

(2012) 09 GUJ CK 0056

Gujarat High Court

Case No: Special Civil Application No's. 4600, 4601, 4603, 4605 and 4615 of 2002

Jadeja Jitendrasinh
Chandrasinh

APPELLANT

Vs

Tax Recovery Officer,
Range 3 and 2

RESPONDENT

Date of Decision: Sept. 3, 2012

Acts Referred:

- Income Tax Rules, 1962 - Rule 61 , 63

Citation: (2013) 261 CTR 306 : (2012) 211 TAXMAN 215

Hon'ble Judges: Harsha Devani, J; Akil Abdul Hamid Kureshi, J

Bench: Division Bench

Advocate: J.P. Shah, for the Appellant; Pranav Desai, S.N. Soparkar and Mrs. Swati Soparkar, for the Respondent

Judgement

Akil Kureshi, J.

These petitions arise in common factual background. They have been heard together and are being disposed of by this common judgment. For the purpose of this judgment, we may record the facts as emerging from Special Civil Application No. 4600 of 2012.

1.1 The petitioner has challenged order dated 20.04.2001 passed by the Commissioner of Income Tax, Rajkot. By the said order, the Commissioner was pleased to set aside a proclamation for auction of certain immovable properties belonging to respondent No. 3 herein.

1.2 Respondent No. 3 had substantial outstanding dues of the Income Tax Department for a long period of time. To recover such dues, Tax Recovery Officer, Jamnagar, respondent No. 1 herein, published a notice dated 07.02.2000 for public auction of several parcels of land belonging to respondent No. 3. In the notice, it was stated that persons desirous of bidding during such public auction should

deposit a sum of Rs. 10,000/- before 10.03.2000. The auction would be held on 23.03.2000. Income tax dues, for which such auction was being held, was shown at Rs. 2,16,29,000/-. The notice specified that the highest bidder would be allotted/sold the land. Such bidder shall have to deposit 25% of the amount by cash or demand draft on the spot. Remaining 75% would have to be deposited within fifteen days thereafter. It was indicated that the Recovery Officer retained the right to accept or reject any offer.

1.3 On 10.02.2000, however, the Recovery Officer issued a corrigendum in which the dues of respondent No. 3 were shown to be Rs. 15,06,76,539/-. Yet another correction came to be issued through a public notice dated 28.02.2000, wherein the outstanding amount was changed to Rs. 4,06,35,000/- and the date of auction was shifted to 31.03.2000.

1.4 On 31.03.2000, the petitioner participated in the auction proceedings. His offer was found highest and accepted by respondent No. 1 with respect to plot of land No. 9. Accordingly, the petitioner deposited 25% of the bid amount and additional 1% towards the fees. As per the terms of the advertisement, the petitioner had fifteen days of time to deposit the balance 75% of the amount.

1.5 It appears that in the meantime, respondent No. 1 was disputing the action of the Income Tax Department to auction his properties for recovery of tax dues on various grounds. On 04.03.2000, respondent No. 3 had petitioned to the Commissioner of Income Tax, Rajkot and challenged the very action of the Tax Recovery Officer in issuing the public advertisement for auction of his lands. He had raised several contentions including that for want of sufficient details it would not be possible for the department to realize the fair consideration for the lands in question, disputes with respect to the town planning and development plans were pending, that in the public advertisements widely differing figures of outstanding tax dues were mentioned from time to time and also that with respect to the dues of the department, respondent No. 3's dispute was pending before the High Court in writ petition where he had sought settlement by the Settlement Commission. Inter alia on such grounds in such petition, treated as an appeal at his request, the present respondent No. 3 made following prayers:

In view of the above, Shri S.D. Jadeja earnestly request that:

1. The auction be postponed till the new development plan lifting the reservation is approved.
2. The auction be postponed till Shri Jadeja's Special Civil Application in respect of KCSS matter is decided by the High Court.
3. The necessary sanction for the layout plan be obtained from Jamnagar Municipal Corporation so that in the auction whenever conducted, a better price can be realized.

4. The correct updated demand position may be made available.

5. The notice for auction whenever conducted may please be advertised widely and in national news papers with countrywide circulation.

