

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD
WRIT PETITION NO. 570 OF 2012

Munjaji S/o Kondiba Chate
Age 37 years, occ. Agriculture
R/o Warwati, Tq. Ambejogai
Dist. Beed.

Petitioner

Versus

1. The State of Maharashtra
through Principal Secretary
Co-operation & Textile Department
Mantralaya Mumbai 32.
2. District Deputy Registrar,
Co-operative Societies,
Beed.
3. Divisional Joint Registrar
Co-operative Societies,
Latur, Dist. Latur.
4. Deenadayal Nagari Sahakari Bank Ltd.
Ambejogai Dist. Beed
Through its Chief Executive Officer
5. The Special Recovery Officer
Deendayal Nagari Sahakari Bank Ltd.
Ambejogai Dist. Beed.
6. The Executive Director
Vaishnavi Hatcheries Pvt. Ltd.
471, Sadashiv Peth, 10 Shrinivas
Pune 411 030.
7. The Executive Director
Vaishnavi Breeding Farms Pvt. Ltd.
471, Sadashiv Peth, 10, Shrinivas
Pune 411 030.

8. The Executive Director
Vaishnavi Foods & Feeds Pvt. Ltd.
471, Sadashiv Peth, 10, Shrinivas
Pune 411 030.
9. Ratnakar S/o Manikrao Gutte
age major, Occ. Agriculture
R/o Jai Nagar, Parli Vajjnath
Tq. Parli Vajjnath, Dist. Beed.
10. Rajabhau S/o Shriram Phad
Age 41 years, Occ. Business
R/o At Post Kanerwadi, Tq. Parali
Dist. Beed.

Respondents

Mr. V.D. Salunke, Advocate holding for Mr. S.P. Katneshwarkar,
Advocate for the petitioner.
Mr. S.P. Sonpawale, AGP for respondents No. 1 to 3.
Mr. Yashodeep Deshmukh, Advocate holding for Mr. H.A. Joshi,
Advocate for respondents No. 4 and 5.
Mr. A.N. Irpatgire, Advocate for respondents No. 6 to 8.
Mr. P.R. Katneshwarkar, Advocate for respondent No. 9.

CORAM : M.G. Sewlikar, J.

RESERVED ON : 15th July, 2021.

PRONOUNCED ON : 30th July, 2021.

JUDGMENT :

1. Rule. Rule made returnable forthwith.
2. By consent, heard both the sides finally at the admission stage.
3. By this petition under Article 227 of the Constitution of

India, petitioner is challenging the validity of the auction proceedings vide which, properties mortgaged with the bank – respondent No. 4 came to be sold in auction to respondent No. 9.

4. Facts leading to this petition can be summarised as under :-

Petitioner is the owner of property block Nos. 440 and 437 situated at Warwati, Tq. Ambejogai, Dist. Beed. He is also the owner of land block No. 102 situated at Girwali, Tq. Ambejogai, Dist. Beed. Petitioner had taken loan from respondent No. 4-bank by mortgaging lands Block No. 440, 437 and 102. Since the petitioner defaulted in payment of loan, proceedings under Section 101 of Maharashtra Co-operative Societies Act (for short “MCS Act”) came to be initiated which resulted in issuance of certificate under Section 101 of the MCS Act. Upset price was fixed at Rs. 98,10,000/-.

5. It is further contended that the Special Recovery Officer – respondent No. 5 decided to sell the mortgaged lands i.e. block No. 440, 437 and 102. He, therefore, issued a proclamation dated 9th September, 2010, for auctioning the aforesaid properties. This

proclamation came to be published on 14th September, 2010 in newspaper namely daily “Zunzar Neta”.

6. It is further contended that in the meantime, petitioner had filed Revision Application No. 58/2010 before the Divisional Joint Registrar, Co-operative Societies, Latur, against sanction dated 26th July, 2010 given by the District Deputy Registrar, Co-operative Societies, Beed. The Divisional Joint Registrar, Latur, vide order dated 28th September, 2010, was pleased to stay the sanction and proclamation of auction dated 9th September, 2010. This revision was dismissed by the Divisional Joint Registrar on 23rd November, 2010.

