income Tax Act, 1961 (for brevity, 'the Act of 1961'), was published in the newspaper on 05.12.2002. In terms of this proclamation, the auction was conducted on 09.01.2003, wherein the petitioner was declared the highest bidder at Rs.82,00,000/- for the first respondent's plot of land. On the same day, the petitioner paid 25% of the sale consideration along with 1% poundage, aggregating to Rs.21,32,000/-, to the Recovery Officer.

The petitioner claims that he and his family members visited the subject plot on 10.01.2003 and found that a board had been erected thereon, purportedly by the Hyderabad District Collector, claiming that title to the land was in dispute in Land Grabbing Case No.1 of 2003. The petitioner thereupon addressed letter dated 15.01.2003 to the Recovery Officer and requested him to issue appropriate clarification as to whether there was a cloud on the title to the said plot. The Recovery Officer failed to give a clarification and the petitioner issued reminder letter dated 23.05.2003 requesting him again to give a clarification in terms of the earlier letter dated 15.01.2003. It was only on 05.08.2003 that the Recovery Officer issued a notice calling upon the petitioner to pay the balance sale consideration, failing which the sale would be cancelled. On 18.09.2003, the Recovery Officer *suo motu* directed the petitioner to pay the balance sale consideration of Rs.61,50,000/- on or before 16.10.2003. The petitioner then paid the said amount, duly acknowledged by the Recovery Officer under receipt dated 13.10.2003. This amount was accepted by the Recovery Officer subject to the outcome of L.G.C.No.1 of 2003 pending before the Special Court constituted under the Andhra Pradesh Land Grabbing (Prohibition) Act, 1982. Further, by order dated 23.06.2004, the Recovery Officer accepted the request of the petitioner and permitted him to retain security at the subject plot at his own cost. He further informed the petitioner that the order of confirmation of sale would be issued after disposal of L.G.C.No.1 of 2003. Thereafter, the petitioner filed W.P.No.7814 of 2005 before this Court in relation to L.G.C.No.1 of 2003 and secured interim order dated 11.04.2005, staying further proceedings therein.

While so, on 19.03.2006, the first respondent filed M.P.No.11 of 2006 before the Recovery Officer, Debts Recovery Tribunal, Hyderabad, under Rules 57 and 58 of the Rules in the Second Schedule to the Act of 1961 (for brevity, 'the IT Rules') to set aside and/or cancel the auction sale dated 09.01.2003. By order dated 05.06.2009, the Recovery Officer dismissed the said petition as time barred. Aggrieved thereby, the first respondent filed an appeal in R.A.No.3 of 2009 before the Debts Recovery Tribunal, Hyderabad. The Tribunal allowed the said appeal *vide* order dated

23.12.2009. Perusal of the said order demonstrates that the following points were framed for consideration by the Tribunal:

1. Whether the Auction dated 9.1.2003 is liable to be set aside?
2. Whether the Appellant has filed MP.No.11 of 2006 within the period of limitation?
3. To what relief?

On the first point, the Tribunal held that the sale held on 09.01.2003 was a complete nullity as the Recovery Officer had no power to extend time for deposit of the balance sale consideration. On the second point, the Tribunal opined that the limitation prescribed under Rule 61 of the IT Rules was not relevant as there was no sale at all, as the sale proceedings dated 09.01.2003 were *non est* in law, and the question of asking for setting aside the sale did not arise. Consequently, the Tribunal allowed R.A.No.3 of 2009 setting aside the order dated 05.06.2009 passed in M.P.No.11 of 2006 in R.P.No.33 of 2002 in O.A.No.123 of 1997 and also the sale dated 09.01.2003 held by the Recovery Officer. In its summation, the Tribunal cited the following reasons for allowing the appeal:

(i) as the title of the subject property was not clear and no sale could have been conducted in relation thereto;

(ii) as the auction purchaser failed to deposit the balance 75% of the sale consideration within fifteen days from the date of the auction sale;

(iii) as the auction sale was knocked down in favour of the individual auction purchaser and not in favour of the individual auction purchaser and his family; and

(iv) as the limitation prescribed under Rule 61 of the IT Rules would not apply as the first respondent was not asking for setting aside the sale on the ground of any material irregularity but on the ground that it was null, void and *non est* in the eye of law.