1.6 Respondent No. 3 had requested the Recovery Officer to postpone the auction pending his disputes. Such request was not accepted. By 31.03.2000, the date fixed for public auction, since the Commissioner had not granted any stay in favour of respondent No. 3 on the above mentioned petition/appeal, the Tax Recovery Officer, Jamnagar proceeded to conduct such auction. However, before the petitioner deposited remaining 75% of the bid amount with the authorities, on 31.03.2000 itself, the Commissioner of Income Tax, Rajkot passed two separate orders. In first such order which was passed under Rule 80(3) of the Second Schedule under the Income Tax Schedule, 1961 (hereinafter referred to as "the Second Schedule" for short) he provided as under:

Whereas an appeal has been filed by the abovenamed tax defaulter against the order of the Tax Recovery Officer, Jamnagar, directing for sale of his immovable property located at Walkeshwarnagri, Jamnagar, by auction, on various grounds mentioned therein.

Pending the decision of this appeal, execution of the recovery certificate issued in the above case, is hereby stayed till further orders.

1.7 By a separate notice also issued on 31.03.2000, the Commissioner of Income Tax, Rajkot provided as under:

Notice

Shri S.D. Jadeja of Jamnagar, has filed a petition before the Commissioner of Income Tax, Rajkot on 4th March, 2000, objecting to the auction of his immovable property located at Jamnagar, by the Tax Recovery Officer, Jamnagar, for recovery of his tax dues. This petition is pending before the Commissioner of Income Tax, Rajkot. The auction being conducted by the Tax Recovery Officer, Jamnagar is subject to confirmation under Rules 61 & 63 of the Second Schedule to the income tax Act, 1961, by the Tax Recovery Officer, and the disposal of appeal, if any, against the same, by the Commissioner of Income Tax, Rajkot, under Rule 86 of the income tax Act, 1961.

2. This is for the information of the general public.

1.8 Since the Tax Recovery Officer, who was in charge of the public auction, was communicated such orders, he could not thereafter accept any further sums from the petitioner. The opinion of the Commissioner of Income Tax, Rajkot by his office was conveyed to the Tax Recovery Officer on 06.04.2000 in following terms:

In the appeal U/R 86, the sale proclamation U/R 53 issued by the TRO is being challenged. Prima facie it is seen that the proclamation issued by the TRO on

28/2/2000 does not contain the mandatory information required to be included U/R 58(b), (c) & (cc) of II Schedule. By the order U/R 86(3) the further execution of the Recovery Certificates has been stayed till further orders. Therefore, the TRO is to maintain the status quo, as it obtained on 31.03.2000 when the order U/R 86(3) was served on him, till the order U/R 86(3) is modified or the appeal is decided. It follows that he can not accept balance sale price from the purchasers till the order U/R 86(3) can be modified. The time limit of 15 days U/R 57(2) will operate from the date of vacation of the stay granted U/R 86(3). The TRO may inform the purchaser, and request them to await final orders on the appeal of the assessee.

1.9 On 07.04.2000, the Tax Recovery Officer, Jamnagar wrote a letter to the petitioner and conveyed as under:

Kindly refer to the auction proceedings dated 31st March, 2000 of Walkeshwarinagri land Phase IV in the case of Shri S.D. Jadeja.

2. By paying 25% of the amount you have initially established your right on Plot No. 9. The sale certificate can only be issued after obtaining the remaining 75% amount of purchase price from you. As per Rule 57(2) you are supposed to make such 75% payment on or before 15th April, 2000. However, it is seen that due to the stay order received from the Commissioner of Income tax, Rajkot on 31.03.2000 at 3.15 p.m. in this office, remaining amount of 75% cannot be accepted by this office as status quo is to be maintained. You are, therefore, requested to please make such 75% payment after stay order is vacated or modified (within 15 days time of vacation of stay order.)

1.10 On 20.04.2000, Commissioner of Income Tax, Rajkot passed impugned order and allowed the appeal of respondent No. 3 herein. He set aside the proclamation for auction and subsequent proceedings of auction, under which, the plots of land were sold. In his order, he concluded that there was no proper application of mind or verification as to the actual outstanding of income tax and wealth tax dues of respondent No. 3 after taking into account the payments made by him. He was of the opinion that such error would vitiate the proclamation since requirement of Rule 53 of Second Schedule to specify as fairly and accurately as possible the amount of recovery for which the sale was ordered, was not satisfied. He also noted that proceedings were pending before the Gujarat High Court where respondent No. 3 had prayed for settlement under KVSS scheme. He, therefore, recorded that in respect of the demands, the disputes still exist. On such grounds, the appeal under Rule 86 of the Second Schedule came to be allowed.

