

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 11679 OF 2014

M/s. Mountain Villas,
Proprietor Rajesh M. Sawant .. Petitioner
vs.
Dy. Registrar, Co-operative
Societies (Mumbai)
(On Deputation) & Ors. .. Respondents

WITH
WRIT PETITION NO. 1080 OF 2016

Baburao Marotirao Sakpal .. Petitioner
vs.
The Sahebrao Deshmukh Co-op.
Bank Ltd. & Ors. .. Respondents

Mr. R. V. Govilkar with Mr. J. P. Patil for Petitioner in WP 11679 of 2014 and for Respondent No. 3 in WP No. 1080 of 2016.
Ms Nidhi Dotiya for Petitioner in WP 1080 of 2016.
Mr. P. K. Dhakephalkar – Senior Advocate i/b. Mr. Vijay Ghosalkar for Respondent No. 2 in WP 11679 of 2014 and for Respondent No. 1 in WP 1080 of 2016.
Mr. S. D. Rayrikar – AGP for Respondent Nos. 1 and 7 in WP 11679 of 2014 and for Respondent No. 4 in WP 1080 of 2016.

CORAM : M. S. SONAK, J.

Date of Reserving the Judgment : 02 February 2016
Date of Pronouncing the Judgment : 05 February 2016

JUDGMENT :-

1] Heard learned counsel for the parties.

2] Since the challenge in both the petitions is to the same orders, it is only proper that both these petitions are disposed of with a common judgment and order.

3] The challenge in both these petitions is to the recovery certificate dated 18 July 2013 and the judgment and order dated 18 November 2014 made by the Divisional Joint Registrar, rejecting the petitioners challenge to the recovery certificate dated 18 July 2013. In addition, the petitioners have also challenged the auction sale notice dated 26 November 2014, which is really consequential to recovery certificate dated 18 July 2013 and the judgment and order dated 18 November 2014.

4] M/s. Mountain Villas, the proprietary concern of Rajesh M. Sawant, the petitioner in writ petition no. 11679 of 2014, applied for and obtained a loan of Rs.3.50 crores from The Sahebrao Deshmukh Co-op. Bank Ltd. (respondent no. 2) on or about 1 June 2011. The said Rajesh Sawant, by way of security, mortgaged with the respondent no. 2 bank the suit property, more particularly described in the registered mortgage deed dated 28 June 2011. As there was default in the payment of the loan amount, notices were issued by the respondent no. 2 bank under the provisions of the Securitization and Reconstruction of Financial Assets and

Enforcement of Security Act, 2002 (Securitization Act) calling upon the said Rajesh Sawant and the sureties to the loan account, to pay a sum of Rs.3,83,68,201/- to the respondent no. 2 bank. Such notices were published in English as well as Marathi newspapers. It is the contention of the respondent no. 2 bank that the possession of the mortgaged suit property was handed over by Rajesh Sawant to the respondent no. 2 bank. In this regard, the respondent no. 2 bank placed reliance upon a letter dated 5 October 2012. On or about 27 February 2013, notices were published in English and Marathi newspapers for the sale of the mortgaged suit property. By order dated 7 May 2013, Debt Recovery Tribunal also directed the auction of the mortgaged suit property.

5] In the meantime, possibly on account of the controversy as to whether the Securitization Act applies to co-operative banks, the respondent no. 2 bank applied for and obtained a recovery certificate under Section 101 of the Maharashtra Co-operative Societies Act 1960 (MCS Act), in the matter of recovery of an amount of Rs.4,15,94,505/- from the petitioner and the sureties to the loan amount availed by the petitioner Rajesh Sawant. The petitioner, thereupon, instituted a revision petition before the Divisional Joint Registrar, challenging not only the recovery certificate but also the auction sale notices issued in the meanwhile.

In compliance with the provisions contained in Section 154 of the MCS Act, the petitioner also deposited 50% of the amounts referred to in the recovery certificate. The Divisional Joint Registrar, by the impugned judgment and order dated 18 November 2014, has rejected the petitioner's revision application.

6] Mr. Baburao Sakpal, the petitioner in writ petition no. 1080 of 2016 claims to have purchased the mortgaged suit property and thereafter, even sold the same to Concord Buildcom, by registered documents. Baburao Sakpal, also claims to be aggrieved by the recovery certificate dated 18 July 2013 and the impugned order of the Divisional Joint Registrar dated 18 November 2014 and the consequent notice for sale of the mortgaged suit property. Therefore, both Rajesh Sawant and Baburao Sakpal have instituted the two petitions questioning the recovery certificate and the impugned judgment and order dated 18 November 2014.

