IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 2754 OF 2013

Kausar Sultana W/o Sk. Shakeel
Age : 40 yrs., Occu. Household,
R/o Plot No. A 83, Arif Colony,
Near Faizan Maszid,
Dist. Aurangabad. ….PETITIONER

VERSUS

1) City Finanacial Consumer Finanace India Ltd.
Having its registered officer at
3, LSC, Pushpa Vihar, New Delhi – 110062
Having its branch At Nirala Bazar, Aurangabad
Through its authorized officer.

2) Assets Reconstruction Company (India) Ltd (ARCIL)
Having its registered office at Shreepati Arcade,
August Kranti Marg, Nana Chowk, Mumbai-40036
And having its branch office at ARCIL ARMS
1st Floor, City Pride Buildikng, Mondha Naka,
Jalana Road, Aurangabad – 431 006.
Through its Authorized officer.

3) Mohammad Parvez Hamiduddin
Age : 40 yrs, Occu. Business,
R/o : Manzoorpura, in front of Shalimar Bekri,
Aurangabad.

4) Kotak Mahindra Bank Ltd. (Asset Reconstruction division)
through Authorised Officer, Saurabh Hall
Sasun Hospital Road, Pune.

RESPONDENTS.

. . .

Mr. C.R. Thorat, Advocate for the petitioner-employer
Mr. S.S. Gangakhedkar, Advocate for respondent No.1.
Mr. L.D. Vakil, Advocate for respondent No.2
Mr. A.D. Kasliwal, Advocate for respondent No.3.
Mr. N.T. Tribhuwan, Advocate for respondent No.4
Mr. R.C. Bora, Advocate for intervenor.

CORAM : K.K. SONAWANE, J.
DATE OF RESERVING THE ORDER : 22ND SEPTEMBER, 2016.
DATE OF PRONOUNCEMENT OF ORDER : 26TH OCTOBER, 2016.

PER COURT:

1] Rule. Rule made returnable forthwith. Heard finally, with the consent of parties.

2] The petitioner is assailing the order below Exh. 61 passed in R.D. No. 149 of 2009 dated 25.10.2012 by the Executing Court, Aurangabad, rebuffing the relief prayed in the application purportedly filed under Order 21 Rule 89 of CPC, to set aside the auction sale on deposit of the amount. The petitioner also agitated the propriety and validity of the common orders below Exh. 29 and 74 dated 27.2.2013, of the Executing Court, Aurangabad, thereby issuing directions to pay auction proceeds to the respondent No.2 ARCIL towards partial satisfaction of its secured debts as well as directions for payment of amount deposited in the court by the petitioner vide application under Order 21 Rule 89 of CPC to the respondent No.1 – Decree Holder.

3] The genesis of the petition culled out in brief is as under :-

That, the petitioner availed financial assistance of Rs. 5 Lakhs from the respondent No.1 City Financial Consumer Finance India Ltd., for purchase of immovable property I.e. Flat No.3, Noor Complex building located at S.T. Colony Aurangabad. The loan agreement was executed on

7.9.2007 and accordingly petitioner purchased aforesaid immovable property on 29.10.2007 after executing registered sale deed from the owner Kadiruddin Kadri. Thereafter, petitioner failed to comply with the terms and conditions of loan transaction and did not repay the loan amount. Consequently, an amount of Rs. 5,61,731/- was found outstanding towards the petitioner. Hence, respondent No.1 financial institution referred the dispute to the Arbitral forum for recovery of loan amount. The sole arbitrator, considering the attaining circumstances on record, passed an order directing the petitioner to pay a sum of Rs. 5,61,731/- with interest. The petitioner did not respond to the award . Eventually, respondent No.1 DH, preferred a Regular Darkhast bearing No. 149 of 2009, for enforcement of the award under section 36 of the Arbitration Act, 1996. The Executing Court also did not receive any communication from the petitioner for satisfaction of the decree. At last, the requisite order of auction sale of the mortgaged immovable property, I.e. Flat No.3, Noor Complex, ST colony, Aurangabad came to be pased for recovery of decretal amount. In the process of auction sale respondent No.3 Mr. Mohammad Parvej s/o. Haminuddin was declared as successful bidder for consideration price of Rs. 10.75,000/-. The highest bid was accepted by the Executing Court and he was directed to deposit 25% amount of the auction price.

