

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of decision: 21st January, 2019.**

+ **CS(COMM) 962/2016, CCP No.128/2013, IA No.20451/2013 (u/O XXXIX R-1&2 CPC), IA No.2160/2014 (u/O XXXIX R-1&2 CPC), IA No.13912/2018 (u/O VII R-11 CPC) & IA No.13913/2018 (u/S 151 CPC)**

BHASIN TOBACCOS LTD. & ORS.

..... Plaintiffs

Through: Mr. B.B. Gupta, Sr. Adv. with Mr. S.K. Gandhi, Ms. Manjula Gandhi, Mr. Aditya Kapoor, Mr. Nawit Suri, Ms. Soumya Sarin & Mr. Himanshu Dubey, Advs.

Versus

GAMBRO NEXIM (INDIA) MEDICAL LTD. & ORS.

....Defendants

Through: Mr. Chetan Sharma, Sr. Adv. with Ms. Ananya Bhattacharya, Adv. for D-1 to 3.
Mr. Sunil Magon, Adv. for D-4&5.
Mr. Ayush Chaudhary, Adv. for Mr. Gautam Awasthi, Adv. for D-6/Indian Bank.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. IA No.13912/2018 of the defendants no.1 to 3 under Order VII Rule 11 of the CPC read with Sections 18 and 34 of the Recovery of Debts Due to Banks & Financial Institutions Act, 1993 (DRT Act) is for consideration.

2. The counsel for the plaintiffs was heard at length on the said application on 5th December, 2018 when, after recording the submissions made and the queries of the Court, further opportunity was given to the plaintiffs to make submissions. The senior counsel for the plaintiffs appearing today, the senior counsel for the defendants no.1 to 3 and the counsel for the defendant no.6 Indian Bank have been heard. The counsel for the defendants no.4 and 5 has made only one submission, that it is the choice of the plaintiffs, whether to proceed before the Debt Recovery Tribunal (DRT) / its Recovery Officer or before this Court.

3. The plaintiffs instituted this suit, initially for the reliefs of, (i) declaration that the plaintiffs are the owners of property no.47, Ring Road, Lajpat Nagar-III, New Delhi-110 024 and that the defendants no.1 to 3 have no right, title and interest in the said property; (ii) mandatory injunction directing the defendant no.5 to refund the amount of Rs.5,20,000/- entrusted by the plaintiffs to the defendant no.5 for conversion of leasehold rights in the land underneath the said property into freehold; (iii) mandatory injunction directing the defendant no.5 to get the property converted from leasehold to freehold and execute the sale deed of the property in favour of the plaintiffs; and, (iv) permanent injunction restraining the defendants no.1 to 3 from representing themselves to be the owners of the property.

4. In the suit as initially filed, the defendant no.6 Indian Bank was not a party.

5. The suit, in which issues had already been framed, was listed before the undersigned on 7th December, 2016 when on being informed that the lease of the land underneath the property and the property is in the name of

the defendant no.1, of which defendants no.2 and 3 are the Directors and that the plaintiffs were only claiming an Agreement to Sell by the defendants no.4 and 5 coupled with registered General Power of Attorney with respect to the property in their favour, it was enquired as to how the plaintiffs, without having any title to the property could seek a declaration of being the owners of the property. The said question arose in the light of the dicta of the Supreme Court in *Suraj Lamp & Industries Pvt. Ltd. Vs. State of Haryana* (2009) 7 SCC 363 and (2012) 1 SCC 656.

6. Thereafter the application of the defendants no.1 to 3 under Order VII Rule 11 of the CPC for rejection of the plaint in the suit as originally filed came up for consideration before the undersigned on 1st March, 2017 when again after recording detailed submissions and drawing attention of the counsel for the plaintiffs to the dicta of the Courts holding that Agreement to Sell merely creates a right to seek specific performance and does not vest any right, title or interest in the property subject matter thereof, on the request of the counsel for the plaintiffs, the hearing was adjourned.