Aggrieved by the allowing of R.A.No.3 of 2009, the petitioner herein filed M.A.No.142 of 2010. This appeal was filed before the Debts Recovery Appellate Tribunal, Chennai, but it was transferred to and heard by the Debts Recovery Appellate Tribunal, Mumbai. By order dated 22.05.2013, the Appellate Tribunal rejected the petitioner's appeal primarily on the ground that he had failed to deposit the 75% balance consideration within the time prescribed. It is this order which is presently subjected to challenge.

Sri Vedula Venkata Ramana, learned senior counsel, would advance the following arguments:

(i) The proper remedy of the first respondent to seek setting aside of the sale was not a petition under Rules 57 and 58 of the IT Rules. A petition to set aside an auction sale could be filed only under Rule 61 of the IT Rules and the limitation prescribed therefor is thirty days from the date of the sale. M.P.No.11 of 2006 was therefore not maintainable.;

(ii) In any event, Rules 57 and 58 of the IT Rules should be treated as directory and not mandatory in as much as no consequence is provided for violation thereof and any infraction of the procedure prescribed thereunder would not vitiate the sale;

(iii) The first respondent was not entitled to seek indulgence three years after the sale and all the more so, when the loan had not even been liquidated. Therefore, relief ought not to have been granted to him by nullifying the sale;

(iv) The order dated 18.09.2003 passed by the Recovery Officer *suo motu* extending time for making payment of the balance 75% of the sale consideration was never subjected to challenge and the amount payable thereunder was remitted within time. This aspect was lost sight of by both the Tribunals;

(v) The order dated 18.09.2003 passed by the Recovery Officer was in the nature of a consent order and therefore, in the absence of a challenge, no inference could be drawn that it was not legal; and

(vi) The reasoning of the Debts Recovery Tribunal, Hyderabad, in R.A.No.3 of 2009 in M.P.No.11 of 2006 in R.P.No.33 of 2002 in O.A.No.123 of 1997 is fallacious and contrary to the spirit of the rules.

He would further contend that the understanding and construction of Rule 57(1) and 2 of the IT Rules by both the Tribunals is incorrect. He would assert that Rule 57(2) is directory in nature. He would point out that the Tribunals did not even set aside the order dated 18.09.2003, whereby the Recovery Officer *suo motu* extended the time for the petitioner to pay the balance sale consideration. He would submit that there is no clear finding as to maintainability of M.P.No.11 of 2006 filed under Rules 57 and 58 of the IT Rules. He would point out that unless the sale is set aside, be it on the ground of a material irregularity or on the ground that it is void, it would not come to naught automatically, and therefore, an application necessarily had to be filed by the aggrieved party under Rule 61 of the IT Rules to set it aside. As no such application was ever filed, the learned senior counsel would contend that it was not open to the Tribunals to assume jurisdiction for setting aside the sale, when the Recovery Officer had dismissed the petition on a different ground altogether, *viz.*, that extension of time granted to make the balance payment under order dated 18.09.2003 was within the knowledge of the first respondent and that the sale was conducted on 09.01.2003, despite which the petition was filed only on 27.03.2006, long after the limitation period prescribed in Rule 61 of the IT Rules. Further, he would contend that as Rules 57 and 58 of the IT Rules are only declaratory and do not provide any remedy for an aggrieved party to seek setting aside of the sale thereunder, no jurisdiction is conferred under these provisions to do so, but losing sight of this aspect, both the Tribunals did so. He would also contend that as no steps were taken to assail the order dated

18.09.2003, the first respondent is deemed to have acquiesced with the same and waived his right to object thereto.

