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

**Delivered on : 01-02-2019**

**Coram :**

**The Honourable Mr. Justice V.RAMASUBRAMANIAN**
**and**
**The Honourable Mr. Justice P. KESHAVA RAO**

**<u>Writ Petition No.14840 of 2018</u>**

**<u>Between</u>**:

1. Mendu Venkateswara Rao, S/o Sri Hanumaiah,
   Aged 55 years, Occ: Business/Agriculture,

2. M. Rajini Kumari W/o Mendu Venkateswara Rao
   Aged 50 years, Occ: House-wife,
   Both R/o Villa 21, Krupa Patel Villas,
   Ashokmanipur Colony, Kapra, Medchal District.

… Petitioners

Vs.

1. Union of India, rep.by its Secretary,
   Ministry of Finance, Secretariat, New Delhi.
2. Bank of India, Secunderabad Branch,
   Rep.by its Chief Manager & Authorized Officer.
3. S. Narasimha Rao S/o Chinna Venkateshwarlu,
   Aged: Major, R/o D.No.6-21A, Papaya Palem,
   Vetapalem,Kothapeta, Prakasam District.
4. Puli Krisharjuna S/o Puli Venkateshwarlu,
   Aged: Major, R/o D.No.6-19A, Papaya Palem,
   Vetapalem,Kothapeta, Prakasam District.

… Respondents

For Petitioners : Mr. P. Venugopal,
Senior Counsel for
Mr. T.C.D. Sekhar

For Respondent No.1 : Mr. K. Lakshman,
Asst. Solicitor General

For Respondent No.2 : Ms. V. Dyumani,
Standing Counsel

For Respondent Nos.3&4 : Mr. V. Ravinder Rao
Sr. Counsel for
Mr. N.A. Ramachandra Murthy,

**HONOURABLE SRI JUSTICE V. RAMASUBRAMANIAN**

**AND**

**HONOURABLE SRI JUSTICE P. KESHAVA RAO**

**WRIT PETITION No.14840 OF 2018**

**ORDER**: *(per V. Ramasubramanian, J)*

Challenging an order passed by the Debts Recovery Tribunal in an appeal arising out of the order of the Recovery Officer, the borrowers have come up with the above writ petition.

2. We have heard Mr. Venugopal, learned senior counsel appearing for the writ petitioners, Smt. V. Dyumani, learned standing counsel appearing for the bank and Mr. V. Ravinder Rao, learned senior counsel appearing for the unofficial respondents, who are the auction purchasers.

3. The writ petitioners availed credit facilities from the second respondent bank and the facilities were secured by a mortgage of the properties owned by the petitioners. After classifying the account of the petitioners as a Non Performing Asset, the bank filed an original application in O.A. No.40 of 2011 on the file of the Debts Recovery Tribunal - II at Hyderabad. The application was allowed and a recovery certificate was issued on 09.04.2012.

4. Based upon the certificate of recovery, a notice of demand dated 10.05.2012 was issued, followed by the issue of Forms 16 and 17 dated 24.07.2012. Thereafter a proclamation of sale was made on 01.01.2016 fixing the date of auction as 05.02.2016.

5. Immediately the first petitioner filed an application in M.P. No. 13 of 2016 before the Recovery Officer to defer the auction. After hearing the parties, the Recovery Officer dismissed M.P. No. 13 of 2016 by order dated 28.03.2016.

6. Challenging the order of the Recovery Officer, the petitioners filed an appeal in R.A. No.2 of 2016. It was later re-numbered as R.A. No.2 of 2017. But the auction did not fructify on 05.02.2016. Therefore a fresh auction sale notice was issued on 11.04.2016, fixing the auction on 27.05.2016.

7. Therefore, the petitioners sought the stay of further proceedings pursuant to the fresh auction sale notice dated 11.04.2016, in the very appeal that was already filed against the order of the Recovery Officer dated 28.03.2016. On the said prayer, the DRT passed an interim conditional order on 26.05.2016 granting stay of confirmation of sale subject to the petitioners depositing Rs.40.00 lakhs within four weeks. Without depositing the said amount, the petitioners filed an application in I.A. No.2065 of 2016, for extension of time. But the same was dismissed on 05.02.2018.

8. Eventually the DRT dismissed the appeal in R.A. No.2 of 2017, by an order dated 19.04.2018. It is against the said order, the above writ petition has been filed.

9. The above narration of facts on which there is no controversy would show that what was challenged by the petitioners before the

Recovery Officer in their application M.P. No. 13 of 2016 under Rule 11 of the Second Schedule to the Income Tax Act, 1961 was only the Proclamation of sale dated 01.01.2016 scheduling the auction to be held on 05.02.2016. Even during the pendency of M.P. No. 13 of 2016, the sale proposed to be held on 05.02.2016 did not fructify and M.P. No. 13 of 2016 was dismissed on 28.03.2016.