7. Thereafter the plaintiffs sought amendment of the plaint to seek the relief of specific performance of the Agreements to Sell in their favour and for seeking other reliefs including of impleadment of defendant no.6 Indian Bank and the plaint as it stands today is for the reliefs of (a) declaration that the plaintiffs are the sole, absolute and exclusive owners of the property and the defendants no.1 to 3 and 6 have no right, title and interest of any nature whatsoever in the property; (b) specific performance directing the defendants no.4 and 5 to cooperate with the plaintiffs in getting the

leasehold rights in the land underneath the property converted to freehold on the basis of General Power of Attorney dated 27th March, 1997 executed by the defendant no.1 in favour of defendant no.5 and to thereafter execute the sale deed of the property in favour of the plaintiffs; (c) permanent injunction restraining the defendants from interfering in any manner whatsoever in the right, title and interest of the plaintiffs in the property; (d) declaration restraining the defendants no.1 to 3 and 6 from giving effect to the orders dated 23rd November, 2012, 20th December, 2012, 27th November, 2013 in proceedings bearing No.61/2012 titled Indian Bank Vs. Rexima Exports Pvt. Ltd. pending before the Recovery Officer, DRT and from giving effect to the order dated 8th November, 2013 of the Debt Recovery Appellate Tribunal in appeal No.411/2013 titled Rexima Exports & Ors. Vs. Indian Bank; (e) declaration of the aforesaid orders as non est, null and void and having been obtained by playing fraud; (f) mandatory injunction directing the defendants no.1 to 3 and 6 to hand over physical possession of the property to the plaintiffs; and, (g) permanent injunction restraining the defendants no.1 to 3 and 6 from proceeding against the property before the Recovery Officer / Debt Recovery Tribunal.

8. Rejection of the plaint is sought on the ground of the jurisdiction of this Court being barred by the DRT Act.

9. It is deemed appropriate to set down the relevant facts in chronology:

- (i) The DRT, vide order dated 5th December, 1996 in OA No.871/1996 titled Indian Bank Vs. Gambro Nexin (I) Medical Ltd. i.e. defendant no.1 herein, restrained the defendant no.1 from

alienating, encumbering or parting with possession of property aforesaid.

(ii) It is not in dispute that as on that date, the defendant no.1 was the owner of the property and lessee of the land underneath the property and in possession thereof.

(iii) The defendant no.1, on 27th March, 1997 entered into an Agreement to Sell the property to the defendant no.4 Motor & General Finance Ltd. and executed and registered a General Power of Attorney with respect to the property in favour of defendant no.5 Mr. Rajeev Gupta, Executive Director of Motor & General Finance Ltd.

(iv) The property, at the time of Agreement to Sell was mortgaged with Punjab & Sind Bank and it was *inter alia* a term of the Agreement to Sell that the defendant no.4 will deposit the amount mentioned in the Agreement to Sell with the Punjab & Sind Bank, in full and final settlement of all the dues of the said Bank and take custody of the title deeds of the property deposited by way of equitable mortgage with the Punjab & Sind Bank.

(v) It is not in dispute that the defendant no.4 paid the dues of Punjab & Sind Bank and took custody of the title deeds of the property.

(vi) On 29th April, 2000, the defendant no.4 entered into ten Agreements to Sell with each of the plaintiffs and also executed a registered General Power of Attorney in favour of each of the ten plaintiffs.

(vii) At the time of Agreement to Sell in favour of the defendant no.4 as well as the Agreements to Sell in favour of the plaintiffs, Chapter XXC of the Income Tax Act, 1961 was in vogue. The same prohibited transfer of property in excess of the specified value without obtaining the prior permission of the Authority constituted under the Income Tax Act and which Authority was empowered to pre-emptively acquire the property. Permission was obtained for transfer to defendant no.4. However, no permission was obtained for transfer to the ten plaintiffs, because the value of each of the Agreements to Sell was below the specified limits.

(viii) OA No.871/1996 supra instituted by the defendant no.6 Indian Bank and in which vide order dated 5th December, 1996 aforesaid there was an injunction restraining the defendant no.1 from dealing with the property, was decided on 28th March, 2012 and a Recovery Certificate ordered to be issued in favour of the defendant no.6 Indian bank and against the defendants no.1 to 3.

(ix) The Recovery Officer of the DRT, in pursuance to the Recovery Certificate aforesaid, issued notice and which notice was also affixed on the suit property. It was then that the plaintiffs, though the present suit was already pending, filed objections before the Recovery Officer of the DRT.

(x) The Recovery Officer of the DRT on 6th December, 2013 took physical possession of the property and according to the plaintiffs from the plaintiffs.

(xi) Vide interim order dated 16th December, 2013 in this suit, the Receiver, who on behalf of the Recovery Officer of the DRT had taken possession, was directed to maintain *status quo* both as regards title and possession of the property. Owing to the said order being in force for the last over five years, no proceedings before the Recovery Officer qua the said property have taken place.