Per contra, Sri D.V.Seetharama Murthy, learned senior counsel, would point out that no warranty is ever offered by a secured creditor in relation to any auction sale and merely because a clarification was sought with regard to the pending land grabbing case, the same was not a valid excuse for the petitioner to fail to pay the balance sale consideration in terms of the relevant rules. Learned senior counsel would point out that in the event the petitioner had any apprehension as to marketability of the subject property, he could have sought dissolution of the sale under Rule 62 of the IT Rules, on the ground that there was no saleable interest in the property. Without doing so, a novel mechanism was adopted by asking for a clarification thereby putting off compliance with the mandatory temporal stipulation. Learned senior counsel would further point out that the scheme of a sale under the IT Rules is in *pari materia* with the scheme of a sale in execution proceedings under Order 21 Rules 85 and 86 CPC, which is also mandatory, and in the event of violation of such procedure, there is no sale at all and no order is required to be passed holding to that effect. Learned senior counsel would further point out that in so far as the *ex parte* final order in O.A.No.123 of 1997 is concerned, a petition to set aside the same was filed, along with I.A.No.525 of 2004 to condone the delay in filing the same and the said application was allowed and the set aside petition which was then numbered as M.A.No.49 of 2006 is posted on 18.01.2018. Learned senior counsel would further point out that the plea of acquiescence and waiver were never raised, either before the

Tribunal, the Appellate Tribunal or even before this Court, in the pleadings. He would also point out that the order dated 18.09.2003 demonstrates that no notice was given to his client and only the bank and the petitioner, being the highest bidder, were heard in the matter. In any event, *per* the learned senior counsel, the question of extension of time would arise only if a valid sale had taken place but once the mandate of the IT Rules was violated, there was no sale at all in the eye of law. The question of extension of time therefore did not arise, according to the learned senior counsel, and he would submit that though it is now asserted that the Recovery Officer *suo motu* extended time under the order dated 18.09.2003, the implicit request made by the petitioner in that regard is evident from the letters dated 15.01.2003 and 23.05.2003. He would further assert that the application in M.P.No.11 of 2006 was to sensitize the Recovery Officer as to the mistake committed by him in terms of Rules 57 and 58 of the IT Rules. He would submit that there is no need to challenge a void order and therefore, the extension order dated 18.09.2003 was not required to be independently subjected to challenge. He would state that the prayer in the said M.P. was to cancel/set aside the auction sale dated 09.01.2003 but the framing of this prayer would not bring it within Rule 61 of the IT Rules. He would further assert that the statutory scheme indicates that finality must attach to the orders of the Tribunal/Appellate Tribunal and only judicial review would be permitted of such orders under Article 226 of the Constitution, but the petitioner is practically asking this Court to sit in appeal over the order of the Appellate Tribunal by way of this writ petition.

Sri M.Narender Reddy, learned senior counsel, would state that the bank is supporting the petitioner. He would state that the first respondent did not even cite any prejudice having been caused to him in M.P.No.11 of 2006 and as he never disputed his liability in the capacity of a guarantor, he could not seek nullification of the sale of his property on a technical ground. He would further point out that the delay on his part in taking steps, in as much as he filed the subject petition only three years after the auction sale, should be treated as fatal to even consider his plea. Learned senior counsel would point out that the provisions of the Code of Civil Procedure, 1908 have no application to proceedings under the Recovery of Debts Due to the Banks and Financial Institutions Act, 1993 (for brevity, 'the Act of 1993') in the light of Section 22(1) thereof and therefore, reliance placed by Sri D.V.Seetharama Murthy, learned senior counsel, on case law pertaining to Order 21 Rules 85 and 86 CPC is misconceived. He would further point out that the first respondent was aware of every aspect of the matter throughout but did not choose to take steps till 2006. He would reiterate that the absence of challenge to the extension order dated 18.09.2003 passed by the Recovery Officer is fatal to the claim put forth by the first respondent.

Sri D.V.Seetharama Murthy, learned senior counsel, would submit that as the bank is supporting the petitioner, he would be entitled to rebut the arguments put forth by Sri M.Narender Reddy, learned senior counsel, and point out that the question of prejudice would not at all apply in the case on hand as there is a clear illegality which goes to the root of the matter, *viz.*, the auction sale held on 09.01.2003.

