M/S. Al-Can Export Pvt. Ltd vs Prestige H.M. Polycontainers Ltd. And ... on 9 July, 2024

2024 INSC 500

REPO

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO. 7254 OF 2024
(ARISING OUT OF SLP(C) NO. 29334 OF 2016)

M/S AL-CAN EXPORT PVT. LTD. ….APPELL

VERSUS

PRESTIGE H.M. POLYCONTAINERS LTD. & ORS. ….RESPONDEN

WITH

CIVIL APPEAL NO. 7255 OF 2024
(ARISING OUT OF SLP(C) NO. 29335 OF 2016)

JUDGMENT

J. B. PARDIWALA, J:

For the convenience of exposition, this judgment is divided into the following parts:

1. Leave granted.

2. Since the issues raised in both the captioned appeals are the same; the subject-matter also being the same; the parties are also same and the challenge is also to the self-same judgment and order passed by the High Court, those were taken up for hearing analogously and are being disposed of by this common judgment and order.

3. The captioned appeals arise from the common judgment and order passed by the High Court of Judicature at Bombay dated 9.12.2015 in Writ Petition (C) No. 415 of 2011 with Writ Petition (C) No. 418 of 2011 respectively filed by the appellant herein by which the High Court rejected both the writ petitions and thereby affirmed the common order dated 18.02.2010 passed by the Additional Commissioner, Konkan Division, Mumbai setting aside the order of sale passed by the Tahsildar, Talasari dated 3.12.2008 as affirmed by the Additional Collector, Thane dated 15.01.2009 passed in favour of the appellant herein.

4. The subject-matter of the present litigation relates to the legality, validity and propriety of the auction proceedings conducted by the Tahsildar, Talasari of the subject property which was originally owned by the respondent No. 1 herein, namely, Prestige H.M. Polycontainers Limited.

5. The subject property owned by the respondent no. 1 herein was put to auction under the provisions of the Maharashtra Land Revenue Code, 1966 (hereinafter referred to as “the Revenue Code”). In the said auction proceedings, the appellant herein was declared as the successful bidder and ultimately, sale certificate was issued by the Additional Collector, Thane in favour of the appellant.

A. FACTUAL MATRIX

6. This litigation has a chequered history and therefore, it is necessary for this Court to look into the events that occurred over a period of time giving rise to the present two appeals before us:

a. The respondent no. 1, M/s Prestige H.M. Polycontainers, executed necessary loan and security documents in favour of the State Bank of India thereby mortgaging its property situated at Village Vadavali, Taluka Talsari, District Thane (Now District Palaghar), Maharashtra (hereinafter referred to as “the property”) bearing Survey No. 87/11, admeasuring 13,978 sq. mts.

Subsequently, the State Bank of India by an assignment agreement assigned the debts due and payable to it in favour of the respondent no. 6, Asset Reconstruction Company (India) Ltd. (hereinafter referred to as "ARCIL") under the provisions of The Securitisation and Reconstruction of Financial Assets and Enforcement Of Security Interest Act, 2002 (hereinafter referred to as the "SARFAESI Act, 2002").

It is the case of the respondent no. 6 that accordingly it became legally entitled to recover the debt due and payable from the respondent no. 1 by way of the sale of the property subject to the pre-existing mortgage in favour of the respondent no. 6.

b. Two demand notices dated 15.10.2007 and 20.11.2007 respectively of Rs.

29,52,000/- were issued as per Form No. 1 under Section 178 of the Revenue Code and Rule 5(1) of the Maharashtra Realisation of Land Revenue Rules, 1967 (hereinafter referred to as "the Rules") to the respondent no.1 by the office of the Tahsildar.

The notices were pasted on the main door of the respondent no. 1 and also on the office board of the Gram panchayat.

c. The Office of the Circle Officer, Talasari issued a letter dated 27.11.2007 to the Tahsildar, Talasari stating that the demand notices were sent to the respondent no. 1 as it was in arrears of land revenue to the tune of Rs.

29,52,000/-. It also noted that since the company was closed, the notices were affixed on the gate of respondent no. 1 in the presence of panchas.

d. The respondent no. 4 issued a letter dated 14.08.2008 addressed to the government certified valuer, Mr. Dilip Sahani of the M/s Trimurti Industrial Engineering Services, with a request to calculate the upset price of the property for the purpose of recovery of the arrears of land revenue, as the respondent no. 1 had failed to make the payment towards penalty.

e. The respondent no. 4 thereafter issued a letter dated 18.08.2008 addressed to the Circle Officer, Talasari informing him about the facts of the case and requesting him to seize and seal the premises of the respondent no. 1.

f. The respondent No. 4 also issued a letter dated 21.08.2008 addressed to the Police Inspector, Talasari apprising him of the necessary facts of the case and further informing that they would undertake the necessary exercise of determining the valuation of the property. In view thereof, the respondent no. 4 requested him to provide one police guard.

g. The valuation report of the property dated 21.08.2008 was issued by Mr. G.W. Sahani of M/s Trimurthi Industrial Engineering Services with a disposal value of Rs. 69,00,000/- and Distressed Value of Rs. 51,75,000/-

h. Although it is the case of the respondent No. 4 that the Director of Respondent No. 1, viz. Mr. P.K. Gupta had issued a No-Objection Certificate dated 20.10.2008 for conducting the auction sale of the property, yet the said fact was outrightly denied by Mr. P.K. Gupta in proceedings before the Additional Commissioner and the High Court.

i. On 20.10.2008, respondent no. 4 issued a letter to the Sub-Divisional Officer, Dahanu division, informing him of the valuation of the property at Rs. 51,75,000/- and requesting him to fix the upset price.

j. On 07.11.2008, the respondent no. 4 issued a letter to the Sub Divisional Officer, Dahanu Division stating that No-Objection Certificate had been received from the Director Mr. P.K. Gupta of the respondent no. 1 for the auction of the Property.

k. On 17.11.2008, the Sub-Divisional Officer, Dahanu Division approved the price of the land at Rs. 54,33,750 being a total of Rs. 51,75,000 (which had been fixed by M/s Trimurti Industries Eng. Services, Mumbai) + 2,58,750 (+5%) under Rule 13 of the Rules.

l. Notice dated 18.11.2008 came to be published by the respondent no. 4 in the newspaper viz. Dahanu Times for public auction furnishing details of the suit property with the upset price, auction date and time.The notice specified that if the dues towards the arrears of revenue would not be cleared on or before 03.12.2008, the Property, free from encumbrances would be put to auction at the Tahsildar's office.

m. The Board Officer, Talasari issued a letter dated 19.11.2008 to the respondent No. 4 informing that they had pasted the copy of the notice on the gate of the property of the respondent no. 1 as per Namuna 5, Rule 12(2)A of the Rules.

n. Respondent no. 4 issued a letter dated 20.11.2008 to the Assistant Director, Director of Enforcement requesting to keep one representative present on their behalf on 03.12.2008 at 11 AM.

o. On 21.11.2008, respondent no. 4 issued a letter addressed to the Collector, Thane; Additional Collector, Thane H.Q. Jawar; Sub-Divisional Officer, Dahanu Division; Group Development Officer, Talsari; Gram Panchayat Vadavli-Bhavane and Talathi Saja, Vadavli requesting them to display the public notice on their office notice boards and to provide a publicity report regarding the public advertisement of the immovable and movable properties of the respondent no. 1 proposed to be auctioned

on 03.12.2008.

p. Respondent no. 4 issued a letter dated 21.11.2008 to the respondent no. 1 informing that the auction was fixed on 03.12.2008 at 11 AM at the Office of Tahsildar, Talsari district, Thane. It was further notified that if the amount toward the arrears would be paid the auction would be cancelled. q. Respondent no. 4 issued another public notice on 23.11.2008 in the local newspaper called the Dahanu Times.

r. On 29.11.2008, respondent no. 4 requested the Additional Collector Thane, Head Office Javar, to accord sanction for the auction of the Property since the arrears had not been received.

s. On 01.12.2008, the Additional Collector Thane, Head Office, Jawar accorded its sanction for the auction.

t. Ultimately the public auction was held on 03.12.2008 wherein the appellant was declared as the highest bidder having offered Rs. 54,50,000/-. u. The appellant was issued the Sale Certificate dated 03.12.2008 of the Immovable Property which was sold under liquidation by the respondent no. 4 according to Specimen 8 as per Rule 14(A) of the Rules. v. On 04.12.2008, the appellant deposited the entire auction amount. w. On 10.12.2008, the IFCI raised its objections with respondent no. 4 which came to be recorded in its letter dated 19.12.2008.

x. The respondent No. 1 issued a letter dated 16.12.2008 to the Assistant Director, FEMA stating that they had not received the Enforcement Order dated 12.08.2003.

y. On 18.12.2008, respondent no. 4 in its letter recorded that full sale consideration of the property was deposited by the appellant on 04.12.2008.

z. On 19.12.2008, respondent no. 4 issued a response to the letter dated 10.12.2008 of the IFCI.

aa. On 26.12.2008, the WP (C) No. 2998 of 2008 (renumbered as WP 207 of 2009) was preferred by the respondent no. 1 against the auction and sale dated 03.12.2008 before the Bombay High Court. Vide the said writ petition the respondent no. 1 sought a direction to quash and set aside the enforcement order dated 12.08.2003 and all the consequential acts of recovery of penalty by auction of the properties.

bb. The Bombay High Court by its order dated 31.12.2008 passed in WP (C) NO. 2998 of 2008 (renumbered as WP 207 of 2009) directed Union of India, the respondent therein, to provide photocopies of the relevant documents and to allow inspection.

cc. The Additional Collector, Head Office, Jawar issued a letter dated 07.10.2009 to respondent no. 4, directing him to submit a detailed report on whether all the conditions as stipulated under Section 208 of the Revenue Code had been fulfilled.

dd. Respondent no. 4, vide its letter dated 12.01.2009 addressed to the Additional Collector, Head Office Jawar, informed that except for the writ petition pending before the High Court of Bombay, no objections were received. Thereby all requirements under Section 208 of the Revenue Code had been fulfilled (despite IFCI raising its objections). ee. On 15.01.2009, the office of the District Collector, Thane informed the respondent no. 4 that the auction sale had been approved and the appellant had been declared and confirmed as the auction purchaser of the suit property as per the Section 208 of the Revenue Code.