10. The question for adjudication before this Court is, whether the suit for the reliefs aforesaid claimed in the amended plaint lies before this Court and / or whether the jurisdiction of this Court is barred by the DRT Act.

11. The senior counsel for the plaintiffs has drawn attention to Sections 17 and 18 of the DRT Act and which are as under:

“17. Jurisdiction, powers and authority of Tribunals.—(1) A Tribunal shall exercise, on and from the appointed day, the jurisdiction, powers and authority to entertain and decide applications from the banks and financial institutions for recovery of debts due to such banks and financial institutions.

[(1A) Without prejudice to sub-section (1), --

(a) the Tribunal shall exercise, on and from the date to be appointed by the Central Government, the jurisdiction, powers and authority to entertain and decide applications under Part III of Insolvency and Bankruptcy Code, 2016.

(b) the Tribunal shall have circuit sittings in all district headquarters.]

(2) An Appellate Tribunal shall exercise, on and from the appointed day, the jurisdiction, powers and authority to entertain appeals against any order made, or deemed to have been made, by a Tribunal under this Act.

[(2A) Without prejudice to sub-section (2), the Appellate Tribunal shall exercise, on and from the date to be appointed by the Central Government, the jurisdiction, powers and authority to entertain appeals against the order made by the Adjudicating Authority under Part III of the Insolvency and Bankruptcy Code, 2016.]

18. Bar of Jurisdiction.—On and from the appointed day, no court or other authority shall have, or be entitled to exercise, any jurisdiction, powers or authority (except the Supreme Court, and a High Court exercising jurisdiction under articles 226 and 227 of the Constitution) in relation to the matters specified in section 17:

[Provided that any proceedings in relation to the recovery of debts due to any multi-state co-operative bank pending before the date of commencement of the Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Act, 2012 under the Multi-State Co-operative Societies Act, 2002 shall be continued and nothing contained in this section shall, after such commencement, apply to such proceedings.”

12. Attention has next been invited to Section 29 under Chapter-V titled “Recovery of Debt Determined by Tribunal” of the DRT Act and which is as under:

“29. Application of certain provisions of Income-tax Act.—The provisions of the Second and Third Schedules to the Income-tax Act, 1961 and the Income-tax (Certificate Proceedings) Rules, 1962, as in force from time to time shall, as far as possible, apply with necessary modifications as if the said provisions and the rules referred to the amount of debt due under this Act instead of to the Income-tax:

Provided that any reference under the said provisions and the rules to the “assessee” shall be construed as a reference to the defendant under this Act.”

13. Attention is next invited to Schedule II of the Income Tax Act and Rule 11 whereof is as under:

“Investigation by Tax Recovery Officer.

11. (1) Where any claim is preferred to, or any objection is made to the attachment or sale of, any property in execution of a certificate, on the ground that such property is not liable to such attachment or sale, the Tax Recovery Officer shall proceed to investigate the claim or objection:

Provided that no such investigation shall be made where the Tax Recovery Officer considers that the claim or objection was designedly or unnecessarily delayed.

(2) Where the property to which the claim or objection applies has been advertised for sale, the Tax Recovery Officer ordering the sale may postpone it pending the investigation of the claim or objection, upon such terms as to security or otherwise as the Tax Recovery Officer shall deem fit.

(3) The claimant or objector must adduce evidence to show that—

(a) (in the case of immovable property) at the date of the service of the notice issued under this Schedule to pay the arrears, or

(b) (in the case of movable property) at the date of the attachment, he had some interest in, or was possessed of, the property in question.

(4) Where, upon the said investigation, the Tax Recovery Officer is satisfied that, for the reason stated in the claim or objection, such property was not, at the said date, in the possession of the defaulter or of some person in trust for him or in the occupancy of a tenant or other person paying rent to him, or that, being in the possession of the defaulter at the said date, it was so in his possession, not on his own account or as his own property, but on account of or in trust for some other person, or partly on his own account and partly on account of some other person, the Tax Recovery Officer shall make an order releasing the property, wholly or to such extent as he thinks fit, from attachment or sale.

(5) Where the Tax Recovery Officer is satisfied that the property was, at the said date, in the possession of the defaulter as his own property and not on account of any other person, or was in the possession of some other person in trust for him, or in the occupancy of a tenant or other person paying rent to him, the Tax Recovery Officer shall disallow the claim.

(6) Where a claim or an objection is preferred, the party against whom an order is made may institute a suit in a civil court to establish the right which he claims to the property in dispute; but, subject to the result of such suit (if any), the order of the Tax Recovery Officer shall be conclusive.”

