IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.1543 OF 2009
ALONGWITH
APPELLATE SIDE WRIT PETITION NO.6544 OF 2009

Deepak Nikhalje, Sole Proprietor
of M/s Adhishakti Developers … Petitioner
Versus
State of Maharashtra And Others … Respondents

ALONGWITH
WRIT PETITION NO.393 OF 2010

Mr.Deepak Nikhalje … Petitioner
Versus
The Divisional Joint Registrar,
Co-op. Societies, Mumbai Div.
And Others … Respondents

ALONGWITH
WRIT PETITION NO.1779 OF 2010

The Mahanagar Co-op. Bank Ltd. … Petitioner
Versus
The Divisional Joint Registrar,
Co-op. Societies, Mumbai Div.
And Others … Respondents

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Mr. A.S. Khandeparkar a/w Mr. P.A. Sarwankar I/b Sarwankar & Co. for the Petitioner in Writ Petition No.1779 of 2010 and Appellate Side Writ Petition No.6544 of 2009 and Respondent No.2 in Writ Petition No.393 of 2010 and Respondent No.6 in Writ Petition No.1543 of 2009.

Mr. Rohan Kadam a/w Mr. Prayag Joshi I/b Mr. Bipin Joshi for the Petitioner in Writ Petition No.1543 of 2009 and Writ Petition No.393 of 2010.

Mr. Girish Godbole, Senior Advocate a/w Kedar Kanetkar, Ms. Jaishree Surati I/b Ashwinkumar And Co. for Respondent Nos.4 to 6 in Writ Petition No.1779 of 2010 and Writ Petition No.393 of 2010 and Respondent Nos.3

to 5 in Writ Petition No.1543 of 2009 and Appellate Side Writ Petition No.6544 of 2009.
Mr. Milind More, AGP for Respondent Nos.1 and 2-State.

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CORAM : S.C.GUPTE, J.

DATE : 26 MARCH 2018

ORAL JUDGMENT :

. These four petitions concern a plot of land bearing No.21, admeasuring 810 sq. meters out of Suvery No.14 part of Village Chembur, Taluka Kurla, District B.S.D. ("subject plot"). With a view to understand the controversy in these petitions, a few facts may be noted as below :-

2 In or about 1981, the subject plot was proposed to be purchased by a partnership firm known as M/s Borse Brothers. One Panditrao S. Borse and his father and three brothers were partners of this firm. On 1 August 1981, the subject plot was purchased in an auction sale held by Collector of Bombay. There is some controversy between the parties as to whether the purchase was on behalf of the firm. It is, however, not disputed that the plot was infact purchased in the name of Panditrao Borse, who also paid the purchase price for the same. The sale was subsequently confirmed. In October 1986, M/s Borse Brothers sought cash credit loan of Rs.10,00,000/- from one of the Respondents herein, namely, Mahanagar Co-operative Bank Limited ("Bank"). M/s Borse Brothers failed to repay this loan to the Bank and as a result, recovery proceedings were filed by the Bank under Maharashtra Co-operative Societies Act, 1960 ("Act"). On 4 April 1994, the Court passed an *ex parte* award under Section 91 of that Act against M/s Borse Brothers, through its partners including Panditrao

