SUPREME COURT OF INDIA

C.N.Paramsivan

Vs.

Sunrise Plaza TR.Partner

C.A.No.154 of 2013

(T.S.Thakur and Gyan Sudha Misra JJ.)

09.01.2013

JUDGMENT

T.S. THAKUR, J.

1. Leave granted.

2. This appeal by special leave arises out of an order passed by the High Court of Judicature at Madras whereby writ petition No.14594 of 2007 filed by the appellants has been dismissed and orders passed by the Debt Recovery Appellate Tribunal in M.A. No.90 of 2006 upheld, no matter on a ground other than the one on which that found favour with the Appellate Tribunal.

3. Facts leading to the filing of the writ petition have been set out at considerable length in the orders passed by the Appellate Tribunal and that passed by the High Court. We do not, therefore, consider it necessary to recapitulate the entire history over again except to the extent the same is necessary for the disposal of the present appeal. The long drawn legal battle that has raged over the past two decades or so has its genesis in a loan which respondent Indian Bank advanced to M/s. Sunrise Plaza, a partnership concern comprising respondent-S. Kalyanasundaram and his wife - Mrs. Vasantha Kalyanasundaram. The loan was advanced on the basis of an equitable mortgage of the properties owned by the partners of the firm by deposit of title deeds relevant thereto. The borrower having defaulted in the repayment of the loan amount, the respondent-bank filed O.A. No.238 of 1998 re-numbered as O.A. No.1098 of 2001 before the Debt Recovery Tribunal at Chennai. Failure of the respondents to appear and contest the claim made against them culminated in the passing of an ex-parte decree in favour of the bank on 20th September, 1999.

An application for setting aside of the said decree was then made by the borrower defendants which was dismissed by the Tribunal for default. An application for recall of the said order too failed and was dismissed by the Tribunal.

4. Proceedings for execution of the Recovery Certificate issued in favour of the bank were in the meantime initiated and the property mortgaged with the bank brought to sale in a public auction on 7th March, 2003 in which the appellants emerged as the successful bidders. The respondents then filed I.A. No.146 of 2003 for setting aside of the auction sale, while I.A. No.150 of 2003 filed by them prayed for an order of refusal of confirmation of the sale. The Debt Recovery Tribunal passed a conditional order in the said application deferring the confirmation of sale subject to the judgment-debtor depositing a sum of Rs.10,00,000/- with the decree holder bank on or before 25th April, 2003. I.A. No.146 of 2003 for setting aside the sale was, however, dismissed by the Tribunal on 15th April, 2003, as not maintainable. A prayer made by the respondents - judgment-debtors for extension of time to make the deposit of the amount directed by the Tribunal having been rejected, the recovery officer proceeded further and issued a sale certificate in favour of the appellants on 28th May, 2003. The judgment-debtors -respondent Nos.1 to 3 then filed an appeal challenging the orders passed by the Debt Recovery Tribunal in which the Appellate Tribunal directed them to pay the requisite court fee.

5. Aggrieved by the order of the Appellate Tribunal, the judgment- debtors filed Writ Petition No.28235 of 2003 in which the High Court by an order dated 14th October, 2003 set aside the ex-parte decree on payment of costs. That order when challenged by the decree holder bank in a Special Leave Petition before this Court was affirmed and the SLP dismissed in July 2004. Undeterred by the dismissal of the Special Leave Petition, the bank filed a Review Application before the High Court for review of its order dated 14th October, 2003 setting aside the ex-parte decree. Even the appellants herein filed a review petition against the said order which applications were dismissed by the High Court with liberty to the auction purchaser-appellants herein to represent their case before the Debt Recovery Tribunal in the O.A. pending before it.

6. The appellants-auction purchasers at that stage filed I.A. No.20 of 2005 before the Debt Recovery Tribunal at Chennai seeking delivery of possession of the property purchased by them. That application was allowed by the Tribunal with a direction to the Recovery Officer to put the auction purchasers in possession of the property in question. The defendants- respondents herein challenged that order before the Appellate Tribunal at Chennai on several grounds in M.A. No.90 of

2006. The Appellate Tribunal allowed the said appeal and set aside the order passed by the Debt Recovery Tribunal with a direction to the Debt Recovery Tribunal to take up I.A. No.20 of 2005 along with O.A. No.1098 of 2001 and dispose of the same in accordance with law.

