

Diksha Rane/PMB

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 6159 OF 2011

Shri Sarang Avinash Kamtekar
Age : adult, Occupation : Service,
residing at 202, Bhagyadarshan
Society, Behind Ayyappa Temple,
Bhosari, Pune 411 039.

..Petitioner

vs.

1. M/s. Alpha Organic,
a Proprietary concern of Shri Mukund
Vasant Deshpande,
Age : adult, Occupation : Business,
residing at C/o. Shri Ashok Dategaonkar,
having address at Raul Apartment,
B5, Erandavane, Pune 411 004.

2. Bank of India, a Body Corporate,
constituted under the Banking
(Acquisition and Transfer of Undertaking)
Act, 1970, having its office among
other places at Karve Road Branch,
65-1-B, Erandavane, Pune 411 004.

3. The Ld. Chairperson,
The Debts Recovery Appellate Tribunal,
Fourth Floor, Sindhiya House,
Ballard Pier, Mumbai.

..Respondents

Mr. Siddharth R. Ronghe for the Petitioner.
Dr. Arunkumar Barthakur and Mr. Shrinivas Chopade for
Respondent No.1.
Mr. Rakesh Singh a/w. Purri Davda i/b. M. V. Kini and Co. for
Respondent No.2.

**CORAM : A. A. SAYED &
M. S. KARNIK, JJ.**

DATE : 7 APRIL, 2022

JUDGMENT : (PER M. S. KARNIK, J.) :

1. The challenge in this proceeding under Article 226 of the Constitution of India is to the judgment and order dated 27/6/2011 of the Debts Recovery Appellate Tribunal at Mumbai (hereafter 'DRAT' for short). Before the DRAT the order dated 26/3/2008 passed by the Debts Recovery Tribunal, Pune (hereafter 'DRT' for short) was under challenge, whereby the Appeal No. 28 of 2006 filed by Respondent No.1 under Section 30 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (hereafter 'RDDB & FI Act' for short) was dismissed as being barred by time and as being beyond the scope of Section 30 of the RDDB & FI Act.

2. The facts of the case in brief are: -

The Respondent No.2-Bank of India (hereafter 'BOI' for short) filed Civil Suit No.180 of 1992 before the Civil Judge, Senior Division, Pune against the Respondent No.1-M/s. Alpha Organic (hereafter 'Alpha Organic' for short) for

recovery of Rs.4,96,248/- along with interest. The suit came to be decreed on 27/9/2000. The DRT, Pune was established on 16/7/1999 and RDDB & FI (Amendment) Act, 2000 (hereafter 'Amendment Act, 2000' for short) became effective from 17/1/2000. Alpha Organic filed First Appeal No. 326 of 2001 before this Court against the judgment and decree dated 27/9/2000. The Appeal is admitted and pending final hearing. This Court by an order dated 11/10/2002 passed in Civil Application ('C.A.' for short) No. 3222 of 2001 and C. A. No. 3223 of 2002 in F. A. No. 326 of 2001 stayed the impugned decree subject to the condition regarding payment of the amount by Alpha Organic in the manner stated in the order. By an order dated 18/6/2003, this Court allowed the C.A. No. 1886 of 2003 in F. A. No. 326 of 2001 filed on behalf of BOI for withdrawal of the amount deposited, by passing following order:

"So far as deposit of Rs.1,50,000/- made by the Respondent herein under order of this Court dated 11/10/2002 is concerned, the applicant bank is allowed to withdraw this amount subject to furnishing an undertaking to this Court that in the event respondent succeeds, the applicant bank shall bring back the said amount with interest as may be ordered

by this Court at the time of final hearing.”

3. In the meantime, the recovery proceedings (for execution of decree dated 27/9/2000) came to be initiated by BOI before the DRT-II invoking the provisions of Section 31A of the RDDB & FI Act. The Presiding Officer, DRT, Pune issued the recovery certificate dated 28/12/2001 under sub-section 7 of Section 19 of RDDB & FI Act of Rs.14,65,500/-, certifying that the mentioned sum of Rs.14,65,500/- together with further interest till realization of the amount aforesaid is due to BOI from Alpha Organic. It is further stated in the certificate that the Recovery Officer shall realize the amount as per such certificate in the manner and mode prescribed under Sections 25 and 28 of the RDDB & FI Act.

