

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 3284 OF 2017

Hanumant D. Bhagat and Ors

..Petitioners.

Vs

Ajit Nagari Sahakari Patsanstha
Maryadi and Ors.

.. Respondents

Mr.R.D.Suryawanshi i/b Sachin Deokar, Advocate for Petitioners.
Mr. Mohan Tekavde a/w Smt Swati Tekavde, Anjali Mishra,
Advocate for Respondent no.1.
Mr S.D.Rayrikar, A.G.P for Respondents no. 3 and 5.
Mr.Vijay Patil i/b Nimeet Sharma, Advocate for Respondent no.4.
Mr N.V.Walawalkar, Senior Advocate i/b Ms.Anjali Baxi, Advocate
for Respondent no.6.

**CORAM : R.G.KETKAR,J.
DATE : 28/04/2017**

PC:

1. Heard Mr.R.D.Suryawanshi, learned counsel for the petitioners, Mr.Mohan Tekavde, learned counsel for respondent no.1, Mr. S.D.Rayrikar, learned A.G.P for respondents no. 3 and 5, Mr.V.D.Patil, learned counsel for respondent no.4 and Mr.N.V.Walawalkar, learned senior counsel for respondent no.6 at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioners have challenged the order dated 4.3.2017 passed by respondent no.5, Divisional Joint Registrar, Co-operative Societies, Pune Division, Pune (for short, 'Registrar'). By that order, respondent no.5 rejected the applications made by the petitioners for staying the auction to be held on 18.2.2017 in

pursuance of the sale proclamation dated 17.1.2017 as also restraining respondent no.2- Special Recovery Officer from auctioning Gat No.25/1 admeasuring 85 Ares and Gat No. 951 admeasuring 33 Ares, situate at village Jejuri, Taluka Purandar, District- Pune (for short, 'suit properties').

3. The petitioners had availed loan from respondent no.1. Respondent no.1 initiated proceedings under Section 101 of the Maharashtra Cooperative Societies Act, 1960 (for short, 'Act') as the petitioners defaulted in making payments against loan Accounts No. 0004016000399 for Rs.35,11,831/- and Loan Accounts No. 0004016000400 for Rs35,32,412/-. Notices were issued to the petitioners in those proceedings and hearings were held on 19.12.2014, 26.12.2014 and 2.1.2015. The petitioners neither filed reply nor participated during the course of hearing before the Assistant Registrar. By orders dated 2.1.2015, Assistant Registrar issued two Recovery Certificates, namely (1) for recovery of Rs.30,83,115/- together with interest at the rate of 17% per annum on principal amount of Rs.30,06,584/- from 30.9.2014 till realization of the amount and (2) for Rs.30,83,069/- together with interest at the rate of 17% per annum on principal amount of Rs. 30,06,584/- from 30.09.2014 till realization of the amount. The petitioners did not challenge the recovery certificates by filing Revision Applications under Section 154 of the Act.

4. Respondent no.1 issued demand notice on 12.1.2015. The petitioners did not give reply to the demand notice. The suit properties were attached on 8.2.2015. The petitioners did not challenge the attachment notice. On 8.2.2015, prohibitive order under Rule 107(10) of the Maharashtra Co-operative Societies Rules, 1961 (for short, 'Rules') was issued giving 30 days time for making payments. On 26.8.2015, possession was taken. It is the case of the respondents that at the time of fixing upset price, the petitioner no.1 was present either personally or through his authorized representative. He did not object to the fixation of upset price based upon the valuation report. The valuation was approved on 16.1.2017. On 17.1.2017, sale proclamation was issued fixing date of auction on 18.2.2017. On 14.2.2017, the petitioners filed Revision Applications challenging (1) order dated 16.1.2017 fixing upset price of Rs.60,18,000/- in respect of the suit properties by District Deputy Registrar and (2) sale proclamation notice dated 17.1.2017.

5. During the pendency of the Revision Applications, the petitioners took out applications for staying the auction proposed to be held on 18.2.2017 and for injunction restraining respondent no.2 - Special Recovery Officer from holding auction. By the impugned order, the Divisional Joint Registrar rejected the said application. It is against this order, the petitioners have instituted the present petition.