We may notice that the present petitioner was not a party to such proceedings and the Commissioner of Income Tax principally considered the objections of respondent No. 3 to the auction proclamation and allowed such appeal. Be that as it may, the department conveyed such a decision of the Commissioner to the petitioner under communication dated 22.05.2001. The petitioner was requested to

attend the office within a week on receipt of the letter and collect the amount paid by him during the auction proceedings.

2. It is the case of the petitioner that during the pendency of the proceedings with the Commissioner and even thereafter, the petitioner went on making requests for supplying necessary documents and the orders to which the Commissioner did not oblige. Eventually, the petitioner, on 30.01.2002, addressed a detailed letter to the Commissioner of Income Tax, Jamnagar and inquired about the stage of the proceedings and also the position of the land in question. Since the petitioner did not receive any favourable reply, he filed the present petition and challenged the order passed by the Commissioner, Income Tax, Rajkot on 20.04.2001, after obtaining copy thereof.

3. Learned counsel, Mr. J.P. Shah for the petitioner submitted that the order and the manner, in which the same was passed, was wholly illegal. The Commissioner, despite full knowledge of the petitioner's highest bid and its acceptance by the Tax Recovery Officer on 31.03.2000, proceeded to allow the appeal of respondent No. 3, and consequently, set aside the sale proclamation and the auction itself without giving any opportunity to the petitioner of being heard. He submitted that the order thus, suffered from breach of principles of natural justice. The basic requirement of hearing the party likely to be affected by the outcome of the proceedings was not fulfilled. According to the counsel, the petitioner was vitally interested in such appeal proceedings and since he was likely to be adversely affected if such appeal was allowed.

4. In support of such contention, counsel relied on decision of the Apex Court in case of [Darshan Lal Nagpal \(dead\) by L.Rs. Vs. Government of NCT of Delhi and Others](#), in which the Supreme Court referred to various earlier decisions on the principles of natural justice and requirement of hearing of a person who is likely to be adversely affected by the order that the authority may pass.

5. Counsel further submitted that the petitioner had offered the highest price at a public auction held by the department for outstanding tax dues of respondent No. 3. The offer of the petitioner was accepted by the auctioning officer. 25% of the bid amount was deposited on spot. Remaining 75% amount, which was to be deposited in fifteen days, the petitioner was always ready and willing to pay. At such an advanced stage, the auction proceedings could not have been quashed and that too without hearing the petitioner.

6. Counsel submitted that even in equity gross injustice would be caused to the petitioner if the order of the Commissioner is allowed to stand. The auction was held way back in the year 2000. In the meantime, the land prices have gone up. If the petitioner is not granted benefit of his highest bid, irreparable injury would be caused to him.

7. Mr. Shah drew our attention to the communication dated 09.03.2000 made by the Tax Recovery Officer, Jamnagar to the Commissioner of Income Tax, Rajkot, in which he pointed out various reasons why the appeal of respondent No. 3 should be rejected. In such communication, Tax Recovery Officer had pointed out various efforts made for tax recovery of such respondent and the fact that such dues had remained outstanding for years together.

8. On the other hand, learned counsel, Mr. Soparkar for respondent No. 3 submitted that even before the date of auction, the respondent No. 3 had preferred a statutory appeal to the Commissioner. In such appeal, the very basis of the sale proclamation was questioned. The petitioner, who was at the time of filing of the appeal not in the picture, was neither necessary nor a proper party.

9. In support of such contention, counsel drew our attention to an order dated 11.02.2009 passed by this Court in Misc. Civil Application No. 2593 of 2009 in Special Civil Application No. 22581 of 2006. Counsel pointed out that the present respondent No. 3 had filed Special Civil Application No. 22581 of 2006 challenging the validity of auction proclamation for his income tax dues. Such petition was allowed by Division Bench of this Court by an order dated 09.02.2009. In the meantime, the auction was conducted. The highest bidder had, therefore, filed Misc. Civil Application No. 2593 of 2009 and sought recall of judgment dated 09.02.2009 passed in main petition on the ground that he was not heard. Division Bench rejected such a review petition holding that the review petitioner was not required to be heard.

