

R.M. AMBERKAR
(Private Secretary)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.

WRIT PETITION NO. 423 OF 2019

Sapana Charudatt Ranadive

.. Petitioner

Versus

The Asst. Commissioner of Income Tax
17(3), Mumbai & Ors.

.. Respondents

.....

- Mr. Rohan Deshpande i/by Ms. Alisha Pinto for the Petitioner
- Mr. Anil Singh, Addl. Solicitor General a/w Abhay Ahuja and Sangeeta Yadav i/by Mr. P.C. Chhotaray for Respondent Nos. 1 and 2
- Mr. Prashant Govind. Karande for Respondent Nos. 4 to 8

.....

**CORAM : AKIL KURESHI &
S.J. KATHAWALLA, JJ.**

Reserved on : JULY 15, 2019.
Pronounced on : JULY 23, 2019.

JUDGMENT (Per Akil Kureshi, J.)

1. The petitioner has challenged a sale proclamation dated 21.1.2019 issued by the Tax Recovery Officer, Mumbai as also a notice dated 23.1.2019 issued by the Income Tax Department advertising public auction for sale of various

immovable properties in a local newspaper.

2. Brief facts are as under:-

Petitioner is an individual. She is the granddaughter of late Mr. Sudhir L. Hendre and Mrs. Manik Sudhir Hendre. The grandparents of the petitioner were the original assesses (hereinafter to be referred to as the "assesseees"). The Income Tax Department has raised sizable tax dues of the said assesses in relation to the assessment years 1974-75 to 1999-00. Mr. Sudhir L. Hendre expired on 3.3.2003. His wife Manik S. Hendre expired on 5.7.2008. According to the petitioner, the said assesses had died intestate. Their properties, therefore, would devolve by intestate succession as per governing laws. The deceased couple had left behind one daughter and two sons. Both the sons predeceased the petitioner's grandparents. The daughter is still alive. The petitioner is a daughter of Jagdish S. Hendre, one of the sons of the assesseees who died on 23.11.1977. The petitioner, therefore, claims her share in the properties left behind by the said assesses as daughter of a predeceased son.

3. It appears that the said assesses had left behind six immovable properties, some of them are tenanted. Five out of six properties were placed under attachment by the Income Tax Department for unpaid dues on 19.8.1997. The sixth one was attached on 2.4.1997. The Income Tax Department received the rent of the tenanted properties after the same were placed under attachment. However, such rent was meager and would not cover even a small portion of sizable tax dues of the assesses. The Income Tax Department, therefore, initiated further steps for auctioning the immovable properties for recovery of income tax dues. Most of the heirs appeared to have given their consent for auctioning the said immovable properties. The petitioner herself on 23.1.2019 wrote to the Tax Recovery Officer and gave her consent as under:-

"1. In respect to your letter dated 28.11.2018 in respect to Auction of properties of Deceased assesses (**Late Shri. S.L. Hendre & Late Smt. M.S. Hendre**) for recovery of outstanding dues, we have already given our consent by letter dated 7th September, 2018.

We further give our consent to the same for auction of properties for recovery of outstanding dues of Deceased assesses (Late Shri. S.L. Hendre & Late Smt. M.S. Hendre).

2. In respect to point no. 2 of your letter dated 3.1.2019 there is calculation of huge amount of interest charged under 220(2).

We humbly request you to not charge the interest as the said properties of deceased assesses have remained been attached by I.T. Department from the year 1997 till date in accordance with the minutes of order dated 14.1.1998 passed in Cri. Writ Petition No. 1145 of 1997 and thereafter the I.T. Department has been collecting rent and holding properties under attachment till date.

3. In respect of point 3 of your letter dated 3.1.2019 we have annexed the NO Dues certificate issued by the TRO Central dated 23.3.1984 which clearly mentions of having NO DUES of deceased assesses till that date which is a letter issued by your department and hence does not require any further support or evidence in this subject.