14. The senior counsel for the plaintiffs has next drawn attention to ***Tax Recovery Officer II, Sadar, Nagpur Vs. Gangadhar Vishwanath Ranade*** 1998 (6) SCC 658 laying down that, (i) under Rule 11(1) supra of the Second Schedule to the Income Tax, where any claim is preferred to or any objection is made to the attachment or sale of any property in execution of a certificate on the ground that such property is not liable to such attachment or sale, the Tax Recovery Officer shall proceed to investigate the claim or objection; (ii) under Rules 11(4) to 11(6), the Tax Recovery Officer has to examine who is in possession of the property and in what capacity; he can only attach property in possession of the assessee in his own right and / or in possession of somebody for the benefit of or on behalf of the assessee; (iii) the Tax Recovery Officer cannot declare any transfer made by the assessee in favour of a third party as void; if the department finds that a property of the assessee is transferred by him to a third party with the intention to defraud the Revenue, it will have to file a suit under Rule 11(6) to have the transfer declared void under Section 281; (iv) if the judgment-debtor was in possession, he may have been in possession as agent or trustee for another and this has to be enquired into; to that extent title may be a part of the inquiry; similarly, if the property attached is claimed by a third party who adduces evidence to show that he was possessed of the property under some kind of a title, the property will have to be released

from attachment; the procedure is not meant to decide intricate questions of law as to title to the property; (v) therefore, where a claim is made to the property attached by someone claiming to be a transferee from the judgment-debtor and the claim is disallowed, the claimant can institute a suit under Order XXI Rule 63 to establish his title to the property and in such a suit it would be open to the attaching creditor to plead in defence that the transfer was in fraud of the general body of creditors and was void under Section 53 of the Transfer of Property Act, 1882; and, (vi) similarly, if the claim of the transferee is allowed, the attaching creditor may sue on behalf of himself and all other creditors under Section 53 of the Act for a declaration that the transfer was void.

15. The senior counsel for the plaintiffs on the basis of aforesaid has contended that Section 29 of the DRT Act having applied the Second Schedule to the Income Tax Act in the matter of enforcement of the Recovery Certificate, the dicta aforesaid in ***Gangadhar Vishwanath Ranade*** supra would squarely apply and since intricate questions of law are involved, this suit is maintainable.

16. Section 29 of the DRT Act however, while making the provisions of Second Schedule to the Income Tax Act applicable, does so “as far as possible” and “with necessary modifications”. I have thus enquired from the senior counsel, whether not the DRT Act provides for appeals against all orders of the Recovery Officer to the DRT and if so, why should the remedy of the plaintiffs in pursuance to a decision of the Recovery Officer (as the Recovery Officer is stated to have already taken), be not before the DRT.

17. Section 30 of the DRT Act as under:

“30. Appeal against the order of Recovery Officer.—(1)

Notwithstanding anything contained in section 29, any person aggrieved by an order of the Recovery Officer made under this Act may, within thirty days from the date on which a copy of the order is issued to him, prefer an appeal to the Tribunal.

(2) On receipt of an appeal under sub-section (1), the Tribunal may, after giving an opportunity to the appellant to be heard, and after making such inquiry as it deems fit, confirm, modify or set aside the order made by the Recovery Officer in exercise of his powers under sections 25 to 28 (both inclusive).”

provides for appeals to the DRT against an order of the Recovery Officer. Not only so, Section 30 is notwithstanding anything contained in Section 29. The same reaffirms that notwithstanding the applicability of the provisions of the Second Schedule of the Income Tax Act to Recovery Certificates under the DRT Act, the option as available under Rule 11(6), of filing a civil suit, is not available with respect to proceedings under the DRT Act and the remedy against the order of the Recovery Officer on the objections preferred by the plaintiffs is before the DRT.

18. The senior counsel for the plaintiffs in this context has also drawn attention to the dicta of the Division Bench of the Bombay High Court in **Hill Properties Ltd. Vs. Union Bank of India** 2009 SCC OnLine Bom 1669, the question no.1 framed wherein as under:

“1. Whether in view of the provisions of Section 29 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 read with Rule 11(1) and 11(6) of the, Second Schedule of the Income Tax Act, 1961 a person against whom an order is passed is entitled to institute a

suit in a civil Court, or whether the said order can only be challenged by way of an Appeal under Section 30 of the Act?”

was answered as under:

“(i). Question No.1 would have to be answered in the affirmative. The remedy of an Appeal provided under Section 30 would not oust the jurisdiction of the Civil Court in entertaining a Civil Suit as provided under Rule 11(6) of the Second Schedule to the I.T. Act.”