10. It is only after the dismissal of M.P. No. 13 of 2016 on 28.03.2016 that the bank issued a fresh sale notice on 11.04.2016 fixing the auction on 27.05.2016. Therefore the cause of action that the petitioners had in M.P. No. 13 of 2016 did not survive and they had a fresh cause of action as against the fresh sale notice dated 11.04.2016.

11. But without challenging the fresh sale notice dated 11.04.2016, the petitioners moved an appeal before the DRT, as against the order of the Recovery Officer dated 28.03.2016 and sought a stay of further proceedings pursuant to the fresh sale notice dated 11.04.2016. This sale notice was not the subject matter of the application under Rule 11 of the Second Schedule to the Income Tax Act, 1961 and hence it could not have been the subject matter of the appeal before the DRT.

12. What is stated above assumes significance in the light of the fact that the sheet anchor of the case of the petitioners in this writ petition is only the subsequent event that happened after the auction held on 27.05.2016. This can be understood better, if we elaborate on the submissions made by the learned senior counsel for the petitioners.

13. The one and only contention raised by Mr. P. Venugopal, learned senior counsel appearing for the petitioners is that on the date of the auction, namely, 27.05.2016, the petitioners paid 25% of the bid amount and that towards payment of the balance 75% of the bid amount, working out to Rs.2,41,50,000/-, the petitioners issued five cheques, two of which were dated 06.06.2016 and the remaining three cheques were dated 07.06.2016. Even admittedly the respondents 3 and 4 (highest bidders) did not have sufficient funds left in their bank account, either on the date of issue of these cheques or on or before 11.06.2016, which was the last date for payment of 75% of the bid amount. But the bank appears to have presented all the five cheques on 23.06.2016 in order to help the auction purchasers. Therefore, the contention of Mr. P. Venugopal, learned senior counsel for the petitioners is that there was a clear infringement of Rule 57(2) of the Second Schedule to the Income Tax Act, 1961 and the law declared by the Supreme Court in **C.N. Paramasivam v. Sunrise Plaza**[1]. Since Rule 57(2) of the Second Schedule to the Income Tax Act, 1961 mandates the full amount of purchase money to be paid on or before the 15th day from the date of sale of the property and since the 15th day expired on 11.06.2016 when the auction purchasers admittedly did not have sufficient funds to honour the cheques issued on 06.06.2016 and 07.06.2016, it is contended by the learned senior counsel for the petitioners that the sale was illegal.

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[1]. (2013) 9 SCC 460

14. In the light of the above submission, it is clear that what is sought to be argued is different from the cause of action based upon which the above writ petition arose. The above writ petition arises out of the dismissal of an appeal by the DRT, as against the order of the Recovery Officer passed in relation to a proclamation of sale dated 01.01.2016 fixing the date of auction as 05.02.2016. Since the auction did not fructify on 05.02.2016, the application before the Recovery Officer actually became infructuous. However the Recovery Officer dismissed the application in M.P. No. 13 of 2016 on 28.03.2016, on merits rejecting the contention about service of demand notice and service of notice of attachment and sale.

15. It is true that in the appeal filed by the petitioners in R.A. No. 2 of 2017 against the order of the Recovery Officer dated 28.03.2016, they can still canvass the points relating to non service of demand notice and non service of notices of attachment and sale. It is also true that in a writ petition arising out of the dismissal of R.A. No.2 of 2017, the petitioners can still canvass the issues relating to the non service of notice of demand and non service of notices of attachment and sale.

16. But the petitioners are not canvassing the correctness of the order of the DRT and that of the Recovery Officer, on the grounds available in respect of the original cause of action. The challenge is now confined to the conduct of the auction purchasers in not making payment as per Rule 57(2) of the Second Schedule to the Income Tax

Act, 1961. This is why we were constrained to point out that in the present writ petition arising out of the order of the DRT revolving around the correctness of the order of the Recovery Officer, the petitioners cannot canvass issues that arose entirely out of a fresh cause of action.

