

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION (L) NO.196 OF 2015

IN

WRIT PETITION NO.3080 OF 2014

WITH

NOTICE OF MOTION (L) NO.734 OF 2015

IN

WRIT PETITION NO.3080 OF 2014

Usha Offset Printers Pvt.Ltd.

... Petitioner

v/s

Bank of Maharashtra and others

... Respondents

Mr Abhay Bhide, Petitioner No.2 in person.

Mr N.J. Devashrayee for Respondent No.1.

Mr Pravin Samdani, Sr. Counsel with Mr Aditya Shiralkar i/b M/s Shiralkar and Co. for Respondent No.2.

**CORAM: S.C. DHARMADHIKARI &
B.P. COLABAWALLA JJ.**

Reserved On : 4th December, 2015.

Pronounced On : 18th February, 2016.

JUDGMENT [Per B. P. Colabawalla J.] :-

1. By this Writ Petition under Article 226 of the Constitution of India, the Petitioners have challenged the order dated 9th December, 2013 passed by the Debts Recovery Appellate

Tribunal, Mumbai (for short, the **“DRAT”**) as well as the orders dated 19th September, 2008 and 27th September, 2005 passed by the Debts Recovery Tribunal (for short, the **“DRT”**) and the Recovery Officer respectively. In addition thereto, the Petitioners have also prayed for a direction against Respondent No.2 to compensate the Petitioners monetarily in the sum of Rs.73 crores. An additional prayer that is sought is for an appropriate writ directing the 1st Respondent – Bank to accept an amount of Rs.3.03 crores from the Petitioners as a One Time Settlement (for short, the **“OTS”**) of all its outstanding dues and claims as mentioned in its letter dated 20th September, 2005 alongwith such interest and from such date as this Court may deem fit. This Writ Petition was admitted on 11th November, 2014 and the hearing of the same was expedited. This is how the Writ Petition has come up for hearing and final disposal before us. Since Petitioner No.2 appeared in person, we have heard him at length. He has also filed verbose written arguments which we shall deal with later in this judgment.

2. The brief facts giving rise to the present controversy and which are not really in dispute are that Petitioner No.1 is a Private Limited Company incorporated under the Companies Act,

1956 and has availed of various credit facilities sanctioned by Respondent No.1 **(Respondent - Bank)**. Petitioner No.2 is a Director of Petitioner No.1. The credit facilities availed of by the Petitioners were inter alia secured by creation of an equitable mortgage of an immovable property bearing Plot No.125 situated at Government Industrial State, Kandivali West, Mumbai, admeasuring about 1,740 sq. mtrs. alongwith a two storied building and other structures, comprising of a built up area of about 18,327 sq.ft. (hereinafter referred to as the **“mortgaged property”**).

3. It is not in dispute that the Petitioners committed defaults in repayment of the credit facilities availed by it. In view thereof, the Respondent - Bank, in 1998 filed a suit in this Court against the Petitioners & others inter alia for recovery of an amount of Rs.4.14 crores together with interest. Thereafter, in 1999 this suit was transferred to DRT-II, Mumbai and renumbered as Original Application No.2161 of 1999.

4. During the pendency of this Original Application, the Petitioners and the Respondent - Bank arrived at a settlement. In view thereof, on 19th October 2001, consent terms were filed by the

parties in the pending Original Application. The same were duly accepted by the DRT and the Original Application was disposed of on the basis of the said consent terms. As per the consent terms, against their claim of Rs.4.14 crores, the Respondent - Bank settled the dues of the Petitioners for Rs.2.25 crores with further interest thereon. In the said consent terms, it was provided that an amount of 2.25 crores was to be paid in the manner set out therein and latest by 31st March, 2003.

5. It is undisputed that the Petitioners failed to abide by the consent terms and pay the amounts within the time-frame stipulated therein. In these circumstances, the Respondent - Bank preferred Miscellaneous Application No.130 of 2002 before the DRT for issuance of Recovery Certificate in terms of the consent terms. This Miscellaneous Application was allowed by the DRT vide its order dated 6th March, 2003 and a Recovery Certificate was issued against the Petitioners and the guarantors for Rs.4.14 crores together with interest thereon as mentioned in the Original Application. However, time was given till September 2003 to the Petitioners to make payment. Since the Petitioners were not in a position to pay the decretal amount, the Presiding Officer on 30th October, 2003 issued a Recovery Certificate which gave rise to

Recovery Proceedings No.348 of 2003.