4. A show cause notice under Rule 73 of second Schedule of Income Tax Act, 1961 read with Sections 28 and 29 of the RDDB & FI Act was issued on 24/6/2002 as to why the proprietor of Alpha Organic should not be committed to civil prison in execution of the said certificate. Alpha Organic filed an application before the Recovery Officer on 12/9/2003 informing him about the stay granted by the

High Court to the decree and requested the Recovery Officer to stay the proceedings. The said application was rejected. In course of recovery proceedings, the Recovery Officer invited offers in sealed envelope of interested parties for auction sale on "as is where basis". The property for sale is described as "all the piece and parcel of the property bearing Flat no.A-14, Vijay Laxmi Society, Paud Road, Pune 411 038 (hereafter 'the said flat' for short). The last date for receiving the bids was 29/12/2003 till 2.30 p.m. The public notice stipulated that the tenders received after the prescribed date and time will not be accepted. This public notice was published in the daily newspaper "Prabhat" circulated in Pune.

5. By its order dated 23/4/2004, the Recovery Officer declared that in the public auction held on 23/4/2004, the Petitioner-Shri Sarang Avinash Kamtekar (hereafter 'Kamtekar' for short) was the successful bidder of the said flat. The order reflects that Kamtekar's bid was of Rs.2,40,000/- which is equal to the reserve price and that he had already deposited Rs.1,00,000/- as EMD and

balance 25% of the bid amount. He was directed to deposit the remaining 75% balance of the bid amount i.e. Rs.1,40,000/- within 15 days on or before 7/5/2005. The order confirming the sale of the said flat is dated 24/5/2004 whereupon the sale certificate is issued in respect of the sale of the said flat.

6. Alpha Organic filed M. A. No. 55 of 2005 before the DRT for condonation of delay of 51 days in filing the Appeal in its challenge to the sale proceedings before the Recovery Officer. The application was opposed by BOI. The said application for condonation of delay came to be dismissed by the DRT vide order dated 27/6/2005. Alpha Organic challenged the order dated 27/6/2005 by filing Appeal No. 353 of 2006 before the DRAT. The DRAT vide order dated 11/9/2006 set aside the order dated 27/6/2005 of DRT, thereby condoned the delay of 51 days and directed the DRT, Pune to decide the Appeal on merits.

7. Alpha Organic filed Appeal No. 28 of 2006 before the DRT, Pune, challenging various orders passed by the Recovery Officer in Recovery Proceeding No. 13 of 2002.

The DRT was of the opinion that the recovery certificate has not been challenged by Alpha Organic and therefore, it has become final and conclusive. It further held that the question regarding legality of the certificate does not fall within the scope of Appeal as provided for under RDDB & FI Act and therefore, in the Appeal the said question cannot be gone into. According to DRT, the scope of the Appeal is limited by Sections 25 to 28 of the RDDB & FI Act. In its opinion, as Alpha Organic did not take resort to Rules 60 and 61 of the second Schedule of the Income Tax Act to set aside the sale on the ground of irregularity by depositing the amount recoverable from it in execution of the sale certificate, it held the Appeal to be not maintainable. It further held that the challenge of the confirmation of the sale is time barred. The Appeal thus came to be dismissed as barred by time and as the same is beyond the scope of Section 30 of RDDB & FI Act.

8. Alpha Organic filed Appeal No. 188 of 2008 along with M. A. No. 384 of 2008 before the DRAT, Mumbai. The DRAT, Mumbai by the order impugned in this Petition allowed the

Appeal and set aside the sale of the flat and the subsequent actions of the Recovery Officer in pursuance of the sale. The DRAT, Mumbai, directed that the possession of the said flat be restored back to Alpha Organic on or after 29/7/2011. It observed that further action in the Recovery Proceedings No. 13 of 2002 will be taken in accordance with the result of Appeal No. 326 of 2001 pending before in this Court.

