

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

WRIT PETITION NO.11089 OF 2018

Narayan Gajanan Thakur,]
At village Dhutum, Post Jasai,]
Taluka Uran District Raigad].... Petitioner.

Versus

- | | | | |
|----|-----------------------------------|---|--------------------|
| 1] | Karnala Nagari Sahakari Bank Ltd. |] | |
| | Ratan Market, First Floor, |] | |
| | Tapal Naka, Uran Road, Panvel, |] | |
| | Raigad – 410 206 |] | |
| | |] | |
| 2] | Roshan Construction, |] | |
| | Proprietor – |] | |
| | Mrs. Sarita Narayan Thakur, |] | |
| | Village Dhutum, Post Jasai |] | |
| | Taluka Uran, District Raigad |] | |
| | |] | |
| 3] | Pandurang Parshuram Kharpatil |] | |
| | At Post Chirner, Dist – Raigad. |] | |
| | |] | |
| 4] | The Deputy Registrar, |] | |
| | Co-operative Societies |] | |
| | Raigad, Alibag, |] | |
| | Shukra Tara Building |] | |
| | Kamath Aaqli, Alibag, Raigad |] | |
| | |] | |
| 5] | The Divisional Joint Registrar, |] | |
| | Co-operative Societies, |] | |
| | Kokan Division, |] | |
| | Kokan Bhavan, Navi Mumbai. |] | Respondents. |

Mr. Sampatrao Pawar for the Petitioner.

Mr. C G Gavnekar with Mr. C S Hiranandani for Respondent No.1.

Mr. S D Rayrikar, AGP, for Respondent Nos.4 and 5.

CORAM : S. S. SHINDE, J
Reserved on : 03rd April 2019
Pronounced on : 30th April 2019

JUDGMENT :

1 The above Writ Petition takes exception to the order dated 27/03/2018 passed by Divisional Joint Registrar, Co-operative Societies, Konkan Division, Navi Mumbai by which the Revision Application No.16 of 2017 filed by the Applicant – Bank i.e. Respondent No.1 herein came to be partly allowed and the order dated 21/01/2017 passed by the District Deputy Registrar, Co-operative Societies, Raigad came to be set aside and the matter was remanded back to the District Deputy Registrar for re-consideration.

2 The learned counsel for the Petitioner has submitted that though there is a report of the four cooperative officers that the Petitioner is not surety to the loan, the Divisional Joint Registrar has totally failed to consider the said fact. It is further submitted by the learned counsel for the Petitioner that the Divisional Joint Registrar did not appreciate the fact that while disposing of the Civil Application No.3067 of 2015 filed by the Respondent-Bank for permission to re-auction the attached property, this Court has not granted permission for re-auction of the said property. It is also submitted by the learned counsel for the Petitioner that, there was no attachment order and hence without following procedure under Rule 107(11) of the Maharashtra Co-operative Societies Rules, 1961, the reserved price cannot be fixed. The learned counsel for the Petitioner further submitted, that on the basis of the order passed by this Court the Revenue Authority has set aside the charge on the property, and

unless the charge is imposed, no reserved price is to be fixed. He lastly contended that the impugned order passed by the Divisional Joint Registrar is illegal and is therefore liable to be quashed and set aside.

3 The learned counsel for Respondent No.1 Bank submitted that Bank has advanced loan to Respondent No.2 and as the said loan was not repaid, the proceedings under Section 101 was initiated and recovery certificate came to be granted by the Assistant Registrar, Co-operative Societies under Section 101 of the Maharashtra Co-operative Societies Act, 1960. He further submitted that the property of the Petitioner was put in auction. The learned counsel for the Petitioner submitted that while admitting the Writ Petition filed by the Petitioner challenging the public auction, this Court has observed that the recovery certificate issued against the Petitioner and Respondent Nos.4 and 5 therein has attained finality. He further submitted that, this Court with the consent of the Bank decided the Writ Petition and has set aside the public auction of the Petitioner's property, and as more than 1 year has elapsed from setting aside the said auction, an application was made by the Bank to grant fresh upset price on 10/08/2015 as required under the provisions of Rule 107(11) of the Maharashtra Co-operative Societies Rules, 1960. He further submitted that the District Deputy Registrar has erred in declining to grant upset price certificate to the Bank on the basis that the mutation entry was cancelled by the Divisional Commissioner. He submitted