7] Mr. R. V. Govilkar and Ms. Nidhi Dotiya, appearing for the petitioners in writ petition no. 11679 of 2014 and 1080 of 2016, at the outset, submitted that in pursuance of certain orders made by this Court, the Chartered Accountants of the petitioner and the respondent no. 2 bank have met on at least two occasions in order to reconcile the accounts. The learned counsel submitted that in

terms of the report submitted by M/s. Jaipuria & Co., the Chartered Accountants for the petitioners, the petitioners are entitled to the benefit of One Time Settlement Scheme (OTS), since, on the date, Rajesh Sawant was sanctioned loan by the respondent no. 2 bank, Rajesh Sawant was already a defaulter in respect of some other loan account. The learned counsel, relying upon the report of M/s. Jaipuria & Co. submitted that in terms of the OTS, Rajesh Sawant was due and payable to the respondent no.2 bank an amount of Rs.33,60,387/- in full and final settlement of the loan account and that Rajesh Sawant was ready and willing to pay the said amount by way of instalments as contemplated under the OTS. The learned counsel for the petitioners submitted that the respondent no.2 bank, either by not responding to this proposal or by impliedly denying the benefit of the OTS to the petitioners, was acting in an arbitrary and unreasonable manner. The learned counsel, made reference to the OTS Circular and pointed out that there was nothing in the circular, which rendered the petitioner Rajesh Sawant, ineligible to avail the benefits of the OTS Scheme.

8] The learned counsel for the petitioners did not make any serious submissions in the context of the recovery certificate and the impugned judgment and order dated 18 November 2014. Only, reference was made to one statement of accounts to submit that

excessive amounts were charged to the petitioners' loan accounts towards Advocates fees. Mr. Govilkar pointed out that they have material to establish that the Advocates of the respondent no.2 did not even appear before the Court / Authorities and yet, have billed the respondent no. 2 bank for their services. Mr. Govilkar submitted that the respondent no. 2 bank has no right or authority to include such amounts in the loan account of Rajesh Sawant.

9] At the outset, it is required to be noted that such amounts, though, by themselves may appear to be substantial, the same are by no means substantial, if considered in the context of the total claims against the petitioner Rajesh Sawant. In any case, all these are seriously disputed questions of fact, which cannot be redressed in the exercise of the extra ordinary jurisdiction under Articles 226 and 227 of the Constitution of India. At this stage, it is really not possible to go into the issue as to whether the Advocates for the respondent no. 2 bank appeared before the Court / Authorities on the appointed dates, for which, they have billed the respondent no. 2 bank, and therefore, whether the respondent no.2 bank was justified in paying fees to said Advocates in respect of such dates. This amount of professional fees, is in the range of Rs.8,00,000/- or thereabouts. In contrast the total dues payable by the petitioner Rajesh Sawant in terms of the recovery certificate are Rs.4.15

crores or thereabouts. Accordingly, it is really not possible to entertain or uphold such submissions of the learned counsel for the petitioners.

10] Before, adverting to the contention in the context of the OTS Scheme, it is required to be noted such a contention was never raised at the stage when the recovery certificate was issued or when the recovery certificate was challenged. In the entire revision application memo, there is no ground that the petitioner Rajesh Sawant has applied for or was entitled to the benefit of the OTS Scheme and that such benefit has been denied to the petitioner Rajesh Sawant. By relying upon some omnibus clause in the context of the recovery certificate being allegedly not just or equitable, it is impermissible for the petitioners to raise the issue of OTS for the first time before this Court. There is however yet another reason why the petitioners cannot be permitted to raise such pleas in this Court. This reason has nexus with the conduct of the petitioners, which is a very important consideration when it comes to exercise of extra ordinary and equitable jurisdiction under Articles 226 and 227 of the Constitution of India.