9. Learned Counsel for Kamtekar, challenging the judgment and order passed by the DRAT submits as under:-

(a) The said flat in question was acquired by Kamtekar in accordance with the procedure prescribed by RDDB & FI Act. Kamtekar is in possession of the said flat for almost 17 years. To direct restoration after such a long time is harsh and would cause serious prejudice to Kamtekar.

(b) The rejection of the application for stay to the recovery proceedings before the Recovery Officer filed on behalf of Alpha Organic was not challenged in Appeal before DRT thereby rendering the recovery certificate final and conclusive. In these circumstances

the finding of DRAT that recovery should proceed only after decision in the First Appeal before the High Court is unjustified.

(c) The DRAT has committed an error in entertaining the Appeal in its challenge to the auction proceedings, as according to learned Counsel, such a challenge under Section 30 of the RDDB & FI Act is not maintainable in the absence of Alpha Organic resorting to the remedy provided by Rules 60 and 61 of the IT Rules.

(d) Though the public notice is in English, the same is published in a Marathi newspaper having wide circulation and therefore there is substantial compliance with the Rules of procedure.

(e) The said flat was sold after following the due procedure prescribed by RDDB & FI Act. The stay granted to the decree by the High Court is of no consequence as Alpha Organic participated in both the proceedings thus submitting to the jurisdiction of the DRT.

(f) Learned Counsel cited the following decisions in support of his submissions:-

- (i) Union of India and another vs. Delhi High Court Bar Association and others¹.
- (ii) Hill Properties Ltd. vs. Union Bank of India & Others².
- (iii) Usha Offset Pvt. Ltd. vs. Bank of Maharashtra and others³.
- (iv) M/s. Maan Saravoar Properties Development Pvt. Ltd. vs. The Union of India & others⁴.
- (v) Sadashiv Prasad Singh vs. Harendar Singh and others⁵.

10. On the other hand, learned Counsel for Alpha Organic invited our attention to the findings recorded by the DRAT and argued in support of the findings. He submits that without a fresh public notice regarding a proclamation of sale, the said flat is auctioned in favour of Kamtekar in complete breach to the prescribed statutory procedure. In support of his submissions, learned Counsel relied upon the following decisions:

1 (2002) 4 SCC 275
2 2010 (1) AIR (BOM) R 286
3 (2016) 3 AIR BOM R 549
4 2014-5-L.W. 381
5 (2015) 5 SCC 574

- (i) Himadri Coke & Petro Ltd. vs. Soneko Developers (P) Ltd. & ors.⁶
- (ii) M/s. Navalkha & Sons vs. Sri Ramanya Das & ors.⁷
- (iii) FCS Software Solutions Ltd. vs. La Medical Devices Ltd. & ors.⁸
- (iv) Chandavarkar Sita Ratna Rao vs. Ashalata S. Guram⁹.
- (v) C. N. Paramasivam & Anr. vs. Sunrise Plaza through Partner & ors.¹⁰
- (vi) Official Liquidator, Uttar Pradesh & Uttarakhand vs. Allahabad Bank & ors.¹¹
- (vii) Asha Mehta vs. Allahabad Bank¹².
- (viii) Mathew Varghese vs. M. Amritha Kumar & ors.¹³
- (ix) Keshrimal Jivji Shah & anr. vs. Bank of Maharashtra & ors.¹⁴
- (x) Hari Vishnu Kamath vs. Ahmad Ishawue & ors.¹⁵
- (xi) Raghunath Rai Bareja & anr. vs. Punjab National Bank & ors.¹⁶

11. Heard learned Counsel at length. Perused the pleadings and the impugned order. The DRAT allowed the appeal finding that the High Court having granted stay to the decree passed by the trial Court, as this decree was

6 (2005) 12 SCC 364
7 1969(3) SCC 537
8 (2008) 10 SCC 440
9 (1986) 4 SCC 447
10 (2013) 9 SCC 460
11 (2013) 4 SCC 381 Utt
12 2011 (1) Mh. L.J.
13 (2014) 5 SCC 610
14 2004 (3) Mh.L.J.
15 AIR 1955 SCC 233
16 (2007) 2 SCC 230

subject matter of recovery proceedings before the DRT, the recovery proceedings before the DRT should not have proceeded further. It held that the Recovery Officer has committed irregularities by not mentioning the reserve price in the sale proclamation and further by not publishing the sale proclamation in the language of the district.