6. Consequent to the Recovery Proceedings being initiated, the Recovery Officer, on 31st March 2004, issued a demand notice on the Petitioners calling upon them to pay the dues under the Recovery Certificate. Admittedly, the Petitioners could not comply with the requisitions of the demand notice and therefore the Recovery Officer on 15th October, 2004 attached the mortgaged property. Thereafter and in furtherance thereof, on 12th May 2005, the Recovery officer issued a proclamation of sale fixing the auction sale of the mortgaged property on 27th June, 2005. On the date when the mortgaged property was fixed for sale (i.e. 27th June, 2005) the bids received by intending purchasers were opened at around 4.30 p.m. On opening the bids, the Recovery Officer found that the offer of IPCA Laboratories Ltd. (Respondent No.2 herein) was the highest at Rs.3.21 crores. However, before this bid could be accepted by the Recovery Officer, he was informed of an order of interim injunction passed by the Industrial Court restraining the Bank from selling the mortgaged property. However, a copy of the order was not made available to the Recovery Officer. In view thereof, the Recovery Officer, in all fairness did not accept the bid on that date and deferred the same. Thereafter, the Respondent –

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Bank approached the Industrial Court and the Industrial Court vide its order dated 16th August, 2005 vacated the injunction order and which was duly communicated by the Respondent - Bank to the Recovery Officer.

7. The Recovery Officer thereafter on 22nd August, 2005 accepted the bid of Respondent No.2 (viz. IPCA Laboratories Ltd.) and declared them as a successful purchaser and directed them to deposit the sale price within the given time schedule and fixed the matter for confirmation of sale on 26th September, 2005. It is not in dispute that Respondent No.2 (IPCA Laboratories Ltd.) deposited the sale price within the time schedule allowed by the Recovery Officer.

8. On the date when the matter was kept for confirmation of sale (i.e. on 26th September, 2005), the Recovery Officer was on leave. Therefore, the matter was adjourned to 27th September, 2005. The Recovery officer on 27th September, 2005 confirmed the sale in favour of Respondent No.2 as they had paid the entire sale consideration and the Petitioners had not moved any application for setting aside the sale. After the sale was confirmed, one Mrs Anjali Bhide (Defendant No.3 to the Original Application) on the

same date moved an application before the Recovery Officer contending that she being a Director and a joint shareholder of Petitioner No.1 - Company, had offered a proposal for a One Time Settlement (OTS) to the Respondent - Bank. The Respondent - Bank at its meeting on 16th September, 2005 had approved the OTS under which the Petitioners were to make payment of the OTS amount of Rs.3.03 crores by 20th September, 2005. It was however her contention that the letter communicating the acceptance of the OTS was communicated to the Petitioners only on 21st September, 2005 and therefore a request was made to the Respondent - Bank to extend time for payment of the OTS amount to 30th September, 2005. Keeping these facts in mind, she prayed that the Recovery Officer stay/defer the confirmation of sale at least for one month. It is pertinent to note that even though it is the contention of the Petitioners that the aforesaid application was filed by Mrs Anjali Bhide before the order of confirmation of sale was passed by the Recovery Officer, the DRAT has categorically found that this Application was filed by Mrs Anjali Bhide after the Recovery Officer had already passed the order of confirmation of sale. It is in this light that the Recovery Officer rejected the aforesaid application.

9. Being aggrieved by this order of the Recovery Officer

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dated 27th September 2005, the Petitioners directly approached this Court in its writ jurisdiction. This Writ Petition was withdrawn with liberty to file an appeal under section 30 of the *Recovery of Debts due to Banks and Financial Institutions Act, 1993* (for short, the “**RDDB Act**”) before the DRT.

10. Pursuant to the aforesaid liberty, the Petitioners approached the DRT by filing an appeal under section 30 of the RDDB Act challenging the order dated 27th September, 2005 passed by the Recovery Officer. Since the appeal was filed beyond the time period prescribed, the Petitioners moved a Miscellaneous Application for condonation of delay which was initially rejected by the DRT on 19th December, 2005. Being aggrieved by this order, the Petitioners approached the DRAT and filed a Miscellaneous Application praying for interim reliefs. In this Miscellaneous Application, the DRAT, by its order dated 4th January, 2006 directed the Petitioners to deposit a sum of Rs.3.05 Crores with the Respondent – Bank on or before 9th January, 2006. Admittedly, this amount was not deposited with the Respondent – Bank as directed by the DRAT. Therefore, after 9th January, 2006 there was no impediment in proceeding with the sale of the mortgaged

property. In view thereof, the Recovery Officer vide his order dated 20th January, 2006 directed the Petitioners to handover possession of the mortgaged property to the auction purchaser viz. Respondent No.2 and also issued a sale certificate in their favour. Be that as it may, the appeal of the Petitioners was heard by the DRAT and by its order dated 11th January, 2008, the DRAT condoned the delay and directed the DRT to decide the Petitioners' appeal filed under Section 30 of the RDDB Act, on merits.