7. The appellants questioned the correctness of the above order in Writ Petition No.29356 of 2006 which was allowed by a Division Bench of the High Court by Order dated 29th November, 2006, setting aside the order passed by the Appellate Tribunal and remitting the matter back to the Debt Recovery Appellate Tribunal to decide the issue whether or not the rights of a bona fide purchaser get curtailed if the ex-parte decree on the basis whereof the auction sale was conducted is eventually set aside. The Debt Recovery Appellate Tribunal examined the matter afresh and held that the appellants- auction purchasers were not bona fide purchasers of the property as they were aware of the pending legal proceedings between the bank and the borrower. The Tribunal accordingly set aside the sale with a direction to the defendants-respondents 1 to 3 to deposit the entire amount claimed in original application.

8. Aggrieved by the orders passed by the Appellate Tribunal, the appellants filed Writ Petition No.14594 of 2007 before the High Court which writ petition has been dismissed by the High Court as already mentioned above. The High Court approached the issues from a slightly different angle; for instead of going into the question whether the appellants were bona fide auction purchasers, it examined the validity of the auction itself and came to the conclusion that the auction conducted by the Recovery Officer was illegal and void because of non-compliance with the provisions of Rule 57 in the Second Schedule of the Income Tax Act, 1961 which were in view of the provisions of Section 29 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (hereinafter referred to a 'RDDB Act' for short) applicable to recovery of debt dues under the latter mentioned Act. The present appeal assails the correctness of the above order passed by the High Court.

9. Appearing for the appellants Mr. L. Nageshwar Rao, learned senior counsel, made a threefold submission in support of his case. Firstly he contended that the remand order passed by the High Court in the earlier round was limited to the Appellate Tribunal finding out whether the rights of a bona fide purchaser stood curtailed in view of the setting aside of the ex-parte decree on which the auction had been conducted. While the Tribunal had answered that question, the High Court had failed to do so in the writ petition filed by the appellants. The High Court had digressed from the subject and added a new dimension which had not been noticed or pressed in the earlier round.

10. Secondly he contended that even if the High Court could examine a ground other than the one on which a remand had been ordered, it failed to appreciate that the provisions of the Income Tax Rules set out in the Second Schedule of the Income Tax Act were applicable only "as far as possible and with necessary modification". This was, according to Mr. Rao, evident from a plain reading of Section 29 of the RDDB Act. The use of the expressions "as far as possible" and "with necessary modifications", argued the learned counsel, gave sufficient play at the joints to the Recovery Officer to apply the said rules in the manner considered most appropriate by him, having regard to the facts and circumstances of a given case. The High Court had, argued Mr. Rao, fallen in an error in ignoring the expressions appearing in Section 29 and proceeding with the matter as if Rule 57 of the said rules was mandatory and applicable with full force. It was also contended by the learned counsel that if Rules 57 and 58 of the Income Tax Rules were held applicable in the form in which they appear in the Second Schedule, the requirement of Rule 61 of the said Rules could not be ignored and had to be mandatorily followed. Inasmuch as the Interlocutory Application filed by the judgment-debtor for setting aside the sale had been dismissed by the Tribunal and inasmuch as there was no challenge to the said dismissal order at any stage, the High Court ought to have held that the condition precedent for setting aside the sale namely filing of a proper application was not satisfied thereby rendering the sale in favour of the appellants immune from any challenge or interference.

11. It was thirdly argued by learned counsel for the appellants that the appellants were bona fide purchasers, hence protected against any interference with the sale in their favour, no matter the decree on the basis whereof the sale had been effected had itself been set aside by High Court. Reliance in support was placed by Mr. Rao upon the decisions of this Court in Janak Raj v. Gurdial Singh (1967) 2 SCR 77; Janatha Textiles and Ors. v. Tax Recovery Officer and Anr. (2008) 12 SCC 582; (1994) 2 SCC 364, Padanathil Ruqmini Amma Vs. P.K. Abdulla (1996) 7 SCC 668. It was further contended that a contrary view was no doubt expressed by a Two- Judge Bench of this Court in Chinnammal and Ors. v. P. Arumugham and Anr. (1990) 1 SCC 513 but the conflict between the two lines of the decisions referred to above deserved to be resolved by a reference to a larger Bench.

12. Mr. Rakesh Dwivedi, learned senior counsel appearing for the respondents, per contra argued that the scope of the proceeding before the High Court in the second round was not in any way limited by the earlier remand order and the High Court could have and has indeed examined the question of validity of the auction sale. He urged that the provisions of the Income Tax Rules in the Second Schedule of the

Act were applicable in the form in which the said rules were found in the statute book as no modification or amendment of the said rules had been made either by any legislative enactment or by way of Rules under the RDDB Act. He contended that the words "as far as possible" were incapable of conveying that the Recovery Officer could at his discretion play with the rules without any limitations on his power or discretion and without any guidelines under the Act or the Rules. He submitted that decision of this Court in Chinnammal and Ors. v. P. Arumugham and Anr. (1990) 1 SCC 513 was not in conflict with the view taken in the decisions relied upon by Mr. Rao inasmuch as the said decisions had not examined the issue as to what would constitute a bona fide purchaser to be entitled to protection in law. We propose to deal with the contentions raised by Mr. Rao ad seriatim.