In his reply, Sri Vedula Venkata Ramana, learned senior counsel, would assert that the power of the Recovery Officer or the Tribunal to set aside the sale is traceable only to Rule 61 of the IT Rules and therefore, Rules 57 and 58 of the said Rules had no role to play. As only a competent forum can set aside an auction sale already held, be it on whatever ground, the application filed by the first respondent could not be entertained and only a petition under Rule 61 of the IT Rules could have been maintained to set aside such a sale. Once such an application was not made, neither the Recovery Officer nor the Tribunals thereafter could have exercised jurisdiction under a rule which was never invoked. He would submit that the application in M.P.No.11 of 2006 was therefore not an application in the eye of law. He would point out that the powers of the Recovery Officer are set out in Section 28 of the Act of 1993 and he necessarily had to act within the four corners of the statutory provision and if he failed to do so, it would not mean that an appeal would lie to the Tribunal as the Recovery Officer could have been asked to resell the property straightaway. *Per* the learned senior counsel, the three years delay in seeking such a remedy was never explained and he would assert that it would be a travesty of justice to allow a party to come forward at his own convenience, irrespective of compulsory time stipulations, to seek setting aside of completed and concluded actions on the ground that such an action is a nullity in the eye of law.

In the light of the rival contentions urged by the three learned senior counsel, set out hereinabove, the following points arise for consideration:

(1) Whether the recovery officer was entitled to extend the time for payment of the balance sale

consideration of 75%, under his order dated 18.09.2003, in the scheme of Rules 57 and 58 of the IT Rules?

(2) If not, whether the said order required to be challenged independently?

(3) If the sale held on 09.01.2003 was a nullity in the eye of law, whether the same required to be set aside by way of an appropriate application under Rule 61 of the IT Rules?

(4) If so, whether the application filed by the first respondent under Rules 57 and 58 ought not to have been entertained?

(5) Whether the delay on the part of the first respondent in filing the said application only in the year 2006 would be fatal to his claim?

In terms of Section 29 of the Act of 1993, the sale of an asset under the said enactment has to be in accordance with the procedure prescribed in Part III of the IT Rules. Rules 52 to 54 therein deal with the proclamation of sale, the contents and mode of making thereof. Rule 55 deals with the time of sale while Rule 56 provides that the sale should be by public auction to the highest bidder, subject to confirmation by the Recovery Officer. Rules 57 and 58 are crucial for the purpose of this case and read as under:

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

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

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

Rule 60 relates to an application to set aside the sale of immovable property on deposit. Rule 61 deals with an application to set aside the sale of immovable property on the ground of non-service of notice or irregularity and also requires extraction:

'**61. Application to set aside sale of immovable property on ground of non-service of notice or irregularity**.—Where immovable property has been sold in execution of a certificate, such Income-tax Officer as may be authorised by the Chief Commissioner or Commissioner in this behalf, the defaulter, or any person whose interests are affected by the sale, may, at any time within thirty days from the date of the sale, apply to the Tax Recovery Officer to set aside the sale of the immovable property on the ground that notice was not served on the defaulter to pay the arrears as required by this Schedule or on the ground of a material irregularity in publishing or conducting the sale:

Provided that—

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

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

Rule 62 empowers the purchaser to apply to the Recovery Officer to set aside the sale within thirty days of the sale on the ground that the defaulter had no saleable interest in the property sold. Rule 63 deals with confirmation of the sale and states to the effect that where no application is made for setting aside the sale under the foregoing rules or where such an application is made and disallowed, the Recovery Officer shall, if the full amount of the purchase money is paid, make an order confirming the sale, and thereupon, the sale shall become absolute.

Bare perusal of Rule 57(1) demonstrates that the person declared to be the purchaser is required mandatorily to pay, immediately after such declaration, 25% of the purchase money and in default of such payment, the property is to be resold. Rule 57(2) mandates that the full amount of purchase money shall be paid by the purchaser to the Recovery Officer on or before the fifteenth day from the date of the sale of the property. There is neither ambiguity nor lack of clarity in the rule that would require any extraneous interpretation or construction being called for.