that the Divisional Joint Registrar has allowed the Revision filed by the Bank against the order of the Deputy Registrar, and the Divisional Joint Registrar has rightly come to a conclusion that the order passed by the District Deputy Registrar was contrary to Maharashtra Co-operative Societies Rules by observing that the decision of the Divisional Commissioner has no effect in considering the upset price. He lastly contended that it is mandatory under the provisions that if 1 year has elapsed, the bank has to apply for fresh upset price certificate. He therefore submitted that the impugned order passed by the Divisional Joint Registrar needs no interference and the Writ Petition filed by the Petitioner is required to be dismissed.

4 I have heard the learned counsel for the parties. Perused the pleadings and grounds taken in the Petition and annexures thereto, the reasons assigned in the impugned order, the reply filed by the Respondents and also the written notes placed on record by the learned counsel appearing for the Petitioner and the Respondent – Bank.

5 By way of filing this Writ Petition, the Petitioner has made attempt to raise disputed question of facts. However, the controversy raised in the present Petition, is limited inasmuch as being aggrieved by the order passed by the District Deputy Registrar, Raigad Alibag, i.e. Respondent No.4 herein, wherein Respondent No.4 did not express any opinion about fixing the upsets

price, Respondent No.1 herein i.e. the Bank has filed a Revision Application before the Divisional Joint Registrar i.e. the Respondent No.5 herein. By the impugned order, Respondent No.5 has remanded the matter back to Respondent No.4 herein for reconsideration. It appears from the affidavit in reply placed on record by Respondent No.1 that Respondent No.2 herein i.e. M/s. Roshan Constructions filed a Writ Petition being No.3132 of 2010 before this Court. This Court (Coram : R V More, J) by order dated 15/04/2010 disposed of the said Writ Petition by holding that Respondent No.3 therein i.e. the Revisionary Authority shall not entertain the Revision of the Petitioner therein i.e. Respondent No.2 herein unless the Petitioner therein complies with the provisions of Section 154(2A) of the Maharashtra Cooperative Societies Act, 1960, (for short "the said Act). It appears that a recovery certificate under Section 101 of the said Act was issued by the Competent Authority in favour of the Respondent No.1 – Bank and against Respondent No.2 herein. In relation to the said recovery certificate, this Court while disposing of the said Writ Petition has observed that Respondent – Bank is at liberty to execute the said certificate in accordance with law.

6 It further appears from the record that Petitioner herein has also filed Writ Petition No. 2546 of 2011 before this Court challenging the recovery certificate issued under Section 101 of the said Act against the Petitioner and Respondent Nos.4 and 5 therein i.e. the wife and son of the Petitioner. This

Court (Coram : A. S. Oka, J) while admitting the said Writ Petition by order dated 12/08/2011 has observed in paragraph No.5 that the recovery certificate issued against the Petitioner and the Respondent Nos.4 and 5 has attained finality. The Court has also taken note of the fact that in execution of the recovery certificate, house property owned by the Petitioner was put to auction sale by the Special Recovery Officer and also the auction was conducted and the Respondent No.9 therein who offered bid of Rs.1,01,00,000/- was declared as the auction purchaser and there is an order passed confirming the auction sale on deposit of the price by the Respondent No.9 therein. It further appears that the Petitioner herein filed a Revision Application under Section 154 of the said Act wherein the challenge was to the auction notice dated 29/09/2010 and the order dated 08/11/2010 passed by the Special Recovery Officer confirming the auction sale. However, the Divisional Joint Registrar by the order dated 16/12/2010 declined to entertain the said revision application on the ground of non-compliance with the mandatory requirement of Subsection 2-A of Section 154 of the said Act. It further appears that by the said order dated 12/08/2011 this Court has issued Rule in the said Writ Petition. The Petitioner was directed to deposit a sum of Rs.1,01,00,000/- . It was further observed by this Court that the Revision Application preferred by the Petitioner and the borrowers for challenging the recovery certificate was dismissed for non-compliance of the the requirements of subsection 2A of Section 154 of the said Act. The order of dismissal of the revision application has been confirmed

by this Court by order dated 15/04/2010. Thus the recovery certificate has attained finality. Therefore in the present Writ Petition it is unwarranted to appreciate the contention of the Petitioner herein that neither the loan amount was borrowed nor the Petitioner was guarantor to the loan amount sanctioned and disbursed in favour of Respondent No.2 herein.