In view of the aforesaid para's 2 and 3, we humbly request your good office to look into the subject matter sympathetically and verify your records and revise the principal demand."

Subsequently, the Income Tax Department issued the impugned sale proclamation dated 21.1.2019 and published the auction notice in the daily newspaper on 23.1.2019 inviting bidders to participate in the auction of the said immovable properties. At that stage, by filing the present petition, the impugned action of the Department is challenged on various grounds including that:-

- (i) The Department had seized jewellery of the deceased assesses which is still in the possession of the Department.

The same is not accounted for;

- (ii) The rent of the tenanted properties is being recovered by the Department since attachment. Said rent is also not accounted for;
- (iii) The Department has not given any break-up of the outstanding dues without which it is not possible for the petitioner and other heirs of the deceased assesses to verify the tax dues;
- (iv) The Department itself had issued 'no due certificate' on 23.3.1984 which would imply that till such date, the deceased had no tax dues and lastly,
- (v) The sale proclamation is hit by period of limitation prescribed in Rule 68B of the Second Schedule to the Income Tax Act, 1961 ("the Act" for short).

4. We have heard the learned counsel for the parties at considerable length on the fundamental question of sale proclamations being barred by limitation as prescribed in Rule 68B of the Schedule II. In view of our answer to this issue, we have not examined the petitioner's other grievances leaving it open to be urged in future if need so arises.

5. In the context of such facts, learned counsel for

the petitioner took us extensively through the provisions contained in Schedule II referring to recovery of unpaid tax. In particular, our attention was drawn to Rule 68B which was inserted by the Finance Act, 1992 w.e.f. 1.6.1992. It was contended that this rule permits sale of immovable property for recovery of unpaid taxes only within three years from the date of order giving rise to the tax dues, after which, the sale of immovable property would not be permitted. Learned counsel had relied on the objects behind insertion of the said rule and the notes on clauses explaining the said provision contained in the Finance Bill of 1992 in support of his contention. Learned counsel had also relied on the following decisions:-

- (i) **M.U. Joshi Vs. Tax Recovery Officer & Ors.**¹;
- (ii) **Noorudin Vs. Tax Recovery Officer**²;
- (iii) **V. Rajendran Vs. Tax Recovery Officer**³

Learned counsel submitted that the petitioner had not given unconditional consent to the sale of immovable properties. In any case, there cannot be any estoppel against law. When the action of the Department had exfacie become time barred, merely because the petitioner did not raise such

1 [2006] 281 ITR 289 (Bom)

2 [2001] 251 ITR 357

3 [2000] 246 ITR 812

a ground earlier, would not permit sale of the property in defiance of the statutory provision.

6. On the other hand, learned counsel for the Department opposed the petition contending that the petitioner had consented to the sale of immovable properties in question. She now cannot challenge the action of the Department. Even otherwise, Rule 68B would not debar the Department's action. Learned counsel relied on following decisions:-

- (i) **Rajiv Yashwant Bhale Vs. Pr. CIT (Bom)**⁴;
- (ii) **Sanjay Khetan Vs. CIT**⁵

7. Relevant facts are not in dispute. The immovable properties belong to the grandparents of the petitioner. The immovable properties put to sale were placed under attachment in April 1997 and August 1997. No further or fresh attachment orders have been passed. The short question is can such properties be put to auction in the year 2019 in face of Rule 68B of IInd Schedule to the Act. Chapter XVII of the Act pertains to collection and recovery of tax. Part D of the Chapter pertains to collection and recovery.

⁴ [2018] 401 ITR 408 (Bom)

⁵ [2004] 266 ITR 453

Section 220 contained in this part contains provision as to when the assessee would be deemed to be in default of payment of tax. Section 222 of the Act pertains to certificate to Tax Recovery Officer. Sub-section (1) of Section 222 provides that when an assessee is in default or is deemed to be in default in making payment of tax, the Tax Recovery Officer may draw up a statement in the prescribed form specifying the amount of arrears due from the assessee and shall proceed to recover the amount so specified by one or more of the modes mentioned in clauses (a) to (d) thereof in accordance with the rules laid down in IIInd Schedule. One of these modes is attachment and sale of the assessee's immovable property.