4] Meanwhile, respondent No.2, ARCIL, approached to the Executing Court and filed application Exh.29 for recovery of its secured debt. It has been contended that immovable property Flat NO.3, Noor

Complex, Aurangabad is the property mortgaged with it by depositing the original title deeds, on the part of its original owner Kadiruddin Kadri. It has been submitted that ICICI bank had granted house loan of Rs. 4,30 lakhs in the name of Mr. Kadiruddin Kadri as well as his co-borrower, Saira w/o. Kadiruddin Kadri for purchase of immovable property i.e. Flat No.3 Noor complex, Aurangabad. After execution of registered sale deed, the ICICI has created charge in the said property on 30.6.2003. Thereafter, the ICICI bank has transferred and assigned its right and interest of the immovable property in home loan agreement in favour of respondent No.2 ARCIL. Accordingly, respondent No.2 ARCIL preferred the application Exh. 29 for recovery of secured debt from the auction sale being a secured creditor. The respondent No.2 ARCIL claimed first charge over the auction sale proceeds of the flat NO.3, Noor Complex, which took place on 23.4.2012. Respondent No.3 Mohd. Parvej was declared successful bidder for an amount of Rs.10,75,000/-.

5] Petitioner submitted that , she was not aware about the sale of her flat in auction for recovery of the loan. She came to know about the auction sale from the purchaser. She immediately rushed to the Court and filed application Exh. 61 for setting aside the auction sale on deposit of amount. The petitioner deposited a sum of Rs. 11,03,985/- in the Executing Court to show her bonafides for satisfaction of the decree. But, the application of the petitioner purportedly filed under Order 21 Rule 89 to set aside the auction sale on deposit of amount, came to be rejected by the Executing Court being time barred application. Moreover, the claim of

Respondent No.2 ARCIL being secured creditor was accepted by the Executing Court and it was directed to disburse the auction sale proceeds in favour of respondent No.2 ARCIL. The Executing Court also proceeded to pass common order below Exh. Nos. 29 and 74 and allowed the respondent No.1 financial institution, to receive the amount of Rs. 11,09,985/- deposited by the petitioner in the Court for satisfaction of the decree. Being aggrieved by the negative approach on the part of the Executing Court, the petitioner by availing remedy under Article 226 and 227 of the Constitution of India approached this Court and preferred the present writ petition, to redress her grievances.

6] learned counsel for the petitioner vehemently submitted that the impugned orders passed below Exh.61and common order below Exhibits 29 and 74, are all erroneous, arbitrary and not within the purview of law. The Executing Court did not appreciate the provisions of Order 21 Rule 89 in its proper perspective. The Executing Court ought to have considered that the period of limitation should be reckoned from the confirmation of sale and not from the date of auction. According to the learned counsel, the auction sale was conducted on 23.4.2012 and it was yet to be confirmed by the Executing Court after passing the requisite order. The amount of 25% of the auction price was to be deposited by the highest bidder for confirmation of sale. Therefore, no question arises about the period of limitation in this case. The sale was not confirmed till 27.4.2012 i.e. date on which the petitioner filed application Exh. 61. The learned counsel for the petitioner in support of his arguments relied on the ratio laid down in the case of ***"Kancherla Lakshminarayana vs. Mattaparthi Shyamala and others" AIR 2008 SC 2069***, in which it has been held that mere holding of auction sale does not bar the raising of objection to attachment of property. The sale means complete sale including confirmation of the auction. Learned counsel further added that the Executing Court has no concern at all with the amount deposited by the petitioner for the application purportedly filed under Order 21 Rule 89 of the CPC. Therefore, the order of payment of amount deposited by the petitioner in favour of respondent No.1 for satisfaction of the decree is erroneous, arbitrary and improper one. The impugned common order below Exhibits 29 and 74 cause prejudice and injustice to the petitioner as the petitioner deposited the amount to set aside the auction sale and not for payment of secured debts to the respondent No.2 ARCIL. The borrower has repaid the part of housing loan to the ICICI bank and the statement of account in between the borrower and the respondent No.2 ARCIL, is remained to be settled. In such circumstances, the direction to pay amount of sale proceeds to the respondent No.2 is apparently illegal and without any jurisdiction. The learned counsel requested to upset the impugned order passed by the Executing court and directions be issued to the Executing Court to quash and set aside the auction sale by accepting the amount deposited on behalf of the petitioner.

