

IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA
* * * *

WRIT PETITION NO.5068 OF 2019

Between:

M/s. Shubham Enterprises ... Petitioner

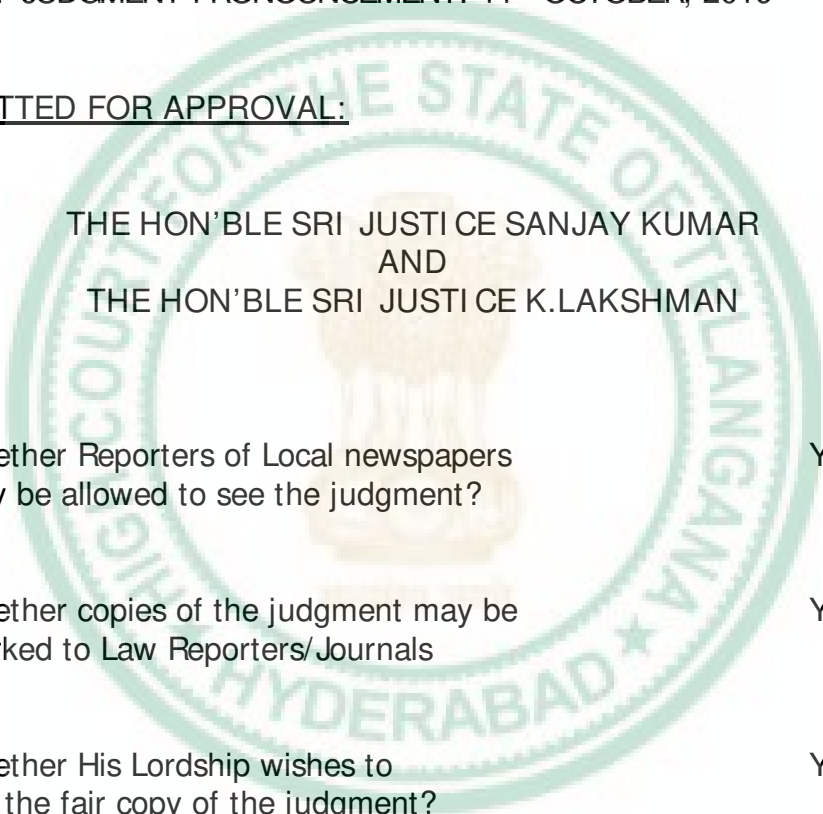
and

K.Srinivas Rao and others ... Respondents

DATE OF JUDGMENT PRONOUNCEMENT: 11th OCTOBER, 2019

SUBMITTED FOR APPROVAL:

THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE SRI JUSTICE K.LAKSHMAN

- 
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

K.LAKSHMAN, J

* THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE SRI JUSTICE K.LAKSHMAN

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Between:

M/s. Shubham Enterprises

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> Head Note:

! Counsel for Petitioner

: Sri P.Sriraghuram and
Smt. A.Satya Sri

^ Counsel for Respondent No.1

: Sri R.Raghunandan Rao and
Sri M.S.Srinivasa Iyyengar

^ Counsel for Respondent No.2

: Sri Peri Prabhakar

^ Counsel for Respondent Nos.3 to 10

: --

CASES REFERRED:

1. (1982) 31 CTR (P&H) 239 = (1983) 141 ITR 54 (P&H)
2. 2012 SCC OnLine Kerala 24927
3. (1969) 71 ITR 277

HONOURABLE SRI JUSTICE SANJAY KUMAR
AND
HONOURABLE SRI JUSTICE K.LAKSHMAN

WRIT PETITION NO.5068 OF 2019

ORDER

(Per Sanjay Kumar, J)

1. By common order dated 05.03.2019, the Debts Recovery Tribunal, Hyderabad (*for brevity*, 'the Tribunal'), allowed Recovery Appeal Nos.03 and 04 of 2014 in R.P.No.512 of 2003 in O.A.No.455 of 2000. Aggrieved thereby, Shubham Enterprises, a partnership firm, the eighth respondent in the said appeals, being the auction purchaser, filed this writ petition seeking a declaration that the said common order was illegal and to set it aside.
2. By order dated 12.03.2019, this Court directed *status quo* obtaining as on that date to be maintained.
3. Heard Sri P.Sriraghuram, learned senior counsel appearing for Smt. A.Satya Sri, learned counsel for the petitioner/eighth respondent; Sri R.Raghunandan Rao, learned senior counsel appearing for Sri M.S.Srinivasa Iyyengar, learned counsel for the first respondent/appellant; and Sri Peri Prabhakar, learned counsel for IndusInd Bank Limited, the second respondent/first respondent.
4. At the outset, we may note that though a common order was passed by the Tribunal, it actually related to two separate appeals. However, the petitioner, in its wisdom, chose to file only one writ petition. The ground cited by it for approaching this Court instead of invoking the statutory appellate remedy available to it was that the Debts Recovery Appellate Tribunal at Kolkata was not sitting, owing to want of a Presiding Officer. Even if so, the petitioner ought to have filed two separate cases and not one.

