

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.SURENDRA MOHAN

&

THE HONOURABLE MRS. JUSTICE MARY JOSEPH

WEDNESDAY, THE 6TH DAY OF DECEMBER 2017/15TH AGRAHAYANA, 1939

WA.No. 60 of 2010 () IN WP(C).1867/2008

AGAINST THE JUDGMENT IN WP(C) 1867/2008 of HIGH COURT OF KERALA
DATED 23-11-2009

APPELLANT(S)/PETITIONER:

K.KUTAGUPTAN, AGED 61 YEARS,
S/O.APPUGUPTAN, KUNIYANGITTIL HOUSE,
CHETHALUR, MANNARKKAD, PALAKKAD DISTRICT.

BY ADVS.SRI.B.JAYASANKAR
SRI.C.S.ULLAS
SRI.P.CHANDRASEKHAR

RESPONDENT(S) RESPONDENTS:

1. THE CANARA BANK,
REP. BY ITS MANAGER,
SULTANPET BRANCH, PALAKKAD DISTRICT.
2. SRI.T.S.VIJAYAN, S/O.SRI. T.S.ASOKAN,
R/O.85, CHANDRA NAGAR,, PALAKKAD.
3. SMT.SANDHYA ASOKAN,
W/O.T.S.ASOKAN, CHANDRANAGAR,
PALAKKAD DISTRICT.
4. THE RECOVERY OFFICER,
D.R.T., ERNAKULAM.

R2 BY ADV. SRI.P.S.APPU
R1 BY ADV. SRI.E.K.NANDAKUMAR
R2 BY ADV. SRI.C.A.ANOOP
R2 BY ADV. SMT.A.B.MOLY
R2 BY ADV. SRI.JIBU P THOMAS

R1 BY ADV. SRI.P.GOPINATH MENON
R2 & R3 BY ADV. SRI.K.JAYAKUMAR (SR.)
R2 & R3 BY ADV. SRI.P.B.KRISHNAN
R2 & R3 BY ADV. SMT.GEETHA P.MENON
R2 & R3 BY ADV. SRI.N.AJITH
R2 & R3 BY ADV. SRI.P.B.SUBRAMANYAN
R2 BY ADV. SRI.T.C.SURESH MENON
R4 BY ADV. SRI.N.NAGARESH,
ASSISTANT SOLICITOR GENERAL

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON
06-12-2017, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

C.R.

K. SURENDRA MOHAN & MARY JOSEPH, JJ.

W.A. No. 60 of 2010

Dated this the 6th day of December, 2017

JUDGMENT

Surendra Mohan, J.

The appellant is the writ petitioner in W.P.(C) No. 1867 of 2008. He challenges the judgment of the learned Single Judge dated 23.11.2009 dismissing the writ petition. He had filed the writ petition seeking a declaration that Ext.P1 sale proceedings were void in view of Rule 68B of the Second Schedule to the Income Tax Act, 1961 ('IT Act' for short) and a consequential order setting aside the sale of his property and allowing him to pay the entire purchase money within a period of one month. The writ petition was filed in the following circumstances:

The appellant is the absolute owner of an extent of 6.08 acres of land comprised in Sy. No. 360/4 of

Thachanattukara-II Village in Mannarkkad Taluk of Palakkad District. The son-in-law of the appellant had availed a loan from the 1st respondent Bank. The immovable property of the appellant mentioned above was furnished as security for the loan transaction, creating a mortgage in respect of the same. His son-in-law committed default in repayment of the loan amount. The 1st respondent thereupon preferred O.A. No. 202 of 2001 before the Debts Recovery Tribunal, Ernakulam ('DRT' for short). The appellant was the 2nd defendant in the said proceedings. The O.A. was allowed and the Tribunal issued Recovery Certificate No. 1463 authorising the Recovery Officer to recover the amount due from the defendants therein. The appellant is the 2nd certificate debtor before the Recovery Officer, Debts Recovery Tribunal, Ernakulam in D.R.C. 1463. The property of the appellant was the A schedule property in the said proceedings. The property was sold by the 4th respondent Recovery Officer on 21.11.2007 for an amount of

Rs.18,10,000/-. Respondents 2 and 3 are the purchasers of the property.

2. According to the appellant, the O.A. was allowed on 27.2.2004. A Recovery Certificate was issued on 6.5.2004. The sale of the property was on 21.11.2007. Therefore, the sale was conducted after a lapse of 3 years and 7 months from the end of the financial year in which the order giving rise to the demand for recovery was passed. As per Rule 68B of the Second Schedule to the Income Tax Act, 1961, which has been made applicable to proceedings under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 ('Debt Recovery Act' for short) by Section 29 thereof, the sale has to be conducted within a period of 3 years. In view of the above, it was contended that the sale was vitiated and liable to be set aside.