7] learned counsel for the respondent Nos. 1 and 2 vociferously opposed the contentions put forth on behalf of petitioner being not considerable and appropriate within ambit of law and upheld the impugned orders passed by the Executing Court. Both the learned counsel requested not to nod in favour of petitioner. I have also heard the learned counsel appearing for the rest of the respondents.

8] It is not in dispute that the auction sale of the property took place on 23.4.2012 for satisfaction of the decree in executing proceedings. The highest bid of respondent No.3 Mohd. Parvej came to be accepted. He was directed to deposit 25% of the auction sale price in the Court. The petitioner moved an application Exh. 61, purportedly filed under Order 21 Rule 89 of C.P.C. to set aside the auction sale on deposit of the amount.

9] The provision of Order 21 Rule 89(1) would be read as under :-

> **"Order 21 Rule 89(1)** :-
>
> **89) Application to set aside sale on deposit :**
>
> 1) Where immovable property has been sold in execution of a decree (any person claiming an interest in the property sold at the time of the sale or at the time of making the application or acting for or in the interest of such person) may apply to have the sale set aside on his depositing in Court :
>
> (a) For payment to the purchaser, a sum equal to five percent of the purchase-money, and
>
> (b) for payment to the decree-holder, the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered less any amount, which may since the date of such proclamation of sale, have been received by the decree-holder."

10] The aforesaid provision of Order 21 Rule 89 of CPC does not prescribe period of limitation within which the application is to be made to set aside the sale on deposit of the amount. Obviously, the application to set aside the sale under Order 21 Rule 89 of CPC is governed by the provisions of Article 127 of the Limitation Act, which provides the period of limitation as 60 days from the date of sale. It is the settled principle of law that the Court has no power to extend the time by invoking remedy under Section 148 of the CPC, for the reason that the time for making application under Rule 89 of Order 21, is not fixed by the Court. Moreover, the provisions of Section 5 of the Limitation Act on its own language, has no application specifically to the provisions of Order 21 of the CPC. In such circumstances, the Executing Court, has no jurisdiction whatsoever, to condone the delay. The provision of Section 5 of the Limitation Act is reproduced as under :-

> "Section 5 :- Extension of prescribed period in certain cases :- Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908, may be admitted after the prescribed period if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period.
>
> Explanation :- The fact that the appellant or the applicant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period may be sufficient cause within the meaning of this Section."

11] As referred supra, the impugned auction sale, took place on

23.4.2012. The petitioner presented the application Exhibit 61, on 26.6.2012, purportedly under Order 21 Rule 89 of the CPC to set aside the sale on deposit of the amount. The executing court, verified the circumstances and arrived at the conclusion that the application under Order 21 Rule 89 of C.P.C. is filed at a belated stage after efflux of period of 60 days prescribed under Article 127 of the Limitation Act. There is a delay of 3 days which cannot be condoned and, therefore, Executing Court refused to accept the request on behalf of the petitioner to set aside the sale.

12] In the light of aforesaid legal position, I find merit in the impugned order passed below Exh. 61 by the executing Court. It is evident that the present application of the petitioner is filed after period of limitation. There is a delay of three days. The Executing Court has no jurisdiction to entertain the application purportedly filed under Order 21 Rule 89 of the CPC beyond the prescribed period of 60 days as envisaged under Article 127 of the Limitation Act. The so called delay also cannot be condoned on the strength of Section 5 of Limitation Act as same is inapplicable to the provision of Order 21 of C.P.C. The present application is filed under Order 21 Rule 89 of C.P.C.

13] Learned counsel for the petitioner heavily relied upon the ratio laid down in the matter of ***Kancherla Lakshminarayana*** (supra) in which the Honourable Apex Court, observed that mere holding of auction does not bar to raise objection for attachment of the property. The word “sale” in clause (a) of the proviso to Rule 58 has to be read, meaning thereby, the “complete sale", including confirmation of the auction. Learned counsel for the petitioner explained that, the impugned auction sale is yet to be confirmed by the Executing Court. Therefore, there is no bar to raise objection to the auction sale by the petitioner to get it set aside on depositing the amount.