5. Be that as it may. We proceed to adjudicate on merits.

6. IndusInd Bank Limited (for brevity, 'the bank') secured an *ex parte* order on 25.08.2003 in O.A.No.455 of 2000 on the file of the Tribunal. Recovery Certificate bearing R.P.No.512 of 2003 dated 01.10.2003 was issued in consequence thereof. The demand notice sent on 17.12.2003 by the Recovery Officer of the Tribunal, the tenth respondent herein/ninth respondent in the appeals, was not served upon the first respondent, *viz.*, the Certificate Debtor No.3. No steps were however initiated by the Recovery Officer to effect substituted service of the demand notice by publication thereof, though the bank requested for the same. This aspect is however disputed by Sri P.Sriraghuram, learned senior counsel.

7. The Recovery Officer attached the property, which was the subject matter of the appeals, *vide* Order dated 24.05.2005 passed in M.P.No.23 of 2005. He issued Form-16 dated 07.06.2005 attaching the property belonging to the first respondent, *viz.*, the Certificate Debtor No.3, and on the same day issued the notice of proclamation in Form-17. These forms were also not served upon the first respondent. Proclamation of sale was issued by the Recovery Officer on 09.09.2005 fixing the date of auction as 18.10.2005. In the said auction, the petitioner was declared the highest bidder for Item No.1 property (Plot No.4) with a bid of Rs.2.63 Crore while one Bhagyanagar Metals Limited was declared the highest bidder for Item No.2 property (Plot No.2) with a bid of Rs.2.75 Crore. However, basing on the affidavits filed by the representatives of Bhagyanagar Metals Limited and the petitioner, the Recovery Officer changed the name of the highest bidder for Item No.2 property from Bhagyanagar Metals Limited to the name of the petitioner. This was on 02.11.2005. Thereafter, basing on the Memos filed by the petitioner and the bank, the Recovery Officer passed

an order on 23.11.2005 directing refund of a sum of Rs.93,49,600/-, out of the sale proceeds of Rs.5.38 Crore, to the petitioner towards deficiency in the land area and owing to a high tension wire passing over it. Then, on 25.11.2005, the Recovery Officer set aside the sale on the ground of irregularity in the auction. The petitioner however submitted Memo dated 28.11.2005 to the Recovery Officer in this regard and thereupon, the Recovery Officer set aside the Order dated 25.11.2005 and confirmed the sale held on 18.10.2005. He then issued a Sale Certificate on 05.12.2005.

8. According to the first respondent, he came to know of the recovery proceedings only upon receipt of the caveat filed by the bank in the High Court. He then filed Writ Petition No.966 of 2006 before the High Court questioning the auction proceedings. This writ petition was allowed on 17.01.2007. Aggrieved thereby, the bank and the petitioner approached the Supreme Court *vide* Civil Appeal Nos.1388 and 3389 of 2007. The Supreme Court disposed of these appeals on 27.08.2014, setting aside the order under appeal and granting liberty to the first respondent to approach the jurisdictional Debts Recovery Tribunal under Section 30 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, (now, known as The Recovery of Debts and Bankruptcy Act, 1993) (*for brevity*, 'the Act of 1993'). Thereupon, the first respondent filed Recovery Appeal No.03 of 2014 against the order dated 02.11.2005 passed by the Recovery Officer permitting change of the name of the bidder in relation to Item No.2 property. He also filed Recovery Appeal No.04 of 2014 assailing the Order dated 28.11.2005, whereby the Recovery Officer reviewed his earlier order dated 25.11.2005. These appeals came to be allowed by the common order, presently under challenge.

9. Perusal of the impugned common order reflects that the Tribunal framed the following points for adjudication:

i) Whether the order dated 02.11.2005 changing the name 2nd Lot Bidder from M/s Bhagyanagar Metals Limited to M/s Shubham Enterprises-Respondent No.8 is in accordance with the provisions of Second Schedule of the Income Tax Act, 1961?

ii) Whether the order dated 28.11.2005 passed by the Respondent No.9-Recovery Officer reviewing the earlier dated 25.11.2015 is legal and proper?

iii) To what relief?

10. Considering the first point framed for adjudication, the Tribunal noted that after issuance of the Recovery Certificate dated 01.10.2003 for a sum of Rs.6,44,18,997/-, the Recovery Officer had issued notice of demand dated 27.10.2003 to the first respondent and the other Certificate Debtors. In so far as the first respondent was concerned, the notice was sent to the address specified against his name in the cause title in O.A.No.455 of 2000 filed by the bank. The Tribunal noted that the bank itself filed Memo dated 02.05.2005 before the Recovery Officer seeking substituted service of the demand notice by way of publication in local newspapers. Therein, the bank specifically stated that the notices sent to the Certificate Debtors, other than the first defendant in the O.A., had not been returned and no acknowledgement cards were received. The bank therefore asserted that it was just and necessary that substituted service of the demand notice be ordered by way of publication in any local newspaper. The Tribunal observed that it was a matter of record that the Recovery Officer did not pass any orders upon the aforesaid Memo. Be it noted, the first respondent herein was the third defendant in the O.A.

