IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:04.08.2021

CORAM :

THE HON'BLE MR.SANJIB BANERJEE, CHIEF JUSTICE

AND

THE HON'BLE MR.JUSTICE P.D.AUDIKESAVALU

W.P.No.1690 of 2016

and W.M.P.No.1465 of 2016

State Bank of India
Ganapathy Branch,
Sathy Road, Coimbatore – 641 006
Rep. by its Authorised Officer. .. Petitioner

Vs.

1. P.K.Janardhanan
2. V.Shantha

3. The Registrar,
   Debt Recovery Appellate Tribunal,
   Egmore, Chennai - 600 008. .. Respondents

Prayer: Petition filed under Article 226 of the Constitution of India seeking issuance of a writ of certiorari to call for the records of the impugned order dated 10.07.2015 passed in M.A.No.227 of 2008 on the file of the third respondent herein, and to quash the said impugned order being grossly illegal, not tenable in law.

For Petitioner : Mr.E.Om Prakash
Senior Counsel
for M/s.Ramalingam
and Associates

For Respondents : Mr.K.K.Shivashanmugam
for 1st respondent

: Mr.V.Suresh
for M/s.Shivakumar
and Suresh
for 2nd respondent

: Third Respondent (Tribunal)

ORDER
(Order of the Court was made by The Hon'ble Chief Justice)

The writ petition has, unfortunately, remained unattended to for more than five years though it pertains to bank recovery proceedings instituted in 2002 and involves orders of the years 2008 and 2015.

2. The petitioning bank questions the propriety of an order dated July 10, 2015 passed by the Debt Recovery Appellate Tribunal on the first respondent's appeal against an order dated September 18, 2008 passed by the Debts Recovery Tribunal, Coimbatore. The first respondent, a guarantor in a run-of-the-mill bank transaction, had appealed to the Presiding Officer of the Debts Recovery Tribunal under Section 30 of the then Recovery of Debts Due to Banks and Financial Institutions Act, 1993, which has now been rechristened as the Recovery of Debts and Bankruptcy Act, 1993.

3. The grievance that the first respondent carried to the Presiding Officer was the impropriety on the part of the Recovery Officer to sell a property in certificate recovery proceedings after the petitioner herein had succeeded in establishing the quantum of debt due from the borrower and the guarantor in proceedings under Section 19 of the Act of 1993. The Presiding Officer discussed the several aspects urged by the first respondent herein in great detail before repelling the appeal on the ground that it was not maintainable. The Presiding Officer held that in view of Section 29 of the Act of 1993 and the application of the provisions of, inter alia, the Second Schedule to the Income Tax Act 1961 in respect of sale of properties conducted in certificate recovery proceedings, the first respondent herein ought to have invoked Rule 61 to the Second Schedule to the Act of 1961.

4. It is necessary in the present context to see Sections 29 and 30 of the Act of 1993 and Rules 60, 61 and 62 of the Second Schedule to the Act of 1961:

> Act of 1993
>
> "29. Application of certain provisions of Income Tax Act.—
>
> The provisions of the Second and Third Schedules to the Income Tax Act, 1961 (43 of 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 Act:

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."

"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 enquiry 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)."

Rules in the Second Schedule to the Act of 1961
"60. Application to set aside sale of immovable property on deposit. -

(1) Where immovable property has been sold in execution of a certificate, the defaulter, or any person whose interests are affected by the sale, may, at any time within thirty days from the date of the sale, apply to the Tax Recovery Officer to set aside the sale, on his depositing -

(a) the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, with interest thereon at the rate of one and one-fourth per cent for every month or part of the month calculated from the date of the proclamation of sale to the date when the deposit is made; and

(b) for payment to the purchaser, as penalty, a sum equal to five per cent of the purchase money, but not less than one rupee.

(2) Where a person makes an application under rule 61 for setting aside, the sale of his immovable property, he shall not, unless he withdraws that application, be entitled to make or prosecute an application under this rule."

"61. Application to set aside sale of immovable property on ground of non-service of notice or irregularity:

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

(a) no sale shall be set aside on any such ground unless the Tax Recovery Officer is satisfied that the applicant has sustained substantial injury by reason of the non-service or irregularity; and
(b) an application made by a defaulter under this rule shall be disallowed unless the applicant deposits the amount recoverable from him in the execution of the certificate."

"62. Setting aside sale where defaulter has no saleable interest.
At any time within thirty days of the sale, the purchaser may apply to the Tax Recovery Officer to set aside the sale on the ground that the defaulter had no saleable interest in the property sold."