7. Respondent No. 5 attached the property of petitioner vide proclamation dated 26th May, 2010. Auction was scheduled on 14th September, 2010 and tenders were to be filled in by 29th September, 2010. The auction was held on 29th November, 2010 and respondent No. 9 being the highest bidder at the auction, purchased the lands for Rs. 1,26,00,000/-. 15% of the purchase price, as required by Rule 107(11)(g) of the Maharashtra Co-operative Societies Rules, 1961 (for short “MCS Rules”) was deposited on the same day. Remainder 85% of the purchase price was deposited on 12th January, 2011 by

respondent No. 9 and sale-deed was executed on 19th January, 2011.

8. It is the contention of petitioner that illegalities have been committed while issuing proclamation. Proclamation of auction was issued on 9th September, 2010. However, it was published in Dainik Zunzar Neta on 14th September 2010. In this proclamation, the date of auction is not mentioned. As per rule 107(11)(e) of the MCS Rules, thirty days notice ought to have been given for holding auction. However, in the present case, the date of auction was not published. The date of calling tenders was mentioned as 28th September, 2010. It is further contended that actual auction took place on 29th November, 2010. The auction was to be held on 28th September, 2010 but actually it was held on 29th November, 2010. In terms of proviso to Rule 107(11)(e) of the MCS Rules, if auction is not conducted within seven days from the scheduled date, fresh proclamation has to be issued. This procedure is not followed in the present case. Upset price was fixed at Rs. 98,10,000/-. The purchaser deposited 15% of the price immediately. As per Rule 107(11)(h), the remainder 85% amount was to be deposited. However, the same was not deposited within the period prescribed by Rule 107(11)(h). It was deposited on 12th January, 2011. It is contended that all these illegalities have

been committed by the Special Recovery Officer – respondent no. 5 because of which, the entire auction needs to be quashed and set aside. According to the petitioners, auction was illegal as being in violation of Rule 107 of MCS Rules and the same needs to be set aside.

9. It is further contended that a very low upset price was fixed. Similarly, another property of petitioner was sold for Rs. 3,00,00,000/- whereas this property was sold for Rs. 1,29,00,000/-. For this reason also the auction needs to be set aside.

10. This auction proceeding was challenged by the petitioner before the Divisional Joint Registrar by preferring Revision Application No. 11/2011 which came to be dismissed on 13th April, 2011. Against said revision, this writ petition is preferred.

11. Respondents No. 4 and 5 filed their affidavit-in-reply on 20th September, 2016. Respondents No. 6 to 8 and respondent No. 9 have also filed affidavit-in-reply. They contended that the revision before the Divisional Joint Registrar was not maintainable. Revision

can be preferred against the order of the Recovery Officer confirming or not confirming sale. If the borrower has any objection regarding conduct of auction proceedings, he has to make an application to the Recovery Officer and, the order passed by the Recovery Officer and order passed on that application becomes revisable. In the case at hand, the petitioner did not follow this procedure. Therefore, revision before the Divisional Joint Registrar was not maintainable. The petitioner has not availed the remedy provided under Rule 107(13) & (14) of MCS Rules 1961. Since this procedure was not followed, revision was not maintainable. They further contended that auction was to be held on 28th September, 2010 but the same could not be proceeded with as the auction was stayed by the Divisional Joint Registrar. The auction had to be adjourned because of the circumstances beyond the control of the Recovery Officer. Stay came to be vacated on 23rd November, 2010. Therefore, immediately on vacation of stay, auction was conducted on 29th November, 2010. Therefore, there was no illegality. They, therefore, prayed for the dismissal of the writ petition.

12. Heard Shri Salunke, learned counsel for the petitioner, Shri Deshmukh, learned counsel for respondents No. 4 and 5, Shri

Irpatgire, learned counsel for respondents No. 6 to 8 and Shri Katneshwarkar, learned counsel for respondent No. 9.

13. Shri Salunke submitted that this auction proceedings suffer from fragrant violation of the Maharashtra Co-operative Societies Rules. He submitted that as per Rule 107(11)(e), proclamation of sale has to be published atleast thirty days before the date fixed for sale. He submitted that as per proviso to Rule 107(11)(e), if for any reason, sale had to be postponed beyond seven days, a fresh proclamation is required to be issued. This mandatory procedure is not followed. He further argued that as per Rule 107(11)(g), 15% of price of immovable property has to be deposited by the purchaser at the time of purchase and in terms of Rule 107(11)(h), the remainder of purchase money is to be deposited within thirty days from the date of sale. Sale was conducted on 29th November, 2010 and 85% of purchase price was deposited on 12th January, 2011 i.e. beyond thirty days. He submitted that these mandatory requirements have not been followed and, therefore, the auction is liable to be set aside. He placed reliance on judgments in the matter of M/s Shilpa Shares and Securities and others vs. The National Co-operative Bank Ltd. and others reported in 2007(3) ALL MR 832,

Niranjan D. Woody vs. South Indian Co-operative Bank Ltd. reported in 2006(5) Bom.C.R. 587 and on unreported judgment of this Court in Civil Writ Petition No.5627/2019 (Coram N.J. Jamadar, J.) decided on 25th May, 2021.