11. While so, the bank filed M.P.No.23 of 2005 in R.P.No.512 of 2003 in O.A.No.455 of 2000 under Section 19(2) of the Act of 1993 seeking attachment and sale of Plot Nos.2 and 4 situated in Sy.No.124, Gachibowli Village, Serilingampally Mandal, Ranga Reddy District, belonging to the

first respondent. The Recovery Officer thereupon issued Form Nos. 16 and 17 on 07.06.2005, followed by the proclamation of sale, fixing the date of auction as 18.10.2005. The petitioner was declared the highest bidder for Plot No.4, while Bhagyanagar Metals Limited became the highest bidder for Plot No.2. Accepting their bids, the Recovery Officer received 25% of the bid amounts on 18.10.2005 from both of them. On the said date, the bank gave a letter of consent agreeing to forego the value of the land over which high tension wires passed.

12. Bhagyanagar Metals Limited then filed an affidavit on 24.10.2005 stating that the confirmation of sale and the consequential sale certificate may be effected in favour of the petitioner in respect of Plot No.2, stating that it had participated in the auction on behalf of the petitioner. The petitioner also filed an affidavit to the same effect. Basing on these affidavits, the Recovery Officer changed the name of the highest bidder in relation to item No.2 property, viz., Plot No.2. This order was passed on 02.11.2005 and it reads as follows:

"Heard both petitioner and perused the affidavits. Ordered to change the name of the 2nd Lot Bidder as prayed.

Issue Receipt in the name of M/s.Shubham Enterprises for Both Lots.

Call on 18-11-05.

Credit the proceeds of the Draft for the credit of D.R.T. general account."

13. A day prior thereto, i.e., on 01.11.2005, the petitioner had paid the sale consideration for both plots. Adverting to this aspect, the Tribunal noted that Rule 59 of the Second Schedule to the Income-tax Act, 1961 (*for brevity*, 'the Act of 1961'), pertaining to the procedure for recovery, dealt with the authority to bid and Rule 59(2) specifically required a person bidding on behalf of a principal to deposit his authority to do so and in default, his bid had to be rejected. The Tribunal observed that

there was no material placed on record to show that Bhagyanagar Metals Limited had participated in the auction sale held on 18.10.2005 as an agent of Shubham Enterprises, the petitioner, and no authority had ever been produced before the Recovery Officer in that regard. The Tribunal also observed that 25% of the bid amount had been paid by Bhagyanagar Metals Limited itself and not in the professed capacity of being an agent of Shubham Enterprises, the petitioner. Holding that the same was contrary to the procedure contemplated by Rule 59(2) of the Second Schedule to the Act of 1961, the Tribunal answered the first point in favour of the first respondent herein.

14. Dealing with the second point framed for adjudication, the Tribunal noted that the petitioner had filed a Memo on 23.11.2005 seeking refund of a sum of Rs.1,50,24,088/- on the ground that there was a deficiency in the land area to the extent of 2089 square yards. It accordingly sought refund of the sale consideration paid by it on proportionate basis. This Memo reads as under:

"Further, the auction purchaser went the bank and discuss the matter with the higher officials i.e. Senior Vice President and the head asset management and the local bank officials. In that discussion bankers were agreed to refund an amount of Rs.96,42,314/- towards the area admeasuring 1020 square yards at the rate of Rs.7192/- under the High Tension Electrical Cables which comes to Rs.73,35,840/- as they given assurance on the prior to auction on 18-10-2005 and even after deduction 1020 square yards under high tension wires there is deficit of 1069 square yards as per the survey. For the above area the value comes to Rs.76,88,248/- where as the banker agreed to refund 30% of the same which comes to Rs.23,06,474/- and denying an amount of Rs.53,81,773.

In the circumstances, I request the Hon'ble Recovery Office to refund an amount of Rs.1,50,24,088/- towards the deficit land admeasuring 2089 sq. Yards in proportionate rate and the interest of justice and equity."

15. The bank filed a Memo on 23.11.2005 agreeing to refund a sum of Rs.93,49,600/-. This Memo reads as under:

“The applicant bank submits that in response to the request of the purchaser, the applicant bank is willing to waive an amount equivalent to an area not more than 1300 sq.Yards towards providing internal approach road and part of shortfall in measurements if any. This facility is given to the purchaser towards full and final settlement and no more requests may be entertained.

The applicant bank further submits that the amount so foregone being Rs.93,49,600/- is calculated on prorata basis i.e., Rs.7192.00 per sq. Yd x 1300 sq. Yards.”

16. On the strength of the aforestated two Memos, the Recovery Officer passed an order on 23.11.2005 directing refund of Rs.93,49,600/- to the petitioner and placed the matter before the Presiding Officer of the Tribunal for release of the amount. The order dated 23.11.2005 passed by the Recovery Officer reads as follows:

“Taking into consideration of the above facts the auction purchaser gave a representation stating that the available area is 5,399 sq. Yds and unavailable area includes covering high tension wire comes to 2089 sq. Yds and proportionately the auction purchaser claim an amount of Rs.1,50,24,088/-. The Applicant Bank i.e., Indusind Bank gave consent that they are going to forego an amount of Rs.93,49,600/- which included on prorata basis i.e., Rs.7,192/- per sq. yd x 1300 sq.yds.