10. Counsel further submitted that, in any case, the hearing the petitioner would be an empty formality since the petitioner has not challenged the order of the Commissioner on merits. Findings of the Commissioner, that the tax dues of respondent No. 3 for which the auction was being conducted were not accurately indicated in the public auction, cannot be faulted. In that view of the matter, no useful purpose would be served in providing hearing to the petitioner at this stage.

11. In this respect, counsel relied on the decision of the Apex Court in case of [Ashok Kumar Sonkar Vs. Union of India \(UOI\) and Others](#), wherein the Apex Court observed that the principle of natural justice cannot be put in a straitjacket formula and in a given case, unless prejudice is shown, the hearing may not be granted. It was observed as under:

27. It is also, however, well settled that it cannot put any straitjacket formula. It may not be applied in a given case unless a prejudice is shown. It is not necessary where it would be a futile exercise.

28. A court of law does not insist on compliance with useless formality. It will not issue any such direction where the result would remain the same, in view of the fact situation prevailing or in terms of the legal consequences. Furthermore in this case, the selection of the appellant was illegal. He was not qualified on the cut-off date.

Being ineligible to be considered for appointment, it would have been a futile exercise to give him an opportunity of being heard.

12. Counsel lastly submitted that there was considerable delay on the part of the petitioner in filing present petition. He pointed out that the Commissioner passed the impugned order on 20.04.2001. Such order was promptly conveyed to the petitioner by the department under communication dated 22.05.2001. The present petition came to be filed only on or around 15.04.2002. The petitioner has not explained such delay. Counsel submitted that subsequently, respondent No. 3 had succeeded in persuading this Court to require the settlement commission to entertain the request of the respondent No. 3 for a settlement. Such request was entertained and appropriate order was passed. Respondent No. 3 had also made payments in terms of such order. He submitted that though there are still disputes remaining with respondent No. 3 and the Department with respect to filing settlement of accounts, the entire basis on which the proclamation of sale was made has now changed.

13. Learned counsel, Mr. Pranav Desai for the department, in addition to adopting the submissions of the private respondent's counsel further submitted that the department had as early as in May, 2001 conveyed to the petitioner to collect his 25% of the amount paid. He took no steps in respect of the same for several years. He cannot claim such amount back, at any rate with interest.

14. Having thus heard the learned counsel for the parties, we may briefly recapitulate the facts. Respondent No. 3 had income tax dues. Non-payment of which led to the department issuing public notice holding the auction of several of his immovable properties on 31.03.2000. Such auction was held, in which, the petitioner offered highest price for Plot No. 9. He deposited 25% of the bid amount on the spot. However, before remaining amount could be deposited, the Commissioner of Income Tax, Rajkot in an appeal filed by respondent No. 3 under Rule 86 of Second Schedule, granted stay against any further proceedings. Eventually, such appeal came to be allowed by impugned order dated 20.04.2001. The short question is, could such appeal have been allowed without hearing the petitioner. If answer to such a question is in the affirmative, thereafter, the question whether despite the requirement of such hearing would it now be an empty formality to require fresh consideration of the appeal and disposal in accordance with law by the Commissioner. If on the other hand, our answer to the question itself is in the negative, further question of consideration whether such hearing would be an empty formality or otherwise may not arise.

15. In order to answer such question, we may notice some of the provisions contained in Second Schedule with respect to attachment and sale of immovable properties contained in part 3 thereof. Rule 48 pertains to attachment and provides for manner in which attachment of the immovable property of the defaulter shall be made. Rule 52 pertains to sale and proclamation of sale and authorises Tax

Recovery Officer to direct that any immovable property which has been attached or portion thereof shall be sold. Sub rule (2) of Rule 52 provides for issuance of a proclamation of intended sale of such property. Rules 53 to 55 pertain to the procedure with respect to the proclamation and the time of sale. Rule 56 pertain to sale by auction and provides that the sale shall be made by public auction to the highest bidder and shall be subject to confirmation by the Tax Recovery Officer. Rule 57 inter alia requires the highest bidder of the immovable property to deposit 25% of the purchase money immediately, in default of which, the property shall forthwith be resold.