14] The arguments advanced on behalf of petitioner appears to be not much more attractive and sustainable one. The aforesaid judicial precedent relied upon by the petitioner seems to be misplaced and cannot be considered in favour of petitioner. It pertains to the provisions of Rule 58 of Order 21 of CPC. The provision of Order 21 Rule 89 is totally based on different criteria and would not be equated with the provisions contemplated under Order 21 Rule 58, where the objection is allowed to be raised to attach the property being not liable for attachment. Rule 89 of Order 21, prescribe the remedy for interested person to file an application in the court to set aside the sale on deposit of the amount. It is to be noted that the object of Rule 89 is to put an end the dispute of every kind by providing the last opportunity to the judgment debtor to save the property. The application under Order 21 Rule 89 of CPC is required to be made within the prescribed period of 60 days from the date of sale. The provision of Order 21 Rule 92 of CPC provides that where no application is made under Rule 89, 90 or 91 of CPC or where such application is made and disallowed, the Court shall make an order confirming the sale and thereupon the sale becomes absolute. The stage of confirmation of sale is the stage lateron after disallowing the application under Order 21 Rule 89 of CPC or if no application is made to set aside auction sale on depositing the requisite sum . Therefore, it is fallacious to appreciate that the date of sale for application under Order 21 Rule 89 of CPC would be the date of confirmation of sale by the executing Court and not the date on which the auction sale has actually taken place. The date of sale on which property put to auction agreed to be given to highest bidder would be the date to be considered as date of sale for the application under Order 21 Rule 89 of CPC.

15] The Division Bench of this Court in the matter of ***Sayed Mohomed Raja Sayed Sadak Miya vs. Thoakordas Chaturbhujdas, AIR 1926 Bombay 335(2)***, dealt with the similar issue and delinated that the date of sale prescribed under Order 21 Rule 89 is when the property is put up for auction sale and knocked down to the highest bidder. It is observed as under :-

> "It has been urged before us that the date of the sale is not the date on which the sale takes place, and the highest bid is accepted and the deposit paid, but the date when the Collector confirms the sale and directs the remainder of the purchase money to be collected. But it seems very clear to us that the date of the sale is when the property is put up for sale and knocked down to the highest bidder. Supposing for a moment that for one reason or another the sale is not completed that does not alter the fact that the sale has been held on that particular date. It is curious that the point, if it has any competence, should not have been raised before. Certainly, as far as my experience goes, it has always been considered that the date of the sale is when the property is put up for sale and knocked down to the highest bidder."

Taking recourse of the above observations of Division Bench of this Court, it is manifestly clear that the period of limitation to make an application under Order 21 Rule 89 of CPC should be reckoned from the date of sale when the property is put in auction. It would be reiterated that the date of sale in the instant case is 23.4.2012. Therefore, the application to set aside the sale on deposit of amount in the Court under Order 21 Rule 89 of CPC is required to be made within 60 days from the date of sale I.e. 23.4.2012. But the petitioner moved an application after about a delay of 3 days, which cannot be condoned at all as per mandate of the law. There is no error in the impugned order passed by the Executing Court while rejecting the application to set aside the sale being time barred.

16] Now, turning to the another aspect of the matter, pertaining to the impugned common order passed below Exhibit 29 and 74, I do not come across with any illegality or arbitrariness in the impugned order. The circumstances on record, adumbrate that the immovable property under the auction sale was the secured asset of the respondent No.2 under the Securitization and Reconstruction of Financial Assets and Securities Interest Act, 2002. Therefore, the respondent No.2 has a valid preferential right to claim the sale proceeds for recovery of secured debts. The Executing Court has correctly appreciated the factual score in its proper perspective and passed the impugned order, directing to make payment of sale proceeds to the respondent No.2 for repayment of the secured debts. The judgment debtor i.e. respondent No.1 has also the locus-standi to recover the decretal amount from the petitioner for satisfaction of the decree passed in its favour. The amount of Rs. 11,09,985/- deposited by the petitioner is ordered to be paid to the respondent No.1 judgment debtor, towards satisfaction of the decree. The impugned order is amenable within the jurisdiction of executing court. The respective orders below Exh.24 and 74 appears sustainable and valid in the eye of law to meet the ends of justice. There is no perversity or illegality in it. As such, I do not find any propriety to cause interference in the impugned orders at the behest of petitioner. In contrast, the impugned orders deserve to be upheld for substantial justice under law.

17] In the above circumstances and legal aspects of the matter the writ petition being devoid of merits stands dismissed. Rule is discharged. No orders as to costs. Civil application also stands disposed of.

[K.K.SONAWANE]
JUDGE

grt/-