3. The writ petition was contested by the respondents. It was contended on behalf of the Bank that the

provisions of Second Schedule to the IT Act would apply to the proceedings before the Debts Recovery Tribunal only to the extent permissible in terms of Section 29 of the Debts Recovery Act. Therefore, the interpretation sought to be placed on the provisions thereof by the appellant was unsustainable.

4. The learned Single Judge considered the respective contentions, found that the provisions of Rule 68B of the Second and Third Schedules to the IT Act would apply only as far as possible with necessary modifications. It was noticed as an added reason for negating his claim that, absolutely no amount was paid by the appellant towards the debt due to the Bank. The learned Single Judge found that there was no infirmity in the sale warranting an interference therewith and dismissed the writ petition. This appeal is against the said judgment.

5. According to Adv. P. Chandrasekhar, who appears for the appellant, Rule 68B of the Second and Third Schedules to the IT Act has been made applicable to proceedings under the Debt Recovery Act by Section 29 thereof. Consequently, the provisions of the Income Tax (Certificate Proceedings Rules), 1962 (hereinafter referred to as 'IT Rules' for short) also became applicable. A detailed procedure for conduct of the sale of an immovable property has been stipulated by the said Rules. Therefore, as per Rule 15, there has to be an attachment of the property, to be followed by a proclamation and sale, after fixing a reserve price. Attachment and sale have been stipulated by the Rules in the Second and Third Schedules of the IT Act from Rule 48 onwards. In the present case, it is contended that, none of the procedures contemplated have been complied with. Therefore, the sale is void and liable to be set aside.

6. Apart from the above, the sale is vitiated, having been conducted after the expiry of the time limit stipulated by Rule 68B of Second and Third Schedules to the IT Act. According to the learned counsel, the O.A. was allowed on 27.2.2004. Limitation would start to run from the said date. Therefore, it is contended that the sale ought to have been conducted before 27.2.2007. But, the sale was conducted only on 27.11.2011 long after the expiry of the period stipulated by the provision. In view of the above, it is contended that the sale is void and liable to be set aside. The learned counsel has a further contention that the property that was sold was much more valuable than the amount for which it was purchased by respondents 2 and 3. The property is more than 6 acres in extent. It was not necessary for such a large extent of property to have been sold, to satisfy the certificate debt. It was therefore incumbent on the 4th respondent to have sold only a portion of the property. The

counsel also disputes the valuation of the property. On the above grounds, he seeks interference with the judgment of the learned Single Judge.

7. Senior Advocate Sri.K. Jayakumar appears for respondents 2 and 3. The learned Senior Counsel points out that the period stipulated by Rule 68B of the Second and Third Schedules to the IT Act is not to be computed from the date on which the order was passed by the DRT. The limitation would commence to run only from the end of the financial year in which the order is passed. Going by the stipulations in the provision, the order became final only on 31.3.2005. The three year period would end only on 31.3.2008. Since the sale was conducted on 21.11.2007, it is contended that the sale was perfectly within the period stipulated by the statutory provision. Therefore, there are no grounds to interfere with the same, it is contended.

8. With respect to the infirmities pointed out in the procedure, it is contended that, all procedures had been complied with and that the sale conducted was proper. The learned Senior Counsel therefore seeks dismissal of the appeal.

9. Heard. Before considering the main contention that has been put forward by the counsel for the appellant, it is necessary to take note of a few other circumstances leading up to the filing of the writ petition from which this appeal arises. As already noticed above, the O.A. was allowed by the DRT on 27.2.2004. Thereafter, various proceedings were instituted by the appellant as well as his son-in-law against the said order of the DRT. I.A. No. 1177 of 2004 was filed by the son-in-law to set aside the order that was passed ex-parte. However, the said application was dismissed by the DRT on 4.10.2004. The said order was made the subject matter of challenge before this Court in W.P.(C) No. 188 of

2005. The contention there was that notice in the O.A. had been served only on the appellant herein and not on the son-in-law. The plea was rejected. W.A. No. 1854 of 2005 filed against the said judgment was dismissed on 26.9.2005, for default. M.J.C. No. 257 of 2005 was filed for restoring the appeal. However, the same was dismissed on 31.10.2005.