16. Rule 60 pertains to application to set aside sale of immovable property on deposit and reads as under:

60. (1) Whether immovable property has been sold in execution of a certificate, the defaulter, or any person whose interests are affected by the sale, may, at any time within thirty days from the date of the sale, apply to the Tax Recovery Officer to set aside the sale, on his depositing:-

(a) the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, with interest thereon at the rate of [one and one-fourth per cent for every month or part of a month], calculated from the date of the proclamation of sale to the date when the deposit is made; and

(b) for payment to the purchaser, as penalty, a sum equal to five per cent of the purchase money, but not less than one rupee.

(2) Where a person makes an application under rule 61 for setting aside the sale of his immovable property, he shall not, unless he withdraws that application, be entitled to make or prosecute an application under this rule.

17. Rule 61 pertains to application to set aside the sale of immovable property on ground of non-service of notice or irregularity. Rule 62 pertains to setting aside sale where defaulter has no saleable interest. Rule 63 deals with confirmation of sale and reads as under:

63. (1) Where no application is made for setting aside the sale under the foregoing rules or where such an application is made and disallowed by the Tax Recovery Officer, the Tax Recovery Officer shall (if the full amount of the purchase money has been paid) make an order confirming the sale, and, thereupon, the sale shall become absolute.

(2) Where such application is made and allowed, and where, in the case of an application made to set aside the sale on deposit of the amount and penalty and charges, the deposit is made within thirty days from the date of the sale, the Tax Recovery Officer shall make an order setting aside the sale:

Provided that no order shall be made unless notice of the application has been given to the persons affected thereby.

18. Rule 64 provides for return of purchase money in certain cases and reads as under:

64. Where a sale of immovable property is set aside, any money paid or deposited by the purchaser on account of the purchase, together with the penalty, if any, deposited for payment to the purchase, and such interest as the Tax Recovery Officer may allow, shall be paid to the purchaser.

19. Rule 65 pertains to sale certificate. Sub rule (1) thereof provides that where a sale has become absolute, the Tax Recovery Officer shall grant a certificate specifying the property sold and the name of person who was at the time of sale is declared to be the purchaser. Sub rule 2 of 65 provides that such certificate shall state the date on which the sale become absolute.

20. Rule 86, which is contained in part 6 pertaining to miscellaneous provisions provides for appeals. Rule 86 reads as under:

86. (1) An appeal from any original order passed by the Tax Recovery Officer under this Schedule, not being an order which is conclusive, shall lie to the Chief Commissioner or Commissioner]

(2) Every appeal under this rule must be presented within thirty days from the date of the order appealed against.

(3) Pending the decision of any appeal, execution of the certificate may be stayed if the appellate authority so directs, but not otherwise.

(4) Notwithstanding anything contained in sub-rule (1) where a chief Commissioner or Commissioner is authorized to exercise powers as such in respect of any area, then, all appeals against the orders passed before the date of such authorization by any Tax Recovery Officer authorized to exercise powers as such in respect of that area, which is included in that area, shall lie to such Chief Commissioner or Commissioner.

21. From the above, rule position it can be seen that proclamation of sale and holding a public auction are only the initial steps towards sale of immovable property of a tax defaulter to recover such amount through sale of his properties. The highest bidder, whose offer is accepted, during such public auction, has the responsibility to deposit 25% of the purchase money on spot, failing which, the acceptance of offer stands revoked. However, before the sale can be confirmed in favour of the highest bidder, several steps are to be completed and intervening factors to be taken into account. For example within fifteen days from the date of public auction, the purchaser has to pay remaining 75% of the amount. Even then the sale is subject to confirmation and the tax defaulter, at various stages, has right

either to intervene, pay off the tax or question the very proclamation. For example, under Rule 60 he can apply to set aside the sale of immovable property upon deposit of the amount of tax dues, of course before the confirmation of sale. He also has a right to question any order that the Tax Recovery Officer may have passed under the schedule. Rule 86(1) provides for a statutory appeal against any such order before the Chief Commissioner or the Commissioner. Sub-rule (3) empowers the appellate authority, pending its final decision in appeal, to stay the execution of the certificate.

