144 **IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH**

CWP-2104-1989 (O&M)
Reserved on: 22.04.2024.
Date of Decision: 27.05.2024

M/s Gokal Chand Rattan Chand …Petitioner

Vs.

Union of India and others …Respondents

CORAM: HON'BLE MR. JUSTICE SANJEEV PRAKASH SHARMA
HON'BLE MRS. JUSTICE SUDEEPTI SHARMA

Present Ms. Radhika Suri, Sr. Advocate with
Mr. Abhinav Narang, Advocate and
Mr. Sidhant Suri, Advocate
for the petitioner.

Ms. Pridhi Jaswinder Sandhu, Senior Standing Counsel for the respondents-UOI.

Mr. Akshay Bhan, Sr. Advocate with
Mr. Alok Mittal, Advocate,
Mr. Shantanu Bansal, Advocate,
Mr. Yugank Goyal, Advocate and
Mr. Adit Garg, Advocate for respondent Nos.8, 10 and 11.

Mr. Kashmiri Lal Goyal, Sr. Advocate with
Mr. Avneet Singh, Advocate and
Mr. Sandeep Goyal, Advocate for respondent No.7.

Mr. Anupam Gupta, Sr. Advocate assisted by
Mr. Gautam Pathania, Advocate,
Mr. Bhavnik Mehta, Advocate and
Mr. Sukhpal Singh, Advocate for respondent No.12.

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SANJEEV PRAKASH SHARMA, J.

SUBMISSIONS OF THE PETITIONER.

1. The petitioner has preferred this writ petition as a member of the *Hindu Undivided Family* (hereinafter referred to as 'HUF') assailing the

auction of sale conducted by the respondents of the properties owned by the HUF and individually by the members of the HUF to recover the tax assessed against the HUF.

2. Briefly, the contentions raised by the petitioner are that the Rattan Trust was a non-charitable trust created by registered deed executed on 28.03.1942. It is asserted that besides other donations, donation for a sum of Rs.5 Lakh was received by the trust in January, 1946 from Gokal Chand individual. The assessment for the years 1946-1947 of the HUF was completed on 06.09.1946, which reflected the receipt of the aforesaid donation of Rs.5 Lakh. The Income Tax Officer (hereinafter referred to as 'the ITO') had completed the assessment of the trust for the years 1947-48 and exemptions certificates were duly granted to the trust on 14.06.1947, 08.01.1952 and 01.09.1959.

3. The original assessment of the years 1946-47 was completed on 06.09.1946 on a total income of Rs.97,789/-. However, the ITO after seventeen years reopened the assessment order under Section 147 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') and held that the demand of Rs.5 Lakh had emanated from the petitioner HUF, resulting in total imposition of tax on income of Rs.6,01,789/- under the order dated 31.10.1964, passed by the ITO (Special Investigation Circle, Amritsar), Camp, New Delhi.

4. On 27.07.1967, the appeal filed by the petitioner against order dated 31.10.1964, came to be allowed by the Appellate Assistant Commissioner of Income Tax 'F' Range, New Delhi (hereinafter referred to

as 'the AAC'). On 16.10.1968, the Income Tax Appellate Tribunal, Delhi Bench 'C', (hereinafter referred to as 'the ITAT') dismissed the appeal filed by the department assailing the order dated 27.07.1967 and upheld the deletions.

5. A reference was made under Section 256 (2) of the Act, 1961 to the Hon'ble Delhi High Court. It was answered in favour of the revenue and the decision of the AAC and ITAT were set aside and the matter was remanded back to the ITAT.

The ITAT thereafter passed an ex-parte order on 07.03.1979 against the petitioner upholding the assessment. Based on the ex-parte order, demand notice was issued to the petitioner on 23.07.1979 and a recovery certificate was issued on 14.12.1979. The petitioner moved an application for setting aside the ex-parte order and on 29.04.1980, ex parte order dated 07.03.1979 was set aside and the case was posted for rehearing for de-novo consideration by the ITAT.

6. Vide order dated 11.04.1983, the ITAT after considering all aspects, again upheld the assessment and action of the ITO under Section 147 of the ACT and the appeal of the revenue was accepted. The petitioner submitted a reference under Section 256(2) of the Act against order dated 11.04.1983 to the Hon'ble Delhi High Court and the same was admitted.

7. It is stated that the petitioner submitted objections against the recovery certificate and the demand notice dated 23.07.1979 and recovery certificate dated 14.12.1979 to the TRO. It was contended that the demand notice and the tax recovery certificate were defective and had become

meaningless after the ex parte order dated 07.03.1979 was set aside. Since the basis of the demand notice dated 23.07.1979, was the order of the ITAT and recovery certificate was also based on the same order, which had been set aside, the TRO had no jurisdiction to proceed with the recovery certificate. It was also pointed out that the interest amounting to Rs.7,04,476/- could not have been included in the recovery certificate by calculating the interest from an earlier date and the proclamation of sale for recovery of Rs.14,16,283/- was therefore, on the higher side. The public auction was sought to be cancelled by submitting that since the amount had become non est, therefore, the subsequent sale of properties for recovery of tax of Rs.14,16,283/- should be cancelled.

It was also objected that from the amount mentioned in the recovery certificate, a sum of Rs.2,45,000/- had already been deposited but the same was shown as outstanding wrongfully. Apart from Rs.2,45,000/-, a sum of Rs.1,20,000/- had also been recovered from the tenants by attachment of rent, therefore, the same was required to be deducted from the total as shown in the recovery certificate.