12. The DRAT was of the opinion that the Recovery Officer should not have proceeded with the sale in view of the pendency of the Appeal in this Court against the decree which was subject matter of execution before the DRT. The premise on which the DRAT proceeded to form this opinion is that, in the event the First Appeal filed by Alpha Organic in this Court is allowed, it would result in complicating the issue. The DRAT was of the opinion that the decree having been stayed by the High Court and Alpha Organic having complied with the conditions of the stay, it would have been advisable for the Recovery Officer to have not proceeded further with the execution. The relevant observations of the DRAT in paragraph 9 are as under:-

"As noted above, the Civil Court had passed the decree on 27/7/2000. On 15/3/2001 the appeal was filed

against the decree in the Hon'ble High Court. On 30/7/2001 the appeal was admitted by the Hon'ble High Court bearing Registration No. 326/2001. The said appeal is still pending. On 11/10/2001 the Hon'ble High Court granted stay of the decree on deposit of Rs.1.50 lacs within four weeks. The appellants deposited the aforesaid amount of Rs.1.50 lacs on 31/10/2002. Subsequently the appellant filed application Exhibit 27 before the Recovery Officer on 12/9/2003 for stay of the recovery proceedings in R. P. No. 13 of 2002. The Recovery Officer rejected Exhibit 27 on 17/10/2003. On 3/11/2003, the Recovery Officer ordered for proclamation of sale by public auction. Subsequently this auction took place and the property was sold to the auction purchaser. The contention raised by Dr.Barthakur is that once the Hon'ble High Court was seized of the matter and had passed an effective order of stay whereby the execution of decree was stayed on deposit of Rs.1.50 lacs by the appellant, it was not proper for the Recovery Officer to have gone ahead with the execution of the decree. The order passed by the Hon'ble High Court was brought to the notice of the Recovery Officer. He still proceeded to execute the recovery certificate, in clear disregard of the fact that the decree was passed by the Civil Court and the same was stayed by the Hon'ble High Court. It was the same decree on the basis of which the Tribunal had issued the recovery certificate. The submission of Dr. Barthakur is that it is advisable to avoid such situation. For a moment he may agree that legally the Recovery Officer could execute the recovery certificate. But what will happen if the appellant ultimately succeeds before the Hon'ble High Court in its appeal? This is situation where there are two forums where the matter is pending – first appeal is pending before the Hon'ble High Court while a decree, though stayed by the Hon'ble High Court is being executed by the Recovery Officer. The submission of the appellant's learned counsel is that such a situation must be avoided. He has placed reliance upon a judgment of the Hon'ble Supreme Court reported in 2006 (12) Supreme Court Cases 484 (State of H.P. and Others V/s. Surinder Singh Banolta), where it was laid down;

"A situation, thus, may arise where two different proceedings may lie before two different authorities at the instance of two different persons. Two parallel proceedings, it is

well settled, cannot be allowed to continue at the same time. A construction of a statute which may lead to such a situation, therefore, must be avoided. It will also lead to an absurdity if two different tribunals are allowed to come to contradictory decisions”.

Under the facts and circumstances that have unfolded before us, it was advisable for the Recovery Officer to have refrained from proceeding further once the order of stay granted by the Hon’ble High Court had been brought to his notice. The Recovery Officer refused to stay further proceedings of R.P. No. 13 of 2002 and rejected the appellant’s application for stay. It appears that the appellant did not challenge the order before the learned Presiding Officer so as to bring the order of stay passed by the Hon’ble High Court to the notice of the learned Presiding Officer. However, the ideal situation was that Recovery Officer should have stayed his hands in R.P. No. 13 of 2002, once the order passed by the Hon’ble High Court on 11/10/2002 was brought to his notice.”

