

RAJASTHAN HIGH COURT

Geeta Devi Khutenta

Vs.

Debts Recovery Tribunal

D. B. Civil Spl. Appeal (Writ) No. 915 of 2005 in S.B.C.W.P. No. 1840 of 2003
(R.M. Lodha and Mohammad Rafiq, JJ.)

14.11.2007

JUDGEMENT

R. M. Lodha, J.

1. This appeal impugns the dismissal of the writ petition by the Single Judge vide his order dated 16th September, 2005.
2. The brief facts giving rise to the controversy in the appeal may be noticed by us first.
3. The Union Bank of India (for short, 'the Bank') initiated the proceedings for recovery of loan against Govind Narain-the husband of the present appellant (for short, 'the borrower') and the present appellant (for short, 'the guarantor') under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (for short, 'the Act of 1993') before the Debts Recovery Tribunal, *Jaipur*.
4. On 24th August, 2001, the Debts Recovery Tribunal passed an order/decree for an amount of Rs. 23,45,790.74 along with interest @ 6% per annum against the borrower as well as the guarantor.
5. The Debts Recovery Tribunal then issued a certificate of recovery against the appellant and her husband.
6. On 17th July, 2002, in execution proceedings, an order directing the sale of the house being *House No. 43, Govind Nagar, Amer Road, Jaipur* belonging to the appellant was passed. The proclamation of sale was affixed on the property (*house No. 43, Govind Nagar, Amer Road, Jaipur*) on 3rd August, 2002. It was also affixed on the notice board of the Debts Recovery Tribunal on 25th July, 2002. In addition to these

two modes of publication of proclamation of sale, the Recovery Officer also ordered the proclamation of sale to be published in the newspaper which was done on 30th August, 2002. The sale took place on 4th September, 2002. In that sale, two bidders participated. The highest bid of Rs. 14,50,000/- given by the present respondent Nos. 3 and 4 was accepted. The 25% of the sale price was deposited by the purchasers through bankers cheque on the next day i.e. 5th September, 2002 and the remaining 75% of the sale price was deposited on 19th September, 2002.

7. The present appellant (one of the judgment-debtors) made the application on 30th September, 2002 before the Recovery Officer raising diverse objections to the acceptance of the bid of respondent Nos. 3 and 4 by the auctioneer. The Recovery Officer overruled the objections by his order dated 27th January, 2003.

8. Aggrieved by the order of the Recovery Officer dated 27th January, 2003, the present appellant approached the Debts Recovery Tribunal by filing the Misc. Appeal which came to be dismissed on 18th February, 2003.

9. The present appellant then filed writ petition before the Single Judge which as noticed above was dismissed on 16th September, 2005. Hence the appeal.

10. From the perusal of the order dated 27th January, 2003 passed by the Recovery Officer, it transpires that on behalf of the appellant, four objections were raised challenging the legality of the auction of her property. These objections were:

(One) That the auction proceedings were nullity since the demand notice was not served upon her.

(two) That the decree passed by the Debts Recovery Tribunal was under challenge in the appeal in respect of the award of interest. Until the decision in the appeal, no execution application for recovery could have been made.

(Three) That before the auction of her house, adequate publicity was not made and there were many people willing to purchase the property for Rs. 18 lacs.

(Four) That the purchasers did not deposit 25% of the purchase price immediately after the declaration of purchase was made and that the auctioneer had no competence or authority to extend the time for deposit of 25% of the purchase price until next day.