19. With due respect, I am unable to accept that a person who has preferred objections to an attachment of immovable property affected by the Recovery Officer and whose objections have been dismissed by the Recovery Officer has a choice, whether to appeal under Section 30 of the DRT or to file a civil suit, as is contended by the senior counsel for the plaintiffs.

20. I say so not only because of the words “as far as possible” and “with necessary modifications” in Section 29 and the words “Notwithstanding anything contained in Section 29” in Section 30, but also because in my view, the DRT Act and the Rules thereunder are a complete Code and if it is held that person claiming right to the property attached by the Recovery Officer has a right to invoke the jurisdiction of the Civil Court, the same would stall indefinitely the recovery proceedings and inspite of Certificates of Recovery being issued, the same will remain unexecuted indefinitely.

21. In ***Punjab National Bank Vs. O.C. Krishnan*** (2001) 6 SCC 569 it was held (i) that the DRT Act has been enacted with a view to provide a special procedure for recovery of debts due to the banks and the financial institutions; (ii) there is hierarchy of appeal provided in the Act and the fast

track procedure under the said Act cannot be allowed to be derailed either by taking recourse to proceedings under Articles 226 and 227 of the Constitution or by filing a civil suit, which is expressly barred; and, (iii) even though a provision under an Act cannot expressly oust the jurisdiction of the Court under Articles 226 and 227 of the Constitution, nevertheless when there is an alternative remedy available, judicial prudence demands that the Court refrains from exercising its jurisdiction under the said constitutional provisions. Again, in ***Central Bank of India Vs. State of Kerala*** (2009) 4 SCC 94, on an analysis of the provisions of the said Act, it was held (i) that the primary object of the DRT Act was to facilitate creation of special machinery for speedy recovery of the dues of banks and financial institutions; (ii) that this is the reason why the DRT Act not only provides for establishment of the Tribunals and Appellate Tribunals with the jurisdiction, powers and authority to make summary adjudication of applications made by banks or financial institutions and specifies the modes of recovery of the amount determined by the Tribunal or Appellate Tribunal but also bars the jurisdiction of all Courts except the Supreme Court and High Courts in relation to the matters specified in Section 17; (iii) that the Tribunals and Appellate Tribunals have also been freed from the shackles of procedure contained in the CPC; (iv) that DRT Act has not only brought into existence special procedural mechanism for speedy recovery of the dues of banks and financial institutions, but also made provision for ensuring that defaulting borrowers are not able to invoke the jurisdiction of Civil Courts for frustrating the proceedings initiated by the banks and financial institutions; (v) that DRT Act was enacted by the Parliament in the backdrop of recommendations made by the Expert Committees appointed

by the Central Government for examining the causes for enormous delay in the recovery of dues of banks and financial institutions which were adversely affecting fiscal reforms; and, (vi) that the *non obstante* clause contained in Section 34(1) of the DRT Act gives overriding effect to the provisions of this Act only if there is anything inconsistent contained in any other law or instrument having effect by virtue of any other law. Similarly, in ***Standard Chartered Bank Vs. Dharminder Bhohi*** (2013) 15 SCC 341 it was held that the intendment of DRT Act is for speedy recovery of dues of the bank and in this backdrop, the Tribunals are expected to act in quite promptitude, regard being to the nature of the *lis* and see to it that an ingenious litigant does not take recourse to dilatory tactics.

22. The senior counsel for defendants No.1 to 3 in this context has also drawn attention to my judgment in ***Radnik Exports Vs. Standard Chartered Bank*** 2014 SCC OnLine Del 3404 where, on an analysis of the provisions of the DRT Act it was held that if suits under Section 34 of the Specific Relief Act, 1963 for declaration with respect to title to the property were held to be maintainable, the same would set at naught the very reason for the enactment of the DRT Act and establishment of the DRT and would lead to a waste of effort on the part of DRT in adjudication, if the same were not binding. It was observed that the hard reality of life that every person against whom the bank or financial institution has a claim would be interested in stalling the same and with the said intent approach the Civil Court, cannot be overlooked.