In view of the above circumstances it is decided that an amount of Rs.93,49,600/- is ordered to be deducted from the sale proceeds of Rs.5.38 crores and the applicant bank is entitled for an amount of Rs.4,44,50,400/- and the auction purchaser is entitled for refund of Rs.93,49,600/-.

Hence, placed before Hon'ble Presiding Officer for release of amount as aforesaid.”

17. However, the Presiding Officer of the Tribunal sought a clarification from the Recovery Officer on the following points:

“a. The Recovery Officer may state under what powers of law the return of Rs.93,49,600/- is permissible?

b. Whether the Sale Proclamation under Rule 53 of the II Schedule to the Income Tax Act, 1961 contains that the price for 2089 square yards will be refundable to the auction purchaser?

c. It is seen that there is an application filed by the Auction Purchaser for refund of amount and Recovery Officer may examine the same in the light of the provisions of Rule 61 of the II Schedule and the background of any irregularity of the conduct of the action.”

18. The Recovery Officer furnished clarifications on 24.11.2005 as under:

- “1. There is no provision for the return of the auction purchase amount. However, the same has been put up for return, in view of the No Objection by the Applicant Bank?
2. The Sale Proclamation does not contain that the price of 2089 square yards will be excluded or refunded to the Auction Purchaser and in the light of the above there is a clear violation of Rule 53 of the Second Schedule to the Income Tax Act.
3. There is no bar for considering the application filed by the Auction Purchaser under Rule 61 of the Second Schedule to the IT Rules as there are serious irregularities in the auction.
4. Submitted to the Hon'ble Presiding Officer.

Sd/-
RECOVERY OFFICER”

19. On the very same day, the Presiding Officer responded as follows:

“The Recovery Officer may if satisfied that there has been serious irregularity in the conduct of the auction pass order that may be deemed fit and proper.

Sd/-
PRESIDING OFFICER”

20. At this stage, the Recovery Officer passed the Docket Order dated 25.11.2005, whereby he set aside the sale under Rule 61 of the Second Schedule to the Act of 1961 and directed refund of the total sale consideration. This order reads as follows:

“In view of the circumstances, there is an irregularity for not mentioning the refund of the amount for 2089 sq.Yards in the proclamation of sale issued under Rule 53 and also as there is no provision for refund of the amount to the auction purchaser, it is necessary to set aside the sale under Rule 61 of the Second Schedule to the Income Tax Act, 1961.

Hence sale is hereby set aside.

Issue Fresh Proclamation of sale under Rule 52(2) of the Second Schedule to the Income Tax, 1961.

Place before Hon'ble Presiding Officer issuing cheque for Rs.5,43,38,020.00 (Rupees Five Crores Forty three Lakhs Thirty Eight Thousand and Twenty only) in favour of the Auction Purchaser Shubham Enterprises.

Sd/-
RECOVERY OFFICER”

21. Thereupon, the petitioner filed Memo dated 28.11.2005 before the Recovery Officer stating as follows:

"We were successful bidders of the above auction and we have paid all amounts within time. The auction was conducted on 18-10-2005 and we were invested huge money and also entered into agreements with the third parties against the said property.

Hence we are requesting the Recovery Officer to permit us to withdraw the memo dt.23-11-2005 and issue sale confirmation and execute the sale certificate in our favour at the earliest."

22. The bank also filed a Memo on the same day consenting to review of the earlier order dated 25.11.2005 passed by the Recovery Officer. Basing on these Memos, the Recovery Officer proceeded to review his earlier order and confirmed the auction in favour of the petitioner, *vide* order dated 28.11.2005. This order reads as follows:

"In view of the above circumstances, it has become just and necessary to review the earlier order under Rule 87 of Second Schedule of the Income Tax, 1961 because of the intention of the Auction Purchaser to withdraw the earlier representation dated 23.11.2005 and to avoid multiplicity of proceedings and the huge public money is involved and to avoid further litigation, it is just and necessary in the interest of public to confirm the sale in favour of the Auction Purchaser.

Accordingly the earlier order dated 25.11.2005 is hereby reviewed and sale conducted on 18.10.2005 for the schedule property i.e. all that land admeasuring 31 guntas bearing Bit No.4 in S.No.124 situated at Gachibowli Village, Lingampalli Revenue Mandal, R.R.Dist and all that land admeasuring 31 guntas bearing Plot No.2 in S.No.124 situated at Gachibowli village, Lingampalli Revenue Mandal, R.R. Dist is hereby confirmed in favour of the Auction Purchaser M/s. Shubham Enterprises."

23. Ostensibly, the above review was undertaken by the Recovery Officer under Rule 87 of the Second Schedule to the Act of 1961. The Tribunal noted this aspect and observed that exercise of review power under Rule 87 could only be when the order suffered on account of any mistake apparent from the record and opined that the review order dated 28.11.2005 was not in accordance with the Rule as it was not even the case of the Recovery Officer that there was any mistaken apparent on the

record. The Tribunal accordingly held in favour of the first respondent on this point also. In the result, the Tribunal allowed both the appeals and granted relief to the first respondent.