Another objection was raised after the auction has been conducted of the properties which were held on 31.10.1985 and 15.11.1985, pointing out that (a) that the certificate issued by the ITO District VIII (3) dated 14.12.1979, for proclamation of sale was invalid and illegal; (b), the ITO had no jurisdiction to issue the certificate under Section 222 (1) of the Act; (c) tax paid at the time of original assessment had not been deducted; (d) no formal demand notice was issued by the ITO before sending the recovery

certificate to the TRO; (e) the TRO had not served any notice under Rule 2 for payment of tax; (f) the properties were not attached under Rule 48 of the Second Schedule; (g) the proclamation order was issued on 07.10.1985 and the date of auction was fixed 29.10.1985 and 30.10.1985, which were within 30 days of the date of proclamation which was in violation of Rule 55 of the Act, (h) the proclamation of the sale does not mention any reserve price and the proclamation was for Rs.14,16,283/- while payment of Rs.2.5 Lakh had been made to the TRO apart from the original tax paid of Rs.43,000/- and (i) that the properties situated at Link Road were with the administrator of estate of Rattan Chand and was not belonging to HUF Gokal Chand Rattan Chand.

8. The TRO vide its order dated 12.12.1985 rejected the objections and the additional objection as noticed above under Rule 61 of the Second Schedule of the Act, 1961. It was held that under Section 224 of the Act, 1961, the TRO was not empowered to examine the correctness of the assessment nor was he empowered to change the amount mentioned in the recovery certificate. The TRO also refused to accept the contentions that the recovery certificate and the demand notice stood *non est* after the order of the ITAT dated 07.03.1979, had been recalled.

9. The petitioner challenged the order of the TRO in appeal. During the pendency of the appeal, on 16.04.1987, credit for the tax already paid was allowed and the assessment order was rectified. The interest was waived and refund of Rs,1,24,085/- was granted to the petitioner in respect of the demand originally raised. However, the appellate authority did not take

into consideration the facts which occurred during the intervening period and dismissed the appeal on 17.05.1988.

Against the order passed by the TRO dated 12.12.1985 and appellate order of dismissal dated 17.05.1988, the present writ petition was filed.

On 27.02.1989, this Court while issuing notice of motion passed an interim order restraining the auction purchasers from raising construction or demolishing the property, whereafter on 05.12.1989, the writ petition was admitted and the interim order was modified by putting the auction purchasers on their own risk to raise construction.

That while writ petition was pending before this Court, the reference pending before the Delhi High Court was answered in favour of the assessee vide order dated 15.05.2008 and the entire proceedings initiated under Section 147 of the Act, 1961, were held to be bad in law and the reassessment order and consequential actions were also held to be bad in law.

The ITAT accordingly in terms of the order of the Delhi High Court modified its order dated 11.04.1983 and the appeal of the revenue was dismissed and the order of the AAC passed in favour of the petitioner dated 27.07.1967, was upheld by its order dated 20.02.2009.

10. Learned senior counsel for the petitioner submits that the action of the TRO is wholly illegal and unjustified. It is submitted that the TRO could not have rejected the objections filed by the petitioner and he was bound to have passed an order by correcting the recovery certificate. Once, it was brought to his knowledge that the ex parte order of the ITAT stood set

aside, he should have referred the recovery certificate and the demand notice to the assessing officer for correcting the same and for evaluation to be calculated accordingly. More so, as part of the amount had already been recovered by way of attachment of rent and deposits from the members of the HUF, it is submitted that the TRO violated rule 52 (2) of the Second Schedule of the Act, 1961, by not issuing a proclamation in the language of the district. It is submitted that rule 53(c) of the Second Schedule was also violated as the amount sought to be recovered was not mentioned in the proclamation notice. Reserve price was also not mentioned, therefore, Rule 55 of the Second Schedule of the Act, 1961, was violated. Rule 56 of the Second Schedule of the Act, 1961, requiring 15 days notice in terms of Rule 2 was also not served on the petitioner. There was also non-compliance of Rules 10 and 11 of the Income Tax Rules, 1962. The amount which already stood deposited was also not mentioned. She submits that pendency of the reference before the Delhi High Court under Section 256 (2) of the Act, 1961, was sufficient reason for the TRO to stay his hands from auctioning the property which is to be used as a last resort. The action of selling of the property has resulted in great loss to the petitioner. More so, as he has been stating since beginning that he was not required to pay any tax which ultimately has been found correct by the Delhi High Court in its order dated 15.05.2008.

Learned counsel submits that doctrine of *lis pendens* in terms of Section 52 of the Transfer of Property Act, 1882, would apply as the auction purchasers who were having full knowledge of the case pending before the

Delhi High Court and the property being under litigation, had knowingly purchased the property *pendent lite* would not be entitled to claim themselves to be strangers or *bona fide* purchasers. She submits that in terms of Section 52 of the Transfer of Property Act, 1882, purchase made *pendent lite* would not create any title irrespective of whether the purchaser had any notice or not of the legal proceedings going on and she relies upon the judgment passed by the Supreme Court in Guruswamy Nadar vs. P. Lakshmi Ammal (D) and others 2008 (5) SCC 796**.**

It is further submitted that provisions of Section 224 and 225 of the Act, 1961, would operate anterior to Rule 61A of the Act, 1961, and in case there was an error in the recovery certificate or any question arises, the same ought to have been corrected by sending it to ITO after the information was already received and before the demand was enforced in terms of Section 224 (3) and 224 of the Act, 1961. Learned counsel submits that after the ITAT passed a fresh order when the High Court remanded the case to it i.e. on 11.04.1983, it was necessary to issue a fresh demand notice to the petitioner as issuing of a fresh demand notice was a *sine qua non* before issuing orders of recovery but the respondents did not act in terms of Section 224 (3) of the Act, 1961 nor they provided 15 days notice in terms of Rule 12 (2) to pay the defaulted amount. Learned counsel relies on Ram Sarup Gupta vs. Bihari Lal Baldeo Prashad and others 95 ITR 339, which was upheld in Union of India vs. Jardine 118 ITR 112.