23. The matter is also found to be no longer *res integra*. In ***C.N. Paramasivam Vs. Sunrise Plaza*** (2013) 9 SCC 460, the words “as far as

possible” and “with necessary modifications” in Section 29 were for interpretation, though in the context of Rules 57 & 58 of Second Schedule to the Income Tax Act. It was held (i) that the said words have been used to take care of situations where certain provisions under the Income Tax Rules may have no application on account of the scheme under the DRT Act being different from that of the Income Tax Act or the Rules framed thereunder; (ii) that the Rules in Schedule II to the Income Tax Act are attracted only in so far as the same deal with recovery of debts under the Act with the modification that the ‘amount of debt’ referred to in the Rules is deemed to be one under the DRT Act; (iii) that this modification was intended to make the position explicit and to avoid any confusion in the application of the Income Tax Rules to the recovery of debts under the DRT Act, which confusion could arise from a literal application of the Rules to recoveries under the DRT Act; (iv) that the Income Tax Rules make provisions that do not strictly deal with recovery of debts under the DRT Act; (v) that such of the Rules cannot possibly apply to recovery of debts under the DRT Act; and, (vi) that suffice it is to state that the use of the words “as far as possible” in Section 29 of the DRT Act simply indicate that the provisions of the Income Tax Rules are applicable except such of them as do not have any role to play in the matter of recovery of debts recoverable under the DRT Act. The argument, that the use of the words “as far as possible” in Section 29 are meant to give discretion to the Recovery Officer to apply the said Rules or not to apply the same in specific fact situations, did not find favour and was rejected.

24. Division Benches of the High Court of Madras also in ***J.N. Krishnan Vs. The Branch Manager, Canara Bank, Aravenu Branch, Kothagiri***
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2011 SCC OnLine Mad 828 and in *S. Reshma Vs. Debt Recovery Tribunal* MANU/TN/0862/2017 are found to have held that the use of the words “as far as possible” in Section 29 means that entire provisions of Second and Third Schedule to the Income Tax Act in relation to proceedings under the DRT Act were to be applied “suitably and not absolutely”.

25. Supreme Court, dealing with the challenge to the vires of the DRT Act, in *Union of India Vs. Delhi High Court Bar Association* (2002) 4 SCC 275 held, (i) that by virtue of Section 29 of the DRT Act, the provisions of the Second and Third Schedules to the Income Tax Act have become applicable for the realisation of the dues by the Recovery Officer; (ii) that detailed procedure for recovery is contained in the Schedules to the Income Tax Act; (iii) that it cannot, therefore, be said that the Recovery Officer would act in an arbitrary manner; (iv) furthermore, Section 30 of the DRT Act, after the amendment thereto of the year 2000, gives a right to any person aggrieved by an order of the Recovery Officer, to prefer an appeal to the Tribunal; (v) that thus now an appellate forum has been provided against any orders of the Recovery Officer which may not be in accordance with law; (vi) that there is sufficient safeguard which has been provided in the event of the Recovery Officer acting in an arbitrary or an unreasonable manner; and, (vii) that the provisions of Sections 25 and 28 could not therefore be held to be bad in law.

26. It would thus be seen that while upholding the vires of the provisions of the DRT Act and commenting particularly on Section 29 thereof, notice was taken of the remedy of appeal to the DRT against the order of the Recovery Officer and which remedy does not exist in the Second and Third

Schedules to the Income Tax Act. Once in the scheme of the DRT Act, there is a remedy of appeal against the order of the DRT, the question of the objector before the DRT having a choice, whether to prefer an appeal to the DRT or to institute a suit under Rule 11(6) of the Second Schedule to the Income Tax Act, as held by the Division in my humble opinion, would not arise.

27. Mention may be made of the judgment of a Co-ordinate Bench of this Court in *Triveni Gupta Vs. Bijender Singh* 2014 SCC OnLine Del 2537. The Court therein was concerned with a challenge under Article 227 of the Constitution of India to the order of the Sub-ordinate Court of dismissal of an application for interim relief in a suit filed by the plaintiff for stay of sale of the immoveable property ordered by the Recovery Officer of the DRT, after the dismissal of the objections preferred by the plaintiff before the DRT. The petition was dismissed reasoning that since efficacious statutory remedy of appeal before the DRT was available to the plaintiff, the plaintiff could not petition the Civil Court seeking alternate remedy. Section 41(h) of the Specific Relief Act was invoked.