13. Let us consider the submission of learned Counsel for the Petitioner that the DRAT was not justified in recording a finding that the Recovery Officer should not have proceeded with the execution, after the order of the High Court granting stay to the judgment and decree sought to be executed was brought to his notice. The decree was passed in favour of BOI on 27/9/2000. Section 31A of the RDDB & FI Act was inserted by Act 1 of 2000 w.e.f. 17/1/2000. Though a query was raised whether upon establishment of the DRT, Pune w.e.f. 16/7/1999, the Civil Court would

continue to have jurisdiction to try the suit in view of Section 31 of the RDDB & FI Act; the learned Counsel for the parties submit that the decree passed by the Civil Court, so also the initiation of the execution proceedings for recovery under Section 31A of the RDDB & FI Act are well justified and hence do not dispute this position. We are satisfied that having regard to the nature of the claim, this is not a case where jurisdiction is conferred on the DRT by consent of the parties as the DRT has jurisdiction to entertain the recovery proceedings. We therefore do not deliberate on this aspect of jurisdiction any further, as in any case none of the parties object to the jurisdiction of the DRT or the Recovery Officer in executing the decree of the Civil Court.

14. As indicated earlier, as per Section 31A of the RDDB & FI Act, a Certificate for Recovery was issued by the DRT on 28/12/2001 in execution of the decree dated 27/9/2000 of the Civil Court. On receipt of such certificate issued under Sub-Section 2 of Section 31A of the RDDB & FI Act, the Recovery Officer proceeded to recover the amount in terms

of Sub-Section (3) of Section 31A of the RDDB & FI Act. No doubt, the Recovery Officer was informed only on 12/9/2003 about the stay to the decree granted by the High Court i.e. after the issuance of the Recovery Certificate by the DRT. An application for stay of the recovery proceedings was made by Alpha Organic. The said application came to be rejected. The Recovery Certificate was not challenged by Alpha Organic which is the basis for learned Counsel for Kamtekar submitting that the Recovery Officer was justified in proceeding ahead with the execution. The question is whether in the teeth of the stay granted by the High Court to the decree of the Civil Court, should the Recovery Officer have at all proceeded with the execution once this was brought to his notice. The provisions of Section 31A of the RDDB & FI Act assume relevance in this context and hence need to quoted, which reads thus :-

"31A. Power of Tribunal to issue certificate of recovery in case of decree or order.—

(1) Where a decree or order was passed by any court before the commencement of the Recovery of Debts Due to Banks and Financial Institutions

(Amendment) Act, 2000 and has not yet been executed, then, the decree-holder may apply to the Tribunal to pass an order for recovery of the amount.

(2) On receipt of an application under sub-section (1), the Tribunal may issue a certificate for recovery to a Recovery Officer.

(3) On receipt of a certificate under sub-section (2), the Recovery Officer shall proceed to recover the amount as if it was a certificate in respect of a debt recoverable under this Act.”

15. The Apex Court in **Punjab National Bank, Dasuya vs. Chajju Ram and ors.**¹⁷ held that Section 31A is clearly applicable to a case where the decree passed by Court before commencement of the Amendment Act and the same has not yet been executed.

16. We find that but for Section 31A, the decree would have been subject matter of execution by the Civil Court as per the provisions of Code of Civil Procedure. In the absence of provision such as Section 31A, the executing Court (Civil Court) would have proceeded to execute the decree. The effect of stay of the decree by the High Court

¹⁷ AIR 2000 SC 2671

would have had the effect of staying further execution proceedings before the Civil Court and there is then no question of proceeding ahead with the execution till further orders in the Appeal by the High Court. This being the position, upon coming into force of Section 31A, can the DRT or the Recovery Officer despite noticing the pendency of the Appeal and the consequent stay to the execution of the decree by the High Court, when such decree itself is the subject matter of execution under Section 31A, still proceed with the execution in the face of the stay to the decree granted by the High Court. The object of enacting the said Act was to work out a suitable mechanism through which the dues to the Banks and financial institutions could be realised without delay.