11. The Recovery Officer did not find any merit in any of the contentions. He held that the Recovery Certificate was issued in the presence of the advocate for the objector and she was granted six months' time to deposit the decretal amount and, therefore, it cannot be said that the demand notice was not served upon her. The Recovery Officer

held that there was no impediment for the Bank in proceeding with the execution of the decree dated 24th August, 2001 as there was no stay by the Appellate Tribunal. The Recovery Officer did not accept the contention made on behalf of the appellant that there was no adequate publicity for sale since according to him the proclamation of sale was published in the daily newspaper 'Dainik Bhaskar', and the hand bills for sale were also distributed. He held that though the objector set-up the plea that there were quite a few people ready for purchase of the property for Rs. 18 lacs, not a single person came for the same. The Recovery Officer also held that looking to the facts and circumstances of the case whereby 25% of the purchase amount was required to be deposited by way of a demand draft, the extension of time by the auctioneer until next day was not unreasonable.

12. Before the Single Judge, on behalf of the judgment-debtor (present appellant) broadly two issues were raised. Firstly, that although the valuation of the property was approximately Rs. 28 lacs, the reserve price at Rs. 14,50,000/- was too low and secondly that the auction held within 30 days of the publication of the proclamation of sale was bad in law. Both these contentions have been negated by the Single Judge.

13. Mr. Alok Sharma counsel for the appellant would submit that the Second Schedule of the Income-tax Act, 1961 that provides for procedure for recovery of tax has been made applicable for the recovery of the amount of debt determined by the Tribunal by Section 29 of the Act of 1993 and there has been wholesale breach of the mandatory provisions contained in the Second Schedule and, thus, the entire auction proceedings are bad in law and the bid accepted in favour of respondent Nos. 3 and 4 is a nullity. He submitted: (i) that the contents of proclamation do not meet the requirement of Rule 53; (ii) that the proclamation of sale was published in the news- paper on 30th August, 2002 and the sale took place on 4th September, 2002 i.e. within four days which was in contravention of Rule 55; and (iii) that 25% of the purchase price was not deposited immediately by the auction-purchasers.

14. Part III of Second Schedule of the Income-tax Act, 1961 that has been made applicable for the recovery of debts determined by the Tribunal deals with the attachment and sale of immovable property. Rule 53 provides thus :

"53. A proclamation of sale of immovable property shall be drawn up after notice to the defaulter, and shall state the time and place of sale, and shall specify, as fairly and accurately as possible,-

(a) the property to be sold;

- (b) the revenue, if any, assessed upon the property or any part thereof;
- (c) the amount for the recovery of which the sale is ordered;
- (cc) the reserve price, if any, below which the property may not be sold;
- and
- (d) any other thing which the Tax Recovery Officer considers it material for a purchaser to know, in order to judge the nature and value of the property."

15. We perused the proclamation of sale drawn up by the Recovery Officer. There appears nothing that the drawn up proclamation of sale of the subject property suffered from any infirmity. As a matter of fact, nothing specific was demonstrated by Mr. Alok Sharma from the drawn up proclamation of sale which could lead to an inference of no-compliance of the requirement of Rule 53. No such objection was pressed by the judgment-debtor before the Recovery Officer or the Debts Recovery Tribunal or the Single Judge. We, thus, find no merit in the submission of Mr. Alok Sharma that the drawn up proclamation of sale was not in accord with Rule 53.

16. Rule 54 provides for mode of making proclamation while Rule 55 makes provision for time of sale. Both these provisions read thus:

"54. (1) Every proclamation for the sale of immovable property shall be made at some place on or near such property by beat of drum or other customary mode, and a copy of the proclamation shall be affixed on a conspicuous part of the property and also upon a conspicuous part of the office of the Tax Recovery Officer.

(2) Where the Tax Recovery Officer so directs, such proclamation shall also be published in the Official Gazette or in a local newspaper, or in both; and the cost of such publication shall be deemed to be costs of the sale.

(3) Where the property is divided into lots for the purpose of being sold separately, it shall not be necessary to make a separate proclamation for each lot, unless proper notice of the sale cannot, in the opinion of the Tax Recovery Officer, otherwise be given.

55. No sale of immovable property under this Schedule shall, without the consent in writing of the defaulter, take place until after the expiration of at least thirty days calculated from the date on which a copy of the proclamation of sale has been affixed on the property or in the office of the Tax Recovery Officer, whichever is later."