She submits that the sale certificate deserves to be declared as nullity as the same was issued to enforce a fictitious demand

which was already paid to certain extent as ultimately the Delhi High Court has found the tax demand to be non-existent, and the ITAT also passed a consequential order, the petitioner is entitled to the property which was illegally and wrongfully taken from him. She submits that since the sale auction conducted to realize the tax demand suffers from illegalities and mandatory rules were violated, the sale auction deserves to be declared a nullity in the eyes of law. She relies on the judgment in Income Tax Officer vs. Madnani Engineering Works Ltd. 1979 (2) SCC 455, Baldev Singh Giani vs. Commissioner of Income Tax and others (2001) 248 ITR 266 (P&H), Surinder Nath Kapoor vs. Union of India and others AIR 1988 SC 1777, Mohan Wahi vs. Commissioner, Income Tax, Varanasi and others 2001 (4) SCC 362, Chinnamal and others vs. P. Arumugham and another 1990 (1) SCC 513, Desh Bandhu Gupta vs. N.L. Anand and Rajinder Singh, 1994 (1) SCC 131, Satyapal Uttamchand Chowdhary vs. Rukayyabai Huseinbhai Bandukwala and another S.C. Suit No.769 of 1975, Guruswamy Nadar vs. P. Lakshmi Ammal (D) and others Civil Appeal No.6764 of 2001, South Eastern Coalfields Ltd. vs. State of M.P. and others CA No.5282 of 2002, State of Gujarat and others vs. Essar Oil Limited and another Civil Appeal No.599 of 2012.

11. Learned senior counsel Mr. Kashmiri Lal Goyal, appearing for respondent No.7, who had purchased 1/5th share of the property of Kwality Restaurant, in auction, has objected to the maintainability of the writ petition and *locus-standi* of the petitioner, stating that the petitioner-HUF has filed the petition through its '*karta'*, Inderjit Kapoor. After the auction, two objection

petitions were filed by Anand Parkash Kapoor, coparcener and Sham Sunder Kapoor, another coparcener and brother of Anand Parkash Kapoor and both the objectors have claimed that the property which the respondent No.7 has purchased, does not belong to HUF and it actually belongs to estate of Rattan Chand and if it is so, the present petition filed by HUF would not be maintainable. He submits that the writ petition filed by HUF would not be maintainable as the HUF has no *locus-standi* to claim the property purchased in auction by respondent No.7. He relies on Bokaro and Rambur vs. State of Bihar 1962 Supp. (3) SCR 831, in support of his contention that the petitioner must establish that he has a title to the property before he can complain of any infringement of his fundamental rights to hold the property. He also relies on Satyanarayana Sinha vs. S. Lal and Company (1973) 2 SCC 696, Charanjit Lal Chaudhary vs. UOI, AIR 1951 SC 30 and State of Orissa vs. Madan Gopal Gungta, AIR 1952 SC 12, to submit that the existence of right is the foundation of exercise of jurisdiction.

He has further submitted that original assessment order was passed on 31.10.1964 and on 27.07.1967, the 1st Appellate Authority had deleted the entire additions on merits and ITAT had affirmed the order of CIT (A) on 16.10.1968. On 23.12.1977, the Delhi High Court passed an order in reference against the assessee and on remand, the ITAT passed an ex parte order under Section 260 (1) of the Act, 1961, on 07.03.1979. The same was recalled on 29.04.1980 by the ITAT, whereafter, on 11.04.1983, ITAT passed fresh order against the petitioner-assessee, which was taken up in reference by the assessee to the High Court. The High Court passed an order on

15.05.2008, in favour of the assessee setting aside the proceedings initiated against the assessee. On 20.02.2009, the ITAT passed consequential orders under Section 260(1) of the Act, 1961, upholding the CIT (A) order dated 27.07.1967. He further submits that the original assessment order cannot be termed as nullity as there is no such findings arrived at by the CIT (A) or by the Delhi High Court.

He further submits that at the maximum it can be said that the assessment order was illegal as proper procedure was not adopted and the order of assessment was never declared nullity as it is not stated anywhere that the assessment order was passed without jurisdiction. He relies on Central Potteries vs. State of Maharashtra AIR 1966 SC 932, to submit that an order passed by an authority which has jurisdiction over the matter but has assumed it otherwise, then in the mode prescribed by law is not a nullity and can be termed as a mere irregularity and the Delhi High Court has only presumed that the department could not prove that reasons were recorded before issuance of notice and thus it was having jurisdiction and, therefore, the order of assessment cannot be declared as a nullity. It was further submitted in the written submissions filed by the learned Senior Counsel that the demand raised on 31.10.1964, was revived on 23.07.1979. Apart from the original tax demand amount of Rs.4,94,372/-, interest upto the date of demand of notice i.e. Rs.7,04.476/- was also added creating a total demand of Rs.11,98,848/- on 14.12.1979, a recovery certificate under Section 222(1) of the Act, 1961, for a sum of Rs.11,98,848/- was forwarded to the TRO.

It has been submitted that the petitioner's contention of the demand being fictitious and sale of the property being a nullity, is not legally correct and submits that there is no occasion to declare the proceedings as a nullity in the eye of law. Learned counsel has submitted that the law laid down in Surinder Nath Kapoor vs. UOI AIR 1988 SC 1777, would therefore have no application to the facts of the present case. Learned counsel has further submitted that the reliance on Section 224 (2), 224 (3) and 225 (4) of the Act, 1961 would have no application to the facts of the present case as Section 224 (3) of the Act, 1961, is applicable, when the AO has withdrawn or cancelled any recovery certificate. It is also applicable when a correction is made under Section 224 (2) i.e. the AO shall have the power to withdraw any certificate or correct any clerical or arithmetical mistake in the said certificate by sending an intimation to the TRO. In the present case, neither there was any occasion for the AO to withdraw or cancel the recovery certificate. Also there was no reason to correct any kind of clerical or arithmetical mistake. Section 225 (4) is also not applicable as after the issuance of recovery certificate, any outstanding demand was reduced in appeal or other proceedings under the Act and those proceedings have become final and conclusive before the date of auction sale made on 15.11.1985 and confirmed on 18.12.1985, therefore, Sections 224 (3), 225(2) or 225(3) were not invokeable in the present case.