13. The remand ordered by the High Court in Writ Petition No.29356/2006 was an open remand which allowed the parties to urge their respective contentions not only in regard to the rights of a bona fide purchaser, but any other contention available to them on facts and in law. This is evident from the operative portion of the order passed by the High Court which was as under:

> "In the above circumstances, as agreed by learned counsel appearing for the parties, the impugned order dated 13.7.2006 passed by the Debt Recovery Appellate Tribunal in M.A. No.90 of 2006 is set aside and the case is remitted to the Debt Recovery Appellate Tribunal, Chennai, to determine the aforesaid issues and any other issue as has been raised by one or other party in M.A. No.90 of 2006, preferably within two months from the date of receipt or production of a copy of this order."

14. The language employed in the remand order apart, the High Court had not examined or determined the question whether Rule 57 of the Income Tax Rules was mandatory and if so whether there was any breach of that provision or the effect thereof. There was no discussion leave alone any finality to the determination of that aspect, so as to prevent anyone of the parties from urging their submissions on those questions. We have in that view no hesitation in rejecting the first limb of Mr. Rao's argument that the High Court could not have gone into any other question apart the rights of a bona fide purchaser in the proceedings arising after the remand order.

15. That brings us to the question whether Section 29 of the RDDB Act do not apply the Income Tax Rules in the Second Schedule of the Income Tax Act to the recovery proceedings under RDDB Act with full force and that the expression 'as far as possible' appearing in Section 29 vests the Recovery Officer with discretion

to apply the said Rules depending upon the fact situation of each case. Section 29 of the RDDB Act 29 is as under:

> 29. Application of certain provisions of Income-tax Act.—The provisions of the Second and Third Schedules to the Income-tax Act, 1961 and the Income-tax (Certificate Proceedings) Rules, 1962, as in force from time to time shall, as far as possible, apply with necessary modifications as if the said provisions and the rules referred to the amount of debt due under this Act instead of to the Income-tax:
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> > Provided that any reference under the said provisions and the rules to the "assessee" shall be construed as a reference to the defendant under this Act.

16. A bare reading of the above leaves no manner of doubt that the rules under Income Tax Act were applicable only "as far as possible" and with the modification as if the said provisions and the rules referred to the amount of debt due under the RDDB Act instead of the Income Tax Act. The question is whether the said two expressions render the provisions of Rule 57 directory no matter the same is couched in a language that is manifestly mandatory in nature.

17. Legislation by incorporation is a device to which legislatures often take resort for the sake of convenience. The phenomenon is widely prevalent and has been the subject matter of judicial pronouncements by Courts in this country as much as Courts abroad. Justice G.P. Singh in his celebrated work on Principles of Statutory Interpretation has explained the concept in the following words:

> "Incorporation of an earlier Act into a later Act is a legislative device adopted for the sake of convenience in order to avoid verbatim reproduction of the provisions of the earlier Act into the later. When an earlier Act or certain of its provisions are incorporated by reference into a later Act, the provisions so incorporated become part and parcel of the later Act as if they had been 'bodily transposed into it. The effect of incorporation is admirably stated by LORD ESHER, M.R.: 'If a subsequent Act brings into itself by reference some of the clauses of a former Act, the legal effect of that, as has often been held, is to write those sections into the new Act as if they had been actually written in it with the pen, or printed in it.
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> Even though only particular sections of an earlier Act are incorporated into later, in construing the incorporated sections it may be at times necessary

> and permissible to refer to other parts of the earlier statute which are not incorporated. As was stated by LORD BLACKBURN: "When a single section of an Act of Parliament is introduced into another Act, I think it must be read in the sense it bore in the original Act from which it was taken, and that consequently it is perfectly legitimate to refer to all the rest of that Act in order to ascertain what the section meant, though those other sections are not incorporated in the new Act."