6. In support of this petition, Mr.Suryawanshi strenuously contended that earlier one Shri Bhushan Subhash Gaikwad was Special Recovery Officer. Mr. Gaikwad submitted proposal on 24.10.2016 for fixing upset price. Along with the proposal, valuation report dated 18.11.2015 made by Government approved valuer Shri Amin Shaikh was submitted. In that report, market value of the suit properties stated was Rs. 60,18,000/-. He invited my attention to the valuation report dated 12.11.2014 relied upon by the petitioners. In respect of the land bearing Gat No.25/1 admeasuring 85 Ares, the market value was fixed at Rs.14,45,00000/-. In respect of the land baring Gat No. 951, the market value was fixed at Rs. 5,61,00000/-. He submitted that the valuation report relied upon by Special Recovery Officer Mr Dinesh Ghone fixed upset price at Rs. 60,18,000/- only with a view to ensuring that his brother is a successful bidder in the auction. To suit convenience of his brother, the upset price was deliberately fixed on lower side. He submitted that while passing the order on 16.1.2017, District Deputy Registrar ignored the valuation reports dated 12.11.2014 submitted by the petitioners and fixed the upset price at Rs.60,18,000/-. He submitted that in the auction conducted on 18.2.2017, respondent no.6 participated and purchased land bearing Gat no.951. Respondent no.6 is brother of Special Recovery Officer Shri Ghone. He, therefore, submitted that on the face of it, auction

held in respect of Gat No. 951 is vitiated. Mr. Suryawanshi submitted that the sale is required to be set aside on the ground of material irregularity and/or fraud.

7. Mr. Suryawanshi invited my attention to the order dated 17.3.2017 passed by the Division Bench of this Court. Subject to the petitioners depositing Rs.15,00,000/- on or before 21.3.2017 with respondent no.1, this Court granted ad-interim order in terms of prayer clause (c). In pursuance of that order, the petitioners have deposited Rs. 15 lakhs with the first respondent within the stipulated period. The Division Bench also recorded the further statement of the petitioners that the entire balance amount will be deposited by the petitioners on or before 31.5.2017. Mr. Suryawanshi states that the petitioners are present in the Court and upon taking instructions from them, he states that on or before 10.5.2017 the petitioners will deposit/pay the entire loan amount of respondent no.1 and for that purpose time may be extended.

8. On the other hand, Mr. Walawalkar and Mr. Patil supported the impugned order. It was submitted that the auction was conducted by Shri Satish Jadhav, Special Recovery Officer. He is neither related to earlier Special Recovery Officer, Mr. Dinesh Ghone nor respondent no.6-Sandeep Ghone. It was submitted that though sufficient opportunities were given to the petitioners in Section 101 proceedings, the petitioners did not avail those

opportunities. Petitioners did not challenge Certificates issued under Section 101. They did not reply demand notice. They did not challenge attachment orders as well. It was submitted that before passing order on 16.1.2017, hearings took place on 15.11.2016, 20.11.2016 and 6.12.2016. On all these dates, either petitioner no.1 was personally present or his representatives were present. In other words, after hearing the petitioners, the upset price was fixed by order dated 16.1.2017. It was further submitted that the petitioners did not adopt proceedings under Rule 107(13) and (14). The petitioners filed Revision Application 14.2.2017 challenging order dated 16.1.2017 when the auction was proposed to be held on 18.2.2017. Reliance was placed upon the decision of the Apex Court in the case of Ram Karan Gupta Vs. J.S.Exim Limited, (2012) 13 Supreme Court Cases 568, to contend that the petitioners ought to have deposited 5% of the purchase money along with other amounts as stipulated in Rule 107(13) and on account of failure of the petitioners to comply with the mandatory requirements, Divisional Joint Registrar rightly rejected the application. It was submitted that no case is made out for invocation of powers under Article 227 of the Constitution of India.

9. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. It is not in dispute that the petitioners

have availed loan from respondent no.1. Respondent no.1 initiated proceedings for issuance of recovery certificates under Section 101 of the Act. Despite giving several opportunities to the petitioners, they neither filed reply nor participated in the proceedings. Accordingly, Assistant Registrar issued two Recovery Certificates, as indicated earlier. The petitioners admittedly did not challenge recovery certificates by filing Revision Application under Section 154 of the Act. Demand notices were issued to the petitioners which were not replied. Attachment orders were passed which were also not challenged by the petitioners. Proceedings for fixation of upset price was initiated and the first date of hearing was fixed on 15.11.2016. On that day, petitioner no.1 appeared. Respondents filed their valuation reports. Next date was fixed on 20.11.2016. On behalf of the petitioners, Shri Pardeshi appeared along with authority letter. Next date was fixed on 6.12.2016 when on behalf of the petitioners Mr. Mahadeo Tavade remained present. Matter was thereafter fixed on 19.12.2016. District Deputy Registrar considered the valuation report dated 12.11.2014 produced by the petitioners and observed that the suit lands are agricultural lands and the valuation reports are on the basis that it is non agricultural lands and the suit properties are divided into various plots. District Deputy Registrar, therefore, discarded the valuation report dated 12.11.2014 submitted by the petitioners.

After considering the material on record, in respect of the suit properties, the upset price of Rs. 60,18,000/- was fixed on 16.1.2017. On 17.1.2017, sale proclamation was issued fixing auction on 18.2.2017. The petitioners immediately did not file Revision Application and waited till 14.2.2017. Rule 107(13) reads this:

“107: Procedure for attachment and sale of property under Section 156.

(13) (i) Where immoveable property has been sold by the Recovery Officer, any person either owning such property or holding any interest therein by virtue of a title acquired before such sale may apply to have the sale set aside on his depositing with the Recovery Officer,

(a) for payment to the purchaser, a sum equal to 5 per cent, of the purchase money, and

(b) for payment to the applicant, the amount of arrears specified in the proclamation of sale as that for the recovery of which the sale was ordered together with interest thereon and the expenses of attachment if any, and sale and other costs due in respect of such amount, less amount which may since the date of such proclamation have been received by the applicant,

(ii) If such deposit and application are made within thirty days from the date of sale, the Recovery Officer shall pass an order setting aside the sale and shall repay to the purchaser, the purchase money so far as it has been deposited, together with the 5 per cent, deposited by the applicant:

Provided that, if more persons than one have made deposit and application under this sub-rule, the application of the first depositor to the officer authorised to set aside the sale, shall be accepted.

(iii) If a person applies under sub-rule (14) to set aside the sale of immoveable property, he shall not be entitled to make an application under this sub-rule.

Provided that, in case the Recovery Officer fails to hand over, possession of the property for any reason within six months from the date of confirmation of the sale to the purchaser, amount deposited by the purchaser may be refunded to him on his demand.”

10. A perusal of the above provisions shows that the application for setting aside the sale can be made on depositing with the Recovery Officer payment to the purchaser a sum equal to 5 percent of the purchase money and for payment to the applicant, the amount of arrears specified in the proclamation of sale as that for the recovery of which the sale was ordered together with interest thereon and the expenses of attachment, if any, and sale and other costs due in respect of such amount, less amount which may from the date of such proclamation have been received by the applicant. If such deposit and application are made within thirty days from the date of sale, the Recovery Officer shall pass an order setting aside the sale and shall repay to the purchaser, the purchase money so far as it has been deposited, together with 5 per cent, deposited by the applicant.

Rule 107(14) reads thus:

“107: Procedure for attachment and sale of property under Section 156.

(14) (i) At any time within thirty days from the date of the sale of immoveable property, the applicant or any person entitled to share in a rateable distribution of the assets or whose interests are affected by the sale, may apply to the Recovery Officer to set aside the sale on the ground of a material irregularity or mistake or fraud in publishing or conducting it:

Provided that, no sale shall be set aside on the ground

of irregularity or fraud unless the Recovery Officer is satisfied . If the applicant has sustained substantial injury by reason of such irregularity, mistake or fraud.

(ii) If the application be allowed, the Recovery Officer shall set aside the sale and may direct a fresh one. Expenses of such set aside sale shall be borne by the society.

(iii) On the expiration of thirty days from the date of sale, if no application to have the sale set aside is made or if such application has been made and rejected, the District Deputy Registrar shall make an order confirming the sale:

(iv) Whenever the sale of any immoveable property is not so confirmed or is set aside, the deposit or the purchase money, as the case may be, shall be returned to the purchaser.

(v) After the confirmation of any such sale, the District Deputy Registrar shall grant a certificate of sale bearing his seal and signature to the purchaser, and such certificate shall state the property sold and the name of the purchaser.”