17. The recovery proceedings under the RDDB & FI Act provides for a mechanism through which the dues of the bank could be realised in execution of the decree without delay. No doubt that the Recovery Officer has to recover the dues as per the recovery certificate issued by the DRT. In the course of recovering the dues under Section 31A of the

RDDB & FI Act, the Recovery Officer is effectively executing the decree of the Civil Court. The recovery certificate under Section 31A of the RDDB & FI Act is a consequence of the decree. In simple words, the decree is the main order. Once the decree is stayed by the High Court, it cannot be gain said that the recovery proceedings can continue on the basis of the recovery certificate. If the Recovery Officer proceeds to recover the dues in execution of the recovery certificate, it will have the effect of virtually rendering the stay granted to the decree by a Superior Court otiose. Such a course is impermissible. The decree which was a subject matter of recovery proceedings before the DRAT was stayed, in which case, the Recovery Officer ought not to have proceeded with the recovery proceedings once this was brought to his notice. Merely because the application made by Alpha Organic for staying the recovery proceedings is rejected, or that the recovery certificate is not challenged, will not authorise the Recovery Officer to overreach the orders passed by the High Court. We therefore have no hesitation in endorsing the view taken by

the DRAT for these additional reasons as well.

18. On 3/11/2003, the DRT, Pune, issued a public notice for sale of the said flat. Last date for receiving the bids was 29/12/2003 till 2.30 p.m. and the tenders were to be opened on the same date at 3.00 p.m. Final bids were to be conducted on the same day at 3.30 p.m. In the public notice dated 3/11/2003, there is no mention of the reserve price. The public notice further stipulated that the tenders received after the prescribed date and time will not be accepted. No bids were received on 29/12/2003 and auction was postponed. Even on the subsequent dates i.e. 20/1/2004, 5/2/2004, 3/3/2004 and 26/3/2004 no bids were received. In the roznama dated 23/4/2004, it is recorded that one bid received was opened at 3.30 p.m. The bid of Mr. Kamtekar at Rs.2.40 lakhs being equal to the reserve price fixed for this property was accepted. Perusal of the order passed by the DRAT reveals that the reserve price finds mention in the roznama dated 23/4/2004 for the first time. The DRAT was of the opinion that the reserve price should have appeared in the proclamation of sale

published on 6/11/2003 in the Daily 'Prabhat'.

19. Rule 53 of Second Schedule to the Income Tax Act provides for the contents of proclamation which also include the reserve price below which the property may not be sold. In this context, it would be profitable to rely on the decision in the case of **FCS Software Solutions Ltd.** (*supra*). We may usefully refer to paragraphs 14, 36 and 37 of the said decision, which reads thus: -

"14. The learned counsel for the appellant contended that the Company Judge as well as the Division Bench of the High Court were wholly wrong in setting aside the auction sale in favour of the appellant. It was submitted that pursuant to sale notice, tenders were invited, twelve persons offered their bids. The bid of the appellant was highest. In consonance with law, therefore, the said bid was accepted and the appellant deposited amount of 25% as required by law. It also paid the remaining amount of 75%. Sale was confirmed in favour of the appellant and direction was issued by the Company Judge to the Official Liquidator to hand over possession of the property to the appellant. The Official Liquidator, however, with mala fide intention and oblique motive, refused to do so.

36. In *Gajraj Jain v. State of Bihar & Ors.*, (2004) 7 SCC 151, this Court reiterated that in absence of valuation report and reserve price, the auction sale becomes only a pretence. If there is no proper mechanism and if the intending purchasers are not able to know details of the assets or itemised valuation, auction sale cannot be said to be in accordance with law. If publicity and maximum participation is to be attained, all bidders must know the details of the assets and the valuation thereof.

37. In the present case, it was alleged that there

were several irregularities in the first auction. The tender notice did not state valuation of movable and immovable property; reserve price was not fixed, inventory of plant and machinery was not made available, etc. If on consideration of these facts, the Company Judge ordered fresh auction, in our considered opinion, no complaint can be made against such action."