5. To complete the narration of events, the Debt Recovery Appellate Tribunal, in its rather terse order of July 10, 2015, held that the first respondent herein had a choice in either invoking Rule 60 or 61 of the said Rules in the Second Schedule to the Act of 1961 or preferring an appeal to the Presiding Officer under Section 30 of the Act of 1993. This was the appellate tribunal's simple interpretation of the non-obstante clause appearing at the beginning of Section 30 of the Act of 1993.

6. Two judgments, which are completely irrelevant in the context, have been cited on behalf of appearing parties: a judgment reported at (2013) 9 SCC 460 (C.N.Paramasivam v. Sunrise Plaza) where the discussion pertains to the modifications referred to in Section 29 of the Act of 1993, and

another, a Division Bench judgment of this Court reported at 2017-1-LW 577 (S.Reshma v. Debt Recovery Tribunal), which also dwelt on such aspect of Section 29 of the Act of 1993.

7. Section 29 of the Act of 1993 provides for the procedure as laid down in, inter alia, the Second Schedule to the Act of 1961 to be applicable in respect of the relevant matters under the Act of 1993. Section 29 is under Chapter V of the Act of 1993, which is intituled "Recovery of Debt determined by Tribunal" and contains sections which carry headings as "Modes of Recovery of Debts", "Validity of Certificate and Amendment thereof", and "Other Modes of Recovery". Chapter V of the Act of 1993 spans Sections 25 to 30A.

8. The non-obstante clause in Section 30 of the Act of 1993, in its simplest form and plain meaning, permits any person aggrieved by an order of the Recovery Officer to prefer an appeal against the relevant order, notwithstanding any other remedy that may have been provided to the person aggrieved in such regard in Section 29 of the Act of 1993 itself. Since Section 29 of the Act of 1993 embraces the provisions of, inter alia, the Second Schedule to the Act of 1961 within its fold in the widest terms, all of the provisions in the relevant Second Schedule, which can be seen to apply to the steps taken by the Recovery Officer, would be applicable, with necessary modifications. In other words, the provisions of, inter alia, the Second Schedule to the Act of 1961 would not apply stricto sensu, but the substance thereof would apply with the necessary modifications being read into the provisions as if by way of a legal fiction. Thus, to such extent, the sale provision envisaged in Rule 56 of the said Second Schedule and other provisions pertaining to the challenge to the sale under Rules 60, 61 and 62 would be attracted in respect of recovery proceedings before the Recovery Officer under the Act of 1993.

9. If a borrower or a guarantor misses the bus in paying the amount covered by the certificate and the sale is conducted by the Recovery Officer, Rule 60 of the Second Schedule to the Act of 1961 permits such person to approach the Recovery Officer within 30 days of the date of sale and upon depositing the sale price to require the sale not to be completed or effected. Similarly, Rule 61 of the Second Schedule to the Act of 1961 permits the defaulter as defined therein or any person whose interests are affected by the sale to approach the Recovery Officer if the ground of prejudice is that the defaulter had not been served any notice to pay arrears or there was a material irregularity in publishing or conducting the sale. Although it is irrelevant in the context, in view of the Proviso to the relevant provision, the applicant also must demonstrate the prejudice suffered before the application for setting aside the

sale of the immovable property may be received by the Recovery Officer. Rule 62 of the Second Schedule to the Act of 1961 permits the ground of lack of saleable interest to be taken, but only by the purchaser. It is also necessary to see Rule 63 of the said Schedule as it provides for confirmation of sale on two conditions: that such confirmation of sale would be made after the time for setting aside the sale under the previous Rules had expired or where the application was made and disallowed; and, upon the full payment of the purchase money having been received. Thus, no confirmation of sale can be made without both the conditions being met. To boot, the confirmation of sale would be an order since Rule 63(1) of said Schedule provides that the relevant official shall "make an order confirming the sale". Even the Proviso to the Rule refers to the confirmation of sale being an order.

10. Thus, when a defaulter - where the defaulter is the person who has defaulted making payment in terms of the certificate - or any other person who has an interest in the immovable property, seeks to apply for setting aside the sale of the property under Rule 60 of the Second Schedule to the Act of 1961, it is implicit that the person in essence accepts the obligation to discharge the certificate amount.

11. On the other hand, Rule 61 of the Second Schedule permits a ground of irregularity to be asserted without depositing any money, unless the applicant is a defaulter within the meaning of the word as used in the provision. It is possible, in terms of Rule 61 of the said Schedule, for either the defaulter or any person whose interests are affected by the sale of the property to apply, but the requirement of deposit is only on the defaulter in terms of the Proviso to such Rule.