It is submitted that as on the date of confirmation of auction of sale, there was a demand due of Rs.11,98,848/- and submits that there was nothing wrong in the auction when an amount of Rs.11,98,848/- was due

from the defaulter/petitioner. It is further submitted that the order waiving interest under Section 220 (2A) was passed after the auction taken place on 31.07.1987 while the auction had taken place and confirmed on 15.11.1985 and 18.12.1985 respectively. The power of waiver of interest under Section 220 (2A) of the Act, 1961, was given to the Commissioner on 01.04.1987 before that the powers were with the Board and the power was to be exercised with discretion. Thus, on the date of confirmation of sale, there was a valid demand due. He further submits that in terms of Section 265 of the Act, even if a reference has been made to the High Court, tax would be payable in terms of the assessment order. Rule 5 of the Second Schedule states that the interest on the amount of tax is payable under Section 220 (2) of the Act, 1961, and therefore, he submits that the doctrine of *lis pendens* would not apply and the sale cannot be termed as illegal in any manner.

Learned counsel has further relied on CIT vs. Bansi Dhar AIR 1986 SC 421, to submit that if a reference is pending before the High Court, no stay can be granted by the High Court and ITAT can grant stay, but no such application was ever made by the petitioner. Learned counsel relies on B.C. Dalal vs. Custodian and others (2006) 2 SCC 411, to submit that once there is no stay of recovery and the demand is outstanding, the sale of attached property cannot be stayed. He further submits that the auction was perfectly legal in this case.

12. Learned counsel further submits that respondent No.7 was a bona fide purchaser and the objections raised by the petitioner had been rejected, and therefore, auction of sale cannot be set aside. He submits that

the properties were sold at adequate price. He further submits that there is no similar provisions to Section 144 of the Code of Civil Procedure in Second Schedule appended to the Act, 1961, therefore, no question of setting aside of sale or restitution of property would arise, with reference to auction conducted under the Act, 1961. He further submits that at best the petitioner was entitled for refund of the entire amount paid along with statutory interest.

13. Mr. Akshay Bhan, Senior Advocate, contends that on the date when the auction was done, amount was due although interest was reduced subsequently. He further submits that there was no stay granted by any Court and the interim order was vacated and if any demand was set aside or reduced, the same would have no application to cancel the auction which had already taken place. He relies on Janatha Textiles vs. Tax Recovery Officer (2008) 301 ITR 337 (SC), to submit that there is a distinction between a stranger who is a bona fide purchase of the property in an auction and decree-holder purchaser at a court auction. The strangers to the decree are afforded protection by the Court because they are not connected to the decree and if that is so, the court auction would not fetch a best market fair price of the auction property. He further submits that no interference ought to be made by the High Court with regard to the property purchased by him in furtherance of a duly published auction. Learned counsel further submits that once a sale has been effected and a third party interest is created, then the same ought to be protected by the Court. Learned counsel has relied on Sadashiv Prasad Singh vs. Harendra Singh 2015 (5) SCC 574, Samiro Alcantra Vaz vs. Ana Rita Sulochana, Law Finder Doc ID #1199182, Janak Raj vs. Gurdial Singh

AIR 1967 SC 608, Sardar Govindrao Mahadik vs. Devi Sahi AIR 1982 SC 989, Nanhelal vs. Umrao Singh AIR 1931 PC 33.

14. Ms. Pridhi Sandhu, appearing for the revenue submits that the auction notice had been issued on 16.10.1985 and the auction was released on 31.10.1985 and 15.11.1985, relating to the properties situated at Link Road and Kwality Restaurant, Lawarance Road, Amritsar, respectively. There was no stay against auction of properties by the High Court. She relies on Sanjiv Kumar Singh vs. State of Bihar and othes 2023 Live Law (SC) 63 and Collector of Customs, Bombay vs. M/s Krishan Sales (P) Ltd. AIR 1994 SC 1239, to submit that mere filing of an appeal would not operate as stay and as there was no stay in the petition filed by the assessee, therefore, the department has rightly auctioned the properties. The writ petition was filed in the year 1989 and application filed by the assessee to set aside the sale of the immovable property based on the orders passed by the High Court, cannot be said to be in terms of Section 60 (1A) of the Act, 1961, as no payment was made of the amount specified in the proclamation of sale.

Learned counsel further submits that as per Section 61 of the Act, 1961, no sale would be set aside on such grounds unless the TRO is satisfied that the applicant has sustained substantial injury by reason of non-service or irregularity and that the application made by the defaulter shall be disallowed unless the applicant deposits the amount recoverable from him in execution of the certificate. Thus, the amount specified in the proclamation order was to be paid in full, however, the petitioner never paid the same. She further submits that the Delhi High Court order was passed on technical

grounds and not on merits and therefore, there is no ground to set aside the auction conducted by the department. She further submits that as per Section 224 of the Act, 1961, a recovery certificate cannot be altered or amended by the TRO and the contentions of the petitioner having paid part of the amount sought to be recovered, would have no effect on the recovery certificate, and therefore, it is her submission that the auction does not call for any interference. Learned counsel has further submitted that the writ petition is not maintainable in view of Rule 11(6) of the Rules and the remedy available is under the civil proceedings and cannot claim the same in a writ jurisdiction.

15. Mr. Anupam Gupta, Senior Counsel appearing for respondent No.12 has argued at length supporting the auction purchaser and submits that no right is created in favour of the assessee for restitution of the properties as order passed by the Delhi High Court does not take into consideration the facts relating to auction. The Delhi High Court while deciding the first reference had considered all aspects and the subsequent order passed by the Delhi High Court would not defeat the bona fide purchaser's right to hold the property which was purchased in public auction. He submits that there has been material changes in the property and the nature thereto after the same was purchased in auction in the year 1985/1986.

16. We have given our thoughtful consideration to the submissions made by counsel for the parties.

17. While a plethora of judgments have been cited at bar by all the counsel, which we have gone through at length, but we do not propose to

make this judgment more lengthy as then what it has already been and would propose to give our findings on the issues raised by the petitioner and respondents on the facts which have already been noticed hereinabove and based on the law which we find to be applicable to the facts of the present case.