14. Shri Deshmukh, learned counsel for respondents No. 4 and 5 submitted that on 26th May, 2010, proclamation was published after giving notice to petitioner. Despite that, petitioner failed to deposit the amount of loan. He further submitted that petitioner preferred Revision Application No. 58/2010 against fixation of upset price. On 28th September, 2010, auction proceedings were stayed by the Divisional Joint Registrar. On 23rd November, 2010, the Divisional Joint Registrar dismissed Revision Application No. 58/2010. He submitted that because of the stay given by the Divisional Joint Registrar, auction could not be proceeded with. Respondent No.5 did not suo moto adjourn the auction. It had to be adjourned because of the stay given by the Divisional Joint Registrar. Therefore, the provisions of Rule 107 of the MCS Rules were not required to be followed. He further submitted that petitioner had alternate remedy under Rule 107(13) of the MCS Rules. Petitioner should have applied to the Recovery Officer for setting aside auction

within thirty days from the date of sale. Petitioner did not exhaust this remedy. After giving decision by the Recovery Officer under Rule 107(14)(i), this order becomes revisable. This alternate remedy was not exhausted by the petitioner. He further submitted that respondent No. 9 deposited 15% of the amount on the date of sale. Respondent No. 4 – bank had applied to the Divisional Joint Registrar for confirmation of sale which was not received within thirty days but it was received on 29th November, 2011. He submitted that respondent No. 9 was not responsible for delay in payment of remainder. Payment was delayed as respondent No. 4 and 5 waited for confirmation of sale. He submitted that provisions of Rule 107(11) (h) are not mandatory and, therefore, late payment of remainder of purchase price cannot vitiate the auction. He submitted that the mandatory requirement of Rule 107(13) of the MCS Rules is that the petitioner should have deposited 5% of the purchase money with the Recovery Officer, which he did not do. Therefore, the remedy available to the petitioner was not availed and he preferred revision which was not maintainable. He, therefore, prayed for the dismissal of the writ petition. He placed reliance on judgments in the matter of Ramchanra Sitaram Mulik and others vs. Janata Nagari Sahakari Patsanstha Ltd. and others reported in MANU/MH/0088/2018 and

Amit P. Modi vs. The State of Maharashtra and others reported in MANU/MH/2363/2018.

15. Learned counsel Shri Irpatgire adopted the arguments of Shri Deshmukh, learned counsel for respondents No. 4 and 5. He further submitted that respondents had raised the objection before Divisional Joint Registrar about the maintainability of the revision.

16. Shri Katneshwarkar, learned counsel for respondent No. 9 submitted that the rule is not mandatory. He submitted that proviso to Rule 107(11)(h) states that for payment of cost of stamp, the Recovery Officer has a discretion to extend time by 45 days from the date of sale. He submitted that the date of sale was 29th November, 2010. He further submitted that payment of remainder was made within 45 days and, therefore, no illegality in auction was committed. In terms of Rule 107(14)(i), application to set aside sale on the ground of material irregularity or mistake or fraud can be made. But no sale shall be set aside on the ground of irregularity or mistake fraud unless the District Deputy Registrar is satisfied that the applicant or person entitled to share in a rateable distribution of the assets or whose interest is affected by sale has sustained

substantial injury on account of the alleged irregularity. The irregularities which are alleged by the petitioner are not material irregularities and, therefore, they do not deserve any consideration. He, therefore, prayed for dismissal of the petition.