A perusal of Rule 107(14)(iii) shows that on the expiration of thirty days from the date of sale, if no application to have the sale set aside is made or if such application is made and rejected, the District Deputy Registrar has to make an order confirming the sale. In the present case, auction was held on 18.2.2017 and within thirty days therefrom, the petitioners did not adopt proceedings either under Rule 107(13) or Rule 107(14). They did not comply the conditions stipulated in Rule 107(13). As the petitioners belatedly filed Revision Applications as also did not challenge Recovery Certificates as also did not deposit 50% amount, by the impugned order dated 4.3.2017, Divisional Joint Registrar rejected the stay application on the ground that the

auction was already conducted on 18.2.2017.

11. In the case of Ram Karan Gupta (supra), auction sale was held on 8.10.2010 and respondent J.S.Exim Limited was found to be highest bidder for a bid amount of Rs. 9.60 crores. The auction purchaser deposited Rs. 2.40 crores by way of 27 demand drafts of even date towards 25% of the bid amount. On 23.10.2010, auction purchaser deposited 75% of the sale amount in State Bank of India. The auction purchaser moved application under Order XXI, Rules 94 and 95 of C.P.C. for confirmation of sale. Appellant/judgment-debtor no.2 sought for cancellation of the auction held on 8.10.2010 on the ground that the auction purchaser had failed to deposit 25% of the bid amount on completion of the auction sale proceedings. The Apex Court considered the provisions of Order XXI, Rules 84,85,89,90,92 as also earlier decisions of the Apex Court. A comparison of Order XXI, Rules 89 and 90 with Rule 107(13) and (14) shows that they are almost para materia. Order XXI, Rule 92 lays down that where no application is made under Rules 89, 90 and 91 or where such application is made and disallowed, the Court shall make an order confirming the sale and thereupon the sale shall become absolute. Rule 107(14)(iii) also lays down that on the expiration of thirty days from the date of sale, if no application to have the sale set aside is made or if such application is made and rejected, the District Deputy Registrar has to make an order

confirming the sale. In the present case, admittedly, the petitioners did not make application under Rule 107 (13) or Rule 107(14). They also did not deposit the amount as required within 30 days from the date of auction held on 18.2.2017. It is only because of ad-interim order in terms of prayer clause (c) of the petition granted by this Court on 17.3.2017, the sale was not confirmed.

12. In paragraph 16, the Apex Court has observed thus:

“16. Learned senior Counsel appearing for the Appellant, as we have already indicated, submitted that the Executing Court should have allowed his application dated 1.12.2010 since he preferred that application within 60 days of the date of sale, but could not deposit the amount since the application filed in terms of Order 21 Rule 92(2) Code of Civil Procedure was neither dealt with nor allowed. Order 21 Rule 89 Code of Civil Procedure, it may be noted, gives a final opportunity to the judgment debtor to save his property by setting the sale aside before the confirmation upon the terms of satisfying the decretal debt and of paying compensation to the auction purchaser. Rules 89 to 92 of Order 21 deal with setting aside of sale. When a property is sold in execution of a decree and an application for setting aside the sale can be made under those provisions by the persons affected on the grounds mentioned therein. Such an application has to be made within the prescribed period of limitation, the provisions mentioned therein are in the nature of concession and those provisions must be strictly complied with before a sale is set aside before confirmation. On setting aside the sale under Order 21 Rule 89 Code of Civil Procedure the property continues to be the property of the judgment-debtor.”

Applying the tests laid down by the Apex Court to the facts of the present case, in my opinion, no case is made out for interfering with the impugned order. A perusal of the material on record

shows that in respect of Loan Account No. 0004016000399, amount due as on 18.2.2017 is Rs.35,11,831 and in respect of other Loan Account No. 0004016000400 amount due as on 18.2.2017 is Rs.35,32,412/-. In the light of the above discussion, Petition fails and the same is dismissed.

13. At this stage, Mr.Suryawanshi orally applies for continuation of ad-interim order dated 17.3.2017 for a period of three weeks from today. On the other hand, Mr. Walawalkar and Mr. Patil opposed the oral application. As the petitioners have not complied the requirements laid down under Rule 107(13), oral application is rejected. Order accordingly.

(R.G.KETKAR, J.)