8. Schedule II to the Act pertains to the procedure for recovery of tax. The Schedule contains detail rules for recovery of unpaid taxes through various modes envisaged in sub-section (1) of Section 222 of the Act. Part III of Schedule II pertains to attachment and sale of immovable property. Rule 48 contained in the said part provides that attachment of the immovable property of the defaulter shall be made by

an order prohibiting the defaulter from transferring or charging the property in any way and prohibiting all persons from taking any benefit under such transfer or charge. Under Rule 49, a copy of the order of attachment shall be served on the defaulter. As per Rule 50, the order of attachment shall be proclaimed at some place on or adjacent to the property attached. Rule 51 provides that where any immovable property is attached under the said Schedule, the attachment shall relate back to, and take effect from the date on which the notice to pay the arrears was served upon the defaulter. Sub-rule (1) of Rule 52 provides that the Tax Recovery Officer may direct that any immovable property which has been attached, or such portion thereof as may seem necessary to satisfy the certificate, shall be sold. Rule 53 pertains to contents of proclamation. This Rule requires proclamation of sale of immovable property and various details including the details of the property to be sold and the reserve price if any below which the property may not be sold. Rule 55 provides that no sale of immovable property under Schedule II shall, without the consent in writing of the defaulter take place until after the expiration of at least

thirty days calculated from the date on which a copy of the proclamation of sale has been affixed on the property or in the office of the Tax Recovery Officer, whichever is later. Rule 56 provides that the sale would be by public auction to the highest bidder and shall be subject to confirmation by the Tax Recovery Officer. Proviso to Rule 56 provides that no sale under the said Rule shall be made if the amount of the bid offered by the highest bidder is less than the reserve price, if any, specified under clause (cc) of Rule 53.

9. In terms of sub-rule (1) of Rule 57, upon sale of immovable property, the person declared to be the purchaser would have to pay immediately after declaration 25% of the purchase money, in default of which, the property would be subject to resale. Under sub-rule (2) of Rule 57, the full amount of purchase money payable by the purchaser would be deposited on or before the 15th day of sale of the property. As per Rule 58, in default of payment within the period mentioned in Rule 57, the Tax Recovery Officer may after defraying the expenses of sale, forfeit the deposit amount to the Government and the property would be

resold. Under sub-rule (1) of Rule 60, the defaulter or any person whose interests are affected by the sale, could at any time within 30 days from the date of the sale of immovable property sold in execution of the certificate apply to the Tax Recovery Officer to set aside the sale on depositing the amount specified under proclamation of sale with interest and for payment to the purchaser, as penalty, a sum equal to 5% of the purchase money. Rule 63 pertains to confirmation of sale. Sub-rule (1) thereof provides that where no application is made for setting aside the sale or whether such an application is made and disallowed, the Tax Recovery Officer shall (if the full purchase money has been paid) make an order confirming the sale and thereupon the sale would become absolute. As per sub-rule (2) of Rule 63 however, where such application is made and allowed and in case of an application to set aside the sale on deposit of the amount and penalty and other charges is made within the time prescribed, the Tax Recovery Officer would make an order setting aside the sale. Under Rule 65, the Tax Recovery Officer would issue a Sale Certificate of the immovable property specifying the property sold and the

name of the person who is declared to be the purchaser.

10. This is broadly the scheme for attachment and sale of immovable property of an assessee in default. Rule 68B which is at the center of the controversy was inserted by the Finance Act, 1992 w.e.f. 1.6.1992 and reads as under:-

"68B.(1) No sale of immovable property shall be made under this Part after the expiry of three years from the end of the financial year in which the order giving rise to a demand of any tax, interest, fine, penalty or any other sum, for the recovery of which the immovable property has been attached, has become conclusive under the provisions of section 245-T or, as the case may be, final in terms of the provisions of Chapter XX:

Provided that where the immovable property is required to be re-sold due to the amount of highest bid being less than the reserve price or under the circumstances mentioned in rule 57 or rule 58 or where the sale is set aside under rule 61, the aforesaid period of limitation for the sale of the immovable property shall stand extended by one year.