7 It is true that in Writ Petition No.2546 of 2011 the Respondent – Bank has filed Civil Application No.3067 of 2015. While disposing by the said Writ Petition No.2546 of 2011 and Civil Application No.3067 of 2015, this Court (Coram : M S Sonak, J) by order dated 26/11/2015 recorded the statement made by the learned counsel for the Respondent Nos.1 and 2 therein i.e. the Bank that the auction dated 08/11/2010 was incorrectly held and therefore the said Respondents have no objection if the Petition is made absolute in terms of prayer clause (c) thereof. However, in so far as the observation made by this Court while admitting the said Writ Petition No.2546 of 2011 by order dated 12/08/2011 that the recovery certificate issued against the Petitioner and the Respondent Nos.4 and 5 has attained finality, has not been shuttered in any manner.

8 Therefore, keeping in view the limited controversy involved in this Petition, it would be apposite to refer to the provisions of Sub-Rule 10 of Rule 107 of the Maharashtra Co-operative Societies Rules, 1961 (for short “the said

Rules) which for the sake of ready reference, reproduced herein under :-

“10 Immovable property shall not be sold in execution of a decree unless such property has been previously attached.

Provided that where the decree has been obtained on the basis of a mortgage of such property, it shall not be necessary to attach it.”

In the facts of the present case, the house property of the Petitioner herein which is mentioned in various proceedings is not in dispute. Therefore the immovable property was attached in execution of recovery certificate issued under Section 101 of the said Act.

9 In the context of the challenge raised in the present Petition, it would also be apposite to refer to Sub-Rule 11(f) of Rule 107 of the said Rules, which for the sake of ready reference, is reproduced herein under :-

(f) When any immovable property is sold under these rules, the sale shall be subject to the prior encumbrances on the property, if any. The applicant shall, when the amount for the realisation of which the sale is held exceeds Rs. 100, furnish to the Recovery Officer within such time as may be fixed by him or by the Recovery Officer an encumbrance certificate from the Registration Department for the period of not less than twelve years prior to the date of attachment of the property sought to be sold, or in cases falling under the proviso to sub-rule (10), prior to the date of the application for execution. The time for production of the encumbrance certificate may be extended at the discretion of the Recovery

Officer, as the case may be. The sale shall be by public auction to the highest bidder:

Provided that, it shall be open to the Recovery Officer to decline to accept the highest bid where the price offered appears to be unduly low or for other adequate reasons:

Provided further that, the Recovery Officer shall obtain prior approval of the Registrar to the upset price of movable and immovable property before publication of proclamation of sale:

Provided also that, upset price shall be approved by the Registrar by considering the comparative prevailing prices in the market, ready reckoner rates, by obtaining valuation from the approved valuer within one month from the date of receipt of proposal from the Recovery Officer, after hearing the judgment debtor. Such approved upset price shall be valid for six months from the date of approval.

Provided further that, the Recovery Officer may, in his discretion, adjourn the sale to a specified day and hour, recording his reason for such adjournment. Where a sale is so adjourned for a longer period than seven days, a fresh proclamation under clause (e) shall be made, unless the defaulter consents to waive it.

The sale shall be held after the expiry of not less than thirty days calculated from the date on which notice of the proclamation was affixed in the office of the Recovery Officer. The time and place of sale shall be fixed by the Recovery Officer and the place of sale shall be the village where the property to be sold is situated or such adjoining prominent place of public resort as may be fixed by the Recovery Officer :

Provided that, in cases where an encumbrance certificate is not obtainable owing to the destruction of the connected records, an affidavit

from the village Talathi or corresponding officer in regard to the encumbrances known to him supported by a certificate from the Registration Department that the encumbrance certificate cannot be granted owing to the destruction of the connected records, shall be accepted in place of an encumbrance certificate.”

Sub-Rule (11) Rule 107 of the said Rules provided for the procedure to be followed in the attachment and sale or sale without attachment of immovable property. In the present case, Respondent No.1 – Bank filed Civil Application No.3067 of 2015 in Writ Petition No.2546 of 2011 for permission to the bank to re-auction the attached house. Since the public auction of the Petitioner's property was set aside by order dated 26/11/2015 passed in Writ Petition No.2546 of 2011, and more than one year has elapsed from the setting aside of the said public auction, Respondent No.1- Bank was required to take fresh upset price approved by the Registrar as provided in Rule 107(11) of the said Rules.