10. Thereafter, the appellant filed W.P.(C) No. 8110 of 2006 before this Court alleging that he had no notice of the proceedings in the O.A. filed by the Bank. This Court directed the DRT to consider and pass orders on a petition filed by the appellant before the said forum. Meanwhile, the son-in-law of the appellant approached the Debts Recovery Appellate Tribunal ('DRAT' for short) by filing an appeal. The auction proceedings were stayed on condition that an amount of Rs.3 Lakhs was paid on 21.3.2006, a further amount of Rs.2 Lakhs before 31.3.2006 and an amount of Rs.15 Lakhs within 3 months from 28.4.2006. However, no deposit was made as

contemplated by the interim order. Thereafter, on 3.4.2006 on finding that the conditions had not been complied with, the DRAT directed the deposit of an amount of Rs.50,000/-, failing which the appeal would stand rejected. Since the said order was not complied with, the appeal was dismissed. The said order of the DRAT was challenged by the son-in-law of the appellant before this Court in W.P.(C) No. 14251 of 2006. This Court admitted the appeal and granted an interim order adjourning the sale on condition that an amount of Rs.5 Lakhs was deposited on or before 7.6.2006. The said condition was also not complied with. The writ petition was thereafter dismissed on 4.7.2006. However, it was directed by this Court that the sale if any conducted shall not be confirmed for a period of 45 days and further directed the petitioner to approach the Bank for a settlement of the entire dues. The said opportunity was also not utilized.

11. The appellant's son-in-law thereafter filed W.P. (C) No. 37986 of 2007 seeking a direction to consider and dispose of an application filed under Rule 61 of the Second and Third Schedules to the IT Act without insisting for deposit of the amount sought to be recovered. However, the said writ petition was dismissed by judgment dated 23.11.2009. What appears from the above proceedings is that though the appellant and his son-in-law had been challenging the proceedings for recovery of the amount due from them, by instituting various proceedings, they have not made any payment towards the dues, despite being granted a number of opportunities to do so. We are told that even to this date, they have not made any payment towards the amount due from them.

12. The main contention put forward before us is that the sale is vitiated for the reason of not having been conducted within the time stipulated by law. For the purpose

of considering the above contention, it is necessary to examine the statutory provision. Rule 68B of the Second and Third Schedules to the IT Act is extracted hereunder for convenience of reference.

“Time limit for sale of attached immovable property.

68B. (1) No sale of immovable property shall be made under this Part after the expiry of three years from the end of the financial year in which the order giving rise to a demand of any tax, interest, fine, penalty or any other sum, for the recovery of which the immovable property has been attached, has become conclusive under the provisions of section 245-I or, as the case may be, final in terms of the provisions of Chapter XX:

Provided that where the immovable property is required to be re-sold due to the amount of highest bid being less than the reserve price or under the circumstances mentioned in rule 57 or rule 58 or where the sale is set aside under rule 61, the aforesaid period of limitation for the sale of the immovable property shall stand extended by one year.

(2) In computing the period of limitation under sub-rule (1), the period–

(i) during which the levy of the aforesaid tax, interest, fine, penalty or any other sum is stayed by an order or injunction of any court; or

(ii) during which the proceedings of attachment or sale of the immovable property are stayed by an order or injunction of any court; or

(iii) commencing from the date of the presentation of any appeal against the order passed by the Tax Recovery Officer under this Schedule and ending on the day the appeal is decided,

shall be excluded:

Provided that where immediately after the exclusion of the aforesaid period, the period of limitation for the sale of the immovable property is less than 180 days, such remaining period shall be extended to 180 days and the aforesaid period of limitation shall be deemed to be extended accordingly.

(3) Where any immovable property has been attached under this Part before the 1st day of June, 1992, and the order giving rise to a demand of any tax, interest, fine, penalty or any other sum, for the recovery of which the immovable property has been attached, has also become

conclusive or final before the said date, that date shall be deemed to the date on which the said order has become conclusive or, as the case may be, final.

(4) Where the sale of immovable property is not made in accordance with the provisions of sub-rule (1), the attachment order in relation to the said property shall be deemed to have been vacated on the expiry of the time of limitation specified under this rule.”

The above provision mandates that, no sale of immovable property shall be made under this part;

- i) after the expiry of three years,
- ii) from the end of the financial year in which the order giving rise to a demand of any tax, interest, fine, penalty or other sum, for the recovery of which the immovable property has been attached,
- iii) has become conclusive under the provisions of Section 245-I or, as the case may be, final in terms of the provisions of Chapter XX.

It is clear from the above provision that, the period of 3 years stipulated therein is to commence “from the end of the financial year” in which the order becomes conclusive or final.