17. But still we would test the validity of the contention, without standing on technicalities.

18. The facts about which there are no controversies are as follows:

a) As against the fresh sale notice dated 11.04.2016 fixing the date of auction as 27.05.2016, the petitioners sought stay. This they did, without filing a fresh application, but by moving R.A. No.2 of 2017 itself.
b) On 26.05.2016 the DRT passed an order directing the Recovery Officer to proceed with the sale but not to confirm it, subject to the condition that the petitioners deposited Rs.40.00 lakhs within four weeks.
c) Therefore, the Recovery Officer proceeded with the auction on 27.05.2016.
d) The respondents 3 and 4 paid 25% of the bid amount on the same day. The last date for payment of the balance 75% of the bid amount was 11.06.2016.
e) The respondents 3 and 4 issued five cheques, dated 06.06.2016 and 07.06.2016 towards payment of the balance 75% of the amount.
f) Admittedly the respondents 3 and 4 did not have sufficient balance in their account during the period 06.06.2016 to 11.06.2016.

g) The respondents 3 and 4 got sufficient balance in their account by 22.06.2016 and the bank got their payments on 23.06.2016, by encashing those five cheques.

19. But admittedly the time of four weeks granted by the DRT on 26.05.2016, for the writ petitioners to deposit Rs.40.00 lakhs, as a condition for directing the Recovery Officer not to confirm the sale, expired on 23.06.2016 and the petitioners failed to comply with the conditional order. Their application for extension of time to comply with the conditional order was dismissed by the DRT. This order attained finality, as the petitioners did not challenge the same. It is in the backdrop of these circumstances that (i) the non-availability of funds in the bank account of the auction purchasers during the period from 06.06.2016 to 11.06.2016 and (ii) the presentation of the five cheques issued by the auction purchasers by the second respondent bank on 22/23.06.2016, have to be tested.

20. It is true that there is a small difference between a sale under the Security Interest (Enforcement) Rules, 2002 and a sale under the Second Schedule to the Income Tax Act, 1961. Under Rule 9(2) of the Security Interest (Enforcement) Rules, 2002, a sale should be confirmed in favour of the purchaser who has offered the highest sale price and this confirmation, obviously by the Authorised Officer, is subject to further confirmation by the secured creditor. Under Rule 9(3) of the Security Interest (Enforcement) Rules, 2002, the purchaser should deposit 25% of the sale price on the very date of sale or at least on the next working

day. The balance amount should be paid under Rule 9(4) on or before the 15th day of confirmation of sale.

21. Thus, under the scheme of the Security Interest (Enforcement) Rules, 2002, confirmation comes immediately upon the highest bid being accepted. It is only after such confirmation that 25% of the amount less the EMD is to be paid on the same day or the next day and it is only within 15 days of confirmation of that the balance 75% has to be paid. Sub-rules (2), (3) and (4) of Rule 9 read as follows:

> "9. **Time of sale, issues of sale certificate and delivery of possession, etc**.-
>
> (1) x x x x
>
> (2) The sale shall be confirmed in favour of the purchaser who has offered the highest sale price in his bid or tender or quotation or offer to the authorised officer and shall be subject to confirmation by the secured creditor: Provided that no sale under this rule shall be confirmed, if the amount offered by sale price is less than the reserve price, specified under sub-rule (5) of rule 9: Provided further that if the authorised officer fails to obtain a price higher than the reserve price, he may, with the consent of the borrower and the secured creditor effect the sale at such price.
>
> (3) On every sale of immovable property, the purchaser shall immediately pay a deposit of twenty-five per cent. of the amount of the sale price, to the authorised officer conducting the sale and in default of such deposit, the property shall forthwith be sold again.
>
> (4) The balance amount of purchase price payable shall be paid by the purchaser to the authorised officer on or before the fifteenth day of confirmation of sale of the immovable property or such extended period as may be agreed upon in writing between the parties."

22. In contrast, Rules 57, 58 and 63 of the Second Schedule to the Income Tax Act, 1961, contemplate the confirmation of the sale,

only after fulfillment of two conditions, namely (i) that no application for setting aside the sale is made or an application for setting aside the sale has been made but disallowed and (ii) that the purchaser has paid the full amount of purchase money. For better appreciation of the scheme of Rules 57, 58 and 63 of the Second Schedule, they are extracted as follows:

> **"Deposit by purchaser and resale in default.**
>
> **57.** (1) On every sale of immovable property, the person declared to be the purchaser shall pay, immediately after such declaration, a deposit of twenty-five per cent on the amount of his purchase money, to the officer conducting the sale; and, in default of such deposit, the property shall forthwith be resold.
>
> (2) The full amount of purchase money payable shall be paid by the purchaser to the Tax Recovery Officer on or before the fifteenth day from the date of the sale of the property.
>
> **Procedure in default of payment.**
>
> **58.** In default of payment within the period mentioned in the preceding rule, the deposit may, if the Tax Recovery Officer thinks fit, after defraying the expenses of the sale, be forfeited to the Government, and the property shall be resold, and the defaulting purchaser shall forfeit all claims to the property or to any part of the sum for which it may subsequently be sold.
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> **Confirmation of sale.**
>
> **63.** (1) Where no application is made for setting aside the sale under the foregoing rules or where such an application is made and disallowed by the Tax Recovery Officer, the Tax 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.
>
> (2) Where such application is made and allowed, and where, in the case of an application made to set aside the sale on deposit of the amount and penalty and charges, the deposit is made within thirty

> days from the date of the sale, the Tax Recovery Officer shall make an order setting aside the sale :
>
> **Provided** that no order shall be made unless notice of the application has been given to the persons affected thereby."