11. Accordingly, the appeal from the order dated 27th September, 2005 before the DRT was heard by the Presiding Officer of DRT-II, Mumbai. The said appeal was opposed by the Respondent – Bank as well as Respondent No.2 herein inter alia contending that the application filed by the Petitioners before the Recovery Officer had become infructuous as the same was for deferment of confirmation of sale but the sale had already been confirmed by the Recovery Officer and the sale certificate was also issued in favour of Respondent No.2. In fact, even possession of the mortgaged property was handed over to Respondent No.2 and therefore, the reliefs sought for by the Petitioners in their application (for deferment of confirmation of sale) had become infructuous. It was the further contention of the Respondents that the Petitioners were

aggrieved by the order dated 27th September, 2005 passed by the Recovery Officer confirming the sale. However, the sale itself (in favour of Respondent No.2) was not challenged and was not the subject matter of the appeal. It was the contention of the Respondents that if the Petitioners were aggrieved by the sale conducted by the Recovery Officer, they had a specific remedy under rules 60 and/or 61 of the Second Schedule to the Income Tax Act, 1961 under which the Petitioners could approach the Recovery Officer for setting aside the sale. The Petitioners had deliberately not approached the Recovery Officer by invoking the said provisions as they would have been required to deposit the decretal amount due under the Recovery Certificate before their application for setting aside the sale could be considered. It is only in light of the fact that they had no intention to deposit the aforesaid amount as required under rule 60 and /or 61 that the application for deferment of confirmation of sale was filed. In other words, it was the contention of the Respondents that the application for deferment of confirmation of sale was filed to thwart the recovery proceedings without having to deposit a single farthing that would have otherwise been required to be deposited by the Petitioners under rule 60 and / or 61 of the Second Schedule to the Income Tax Act, 1961. The DRT, after hearing the parties, by a detailed order

dated 19th September, 2008 dismissed the appeal filed by the Petitioners under section 30 of the RDDB Act.

12. Being aggrieved by this order of the DRT, the Petitioners approached the DRAT raising several contentions. One of the primary contentions raised was that the OTS sanctioned by the Respondent - Bank was contrary to the RBI guidelines dated 3rd September, 2005. It was the contention of the Petitioners that the OTS sanctioned by the Respondent - Bank on 16th September, 2005 giving them time to make payment of 3.03 crores by 20th September, 2005 was communicated to them only on 21st September, 2005. This made it impossible for the Petitioners to comply with the conditions of the OTS as the same was communicated to them after the date to make payment thereunder had already expired. To counter this argument the Respondent - Bank contended that the OTS was approved by the Respondent - Bank on 16th September, 2005 and the same was communicated to Petitioner No.2 on his mobile phone on the same day by their Deputy General Manager (Mr Bhaskar K. Mahajan). According to the Respondent - Bank, Petitioner No.2 was also informed that as per OTS sanctioned, the Petitioners were required to pay an amount of Rs.3.03 crores by 20th September, 2005. The reason for the

delay in sending the letter sanctioning the OTS was that the same was not signed by the chairman and therefore the same could not be communicated in writing to the Petitioners. It is only for this reason that the letter was sent to the Petitioners on 21st September, 2005.

13. Be that as it may, after hearing elaborate arguments advanced on behalf of the Petitioners as well as the Respondents, the DRAT by its order dated 9th December, 2013 dismissed the appeal of the Petitioners. It is the legality and the correctness of this order that is put in question before us in the present Writ Petition.

14. Petitioner No.2 who appeared in person filed written arguments in support of his case. Though the written arguments are quite verbose, there are basically five points raised by him in the said written arguments. They are as follows:-

- (i) The Recovery Officer could not have opened the bids received for sale of the mortgaged property on 27th June, 2005 as there was a stay order granted by the Industrial Court and the same was in operation on the said date.