17. It is not in dispute that petitioner had taken loan. He committed default in the repayment of loan. Therefore, proceedings under Section 101 of the MCS Act were initiated and certificate under Section 101 of MCS Act came to be issued. Upset price was fixed at Rs. 98,00,000/- Respondent No. 2 approved the upset price by letter dated 26th July, 2010. Against said fixation, the petitioner had preferred revision bearing Revision Application No. 58/2010 before the District Deputy Registrar. During pendency of this revision, on 09.09.2010, proclamation for sale of attached properties of petitioner was issued and the same was published on 14th September, 2010 in daily "Zunzar Neta" and the auction was to be held on 28th September, 2010. In the meantime i.e. on 28th September, 2010, auction was stayed by the Divisional Joint Registrar. Stay was vacated on 23rd November, 2010 and the auction was held on 29th November, 2010. Respondent No. 9, being the highest bidder, was declared as the purchaser. These properties were purchased in

auction for Rs. 1,26,00,000/- by respondent No. 9. On the same day, he deposited 15% of the purchase amount and remaining purchase amount was paid on 12th January, 2011.

18. In terms of Section 156 of the MCS Act, the Registrar or the officer subordinate to him and empowered by him in this behalf or the officer of such society as may be notified by the State Government who is empowered by the Registrar in this behalf, has the power of attachment and sale or sale without attachment of the property of the person against whom amount is due under decree, decision, award or order.

19. The procedure for attachment and sale of the property is provided under Rule 107 of MCS Rules. Rule 107(11)(e) provides for proclamation of sale of attached property. It reads as under :-

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

(11) In the attachment and sale or sale without attachment of immovable property, the following rules shall be observed :-

(e) Proclamation of sale shall be published by affixing a notice in the office of the Recovery Officer and the taluka office at least thirty days before the date fixed for the sale and also by beat of drum in

the village (on two consecutive days previous to the date of sale and on the day of sale prior to the commencement of the sale). Such proclamation shall, where attachment is required before sale, be made after the attachment has been effected. Notice shall also be given to the applicant and defaulter. The proclamation shall state the time and place of sale and specify as fairly and accurately as possible :

- (i) the property to be sold;
- (ii) any encumbrance to which the property is liable;
- (iii) the amount for the recovery of which sale is ordered; and
- (iv) every other matter which the [Recovery Officer] considers material for a purchaser to know in order to judge the nature and value of the property.

20. This rule clearly mandates that proclamation of sale has to be published by affixing a notice in the office of the Recovery Officer and the Taluka office atleast 30 days prior to the date fixed for sale. In the case at hand, proclamation was issued on 9th September, 2010, it came to be published in daily "Zunzar Neta" on 14th September, 2010 and auction was scheduled on 28th September, 2010. It is, thus, clear that 30 days notice before the date fixed for sale was not given. Thus, the requirement as mandated by Rule 107(11)(e) has not been followed. This is a clear violation of Rule

107(11)(e) of MCS Rules.

21. Rule 107(11)(f) states that the sale shall be by public auction to the highest bidder. Proviso to this rule states that the Recovery Officer may in his discretion adjourn the sale to a specified day and record his reasons for such adjournment. Where the sale is adjourned for a longer period than 7 days, a fresh proclamation under clause (e) shall be made unless the defaulter consents to waive it.

22. In the case at hand, the requirement mandated by this rule has been given a go bye by the Recovery Officer. As indicated above, auction was to be held on 28th September, 2010. On that day, auction was stayed by the Divisional Joint Registrar in Revision Application No. 58/2010 preferred by the petitioner. Stay was vacated on 23rd November 2010. Chronology of these events clearly shows that the auction could not be held on 28th September, 2010 and it had to be adjourned for a longer period than 7 days. Therefore, it was obligatory on the part of the Recovery Officer to record reasons for adjourning the sale. Stay was vacated on 23rd November, 2010, which means auction could not take place within 7 days. Therefore, it was incumbent on the Recovery Officer to issue

fresh proclamation in terms of above referred rules. The submission that the Recovery Officer – respondent No. 9 did not adjourn the sale on his own but it had to be adjourned as the auction was stayed by the Divisional Joint Registrar and, therefore, there was no necessity of issuing fresh proclamation again, is baseless. The purpose of proclamation is to give wide publicity to the auction being held so that persons who are interested in purchasing the property can bid at the auction. The underlying purpose of an auction sale is to obtain the best financial returns for the owner of the property and to allow free and fair competition to bidders. To have free and fair competition amongst bidders, fresh proclamation ought to have been issued when auction was adjourned beyond seven days. Proviso to Rule 107(11)(f) does not say that fresh proclamation is not necessary when auction is adjourned on account of stay given by higher authority/Courts. Therefore, the Recovery Officer was duty bound to issue fresh proclamation. Since this requirement is not adhered to, the auction held on 29th November, 2010 cannot be said to be a legal auction.