In the present case, though the O.A. was allowed by the DRT on 27.2.2004, we notice that, the order had not become final on the said date. This is for the reason that, the appellant was entitled to file an appeal against the said order under Section 20 of the DRT Act. The period stipulated for filing an appeal is 45 days from the date on which the copy of the order is received by him. Therefore, the order could become final only after expiry of the period prescribed for filing an appeal. The said period expired only on 13.4.2004. Since the financial year in which the order has become final, namely, 13.4.2004, has expired only on 31.3.2005, the three year period stipulated by Rule 68B above expired only on 31.3.2008. Admittedly, the sale was conducted on 27.11.2007. Therefore, the sale was conducted within the time stipulated by Section 68B of the Second and Third Schedules to the IT Act. It is necessary to further notice that, the auction proceedings had remained stayed as per the orders of the

DRAT as well as this Honourable Court, for varying periods. The said periods are also necessary to be excluded going by the terms of Rule 68B. Even without doing that, it has to be held that the sale was conducted within the time stipulated by the statutory provision. It is held so.

13. The other question that arises for consideration is whether in view of section 29 of the DRT Act, all the provisions of the IT Rules would become applicable to proceedings before the DRT. The above aspect has been considered by the Apex Court in *Paramsivan C.N. v. Sunrise Plaza Tr.Partner* ((2013) 9 SCC 460). After considering the scope of Section 29, the Apex Court has held in paragraph 21 of the said decision as follows:

“21. Applying the above principles to the case at hand Section 29 of the RDDB Act incorporates the provisions of the Rules found in the Second Schedule to the Income-tax Act for purposes of realisation of the dues by the Recovery Officer under the RDDB Act. The

expressions "as far as possible" and "with necessary modifications" appearing in Section 29 have been used to take care of situations where certain provisions under the Income-tax Rules may have no application on account of the scheme under the RDDB Act being different from that of the Income-tax Act or the Rules framed thereunder. The provisions of the Rules, it is manifest, from a careful reading of Section 29 are attracted only in so far as the same deal with recovery of debts under the Act with the modification that the 'amount of debt' referred to in the Rules is deemed to be one under the RDDB Act. That modification was intended to make the position explicit and to avoid any confusion in the application of the Income-tax Rules to the recovery of debts under the RDDB Act, which confusion could arise from a literal application of the Rules to recoveries under the said Act. Proviso to Section 29 further makes it clear that any reference "to the assessee" under the provisions of the Income-tax Act and the Rules shall be construed as a reference to the defendant under the RDDB Act. It is noteworthy that the Income-tax Rules make provisions that do not strictly deal with recovery of debts under the Act. Such of the rules cannot possibly apply to recovery of debts under the RDDB Act. For instance Rules 86 and 87

under the Income-tax Act do not have any application to the provisions of the RDDB Act, while Rules 57 and 58 of the said Rules in the Second Schedule deal with the process of recovery of the amount due and present no difficulty in enforcing them for recoveries under the RDDB Act. Suffice it to say that the use of the words "as far as possible" in Section 29 of RDDB Act simply indicate that the provisions of the Income-tax Rules are applicable except such of them as do not have any role to play in the matter of recovery of debts recoverable under the RDDB Act. The argument that the use of the words "as far as possible" in Section 29 is meant to give discretion to the Recovery Officer to apply the said Rules or not to apply the same in specific fact situations has not impressed us and is accordingly rejected."

It has been further reiterated in paragraph 26 as follows:

"26. It is, therefore, reasonable to hold that the phrase "as far as possible" used in Section 29 of the RDDB Act can at best mean that the Income-tax Rules may not apply where it is not at all possible to apply them having regard to the scheme and the context of the legislation."

In view of the above binding dictum of the Apex Court on the point, it has to be held that, to the extent indicated therein, the provisions of the IT Act and the Rules are applicable.

14. Though elaborate contentions have been advanced before us pointing out various alleged procedural lapses in leading up to the auction that was conducted, we do not find any material or evidence to support the said contentions. We notice that the property was already mortgaged to the Bank. Therefore, there was no necessity for attachment thereof before the sale, as contended. Though it is contended that there was no proclamation, fixation of a reserve price etc., as contemplated by the IT Rules, there is no material on record to support any of the said contentions. Therefore, the said contentions have to fail. Since, we have already found on facts that the sale conducted was within the time stipulated by the statutory provision, we do not find any grounds to interfere with the judgment appealed against or to

grant any of the reliefs sought for, except to clarify that the legal position as indicated by the Apex Court in *Paramsivan C.N. v. Sunrise Plaza Tr.Partner* (supra) shall apply.

For the foregoing reasons, the appeal fails and is accordingly dismissed.

Sd/-
K. SURENDRA MOHAN
JUDGE

Sd/-
MARY JOSEPH
JUDGE

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