Borse. The award was for a sum of Rs. 24,19,904.92 with interest on the principal amount at the rate of 17.5 % per annum. On 4 July 1996, in pursuance of this award, the Co-operative Court issued an execution certificate under Section 98 of the Act. A demand notice was served upon M/s Borse Brothers in pursuance of the execution certificate and finally, on 16 April 2004, Special Recovery and Sale Officer ("SRO") took possession of the subject plot. By an application made on 24 May 2004, three of the present Respondents, as heirs and legal representatives of Panditrao Borse (since deceased), through their Constituted Attorney, made an application before the Co-operative Court for setting aside the *ex parte* award and stay of execution. By its order dated 6 September 2004, the Co-operative Court rejected that application. On 30 October 2004, a panchnama was made of taking over of the possession of the subject plot and a notice thereafter was published in the local newspapers inviting tenders for purchase of the plot in execution of the award. On 29 January 2005, SRO opened tenders received in response to the auction notice. The offer of the Petitioner herein as a Proprietor of M/s Adhishakti Developers ("M/s Adhishakti") of Rs.1,51,00,000/- was accepted by SRO. On 25 January 2005, a sum of about Rs.50,96,000/- from out of its offer price was paid by M/s Adhishakti to SRO. The balance purchase price was paid in four separate installments, the last of such installments having been paid on 17 March 2005. After payment of the last installment, vacant and peaceful possession of the subject plot was handed over by SRO to M/s Adhishakti, under a possession receipt dated 18 March 2005. On 13 May 2005, a communication was addressed by SRO to M/s Borse Brothers informing the latter about the auction sale and requesting them to collect surplus amount (that is to say, the surplus sales proceeds after adjustment of the bank's outstanding) from the bank. A conveyance deed appears to have been executed thereafter in favour of M/s Adhishakti after confirmation of sale in its favour. M/s Adhishakti thereafter applied for effecting changes in the revenue records in pursuance of the auction sale in their favour. By an order dated 9 March 2006, the Collector of Mumbai Suburban District rejected that application. That order was challenged in appeal by M/s Adhishakti. By his order dated 16 January 2009, the Hon'ble Minister of Revenue rejected the appeal. This order is the subject matter of challenge in Writ Petition No.1543 of 2009 filed on the original side by M/s Adhishakti and Appellate Side Writ Petition No.6544 of 2009 filed by the Bank. In the meantime, legal heirs of Panditrao Borse had filed a revision application before the Divisional Joint Registrar, Co-operative Societies, Mumbai Divn., Mumbai, challenging the auction sale of the subject plot along with an application for condonation of delay. By his order dated 20 March 2009, the delay was condoned and the application was directed to be heard on merits. By his order dated 29 December 2009, the Divisional Joint Registrar set aside the auction sale held on 29 January 2005 as well as the confirmation of that sale of 18 March 2005. That order along with the order granting condonation of delay is the subject matter of challenge in the other two companion petitions, namely, Writ Petition Nos.393 of 2010 and 1779 of 2010.

3 In the backdrop of these facts, Writ Petition Nos.393 of 2010 and 1779 of 2010 are taken up for consideration first, since they challenge the order cancelling the auction sale. The orders of the Collector and the Hon'ble Minister of Revenue, which are the subject matters of challenge in Writ Petition Nos.1553 of 2009 and 6544 of 2009, which are consequential

upon the auction sale, could be taken up thereafter, if necessary.

4 The order of the Divisional Joint Registrar cancelling the auction sale is based only on one ground and that is non payment of the balance amount of the auction sale within the statutory period of 15 days. It was submitted by the revision applicants before the Divisional Joint Registrar that under sub-rule (11) of Rule 107 of Maharashtra Co-operative Societies Rules, 1961 ("Rules"), a sum of money equal to 15% of the price of the immovable property put to auction was required to be deposited by the purchaser in the hands of Special Recovery Officer at the time of purchase (clause (g) of sub-rule 11) and the remainder of the purchase money was required to be paid within 15 days from the date of the sale (clause (h) of sub-rule 11). It was submitted that the remainder of the purchase money not being deposited within this period, the sale was liable to be treated as null and void, and non-est. This contention was accepted by the Divisional Joint Registrar and the sale and its confirmation were set aside. It is submitted by learned Counsel for the Petitioners, M/s Adhishakti and the Bank, that though ordinarily violation of a mandatory auction rule renders the sale to be a nullity, it would not be so, if the parties, for whose benefit the specific mandatory stipulation is made, waive the same. Learned Counsel submit that Clauses (g) and (h) of Sub-rule (10) of Rule 107, though mandatory, are procedural in nature and are for the benefit of the recovering bank and the borrower. It is submitted if these provisions are waived by the bank and the borrower, then the auction sale cannot be termed as a nullity or non-est. Learned Counsel rely on decisions of the Supreme Court in the cases of **General Manager, Sri Siddeshwara Co-operative Bank Ltd Vs. Ikbal**[1] **and Vasu P. Shetty Vs.**

1 (2013) 10 Supreme Court Cases 83

Hotel Vandana Palace.[2] Learned Counsel also rely on cases of **Babula Badriprasad Varma Vs. Surat Municipal Corporation**[3] and **Mohamad Kavi Mohamad Amin Vs. Fatmabai Ibrahim**[4] , in this behalf.

5 In a plethora of judgments starting from the case of **Manilal Mohanlal Shah Vs. Sardar Sayed Ahmed Sayed Mahmad**[5], the Supreme Court has consistently held that statutory provisions requiring sale money to be paid in designated time in Court auctions are mandatory and upon their non-compliance, there is no sale at all; the sale proceedings are rendered a complete nullity. It is not a case of any material irregularity in the conduct of the sale, but a case of a complete nullity where the purchaser acquires no rights at all. The judgment in the case of **Manilal Mohanlal Shah** and the principles of that case have since been followed and applied by the Supreme Court to a number of similar provisions under different statutes.