(2) In computing the period of limitation under sub-rule (1), the period

—

- (i) during which the levy of the aforesaid tax, interest, fine, penalty or any other sum is stayed by an order or injunction of any court; or
- (ii) during which the proceedings of attachment or sale of the immovable property are stayed by an order or injunction of any court; or

(iii) commencing from the date of the presentation of any appeal against the order passed by the Tax Recovery Officer under this Schedule and ending on the day the appeal is decided, shall be excluded:

Provided that where immediately after the exclusion of the aforesaid period, the period of limitation for the sale of the immovable property is less than 180 days, such remaining period shall be extended to 180 days and the aforesaid period of limitation shall be deemed to be extended accordingly.

(3) Where any immovable property has been attached under this Part before the 1st day of June. 1992, and the order giving rise to a demand of any tax. interest, fine, penalty or any other sum, for the recovery of which the immovable property has been attached, has also become conclusive or final before the said date, that date shall be deemed to be the date on which the said order has become conclusive or, as the case may be, final.

(4) Where the sale of immovable property is not made in accordance with the provisions of sub-rule (1), the attachment order in relation to the said property shall be deemed to have been vacated on the expiry of the time of limitation specified under this rule."

As per sub-rule (1) of Rule 68B, no sale of immovable property would be made after the expiry of three years from the end of the financial year in which the order giving rise to a demand of tax, interest, fine, penalty or any other sum, for the recovery of which the immovable property has been attached, has become conclusive under the

provisions of Section 245-I or Chapter XX of the Act which deals with the appeals and revisions. Proviso to sub-rule (1), however, gives some leverage in case where the immovable property is required to be sold due to the fact that the highest bid is less than the reserve price or where the case falls under Rule 57 or Rule 58 or the same is set aside under Rule 61. In such a case, the period of limitation of sale would stand extended by one year. Sub-rule (2) of Rule 68B provides for exclusion of certain periods while computing the period of limitation. Sub-rule (3) makes special provision for cases where the immovable property is attached before 1.6.1992 and the order giving rise to the demand of tax, interest etc has also become conclusive and final before the said date. In such a situation, the period of limitation as referred to in sub-rule (1) would commence from 1.6.1992. This sub-rule, thus, makes it clear that the limitation provided under sub-rule (1) for sale of immovable property would apply also to the instances of attachment of immovable property and finalization of the tax demand which had occurred prior to 1.6.1992. In such a case, the starting point for computing the period of limitation would be

1.6.1992, that is the date on which the said Rule was inserted. Sub-rule (4) of Rule 68B provides that where the sale of immovable property is not made in accordance with the provisions of sub-rule (1), the attachment order in relation to the said property shall be deemed to have been vacated on the expiry of the time of limitation specified thereunder.

11. The explanatory note explaining the said provision reads as under:-

**"Provision of limitation for the sale of immovable
property attached towards recovery of tax**

53. Section 222 of the Income-tax Act prescribes the modes of recovery of tax from an assessee who is in default in making payment of tax, in accordance with the rules laid down in the Second Schedule to the Income-tax Act. One of the prescribed modes is attachment and sale of the assessee's immovable property. Part III of the Second Schedule to the Income-tax Act contains the rules for attachment and sale of immovable property. No limitation of time had been provided for sale of the immovable property attached towards recovery of tax.