ff. Respondent no. 4 issued a letter dated 16.01.2009 to the appellant informing that the auction sale was approved and the appellant was declared and confirmed as successful auction purchaser of the property by the Additional Collector as per the Sections 207 and 208 respectively of the Revenue Code.

gg. The Writ Petition No. 207 of 2009 with Chamber Summons No. 49 of 2009 filed by the respondent no. 1 was permitted by the High Court to be withdrawn.

hh. On 4.04.2009, respondent no. 6 filed the Writ Petition (C) No. 648 of 2009 before the High Court of Judicature at Bombay challenging legality and validity of the sale of the said property.

ii. A division bench of the High Court, vide its order dated 16.04.2009 passed in WP No. 648 of 2009, recorded that as the respondent no. 1 had filed an appeal under the Revenue Code, the respondent no. 6 should also prefer an independent appeal. Accordingly, the said writ petition was dismissed. jj. On 09.07.2009 the respondent no. 1 filed an appeal being the Appeal No. 195 of 2009 under Section 247 of the Revenue Code before respondent no. 8, the Additional Commissioner, Konkan Division, Maharashtra. kk. On 17.11.2009, the appellant filed Writ Petition No. 3444 of 2009 in the High Court of Judicature at Bombay. Vide order dated 17.11.2009 the High Court directed the respondent no. 4 to release the arrears due to MSEDCL from the balance auction amount relying on the newspaper auction notice that mentioned the property was to be free from all encumbrances. ll. On 18.06.2010 the respondent no. 1 and respondent no. 6 filed Appeal Nos. 195 and 288 of 2009 respectively under Section 247 of the Revenue Code against the sale of the property. Both the appeals came to be allowed by respondent no. 8 by a common order wherein it was held that the order of sale dated 03.12.2008 and the process followed by respondent no. 4 and affirmed by the Additional Collector, Thane H.Q. Jawar dated 15.01.2009 was illegal and accordingly remanded the entire proceedings to the Additional Collector, Thane for appropriate fresh adjudication. mm. Against the aforesaid order dated 18.06.2010, the appellant filed WP No. L-1564 of 2010/W.P. No. 415 of 2011 and WP No. 418 of 2011 before the High Court of Judicature at Bombay.

nn. The High Court in WP No. 1564 of 2010 vide its order dated 07.09.2010 stayed the operation of the order dated 18.06.2010 and directed the parties to maintain the status quo.

7. Both the writ petitions filed by the appellant herein, i.e., Writ Petition (C) No. 415 of 2011 with Writ Petition No. 418 of 2011 ultimately came to be adjudicated by the High Court and vide its impugned judgment & order dated 9.12.2014 were rejected. The relevant observations made by the

High Court while rejecting both the writ petitions are as under:

> “33. Heard the learned counsel for the parties at length. Considering the submissions made by both the counsel and after going through the pleadings, the issue involved in the petitions is "whether the Petitioner has made out a case for setting aside the common order dated 18/02/2010 passed by the Additional Commissioner, Konkan Division in appeal No.195/2009 and 288/2009".
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> 34. As per section 192 of the code, for holding an auction, the Collector, has to issue a proclamation in a prescribed form with its translation in Marathi of the intended sale specifying its time and place, along with description of the immovable property. Such proclamation is required to be made by beat of drum at the headquarters of Taluka and in the village in which the immovable property is situated. As per section 193 of the Code, a written notice of the intended sale of immovable property and its time and place is required to be affixed in the office of Collector of District, office of Tahsildar of the Taluka in which the immovable property is situate and other public building in the Village in which it is situate and the dwelling place.
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> 35. As per section 195, if the sale is postponed for a period longer than 30 days, for sufficient reason, a fresh proclamation and notice is required to be issued unless defaulter consents for waiver of it.
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> 36. Section 202 to 210 provide a procedure when payment to be made, when confirmation of auction sale to be done, how to deal with objections before confirmation etc.
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> 37. In the present proceedings, admittedly, a fresh notice was issued by the Authority on 08/11/2008 for public auction in two newspapers i.e. "Nirdhar" and "Dahanu Times" informing the details of the property and time and date of auction. The Authority Mandal Adhikari, Talasari issued letter dated 19/11/2008 to the owner of the property informing that they have pasted the copy of notice on the gate of the suit property. The auction was held by the Tahasildar on 03/12/2008 and same was confirmed on the same date. This shows that the auction took place before expiry of 30 days from the date of proclamation which is contrary to section 193 of the Code. Moreover, the Tahasildar confirmed the said auction sale in favour of the Petitioner on the same day and handed over possession to the suit property receipt executing a possession receipt. This means, without waiting for 30 days from the date of proclamation, the Tahasildar held a public auction and handed over possession to the Petitioner, which was contrary to law.
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> 38. It is interesting to note that after handing over possession to the Petitioner, the Collector, by order dated 16/01/2009 confirmed the sale of the suit property in favour of the Petitioner. That means, before confirmation of the auction sale in favour of the Petitioner, the Tahasildar on his own, without any authority, handed over

possession to the Petitioner. This court, in the matter of Shravan Vithoba Dekate (supra) in paragraph 12 specifically held that the provisions of the Code in respect of the auction sale to be strictly followed. The Apex Court, in the matter of Mathew (supra) categorically held that if the Rules framed for public auction under the SARFAESI Act are not followed strictly, the auction sale is required to be set aside. These facts are considered by the Additional Commissioner at the time of passing the impugned order.

The Additional Commissioner categorically held that the orders passed by the Tahasildar as well as the Additional Collector were contrary to the provisions of the Code. Hence, the Additional Commissioner Konkan Division set aside both the orders and the matter was remanded to the Additional Collector to decide on its own merits.

39. It is to be noted that, allowing the petition amounts to revival of illegal order and same is not permitted in view of the Apex Court judgment in the matter of Maharaja Chintamani (supra).

40. Considering the above mentioned facts that the Tahasildar as well as the Additional Collector, without following due process of law as required under the said Code, passed the order dated 3/12/2008 and 15/01/2009 and handed over possession of the suit property to the Petitioner and in view of the law declared by the Apex Court as stated herein above, I am of the opinion that the Petitioner failed to make out any case for interference with the well reasoned impugned common order dated 18/02/2010.

41. Hence, following order is passed:

a. Rule stands discharged.

b. Writ Petitions stand dismissed with cost.

42. At this stage, the learned counsel for the Petitioner submits that the interim protection granted by this court to continue for a period of 12 weeks to enable the Petitioner to take chance in higher court.

43. Considering the fact that the Petitioner is in possession of the subject property for last several years and there is a running factory, I am of the opinion that the interim protection granted by this court (Coram : S. J. Kathawalla, J.) on 07/09/2010 shall continue for a period of 12 weeks from today. Same is granted." (Emphasis supplied)

8. It appears from the materials on record that against the above referred impugned judgment passed by the learned Single Judge of the High Court two appeals were filed, i.e., (Appeal (L) No. 41 of 2016 in Writ Petition (C) No. 418 of 2011 with Appeal No. 42 of 2016 in Writ Petition (C) No. 415 of 2011). Both these appeals were not pressed by the appellant before the High Court on the ground that those were not maintainable in law. Thereafter, on 19.09.2016, the two special leave petitions came to be filed before this Court. It appears that although the High Court had ordered the parties

to maintain status quo pending the two writ petitions filed by the appellant, yet on 13.10.2016, i.e., much after the two writ petitions came to be rejected by the High Court, the appellant created a mortgage on the suit property.

9. In such circumstances referred to above, the respondent No. 6 had to file Contempt Petition No. 81 of 2016 in Writ Petition No. 418 of 2016.

10. We were informed that the said contempt petition is pending as on date before the High Court. This Court vide its order dated 3.11.2019 directed the Debt Recovery Tribunal – (I) (hereinafter, "DRT") at Mumbai to proceed to decide the original application filed by the respondent no. 6. These proceedings before the DRT were relating to the Mortgage which came to be created by the appellant herein. The DRT declared the mortgage over the suit property to be illegal and allowed the O.A. No. 168 of 2002 against all the defendants with costs for an amount of Rs. 24,15,20,115.76/- with interest @ 12 per cent per annum from the date of filing of O.A. till such realisation.

11. In such circumstances referred to above, the appellant is here before this Court with the present appeals.

B. SUBMISSIONS ON BEHALF OF THE APPELLANT

12. Mr. P.S. Patwalia, the learned Senior Counsel appearing for the appellant, vehemently submitted that the High Court committed an egregious error in holding that the auction proceeding conducted by the Tahsildar was a sham and much contrary to the statutory provisions of the Revenue Code more particularly Sections 193 and 194 respectively of the Revenue Code.

13. The learned Senior Counsel submitted that a written notice of the intended sale of the suit property with the time and place thereof was affixed strictly in accordance with the conditions as stipulated under Section 193 of the Revenue Code. In this regard, our attention was drawn to the findings recorded by the High court as contained in para 37 of the impugned judgment of the High Court. The learned Senior Counsel further submitted that the original owner (respondent no. 1) on his own free will and volition had given his consent on 20.10.2008 to proceed with the auction sale of the suit property.

14. The learned Senior Counsel further submitted that the appellant is a bona fide purchaser of the suit property in an auction proceeding duly conducted by the Tahsildar under the provisions of the Revenue Code. According to the learned Senior Counsel it is not just sufficient to exhibit some material irregularity or fraud for the purpose of setting at naught the entire sale. It was argued that the aggrieved party must go further and establish to the satisfaction of the Court that the material irregularity or fraud had resulted in substantial injury to it.

15. According to the learned Senior Counsel, even assuming that the aggrieved party in the present litigation suffered substantial injury by reason of the sale of the suit property the same would not be sufficient to set aside the sale unless substantial injury is shown to have been caused by material irregularity or fraud in publishing or conducting the sale.

16. With a view to fortify the aforesaid submission strong reliance was placed on the decision of this Court in the case of Chilamkurti Bala Subrahmanyam v. Samanthapudi Vijaya Lakshmi and Another reported in (2017) 6 SCC 770.

17. The learned Senior Counsel, thereafter, proceeded to argue that the two appeals filed before the Additional Commissioner, Division Konkan, Maharashtra were, by themselves, not maintainable in law. Thus, the Additional Commissioner had no jurisdiction to entertain and decide the two appeals.