23. After the properties sold at auction, the purchaser at the auction is required to deposit 15% of the price of immovable property

and in default of such deposit, the property shall forthwith be resold. Rule 107(11)(h) requires that the remainder of the purchase money and the amount required for the sale certificate shall be paid within 30 days from the date of sale. Rule 107(11)(g), (h), (i) and (j) are quoted below for facility of reference :-

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

(11) In the attachment and sale or sale without attachment of immovable property, the following rules shall be observed :-

(g) A sum of money equal to 15 per cent of the price of the immovable property shall be deposited by the purchaser in the hands of the [Recovery Officer] at the time of the purchase, and in default of such deposit, the property shall forthwith be resold.

Provided that where the applicant is the purchaser and is entitled to set off the purchase money under clause (k), the [Recovery Officer] shall dispense with the requirements of this clause.

(h) The remainder of the purchase money and the amount required for the general stamp for the sale certificate shall be paid within [thirty] days from the date of sale;

Provided that the time for payment of the cost of the stamp may, for good and sufficient reason, be extended at the discretion of the Recovery Officer up to [forty five] days from the date of sale;

Provided further that in calculating the amounts to be paid under this clause, the

purchaser shall have the advantage of any set off to which he may be entitled under clause (k).

(i) In default of payment within the period mentioned in the last preceding clause, the deposit may, if the Recovery Officer thinks fit, after defraying the expenses of the sale, be forfeited to the State Government and the defaulting purchaser shall forfeit all claims to the property or to any part of the sum for which it may subsequently be sold.

(j) Every resale or immovable property in default of payment of the amounts mentioned in clause (h) within the period allowed for such payment shall be made after the issue of a fresh proclamation in the manner and for the period herein before prescribed for the sale.

24. In terms of Rule 107(11)(g), a sum of money equal to 15% of the price of immovable property is required to be deposited by the purchaser with the Recovery Officer. Clause (h) makes it mandatory for the auction purchaser to pay remainder of the purchase money i.e. 85% and the amount required for the general stamp for the sale certificate within 30 days from the date of sale. This requirement of 30 days was substituted by Government Notification dated 30th August, 2014. Prior to that, it was 15 days. The auction in question was held on 29th November, 2010 which means at the relevant time, remainder of the purchase amount was required to be deposited within 15 days from the date of sale. However, the auction purchaser – respondent No. 9 deposited 85% amount i.e. remainder

of purchase amount on 12th January, 2011, when the said amount ought to have been deposited within 15 days from 29th November, 2010 which means before 13th December, 2010. This clearly shows that the mandatory requirement of 15 days for deposit of remainder of purchase amount was not followed. Therefore, the auction becomes void.

25. Learned counsel Shri Deshmukh, Katneshwarkar and Irpatgire vehemently submitted that this provision is discretionary and not mandatory. Learned counsel Shri Katneshwarkar submitted that proviso to Rule 107(11)(h) shows that the Recovery Officer has discretion to extend the time for payment of cost of stamp for good and sufficient reason. This submission cannot be accepted. Rule 107(11)(h) nowhere suggests that the Recovery Officer has any discretion in extending time for depositing remainder of purchase money. In terms of Clause (h), remainder of purchase money ought to have been deposited within 15 days from the date of auction. The same has not been followed. Moreover, the discretion in terms of the proviso is for payment of cost of stamp and for no other purpose. Rule 107(11)(j) makes it mandatory for the Recovery Officer to issue fresh proclamation if remainder of purchase money is not deposited

within 15 days as required by Rule 107(11)(h). Thus, Rule 107(11)(j) specifies consequence for failure to follow the mandate of Clause (h). Therefore, the condition of deposit of remainder of purchase money within 15 days is mandatory and not discretionary as is contended by learned counsel for the respondents.

26. The same question had fallen for consideration before the Honourable Supreme Court in the case of M/s Shilpa Shares and Securities and others (supra). The Honourable Supreme Court has held thus :-

“5. In Manilal Mohanlal Shah and others Vs. Sardar Sayed Ahmed Sayed Mahmud and another AIR 1954 SC 349, it has been held that in such circumstances there is no sale at all if the balance purchase money is not paid within 15 days. It is not a mere irregularity. Non-payment of the said amount renders the sale proceedings a complete nullity.