28. Mention may lastly be made of *Sadashiv Prasad Singh Vs. Harendar Singh* (2015) 5 SCC 574 where the Supreme Court noticed that a remedy of appeal against the order of the Recovery Officer under Section 30 of the DRT Act is available to the objector and set aside the judgment of the High Court in exercise of writ jurisdiction interfering with the order of the Recovery Officer.

29. The emphasis of the senior counsel for the plaintiffs has been that Section 18 of the DRT Act bars jurisdiction of the civil court only in respect of matters specified in Section 17.

30. I am unable to agree. Section 17 encompasses within itself applications for recovery of debts and if it were to be held that the expression 'recovery of debts' includes within itself only the issuance of Recovery Certificate, the Recovery Officers of the DRT would become redundant and the Recovery Certificates will have to be brought to the civil courts for execution, delaying what has been sought to be expedited by enacting the DRT Act.

31. There is also difference in the version of the senior counsel for the plaintiffs and the senior counsel for the defendants no.1 to 3 as to the status of the objections preferred by the plaintiffs before the Recovery Officer. While the senior counsel for the plaintiffs states that the said objections have been decided inasmuch as possession could not have been taken without deciding the objections, the senior counsel for the defendants no.1 to 3 states that the objections are still pending consideration and in fact it is the plaintiffs who have been taking adjournments before the Recovery Officer on the plea of pendency of the present suit. The senior counsel for the plaintiffs also has not drawn attention to any specific order of the Recovery Officer by which the objections may have been disposed of as claimed.

32. It is also the contention of the senior counsel for the plaintiffs that the order dated 5th December, 1996 of the DRT was not extended beyond that date. Reliance is placed on *Ashok Kumar Vs. State of Haryana* AIR 2007

SC 1411. However, in my view the question whether the DRT extended the order of stay granted on 5th December, 1996 or not again cannot be decided by this Court and has to be necessarily decided by the DRT only. One Court cannot decide whether any interim order passed in a proceeding on the board of another Court or Tribunal was extended or not.

33. The senior counsel for the plaintiffs, in the context of ***Suraj Lamp & Industries Pvt. Ltd.*** supra has also referred to ***Hardip Kaur Vs. Kailash*** 193 (2012) DLT 168 (SLP preferred whereagainst is stated to have been dismissed in *limine*) but again once I have concluded that it is for the Recovery Officer of the DRT to decide whether the plaintiffs have some interest in the property or not, it is not for this Court which has not found itself to be seized of the jurisdiction, to comment thereon.

34. Yet another argument of the senior counsel for the plaintiffs has been that the Recovery Officer of the DRT cannot adjudicate intricate issues of title to immovable property.

35. Attention of the senior counsel for the plaintiffs is drawn to the dicta of the Constitution Bench in ***Ashoka Marketing Ltd. Vs. Punjab National Bank*** (1990) 4 SCC 406 meeting the said plea in the context of the Estate Officer under the Public Premises (Eviction of Unauthorized Occupants) Act, 1971 (PP Act) and rejecting the said contention. Once the DRT Act is found to have modified the provisions of Schedule II of the Income Tax Act in their application to the DRT Act by providing for appeal against the order of the Recovery officer on objections, it cannot be forgotten that just like PP Act provides for appeal against the orders of the Estate officer to the District Judge, similarly, the eligibility condition for appointment as a

Presiding Officer of the DRT is equivalent to a District Judge / Additional District Judge and the dicta aforesaid would squarely apply.

36. It is also the contention of the senior counsel for the plaintiffs that the relief of specific performance claimed by the plaintiffs in the present suit cannot be granted by the Recovery Officer and / or by the DRT.

37. However, the entitlement of the plaintiffs to the relief of specific performance would depend on whether the interim injunction order dated 5th December, 1996 was continued or not inasmuch as if it was continued, a question would arise whether an Agreement to Sell and delivery of possession in violation of the order of the DRT would create any rights whatsoever in favour of the defendant no.4 even if claiming specific performance in whose favour they were created. It has been held in ***Surjit Singh Vs. Harbans Singh*** (1995) 6 SCC 50 and ***Vidur Impex and Traders Private Limited Vs. Tosh Apartments Private Limited*** (2012) 8 SCC 384 that an Agreement to Sell in violation of the order of the Court is null and void and of no avail. It was held that if alienation/assignment made in defiance of an injunction order is permitted, it would defeat the ends of justice and the prevalent public policy. It was further held that when the Courts intend a particular state of affairs to exist while in *seisin* of a *lis* that state of affairs is not only required to be maintained but also presumed to exist till the Court orders otherwise and the Court in these circumstances has duty as also the right to treat the alienation/assignment as having not taken place at all. If that be so, then the very basis of the claim for specific performance would not stand. I have however in ***Om Prakash Vs. Santosh***

Chaddha 2013 SCC OnLine Del 4383 noticed the dichotomy of views on the said proposition.