53.1 The recovery provisions without the prescribed time limit of disposal of attached immovable properties had not proved as coercive and deterrent as they should have been

53.2 The Act, therefore, inserts a new rule, i.e rule 68B, in

the Second Schedule to the Income-tax Act to provide a time limit of three years from the end of the financial year in which the order, giving rise to a demand of any tax, interest, fine, penalty or any other sum for the recovery of which the immovable property has been attached, has become conclusive under the provisions of section 245-I or has become final, as the case may be, in terms of the provisions of Chapter XX of the Income-tax Act. The period of three years shall stand extended by one year in certain cases where the sale falls through. Further, certain periods during which the order is stayed by any court, are also to be excluded from the aforesaid period of limitation.

53.3 This amendment takes effect from 1st June, 1992."

12. Appreciating the said Rule in the light of the purpose for which the same was inserted would show that under sub-rule (1), the legislature has now provided for the first time w.e.f. 1.6.1992 a time limit of a period of three years for sale of attached immovable property starting from the end of financial year in which the order giving rise to a demand of tax, interest etc has become conclusive. Sub-rule (4) of Rule 68B provides for the consequences of the immovable property not being sold within such time. As per this sub-rule in such a situation, the attachment order in relation to the said property would be deemed to have been vacated on the expiry of the time limit specified. In the present case, Rule 68B would apply with full force. The

attachment of the said immovable properties was ordered way back in the year 1997. The sale proclamation which was made in February, 2019 was thus, hit by the period of limitation prescribed under such Rule. By virtue of sub-rule (4) of Rule 68B therefore, upon completion of the period of limitation, the attachment would be deemed to have been vacated. The auction sale, therefore, could not have been carried out.

13. The learned single Judge of the Madras High Court in the decision in the case of V. Rajendran (supra) had on similar grounds set aside the sale proclamation making following observations:-

"Though the proclamation of sale was issued prior to March 31, 1996, the sale not having been held pursuant to the proclamation, despite the absence of any order of the court, which prevented the sale being held, no fresh proclamation can now be issued, as none of the circumstances visualized in the proviso to Rule 68B are attracted so as to extend the period.

The relief to be granted to the petitioner has now to be moulded in the light of the circumstances as they are now prevailing. It is not necessary to set aside the impugned proclamation of sale. It is sufficient to give a declaration that the sale not having been held pursuant to the proclamation no further proclamation of sale shall be

issued in respect of the properties which had been attached prior to 1992. It is made clear that the contention of the petitioner that the deceased assessee was not the owner of the property at all is available to the petitioner and that claim is not to be regarded as having been negated by this order. No costs. W. M. P. No. 5504 of 1996 is dismissed."

14. In the case of Noorudin (supra), once again the learned single Judge of the Madras High Court had held as under:-

"The rule appears to be a rigid one. The reason for the rigidity apparently is the need to ensure prompt recovery of the Revenue, by requiring the authorities concerned to take action within the period prescribed and not to tarry or be dilatory. The rule is not one which can be waived by the defaulter. The rule is not one which provides an option to the defaulter or to the Revenue. All parties are bound by the rule. Any sale of immovable property after the limitation prescribed therein would be clearly illegal and void.

A provision which requires the Revenue to act within the period prescribed by law cannot be construed in a manner which would enable the Revenue to act beyond that period unless the Act specifically so provides, especially where, as a result of such inaction on the part of the Revenue, the assessee or the defaulter is entitled to a benefit.

As no fresh proclamation can now be issued, the petitioner is entitled to a declaration that no new proclamation of sale of this property shall be issued pursuant to the certificate on the basis of which the impugned declaration had been issued, as also a declaration that the attachment also is deemed to have been vacated."

15. The Division Bench of this Court in the decision in the case of M.U. Joshi (supra) in reference to Rule 68B of Schedule II had held and observed as under:-

"17. In this view of the matter, in the facts of the case, we are of the opinion that the limitation for sale of the attached immovable property commenced from 15.6.1994 and not from 19.5.1998 as erroneously contended by the revenue. Once it is held that the limitation under Rule 68B commences from 15.6.1994, then, the sale held on 30.3.2004 being beyond the period of limitation prescribed under 68B becomes invalid. The contention of the revenue that the petition suffers from delay is without any merit because, even before the sale was completed the petitioner had raised the point of limitation, but the same was rejected and the sale was confirmed. The writ petition was filed immediately thereafter on 31.5.2004 and, therefore, it cannot be said that the petition suffers from delay.