20. It is, thus, seen that the proclamation for sale does not include the reserve price below which the property may not be sold, thereby contravening Rule 53. There is no disclosure of the reserve price in the proclamation dated 6/11/2003. We find that Kamtekar had not responded to the advertisement of the sale of the property published in the newspaper dated 26/11/2003 within the period stipulated therein. The advertisement expressly stated that the tenders received after the prescribed date and time i.e. 29/12/2003 till 2.30 p.m. will not be accepted. The sale was postponed. The Recovery Officer recorded that the Kamtekar's bid was received only on 23/4/2004 and therefore, the bid was accepted. From the record, we do not find that a fresh advertisement for sale was made though no bids were received in response to the advertisement dated 26/11/2003. The sale was simply postponed by the

Recovery Officer on different dates without a further public notice of proclamation of sale and on one such date, upon Kamtekar submitting his bid, the same was accepted. We find substance in the contention of learned Counsel for Alpha Organic that on this ground alone the sale is vitiated. If any authority is required in support of this proposition, we may usefully refer to (1) **Himadri Coke & Petro Ltd. vs. Soneko Developers (P) Ltd. and others**¹⁸; (2) **Bajaranglal Shivchandrai Ruia vs Shashikant N. Ruia And Ors.**¹⁹ and (3) **A.V. Papayya Sastry & Ors. vs Government Of A.P. & Ors.**²⁰

21. We note that the DRAT has not recorded a finding on the issue whether Kamtekar was entitled to participate in the auction which was held on 23/4/2004 without there being a fresh advertisement for sale. Nonetheless, from the records we find that the auction held subsequently on 23/4/2004 was completely in breach of the provisions of the Rule 15(2) of the Second Schedule of IT Act. The bid is accepted in a postponed auction after a much longer period

18 (2005) 12 SCC 364

19 2004(3) SCR 373

20 (2007) 4 SCC 221

than one calendar month from the date of proclamation of sale. The sale was adjourned by one month for which there is no consent on record of the defaulter (Alpha Organic). The DRAT found that on several dates when the sale came to be postponed, no bids were received and the sole bid of Kamtekar was received on 23/4/2004. The circumstance that reserve price was mentioned in the roznama dated 23/4/2004 for the first time is found to be suspicious by the DRAT. We do not find any perversity in the finding to warrant any interference.

22. So far as the contention raised by learned Counsel on behalf of Kamtekar that Alpha Organic failed to invoke the provisions of Rules 60 and 61 of the Second Schedule of the IT Act, in the absence of which, the Appeal is not tenable, we find that the DRAT for the reasons mentioned in paragraph 12 rightly came to the conclusion that the said contention on behalf of Kamtekar deserves to be rejected. Rule 60 of the Second Schedule of the IT Act provides for setting aside of the sale of the immovable property by deposit of the amount specified in the proclamation of sale

and interest thereon along with penalty for payment to the purchasers within 30 days from the date of the sale. Rule 61 provides for setting aside the sale on ground of non-service of notice or irregularity. Section 30 (1) of the RDDB & FI Act provides for an Appeal. It reads thus : -

"30(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."

23. Section 30 (1) starts with a non-obstante clause. The DRAT in support of its conclusion that Section 30 (1) overrides Section 29 of the RDDB & FI Act, took support from the observation of this Court in **Hill Properties Ltd.** (*supra*). We may usefully refer to paragraph 29 of the said decision which reads thus: -

"29. Section 30 as now substituted by Act 1 of 2000 begins with a non-obstante clause. A person aggrieved by an order of the Recovery Officer may within thirty days from the date on which a copy of the order is issued to him, prefer an appeal to the Tribunal. Under Sub-section (2) of Section 30 a power is given to set aside or modify an order made under Sections 25 to 28. Section 30 co-jointly with Section 29 would mean that irrespective of the Appellate remedy provided in Part VI of IInd Schedule (Rule 86) to the I. T. Act an

Appeal would lie to the Tribunal in respect of orders made under the Second Schedule to the I. T. Act. We may clarify that considering the language of Rule 11(6) an appeal would not lie under Rule 86 of the Second Schedule. Therefore, under Section 30 even if an appeal as provided under Rule 86 is not available because of Rule 11(6) making the order of the Recovery Officer conclusive, nevertheless Section 30 of the Act provides a remedy by way of Appeal against the order passed under the IIInd Schedule. We may clarify here that Section 20 is a provision for Appeal from an order of the Tribunal, when Section 30 is a provision for appeal against the order of the Recovery Officer."