24. In the context of the aforestated findings recorded by the Tribunal, Sri P.Sriraghuram, learned senior counsel, would contend as follows:

25. The petitioner had only sought refund of part of the sale consideration on the ground that there was a deficiency in the extent of land actually sold, both in terms of area as well as utilisation value inasmuch as part of the land was covered by high tension wires. Learned senior counsel would contend that the Recovery Officer ought not to have cancelled the sale on the ground that such refund could not be effected and at best, he could have rejected the claim for such refund. However, as the petitioner and the bank submitted Memos withdrawing their earlier pleas with regard to refund of part of the sale consideration, learned senior counsel would contend that the Recovery Officer was fully justified in reviewing his order, as there was a mistake apparent on the record in so far as the earlier order dated 25.11.2005 was concerned. Adverting to the past litigation in Writ Petition No.966 of 2006 and the Civil Appeal Nos.1388 and 3389 of 2007, the learned senior counsel would state that the recovery appeals were filed by the first respondent pursuant to the liberty granted by the Supreme Court. He would however assert that the issue of change of the name of the bidder, *viz.*, from Bhagyanagar Metals Limited to Shubham Enterprises, was not raised before the High Court or thereafter, before the Supreme Court, and therefore, it was not open to the first respondent to file R.A.No.03 of 2014 in relation to this aspect. He would further assert that the Recovery Officer had no *suo motu* power to cancel the sale under Rule 61 of the Second Schedule to the Act of 1961

and therefore, the order dated 25.11.2005 clearly embodied a mistake apparent on the face of the record. Learned senior counsel would conclude by stating that the petitioner paid the entire sale consideration of Rs.5.38 Crore in 2005 itself and therefore, there was no justification for the Tribunal in practically setting aside the sale thirteen years later.

26. *Per contra*, Sri R.Raghunandan Rao, learned senior counsel, would contend that the Tribunal was fully justified in passing the common order under challenge. He would assert that in so far as the change of the bidder's name is concerned, Rule 59(2) is mandatory. He would further state that pursuant to the liberty granted by the Supreme Court, a separate application was also filed under Rule 61 of the Second Schedule to the Act of 1961 to set aside the sale held on 18.10.2005 and that the same is pending consideration before the Recovery Officer. He would also point out that in terms of the order passed by the Supreme Court in Civil Appeal Nos.1388 and 3389 of 2007, the first respondent deposited 50% of the certificate amount along with interest, aggregating to Rs.3,22,09,500/, and again, pursuant to the order dated 01.04.2015 passed by the Supreme Court in Civil Appeal No.3280 of 2015, he deposited a further sum of Rs.2.78 Crore. He would therefore contend that it is not open to the petitioner to claim any equities on the strength of its deposit of the entire sale consideration.

27. It is pertinent to note at this stage that the present *//s* relates only to the validity of the exercise undertaken by the Tribunal in the appeals filed by the first respondent under Section 30 of the Act of 1993 pursuant to the liberty granted by the Supreme Court. Admittedly, the first respondent chose to file a separate application under Rule 61 of the Second Schedule to the Act of 1961 to set aside the auction sale held by

the Recovery Officer on 18.10.2005 and the said application is pending consideration. We therefore do not propose to go into other issues that may arise for consideration in the said application in the context of the validity of the sale held on 18.10.2005. The issue as to whether the notice of demand was served upon the first respondent is also left open. Similarly, we do not propose to go into the issue as to which party is in possession of the plots as on date. We are only concerned with the validity of the orders passed by the Recovery Officer on 02.11.2005 and 28.11.2005, the subject matter of the appeals wherein the impugned common order dated 05.03.2019 came to be passed by the Tribunal.

28. Though Sri P.Sriraghuram, learned senior counsel, would contend that R.A.No.03 of 2014 was not maintainable inasmuch as the first respondent never raised any grievance with regard to the change of name of the bidder, *vide* order dated 02.11.2005 passed by the Recovery Officer, in Writ Petition No.966 of 2006, and therefore, the liberty granted by the Supreme Court ought not to be interpreted to mean that he could enlarge the scope of his challenge thereafter, we are not persuaded to agree. It is no doubt true that this aspect of the matter was not dealt with in the final order dated 16.01.2007 passed in Writ Petition No.966 of 2006 but the liberty granted by the Supreme Court, while disposing of Civil Appeal Nos.1388 and 3389 of 2007 *vide* order dated 27.08.2014, did not limit the scope of the appeals to be filed by the first respondent under Section 30 of the Act of 1993 only to those issues which had been dealt with by the High Court. Further, when the Supreme Court, in its wisdom, relegated the first respondent to the alternative remedy of filing appeals under Section 30 of the Act of 1993 and an application under Rule 61 of the Second Schedule to the Act of 1961, the question of limiting the scope

of such remedies would not arise, unless specifically stated so in the order granting such liberty. We find no such restriction having been put in place by the Supreme Court. The first respondent was therefore entitled to raise all aspects and issues in his appeals under Section 30 of the Act of 1993.