- (ii) The Recovery Officer had not followed rule 15(2) of the Second Schedule to the Income Tax Act, 1961 which inter alia stipulates that when the sale is adjourned for a period of more than one month then a fresh proclamation of sale has to be issued. Since the auction sale was adjourned for a period of more than one month, the same was in violation of the said rules.
- (iii) The Recovery Officer erred in confirming the sale under rule 56 of the Second Schedule to the Income Tax Act, 1961 and hence was liable to be set aside.
- (iv) The OTS sanctioned by the Respondent – Bank and communicated to the Petitioners was not in conformity with the guidelines issued by the Reserve Bank of India on 3rd September, 2005.
- (v) Since the mortgaged property has lost its original shape and cannot be returned to the Petitioners in its original form, an appropriate writ of monetary compensation be issued to the auction purchaser (Respondent No.2 herein).

15. Before we deal with the arguments that have been canvassed on behalf of the Petitioners, it would be important to note

the scope of the appeals that were filed before the DRT as well as the DRAT. As mentioned earlier, one Mrs Anjali Bhide (Defendant No.3 to the Original Application and wife of Petitioner No.2) on 27th September, 2005 moved an application before the Recovery Officer inter alia praying that the confirmation of sale be stayed / deferred at least for one month. There was no challenge laid to the sale of the mortgaged property. This application of Mrs Anjali Bhide was rejected by the Recovery Officer. Being aggrieved thereby, the Petitioners directly approached this Court in its writ jurisdiction. After this Writ Petition was heard for some time, the same was withdrawn with liberty to file an appeal under section 30 of the RDDB Act before the DRT. As per the said liberty, the Petitioners filed an appeal before the DRT and also made an application for condonation of delay. That application was initially rejected by the DRT on 19th December, 2005 but was allowed by the DRAT vide its order and judgment dated 11th January, 2008. It is pertinent to note that the DRAT by its interim order dated 4th January, 2006 had also passed a conditional order directing the Petitioners to deposit a sum of Rs.3.05 crores. Therefore one more opportunity was afforded to the Petitioners to deposit the OTS amount. Admittedly, no deposit was made and no payment was tendered to the Respondent – Bank. In any event, after the delay was condoned,

the DRT heard the appeal of the Petitioners (under section 30 of the RDDB Act) and by a detailed and reasoned order dated 19th September, 2008 dismissed the appeal of the Petitioners. Whilst dismissing the appeal, the DRT recorded that the appeal before it was not directed against the refusal by the Recovery Officer to set aside the sale. In fact, in paragraph 10 of the said order, the DRT records that the Petitioners had never made any application for setting aside the sale of the mortgaged property and did not avail of the rights available to it under rule 60 or 61 of the Second Schedule to the Income Tax Act, 1961 from the date of the sale till the date of confirmation of sale. Noting that the sale had already been confirmed, the DRT dismissed the appeal. It is aggrieved by this order that an appeal was filed before the DRAT in which the impugned order is passed.

16. From these facts, one thing becomes crystal clear. The Petitioners never challenged the sale of the mortgaged property either before the Recovery Officer or before the DRT. What was challenged was the rejection of their application for deferment of the confirmation of sale. This is also clear from the fact that for setting aside the sale, the Second Schedule to the Income Tax Act, 1961 and more particularly, rules 60 and 61, inter alia stipulate

that where an immovable property has been sold in execution of the certificate, the defaulter or any person whose interests are affected by the sale may, at any time within 30 days from the date of the sale, apply to the Recovery officer to set aside the sale subject to him fulfilling the conditions set out in the said rules. Admittedly, till date, no application to set aside the sale of the mortgaged property has been preferred by the Petitioners. It is now for the first time, in the Writ Petition and by giving a complete go-by to rules 60 and/or 61 of the Second Schedule to the Income Tax Act, 1961 that the Petitioners have sought to assail the sale confirmed in favour of Respondent No.2. Keeping this factual background in mind, we shall now deal with the arguments of the Petitioners.

17. The first argument canvassed on behalf of the Petitioners was that the Recovery officer could not have opened the bids received for sale of the mortgaged property on 27th June, 2005 as there was a stay order granted by the Industrial Court and the same was in operation on the said date. Firstly, we find that no such argument was canvassed on behalf of the Petitioners either before the DRT or the DRAT in the appeals filed by the Petitioners under the provisions of the RDDB Act. This argument is being canvassed for the first time before us in the Writ Petition. On this

ground alone we would be justified in rejecting this argument. However, since Petitioner No.2 argued in person, we have examined this issue from the record and we find that even otherwise this argument has no merit. The roznama of Recovery Proceedings No.348 of 2003 clearly establishes that on 27th June, 2005 (i.e. the date on which the bids were opened), a copy of the order of the Industrial Court was not made available to the Recovery Officer. It is in this light that the Recovery Officer recorded that there was no order before him restraining him from conducting the sale of the mortgaged property despite public notice being given in the newspapers. The Recovery Officer further recorded that taking into account the public interest and the fact that the bidders had deposited the earnest money deposit, he decided to open the bids of both immovable and movable properties. The bid of the highest bidder viz. IPCA Laboratories Ltd. (Respondent No.2) was kept for consideration whereas the other bids were returned. It was also made clear that the sale of the mortgaged property would be concluded only after seeing the order of the Industrial Court. Thereafter, the matter was adjourned to 1st July 2015. It is not in dispute that the bids were accepted by the Recovery Officer on 22nd August, 2005 which is after the date when the order of the injunction granted by the Industrial Court was vacated by it. In