11] In this case, as noted earlier, Rajesh Sawant, mortgaged the suit property to the respondent no.2 bank on or about 28 June

2011, as and by way of security for the repayment of loan of Rs.3.50 crores availed by him from the respondent no. 2 bank. However, Rajesh Sawant and Baburao Sakpal, at the later stage, came up with a plea that by an unregistered agreement dated 24 February 2004, Rajesh Sawant had agreed to sell the suit property to Baburao Sakpal for consideration of approximately Rs.30,00,000/-. This agreement is not registered. Secondly, Rajesh Sawant, suppressed the existence of this alleged agreement, but rather, proceeded to mortgage the suit property with the respondent no. 2 bank as and by way of security for repayment of loan of Rs.3.50 crores which Rajesh Sawant availed from the respondent no. 2 bank. This alleged agreement states that Rajesh Sawant is to receive from Baburao Sakpal consideration of Rs.30,00,000/- in cash. Agreement records that Rs.15,00,000/- has already been paid in cash by the said Baburao Sakpal to Rajesh Sawant. All this hardly inspires any confidence.

12] Baburao Sakpal, on the basis of this unregistered agreement for sale dated 24 February 2004 instituted a suit seeking a decree of specific performance against Rajesh Sawant. Rajesh Sawant and Baburao Sakpal, compromised the suit and obtained a compromise decree dated 3 January 2013, in terms of which, Rajesh Sawant has purported to transfer the suit mortgaged property to Baburao

Sakpal. Thereafter, both the parties have placed on record registered sale deed dated 19 April 2014, by which the suit property is purported to be transferred to Concord Buildcom for consideration of Rs.7.00 Crores or thereabouts. It is significant to note that both Baburao Sakpal and Rajesh Sawant are parties to this deed dated 19 April 2014.

13] From the aforesaid, it is quite evident that Rajesh Sawant, having solemnly mortgaged the suit property to the respondent no.2 bank, has, on the basis of unregistered agreement dated 24 February 2004, purported to transfer property to Baburao Sakpal and thereafter to others, clearly with a view to render it difficult for the respondent no. 2 bank to recover its dues by way of sale of the mortgaged suit property. This attempt on the part of Rajesh Sawant and Baburao Sakpal, is by no means innocent. This attempt is at the stage when proceedings were already pending for the recovery of the loan amount by sale of the suit mortgaged property. This attempt is clearly to defraud the respondent no. 2 bank and for this purpose, both Rajesh Sawant as well as Baburao Sakpal have also made use of the process of the Court. If this background is considered, certainly it does not *behave* the petitioner Rajesh Sawant to contend that he is entitled to the benefit of OTS facility. If the OTS circular is perused, then it is quite clear that the benefit of

the same is not to be granted to parties who commit frauds. The contention of Mr. Govilkar that the petitioner Rajesh Sawant had committed no fraud at the stage of obtaining the loan, hardly deserves any acceptance. The petitioner Rajesh Sawant is a party to the compromise decree dated 3 January 2013. The petitioner Rajesh Sawant has purported to stand by the unregistered agreement to sale dated 24 February 2004. If this be the position, the petitioner Rajesh Sawant, has certainly acted in a fraudulent manner by purporting to offer the suit property as security for repayment of loan of Rs.3.50 crores which he has availed from the respondent no. 2 bank. In these circumstances, there is no question of extending the benefit of any OTS facility to the petitioner Rajesh Sawant.

14] The learned counsel for the petitioner Baburao Sakpal has contended that Baburao Sakpal was a bonafide purchaser. Such an issue cannot be raised in a petition under Articles 226 and 227 of the Constitution of India. Further, from the narration of the aforesaid facts, about which, there is no serious dispute, it can hardly be said that Baburao Sakpal is some innocent or bonafide purchaser for value and without notice. In fact, the record indicates that both Rajesh Sawant and Baburao Sakpal have sought to profit themselves by purporting to sell the mortgaged suit property but are

unwilling to pay to the respondent no. 2 bank its dues towards the loan amounts admittedly availed by the petitioner Rajesh Sawant. Such conduct on the part of the petitioners clearly disentitles them to any equitable relief under Articles 226 and 227 of the Constitution of India.

15] In the case of *S. P. Chengalvaraya Naidu (dead) by LRS. vs. Jagannath (dead) by LRS. & Ors.*¹, the Hon'ble Apex Court has warned against permitting the process of the Court becoming an engine of fraud in the hands of dishonest litigations. The Apex Court has observed that the Courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. The Hon'ble Apex Court expressed concern that more often than, not, the process of the Court is being abused. Property-grabbers, tax-evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the court-process a convenient lever to retain the illegal-gains indefinitely. The Apex Court has ruled unhesitatingly that a person, whose case is based on falsehood, has no right to approach the court and can be summarily thrown out at any stage of litigation.