18. In this regard, our attention was drawn to the provisions of Section 247 of the Revenue Code read in conjunction with Sections 207 and 210 respectively of the Revenue Code. It was argued that in view of Sections 207 and 210 respectively of the Revenue Code the appeals filed by the respondent no. 1 and 6 before the Additional Commissioner were not maintainable under Section 247 of the Revenue Code.

19. It was submitted that the suit property was purchased by the appellant in the year 2008 by depositing the amount of Rs. 55 lakhs in accordance with the valuation report prepared by two government approved valuers. It was pointed out that thereafter, the appellant put up a huge industrial unit for the purpose of manufacturing oxygen cylinders. Various permissions and licences from the Central Government were obtained for the purpose of setting up the oxygen cylinder plant. It was also pointed out that as on date more than two hundred workers are employed in the appellant company.

20. In such circumstances referred to above, Mr. Patwalia, the learned Senior Counsel submitted that if the appellant is asked to hand over the possession of the entire suit property at this point of time, he would incur irreparable injury, which cannot be compensated in terms of money.

21. It was submitted that ordinarily the court should not disturb the sale by auction unless it is an evident case of mala fide or a result of fraud. According to Mr. Patwalia, sometime back his client had also offered to pay to the lenders the market value of the suit property. However, such proposal was not entertained by the bankers.

22. In such circumstances referred to above, the learned senior counsel prayed that there being merit in his appeals, those may be allowed and an appropriate order may be passed protecting the interests of all the parties to this litigation. C. SUBMISSIONS ON BEHALF OF THE RESPONDENT NO. 6/Asset Reconstruction Co. (India) Ltd. (ARCIL)

23. Mr. Amar Dave, the learned Senior Counsel appearing for the respondent No. 6 made the following submissions:

> a. The entire transaction on the basis of which the suit property was taken over by the appellant was nothing but absolute fraud perpetrated in collusion with each other.
>
> b. The entire process initiated by the Tahsildar was by supressing various critical facts from time to time from the Additional Collector who under the scheme of the

Act was to approve the process of any such auction and pursuant thereto to confirm any such sale under the auction.

c. The sequence of events clearly indicate that the Tahsildar did not disclose to the Additional Collector at the relevant time that there were objections already received from one of the banks/financial institution i.e., IFCI and the said objections were summarily rejected solely on the ground that the sale process in pursuance of the auction was being undertaken as per law.

In this regard, the provisions of Section 208 of the Revenue Code are extremely vital in so far as the same contemplates that even if there is no challenge by any other party, the collector himself can set aside any such sale or not approve the same for valid reasons. The said provision clearly indicates the legislative intent that if there are valid legal objections (which in the present case was clearly on the record in so far as IFCI had already raised issues with regard to the mortgage of the land) and therefore in terms of the said provision the collector was obliged in law to factor the said objections and could have examined the issue and not approved the sale.

However, it is apparent that the Tahsildar kept the office of the Additional Collector in dark about the said objection and hence the entire process was clearly vitiated.

d. The Tahsildar, with an oblique motive, initiated proceedings for confirmation of the sale without following the mandatory process as laid under the scheme of the Act. In fact, the sale was confirmed on 03.12.2008 even without ensuring whether the complete payments in respect of the sale proceed had been fully realised or not. More surprisingly, the perusal of the affidavit filed by the Tahsildar in the High court (in the first round of litigation filed by Prestige) clearly indicates that the attempt was to suppress the fact to the extent that one of the cheques had been realised after the sale confirmation 03.12.2008. The cheque was actually realised on 04.12.2008.

No public authority can confirm a sale without even realizing the entire consideration and any such attempt is clearly indicative of the fraudulent and collusive nature of the proceedings in question.

e. That the so-called reliance on the letter of 'No Objection' being the entire basis of the starting of the final auction proceeding is clearly indicative of the fraud perpetuated more particularly when the respondent No. 1 company, i.e., Prestige H.M. Polycontainers Ltd. clearly declared that no such 'No Objection' letter was ever signed by it. Even otherwise the sequence of events including the newspaper advertisements clearly indicate that such a plea of taking "no objection" from the owner and then subsequently asking the owner to make payment before the due date is indicative of the nature of fraud perpetuated in the present proceedings.

f. The record reveals that the entire valuation of the immovable as well as the movable properties were done in a self-serving manner, and the same was done only to benefit the appellant. In this regard, the pleadings clearly reflect that the movable properties itself were almost having a market value of around Rs. 3 Crore (if not around Rs. 1 crore as per depreciated value reflected in the books). In spite of such valuation, the valuer had assigned only around Rs. 75, 000 for the entire machinery and shown the same as scrap. That apart, even the valuation of the immovable property was completely incorrect and therefore in the teeth of these glaring facts, the entire transaction seems to have been engineered in a fraudulent manner.

The appellant cannot be termed as bona fide purchaser.

g. As per the law laid down in the decision of Mathew Varghese v. M. Amritha Kumar reported in 2014 (5) SCC 610, it is now well settled that 30 days' sale notice is mandatory. The High Court correctly placed reliance on the said judgment of this Court to come to the conclusion that sale was conducted in breach of various provisions of the Revenue Code which are mandatory in nature.

h. In fact, 30 days' notice is not just mandatory for the purpose of giving an opportunity to the defaulter but also to invite maximum publicity and get maximum offer. Admittedly, no 30 days' sale notice was given. Further, no wide publicity was made.

i. There are various illegalities in confirming the sale as well. In a process of sale, first the sale is to be conducted, then the proceeds are required to be received. It is only after the receipt of the proceeds that the sale confirmation is required to be made by collector and thereafter sale certificate and possession is to be handed over. In the present case, the sale was conducted and concluded on the same day i.e., 03.12.2008. The sale certificate was issued on the same day without the confirmation from the collector and the possession was handed over on the very next day. j. From a bare perusal of Section 212 of the Revenue Code, it is evident that the purchaser can be put into possession only after confirmation of sale and the sale certificate being handed over to the purchaser. However, in the present case, the appellant was put in possession on 04.12.2008 and the sale of property was confirmed on 15.01.2009 by the Additional Collector, which is per se illegal in nature. The haste with which the proceedings were undertaken speaks for itself.

k. Indisputably, objection was raised by the IFCI on 10.12.2008, which has been recorded by the Tahsildar in its letter dated 19.12.2008. l. On 07.01.2009, the Additional Collector, Head Office Jawar directed respondent no. 4 to submit a detailed report on whether it had fulfilled all the conditions as stipulated under Section 208 of the Revenue Code. However, vide its letter dated 12.01.2009 addressed to the Additional Collector, Head Office Jawar, respondent no. 4 informed that except for the WP in the High Court of Bombay, no other objection was received and thereby all requirements under Section 208 of the Revenue Code had been fulfilled, despite IFCI having raised its objections vide a letter dated 10.12.2008.

24. As regards the offer put forward by the appellant to deposit the requisite amount as per the market value of the property, Mr. Dave fairly submitted that sometime back, the appellant had offered to pay to the lenders but as the lenders found the offered amount to be very meagre the said proposal was not accepted. According to Mr. Dave, the market value of the suit property as on date could be around Rs. 6 to 7 crores.

25. In such circumstances referred to above, the learned Senior Counsel prayed that there being no merit in the appeals those may be dismissed with costs. D. ISSUES FOR DETERMINATION

26. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the following questions of law fall for our consideration:

> a. Whether the provisions of Order XXI Rule 90 of the Code of Civil Procedure would apply to the writ proceedings under Article 226 of the Constitution?
>
> b. Whether the Additional Commissioner, Konkan Division, Maharashtra had the jurisdiction to decide the two appeals filed by the respondent nos. 1 and 6 respectively under Section 247 of the Maharashtra Land Revenue Code, 1966?

E. RELEVANT STATUTORY PROVISIONS OF THE REVENUE CODE

27. Before adverting to the rival submissions canvassed on either side, it is necessary for us to look into few relevant provisions of the Revenue Code:

> "S. 69. Settlement of assessment to be made with holder directly from State Government.—The settlement of the assessment of each portion of land, or survey number, to land revenue, shall be made with the person who is primarily responsible to the State Government for the same.
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> xxx xxx xxx S. 169. Claims of State Government to have precedence over all others.—(1) The arrears of land revenue due on account of land shall be a paramount charge on the land and on every part thereof and shall have precedence over any other debt, demand or claim whatsoever, whether in respect of mortgage, judgment-decree, execution or attachment, or otherwise howsoever, against any land or the holder thereof.
>
> (2) The claim of the State Government to any monies other than arrears of land revenue, but recoverable as a revenue demand under the provisions of this Chapter, shall have priority over all unsecured claims against any land or holder thereof.
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> xxx xxx xxx S. 178. When notice of demand may issue.—(1) A notice of demand may be issued on or after the day following that on which the arrear accrues.

(2) The Commissioner may from time to time make orders for the issue of such notices, and with the sanction of the State Government shall fix the costs recoverable from the defaulter as an arrear of revenue, and direct by what officer such notices shall be issued.

S. 179. Occupancy or alienated holding for which arrear is due may be forfeited.—The Collector may declare the occupancy or alienated holding in respect of which an arrear of land revenue is due, to be forfeited to the State Government, and subject to rules made in this behalf, sell or otherwise dispose of the same under the provisions of section 72 or 73 and credit the proceeds, if any, to the defaulter's accounts :

Provided that, the Collector shall not declare any such occupancy or alienated holding to be forfeited–

(a) unless previously thereto he shall have issued a proclamation and written notices of the intended declaration in the manner provided by sections 192 and 193 for sales of immovable property, and

(b) until after the expiration of at least fifteen days from the latest date on which any of the said notices shall have been affixed as required by section 193.

xxx xxx xxx S. 192. Procedure in effecting sales.—(1) When any sale of either movable or immovable property is ordered under the provisions of this Chapter, the Collector shall issue a proclamation in the prescribed form with its translation in Marathi of the intended sale, specifying the time and place of sale, and in the case of movable property whether the sale is subject to confirmation or, not and when land paying revenue to the State Government is to be sold, the revenue assessed upon it, together with any other particulars he may think necessary.

(2) Such proclamation shall be made by beat of drum at the headquarters of the taluka and in the village in which the immovable property is situate if the sale be of immovable property ; and if the sale be of movable property, the proclamation shall be made in the village in which such property was seized, and in such other places as the Collector may direct.