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these facts, we are unable to agree with the submission of the Petitioners that the Recovery Officer's actions of opening the bids for sale of the mortgaged property was in the teeth of the stay order granted by the Industrial Court and therefore illegal and / or vitiated. As mentioned earlier, on the date when the bids were opened, a copy of the said order of the Industrial Court was not placed before the Recovery officer as is categorically recorded in the roznama. We therefore have no hesitation in rejecting this argument.

18. The next argument canvassed by the Petitioners was that the sale of the mortgaged property was vitiated on the ground that the Recovery officer had not followed the mandatory provisions of rule 15(2) of Second Schedule to the Income Tax Act, 1961 which inter alia provides that when the sale is adjourned for a period of more than one month, then a fresh proclamation of sale is to be issued. Since the auction was adjourned for more than a period of one month, the sale itself was vitiated as the sale was in violation of the said rules, was the submission.

19. At the outset, we must note that even this argument that is now canvassed before us was never canvassed either before

the DRT or the DRAT. We therefore do not think that it would be fair to allow the Petitioners to canvass this argument for the first time before us in our writ jurisdiction. Be that as it may, even otherwise, we find that in the facts of the present case, the reliance placed on the aforesaid rule is wholly misplaced. Rule 15 of the Second Schedule to the Income Tax Act, 1961 reads as follows:-

“Adjournment or stoppage of sale -

15(1) The Tax Recovery Officer may, in his discretion, adjourn any sale hereunder to a specified day and hour and the officer conducting any such sale may, in his discretion, adjourn the sale, recording his reasons for such adjournment;

Provided that, where the sale is made in, or within the precincts of, the office of the Tax Recovery Officer, no such adjournment shall be made without the leave of the Tax Recovery Officer;

(2) Where a sale of immovable property is adjourned under sub-rule (1) for a longer period than one calendar month, a fresh proclamation of sale under this Schedule shall be made unless the defaulter consents to waive it.

(3) Every sale shall be stopped if, before that lot is knocked down, the arrears and costs (including the costs of the sale) are tendered to the officer conducting the sale or proof is given to his satisfaction that the amount of such arrears and costs has been paid to the Tax Recovery Officer who ordered the sale.”

20. As stipulated in the said rule, the Tax Recovery Officer may adjourn any sale to a specified day and hour and the Officer conducting such sale may, in his discretion adjourn the sale

recording the reasons for the same. Sub-rule (2) of rule 15 provides that when the sale of immovable property is adjourned for a period longer than one month, a fresh proclamation of sale shall be made unless the defaulter consents to waive it. Sub-rule (3) provides that every sale shall be stopped if, before the lot is knocked down, the arrears and costs (including the costs of the sale) are tendered to the officer conducting the sale or proof is given to his satisfaction that the amount of such arrears and costs have been paid to the Tax Recovery Officer who ordered the sale. In the facts of the present case, admittedly, the decretal amount as provided under sub-rule (3) of rule 15 was not tendered to the Recovery Officer by the Petitioners to ensure that the sale conducted by the Recovery Officer ought to be stopped. From the date of the Recovery Certificate being issued, till today, not a farthing has been paid by the Petitioners towards the dues of the Respondent - Bank.

21. Be that as it may, as mentioned earlier, the Petitioners never challenged the sale of the mortgaged property before the authorities below. In fact, only the order of the Recovery Officer refusing to defer the confirmation of sale was challenged before the DRT as well as the DRAT. Here it would be important to note the

provisions of rules 60 & 61 which inter alia mandate that before a sale can be set aside, the defaulter has to deposit the amount specified in the proclamation of sale with interest thereon. Rule 60 prior to its amendment in 2007 read thus:-

“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 fifteen per cent per annum, 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.”