18. Firstly we would deal with the maintainability issue raised by learned senior counsel for respondent No.7. The argument of respondent No.7 is that the present petition filed by HUF would not be maintainable because the objection petitions were filed by the coparceners who had in their objection petitions also contended that the properties do not belong to the HUF and could not therefore be sold in auction and relying on said contention, the auction purchaser/respondent No.7 raises point of *locus standi* of petitioner –HUF. We are unable to accept such a contention raised by the auction purchaser/respondent No.7 who has himself purchased the property in auction relating to a demand raised by the revenue against the HUF resulting in the auction. A look at the certificate of sale reveals that the same specifically mentions all the list of properties of M/s Gokal Chand Rattan Chand-HUF to the purchaser, he, therefore, cannot turn around and argue that the property was not that of HUF. Even otherwise, when the revenue itself recognized the property to be that of HUF, it would be HUF alone and none else who can challenge such an auction. The law cited by learned senior counsel in Bokaro and Rambur's case (supra), is therefore found to be not applicable to the facts of the present case.

19. Thus, we hold that the petitioner had a legal right available to challenge the auction by way of present writ petition and the preliminary objection is accordingly rejected.

20. On merits, before we analyze on the aforementioned facts, it would be apposite to quote relevant Sections and Rules of the Act:-

> "**Section 224 (2) and (3) of the Act, 1961**.
>
> (2) Notwithstanding the issue of a certificate to a Tax Recovery Officer, the Income-tax Officer shall have power to withdraw or correct any clerical or arithmetical mistake in the certificate by sending an intimation to the Tax Recovery Officer.
>
> (3) The Income-tax Officer shall intimate to the Tax Recovery Officer any orders withdrawing or cancelling a certificate or any correction made by him under sub-section (*2*) of this section or any amendment made under sub-section (4) of Section-225.
>
> **Section 225 (2), (3) (4) of the Act, 1961**.
>
> (2) Where a certificate for the recovery of tax has been issued, the Income-tax Officer shall keep the Tax Recovery Officer informed of any tax paid or time granted for payment, subsequent to the issue of such certificate.
>
> (3) Where the order giving rise to a demand of tax for which a certificate for recovery has been issued has been modified in appeal or other proceeding under this Act, and, as a consequence thereof, the demand is reduced but the order is the subject-matter of further proceeding under this Act, the Income-tax Officer shall stay the recovery of such part of the amount of the certificate as pertains to the said reduction for the period for which the appeal or other proceeding remains pending.
>
> (4) Where a certificate for the recovery of tax has been issued and subsequently the amount of the outstanding demand is reduced as a result of an appeal or other proceeding under this Act, the Income-tax Officer shall, when the order which was the subject-matter of such

appeal or other proceeding has become final and conclusive, amend the certificate or withdraw it, as the case may be.

Rule 61 of the Second Schedule to the Income Tax Act, 1961.

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 [Principal Chief Commissioner or Chief Commissioner] or [Principal 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."

21. Learned senior counsel Mr. Kashmiri Lal Goyal, has supported the order passed by the TRO rejecting the objections raised by the petitioner's representative relating to conducting of auction of both the properties and has submitted that the provisions of Section 224 and 225 of the Act, 1961 and Rule 61 of the Second Schedule to the Act, 1961, would not be applicable and the TRO had no valid authority to modify the recovery certificate issued under Section 222(1) of the Act, 1961.

22. However, we find that the ex parte order passed by the ITAT dated 23.07.1979, was set aside by the ITAT. When it recalled the ex parte order, any action based on the order dated 23.07.1979 or certificate of recovery issued on the said basis dated 14.12.1979, would be thus *void ab initio*. The subsequent order passed by the ITAT dated 11.04.1983 created a fresh liability on the assessee. Hence, a demand notice was required to be issued after passing of the order by the ITAT dated 11.04.1983 and it is only thereafter that recovery notice and recovery certificate could be issued in terms of Section 222 (1) of the Act, 1961.

23. We are in agreement with the counsel for the petitioner that once a sum of Rs.2,45,000/- had been deposited after the issuance of recovery certificate dated 14.12.1979, the recovery certificate was required to be revised by the Assessing Officer in terms of section 224(3) of the Act, 1961. However, inaction on the part of the Assessing Officer would not give a right to the TRO to reject the objections. On complete reading of the provisions of the Second Schedule to the Act, 1961, which lay down the procedure for recovery, we do not agree with the contentions of the respondents that the TRO is not empowered to take decision relating to the recovery certificate. In fact, he has a power even to cancel the recovery certificate on being informed that the payment has been made by the concerned defaulter.

24. We also find that there has been a complete go-by to the provisions of Sections 224 and 225 of the Act, 1961. It is apparent that even after a certificate for recovery has been issued, it shall be binding on the TRO to amend the certificate or cancel it as the case may be, where subsequently

the amount of outstanding demand is reduced. When it was informed that part of the amount had already been deposited i.e. Rs.2,45,000/-, the same was required to be reduced from the total demand raised from the certificate of recovery drawn by the TRO under Section 220(2) of the Act, 1961. We find that the action taken by the TRO of conducting auction based on the original demand due of Rs.11,98,848/-, was wholly unjustified. We also find that the notice of demand dated 23.07.1979, was required to be corrected and the interest was also illegally calculated from 30.10.1964 instead of 11.04.1983 i.e. when the final adjudication of the so called addition was made.

25. The auction proceedings are very harsh proceedings and it is the last resort and one must be very-very careful and cautious before auctioning the property of a defaulter. The auction not only requires to be done with care and caution but it should also be done in a manner and procedure which is laid down in the rules. Any violation of the procedure would vitiate the entire proceedings of auction as has been held in Nazir Ahmad vs King Emperor 63 Indian Appeals 372.

26. We are in agreement with the counsel for the petitioner that once the TRO was informed by the petitioner on raising objections, it should have withheld the proclamation and further proceedings of auction. More so, as the demand notice and recovery certificate were based on the order of ITAT dated 07.03.1979, which had been set aside by the Delhi High Court, merely because the ITAT again reiterated and held the petitioners liable for the tax, by its subsequent order dated 11.04.1983, it cannot be said that the earlier

demand notice and recovery certificate stood revived. A fresh demand notice was required to be issued and if any amount is deposited, the same was required to be deducted before issuing a recovery certificate.