17. It would be, thus, seen that there are various modes of making proclamation,

namely: (i) by the beat of drum or other customary mode; (ii) by affixation of a copy of proclamation at the conspicuous part of the property; (iii) affixation of a copy of proclamation upon a conspicuous part of the office of the Recovery Officer; (iv) publication of the proclamation in the Official Gazette; and (v) publication of the proclamation in a local newspaper. Under Rule 54(1), proclamation on or near the property to be sold by beat of drum or other customary mode and affixation of a copy of proclamation on a conspicuous part of the property as well as the conspicuous part of the office of the Recovery Officer is mandatory. However, insofar as publication of proclamation in the Official Gazette or a local newspaper is concerned, it is dependent upon the direction of the Recovery Officer and has not to be necessarily followed if not so directed by the Recovery Officer. The time of sale provided in Rule 55 is applicable with regard to the two modes of making proclamation namely : (i) affixation of a copy of proclamation of sale on the property; and (ii) affixation of the copy of the proclamation of sale in the office of the Recovery Officer. What is provided by Rule 55 is that there has to be minimum gap of 30 days between the date of auction and the date on which copy of proclamation of sale has been affixed on the property or the office of the Recovery Officer (whichever is later). The mandatory gap of 30 days provided in Rule 55 is not applicable to the other modes i.e. publication of proclamation in the Official Gazette or in a local newspaper. Seen thus, it is clear that there is no breach or contravention of Rule 55 in the present case. The copy of proclamation of sale was affixed in the office of the Recovery Officer on 25th July, 2002 while a copy of proclamation was affixed on the conspicuous part of the property on 3rd August, 2002. The auction took place on 4th September, 2002 i.e. after a gap of more than 30 days from 3rd August, 2002. It is true that the proclamation was published in the newspaper (Dainik Bhaskar) on 30th August, 2002 and the auction took place on 4th September, 2002 i.e. within five days but that is not in breach of Rule 55. This contention of Mr. Alok Sharma, thus, does not have any merit.

18. At this stage, we may also notice the submission of Mr. Alok Sharma that the purpose of publication of proclamation is to give the widest possible publicity of the auction and Rule 55 must be construed in a manner that meets that object. According to him, the time provided in Rule 55 is applicable to all the modes of publication including the publication of the proclamation in the newspaper and if the auction takes place within 30 days of publication of proclamation of sale in the newspaper, then such auction contravenes the time of sale provided in Rule 55. We are afraid the submission does not take into account the plain language of Rule 55. Although Rule 54 provides diverse modes of making proclamation as noticed above, the rule-makers

have provided the mandatory time of minimum 30 days only for two modes viz., affixation of the copy of proclamation on the property or in the office of the Recovery Officer and not for other modes. When there is no ambiguity in the plain language of Rule 55, the submission put forth by Mr. Alok Sharma cannot be accepted as it would mean re-writing Rule 55 which the Court would always avoid.

19. The proclamation of sale incorporates various conditions. Condition (vii) provides for the deposit of 25% of the purchase money immediately. Condition (vii) reads thus:

"(vii) In the case of immovable property, the person declared to be the purchaser shall pay immediately after such declaration a deposit of twenty- five per cent of the amount of his purchase money to the officer conducting the sale, and default of such deposit the property shall forthwith be put up again and re-sold. The full amount of the purchase money payable shall be paid by the purchaser to the undersigned on or before the 15th day from the date of the sale of the property, exclusive of such day, or if the 15th day be a Sunday or other holiday, then on the first office day after the 15th day. In default of payment within the period mentioned above, the property shall be re-sold, after the issue of a fresh proclamation of sale. The deposit after defraying the expenses of the sale may, if the undersigned thinks fit, be forfeited to the Government and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it pay (sic) subsequently be sold."