29. As regards the Docket Order dated 02.11.2005, which is the subject matter of R.A.No.03 of 2014, it may be noted that though it may have some impact on the application filed by the first respondent under Rule 61 of the Second Schedule to the Act of 1961, it would still constitute a separate cause of action for filing of an appeal under Section 30 of the Act of 1993. Therefore, the validity of the said order and the adjudication thereon by the Tribunal in R.A.No.03 of 2014 would be amenable to judicial review by this Court in the present writ petition.

30. Section 29 of the Act of 1993 makes the provisions of the Second Schedule to the Act of 1961 and the Income-tax (Certificate Proceedings) Rules, 1962, applicable to the recoveries effected under the Act of 1993. It is on the strength of this statutory provision that the Recovery Officer undertakes sale of properties pursuant to the Recovery Certificates issued by the Tribunal for effecting recovery of the dues of financial institutions. To the extent relevant for the purposes of this adjudication, the scheme of the Second Schedule to the Act of 1961 may now be examined. Rule 4 authorises the Recovery Officer to realise the amount due by attachment and sale of the borrower's immovable property. Rules 48 to 68 B in Part III of the Second Schedule to the Act of 1961 deal with attachment and sale of such immovable property. Rule 52 authorises the Recovery Officer to undertake sale of immovable property which has been attached under Rule 48. Rule 52(2) requires him to cause a proclamation of the intended sale to be made. Rule 54(2) provides for the Recovery Officer undertaking

publication of the proclamation of sale in local newspapers. Rule 56 states that the sale shall be by public auction to the highest bidder and shall be subject to confirmation by the Recovery Officer. Rule 59(2) of the Second Schedule to the Act of 1961 mandates that all persons bidding at the sale should declare whether they are bidding on their own behalf or on behalf of a principal and in the latter case, they have to deposit the authority under which they are bidding for such a principal. In the event of default in doing so, the bid itself is liable to be rejected. Rule 61 provides for an application being made within thirty days from the date of the sale to the Recovery Officer to set aside the sale on the ground that notice was not served on the defaulter to pay the arrears or on the ground of material irregularity in publishing or conducting the sale. Rule 63 provides for confirmation of the sale and states that where no application has been made for setting aside the sale or where such an application, if made, has been disallowed, the Recovery Officer shall, if the full amount of the purchase money has been paid, make an order confirming the sale and thereupon, the sale shall become absolute. Rule 65 states that the Recovery Officer shall issue a Sale Certificate once the sale becomes absolute. Rule 87 falls in Part VI of the Second Schedule to the Act of 1961, titled 'Miscellaneous' and deals with the power of review. It states to the effect that any order passed by the Recovery Officer under the Second Schedule may, after notice to all persons interested, be reviewed by him on account of any mistake apparent from the record.

31. It is in the light of this statutory scheme that the validity of the orders passed by the Recovery Officer need to be examined. The legal position emanating from Rule 59(2) of the Second Schedule to the Act of 1961 is clear and manifest. Though Sri P.Sriraghuram, learned senior

counsel, would contend that the aforestated provision is directory in nature, we are not persuaded to agree. The consequence of failure to abide thereby having been spelt out in the provision in the form of a summary rejection of the bid, it is not open to construe this provision to be directory in nature. This is obviously so, because the sale of the property of the borrower is being effected by virtue of the statutory mandate so as to realize adjudicated dues and such a sale has to be transparent and above board in all respects. That is the reason why a bidder who participates in such a sale has to disclose as to whether he is bidding for himself or for any other, and if so, produce the authority that empowers him to do so. The requirements of Rule 59(2) are therefore mandatory (See CHHOTU SOOD V/ s. TAX RECOVERY OFFICER¹).

32. In the case on hand, it is an admitted fact that Bhagyanagar Metals Limited, a corporate entity, was the highest bidder for Plot No.2 and it also deposited 25% of the bid amount on 18.10.2005 without disclosing that it was not bidding for itself. It was only on 24.10.2005 that Bhagyanagar Metals Limited filed an affidavit asking the Recovery Officer to confirm the sale in favour of Shubham Enterprises, the petitioner, and to issue the sale certificate in its favour. Be it noted that Bhagyanagar Metals Limited was a separate and independent legal entity and could not have acted as an agent of Shubham Enterprises, a partnership firm, unless specific authority was conferred upon it by the said firm and its own Board of Directors approved its role as an agent. Proof of neither of these aspects was ever produced before the Recovery Officer. In fact, there was no authority cited or produced before the Recovery Officer, be it on the date of sale, *viz.*, 18.10.2005, or any time thereafter. It appears

¹ (1982) 31 CTR (P&H) 239 = (1983) 141 ITR 54 (P&H)

that only affidavits were filed by both entities before the Recovery Officer after the sale to the effect that Bhagyanagar Metals Limited had participated in the auction on behalf of the firm. There was thus a clear and manifest violation of the requirements of Rule 59(2) of the Second Schedule to the Act of 1961. The mandate of the said Rule being compulsory and inviolable, the transgression rendered the very bid submitted by Bhagyanagar Metals Limited ineligible for consideration, as it warranted immediate rejection at the threshold in terms of Rule 59(2). Ignoring this statutory mandate, the Recovery Officer acted upon the affidavits submitted by both parties long after the auction sale on 18.10.2005 and ordered substitution of the name of the highest bidder *vide* Docket Order dated 02.11.2005. This order, being bereft of application of mind and being in utter violation of law, was therefore unsustainable. In consequence, the Tribunal was justified in holding to this effect and allowing R.A.No.03 of 2014.