18. Accordingly, the petition succeeds. The sale of the immovable property held on 30.3.2004 beyond the period of limitation prescribed under rule 68B of the Second Schedule of the I.T. Act is quashed and set aside. We are not expressing any opinion as to whether the said immovable property can be attached again and sold for recovery of the dues, because, that is not an issue raised in this petition. However, we make it clear that setting aside the sale dated 30.3.2004 shall not affect the right of the revenue to recover its dues by adopting such procedure as is permissible in law."

16. Learned Addl. Solicitor General had, however, relied on certain decisions which we may presently deal with.

Reliance was placed on the decision in the case of Rajiv Bhale (supra). In the said case, however, no ratio was laid down contrary to what we have discussed above. The Division Bench had found that the petitioner had filed various proceedings thwarting the settlement proceedings and consequentially recovery of taxes, the Court had held that the orders giving rise to tax demand had not become conclusive. The petitioner, in the opinion of the Court, could not derive benefit of his own wrong. The petition was found liable to be dismissed only on that ground. The Court nevertheless proceeded to examine whether the order passed by the Settlement Commission giving rise to the tax demand can be said to be conclusive. The answer was held against the petitioner. The case, thus, on its facts is different from the present one.

17. Reliance was placed on the decision in the case of Sanjay Khetan (supra). It was a case in which the Division Bench of Allahabad High Court held that Rule 68B inserted w.e.f 1.6.1992 was not retrospective and not applicable in respect of the certificate issued in March 1982 in regard to

earlier arrears. The petition was dismissed with following observations:-

" We are not inclined to exercise our discretion under Article 226 of the Constitution in this case. The total demand as per the sale proclamation is to the tune of Rs. 75,38,000 plus interest and hence we are not inclined to interfere with these admitted recoveries on technical objections. A person who seeks a writ has not only to show violation of law but he has also to show equity in his favour. Hence, even assuming that Rule 68B is in the petitioner's favour, there is no equity in his favour as the demands are on the basis of the assessment years which have become final long ago. An honest man should pay his taxes, instead of relying on technicalities. Hence, we are not inclined to exercise our discretion under Article 226 in favour of a person who refuses to pay his admitted taxes. The petition is dismissed. Interim order is vacated."

The crux of the judgment, therefore is that the Court was not inclined to exercise discretionary writ jurisdiction in favour of the petitioner since in the opinion of the Court, the petitioner failed to show equity in his favour. In the judgment, of course, the Court has observed that Rule 68B of the IInd Schedule would not apply to the certificates issued prior to 1.6.1992. To this extent, we are unable to persuade ourselves to follow the same line. Sub-rule (3) of Rule 68B makes it clear that the limitation prescribed under sub-rule (1) would apply also to past instances, with

necessary modification provided therein which we have already discussed earlier.

18. The consent given by the petitioner to sale the properties will not prevent her from pursuing their petition. Firstly, it was not an unconditional consent. In her letter dated 23.1.2019, she had raised the issue of owner charging of interest and or no-due certificate issued in the past. Her consent was thus subject to these objections. Further, the question of limitation would go to the root of the matter. If the auction was barred by limitation, the Department was prevented by law from carrying out the same.

19. Under these circumstances, we are of the opinion that by virtue of Rule 68B of the IIInd Schedule, the impugned sale proclamation is barred by limitation. The same must be quashed.

20. Under the circumstances, the impugned sale proclamation is quashed. Consequently, the attachment over the immovable properties in question would also be set

aside. Writ Petition is allowed and disposed of.

[S.J. KATHAWALLA, J.]

[AKIL KURESHI, J]