IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL WRIT PETITION NO. 6116 OF 2016

Dr. Kailash M. Rathod .....Petitioner
v/s.
The Vishweshwar Sahakari Bank
Ltd., Pune and 10 Ors. .....Respondents

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Mr. Tejesh Dande a/w. Mr. Bharat Gadavi i/by. Tejesh Dande & Associates, Advocate for the petitioner.
Mr. S.S. Panchpor i/by. SNP Legal, Advocate for respondents no.1 and 2.
Mr. S.D. Rairikar, AGP for respondents no.10 and 11.

CORAM :- SMT. R.P. SONDURBALDOTA, J.
DATED :- 15TH JUNE, 2016.

P.C. :-

1). This petition challenges the auction sale dated 19th January, 2014 conducted by respondent no.1 bank and confirmation of the sale in auction on 28th March, 2014 by the Deputy Registrar of Co-operative Societies, Pune.

2). Respondent no.1 is the Co-operative Bank (the Bank) and respondent no.2 is it's Recovery Officer. Respondent no.3 is a partnership firm of which respondents no.4 and 5 are the partners. The petitioner and respondent no.5 are the sons of respondent no.4. Respondents no.6 to 8 are the guarantors and respondent no.9 is the auction purchaser.

3). The facts giving rise to the present petition are that, respondents no.4 and 5 as partners of respondent no.3 had taken loan from the Bank in the sum of Rs.1,95,00,000/- and mortgaged properties towards repayment of the loan. In the year 2008, the Loan Account went into default and therefore the Bank initiated recovery proceedings by obtaining recovery certificate. On 8th November, 2010, the Bank issued demand notices to respondents no.3, 4 and 5 calling upon them to make the payment of the amount mentioned in the Recovery Certificate with a caution that on failure to do so, the mortgaged property would be attached and sold. As respondents no.3, 4 and 5 failed and neglected to pay the amounts due from them, respondent no.2, the Recovery Officer published auction notice in the newspaper on 24th May, 2011 and called for auction of the mortgaged property on 30th June, 2011. Thereafter, the wife of respondent no.4 and the mother of the petitioner approached the Bank with a request not to auction the property claiming that she had a right and interest therein. She had also sent a notice through the Advocate. The contention taken up by her in the notice was that by the agreement of sale dated 15th May, 2005 respondent no.5, her son had agreed to sell the property to her.

Since subsequently, he failed to honour the agreement, she had filed a suit for specific performance being Civil Suit No. 154 of 2010 in the Court of Pune. That suit was decreed on 15th May, 2010. Respondent no.5, however, failed to comply with the decree and execute the sale-deed. Then his mother filed execution proceedings being Special Darkhast No.215 of 2010 against her son. Thereafter, respondent no.5 executed sale-deed which was registered with the office of the Sub-Registrar on 14th March, 2011 and the name of the mother was mutated in the revenue records. The petitioner alleges that, despite the notice from the mother, respondent no.1 proceeded with auction of the property. According to the petitioner, in the year 2011 respondent no.4, the father transferred the very property to the petitioner by executing gift-deed and registered the same with the office of the Sub-Registrar on 5th August, 2011. After registration of the gift-deed, the revenue records were mutated in the name of the petitioner.

2). After the auction sale was conducted and confirmed on 28th March, 2014 respondents no.3, 4 and 5 had filed Revision Application No. 206 of 2014 to which the auction purchaser, as well as, the petitioner herein were made parties. In that application, strangely respondents no.3 to 5 and the petitioner were represented by the same Advocate for which there had been an objection taken by the Bank. In that Revision Application, it was specifically contended by respondents no.3 to 5 that on the date of the auction, the property stood in the name of the petitioner and no notice of the auction was served upon the petitioner. Therefore, the auction was illegal. The Revisional Authority considered all the objections to the auction, including the claim that, the property is owned by the petitioner. The Revisional Authority noted that the petitioner himself had not filed Revision Application but he was merely a respondent to the Revision Application filed by respondents no.3 to 5.

3). It appears that, the petitioner had filed Regular Civil Suit No. 350 of 2014 seeking a permanent injunction, simplicitor, to restrain respondents no.1 and 2 from disturbing possession of the petitioner of the suit property. The plaint in that suit was rejected under Order 7 Rule 11 Civil Procedure Code.

4). Mr. Dande, the learned Advocate appearing for the petitioner submits that the petitioner is an unfortunate person, who had been agitating his claim before a wrong forum on account of improper legal advice. He filed Regular Civil Suit No. 350 of 2014 which was disposed off by rejection of the plaint. That order was passed on 28th February, 2015. Thereafter, the petitioner has not taken any steps. Relying upon decision of this Court in **Manager, Adarsh Mahila Nagri Sahakari Bank Ltd. & Anr. Versus. State of Maharashtra & Ors. reported in 2012 (2) BCR 163,** Mr. Dande submits that, the correct remedy available to the petitioner, to challenge the auction sale, was to file an application under Rule 107 (14)(i) before the Recovery Officer within a period of 30 days from the auction.

The petitioner, however, did not get proper legal advice and he filed a civil suit. Therefore, he needs to be given an opportunity. He has shown willingness to deposit 5% of the sale-proceeds for the purpose of getting a hearing. According to Mr. Dande, the facts of the decision cited and the facts of the present case are identical.

6). In the facts of the case, it is difficult to hold that the petitioner who is a well qualified person, a doctor by profession had been misled by advocate. It is also sought to be argued by Mr. Dange that, there are differences and disputes between the petitioner, his father i.e. respondent no.4 and his brother, respondent no.5. He submits that, respondent no.5 is his step brother and there are differences in the family. If irrespective of such differences, the entire family is trying to protect the property from sale in discharge of the dues to the Bank, the differences become irrelevant for the present proceedings.

7). The petitioner claims to have become owner of the property in question by virtue of gift-deed dated 5$^{th}$ August, 2011 allegedly executed by the father, though the property had already been mortgaged in the year 2008 to the bank. In the very breath, the petitioner avers in the petition that, his mother has become owner thereof pursuant to the decree dated 15$^{th}$ May, 2010 of the Court passed in Civil Suit No. 154 of 2010. If that is so, respondent no.4 had not title to the property to gift it to the petitioner. In the circumstances, there is no merit in the petition. Mr. Panchpor, the learned Advocate for the Bank submits that, after the auction was confirmed on 28th March, 2015 possession of the property has already been given to the auction purchaser and he has been enjoying the property since then. It is obvious that, this petition is nothing but an abuse of process of law. Hence, the petition is dismissed with costs. The petitioner shall pay costs quantified at Rs.50,000/- to respondent no.1. Costs to be paid within a period of 6 weeks from today. If the costs are not paid within the time granted, respondent no.1 is at liberty to recover the same as arrears of land revenue.

**(SMT. R.P. SONDURBALDOTA, J)**