20. That the deposit of 25% of the amount of purchase money has to be through demand draft as per the conditions of proclamation is not in dispute. The auction proceedings drawn by the auctioneer show that the bid was over at 15.15 hrs. The purchasers prayed for a day's time to enable them to deposit 25% of the purchase price through demand draft/bankers cheque. The auctioneer in the peculiar facts and circumstances granted indulgence and permitted the auction-purchasers to deposit 25% of the purchase money on the next day before 13.00 hrs. which the auction-purchasers did. The question that falls for our determination is whether the said deposit by auction-purchasers is in conformity with the Condition (vii) afore noticed.

21. The key words in Condition (vii) is, "..... the purchaser shall pay immediately after such declaration a deposit of twenty-five per cent of the amount of his purchase money to the officer conducting the sale.....".

22. In Black's Law Dictionary (Fifth Edition), the word 'immediately' has been explained, '..... without interval of time', 'without delay', 'straightway', 'without any

delay or lapse of time'.

23. Advance Law Lexicon by P. Ramanath Aiyar (third edition 2005) defines 'immediately' to be without unnecessary or un-excusable delay. It refers to the statement of law made by Rolfe, B., in *Thompson v. Ibson*¹ that 'immediately' implies that the act to be done 'should be done with all convenient speed'. It also refers to the *Pybus v. Mitftrod*,² which says that although this word, in strictness, excludes all mean times, "yet to make good the deeds and intents of parties it shall be construed as meaning such convenient time as is reasonably requisite for doing the thing".

24. In our considered view, the word 'immediately', in Condition (vii) needs to be construed as meaning with all reasonable speed considering that deposit of 25% of purchase money was required to be made by demand draft. Obviously, the demand draft could not be ready then and there as it could not be known in advance what would be the purchase money when the sale is by auction. In this situation, the term, 'immediately' cannot be construed to mean 'instantaneously' or 'straightway' or 'without interval of time'. The construction has to be so as not to require something which is not possible to be performed. After all law does not compel a person to do something which is impossible to do on the date and the time.

25. When we consider the facts of the present case, particularly Condition (vii) specified in the proclamation and further condition therein that such payment shall be by way of demand draft, we are of the considered view that asking the auction-purchasers to deposit 25% of the purchase amount then and there without any interval of time by demand draft would have been to ask them to do an impossible act. The Court can take judicial notice of the fact that ordinarily the Banks do not do their banking transactions beyond 3.00 p.m. It would have been nigh impossible for the auction- purchasers, in the circumstances, to be ready with demand draft of 25% of the purchase money then and there. The prayer, thus, made by the auction-purchasers for deposit of 25% of the purchase money on the next day was reasonable and the auctioneer acted reasonably in granting the permission to the auction-purchasers to deposit 25% of the purchase money on or before 1.00 p.m. on the next day.

26. It is pertinent to notice that Condition (vii) of the proclamation is virtually couched in the language of Order 21, Rule 84, C. P. C. The Division Bench of the Karnataka High Court in the case of *Smt. Dakshayani alias Dakshayan Kumar v. Branch Manager, Indian Overseas Bank, Bangalore and others*,³ was concerned with the question about the meaning to be attributed to the expression 'purchaser shall pay

immediately after such declaration a deposit of 25% of the amount of purchase money'. This is how the Division Bench of the Karnataka High Court considered this aspect:

"3. The question that falls for consideration is as to what is the meaning to be attributed to the expression that "the purchaser shall pay immediately after such declaration a deposit of 25% of the amount of purchase money." It is not unknown in law that certain acts have to be done immediately on the occurring of certain events and if such acts are not done accordingly, the same cannot be done subsequently. Under Article 134A of the Constitution an oral application has to be made seeking certificate of fitness to appeal to Supreme Court immediately after the pronouncement of the judgment of the High Court. The meaning of the expression "immediately after pronouncement of the judgment" came up for consideration before this Court in *Keshava S. Jamkhandi v. Ramachandra S. Jamkhandi*,⁴ This Court took note of the object of using such expression. It was held therein that the object of the provision has to be borne in mind. The use of the expression "immediately" is to avoid unnecessary delay and such expression is used to convey a sense of urgency and it is impossible to catalogue all possible situations where oral application as having been made immediately. Adopting this principle of interpretation to the present context, the expression "immediately after the declaration of the purchase" such amount will have to be paid as expeditiously as possible, that is, all steps in regard to deposit of such amount will have to be taken without undue loss of time.