27. We find that the TRO has shown unnecessary haste in conducting the auction while having full knowledge that the order passed by the ITAT is also a subject matter of reference before the Delhi High Court and the reference had been admitted.

28. This Court notices that at the interim stages in the present petition, directions were issued to the respondents/revenue to get an explanation from the concerned TRO and an affidavit had been filed stating the concerned TRO was from Delhi. The provisions of Section 224 which have been discussed in the preceding paras reflect that the ITO and the TRO are required jointly to be responsible for any action which they may take in relation to the recovery orders.

29. We also find that even the appellate authority failed to perform its duty once it was brought to its notice of the tax aspect having been made, the original demand of Rs.11,98,848/- stood considerably reduced and the properties could not have been auctioned. The orders passed by the TRO are not sustainable in law.

30. The procedure laid down has to be followed and there can be no departure from such a procedure and if the Courts reach to the conclusion that departure has been made in performing a work, which is prescribed to be performed in a particular manner, such proceedings are required to be held *void ab initio*. They would not create any right in favour of anyone. The

action taken without giving appropriate notice, without mentioning the base price as well as the amount to be recovered reflects that there has been a departure from the rules and such proceedings would, therefore, have to be declared bad in law. The judgment passed by the Privy Council in the case of Nazir Ahmad's case (supra), has been followed consistently by this Court as well as Hon'ble the Supreme Court in catena of judgments.

31. We are also not agreed with the contentions of learned counsel for the respondents that the auction purchasers are only the strangers. On the other hand we find that the principle of '*buyer beware'* is applicable in all cases of purchases and auctions and no person participating in the auction can state that he had no knowledge about the nature of the property and reasons for selling of the property in auction. Such an auction purchaser cannot be said to be ignorant to such facts of the property being in litigation. As discussed in the preceding paras, the rules were admittedly given a by-pass and as has come on record the auction purchasers are also related and, therefore, they cannot said that they are strangers. We, therefore, cannot accede to the submissions of learned counsel for the respondents that the auction purchasers ought not be made to suffer, as the entire fulcrum of the auction proceedings have been found to be void *ab initio*, therefore, consequential proceedings cannot be allowed to be maintained law. Justice delayed cannot be held to be justice denied if ultimately it has been found that there was no tax requirement to be paid, properties sold forcefully of any person have to be returned back to him and in fact compensation is also required to be paid to such person.

32. In AIR 1988 SC, Surinder Nath Kapoor vs. Union of India and others, the IAC (Asstt), Range-II, Amritsar, had passed a garnishee order under Section 226 (3) of the Act, holding one M/s Krihsna Kapoor and Company a defaulter to the extent of Rs.8,57,377/- and the said order was put into execution and property of M/s Krishna Kapoor and Company were put to sale by the TRO-I, Jaipur, on 21.01.1986. The same was purchased by one Raja Properties and the sale was confirmed on 14.03.986, whereas, Surinder Nath Kapoor, one of the partners of M/s Krishna and Company, filed an application under Rule 61 of the Second Schedule to the Act, before the TRO, Jaipur, and he prayed for setting aside the sale of the property, but the same was dismissed. An appeal was filed under Rule 86(1)(c) of the Second Schedule to the Act along with an application seeking stay. Since, no stay was granted, he filed a petition before the High Court, which too was dismissed. Thereupon, SLP was filed before Hon'ble the Supreme Court and Hon'ble the Supreme Court upon finding that the tax liability of the petitioner therein was reduced and the reduced amount had been paid to the department, held that the sale already held confirmed, of which they have granted stay, would stand vacated. An application was filed for clarification before the TRO and the auction purchaser in whose favour the sale had already confirmed, filed a petition to Hon'ble the Supreme Court for recalling its order dated 12.10.1987 as well as dismissal of the SLP. The Court reiterated that by virtue of their order, the sale was to be set aside. Thereafter, the auction purchaser preferred a petition that as the auction sale had been confirmed, the same could not be set aside. Matter again travelled to Supreme

Court and it was contended that he was third party, an auction purchaser, the sale could not be set aside after it was confirmed, whereas on behalf of the company, it was urged that the garnishee order for the amount and the sale held in execution of such an order are null and void. The Supreme Court considering the aforesaid facts reached to the conclusion that the garnishee order was for a fictitious sum as it was not mentioned in the notice under Section 226 (3) of the Act, 1961, and after considering the law, it proceeded to hold as under:-

> *"17. There can be no doubt that when an order is made for the Payment of a fictitious sum without giving any opportunity to a person, against whom the order is made, to show cause against the passing of such an order for the said sum, the order is a nullity. In other words, in the eye of law it will be deemed that there was no existence of such an order and any step taken pursuant to or in enforcement of such an order will also be a nullity. It will be tantamount to selling a property in execution of a decree when the decree has no factual existence. In such a case also, the sale will be null and void. The garnishee order that was passed by the IAC (Asst.), Range-ll., Amritsar, for the sum of Rs. 8,56,377.55/0 is, therefore, null and void.*
>
> *18. In this connection, we may refer to a decision of the Privy Council in Baijnath Sahai v. Ramgut Singh, Vol. 23 I.A. 45. In that case, a property was sold in execution of a certificate issued under the Bengal Public Demands Recovery Act, 1880, when, as a matter of fact, there was no, existence of any certificate. The Privy Council observed as follows:*
>
> > *"If no such certificate is given then the whole basis of the proceeding is gone. There is no judgment, there is nothing corresponding to a judgment or decree for payment of the amount, and there is no foundation for the sale. The authority to proceed to the sale is based on the certificate which has the effect, as has been already pointed out, of a judgment or decree, and if no judgment or decree is given, and no certificate is filed having the force or effect of a judgment or decree, there can be no valid sale at all."*

> *19. In the instant case, the garnishee order that was passed was a nullity and any sale held pursuant to such an order is also a nullity. If is quite immaterial that the sale was confirmed. When a decree or order is illegal, any sale held in execution of such a decree or order and confirmed cannot be set aside on the ground that it was illegal when the sale is in favour of a third party. But, when a decree or order is a nullity, it will be deemed to have no existence at all and any sale held in execution of such a decree or order must also be held to be null and void. In the language of the Privy Council in the above case, there is no judgment, there is nothing corresponding to a judgment or decree for payment of the amount, and there is no foundation for the sale."*

33. The Court thereafter calculated the interest on the amount deposited by the auction purchaser at the rate of 15% per annum and directed the same to be paid by the revenue and to certain extent by the partner namely Surinder Nath Kapoor.