6 Manilal's case itself was under Rules 84, 85 and 86 of Order 21 of the Code of Civil Procedure, which require payment of twenty-five per cent of the amount of purchase-money by the person declared to be the purchaser immediately after such declaration and the balance amount before the Court closes on the fifteenth day from the sale of the property. The case of **Sardada Singh Vs. Sardara Singh**[6] was under similar payment provisions under Punjab Land Revenue Act, 1887. **Rao Mahmood Ahmad Khan Vs. Ranbir Singh**[7] was a case under Rules 285-D, 285-E, 285-F and

2 (2014) 5 Supreme Court Cases 660
3 (2008) 12 Supreme Court Cases 401
4 (1997) 6 Supreme Court Cases 71
5 AIR 1954 SC 349
6 (1990) 4 Supreme Court Cases 90
7 1995 Supp (4) Supreme Court Cases 275

285-G of Zamindari Abolition and Legal Reforms Rules, 1952 which likewise provided for a schedule of payment in an auction sale. These provisions were held to be similar to the corresponding provisions of Rules 84 to 86 of Order 21 and mandatory, and sale in non-compliance was held to be a nullity. Payment in that case by cheque deposited within time was held to be non-compliant, since the cheque could not possibly be encashed on the same date. In the case of **Gangabai Gopaldas Mohata Vs. Fulchand**[8], the sale was set aside for failure to deposit the balance amount of auction sale within the period of 15 days provided under Rule 8(2) read with Rule 13(3) of Maharashtra Municipalities (Sale of Distrained or Attached Movable and Immovable Property) Rules, 1967 (corresponding to Rules 84 and 85 of Order 21). The case of **Shilpa Shares and Securities Vs. National Co-operative Bank Ltd**[9], was, in fact, under the very rule which we are concerned with, namely, Rule 107(11)(g). Non-payment of the remainder of the purchase price within 15 days from the date of the sale was held to be fatal to the validity of the sale, rendering it as a nullity.

7 In the present case, the time provided for initial payment of 15% of the amount of the auction sale price and for depositing of the remainder, is statutory. The relevant rules are contained in clauses (a) to (k) of sub-rule 11. These are to be observed in every sale with or without attachment of immovable property. The rules for deposit of 15% of the price at the time of purchase and the remainder within 15 days, are contained in clauses (g) and (h) of sub-rule (11) of Rule 107. The auction sale notice in the present case also accordingly, in terms, contained a

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8 (1997) 10 Supreme Court Cases 387
9 (2007) 12 Supreme Court Cases 165

stipulation for payment of purchase price in the manner provided in clauses (g) and (h) of sub-rule 11. It is an admitted position that whereas a sum of over 15% of price was paid by M/s Adhishakti at the time of the purchase, the remainder of the purchase money was not paid within 15 days. The remainder was paid by four installments spanning over the next three months, the last of such installments having been paid on 17 March 2005. In the premises, the sale cannot be held to be a lawful sale. It is as though there was no sale at all and the purchaser, M/s Adhishakti, does not acquire any right. The sale is a complete nullity and the order setting aside the sale on this ground, cannot in any way be faulted.

8 Learned Counsel for the Petitioners submit that the application for cancellation of the sale was not made within the period provided for in sub-rule (14) of Rule 107. Sub-rule (14) of Rule 107 deals with a case, where an application is made for setting aside a sale on the ground of a material irregularity in conducting the sale or a mistake or fraud in publishing or conducting it. It does not take into account the case of a complete nullity for the reason of non-payment of the purchase price within the statutory period.

9 Learned Counsel are also not right in submitting that the sale must still stand by the reason of the alleged waiver of the condition of time for payment by the Bank and the borrower, for whose benefit such mandate exists. In the first place, as a matter of fact, there is no waiver on the part of the borrower or his legal heirs. Any waiver of legal rights implies a conscious decision on the part of the party waiving after knowing his rights. Learned Counsel for the Petitioners could not point out any fact

emanating from the record of the case or otherwise showing knowledge on the part of the legal heirs of Panditrao Borse at the relevant time that the purchase money was not being paid by the auction purchaser within the stipulated period. There is thus no case of waiver on their part. Secondly, it may be open to condone a breach only in a case where the Court has discretion to do so. The law provides that in a case such as this, once the sale is rendered null and void for failure of the auction-purchaser to comply with the requirement to pay within time, it is the imperative duty of the authorities to put the property to re-sale; the law does not confer any discretion in the concerned authorities to extend the time for payment of the balance amount (see the case of **Sardara Singh** (supra)).