(3) A copy of the proclamation issued under this section where it relates to the sale of any holding shall be sent to the Co-operative Bank or the Land Development Bank or both operating within the area in which the holding is situated.

S. 193. Notification of sales.—(1) A written notice of the intended sale of immovable property, and of the time and place thereof, shall be affixed in each of the following places, namely :–

(a) the office of the Collector of the district,

(b) the office of the Tahsildar of the taluka in which the immovable property is situate,

(c) the Chavdi, or some other public building in the village in which it is situate, and

(d) the defaulter's dwelling place.

(2) In the case of movable property, the written notice shall be affixed in the Tahsildar's office, and in the Chavdi, or some other public building in the village in which such property was seized. (3) The Collector may also cause notice of any sale, whether of movable or immovable property, to be published in any other manner that he may deem fit.

(4) A notice referred to in this section shall be in such form as may be prescribed.

S. 194. Sale by whom to be made ; time of sale, etc.—(1) Sales shall be made by auction by such persons as the Collector may direct. (2) No such sale shall take place on a Sunday or other general holiday recognized by the State Government, nor until after the expiration of at least thirty days in the case of immovable property, or seven days in the case of movable property, from the latest date on which any of the said notices shall have been affixed as required by section 193. S. 195. Postponement of sale.—The sale may from time to time be postponed for any sufficient reason : Provided that, when the sale is postponed for a period longer than thirty days a fresh proclamation and notice shall be issued unless the defaulter consents to waive it. S. 196. Sale of perishable articles.—Nothing in sections 192, 193, 194 and 195 applies to the sale of perishable articles. Such articles shall be sold by auction with the least possible delay, in accordance with such orders as may from time to time be made by the Collector either generally or especially in that behalf.

S. 197. When sale may be stayed.—If the defaulter or any person on his behalf, pays the arrear in respect of which the property is to be sold and all other charges legally due by him at any time before the property is knocked down, to the person prescribed under section 170 to receive payment of the land revenue due, or to the officer appointed to conduct the sale or if furnishes security under section 191, the sale shall be stayed.

xxx xxx xxx S. 200. Mode of payment when sale is subject to confirmation.—(1) When sale is subject to confirmation, the party who is declared to be the purchaser shall be required to deposit immediately twenty-five per centum of the amount of his bid, and in default of such deposit, the property shall forthwith be again put up and sold.

(2) The full amount of purchase money shall be paid by the purchaser before the sunset of the third day after he is informed of the sale having been confirmed, or if the said third days be a Sunday or other authorized holiday, then before sunset of the first office day after such day. On payment of such full amount of the purchase money, the purchaser shall be granted, a receipt for the same, and the sale shall become absolute as against all persons whomsoever 2[after the expiry of a period of seven days from the date of sale, if no application is made under section 206, or if made, after it is rejected.] xxx xxx xxx S. 207. Application to set aside sale of immovables.—(1) At any time within thirty days from the date of sale of immoveable property an application may be made to the

Collector to set aside the sale on the ground of some material irregularity, or mistake, or fraud, in publishing or conducting it, but, except as is otherwise provided in sections 208, 209 and 210, no sale shall be set aside on the ground of any such irregularity or mistake, unless the applicant proves to the satisfaction of the Collector that he has sustained substantial injury by reason thereof :

> [Provided that, such application may be made by a defaulter who is a person belonging to a Scheduled Tribe or any person on his behalf, within one hundred and eighty days from such date.] (2) If the application be allowed, the Collector shall set aside the sale, and direct fresh one.
>
> xxx xxx xxx S. 208. Order confirming or setting aside sale.—On the expiration of thirty days or, as the case may be, one hundred and eighty days] from the date of the sale, if no such application as is mentioned in section 207 has been made, or if such application has been made and rejected the Collector shall make an order confirming the sale :
>
> Provided that, if he has reason to think that the sale ought to be set aside notwithstanding that no such application has been made, or on ground other than those alleged in any application which has been rejected, he may, after recording his reasons in writing, set aside the sale.
>
> S. 209. Purchaser may apply to set aside sale under certain circumstances.—Except in a case, where land has been sold for arrears which form a charge on the land, the purchaser may, at any time within thirty days from the date of sale, apply to the Collector to set aside the sale on the ground that the defaulter had no saleable interest in the property sold; and the Collector shall, after due enquiry, pass such order on such application as he deems fit.
>
> S. 210. Application to set aside sale by person owning to holding interest in property.—(1) Where immoveable property has been sold under this code, any person either owning such property or holding an interest therein by virtue of a title acquired before such sale may, at any time within thirty days from the date of sale, apply to the Collector to have the sale set aside on his depositing—
>
> (a) for payment to the purchaser a sum equal to five per cent of the purchase money;
>
> (b) for payment on account of the arrear, the amounts specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may have been paid since the date of sale on that account ; and
>
> (c) the cost of the sale :
>
> [Provided that, such application may be made by any such person belonging to a Scheduled Tribe within one hundred and eighty days from the date of sale.] (2) If

such deposit is made within thirty days, 2[or as the case may be, one hundred and eighty days] from the date of sale, the Collector shall pass an order setting aside the sale.

xxx xxx xxx S. 247. Appeal and appellate authorities.—(1) In the absence of any express provisions of the Code, or of any law for the time being in force to the contrary, an appeal shall lie from any decision or order passed by a revenue or survey officer specified in column 1 of the Schedule E under this Code or any other law for the time being in force to the officer specified in column 2 of that Schedule whether or not such decision or order may itself have been passed on appeal from the decision of order of the officer specified in column 1 of the said Schedule :

Provided that, in no case the number of appeals shall exceed two.

(2) When on account of promotion of change of designation an appeal against any decision or order lies under this section to the same officer who has passed the decision or order appealed against, the appeal shall lie to such other officer competent to decide the appeal to whom it may be transferred under the provisions of this Code.

xxx xxx xxx S. 250. Periods within which appeals must be brought.—No appeal shall be brought after the expiration of sixty days if the decision or order complained of have been passed by an officer inferior in rank to a Collector or a Superintendent of Land Records in their respective departments ; nor after the expiration of ninety days in any other case.

The period of sixty and ninety days shall be counted from the date on which the decision or order is received by the appellant. In computing the above periods, the time required to obtain a copy of the decision or order appealed against shall be excluded.

S. 251. Admission of appeal after period of limitation.—Any appeal or an application for review under this Chapter may be admitted after the period of limitation prescribed therefor when the appellant or the applicant, as the case may be, satisfies the officer or the State Government to whom or to which he appeals or applies, that he had sufficient cause for not presenting the appeal or application, as the case may be, within such period." F. ANALYSIS i. Whether the provisions of Order XXI Rule 90 of the Code of Civil Procedure would apply to the writ proceedings under Article 226 of the Constitution?

28. We shall now proceed to record our findings on the submissions canvassed on either side. We start with the decision of this Court in the case of Chilamkurti (supra) as strong reliance has been placed on the same on behalf of the appellant. This judgment has been relied upon to make good the contention that the provisions of Order XXI Rule 90 of the Code of Civil Procedure (hereinafter, "CPC") should be made applicable to the present litigation or in other words even in the writ proceedings under Article 226 of the Constitution. This decision is relied upon to fortify the

submission that merely establishing a material irregularity or fraud is not sufficient to set aside the auction sale. It is necessary for the party aggrieved to go further and establish to the satisfaction of the court that the material irregularity or fraud in the conduct of the auction has resulted in substantial injury to the said party. Conversely, even if the party aggrieved has suffered substantial injury by reason of the sale, the same would not be sufficient to set aside the auction sale unless substantial injury has been shown to have been caused by a material irregularity or fraud in publishing or conducting the sale.

29. In Chilamkurti (supra), the respondent no. 2 before this Court was the State Bank of India. The State Bank of India was the plaintiff decree holder, whereas the respondent No. 1 was the defendant judgment debtor. The State Bank of India obtained a money decree against the judgment debtor in a suit. As the judgment debtor failed to satisfy the decree, the State Bank of India filed execution application and brought the scheduled property owned by the judgment debtor to auction sale through the process server of the Court of Senior Civil Judge, Kovvur in the execution proceedings for the realisation of decretal dues. The suit scheduled property was accordingly attached by the executing court under a warrant. The property was ultimately put to auction sale. The appellant before this Court in the said proceedings was the highest bidder. The judgment debtor being dissatisfied with the auction conducted under the supervision of the executing court filed an application under Order XXI Rule 90 of the CPC seeking setting aside of the sale on the ground that the proclamation did not give clear 15 days' notice and the same was illegal.

30. The Senior Civil Court, Kovvur found no merit in any of the objections raised by the judgment debtor and accordingly dismissed the application. The judgment debtor thereafter preferred an appeal before the High Court. The High Court allowed the appeal and set aside the order of the executing court inter alia holding that if the judgment debtor deposits a sum of Rs. 7,15,000/- (Rs. Seven Lakh Fifteen Thousand Only) being the price fetched at the public auction within a period of three weeks from the date of the receipt of a copy of the judgment, the sale held would not be given effect to.

31. Aggrieved by the aforesaid, the auction purchaser preferred appeal before this Court. A Division Bench of this Court in Chilamkurti (supra) relying on the decision of this Court in Saheb Khan v. Mohd. Yousufuddin reported in (2006) 4 SCC 476, allowed the appeal filed by the successful auction purchaser holding as under: -

> "14. The law which governs the controversy involved in this appeal is laid down by this Court in Saheb Khan v. Mohd. Yousufuddin [Saheb Khan v. Mohd. Yousufuddin, (2006) 4 SCC 476] (a three-Judge Bench). While examining the scope of Order 21 Rule 90 of the Code, Ruma Pal, J. speaking for the Bench held as under: (SCC pp. 480-

81, paras 12-14) "12. We are unable to sustain the reasoning of the High Court.

Order 21 Rule 90 of the Code of Civil Procedure allows, inter alia, any person whose interests are affected by the sale to apply to the court to set aside a sale of immovable property sold in execution

of a decree on the ground of "a material irregularity or fraud in publishing or conducting" the sale. Sub-rule (2) of Order 21 Rule 90 however places a further condition on the setting aside of a court sale in the following language:

> '90. (2) No sale shall be set aside on the ground of irregularity or fraud in publishing or conducting it unless, upon the facts proved, the court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud.'