34. We have quoted the aforesaid judgment *in extenso* as the facts of the present case are similar in nature. Here too, the petitioner had objected to the imposition of tax by reassessment. Out of the total demand raised of Rs.11,98,848/-, part amount had already been paid before the auction was conducted. An information in this regard was given to the TRO and to the Appellate Authority too but it proceeded to ignore and confirm the sale in favour of the auction purchasers. Thus, the entire basis of auction is based on fictitious demand of Rs.11,98,848/- and therefore, the entire auction proceedings are held to be nullity in the eyes of law.

35. In Mohan Wahi's case (supra), the Hon'ble Supreme Court examined the question 'whether the TRO could have confirmed the sale when the demands on account of tax for the recovery of which tax recovery certificate is issued, had ceased to exist' and observed as under:-

"The term 'reduced' in sub-section(3) of Section 225 would include a case where the demand consequent upon an appeal or any proceedings under the Income-Tax Act has been reduced to nil also. The Tax Recovery Officer is obliged to give effect to such reduction in demand and accordingly amend or cancel the certificate. The scheme of Part III of Second Schedule indicates that the sale proceedings terminate on their becoming absolute whereafter all that remains to be done is the issuance of sale certificate. However, an order confirming the sale by the Tax Recovery Officer is a must. The efficacy of the sale by public auction in favour of the highest bidder has been made to depend on the order of confirmation by the Tax Recovery Officer by incorporating Rule 56 in the Schedule. It is true that ordinarily if there is no application filed for setting aside sale under Rules 60, 61 or 62 and 30 days from the date of the sale have expired, the Tax Recovery Officer has to make an order confirming a sale. Nevertheless, an order shall have to be actually made. The combined effect of Sub-section(3) of Section 225 of the Act and Rule 56 and Rule 63 of Second Schedule is that if before an order confirming the sale is actually passed by the Tax Recovery Officer, the demand of tax consequent upon an order made in appeal or other proceedings under the Act has been reduced to nil, the Tax Recovery Officer is obliged to cancel the certificate and as soon as the certificate is cancelled, he shall have no power to make an order confirming the sale. The sale itself being subject to confirmation by the Tax Recovery Officer, would fall to the ground for want of confirmation.

xx xx xx

Under Rule 63, confirmation of sale is not automatic. An order confirming the sale is contemplated to make the sale absolute. Ordinarily, in the absence of an application under Rule 60, 61 or 62 having been made, or having been rejected if made, on expiry of 30 days from the date of sale the Tax Recovery Officer shall pass an order confirming the sale. However, between the date of sale and the actual passing of the order confirming the sale if an event happens or a fact comes to the notice of the Tax Recovery Officer which goes to the root of the matter, the Tax Recovery Officer may refuse to pass an order confirming the sale. The fact that sale was being held for an assumed demand which is found to be fictitious or held to have not existed at all, in fact or in the eye of law, is one such event which would oblige the Tax Recovery Officer not to pass an order confirming the sale and rather annul the same. The High Court in our opinion, clearly fell in

error in not allowing relief to the petitioner-appellant by setting aside the sale."

36. While the counsel for the respondents have relied on Janak Raj vs. Gurdial Singh and another (1967) 2 SCR 77, Gurjoginder Singh vs. Jaswant Kaur (Smt.) and another (1994) 2 SCC 368 and Padanathil Ruqmini Amma v. P.K. Abdulla (1996) 7 SCC 668**,** but we find that in Mohan Wahi's case (supra), the larger Bench examined the provisions of the Income Tax Act and held that order 21 of the CPC would not apply to the cases of auction sale held under Second Schedule to the Act, 1961 and held as under:-

"Though the learned counsel for the auction purchaser has relied heavily on these decisions, suffice it to observe that these are the cases of auction sale held under Order 21 of the C.P.C. and, therefore, may not apply to the case of an auction sale held under Second Schedule of the Income-tax Act in view of Rule 56 contained therein. Moreover, in these decisions also, the Supreme Court has contemplated situations where in spite of the auction sale having been held and no application for setting aside the sale having been moved, yet in exceptional situations the sale may be refused to be confirmed and may be set aside. Shri S.K. Jain also relied on Padanathil Ruqmini Amma Vs. P.K. Abdulla, JT (1996) 1 SC 381, wherein this court has observed that unless the auction purchasers were protected, the properties which are sold in court auctions would not fetch a proper price. It is true that sanctity of sale of property by public auction has to be protected but at the same time a citizen faced with proceedings for recovery of assumed arrears should not be deprived of his property in spite of judicial or quasi- judicial pronouncement holding, before the sale was confirmed, that there were no arrears. This observation applies a fortiori

under the scheme of Income-tax Act, the relevant provisions whereof have already been referred to by us."

37. We are also of a firm view that we cannot put the auction conducted under the Income Tax Act on the same footings as that of auction being conducted for execution of a decree by the Court or elsewhere in public as the same would be in clear distinction of Income Tax default auctions.

38. Article 300A of the Constitution of India provides that the property of an individual which is under his possession, cannot be taken away without following due process of law. Once, a reference under Section 256(2) of the Act, 1961, was pending in the Delhi High Court against order dated 11.04.1983 and as there was no demand notice due after passing of the order by the ITAT dated 11.04.1983, neither can it be legally said that the petitioner should have approached the Courts for granting of stay on the auctions nor can we say that the demand had attained finality. We further find that neither any reserved price was mentioned in the auction notice nor sufficient time was provided to the assessee. Notice was not forwarded to the other members of the family, which is a mandatory requirement under Rule 61 of the Second Schedule to the Act, 1961 referred (supra).

