IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 5319 OF 2012

Vivek Dal Mill (A registered partner firm)
Through its partners,
R/o. C-22, MIDC, Chikalthana,
Aurangabad & ors ...Petitioners

versus

Lok Vikas People Co-op. Bank Ltd.,
Lok Vikas Bhavan, near Seven Hill
Fly Over, Jalna Road, Aurangabad
& anr ...Respondents

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Mr. D.S. Bharuka, Advocate for petitioners
Mr. A.G. Choudhari, Advocate for respondents

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CORAM : N.W. SAMBRE, J.

DATE : 23rd NOVEMBER, 2015

ORAL ORDER :

The petitioners suffered an order dated 28/08/2011 under Section 101 of the Maharashtra Co-operative Societies Act, whereby it was ordered that the petitioners to pay amount of Rs.43,43,826/- to the respondent-bank towards outstanding loan dues. The said order was not questioned further under Maharashtra Co-operative Societies Act by the petitioners, as such, the said order has attained finality since 28/08/2011.

2. Subsequent thereto, the property of the petitioners was

put to auction for satisfying debt and respondent-bank has issued auction notice for sale of the property which was mortgaged. The auction proceedings are questioned by the petitioners before this Court on following grounds; (a) that the property in question which is claimed to have been mortgaged, no registered mortgage is executed in favour of respondent-bank in relation to the property in question, (b) M.I.D.C. who has granted permanent lease to the present petitioners has not given No Objection for auction of the property in question, (c) there is non compliance of Rule 107 (f) of the Rules framed under Maharashtra Co-operative Societies Act, particularly in the light of point (a) referred to above and (d) the amount mentioned in the recovery certificate issued under Section 101 of the Act is disputed including calculation.

3. Mr. Bharuka, learned Counsel for the petitioners, while trying to canvass above referred issue, has relied upon the judgment of this Court in the matter of ***Veetrag Investments & Finance Co. vs. Premier Brass & Metal Works Pvt. Ltd.*** reported in ***2002(4) Bom.C.R. 169***, ***Veetrag Investments & Finance Co. vs. Premier Brass & Metal Works Pvt. Ltd.*** reported in ***2003(2) Bom.C.R. 812***, judgment under Rule 107 of the Maharashtra Co-operative Societies Rules, 1961 in the matter of ***Suresh Malappa Shetty vs. Special Recovery Officer and others*** reported in ***2003(3) Mh.L.J. 248*** so as

to substantiate the above referred points.

4. While opposing the above referred prayer, Mr. Choudhari, learned Counsel for the respondents would urge that by registered deed property in question is mortgaged with respondent-bank at the time of obtaining loan by petitioners. He would then urge that this Court while showing indulgence at the request of petitioners on 04/07/2012 has stayed auction proceedings subject to deposit of Rs.8,25,000/- within period of three weeks. The petitioners though have deposited the said amount, however subsequent satisfaction of balance dues certified under Section 101 of the Act is not made till date. He would urge that certificate under Section 101 of the Act since has attained finality, respondent authority has every right to auction the property for recovery of its dues. According to him, the petitioners are enjoying interim relief without satisfying money decree. He would then urge that there is compliance of Rules 107 and the provisions of the Co-operative Societies Act and there is no departure or non-complaince.

5. Having considered the rival submissions of the parties, grounds amongst others raised, is about dispute in calculation of payment of dues. I am afraid, in extraordinary jurisdiction under Article 227, particularly having suffered recovery certificate under

Section 101 of the Act on 28/08/2011, which has attained finality, it is not open for the petitioners to question quantum fixed in recovery certificate during auction proceedings, that too in the present petition under Article 226 and 227 of the Constitution, scope of which is required to be taken into account.

6. Apart from above facts, the claim of the petitioners as regards absence of No Objection Certificate from M.I.D.C. for mortgaging property, non-registration of mortgage deed and non compliance of Rule 107 (f) is concerned, it is required to be noted that, for making out non compliance, reliance is placed upon the judgment of Apex Court in the matter Suresh Shetty (supra), Mr. Bharuka, learned Counsel for petitioners would urge that encumbrance certificate from registration department prior to attachment of 10 years was not produced.

It is to be noted that said provision has hardly any applicability to the case of the petitioners, as said provision appears to be in aid of third person who is claiming his right in the property, under attachment and auction by virtue of such encumbrance created in his favour by the owner of the property under auction or otherwise. No. such right of encumbrance if any is demonstrated in the present petition by petitioners. I am fortified in my view in the light of judgment rightly pointed out by Mr. Bharuka, which speaks of dispute between tenant, landlord and recovery officer wherein the High Court, while interpreting the provisions of Rule 107 (f), has rejected motion moved by tenant, seeking stay to the auction. Mr. Choudhari, learned Counsel for the respondent-bank, in my opinion, is right in submitting that said issue will be hardly of any assistance to the petitioners. Para 14 of the judgment in the matter of Suresh Shetty cited supra, reads thus :

> "14. In my view, none of these submissions are sustainable. Rule 107 contemplates encumbrance certificate from the Registration Department for a period of not less that 12 years prior to the date of attachment of the property sought to be sold so as to establish encumbrance on the property. Reading of this rule as a whole would unequivocally show that the encumbrance must be created by a document which is required to be registered with the office of the Sub-Registrar under the provisions of the Registration Act. So far as the present document styled as leave and licence agreement is concerned, this document has not been registered with the Registration Department, what is contemplated under the aforesaid sub-rule (11)(f) of rule 107 of the said Rules is the registered encumbrance, as such; unregistered document under which leave and licence has been created cannot be said to be an act creating encumbrance on the property as contemplated under rule 107(11)(f) of the said Rules. The leave and licence agreement in question cannot be said to

> be an encumbrance on the suit flat as contemplated under the said Rules. The submission made in this behalf is thus liable to be rejected being without any merit."

7. Apart from above, it is required to be noted that at the fag end of recovery proceedings, the petitioners have come out with the case of non-registration of mortgage, which in fact is disputed by learned Counsel for respondent bank. According to respondents, registered mortgage is already placed on record and there is compliance of Rule 107(f) of the Rules and so far as both the cases as are cited by Mr. Bharuka in the matter of Veetrag Investments and Finance Company (supra) are concerned, factual matrix as is narrated therein and consideration thereof has hardly any application to the present case as same are under the provisions Code of Civil Procedure, whereas auction is sought to be conducted for giving effect to recovery certificate under Section 101 of the Act for which there is hardly any applicability of Civil Procedure Code. It is noticed from record that the petitioners are trying to avoid execution of recovery certificate, which is stalled for more than five years, as they have not deposited any additional amount to show their bonafide to satisfy their liability which is already adjudicated and not questioned till date before any authority.

8. In my opinion, no interference in extra-ordinary

jurisdiction is warranted. The writ petition fails, same stands dismissed.

[**N.W. SAMBRE, J.]**

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