Rule 58 makes it clear that in default of payment within the period mentioned in Rule 57(1) and (2), the deposit may, if the Tax Recovery Officer thinks fit, be forfeited to the Government and the property should be resold. The defaulting purchaser has to forfeit all claims to the property and to any part of the sum for which it may subsequently be sold.

The issue raised presently and before the Tribunals below was whether the Recovery Officer, in exercise of power under the aforestated rules, could have extended the time for making payment of the balance 75% of the sale consideration by the petitioner.

This issue is no longer *res integra.*

In ***C.N.PARAMASIVAM V/s. SUNRISE PLAZA***[1], this very question fell for consideration before the Supreme Court. That was also a case arising under the Act of 1993. As in the case on hand, an *ex parte* decree was passed in the OA instituted by the bank before the jurisdictional Debts Recovery Tribunal. The property mortgaged with the bank was brought to sale in a public auction. After protracted litigation, the matter came before the Debts Recovery Appellate Tribunal on the question as to whether the rights of *bonafide* purchasers would get curtailed if the *ex parte* decree, on the basis whereof the auction sale was conducted, is

[1] (2013) 9 SCC 460

eventually set aside. The Appellate Tribunal held that the auction purchasers were not *bonafide* purchasers as they were aware of the pending legal proceedings between the bank and the borrower. Aggrieved thereby, the auction purchasers approached the Madras High Court but suffered an adverse order as the High Court, upon examining the validity of the auction, came to the conclusion that the same was void because of non-compliance with the provisions of Rule 57 of the IT Rules. Aggrieved thereby, they went before the Supreme Court. The Supreme Court opined that though Section 29 of the Act of 1993 provided that the Second and Third Schedules to the Act of 1961 shall, as far as possible, apply with necessary modifications, the use of the words 'as far as possible' and 'with necessary modifications' would not have the effect of rendering the provisions of Rule 57 of the IT Rules directory, as the language therein is couched in a manifestly mandatory form. The Supreme Court further observed that use of these expressions in Section 29 was to take care of situations where certain provisions of the IT Rules may have no application on account of the scheme under the Act of 1993 being different from that of the Act of 1961 and the rules framed thereunder. The argument that the use of the words 'as far as possible' in Section 29 of the Act of 1993 is meant to give discretion to the Recovery Officer to apply the said rules or not to apply the same in specific fact situations was accordingly rejected. The Supreme Court confirmed that upon a plain reading of Rule 57, it is clear that the provisions thereunder are mandatory in character as the use of the word 'shall' is both textually and contextually indicative of the making of deposit of the amount being a mandatory requirement. The Supreme Court observed that the provisions of Rules 57 and 58 of the IT Rules have their equivalent in Order 21 Rules 84, 85 and 86 CPC which are *pari materia* in language, sweep and effect. Reference was made to ***MANILAL MOHANLAL SHAH V/s. SARDAR SAYED AHMED SAYED MAHMAD***[2], ***SARDARA SINGH V/s. SARDARA SINGH***[3] and ***BALRAM V/s. ILAM SINGH***[4] which held to the effect that Order 21 Rule 85 CPC being mandatory, its non-compliance renders the sale a complete nullity and upon such non-compliance, there is no sale at all. It was further observed that when there is no sale within the contemplation of the rules, there can be no question of any material irregularity in the conduct of such sale. The argument that the executing Court has inherent power to extend time by reason of even its own mistake was expressly rejected. Drawing inspiration from these judgments and other judgments on the same lines, the Supreme Court observed that it saw no reason to hold that Rules 57 and 58 of the IT Rules were anything but mandatory in nature, so that breach of the requirements under these rules would render the auction *non est* in the eye of law. As regards the rights of a *bonafide* purchaser, the Supreme Court observed that having regard to the view taken as to the validity of the auction itself, the said issue did not require consideration.