(emphasis supplied)

22. Rule 60(1) of the Second Schedule to the Income Tax Act, 1961 clearly stipulates that where an immovable property has been sold in execution of the certificate, the defaulter or any person whose interests are affected by the sale may, at any time within 30 days from the date of the sale, apply to the Recovery Officer to set

aside the sale on his depositing the amount specified in the proclamation of sale with interest thereon as more particularly stipulated in the said rule as well as penalty equal to 5% of the purchase money which would be paid to the purchaser. Rule 60(2) stipulates that where a person has made an application under rule 61, he would not be allowed to prosecute his application under rule 60 unless he withdraws his application preferred under rule 61.

23. On similar lines, rule 61 reads as under:-

“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.”*

(emphasis supplied)

24. Rule 61 provides for an application to set aside a sale of an immovable property on the ground of non-service of notice or any material irregularity in publishing or conducting the sale. Rule 61 stipulates that where an 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 Recovery Officer to set aside the sale of the immovable property on the ground that a notice to pay the arrears as required by this Schedule was not served on the defaulter or on the ground of a material irregularity in publishing or conducting the sale. Proviso (a) stipulates that no sale shall be set aside on any such ground unless the Recovery Officer is satisfied that the applicant has sustained substantial injury by reason of the non-service or material irregularity, as the case maybe and proviso (b) stipulates that 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.

25. The provisions of rules 60 and 61 are clear and unambiguous. In a nutshell, these rules provide that a defaulter is not allowed to challenge the sale of the immovable property sold in

execution of a Recovery Certificate unless an application for setting aside the sale is preferred before the Recovery Officer and the amount sought to be recovered under the Recovery Certificate is deposited with the Recovery Officer. In the facts of the present case, as mentioned earlier, no such application was ever preferred by the Petitioners and no deposit has been made. The reason for the same is not far to see. It is because the Petitioners were aware that before their application to set aside the sale could be entertained by the Recovery Officer, they would be required to deposit the decretal amount. Since they 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. Having chosen this course of action all throughout, we cannot permit the Petitioners to place reliance on rule 15 and in an indirect fashion challenge the sale and give a complete go-by to the mandatory provisions of rules 60 and 61 of the Second Schedule to the Income Tax Act, 1961. If we were to accept the submissions of the Petitioners, it would effectively mean that the Petitioners are now allowed to challenge the sale of the mortgaged property without complying with the mandatory provisions of rules 60 and 61 and which sale was never challenged till the filing of this Writ Petition.

In this view of the matter, we find absolutely no substance in this argument and the decisions of the Supreme Court relied upon by the Petitioners in the case of **(i) Mathew Varghese v/s M. Amritha Kumar and others, reported in (2014) 5 SCC 610; (ii) J. Rajiv Subramaniyan and anr. v/s M/s Pandiyas and others, reported in (2014) 5 SCC 651; and (iii) Vasu P. Shetty v/s M/s Hotel Vandana Pvt. Ltd., reported in (2014) 5 SCC 660** are wholly inapplicable to the facts and circumstances of the present case.

26. The next argument canvassed by the Petitioners was that the Recovery Officer erred in confirming the sale of the mortgaged property under rule 56 of the Second Schedule to the Income Tax Act, 1961 and hence was liable to be set aside. This argument proceeds on the basis that on the date when the sale was confirmed viz. 27th September 2005, the wife of Petitioner No.2 submitted a letter to the Recovery Officer that a One Time Settlement (OTS) was sanctioned by the Respondent - Bank. According to the Petitioners, it was brought to the notice of the Recovery Officer that the Respondent - Bank had sanctioned the OTS and therefore, the Recovery Officer ought to have deferred the

confirmation of sale and not proceeded with the same under rule 56 of the Second Schedule to the Income Tax Act, 1961. Firstly, we find that rule 56 deals with sale by public auction. Rule 56 states that the sale shall be by public auction to the highest bidder and shall be subject to confirmation by the Recovery officer. There is no dispute in the present case that the sale was conducted by public auction and the mortgaged property was sold to the highest bidder (Respondent No.2). The proviso to the said rule stipulates that no sale under this rule shall be made if the amount paid by the highest bidder is less than the reserve price, if any, specified under clause (cc) of rule 53. On the other hand, the confirmation of sale is done by the Recovery officer under rule 63. Rule 63 stipulates that 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 Recovery Officer, he 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. In the facts of the present case, it has been found as a matter of fact by the authorities below that the application for deferment of sale made by the wife of Petitioner No.2 on 27th September, 2005 was after the sale was already confirmed in favour of the auction purchaser (Respondent No.2). It is in this light that the authorities below have held that