24. Section 30 thus provides for an appellate forum against any orders of the Recovery Officer which may not be in accordance with law. The contention of learned Counsel on behalf of Kamtekar that unless the provisions of Rules 60 and 61 are resorted to, the Appeal under Section 30 is not maintainable can only be stated to be rejected.

25. Relying upon the decision in **Usha Offset** (*supra*), learned Counsel for Kamtekar contended that Alpha Organic never had any intention to repay the dues and somehow is attempting to thwart the sale of the said flat which has now become absolute and possession of which has also been

handed over to Kamtekar as far back as in the year 2004. Learned Counsel also relied upon the observations made in paragraphs 21 to 25 of the decision of the Division Bench of this Court in **Usha Offset** (*supra*) to contend that Alpha Organic is not justified in placing reliance on Rule 15 of the Second Schedule of IT Act, thereby, in an indirect fashion challenge the sale giving a complete go by to the mandatory provisions of Rules 60 and 61 of the Second Schedule to the Income Tax Act, 1961. According to him, if this submission of Alpha Organic is accepted, it would effectively mean that Alpha Organic is now allowed to challenge the sale of the mortgaged property without complying with the mandatory provisions of Rules 60 and 61.

26. We are afraid, the decision of this Court in **Usha Offset** (*supra*) has no application in the present facts. Their Lordships after taking into consideration the totality of the circumstances arrived at a finding that the Petitioners therein never had any intention of honouring any settlement arrived at with the Bank and the arguments are being

canvassed only to somehow thwart the sale of the mortgaged property which has become absolute and the possession of which has also been handed over to the auction purchaser long back. Thus, **Usha Offset** (*supra*) is rendered in a fact situation where there was a settlement which was not honoured. There was an attempt to thwart the sale of the mortgaged property somehow or the other and in those circumstances, the co-ordinate Bench of this Court held that since the Petitioner had no intention to deposit the decretal amount, the Petitioners preferred not to challenge the sale of the mortgaged property but instead only made an application for deferment of the confirmation of sale. It is in these circumstances, having regard to such course of action adopted by the petitioners, Their Lordships did not entertain the challenge to the sale of mortgaged property without complying with the mandatory provisions of Rules 60 and 61. It is in these facts that the co-ordinate Bench in **Usha Offset** (*supra*) did not find substance in the arguments of the petitioners and hence, held that the decision in **Mathew Varghese** (*supra*) is inapplicable in the

facts and circumstances.

27. Thus, the fact situation in the present case is completely different. Alpha Organic has challenged the decree passed by the Civil Court by way of the First Appeal in this Court which is pending. This Court has stayed the decree subject to the deposit of the amount as directed. The said order has been duly complied with by Alpha Organic and even BOI has been permitted to withdraw the amount so deposited subject to conditions. It is in these circumstances, we are of the firm opinion that this is not a case where Alpha Organic is attempting to thwart the sale. Alpha Organic is justified in contending that the Recovery Officer should have stayed his hands in view of the stay to the decree which is subject matter of recovery proceedings. **Usha Offset** (*supra*) has no application in the present facts.

28. We do not find any infirmity in the order passed by DRAT. The view cannot be said to be so perverse to warrant interference in the exercise of writ jurisdiction under Article 226 of the Constitution of India. We, therefore, do not find

any reason to interfere with the order passed by the DRAT. We find that the order passed by the DRAT can be sustained on the grounds discussed herein before.

29. The Petition is dismissed.

30. Rule is discharged with no order as to costs.

31. Learned Counsel for the Petitioner requested for continuation of the interim order passed by this Court. The request is opposed by the learned Counsel for M/s. Alpha Organic. Considering that Kamtekar is in possession of the asset flat since 2004 and the interim order is in operation since 2011, in the interest of justice, we continue the interim order passed by this Court for a period of three (3) months from today.

(M. S. KARNIK, J.)

(A. A. SAYED, J.)