18. In Ram Kirpal Bhagat and Ors. v. State of Bihar (1969) 3 SCC 471 this Court examined the effect of bringing into an Act the provisions of an earlier Act and held that the legislation by incorporation of the provisions of an earlier Act into a subsequent Act is that the provisions so incorporated are treated to have been incorporated in the subsequent legislation for the first time. This Court observed:

> "The effect of bringing into an Act the provisions of an earlier Act is to introduce the incorporated Sections of the earlier Act into the subsequent Act as if those provisions have been enacted in it for the first time. The nature of such a piece of legislation was explained by Lord Esher M. R. in Re Wood's Estate [1881] 31 Ch. D.607 that "if some clauses of a former Act were brought into the subsequent Act the legal effect was to write those Sections into the new Act just as if they had been written in it with the pen".

19. To the same effect is the decision of this Court in Mahindra and Mahindra Ltd. v. Union of India and Anr. (1979) 2 SCC 529 where this Court held that once the incorporation is made, the provisions incorporated become an integral part of the statute in which it is transposed and thereafter there is no need to refer to the statute from which the incorporation is made and any subsequent amendment made in it has no effect on the incorporating statute. The following passage is in this regard apposite:

> "The effect of incorporation is as if the provisions were written out in the incorporating statute and were a part of it. Legislation by incorporation is a common legislative device employed by the legislature, where the legislature for convenience of drafting incorporates provisions from an existing statue by reference to that statute instead of setting out for itself at length the provisions which it desires to adopt. Once the incorporation is made, the provision incorporated becomes an integral part of the statute in which it is transposed and thereafter there is no need to refer to the statute from which the incorporation is made and any subsequent amendment made in it has no effect on the incorporating statute."

20. We may also refer to the decisions of this Court in Onkarlal Nandlal v. Rajasthan and Anr.(1985) 4 SCC 404, Mary Roy and Ors. v. State of Kerala and Ors. (1986) 2 SCC 209, Nagpur Improvement Trust v. Vasantrao and Ors. and Jaswantibai and Ors. (2002) 7 SCC 657, and M/s Surana Steels Pvt. Ltd. v. The Deputy Commissioner of Income Tax and Ors. (1999) 4 SCC 306, which have reiterated the above proposition of law.

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.

22. In Osmania University v. V.S. Muthurangam and Ors. (1997) 10 SCC 741, the question that fell for consideration was whether the age of superannuation of the non-teaching staff at Osmania University should be raised to 60 years when the same had been raised to 60 years for the University's teaching staff. Since Section 38(1) of the Osmania University Act, 1959 stated that the conditions of service for all salaried staff of the University shall be uniform "as far as possible", the decision in the case turned on the meaning to be given to that phrase. It was argued by the Solicitor General on behalf of the University that the use of this phrase in Section 38(1) indicated that the provision could be departed from in certain situations. This Court ruled otherwise and held as follows:

> "8...Mr. Solicitor General is justified in his contention that Section 38(1) of the Act recognizes flexibility and the expression 'as far as possible' inheres in it an inbuilt flexibility...But if uniform conditions of service for teaching and non teaching staff of the University is not otherwise impracticable, the University is under an obligation to maintain such uniformity because of the mandate of Section 38(1) of the Act. In the instant case, we do not find that it is not at all practicable for the University to maintain the parity in the age of superannuation of both teaching and non teaching staff."

(emphasis supplied)

23. It follows that while the phrase "as far as possible", may be indicative of a certain inbuilt flexibility, the scope of that flexibility extends only to what is "not at all practicable". In order to show that Rules 57 and 58 of the Second Schedule of the Income Tax Act may be departed from under the RDDB Act, it would have to be proved that the application of these Rules is "not at all practicable" in the context of RDDB Act.

24. The interchangeable use of the words "possible" and "practicable" was previously established by a three-judge Bench of this Court in N.K. Chauhan and Ors. v. State of Gujarat and Ors., (1977) 1 SCC 308, where this Court observed that in simple Anglo-Saxon Practicable, feasible, possible, performable, are more or less interchangeable. Webster defines the term 'practicable' thus:

> "1. That can be put into practice; feasible. 2. That can be used for an intended purpose; usable."

25. Black's Law Dictionary similarly defines 'practicable' as follows:

"(Of a thing) reasonably capable of being accomplished; feasible."

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.

27. There is nothing in the provisions of Section 29 of RDDB Act or the scheme of the rules under the Income Tax Act to suggest that a discretion wider than what is explained above was meant to be conferred upon the Recovery Officer under Section 29 of the RDDB Act or Rule 57 of the Income Tax Rules which reads as under:

> "57.(1) On every sale of immovable property, the person declared to be the purchaser shall pay, immediately after such declaration, a deposit of twenty-five per cent on the amount of his purchase money, to the officer conducting the sale; and, in default of such deposit, the property shall forthwith be resold.
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> (2) The full amount of purchase money payable shall be paid by the purchaser to the Tax Recovery Officer on or before the fifteenth day from the date of the sale of the property."