10 The case of **Vasu P. Shetty Vs. Hotel Vandana Palace**[10], cited by learned Counsel for the Petitioners is clearly distinguishable. Here the statutory period of fifteen days to pay the balance amount of purchase price in the auction sale provided by the relevant provisions of law, namely, Rules 8 and 9 of Security Interest (Enforcement) Rules 2002, could be "*extended as may be agreed upon in writing by the parties*". The Court held that the provision in Rule 9(1) (i.e. no sale before expiry of 30 days of public notice) and the provisions in Rule 9(3) and 9(4) (i.e. payment of 25 per cent of the sale price immediately and balance within 15 days) being for the benefit of the secured creditor or for the benefit of the borrower could be lawfully waived by them. The Court held that the provisions neither expressly nor contextually indicated otherwise. The Court held that the question whether there is a waiver or not depends on the facts of each case and no hard-and-fast rule can be laid down in that

10 (2014) 5 Supreme Court Cases 660

regard. In the case of **Sri Siddeshwara Co-operative Bank Vs. Ikbal**[11], same provisions of law, namely, Rules 9(1), 9(3) and 9(4), were involved and the writ petition challenging the sale was filed by the borrower more than four years after issuance of the sale certificate and the Court held that on facts there was in fact a waiver on the part of the borrower. These facts are clearly distinguishable, as the operative provisions of law are clearly different and vest a power in the authority conducting the sale to extend the time by consent. This obviously introduced the element of waiver as a ground to condone the breach.

11 Learned Counsel alternatively submit that the legal heirs of Panditrao Borse, at any rate, learnt about the auction sale and the conveyance executed in pursuance thereof in favour of M/s Adhishakti at least in October 2005 when notice of M/s Adhishakti's application to the Collector for changes in the revenue records was given to them. In the first place, there is no case pleaded before the Co-operative or Revenue Authorities that as a result of delay on the part of the challengers, any equity has arisen for the other party including the purchaser himself. The mere fact that there is a delay on the part of the challenger, in the absence of such equity, cannot entail the consequence of confirmation of an invalid sale conducted in breach of a statutory rule for timely payment.

12 Besides, the Divisional Joint Registrar did condone the delay on the part of the legal heirs of Panditrao Borse in approaching him in revision on the ground that there was no case of deliberate or intentional delay. This conclusion can be sustained even on a bare reading of the records of the

11 (2013) 10 Supreme Court Cases 83

case and this Court, in its writ jurisdiction under Articles 226 and 227 of the Constitution of India, would not be inclined to interfere with such order.

13 Accordingly, there is no merit in the writ petitions. Before passing orders on the writ petitions, it is, however, necessary to note that legal heirs of Panditrao Borse, who are the Respondents to the present petitions, have made an unconditional offer of depositing the entire amount of the bank dues, which were payable as on 17 March 2005 in response to the auction sale. The total outstanding of the bank as on 17 March 2005 was a sum of Rs.77,44,042/. This amount is agreed to be deposited by legal heirs of Panditrao Borse within twelve weeks from today. The statement is accepted.

14 Since the auction sale itself has been rightly set aside and that order is now accepted by this Court, no useful purpose would be served by considering the Petitioners' challenge to the order of the Collector rejecting the application of M/s Adhishakti for transfer of the land on the basis of the auction sale.

15 The Bank has already recovered its entire outstandings from the auction sale, and in fact, holds a surplus of over Rs.71,00,000/- lacs. Since its dues are now being paid by the legal representatives of the borrower, as noted above, the Bank will have to refund the entire amount of sale price recovered from M/s Adhishakti to the latter with interest on the surplus amount of Rs.71,55,958/-.

16 In the premises, the following order is passed :

: O R D E R :

(i) Writ Petition Nos.393 of 2010 and 1779 of 2010 are dismissed;

(ii) Respondent Nos.4 to 6 in Writ Petition No.393 of 2010 (who are Respondent Nos.4 to 6 even in the companion petition) shall deposit a sum of Rs.79,44,042/- with Mahanagar Co-operative Bank Limited (Respondent No.2 in these petitions) within a period of 12 weeks from today;

(iii) Mahanagar Co-operative Bank Limited shall refund a sum of Rs.1.51 crores to M/s Adhishakti Developers with such interest as may have accrued from time to time on the surplus amount of Rs.71,55,958/- held by them so far;

(iv) M/s Adhishakti will have liberty to adopt such steps as may be permissible to them in law for recovering damages, if any, suffered by them as a result of cancellation of the auction sale on an application made four years after such auction sale;

(v) Writ Petition No.1543 of 2009 and Appellate Side Writ

Petition No.6544 of 2009 are dismissed;

(vi) No order as to costs.

17 On the application of learned Counsel for the Petitioners in Writ Petition No.393 of 2010, possession of the subject plot in pursuance of cancellation of the sale shall not be recovered from the Petitioners for a period of six weeks from today.

(S.C. GUPTE, J.)