23. Therefore under the scheme of the Second Schedule to the Income Tax Act, 1961, a person declared in an auction to be the purchaser, (i) should pay 25% of the purchase money immediately upon being declared as the successful bidder; (ii) should pay the full amount of the purchase money on or before the 15th day from the date of the sale and (iii) wait thereafter until the expiry of 30 days from the date of the sale for the borrower or any interested person to move an application to set aside the sale either under Rule 60(1) or under Rule 61.

24. Therefore in a sale arising under the Second Schedule to the Income Tax Act, 1961, there is no question of the highest bidder waiting for confirmation of sale, as required by Rule 9(4) of the Security Interest (Enforcement) Rules, 2002, for making payment of the balance 75%. This is on account of the scheme of the Second Schedule being completely different from the scheme of Rule 9 of the Security Interest (Enforcement) Rules, 2002.

25. But in the case on hand, all parties including the DRT have not appreciated the distinction between the sale under Security Interest (Enforcement) Rules, 2002 and the sale under the Second Schedule to the Income Tax Act, 1961. This can be seen from certain facts.

26. In the appeal R.A. No.2 of 2017 arising out of M.P. No. 13 of 2016, the petitioners sought a stay of the auction proposed to be held on 27.05.2016, though the said auction was not the subject matter of controversy either in M.P. No. 13 of 2016 before the Recovery Officer or in the appeal before the DRT in R.A. No.2 of 2017. Without realising this, the Tribunal passed an interim order on 26.05.2016 to the following effect:

> "that the learned Recovery Officer may go ahead with the sale as proposed. However the sale shall not be confirmed provided the appellant deposit Rs.40.00 lakhs within a period of 4 weeks hereof.
>
> Let the matter be fixed for final hearing on 07.07.2016.
>
> In the meantime, parties are to file their necessary pleading."

27. Therefore, if the bank had chosen not to deposit the five cheques dated 06.06.2016 and 07.06.2016 issued by the Auction Purchasers, on account of the aforesaid stay order, the same cannot be construed as an undue favour extended to the auction purchasers. Similarly if the auction purchasers had omitted to keep sufficient balance in their account during the period from 06.06.2016 to 11.06.2016, on account of the interim stay order dated 26.05.2016 and if they had chosen to provide sufficient funds on the very day on which the stay order dated 26.05.2016 was to expire, they cannot be found fault with.

28. Rule 57(2) of the Second Schedule does not provide for a situation where an interim stay order comes into force before the expiry of the period stipulated therein. Therefore the contention that there was no strict compliance of Rule 57(2) cannot be accepted.

29. There is also one more reason. A person, who swears by a Rule, must first bind himself to the Rule. If the sale made by the Recovery Officer is vitiated on account of the prescription contained in the Second Schedule to the Income Tax Act, 1961, the petitioners should have availed the remedy provided to such persons under the very same set of Rules. Rule 60(1) empowers any interested person to file an application to the Recovery Officer to set aside the sale, within 30 days of the date of sale. But this application is maintainable only if the application is accompanied by a deposit of the amount specified in the proclamation of sale, together with interest and penalty. Alternatively any aggrieved person can file an application under Rule 61 to set aside the sale, on the grounds of certain irregularities in the conduct of the sale. An application under Rule 61 should also be filed only within 30 days of the sale.

30. The petitioners never moved any application either under Rule 60(1) or under Rule 61 to set aside the sale. Therefore in essence there was no challenge to the sale conducted on 27.05.2016, by way of any substantial application. On the other hand a mere stay of the sale was sought. After getting a conditional order of stay, the petitioners failed to comply with the condition. Therefore the bank chose to deposit

the cheques issued by the auction purchasers, towards the end of the expiry of the period of stay. Hence we cannot find fault with the bank in taking recourse to such an action.

31. Therefore, we find no merits in the writ petition. Hence it is dismissed. However, there shall be no order as to costs.

As a sequel thereto, Miscellaneous Petitions, if any, pending in the writ petition shall stand closed.

**V. RAMASUBRAMANIAN, J**

**P. KESHAVA RAO, J**

**February 01, 2019**
Mgr