4. On that basis if we interpret the law though there is no power in the Court to extend the time fixed by the statute still the expression "immediately" is capable of taking within its sweep a situation where an act is impossible of performance on the day on which the auction is held as it happened in Savithramma's case when the Bank itself was on strike and no deposit could have been made in the Bank or in the event the auction sale is held after Court hours, a receipt order in that regard cannot be obtained for deposit of such an amount. Such amount could be deposited only after obtaining a receipt order. If next day also happens to be a holiday, the day immediately thereafter coming up which is a working day will be the day on which such act will have to be performed. If any other interpretation is given it would stultify the very object of law. Therefore, we do not think the interpretation placed by this Court in Kanakaraj's case, ILR (1987) Kant 1317 : (AIR 1987 Karnataka 252) would be a correct way of understanding the law in the matter. Neither the decision in Manilal's case nor

the decision in Ramachandra's case has any application to the facts of the present case. In those two cases the Court was interpreting as to whether the deposits had been made within the time stipulated under Order 21 Rule 84 and 86. If the deposit had been made in terms of those provisions then there can be no violation of the said rule. Again what falls for consideration is whether the amount was deposited immediately after the declaration was made as to who was the highest bidder. Therefore, the correct principle to be applied in such cases is as indicated by this Court in the Full Bench decision of this Court to which we have adverted. That is the expression 'immediately' will have to be understood in the context of the matter as imposing the duty upon the party concerned to act with a sense of urgency without undue loss of time. Whether in this case the auction-purchaser has acted so or not will have to be considered.

6. It is a fundamental legal principle *Lex non cogit ad impossibilia* i.e. the law does not compel a man to do that which he cannot possibly perform. The law does not expect a man to perform that which is impossible to do on the date and the time on which it is mentioned and then it must be understood that such performance is expected of him immediately thereafter when he is capable of performing such act."

27. We find ourselves in respectful agreement with the aforesaid view of the Karnataka High Court.

28. Before we conclude, we may notice the submission of Mr. Alok Sharma that the auction proceedings were vitiated by the fraud perpetrated by the Bank, auctioneer and the purchasers. He contended that only two bidders participated and, therefore, it was highly impossible that the auction proceedings would continue for more than four hours from 10.30 a.m. to 3.15 p.m., more- so when there were only four bids, two bids by each of the two bidders. The argument is noted to be rejected. No such argument was pressed before the Recovery Officer. In the appeal before the Debt Recovery Tribunal no such contention was advanced. The order of the Single Judge also does not show that any such argument was pressed before the Single Judge. Moreover, in the reply, the explanation has been given that since there were only two bidders in the auction proceedings, the auctioneer waited for some other bidders to come though it did not happen. From the material, the auction proceedings are not seen to be vitiated by fraud. There is no justifiable reason to doubt the correctness of the proceedings drawn by the auctioneer. There are no personal *mala fides* imputed or attributed to the auctioneer. The argument of fraud at this stage seems to have been advanced by Mr. Alok Sharma out of desperation.

29. Be that as it may, in what we have discussed above, we find no merit in the special appeal. It is dismissed. The parties shall bear their own expense litis.

Appeal dismissed.

Cases Referred.

1. (10 LJ Ex 243)
2. (2 Lev. 77)
3. AIR 1998 Karn 114
4. AIR 1981 Karn 97