> 13. Therefore before the sale can be set aside merely establishing a material irregularity or fraud will not do. The applicant must go further and establish to the satisfaction of the court that the material irregularity or fraud has resulted in substantial injury to the applicant. Conversely even if the applicant has suffered substantial injury by reason of the sale, this would not be sufficient to set the sale aside unless substantial injury has been occasioned by a material irregularity or fraud in publishing or conducting the sale. (See Dhirendra Nath Gorai v. Sudhir Chandra Ghosh [Dhirendra Nath Gorai v. Sudhir Chandra Ghosh, (1964) 6 SCR 1001 : AIR 1964 SC 1300] , Jaswantlal Natvarlal Thakkar v. Sushilaben Manilal Dangarwala [Jaswantlal Natvarlal Thakkar v. Sushilaben Manilal Dangarwala, 1991 Supp (2) SCC 691] and Kadiyala Rama Rao v. Gutala Kahna Rao [Kadiyala Rama Rao v. Gutala Kahna Rao, (2000) 3 SCC 87] .)

> 14. A charge of fraud or material irregularity under Order 21 Rule 90 must be specifically made with sufficient particulars.

Bald allegations would not do. The facts must be established which could reasonably sustain such a charge. In the case before us, no such particulars have been given by the respondent of the alleged collusion between the other respondents and the auction-purchaser. There is also no material irregularity in publishing or conducting the sale. There was sufficient compliance with Order 21 Rule 67(1) read with Order 21 Rule 54(2). No doubt, the trial court has said that the sale should be given wide publicity but that does not necessarily mean by publication in the newspapers. The provisions of Order 21 Rule 67 clearly provide if the sale is to be advertised in the local newspaper, there must be specific direction of the court to that effect. In the absence of such direction, the proclamation of sale has to be made under Order 21 Rule 67(1) "as nearly as may be, in the manner prescribed by Rule 54 sub-rule (2)". Rule 54 sub-rule (2) provides for the method of publication of notice and reads as follows:

> '54. (2) The order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode, and a copy of the order shall be affixed on a conspicuous part of the property and then upon a conspicuous part of the courthouse, and also, where the property is land paying revenue to the Government, in the office of the Collector of the district in which the land is situate and, where the property is land situate in a village, also in the office of the Gram Panchayat, if any, having jurisdiction over that village.'"

> 15. After examining the facts of this case in the light of the law laid down in Saheb Khan [Saheb Khan v. Mohd. Yousufuddin, (2006) 4 SCC 476], we are of the considered opinion that the reasoning and the conclusion arrived at by the executing court deserves to be restored as against that of the High Court in the impugned order. In other words, no case was made out by the judgment-debtor for setting aside of the sale of the property in question on the ground of committing any material irregularity or fraud in publishing or in conducting the sale so as to enable the Court to invoke its powers under Order 21 Rule 90(2) of the Code.
>
> 16. It is noticed that Respondent 1, in her application for setting aside the sale, had mainly raised four objections. Firstly, clear 15 days' notice was not given for sale of the properties as required under the Rules. Secondly, the valuation of the property was not properly mentioned in the documents concerned so as to enable the parties to know its proper valuation prevailing on the date of sale. Thirdly, the market value of the property on the date of auction was more than the price actually fetched in the auction, and fourthly, no proper publication including beating of drum was made before the date of auction due to which there was less participation of the bidders in the auction-sale.
>
> 17. The executing court dealt with all the four objections with reference to the record of the proceedings and found as a fact that none of the objections had any merit. The High Court, however, found fault in the same though not in all but essentially in the matter relating to giving of clear 15 days' notice and the manner in which it was issued and finding merit in the objection, set aside the sale on imposing certain conditions enumerated above.
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> 18. In our considered opinion, as mentioned above, the executing court was justified in overruling the objections and we concur with the reasoning and the conclusion of the executing court.
>
> xxx xxx xxx
>
> 24. The law on the question involved herein is clear. It is not the material irregularity that alone is sufficient for setting aside of the sale. The judgment-debtor has to go further and establish to the satisfaction of the Court that the material irregularity or fraud, as the case may be, has resulted in causing substantial injury to the judgment-debtor in conducting the sale. It is only then the sale so conducted could be set aside under Order 21 Rule 90(2) of the Code.

Such is not the case here."

32. Thus, the dictum as laid by this Court in Chilamkurti (supra) relying upon Saheb Khan (supra) is that a charge of fraud or material irregularity in Order XXI Rule 90 CPC must be specifically made with sufficient particulars. Mere bald allegation would not be sufficient. The fact must be established

which could reasonably sustain such charge. The dictum as further laid is that the sale conducted by the court in the execution proceedings should not ordinarily be set aside merely on the basis of some material irregularity or fraud. The party concerned must go further and establish to the satisfaction of the court that the material irregularity or fraud has resulted in substantial injury to such party.

33. Order XXI Rule 90 of the CPC reads as under: -

> "90. Application to set aside sale on ground of irregularity or fraud. (1) Where any immovable property has been sold in execution of a decree, the decree-holder, or the purchaser, or any person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale, may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it.
>
> (2) No sale shall be set aside on the ground of irregularity or fraud in publishing or conducting it unless, upon the facts proved, the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud.
>
> (3) No application to set aside a sale under this rule shall be entertained upon any ground which could have been taken on or before the date on which the proclamation of sale was drawn up.

Explanation.-The mere absence of, or defect in, attachment of the property sold shall not, by itself, be a ground for setting aside a sale under this rule."

34. Legislative changes: By the Code of Civil Procedure (Amendment) Act, 1976, the following changes have been effected in Rule 90:

> (i) In sub-rule (1), the words "or the purchaser" and "other" were inserted after the words "the decree-holder" and "or any" respectively;
>
> (ii) The proviso to old sub-rule has been renumbered as sub-rule (2) with necessary changes in phraseology and with addition of the words "in publishing or conducting it" after the words "irregularity or fraud";
>
> (iii) Sub-rule (3) has been inserted;
>
> (iv) Explanation to the rule has been added.

35. Object of Amendment: Rule 90, as originally enacted, reads thus:

> "90.(1) Where any immovable property has been sold in execution of a decree, the decree-holder, or any other person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale; may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting

it.

Provided that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud." The Law Commission in its Fourteenth Report, Vol. 1, pp. 454-55 considered the provision and recommended change by stating: -

"51. Under Rule 90 a sale of immovable property in execution of a decree can be set aside on the ground of material irregularity or fraud in publishing or conducting the sale. The right to apply under this rule is given to the decree-holder or to any person entitled to a share in a rateable distribution of assets or whose interests are affected by the sale. It is generally accepted that a large percentage of application made by the judgment-debtors to set aside sales under this Rule are frivolous and are filed with the object of delaying the delivery of possession. It is therefore necessary to make an amendment to Rule 90 by providing that no sale shall be set aside on the ground of delay in the proclamation of sale at the instance of any person who did not attend though given notice to appear at the drawing up of the proclamation or of any person, in whose presence the proclamation was drawn up, unless an objection was taken by him before the sale was held." (Emphasis supplied) The Law Commission again considered the question as to irregularity in attachment and in its Twenty-seventh Report stated:-

"The question whether absence of, or irregularity in attachment is, a defect in the "publication or conduct of the sale" has been discussed in several decisions. At one extreme is the view that attachment is not necessary at all before sale. At the other extreme stands the view that sale without attachment is void. A third view is, that attachment is an irregularity, but not in publishing or conducting the sale. According to the fourth view, a sale is not a nullity because of a defect in the attachment or want thereof, but if it causes "substantial injury", it can be set aside under Rule 90. The last view seems to be the correct one. The object of attachment is to bring the property under the control of the court, and in the case of immovable property one of the requirements is that the order of attachment should be publicly proclaimed. The main object of the proclamation is to give publicity to the fact that the sale of the proclaimed property is in contemplation. The publication of the attachment is thus a step leading up to the proclamation of the sale.

The question whether it is necessary to insert a provision to clarify the position on the subject, has been considered. In the draft Report which had been circulated, an Explanation had been proposed to Rule 90 to the effect that absence of or defect in attachment shall be regarded as an irregularity under this rule.

After some consideration, it has been decided that no such provision need be inserted." In its Fifty-fourth Report, the Law Commission ordered: "The Commission

noted that the question whether the absence of, or irregularity in, attachment is, a defect in the "publication or conduct of the sale" within Order 21, Rule 90 had been discussed in several decisions. At one extreme was the view that attachment is not necessary at all before sale. At the other extreme stood the view that sale without attachment is void. A third view was that want of attachment is an "irregularity" but it is not an illegality in publishing or conducting the sale." In the Notes on Clauses, Gazette of India dated 8.4.1974, Pt. II S.2, Extra, p.

325, the State of Objects and Reasons, it was stated:

"Clause 75, sub-clause (xxxi).-There is a conflict of decisions as to whether an auction-purchaser can apply to set aside a sale under Rule 90. The words "or the purchaser" have been inserted in the rule to make it clear that the auction-purchaser can also apply to set aside the sale.

The rule is also being amended to provide that a sale shall not be set aside on the ground of an irregularity or fraud unless the applicant has sustained a substantial injury by reason of such irregularity or fraud.

It is further being provided that no application to set aside the sale shall be entertained on any ground which the applicant could have taken on or before the date on which the proclamation of sale was drawn up.

In view of the divergence of opinion as to whether absence of, or irregularity in, attachment is a defect in the publication or the conduct of sale, an Explanation is being added to the effect that mere absence of or defect in the attachment of the property sold shall not, by itself, be a ground for setting the sale."

36. Nature and Scope: Rule 90 of Order XXI deals with cases of setting aside auction-sale on the ground of material irregularity or fraud in publishing or conducting such sale. Sub-rule (1) states that where any immovable property has been sold in execution of a decree, any person adversely affected may apply to the court for setting aside sale on the ground of material irregularity or fraud in publishing or conducting the sale. Sub-rule (2) is in the nature of proviso to sub-rule (1) and declares that no sale shall be set aside unless the applicant proves substantial injury by reason of such irregularity or fraud. Sub-rule (3) bars the court from entertaining an application for setting aside sale on any ground which the applicant could have taken on or before the date of proclamation of sale. The Explanation to Rule 90 clarifies that mere absence of or defect in, attachment of property sold would be no ground for setting aside sale.