there was no question of deferring the confirmation of sale. Even otherwise rule 63 and which deals with confirmation of sale, clearly provides that where no application for setting aside the sale under rules 60, 61 and / or 62 is preferred, or where such an application is made and disallowed by the Recovery Officer, the Recovery Officer shall (if the full amount of the purchase money has been paid) make an order confirming the sale. It is not in dispute that no application for setting aside the sale was ever preferred by the Petitioners. In this view of the matter, no fault can be found in the actions of the Recovery officer in confirming the sale in favour of the auction purchaser. This is more so, in view of the fact that the application made for deferment of confirmation of sale was filed before the Recovery Officer after the sale had already been confirmed. We must also mention here that the OTS sanctioned by the Respondent - Bank stipulated that the payment of Rs.3.03 crores had to be made on or before 20th September, 2005. This amount admittedly was not deposited by the aforesaid date and in fact has not been deposited even till date. The facts of this case would clearly reveal that the Petitioners have no intention of paying the dues of the Respondent - Bank and are only seeking to thwart the sale of mortgaged property on one pretext or the other. We therefore find no substance in this argument. Equally, we find

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that the reliance placed by the Petitioners on a decision of the Supreme Court in the case of **Mohan Wahi v/s CIT, Varanasi and others, reported in (2001) 4 SCC 362** is wholly misplaced. The issue before the Supreme Court was whether the Tax Recovery officer could have confirmed the sale on a particular date when in fact the demand for tax for which the property was sold, had ceased to exist. It was in those facts that the observations of the Supreme Court have to be read and understood. In the facts of the present case, admittedly, the dues of the Respondent – Bank have not been satisfied. We therefore have no hesitation in rejecting this argument of the Petitioners.

27. The next argument canvassed on behalf of the Petitioners is that the OTS sanctioned by the Respondent – Bank and communicated to the Petitioners on 21st September, 2005 calling upon them to pay the OTS amount by 20th September, 2005 (i.e. one day before the date on which the OTS was communicated) is contrary to the RBI guidelines issued on 3rd September, 2005 and the actions of the Bank are violative of Article 14 of the Constitution of India.

28. It was urged on behalf of the Petitioners that the OTS

that was sanctioned by the Respondent – Bank on 16th September, 2005 required the Petitioners to pay the OTS amount on or before 20th September, 2005. Petitioner No.2 submitted that however this sanction of the OTS was communicated to the Petitioners only on 21st September, 2005 thereby making it impossible to make payment by the due date mentioned in the sanction letter. He submitted that this sanction of the OTS was no sanction at all and was clearly violative of the RBI guidelines dated 3rd September, 2005 that mandated nationalised banks to enter into one time settlement schemes for recovery of NPAs below Rs.10 crores and which was required to be implemented by all public sector banks. The further submission of the Petitioners was that the actions of the Bank by giving the Petitioners only four days' time to make payment under the said OTS was clearly violative of Article 14 of the Constitution of India inasmuch as to several other parties, time to make payment under their respective OTS' was ranging from two months to six months. In this view of the matter, the Petitioners submitted that the Respondent – Bank be ordered and directed to accept the amount of Rs.3.03 crores from the Petitioners towards the OTS.

29. To appreciate these arguments, it would be necessary to

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reiterate a few facts. It is not in dispute that this is not the first time that the Respondent – Bank entered into a settlement with the Petitioners. As mentioned earlier, since the Petitioners defaulted in repaying the dues of the Respondent – Bank, a suit came to be filed against the Petitioners in this Court in the year 1998 for recovery of Rs.4.14 crores. Thereafter, the said suit was transferred in the year 1999 to the DRT and was numbered as Original Application No.2161 of 1999. Whilst this Original Application was pending, the Petitioners and the Respondent – Bank arrived at a settlement. In view of this settlement, consent terms were filed by the parties in the pending Original Application on 19th October, 2001 on the basis of which the Original Application was disposed of. Under the said consent terms, the Petitioners were required to make payment of Rs.2.25 crores together with further interest thereon against the total claim of the Respondent – Bank of Rs.4.14 crores. In the said consent terms, it was provided that the amount of Rs.2.25 crores was to be paid by the Petitioners in a certain manner and in any event not later than 31st March, 2003. Admittedly, this settlement was not honoured by the Petitioners and therefore, the Respondent – Bank was constrained to initiate recovery proceedings and pursuant to which the DRT issued a Recovery Certificate in the sum of Rs.4.14 crores (the decretal amount claimed in the Original

Application).