39. Once, a reference under Section 256 (2) of the Act, 1961, is admitted by the High Court against an order of the ITAT prudence demands to keep away from conducting auction of properties for the purposes of recovery. The action of the respondents in putting the petitioner's properties to auction hurriedly without awaiting for the decision of the Delhi High Court, would be treated as having been done illegally and at their own risk.

40. As per the principles of *lis pendens*, the action taken during the pendency of the issue being alive in Court, would be at one's own risk and costs and no equity or right can be said to be created in favour of such person who knowingly proceeds to make construction or investment thereto.

41. The principle of *lis pendens* has been incorporated in Section 52 of the Transfer of Property Act, 1882. It was known to one and all about the reference pending. The auction purchasers were also in knowledge of the orders passed by the TRO where contention had already been raised by the petitioner about the reference being pending in the Delhi High Court. In fact the writ petition filed before this Court in 1989 impleads the auction purchaser but they have chosen not to participate in the proceedings before the Delhi High Court. This Court had also stayed the proceedings initially but on an application moved by the respondents, the stay was vacated. Hence, it cannot be said that the auction purchasers were not in knowledge of the proceedings pending before this Court as well as before the Delhi High Court and they had, therefore, proceeded at their own risk and costs in developing and selling their properties further. Any action taken *pendent lite*, would, therefore, be subject to the decision of the case and it cannot be said that the auction had attained finality. We, therefore, hold that no right is created in favour of the auction purchasers.

42. Even at the time of admitting of the present petition and vacating the interim order, this Court was very cautious that no right is created in favour of the auction purchasers, while observing that '*if any of the auction*

purchasers would like to raise any construction, they will do so at their own peril'.

43. We find that the Delhi High Court vide its judgment dated 15.05.2008, has set at naught the complete proceedings initiated by the Income Tax Authorities against the petitioner and it stands concluded that the petitioner was not required to pay any additional tax and the additions of Rs. 5 Lakh to their income was found to be unjustified.

44. The petitioners have been fighting for their justifiable cause since 1960. They cannot be deprived of their rightful claim to their own properties. The contention of learned counsel for the respondents of having offered refund along with interest cannot be in any manner to be a suitable substitute to the return of the properties.

45. A person whose property is put to auction by the Income Tax Authorities not only faces financial loss but also suffers from loss of his esteem in the public but while the same cannot be redeemed in spite of a final adjudication in favour of the assessee.

46. We are maintaining the balance of justice by returning back the properties. The concept of taking over and putting to auction properties of persons who were not able to pay the tax without waiting for the result of appeal, is found to be based on the law as the Britishers before independence had initiated. It is by the aforesaid *modus operandi* that the properties of many rulers had been acquired by the Britishers and the officers of the East India Company. A new interpretation needs to be introduced. However, Hon'ble the Supreme Court in Surinder Nath Kapoor's case (supra) and

Mohan Wahi's case (supra) has charted a new path of interpretation relating to auctions conducted in cases relating to demand of tax. Thus, where the properties are put to auction without awaiting the final result in appeals and ultimately, it is found by the appellate authority that no tax was payable, the properties ought to be restored and the normal rule as laid down with regard to auctions conducted in favour of decree holders would not be applicable.

47. The reference has been answered in favour of the petitioner and the assessment order and demand of interest has become nullity in the eyes of law. The proceedings having become *void ab initio* indicate that from the initial date, the auction has become a nullity. The action would also, therefore, include auction proceedings conducted on the basis of other proceedings which have rendered *void ab initio*. The order passed by the Delhi High Court has not been challenged and has attained finality. It would be apposite to quote the observations made by the Delhi High Court as under:-

> *"In our opinion, since the assessment is of more than 60 years vintage, no useful purpose would be served by keeping the matter pending. We also find that it would not be possible for us to apply our mind to the case in the absence of the relevant record particularly why the income tax officer sought to reopen the completed assessment, keeping in mind the contention of the petitioner that there was no material before the Income Tax Officer to reopen the assessment.*

There is nothing to suggest that approval was granted by the Central Board of Direct Taxes to the Income Tax Officer to issue notice to the assessee for assessment after a gap of 16 years while this has not been directly challenged by the assesee, we have never the less to be satisfied that the revenue has acted in accordance with law, particularly since there is an argument to the contrary. In the absence of relevant material being produced before us, we are left with no opinion but to draw an adverse inference against the revenue without going into merits of the case. We have taken into consideration that the matter is 60 years old and we need to bring the litigation to an end sometime."

48. In view thereof, the writ petition is allowed and orders dated 23.07.1979, 12.12.1985 and 17.05.1988 are set aside and thus quashed. The respondents are directed to restore the properties of the petitioner-HUF from the auction purchasers and subsequent purchasers/assignees or persons to whom interest have been devolved. We further hold that any transfer of property done after the auction by the auction purchasers, shall be treated as *void ab initio* and the title and ownership of the properties shall be restored in the name of the petitioner-HUF. It is made clear that no civil court would be empowered to pass any orders in favour of any person, who has acquired any right on the properties after the auction conducted on 31.10.1985 and 15.11.1985. The Income Tax Officials would be responsible to take appropriate measures for the said purpose. The Income Tax Authorities

would be required to refund the auction price obtained in auction from the auction purchasers along with interest @ 15% per annum as prevalent in the year 1985. The order shall be implemented within one month failing which the petitioner would be free to initiate contempt proceedings without further notice. The petitioner is also held entitled to costs of Rs.1,00,000/- to be paid by the income tax authorities.

49. All pending misc. application(s) also stand disposed of.

(SANJEEV PRAKASH SHARMA)
JUDGE

(SUDEEPTI SHARMA)
JUDGE

27.05.2024
rajesh

1. Whether speaking/reasoned? : Yes/No
2. Whether reportable? : Yes/No