16] The aforesaid position was reiterated by the Hon'ble Supreme Court in the case of *A. V. Papayya Sastry & Ors. vs. Govt. of A.P. &*

1 (1994) 1 SCC 1

Ors.² In the context of the observation of the High Court in the case of *S. P. Chengalvaraya Naidu* (supra) that there is no legal duty cast upon the plaintiff to come to court with a true case and prove it by true evidence, the Hon'ble Apex Court in the case of *A. V. Papayya Sastry* (supra) quoted with approval the observations in paragraph 5 of *S. P. Chengalvaraya Naidu* (supra). The relevant observations read thus :

“28. Allowing the appeal, setting aside the judgment of the High Court and describing the observations of the High Court as “wholly perverse”, Kuldip Singh, J. stated : (SCC p.5, para 5)

“The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. We are constrained to say that more often than not, process of the court is being abused. Property grabbers, tax-evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the court process a convenient lever to retain the illegal gains indefinitely. We have no hesitation to say that a person, whose case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation.”

[Emphasis supplied]

17] In the context of commission of fraud by obtaining consent decrees in order to defeat the right of the mortgagee bank, the Hon'ble Supreme Court in the case of *Ram Chandra Singh vs.*

² (2007) 4 SCC 221

*Savitri Devi & Ors.*³ has held that fraud as is well known vitiates every solemn act. Fraud and justice never dwell together. Fraud is a conduct either by letter or words, which induces the other person, or authority to take a definite determinative stand as a response to the conduct of former either by word or letter. It is also well settled that misrepresentation itself amounts to fraud. Indeed, innocent misrepresentation may also give reason to claim relief against fraud. A fraudulent misrepresentation is called deceit and consists in leading a man into damage by willfully or recklessly causing him to believe and act on falsehood. It is a fraud in law if a party makes representations which he knows to be false, and injury ensues therefrom although the motive from which the representations proceeded may not have been bad. An act of fraud on court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of others in relation to a property would render the transaction void *ab initio*. Fraud and deception are synonymous. Although in a given case a deception may not amount to fraud, fraud is anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine including *res judicata*.

18] The Hon'ble Supreme Court, in the case of *Ram Chandra Singh* (supra) at paragraphs 33 to 35 has observed thus:

3 (2003) 8 SCC 319

“33. Once it is held that a judgment and decree has been obtained by practising fraud on the court, it is trite that the principles of res judicata shall not apply. The High Court, therefore, in our opinion committed a serious error in referring to the earlier orders passed by it so as to shut the doors of justice on the face of the appellant for all times to come. We, therefore are of the impugned judgment dated 10-12-1998 cannot be sustained.

34. So far as order dated 10.5.1999 passed in Civil Review No. 245 of 1998 is concerned, suffice it to say that the High Court should have considered the question as to whether the right of the auction-purchaser could have been set at naught by reason of a consent order passed in his absence. The appellant was not a party in the first appeal. He was also not a party to the compromise.

35. The consent order, as is well known, is an agreement between the parties with the seal of the court superadded to it. The appellant herein in the review application categorically stated that the parties to the appeal had suppressed the auction-sale as also the confirmation thereof. The effect of the events appearing subsequent to the filing of the first appeal resulting in creation of a third party right was bound to be taken into consideration by the High Court. A third party right cannot be set at naught by consent. The High Court, therefore, was required to consider the contention of the appellant in its proper perspective. The High Court, in our opinion, was obligated to address itself on these questions for the purpose of reviewing its order.”

19] Applying the aforesaid principles to the facts and circumstances of the present case, the petitions which are devoid of merits are required to be dismissed. Further, the conduct of the petitioners in both these petitions is such, as would not warrant them any equitable relief under Articles 226 and 227 of the Constitution of India. The petitions are therefore dismissed. Interim orders, if any, stand vacated. The petitioners to pay costs of Rs.25,000/- (Rupees Twenty Five Thousand) each to the respondent no. 2 bank within a period of four weeks from today.

(M. S. SONAK, J.)

20] At this stage, the learned counsel for the petitioners, applied for interim relief. Considering the conduct of the petitioners, it is not possible to grant interim relief. Upon a query as to whether the petitioners are willing to deposit the amount referred to in the recovery certificate, the learned counsel for the petitioners states that period of one year would be required for the purpose of deposit. In these circumstances, the oral application for interim relief is rejected.

(M. S. SONAK, J.)