12. Section 30 of the Act of 1993, when read in the ordinary course, gives an impression that any order of the Recovery Officer may be challenged as long as what is challenged may be regarded as an order and, loosely speaking, an order would be a decision that affects or tends to affect the rights of any person, unless the activity is statutorily regarded as an order. It is necessary to confine what the word "order" would imply in Section 30 of the Act of 1993, since every order of adjournment issued by the Recovery Officer may not be understood to be appellable to the Presiding Officer.

13. However, returning to the issue involved in the present case, the apparent choice that the procedure under Second Schedule to the Act of 1961 and the appellate provision under Section 30 of the Act of 1993 gives to any person who wishes to challenge a sale is not as wide or unconditional as it appears to be. It cannot be reasonably said that to apply under Rule 60

of the Second Schedule a person has to make a deposit, whereas the alternative remedy of resorting to an appeal under Section 30 of the Act of 1993 before a superior forum may be without deposit of any money at all. That would be irrational. Similarly, if a defaulter were to challenge the sale under Rule 61 of the said Schedule which would require a deposit to be made, the defaulter may not wriggle out of the obligation by resorting to the appellate provision under Section 30 of the Act of 1993.

14. The two provisions or the two routes of challenge are qualitatively different. Just as a defendant suffering an exparte decree has the choice to go before the trial court and have the decree set aside by indicating sufficient grounds that prevented him from presenting himself in court at the time that the suit was decreed exparte, such defendant also has an alternative remedy of preferring an appeal against the decree. In such a case, as in the present, the quality of the challenge before either fora would be different. In the exparte decree case, the grounds for not being able to attend court on the relevant date when the suit was scheduled to be taken up may not be urged, but other grounds may be urged in appeal touching upon the reasons proffered in support of the decree to allow the claim. Even the jurisdiction of the trial court may be assailed in such appeal, but the sufficiency of the cause for the defendant’s non-appearance before the trial court on the relevant date may not be cited as a ground, as such ground may be urged only under Order IX Rule 13 of the Code of Civil Procedure.

15. In the present case, a defaulter who has failed to make the payment within time after a certificate has been issued against him or any other person who is interested in the property within the meaning of the expression in Rules 60 or 61 of the said Schedule may resort to the appellate provision of Section 30 of the Act of 1993 to question the authority of the Recovery Officer or the like, but not to seek the setting aside on the same grounds as in Rules 60 or 61 of the said Schedule. Similarly, when a purchaser prefers an appeal from an order of sale, the ground under Rule 62 of the said Schedule may not be urged in such appeal under Section 30 of the Act of 1993, though other grounds not covered by Rule 62 may be cited in course of such appeal.

16. Indeed, the apparent anomaly created by the non-obstante clause in Section 30 of the Act of 1993 is somewhat attempted to be cured by the introduction of Section 30A in the relevant Chapter. Such Section now provides that where an appeal is preferred against an order of the Recovery Officer under Section 30 by any person from whom the amount of debt is due, such

appeal shall not be entertained unless fifty per cent of the amount due has been deposited.

17. However, the present matter has to be assessed without reference to Section 30A of the Act of 1993, which has been introduced subsequent to the appeal being preferred under Section 30 by the first respondent herein and even after the further appellate order of the Debt Recovery Appellate Tribunal was made on July 10, 2015. Section 30A was introduced to the Act of 1993 with effect from September 1, 2016. In the present case, there is no doubt that as a guarantor to the transaction, the liability of the first respondent herein was co-extensive with that of the principal-debtor. In any event, the certificate may have also provided for recovery of the debt from the first respondent herein.

18. The grounds carried by the first respondent in the appeal filed under Section 30 of the Act of 1993 pertained to the non-publication of a notice for sale in the language of the district, within the meaning of the relevant expression in Rule 52(2) of the said Schedule to the Act of 1961. Though the Debts Recovery Tribunal recorded the submission of the bank that a publication in the local language had been made, it rendered no finding on such aspect since it found that the appeal before it was not maintainable. However, the appeal was found to not be maintainable not on the ground that the grounds under Rules 60 and 61 had been urged, but merely on the ground that the appeal would not lie in such a situation without the appellant exhausting the remedy under Rules 60 and 61 of the said Schedule.