In the light of this authoritative edict of the Supreme Court, Point No.1 with regard to the Recovery Officer having the power to extend time, for making payment of the balance sale consideration, is answered in the negative. As affirmed by the Supreme Court, even the executing Court under Order 21 Rule 85 CPC, a provision in *pari materia* with Rule 57 of the IT Rules, has no inherent

[2] AIR 1954 SC 349
[3] (1990) 4 SCC 90
[4] (1996) 5 SCC 705

power to extend the time even if it was at fault, having made a mistake with regard to quantification of the amount to be paid (See ***BALRAM***[4]). Therefore, the recovery officer had no power or jurisdiction to extend the time under Rule 57(2) of the IT Rules for making payment of the balance sale consideration. The order dated 18.09.2003 passed by him was therefore *non est* in the eye of law.

In consequence, the sale held on 09.01.2003 was 'no sale at all' and was *non est* in the eye of law. Being a nullity, the sale did not require to be set aside under Rule 61 of the IT Rules. The said rule only deals with a sale which is otherwise valid, but for a material irregularity which may or may not vitiate the same. However, when the sale is *non est* in the eye of law and is 'no sale at all', the question of alleging any material irregularity would not arise, as pointed out in ***C.N.PARAMASIVAM***[1], basing on earlier precedents. Be it noted that even in ***C.N.PARAMASIVAM***[1], no application had been filed under Rule 61 of the IT Rules to set aside the sale but despite the same, the Supreme Court held it to be *non est* in the eye of law. As pointed out in ***RAFIQUE BIBI V/s. SAYED WALIUDDIN***[5], a distinction must be made between complete lack of jurisdiction and mere irregularity of procedure.

In the case on hand, the judgment of the Supreme Court in ***C.N.PARAMASIVAM***[1] puts it beyond doubt that the order dated 18.09.2003 extending the time for payment of the balance sale consideration was without jurisdiction and was therefore a nullity in the eye of law. In consequence, non-compliance with Rule 57(2) of the IT Rules stood established and the sale held on 09.01.2003 was no sale at all. The question of asking for it to be set aside therefore did not arise. The said sale, being a nullity, could be

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[5] (2004) 1 SCC 287

declared to be such in any collateral proceeding and did not require a separate application to hold it to be so. Therefore, the question of filing an application under Rule 61 of the IT Rules did not arise at all as the said rule is only for assailing a material irregularity tainting a sale and not a sale which is void in its inception. Point Nos.2 and 3 are therefore answered in the negative, as the null and void order dated 18.09.2003 would not mature into a valid one by mere passage of time.

The point as to whether the first respondent could have maintained an application under Rules 57 and 58 of the IT Rules therefore pales into insignificance. As the sale itself was a nullity in terms of the mandate of the rules and the said application was only filed to sensitise the Recovery Officer on this aspect of the matter, it was maintainable as the sale itself was *non est* in the eye of law and was 'no sale at all' but the Recovery Officer had held it to be so by exercising jurisdiction which he lacked and extended the time for making the deposit of the balance sale consideration, contrary to the rule. Point No.4 is accordingly answered in favour of the first respondent and against the petitioner.

As regards the delay on the part of the first respondent in filing M.P.No.11 of 2006, it may be noted that the order dated 18.09.2003 manifests that only the bank and the highest bidder, the petitioner herein, were heard before extension of time was granted. No material is placed before this Court to infer that the first respondent had notice of such extension of time in violation of the statutory mandate. The first respondent claimed that he came to know of the same only at the time of filing the petition under Rules 57 and 58 of the IT Rules. In the absence of any material to counter this claim on his part, no delay or laches can be imputed to him. Further, as already pointed out, a null and void auction which is 'no sale at all' would not mature like fine wine and attain validity.

Be it viewed from any angle, this Court finds no reason to interfere with the order dated 22.05.2013 passed by the Debts Recovery Appellate Tribunal, Mumbai, in M.A.No.142 of 2010.

The writ petition is therefore devoid of merit and is accordingly dismissed. S*tatus quo* orders shall stand vacated. Pending miscellaneous petitions, if any, shall also stand dismissed. No order as to costs.

SANJAY KUMAR, J

J. UMA DEVI, J

19th JANUARY, 2018

<u>Note:</u> L.R. copy to be marked
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