38. It is the contention of the senior counsel for the defendants no.1 to 3 in this context that the Agreement to Sell and Power of Attorney executed by the defendants no.4 and 5 (who are supporting the plaintiffs) in favour of the plaintiffs have been executed not for and on behalf of defendant no.1 and / or as attorney of defendant no.1 but on the premise of the defendants no.4 and 5 being the absolute owners of the property. It is argued that the plaintiffs have not claimed for specific performance against the defendant no.1 in whom title to the property vests.

39. Needless to state all the aforesaid questions also would be in the domain of the objections before the Recovery Officer and / or appeal against the order on the objections before the DRT.

40. In this context, the argument of the senior counsel for the plaintiffs, of fraud and with respect to Rule 9 of the Second Schedule of the Income Tax Act may also be noted. The said Rule 9 of the Second Schedule of the Income Tax Act is as under:

“General bar to jurisdiction of civil courts, save where fraud alleged.

9. Except as otherwise expressly provided in this Act, every question arising between the [Tax Recovery] Officer and the defaulter or their representatives, relating to the execution, discharge or satisfaction of a certificate, or relating to the confirmation or setting aside by an order under this Act of a sale held in execution of such certificate, shall be determined, not by suit, but by order of the Tax Recovery Officer before whom such question arises:

Provided that a suit may be brought in a civil court in respect of any such question upon the ground of fraud.”

41. The question with which Rule 9 of the Second Schedule of the Income Tax Act is dealing is a question between the Recovery Officer and the defaulter or his representative. The plaintiffs do not claim themselves to be the representatives of the defaulter i.e. defendants no.1 to 3. Thus the question of applicability of proviso to Rule 9 and the action in the Civil Court being maintainable does not arise.

42. Attention of the senior counsel for the plaintiffs has also been drawn to Section 17 of the Contract Act, 1872 defining fraud in relation to a contract as under:-

“17. Fraud Defined.—‘Fraud’ means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:—

- (1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true;*
- (2) the active concealment of a fact by one having knowledge or belief of the fact;*
- (3) a promise made without any intention of performing it;*
- (4) any other act fitted to deceive;*
- (5) any such act or omission as the law specially declares to be fraudulent.”*

43. Since the relationship of the parties in the present case is nothing but contractual, the said definition would apply. Admittedly, there was no

privity of contract between the plaintiffs and the defendants no.1 to 3. The Agreements / Power of Attorney executed by the defendants no.4 and 5 in favour of the plaintiffs were also not as Power of Attorney or on behalf of defendants no.1 to 3 but in their own rights and on the basis of their own title when there was no title. The plaintiffs dealt with the defendants no.4 and 5 in the matter of purchase of immovable property without satisfying themselves of the title to the defendants no.4 and 5 and cannot now be permitted to raise such pleas of fraud.

44. The senior counsel for the plaintiffs also relies on ***Bhaurao Dagdu Paralkar Vs. State of Maharashtra*** (2005) 7 SCC 605 but which deals with fraud in the context of public law and would have no application in view of Section 17 of the Contract Act.

45. Reliance is also placed by senior counsel for plaintiffs on ***Ashok Kumar Raizada Vs. The Bank of Rajasthan*** ILR (2014) I Del 356 but which only is on arguable case of fraud and relegating the parties to leading evidence and would not qualify as a precedent. It is not disclosed as to what happened finally in the suit i.e. whether the ground of fraud succeeded or not.

46. The senior counsel for the plaintiffs has lastly contended that the defendants did not raise any such objection as is now being raised and defendants no.1 to 3 have filed this application for rejection taking cue from orders of this Court.

47. Even if that be so, the issue is legal and this Court cannot be a silent spectator of its process being abused.

48. I am therefore of the view that the present suit, insofar as for specific performance, is premature and resultantly the plaint is rejected.

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49. The counsel for the plaintiffs states that this arises from the action of the defendants no.1 to 3 before the Recovery Officer of not disclosing the interim order in the present suit.

50. Since this suit has been held to be premature, the CCP is also disposed of.

RAJIV SAHAI ENDLAW, J.

JANUARY 21, 2019

‘gsr/bs’

(corrected & released 9th February, 2019)



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