10 Keeping in view the aforesaid provisions, while dealing with the request of the recovery officer to grant approval to the fresh upset price, the District Deputy Registrar was obliged to follow the aforesaid provision and then take a decision on approval. However, the said authority in total ignorance of the aforesaid provision has held that since the mutation entry in respect of the subject property is cancelled by the Divisional Commissioner, Konkan Division, Navi Mumbai, it is not proper to fix the upset price of the

said property.

11 As already observed herein above, Respondent No.1 Bank, being aggrieved by the decision of the District Deputy Registrar, Cooperative Societies, Raigad Alibag filed Revision Application before the Divisional Joint Registrar, Konkan Division. The said Revision Application was allowed by the said authority i.e. Respondent No.5 herein and the order passed by the District Deputy Registrar was set aside and the matter was remanded back to the said authority for reconsideration. While passing the impugned order, Respondent No.5 has assigned reasons on the basis of the material placed on record and also keeping in view the provisions i.e. Sub-Rule (11) of Section 107 of the said Rules.

12 From the discussion in the impugned order, prima facie it clearly emerges on record that the District Deputy Registrar has not properly exercised the jurisdiction vested in it and by cryptic reasons, which are not assigned keeping in view the provisions of Sub-Rule 11(f) of Rule 107 of the said Rules, has observed that it is not proper to fix the upset price since the mutation entry in respect of the subject property has been cancelled by the Divisional Commissioner, Konkan Division, Navi Mumbai. Upon overall consideration of the facts and the law involved in the present case as also the material placed on record, it will have to be held that the view taken by Respondent No.5

herein in the impugned order is a plausible view and there is no perversity as such. There is no error apparent on the face of record so as to cause interference in the impugned order. Since the matter is remanded back to Respondent No.4 herein i.e. the District Deputy Registrar for fresh consideration, no hardship can be caused to the Petitioner. However, in case the order of Respondent No.4 is allowed to remain in force, it will cause serious prejudice to the interest of Respondent No.1 Bank, inasmuch as the recovery certificates were issued way back in the year 2010, which have attained the finality and also attachment of property pursuant to issuance of said certificate would remain unimplemented as long as approval is not granted by the District Deputy Registrar to the fixation of upset price of the property seized/attached pursuant to the issuance of the recovery certificates..

13 The contention of the learned counsel appearing on behalf of the Petitioner that while disposing of Writ Petition No.2546 of 2011, no permission is granted to Respondent No.1 Bank to re-auction the property, deserves no consideration inasmuch as it was at the instance of Respondent No.1 Bank that the said Writ Petition was allowed. Respondent No.1 – Bank filed Civil Application No.3067 of 2015 in the said Writ Petition No.2546 of 2011. While disposing of the said Writ Petition and Civil Application, this Court by order dated 26/11/2015 recorded a statement made on behalf of the Respondents – Bank by the learned counsel appearing for Respondent – Bank to the effect that

the auction dated 08/11/2010 was incorrectly held, and therefore the said Respondents have no objection if the said Petition is made absolute in terms of prayer clause (c). Relying upon the said statement, this Court disposed of the said Writ Petition thereby making the Rule absolute in terms of prayer clause (c). It would be travesty in justice if the contention of the Petitioner is accepted that Respondent No.1 Bank cannot take further steps for enforcement of recovery certificate issued under Section 101 of the said Act against the Petitioner.

14 In that view of the matter, no case is made out to cause interference in the impugned judgment and order passed by Respondent No.5 herein i.e. the Divisional Joint Registrar, Co-operative Societies, Konkan Division, Navi Mumbai. Hence the Writ Petition stands rejected. The observations made herein above are confined to the adjudication of the present Writ Petition only. Needless to state that Respondent No.4 herein i.e. the Deputy Registrar, Co-operative Societies, Raigad Alibag will take expeditious and appropriate decision after affording reasonable opportunity to the parties to putforth their contentions and in accordance with law, keeping in view the provisions of Maharashtra Co-operative Societies Act, 1960 and the Rules framed thereunder.

[S. S. SHINDE , J]