37. Order XXI of the CPC is exhaustive and in the nature of a complete code as to how the execution proceedings should take place. This is the second stage after the success of the party in the civil proceedings. This Court in many of its decisions has said that this is the second stage after the success of the party in the civil proceedings. It is often said in our country that another legal battle, more prolonged, starts in execution proceedings defeating the right of the party which has

succeeded in establishing its claim in civil proceedings. This is the reason why Order XXI Rule 90 provides that both the conditions enumerated therein should be fulfilled. (See: M/s Jagan Singh & Co. v. Ludhiana Improvement Trust & Ors. reported in (2024) 3 SCC 308) a. Difference between the auction sale conducted by the court in the execution proceedings initiated by the decree holder and the auction proceedings conducted by the State through its revenue authorities like Tahsildar, etc.

38. There is a fine distinction between the auction sale conducted by the executing court under the provisions of the CPC and the auction sale conducted by the State under the provisions of different enactments like Land Revenue Code etc. The whole object behind Order XXI Rule 90 of the CPC appears to be to discourage the judgment debtors from filing frivolous application complaining about the irregularity or fraud in the conduct of the auction sale. A lot of sanctity is attached to the auction sale conducted by the executing court under the provisions of the CPC compared to the auction sale conducted by the State through its authorities. Execution is the enforcement by the process of the court of its orders and decrees. This is in furtherance of the inherent power of the court to carry out its orders or decrees. Order XXI CPC deals with the elaborate procedure pertaining to the execution of orders and decrees. Sale is one of the methods employed for execution. Rule 89 of Order XXI of the CPC is the only means by which a judgment-debtor can escape from a sale that has been validly carried out. The object of the rule is to provide a last opportunity to put an end to the dispute at the instance of the judgment- debtor before the sale is confirmed by the court and also to save his property from dispossession.

39. We are of the view that even otherwise the provisions of the CPC do not apply to writ petitions under Article 226 of the Constitution of India except some of the principles enshrined therein like res judicata, delay and laches, addition of parties, matters which have not been specifically dealt with by the writ rules framed by the respective High Court.

Position Prior to 1976

40. Before the Code of Civil Procedure (Amendment) Act, 1976, Section 141 of the Code of Civil Procedure, 1908 read as under:

> "Miscellaneous proceedings.- The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any court of civil jurisdiction."

41. There was cleavage of opinion on the question whether the provisions of the Code would apply to writ proceedings under the Constitution. Some High Court had held that writ petitions could be said to be proceedings in 'any court of civil jurisdiction' within the meaning of Section 141 of the CPC. According to other High Courts, however, writ proceedings, being special in nature, were not covered by Section 141 and the provisions of the Code were not applicable to writ petitions.

42. In State of U.P. v. Vijay Anand reported in AIR 1963 SC 946, drawing the distinction between ordinary civil jurisdiction and extraordinary civil jurisdiction, a Constitution Bench of this Court stated:-

> "It is, therefore, clear from the nature of the power conferred under Article 226 of the Constitution and the decisions on the subject that the High Court in exercise of its power under Article 226 of the Constitution exercises original jurisdiction, though the said jurisdiction shall not be confused with the ordinary civil jurisdiction of the High Court. This jurisdiction, though original in character as contrasted with its appellate and revisional jurisdiction, is exercisable throughout the territories in relation to which it exercises jurisdiction and may, for convenience, be described as extraordinary original jurisdiction." (Emphasis supplied)

43. Again, in Babubhai Muljibhai Patel v. Nandlal Khodidas Barot reported in (1974) 2 SCC 706, construing the words 'as far as it can be made applicable' in Section 141 of the CPC (prior to Amendment of 1976), this Court observed:

> "10. It is not necessary for this case to express an opinion on the point as to whether the various provisions of the Code of Civil Procedure apply to petitions under Article 226 of the Constitution. Section 141 of the Code, to which reference has been made, makes it clear that the provisions of the Code in regard to suits shall be followed in all proceedings in any court of civil jurisdiction as far as it can be made applicable. The words "as far as it can be made applicable" make it clear that, in applying the various provisions of the Code to proceedings other than those of a suit, the court must take into account the nature of those proceedings and the relief sought. The object of Article 226 is to provide a quick and inexpensive remedy to aggrieved parties. Power has consequently been vested in the High Courts to issue to any person or authority, including in appropriate cases any government, within the jurisdiction of the High Court, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari. It is plain that if the procedure of a suit had also to be adhered to in the case of writ petitions, the entire purpose of having a quick and inexpensive remedy would be defeated. A writ petition under Article 226, it needs to be emphasised, is essentially different from a suit and it would be incorrect to assimilate and incorporate the procedure of a suit into the proceedings of a petition under Article 226." (Emphasis supplied) Position After 1976

44. By the Code of Civil Procedure (Amendment) Act, 1976, Explanation to Section 141 came to be inserted. It reads thus:

> "Explanation.-In this section, the expression "proceedings" includes proceedings under Order IX, but does not include any proceeding under Article 226 of the Constitution."

45. In the Statement of Objects and Reasons, it has been stated:

> "The question of whether an application under Article 226 of the Constitution is a 'proceeding in any court of civil jurisdiction' within the meaning of Section 141 has been the subject matter of controversy. While the Andhra Pradesh High Court holds

> that Section 141 applies to such proceedings, the Allahabad, Calcutta, Madras and Punjab High Court have held that Section 141 does not apply to such proceedings and in the circumstances, it is being clarified that Section 141 does not apply to proceedings under Article 226 of the Constitution."

46. In view of the Explanation to Section 141 of the CPC, now it can no longer be contended that the provisions of CPC would apply to the proceedings under Article 226 of the Constitution.

47. This Court in Puran Singh & Ors. v. State of Punjab & Ors. reported in (1996) 2 SCC 205, in paras 9, 10 and 11 respectively has held as under:-

> "9. In the case of Ram Kala v. Asstt. Director, Consolidation of Holdings [AIR 1977 P&H 87 : 79 Punj LR 100] , a Full Bench of three Judges held that Article 137 of the Schedule to the Limitation Act does not apply to an application for adding or substituting a party to a petition under Article 226 of the Constitution. It was also held that Section 141 of the Code cannot be pressed into service for applying the provisions including Order 22 of the Code in a petition under Article 226 of the Constitution. Later a Full Bench of five Judges of the same Court in the case of Teja Singh v. Union Territory of Chandigarh [AIR 1982 P&H 169; (1981) 1 SLR 274 : 84 Punj LR 160] held that in view of Rule 32 of the Writ Rules framed by the High Court under Article 225 of the Constitution which provided that in all matters in which no provision had been made by those Rules, the provisions of Civil Procedure Code shall apply mutatis mutandis insofar as they were not inconsistent with those Rules the explanation which had been added to Section 141 of the Code by the aforesaid Amending Act, did not in any way nullify the effect of Rule 32 of the Writ Rules. Rule 32 of the Writ Rules is as follows:
>
> "32. In all matters for which no provision is made in these rules, the provisions of the Code of Civil Procedure, 1908, shall apply mutatis mutandis insofar as they are not inconsistent with these rules."
>
> 10. On a plain reading, Section 141 of the Code provides that the procedure provided in the said Code in regard to suits shall be followed "as far as it can be made applicable, in all proceedings". In other words, it is open to make the procedure provided in the said Code in regard to suits applicable to any other proceeding in any court of civil jurisdiction. The explanation which was added is more or less in the nature of proviso, saying that the expression 'proceedings' shall not include any proceeding under Article 226 of the Constitution. The necessary corollary thereof shall be that it shall be open to make applicable the procedure provided in the Code to any proceeding in any court of civil jurisdiction except to proceedings under Article 226 of the Constitution. Once the proceeding under Article 226 of the Constitution has been excluded from the expression 'proceedings' occurring in Section 141 of the Code by the explanation, how on basis of Section 141 of the Code any procedure provided in the Code can be made applicable to a proceeding under Article 226 of the

> Constitution? In this background, how merely on basis of Writ Rule 32 the provisions of the Code shall be applicable to writ proceedings? Apart from that, Section 141 of the Code even in respect of other proceedings contemplates that the procedure provided in the Code in regard to suits shall be followed "as far as it can be made applicable". Rule 32 of Writ Rules does not specifically make provisions of Code applicable to petitions under Articles 226 and 227 of the Constitution. It simply says that in matters for which no provision has been made by those rules, the provisions of the Code shall apply mutatis mutandis insofar as they are not inconsistent with those rules. In the case of Rokyayabi v. Ismail Khan [AIR 1984 Kant 234 : (1984) 2 Kant LC 114] in view of Rule 39 of the writ proceedings rules as framed by the Karnataka High Court making the provisions of Code of Civil Procedure applicable to writ proceedings and writ appeals, it was held that the provisions of the Code were applicable to writ proceedings and writ appeals.
>
> 11. We have not been able to appreciate the anxiety on the part of the different courts in judgments referred to above to apply the provisions of the Code to writ proceedings on the basis of Section 141 of the Code. When the Constitution has vested extraordinary power in the High Court under Articles 226 and 227 to issue any order, writ or direction and the power of superintendence over all courts and tribunals throughout the territories in relation to which such High Court is exercising jurisdiction, the procedure for exercising such power and jurisdiction have to be traced and found in Articles 226 and 227 itself. No useful purpose will be served by limiting the power of the High Court by procedural provisions prescribed in the Code.

Of course, on many questions, the provisions and procedures prescribed under the Code can be taken up as guide while exercising the power, for granting relief to persons, who have invoked the jurisdiction of the High Court. It need not be impressed that different provisions and procedures under the Code are based on well-recognised principles for exercise of discretionary power, and they are reasonable and rational. But at the same time, it cannot be disputed that many procedures prescribed in the said Code are responsible for delaying the delivery of justice and causing delay in securing the remedy available to a person who pursues such remedies. The High Court should be left to adopt its own procedure for granting relief to the persons concerned. The High Court is expected to adopt a procedure which can be held to be not only reasonable but also expeditious." (Emphasis supplied)

48. As a court of plenary jurisdiction, the writ court while exercising powers under Article 226 of the Constitution is free to adopt its own procedures and follow them. It cannot be compelled to follow the procedures prescribed in the CPC. This is so for the specific provision made in its Section 141.