19. Similarly, in the Debt Recovery Appellate Tribunal order of July 10, 2015, it noticed the non-obstante clause at the beginning of Section 30 of the Act of 1993 and proceeded to opine that it was open to a person in the position of the first respondent herein to opt either to apply under Rules 60 or 61 of the said Schedule or to appeal under Section 30 of the Act of 1993. This was not a reasonable interpretation of the relevant provisions. Ordinarily, two alternative remedies for the same purpose would not be available. At the very least, the considerations relevant to avail either remedy must be distinct, though the effect upon obtaining the remedy may be the same. Just like the effect of an appeal or a review against the same order may be identical, qualitatively a review is different from an appeal and the grounds that may be urged in either case are distinct. It is thus that an application for setting aside an order of sale may be made in the circumstances recognised in Rules 60 or 61 or 62 of the Second Schedule to the Act of 1961; but such circumstances must not be cited when availing the appellate remedy under Section 30 of the Act of 1993. The appeal must be on different grounds than the purposes indicated

in Rules 60 or 61 or 62 of the Rules of the said Second Schedule.

20. Accordingly, since it is evident from the records that the first respondent herein carried grounds which ought to have been urged under Rule 61 of the Second Schedule to the Act of 1961 and since the invocation of such Rule would have required the first respondent to make the pre-deposit, it was not open to the first respondent to bypass such provision and choose the appellate route to urge the same grounds. However, the situation would have been different if grounds other than those available in Rules 60 and 61 were urged by a similarly placed person by way of an appeal.

21. By virtue of Section 29 of the Act of 1993, the provisions of, inter alia, the Second Schedule to the Act of 1961 would apply, with necessary modifications in respect of recovery of debt determined by the Tribunal. In terms of the scheme recognised in Chapter V of the Act of 1993, it is the Recovery Officer who would be entitled to take steps to recover the amount of debt specified in a certificate issued by the Tribunal. Part III of the Second Schedule to the Act of 1961 provides for attachment and sale of immovable property. Thus, by operation of law, the provisions of Part III of the Second Schedule to the Act of 1961 would apply to recovery proceedings in respect of any certificate issued by the Tribunal. Rule 60 of the said Rules, which permits an application for setting aside of sale to be made, and Rule 61 of the said Rules, which also provides for an application for setting aside the sale of an immovable property on other grounds, contain the similar expressions, "has been sold in execution of a certificate". The expression "has been sold" does not imply that the sale has to be completed, in the sense that the confirmation of sale would have been made. Such expression, "has been sold" and even the expression "of the sale" in Rule 62 of the said Rules refer to the sale by auction, where the highest bidder has been identified, and the sale has been made in favour of such highest bidder, but no confirmation of the sale has been made.

22. Rule 63 of the said Rules, which immediately follows the three Rules - 60, 61 and 62 - which provide for setting aside the sale in different circumstances, mandates that the confirmation of sale would be made when "no application is made for setting aside the sale under the foregoing rules or where such an application is made and disallowed". The confirmation of the sale, in terms of Rule 63(1) of the said Rules, makes the sale absolute. What such provision implies is that upon the sale becoming absolute, the Recovery Officer has no means to reopen it.

23. The use of the expression "any person aggrieved by an order of the Recovery Officer made under this Act" in Section 30 of the Act of 1993 would suggest any order which prejudices the rights of any person. In such sense, the sale of an immovable property by the Recovery Officer would be any "order" within the meaning of such word used in the relevant expression. However, the grounds for challenging such order may not be the grounds under which an application for setting aside the sale may be made under Rules 60, 61 or 62 of the said Rules in the Second Schedule to the Act of 1961.

24. For the foregoing reasons, the order dated July 10, 2015 passed by the Debt Recovery Appellate Tribunal cannot be sustained and the same is set aside. The order dated September 18, 2008 passed by the Debts Recovery Tribunal, Coimbatore is restored, but on completely different grounds as indicated hereinabove.

25. As a consequence, the sale which has long been concluded in favour of the second respondent auction-purchaser can no longer be touched by the first respondent and will be regarded to have been finally closed.

W.P.No.1690 of 2016 is disposed of. There will be no order as to costs. Consequently, W.M.P.No.1465 of 2016 is closed.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

sasi

To
The Registrar,
Debt Recovery Appellate Tribunal,
Egmore, Chennai - 600 008.

+2CCs to M/s.Ramalingam & Associates, Advocate, Sr.No.37957
+1CC to Mr.Shivakumar, Advocate, Sr.No.38631

W.P.No.1690 of 2016

MG (CO)
K.RK. (13.08.2021)