22. It was in exercise of such statutory right of appeal that the respondent No. 3 carried order of the Tax Recovery Officer before the Commissioner and questioned the very proclamation of sale. When such appeal was filed, the auction was not even conducted. The petitioner was nowhere in picture. In such appeal, we fail to see how at least at the outset the petitioner could have been made a party. The question of joining the petitioner as a respondent in such an appeal at a later stage also in our view, would not arise since by merely being the highest bidder in a public auction, the petitioner did not get any vested right in the property. His time for depositing remaining 75% of the amount had not yet expired nor before such date he had deposited the remaining amount. Even after depositing the remaining 75% of the amount, the sale was subject to confirmation. Long before such steps could be completed, the Commissioner on the very day of the public auction, had stayed the entire proceedings. In case of [Desh Bandhu Gupta Vs. N.L. Anand and Rajinder Singh](#), in context of somewhat similar provisions in CPC for execution and recovery of the money for and on behalf of judgment creditor, observed that the auction purchaser gets a right only on confirmation of sale and till then his right is nebulous and has only right to consideration for confirmation of sale.

23. Even this Court, in order dated 11.12.2009 passed in Misc. Civil Application No. 2593 of 2009, came to somewhat similar conclusion. We may recall that such Misc. Civil Application which was filed by a successful auction bidder who desired that the sale proclamation which was set aside by the High Court on a petition by the tax defaulter (in the said case also who happened to be present respondent no. 3) be recalled since such order was passed without hearing him. In that context, the Court observed as under:

7. Furthermore, it is an accepted position that the applicants are merely highest bidders at the auction sale conducted by the Income Tax Department. Thus, in law, till the point of time the sale is confirmed and sale certificate issued in favour of the applicants by Income Tax Department the applicants would merely be offerers whose offer may or may not be accepted by Income Tax Department. In the circumstances, it is not possible to accept the contention that the applicants are persons who are directly affected by the outcome of the dispute between the tax defaulter, whose property is put up for auction sale, and the Income Tax Department.

24. Additionally, we also find that though the Commissioner's impugned order was conveyed to the petitioner on 22.05.2001, the petitioner took considerable time in moving the present petition. This in isolation may not have been the sole consideration for us to reject the petition on the ground of delay. However, along with other relevant facts noted above, such delay also would be an additional ground not to entertain the petition.

25. Though full facts are not on record, as pointed out by the counsel for respondent No. 3, several developments have taken place. Respondent No. 3 had succeeded before this Court in requiring the settlement commission to entertain his application for settlement on which certain demand orders were passed. Payments were also made. The entire basis for sale proclamation for the tax dues for which the same was issued has undergone a major change. On all such grounds, we do not find that the petitioner has made out any case for interference. In view of above conclusions, we do not need to go into the question whether hearing, even if granted, would be an empty formality and that therefore, no such provision should be made.

26. Before closing we need to dispose of one last aspect namely of the deposit of 25% of the bid offer made by the petitioner way back in March, 2000. Such amount admittedly is still lying with the department. That such amount must be returned to the petitioner, we have no hesitation. The question is, should it be done with some reasonable interest? It is true that the department, on 22.05.2001, conveyed to the petitioner that in view of the order passed by the Commissioner, he may approach the office for refund of the amount deposited by him. It is true that despite such communication, the petitioner did not accept such amount. Such conduct, however, in our view, should not be held against the petitioner. The petitioner was desirous of prosecuting his remedies against the order of the Commissioner. His plea was that the auction must be completed and property must be sold to him at the price agreed. If the petitioner had voluntarily accepted the refund of deposit amount, he ran a considerable risk of being told that having given up all his claims, the prayer for sale of the land at an agreed price would not arise. His conduct, therefore, of not claiming back such amount pending litigation, in our view, would not go against him in getting the such amount back with reasonable interest. The department had accepted the said amount and used it for considerable period, of course despite its offer to return the same to the petitioner. In the result while dismissing the petitions and refusing to interfere with the Commissioner's impugned order dated 20.04.2001, the departmental authorities are directed to return to the petitioner the amount deposited by him on 31.03.2000 with simple interest @ 8% per annum from such date till actual payment. Rule is discharged.