28. It is clear from a plain reading of the above that the provision is mandatory in character. The use of the word "shall" is both textually and contextually indicative of the making of the deposit of the amount being a mandatory requirement. The provisions of Rules 57 and 58 of the Income Tax Rules, have their equivalent in Order XXI Rules 84, 85 86 of the C.P.C. which are pari materia in language, sweep and effect and have been held to be mandatory by this Court in Manilal Mohanlal Shah and Ors. v. Sardar Sayed Ahmed Sayed Mahmed and Anr. (AIR 1954 SC 349) in the following words:

> "8. The provision regarding the deposit of 25 per cent. by the purchaser other than the decree-holder is mandatory as the language of the rule suggests. The full amount of the purchase-money must be paid within fifteen days from the date of the sale but the decree- holder is entitled to the advantage of a set-off. The provision for payment is, however, mandatory... (Rule 85). If the payment is not made within the period of fifteen days, the Court has the discretion to forfeit the deposit, and there the discretion ends but the obligation of the Court to re-sell the property is imperative. A further

consequence of non-payment is that the defaulting purchaser forfeits all claim to the property (Rule 86)...

9...These provisions leave no doubt that unless the deposit and the payment are made as required by the mandatory provisions of the rules, there is no sale in the eye of law in favour of the defaulting purchaser and no right to own and possess the property accrues to him.

xx xx xx xx

11. Having examined the language of the relevant rules and the judicial decisions bearing upon the subject we are of opinion that the provisions of the rules requiring the deposit of 25 per cent. of the purchase-money immediately on the person being declared as a purchaser and the payment of the balance within 15 days of the sale are mandatory and upon non-compliance with these provisions there is no sale at all. The rules do not contemplate that there can be any sale in favour of a purchaser without depositing 25 per cent. of the purchase-money in the first instance and the balance within 15 days. When there is no sale within the contemplation of these rules, there can be no question of material irregularity in the conduct of the sale. Non-payment of the price on the part of the defaulting purchaser renders the sale proceedings as a complete nullity. The very fact that the Court is bound to resell the property in the event of a default shows that the previous proceedings for sale are completely wiped out as if they do not exist in the eye of law. We hold, therefore, that in the circumstances of the present case there was no sale and the purchasers acquired no rights at all."

29. Relying in Manilal Mohanlal's case (supra) Rules 84, 85 and 86 of Order XXI were also held to be mandatory in Sardara Singh (Dead) by Lrs. and Anr. v. Sardara Singh (Dead) and Ors. (1990) 4 SCC 90.

30. Similarly in Balram, son of Bhasa Ram v. Ilam Singh and Ors. (1996) 5 SCC 705 this Court reiterated the legal position in the following words:

"7...it was clearly held [in Manilal Mohanlal] that Rule 85 being mandatory, its non-compliance renders the sale proceedings a complete nullity requiring the executing court to proceed under Rule 86 and property has to be resold unless the judgment-debtor satisfies the decree by making the payment before the resale. The argument that the executing court has inherent power

to extend time on the ground of its own mistake was also expressly rejected..."

31. We may also refer to the decisions of this Court in Rao Mahmood Ahmed Khan v. Sh. Ranbir Singh and Ors. (1995) 4 SCC 275, Gangabai Gopaldas Mohata v. Fulchand and Ors. (1997) 10 SCC 387, Himadri Coke Petro Ltd. v. Soneko Developers (P) Ltd. And Ors. (2005) 12 SCC 364 and Shilpa Shares and Securities and Ors. v. The National Co-operative Bank Ltd. and Ors. (2007) 12 SCC 165, wherein the same position has been taken.

32. In the light of the above we see no reason to hold that Rules 57 and 58 of the Income Tax Rules are anything but mandatory in nature, so that a breach of the requirements under those Rules will render the auction non- est in the eyes of law.

33. That leaves us with the third and the only other submission made by Mr. Rao touching the rights of bonafide purchaser and whether there is any conflict between the decisions of this Court on the subject to call for a reference to a larger bench. There is, in our opinion, no doubt that there is an apparent conflict between the decisions upon which reliance was placed by learned counsel for the parties. But having regard to the view that we have taken on the question of the validity of this auction itself, we do not consider it necessary to make a reference to a larger bench to resolve the conflict. The cleavage in the judicial opinion is for the present case only of academic importance, hence need not be addressed by us or by a larger bench for the present.

34. In the result, this appeal fails and is hereby dismissed but in the circumstances without any order as to costs.