49. The High Court while exercising jurisdiction under Article 226 of the Constitution has jurisdiction to pass appropriate orders. Such power can neither be controlled nor affected by the provisions of Order XXI Rule 90 of the CPC. It would not be correct to say that the terms of Order XXI Rule 90 should be mandatorily complied with while exercising jurisdiction under Article 226 of the Constitution. Proceedings under Article 226 of the Constitution stand on a different footing

when compared to the proceedings in suits or appeals arising therefrom.

50. The High Court exercises its writ jurisdiction under Article 226 of the Constitution of India, whereas the Civil Courts exercise their jurisdiction in terms of the provisions of the respective State Civil Courts Acts read with Section 9 of the CPC. The High Court exercises constitutional function, the Civil Court exercises a statutory function. The High Court exercises a wide power under Article 226 of the Constitution of India and in a given situation, it can even mould the reliefs in order to do substantial justice between the parties.

51. Where a particular mode is prescribed for doing an act and there is no impediment in adopting the procedure, the deviation to act in a different manner which does not disclose any discernible principle which is reasonable itself is liable to be labelled as arbitrary. The State action must be informed by reason and it follows that the action uninformed by reason is per se arbitrary. The basic requirement of Article 14 is fairness in action by the State and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review not only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. The public authorities are governed by the “rule of law”. Such authorities are constitutionally obliged in law to maintain absolute fairness and transparency during the conduct of the auction sale right from the initiation of the same till its completion. Judicial audit and scrutiny play a key role in ensuring that the public authorities do not act in an unreasonable manner.

52. The dictum as laid by this Court in Tata Cellular v. Union of India reported in (1994) 6 SCC 651 is that the judicial power of review is exercised to rein in any unbridled executive functioning. It was observed that the restraint has two contemporary manifestations viz. one is ambit of judicial intervention and the other covers the scope of the court’s ability to quash an administrative decision on its merits. These restraints bear the hallmarks of judicial control over administrative action. It was held that the principle of judicial review is concerned with reviewing not the merits of the decision in support of which the application for judicial review is made, but the decision-making process itself. It was held that the principle of judicial review would apply to the exercise of contractual powers by the Government bodies in order to prevent arbitrariness or favouritism. It was held that the duty of the court is to confine itself to the question of legality and its concern should be whether a decision-making authority exceeded its powers; whether it committed an error of law or committed a breach of the rules of natural justice or reached a decision which no reasonable tribunal would have reached or, abused its powers. The grounds upon which an administrative action can be subjected to judicial review are classified as illegality, irrationality and procedural impropriety. In that very decision, while deducing the principles from various cases referred, it was held that the modern trend points to judicial restraint in administrative action; that the Court does not sit as a court of appeal but merely reviews the manner in which the decision was made; that the court does not have the expertise to correct the administrative decision and if a review of the administrative decision is permitted, it will be substituting its own decision, without the necessary expertise which itself may be fallible; that the terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract; and, that the government must have freedom of contract, i.e. a free-play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere.

However, the decision must not only be tested by the application of Wednesbury principle of reasonableness, but must be free from arbitrariness not affected by bias or actuated by mala fides. Moreover, quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

53. In Jagdish Mandal v. State of Orissa and Others reported in (2007) 14 SCC 517, this Court observed as under:

> "22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made "lawfully" and not to check whether choice or decision is "sound". When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold." (Emphasis supplied)

54. This Court in State of Punjab & Others v. Mehar Din reported in (2022) 5 SCC 648, after referring to both the aforesaid decisions held as under:

> "20. The scope of judicial review in the matters of tenders/public auction has been explored in depth by this Court in a catena of cases. Plausible decisions need not be overturned and, at the same time, latitude ought to be granted to the State in exercise of its executive power. However, allegations of illegality, irrationality and procedural impropriety would be enough grounds for courts to assume jurisdiction and remedy such ills." (Emphasis supplied)
>
> 55. We are of the view that in cases such as the one at hand wherein the legality, validity and propriety of the auction sale conducted by the State through its authorities is questioned on the ground of mala fides, undue favour for extraneous considerations and gross violation of the mandatory provisions of law, it would be hazardous to apply the principles enshrined in Order XXI Rule 90 of the CPC. Times have changed. Human values and ethics in public functionaries have degraded to a

considerable extent.

Corruption is on a rampage. Having regard to the same and in order to protect and uphold the rule of law, the courts have a duty to ensure that the State authorities have conducted public auctions in a fair and transparent manner and have not done anything by which public exchequer has suffered. It would be too much to say that although the writ court may find an auction sale conducted by a public functionary to be in gross violation of the mandatory provisions of law and the action of such public functionary to be arbitrary, yet the aggrieved party complaining about the same should be told to establish the dual conditions stipulated in Order XXI Rule 90 of the CPC. Once the action of the State is found to be unfair and arbitrary, then that is the end of the matter so far as a writ court is concerned. The first and the foremost aspect that the writ court should look into is fairness and transparency on the part of the State in conducting the auction sale so as to be in conformity with Article 14 of the Constitution.

56. The litigation at hand is one of gross violation of the mandatory provisions of the Revenue Code in so far as conduct of the auction sale is concerned. In terms of Section 194 of the Revenue Code, no sale shall take place until after the expiration of at least 30 days from the latest date on which any of the notice shall have been affixed as required by Section 193 of the Revenue Code. The materials on record reveal that the auction of the property was conducted before the expiry of 30 days' time as prescribed under Section 194 of the Revenue Code. At the cost of repetition, Section 194 of the Revenue Code is reproduced hereunder:-

> "Section 194: (1) Sale shall be made by auction by such persons as the Collector may direct.
>
> (2) No such sale shall take place on a Sunday or other general holiday recognised by the State Government¸ nor until after the expiration of at least thirty days in the case of immovable property, or seven days in the case of movable property, from the latest date on which any of the said notices shall have been affixed as required by section 193."
>
> 57. Further, in terms of Section 195 of the Revenue Code, a fresh notice is required to be issued if the sale is postponed for any reason beyond 30 days and a fresh proclamation and notice has to be issued unless the defaulter consents to waive it. In this regard, it is relevant to note that a fresh proclamation was made on 23.11.2008 in furtherance of Section 195 of the Revenue Code. At the cost of repetition, Section 195 of the Revenue Code is reproduced hereunder:-
>
> "Section 195. Postponement of sale.—The sale may from time to time be postponed for any sufficient reason:
>
> Provided that, when the sale is postponed for a period longer than thirty days a fresh proclamation and notice shall be issued unless the defaulter consents to waive it."

58. Various illegalities were committed even in confirming the sale. In a process of sale, first the sale is to be conducted, then the proceeds are required to be received. It is only after the receipt of the proceeds that sale confirmation is required to be made by the collector and thereafter sale certificate and possession is to be handed over. In the present case, the sale was conducted and concluded on the same day i.e., 03.12.2008. The sale certificate was issued on the same day and that too without the confirmation from the collector and the possession was also handed over on the very next day.

59. From a bare perusal of Section 212 of the Revenue Code, it is evident that the purchaser can be put into possession only after confirmation of sale and the sale certificate being handed over to the purchaser. However, in the present case, the appellant was put in possession on 04.12.2008 and the sale of property was confirmed on 15.01.2009 by the Additional Collector, which is per se illegal in nature. Again at the cost of repetition, Section 212 of the Revenue Code is reproduced hereunder:-

"Section 212. On confirmation of sale, purchaser to be put in possession. Certificate of purchase.— After a sale of any occupancy or alienated holding has been confirmed in the manner aforesaid, the Collector shall put the person declared to be the purchaser into possession of the land and shall cause his name to be entered in the land records as occupant or holder in lieu of that of the defaulter and shall grant him a certificate to the effect that he has purchased the land to which the certificate refers."

60. Indisputably, although a specific objection was raised by the IFCI on 10.12.2008, as recorded by the Tahsildar in its letter dated 19.12.2008, yet the objection was suppressed from the Additional Collector.

61. On 07.01.2009, the Additional Collector, Head Office Jawar directed the respondent no. 4 to submit a detailed report on whether it had fulfilled all the conditions as stipulated under Section 208 of the Revenue Code. At the cost of repetition, Section 208 of the Revenue Code is reproduced hereunder:-

"Section 208: Order confirming or setting aside sale.—On the expiration of thirty days or, as the case may be, one hundred and eighty days from the date of the sale, if no such application as is mentioned in section 207 has been made, or if such application has been made and rejected, the Collector shall make an order confirming the sale:"

62. However, respondent no. 4, vide its letter dated 12.01.2009 addressed to the Additional Collector, Head Office Jawar, misinformed that except for the writ petition pending before the High Court of Bombay, no other objection was received and thereby all requirements under Section 208 of the Revenue Code had been

fulfilled, despite IFCI raising its objections.

63. From the aforesaid, the following inescapable conclusions are discernible:

a. The sale of the Property took place before the expiry of the mandatory 30 days' notice. This clearly shows that the sale was conducted in breach of the provisions of Section 194 of the Revenue Code. The notice was issued on 19.11.2008 and the auction came to be conducted on 03.12.2008.

b. The sale certificate was issued on the same day, i.e., on the date of the auction itself, much before the confirmation of sale by the Additional Collector. This clearly shows that the sale was conducted in breach of the provisions of Section 212 of the Revenue Code.

c. The purchaser, that is, the appellant was put in possession of the property much before the sale came to be confirmed i.e. on 15.01.2009 and that too prior to the cheque being realised. This clearly shows that the sale was conducted in breach of the provisions of Sections 212 and 208 respectively of the Revenue Code.

d. The undue haste exhibited by the Tahsildar in completing the sale in favour of the appellant speaks for itself. Why did the Tahsildar supress an important fact before the Additional Collector as regards the objections received by him from IFCI? This itself indicates that there was some collusion between the Tahsildar and the appellant.

64. The aforesaid lapses, in our opinion, cannot be termed as irregularity. Once it is evident that the mandatory provisions as stipulated under the rules and regulations are not followed or abridged, any action pursuant to the same could be termed as gross illegality. There is a fine distinction between illegality and irregularity. Whereas the former goes to the root of the matter and renders the action null and void, of no effect whatsoever, the latter does not ipso facto invalidate the action, unless prejudice is caused to the person making a complaint, even if, for the purposes of Order XXI Rule 90 of the CPC the lapses we have taken note of could be termed as material irregularities going to the root of the matter.