33. Coming to the validity of the review order dated 28.11.2005 passed by the Recovery Officer, we may note the contents of the docket orders passed by him in R.P.No.512 of 2003 in O.A.No.455 of 2000, which are placed on record. The Docket Order dated 18.10.2005 records that the auction was conducted on that date for Lot.I and Lot.II. In so far as Lot.II is concerned, the Recovery Officer recorded that Bhagyanagar Metals Limited, represented by L.K.Baid, was declared the successful bidder for Rs.2.75 Crore and that he had remitted Rs.71,50,010/- towards 25% of the bid amount and 1% poundage. In so far as Lot.I is concerned, he recorded that Shubham Enterprises was declared the successful bidder for Rs.2.63 Crore and that the proceeds of the draft for Rs.69,00,000/- may be credited to the Tribunal's account. On 02.11.2005, after hearing both

bidders, viz., Bhagyanagar Metals Limited and Shubham Enterprises, the Recovery Officer ordered for change of the name of the bidder for Lot.II as sought by them. He also directed issuance of a receipt in the name of Shubham Enterprises for both Lots. He directed crediting of the proceeds of the drafts to the Tribunal's general account. On 23.11.2005, after dismissing a claim petition which seems to have been filed in R.P.No.512 of 2003, the Recovery Officer directed issuance of the sale confirmation. He also directed refund of part of the sale consideration. He noted that the bank had given its consent to the return of the sum of Rs.93,49,600/-. He accordingly directed the matter to be placed before the Presiding Officer for issuance of a cheque for the sum of Rs.4,44,50,400/- towards the sale consideration, after deducting the proportionate amount. He further directed issuance of a cheque for Rs.93,49,600/-, towards the proportionate amount, to the auction purchaser.

34. However, when the matter was placed before the Presiding Officer, he queried as to under what power of law, the Recovery Officer had held refund of Rs.93,49,600/- to be permissible. Upon the advice of the Presiding Officer, the Recovery Officer seems to have changed his mind and by order dated 24.11.2005, he opined that there was no provision for return of the auction purchase amount as the sale proclamation did not provide for any price reduction in relation to 2089 square yards or for refund to the auction purchaser and therefore, there was a clear violation of Rule 53 of the Second Schedule to the Act of 1961. When he submitted his fresh opinion as recorded in the order dated 24.11.2005 to the Presiding Officer of the Tribunal, the Presiding Officer directed that the Recovery Officer may, if satisfied that there was a serious irregularity in the conduct of the auction, pass an order as deemed fit and proper.

Thereupon, in the Docket Order dated 25.11.2005, the Recovery Officer noted that there was an irregularity in so far as not providing for refund for the 2089 square yards in the proclamation of sale issued under Rule 53 and as there was no provision for such refund to the auction purchaser, it was necessary to set aside the sale under Rule 61 of the Second Schedule to the Act of 1961. He accordingly recorded that the sale was set aside and directed issuance of a fresh proclamation of sale. However, by the Docket Order dated 28.11.2005, acting upon the letter and affidavit received from the auction purchaser and the Memo filed by the bank, the Recovery Officer reviewed the earlier order dated 25.11.2005 under Rule 87 of the Second Schedule to the Act of 1961 and confirmed the auction sale held on 18.10.2005 in favour of Shubham Enterprises, the auction purchaser, on the strength of its representation that it would not claim refund of any amount.

35. Perusal of the Memo dated 23.11.2005 filed by the petitioner before the Recovery Officer reflects that no statutory provision was cited therein for seeking refund of the sum of Rs.1,50,24,088/- towards deficiency in the land. Similarly, the bank filed a Memo on 23.11.2005 stating that in response to the request of the petitioner, it was willing to waive a sum of Rs.93,49,600/-. Be it noted that there was no consensus between the two as to the amount but, by the order dated 23.11.2005, the Recovery Officer directed return of the sum of Rs.93,49,600/-. He accordingly directed the matter to be placed before the Presiding Officer for issuance of a cheque for a sum of Rs.4,44,50,400/- in favour of the bank and a cheque for Rs.93,49,600/- in favour of the auction purchaser. It is at this stage that the Presiding Officer raised doubts as to the propriety of what was being done by the Recovery Officer which led to his