30. These facts would clearly reveal that the Respondent – Bank, has on an earlier occasion, sought to settle the dues with the Petitioners without any success. Despite this, the Respondent – Bank once again gave an opportunity to the Petitioners to settle their dues by paying a sum of Rs.3.03 crores by 20th September, 2005. Admittedly, no payment was made. In these facts, we cannot find any fault with the actions of the Recovery Officer or any of the authorities below in proceeding with the sale of the mortgage property to ensure recovery of the Respondent – Bank's dues.

31. As far as the argument of the Petitioners is concerned regarding the fact that this OTS (under which payment was to be made by 20th September, 2005) was communicated to the Petitioners only on 21st September, 2005 and thereby making it impossible for them to comply with the same, we find that the authorities below have found as a matter of fact that the sanction of this OTS was communicated to Petitioner No.2 on his mobile phone on the very same day (i.e. 16th September, 2005) by one Mr Bhaskar A. Mahajan, Deputy General Manager, Mumbai City Region, of the Respondent – Bank. Petitioner No.2 was informed of

the approval of the OTS and that he had to deposit the OTS amount of Rs.3.03 crores by 20th September, 2005. The reason for delay in sending the letter approving the OTS was because the letter was not signed by the chairman and therefore the same could not be communicated on the very same date. These facts have been accepted by authorities below and nothing has been brought to our notice to hold that these findings of fact are perverse requiring interference in our writ jurisdiction. Even otherwise, we find from the record that even as late as on 4th January 2006, the DRAT, by an interim order had granted an opportunity to the Petitioners to deposit this amount of Rs.3.05 crores. Admittedly, the same was not deposited. The totality of all these facts would clearly lead to an inference that the Petitioners never had any intention of honouring any settlement arrived at with the Respondent – Bank and these 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 as far back as in January, 2006. In these facts, we therefore do not find that there is any violation by the Respondent – Bank of the RBI guidelines issued on 3rd September, 2005 mandating all Public Sector Banks to settle the dues of all NPAs below Rs.10 crores by entering into a One Time Settlement Scheme.

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We do not read the RBI guidelines to mean that irrespective of the fact that the debtor has already defaulted in making payment of an earlier sanctioned OTS, would still continue to get the benefit of the RBI guidelines indefinitely. In any event, this argument (regarding the OTS being in violation of the RBI guidelines) has been dealt with by the authorities below in great detail and we do not think that the findings of these authorities are in any way perverse and / or arbitrary requiring interference in our extraordinary, equitable and discretionary jurisdiction under Article 226 of the Constitution of India. We therefore do not find any substance in this argument.

32. In view of the fact that we have rejected the arguments canvassed by the Petitioners and find no infirmity in the orders passed by the authorities below, there is no question of issuing a writ against Respondent No.2 directing it to pay a sum of Rs.73 crores to the Petitioners. Even otherwise, the Petitioners have not been able to point out how a writ can be issued against a private party, that too, seeking damages in the aforesaid sum.

33. Before parting we must mention that we should not lose sight of the fact that the Petitioners have approached this Court in its writ jurisdiction under Article 226 of the Constitution of India.

It is now well settled that this Court will not interfere in its writ jurisdiction merely because the order is invalid. The party approaching this Court in its writ jurisdiction under Article 226 of the Constitution of India has to do so with clean hands, with utmost good faith and not suppress any material facts. The complaining party also has to demonstrate that justice lies on his side to get the relief. This proposition has been very succinctly set out in a decision of a Division Bench of this Court in the case of **The State of Bombay Vs. Morarji Cooverji reported in (1958) LXI B.L.R.**

318. The Court, speaking through Chief Justice M. C. Chagla (as he then was) opined [at pg 332 of the report] as under:-

“But it is not sufficient that a party should come to this Court and make out a case that a particular requisition order is not valid. In order to get that relief from the Court on a writ petition, not only must he come with clean hands, not only must he not suppress any material facts, not only must he show the utmost good faith, but he must also satisfy the Court that the making of the order will do justice and that justice lies on his side.”

(emphasis supplied)

34. Looking to the totality of the facts before us we are clearly of the view that justice does not lie on the side of the Petitioners for us to exercise our extraordinary, equitable and discretionary jurisdiction under Article 226 of the Constitution of

India in favour of the Petitioners and strike down the orders of the authorities below.

35. For all the foregoing reasons, we find no merit in this Writ Petition. Rule is accordingly discharged and the Writ Petition is dismissed. However, in the facts and circumstances of the case, we leave the parties to bear their own costs. In view of the fact that we have dismissed the Writ Petition, nothing survives in the Notices of Motion and the same are disposed of accordingly.

(B.P. COLABAWALLA J.)

(S.C. DHARMADHIKARI J.)