65. Almost a century back, in Ashutosh v. Behari Lal (1908) 35 Cal 61, drawing the distinction between 'nullity' and 'irregularity', Mookerjee, J. stated; "No hard and fast line can be drawn before a nullity and irregularity; but this much is clear, that an irregularity is a deviation from a rule of law which does not take away the foundation of authority for the proceeding, or apply to its whole operation, whereas a nullity is a proceeding that is taken without any foundation for it or is so essentially defective as to be of no avail or effect whatever, or is void and incapable of being validated".

66. Whether a provision falls under one category or other is not of easy discernment, and in the ultimate analysis it depends upon the nature, scope and object of a particular provision. A workable test, however, has been laid down in Holmes v. Russel (1841) 9 Dowl 487, wherein it was held thus:

> "It is difficult sometimes to distinguish between an irregularity and a nullity, but the safest rule to determine what is an irregularity and what is a nullity is to see whether the party can waive the objection; if he can waive it, it amounts to an irregularity; if he cannot, it is a nullity." [see Dhirendra Nath v.
>
> Sudhir Chandra] (Emphasis supplied)

67. If we were to condone or overlook all the illegalities we have taken note of in para 63 of this judgment, applying the provisions of Order XXI Rule 90 of the CPC, the same would result in nothing but gross travesty of justice. Bureaucracy feels that accountability is an impediment to efficient discharge of the duty. Accountability is no more and no less than, the concept of accountability of a private concern to their shareholders. There is a distinction between prying into details of day-to-day administration and of the legitimate actions or resultant consequences thereof. To enthuse efficiency into administration, a balance between accountability and autonomy of action should be carefully maintained. Over-emphasis on either would impinge upon public efficiency. But undermining the accountability would give immunity or carte blanche power to deal with the public property or of the debtor at whim or vagary. Whether the public authority acted bona fide would be gauged from the impugned action and attending circumstances. The authority should justify the action assailed on the touchstone of justness, fairness, reasonableness and as a reasonable prudent owner. Test of reasonableness is stricter. The public functionaries should be duty conscious rather than power charged. Its actions and decisions which touch the common man have to be tested on the touchstone of fairness and justice. That which is not fair and just is unreasonable. And what is unreasonable is arbitrary. An arbitrary action is ultra vires. It does not become bona fide and in good faith merely because no personal gain or benefit to the person exercising discretion has been established. An action is mala fide if it is contrary to the purpose for which it was authorised to be exercised. Dishonesty in discharge of duty vitiates the action without anything more. An action is bad even without proof of motive of dishonesty, if the authority is found to have acted contrary to reason. [See: Mahesh Chandra v. Regional Manager, U.P. Financial Corporation & Ors : (1993) 2 SCC 279] ii. Whether the Additional Commissioner, Konkan Division, Maharashtra had the jurisdiction to decide the two appeals filed by the respondent nos. 1 and 6 respectively under Section 247 of the Maharashtra Land Revenue Code, 1966?

68. We shall now proceed to deal with the contention canvassed on behalf of the appellant that the Additional Commissioner, Konkan Division, State of Maharashtra had no jurisdiction to adjudicate the two appeals filed by the respondent no. 1 and respondent no. 6 herein respectively. It was argued that the appeals filed before the Additional Commissioner under Section 247 of the Revenue Code were not maintainable as there was a remedy available under Section 210 of the same code.

69. Application before the Collector to get the Sale set aside has to be made within a period of 30 days. It is after considering the objections that the sale is to be confirmed. Section 210 of the Revenue Code reads:

> "Section 210. Application to set aside sale by person owning to holding interest in property.— (1) Where immovable property has been sold under this Code, any person

> either owning such property or holding an interest therein by virtue of a title acquired before such sale may, at any time within thirty days from the date of sale, apply to the Collector to have the sale set aside on his holding depositing-
>
> (a) For payment to the purchaser a sum equal to five per cent of the purchase money
>
> (b) For payment on account of the arrear, the amounts specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may have been paid since the date of sale on that account; and
>
> (c) The cost of the sale:
>
> Provided that, such application may be made by such person belonging to a Schedule Tribe within one hundred and eighty days from the date of sale.
>
> (2) If such deposit is made within thirty days or, as the case may be, one hundred and eighty days from the date of sale, the Collector shall pass an order setting aside the sale."

70. As rightly argued by Mr. Dave, the said remedy was rendered illusory as the sale was finalised by the Tahsildar much before the confirmation by the Collector. In fact, the sale certificate was issued & the possession was also handed over to the appellant. The confirmation was done by the Tahsildar much before the expiry of 30 days. There was nothing left for the Collector to consider and decide under Section 210 of the Revenue Code. It is further pertinent to note that the provision may be applicable in case of owner of the property but not to a lender who has valid subsisting mortgage. The argument that lender is not required to make deposit before challenging the sale is not something which is borne on plain reading of the language of Section 210.

71. Section 210(1) of the Revenue Code provides that an application can be made where an immovable property has been sold under the Revenue Code by i) owner of the property; and ii) holding interest therein by virtue of a title acquired before such sale. It would be relevant to state that the respondent No. 6 does not fall within the category as provided under Section 210(1) of the Revenue Code nor has the respondent No. 6 claimed to be the owner of the property or has an interest in the property by virtue of the "title acquired".

72. The confirmation of the sale had no bearing after the issuance of sale certificate. Therefore, the remedy under Section 210 was rendered illusory and not a remedy actually available as the certificate of sale was already issued. Further, once the sale certificate is issued, then the remedy falls under Section 247 instead of Section 210 of the Revenue Code. At the cost of repetition, Section 247 of the Revenue Code is reproduced hereunder:

> "Section 247: Appeal and appellate authorities.—(1) In the absence of any express provisions of the Code, or of any law for the time being in force to the contrary, an appeal shall lie from any decision or order passed by a revenue or survey officer

specified in column 1 of the Schedule E under this Code or any other law for the time being in force to the officer specified in column 2 of that Schedule whether or not such decision or order may itself have been passed on appeal from the decision or order of the officer specified in column 1 of the said Schedule:

Provided that, in no case the number of appeals shall exceed two. (2) When on account of promotion or change of designation an appeal against any decision or order lies under this section to the same officer who has passed the decision or order appealed against, the appeal shall lie to such other officer competent to decide the appeal to whom it may be transferred under the provisions of this Code."

73. Assuming for the moment that the Additional Commissioner had no jurisdiction to adjudicate and decide the two appeals filed by the respondent No. 1 and respondent No. 6 respectively, yet the common order passed by the Additional Commissioner allowing the appeals and remanding the matter back to the authority concerned could not have been disturbed and the High Court rightly did not disturb the same. Had the High Court taken the view that the Additional Commissioner had no jurisdiction and the order passed by it was a nullity, the result would have been the revival of the illegal order passed by the Additional Collector confirming the sale.

74. It is well settled principle in law that issuance of a writ or quashing/setting aside of an order if revives another pernicious or wrong or illegal order then in that eventuality the writ court should not interfere in the matter and should refuse to exercise its discretionary power conferred upon it under Article 226 of the Constitution of India. The writ court should not quash the order if it revives a wrong or illegal order. Vide : Gadde Venkateswara Rao v. Government of Andhra Pradesh, AIR 1966 SC 828; Maharaja Chintamani Saran Nath Shahdeo v. State of Bihar, (1999) 8 SCC 16: AIR 1999 SC 3609: 1999 AIR SCW 3623; M.C. Mehta v. Union of India, (1999) 6 SCC 237: AIR 1999 SC 2583; Mallikarjuna Mudhagal Nagappa v. State of Karnataka, (2000) 7 SCC 238: AIR 2000 SC 2976: 2000 AIR SCW 3289; and Chandra Singh v. State of Rajasthan, (2003) 6 SCC 545: AIR 2003 SC 2889: 2003 AIR SCW 3518 and Raj Kumar Soni v. State of U.P., (2007) 10 SCC 635.

G. CONCLUSION

75. In view of the foregoing discussion, we are of the view that no interference is warranted with the impugned judgment of the High Court. However, the facts and circumstances of this case have left us with an uphill task to mould the final order necessary to be passed in order to do substantial justice with the parties to this litigation.

76. Having taken the view that the High Court committed no error, much less any error of law, we could have dismissed both the appeals and closed this litigation. However, doing the same will put the appellant in immense difficulties. As noted in the earlier part of this judgment, the appellant has set up an oxygen cylinder manufacturing plant on the suit property. It has invested a huge amount in setting up this plant and has been running this plant for almost 15 years. Approximately 200 employees are working in the said plant. If the possession of the suit property is taken over, then the plant will have to be dismantled unless in any fresh auction proceedings some person is interested in

taking over the entire plant with the land. In such circumstances, we deem fit to give one opportunity to the appellant to save its industrial unit set up on the subject land. If the appellant wants to save the industrial unit and the land, it must deposit a sum of Rs. 4,00,00,000/- (Rupees Four Crore Only) with the respondent no. 6-ARCIL towards full and final settlement of all liabilities. No other lender or financial institution shall thereafter put forward any further claim, even if any. It is for the respondent no. 6-ARCIL to deal with such a situation.

77. In view of the aforesaid, both the appeals are allowed in part. While affirming the impugned judgment and order passed by the High Court, we direct the appellant to deposit a sum of Rs. 4,00,00,000/- (Rupees Four Crore Only) with the respondent no. 6-ARCIL within a period of six months from today, failing which we shall proceed to pass further orders.

78. Let this matter be notified once again before this Bench to report whether the appellant has deposited the amount of Rs. 4,00,00,000/- (Rupees Four Crore Only) with ARCIL or not. We clarify that if the appellant fails to deposit the amount, we shall direct the competent authorities to take over the possession of the entire unit with the land in question and put the same once again for sale by way of fresh auction process.

79. We may further clarify that if the appellant deposits the requisite amount within the stipulated period, then the contempt proceedings pending before the High Court of Bombay shall also stand terminated.

80. There shall be no order as to costs.

81. Pending applications if any shall stand disposed of.

.....J. (J. B. PARDIWALA) .....J. (MANOJ MISRA) New Delhi 9th July, 2024