volte-face as demonstrated by his later order dated 24.11.2005. Thereby, he recorded that there was a serious irregularity in the auction and that there was no bar to consider the application filed by the auction purchaser under Rule 61 of the Second Schedule to the Act of 1961. This opinion expressed by the Recovery Officer defies comprehension as Rule 61 does not permit the auction purchaser to file any application thereunder and it is either the authorities named therein or the defaulter or any person whose interests are affected by the sale to seek setting aside of such sale. As the Presiding Officer left it to the Recovery Officer to pass an order as deemed fit and proper, he ultimately passed the order dated 25.11.2005 recording that there was an irregularity in relation to refund of the amount for 2089 square yards as there was no provision for such refund being made in the proclamation of sale and it was therefore necessary to set aside the sale under Rule 61 of the Second Schedule to the Act of 1961. He accordingly set aside the sale and directed issuance of a fresh proclamation of sale. This order was reviewed by him on 28.11.2005 in exercise of power under Rule 87 of the Second Schedule to the Act of 1961. As per the said provision, the power of review can only be exercised in relation to a mistake apparent from the record and such power can be exercised only after notice is given to all persons interested. As exercise of the power of review under Rule 87, after passing of the order dated 25.11.2005, constituted a fresh exercise, independent and separate from the earlier exercise, the Recovery Officer necessarily had to issue notices to all parties who would be interested in and affected by such review. In effect, he had to issue notices afresh to all the parties arrayed in R.P.No.512 of 2003 in O.A.No.455 of 2000. However, no such measure was obviously undertaken by him, as the order was passed on the very

same day that the letter and affidavit from the petitioner and the Memo from the bank were received. There was therefore a clear transgression of the procedure contemplated by Rule 87.

36. That apart, the Recovery Officer did not even state in the review order as to what was the mistake apparent from the record, warranting exercise of such review power by him. It was the petitioner itself that sought refund of part of the sale consideration and the bank agreed to refund a lesser amount than what was claimed by the petitioner. There is no indication as to how the Recovery Officer adjudicated upon this difference in the amount, whereby he directed refund of the amount stipulated by the bank. However, when the Presiding Officer raised a doubt as to how this exercise was being undertaken, the Recovery Officer noted that there was no provision for refund and the proclamation of sale also did not stipulate any such refund of sale consideration being made in relation to the extent of land in dispute, *viz.*, 2089 square yards. He accordingly set aside the sale by exercising power under Rule 61.

37. The issue as to whether the Recovery Officer has *suo motu* powers to cancel a sale under Rule 61 was hotly contested by the learned senior counsel appearing for the parties. No doubt, Rule 61 does not specifically mention any such *suo motu* power vesting in the Recovery Officer. However, we may note that the statutory scheme provides for the Recovery Officer making an order confirming the sale under Rule 63 and granting a sale certificate under Rule 65. Both would be subject to the power of review under Rule 87, as the said Rule permits *suo motu* review of any order passed by the Recovery Officer under the Second Schedule. Therefore, when confirmation of the sale and grant of the sale certificate under Rules 63 and 65 respectively are both subject to the *suo motu*

review power vesting in the Recovery Officer under Rule 87, it cannot be doubted that the Recovery Officer would also have the power to cancel the sale even before confirmation of the sale. (See M.J.GEORGE V/ s. C.M.BOSE², wherein a Division Bench of the Kerala High Court held to the same effect). When such confirmation is subject to the review power of the Recovery Officer, the power to cancel the sale even before such confirmation would inhere automatically. This aspect of the matter was not considered by a learned Judge of this Court while holding to the contrary in BODDAPATI RAMACHANDRA RAO V/ s. SPECIAL DEPUTY TAHSILDAR, INCOME-TAX, VIJAYAWADA³. Therein, the learned Judge held that the Recovery Officer has no option but to confirm the sale if there is no application to set it aside and that his jurisdiction to refuse to confirm a sale arises only if there is an application either under Rules 60 or 61 of the Second Schedule to the Act of 1961.

38. We are therefore of the opinion that the Recovery Officer had the power to set aside the sale *suo motu* and that his order dated 25.11.2005 cannot be said to be bereft of legal foundation on that count. Once this is the legal position, the mere fact that the Recovery Officer was initially inclined to accept the request of the petitioner for refund of part of the sale consideration but thereafter, he found that there was no such mention made in the proclamation of sale and therefore, he had no power to do so, did not constitute a mistake apparent from the record. Further, the Docket Order dated 24.11.2005 passed by the Recovery Officer recorded that he was of the opinion that there was a 'serious irregularity' in the auction. This was obviously on account of the deficiency in the actual area of the land, which is an admitted fact. Therefore, there was no

² 2012 SCC OnLine Kerala 24927

³ (1969) 71 ITR 277

mistake apparent from the record justifying exercise of review power by the Recovery Officer, *vide* the later order dated 28.11.2005, even on facts. Such exercise of review power was manifestly unsustainable. In consequence, the Tribunal was justified in holding to this effect and allowing R.A.No.04 of 2014.

39. On the above analysis, this writ petition, which suffers from irregularity in its very inception as it was filed in relation to the order in two separate appeals, is found to be devoid of merit even on facts and in law. The impugned common order dated 05.03.2019 passed by the Tribunal allowing both appeals does not warrant interference on any ground.

40. The writ petition is accordingly dismissed. This order shall be placed before the Recovery Officer who is seized of the application filed under Rule 61 of the Second Schedule to the Act of 1961 for proper and comprehensive adjudication thereof in the light of the observations made hereinbefore. Interim order dated 12.03.2019 shall stand vacated. Pending miscellaneous petitions, if any, shall also stand dismissed. No order as to costs.

JUSTICE SANJAY KUMAR

JUSTICE K.LAKSHMAN

11th OCTOBER, 2019

Note: L.R.Copy to be marked.
(B/O) PGS