6. In Balram Vs. Ilam Singh and others 1996(5) SCC 705, it has been held that the obligation of the purchaser to deposit the full purchase money within time is a mandatory requirement and non-compliance of the rule renders the sale a nullity and not a mere irregularity.”

The Honourable Supreme Court in clear terms has held that if the condition as required by Rule 107(11)(h) is not observed, the sale will be a nullity. In the case at hand, this requirement is not

followed and, therefore, sale is a nullity.

27. In the case of Niranjana D. Woody (supra) the Honourable Supreme Court has observed as under :-

“10. From these provisions, it is abundantly clear that a sum of money equal to 15% of the price of the property has to be deposited by the purchaser with the Sale Officer at the time of purchase. The remainder is required to be paid together with the amount required for the stamp duty on the sale certificate, within fifteen days from the date of sale. The proviso to clause (h) empowers the Recovery Officer to extend the period for the payment of the cost of the stamp for a period of upto thirty days from the date of the sale. Therefore, where the rule making authority as the delegate of the legislature considered it appropriate to grant a power of relaxation to the Recovery Officer that has been specifically provided. The only other dispensation which is granted is an entitlement to set off in the case where the applicant himself is a purchaser of the property. The requirement of depositing 15% of the price of the immovable property at the time of purchase is mandatory. The mandatory character of the provision is emphasised by the consequence that if there is a default in making the deposit, the property shall forthwith be resold. When there is a default in the payment of the remaining balance within fifteen days from the date of sale, the Recovery Certificate may, after defraying the expenses of sale forfeit the deposit which has been made upon which the defaulting purchaser shall forfeit all claims to the property. Thereupon a fresh proclamation of sale ensues and the property is resold.

28. From these two authorities, it is clear that sale is a nullity if 85% of the amount is not deposited within 15 days from the date of sale. Since this requirement is not followed, the sale dated 29th November, 2010 has to be declared as a nullity.

29. Learned counsel Shri Deshmukh placed reliance on Rule 107(13) for the proposition that for setting aside sale, the person owning the property or holding any interest by virtue of title acquired before such sale has to apply to the Recovery Officer. Rule 107(13)(i) is quoted below for the facility of reference :-

(13) (i) Where immovable 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 order 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.

He submitted that this is an alternate remedy which the

borrower had and the borrower did not take recourse to this remedy and directly preferred revision and thereafter has preferred this writ petition. He submitted that the petitioner is required to be relegated to the Recovery Officer. This submission cannot be accepted. This provision can be pressed into service only when the auction is held in accordance with law. In the case at hand, there are series of errors. Proclamation was not published in accordance with the rules and auction was not held in accordance with the rules. Therefore, the requirement of Rule 107(13)(i) can be pressed into service only when the auction is held in accordance with the legal provisions.

30. Learned counsel Shri Katneshwarkar placed reliance on Rule 107(14)(i) to contend that sale cannot be set aside on the ground of irregularity or fraud unless the District Deputy Registrar is satisfied that the applicant had sustained substantial injury by reason of such irregularity, mistake or fraud. He submitted that the petitioner has not demonstrated what substantial injury he has sustained because of the irregularities in the auction sale. Rule 107(14)(i) is quoted below for the facility of reference :-

(14) (i) At any time within thirty days from the date of the sale of immovable 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 [District Deputy Registrar] 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 [District Deputy Registrar] is satisfied that the applicant has sustained substantial injury by reason of such irregularity, mistake or fraud.

I cannot persuade myself to accept the submission of learned counsel Shri Katneshwarkar. It is pertinent to note that mandatory requirement of Rule 107(11)(e) and (h) have not been followed because of which the sale has become a nullity. The Honourable Supreme Court in the case of Shilpa Industries (supra) has held that non compliance of provisions of Rule 107(11)(h) vitiates sale and it is not a mere irregularity. This is not an irregularity but it is an illegality. Therefore, provisions of Rule 107(14)(i) do not get attracted. Without observing the mandate of Rule 107(11)(h), the auction is held. For this reason, his submissions deserve rejection.

31. Learned counsel Shri Deshmukh submitted that the revision was not maintainable. Confirmation of sale is not a revisable order. Borrower has to make an application under Rule 107(13) and the order passed by the Recovery Officer on it becomes revisable. In

the case of Ramchandra Sitaram Mulik (supra), the learned Single Judge of this Court has observed thus :-

“25. The question arises for the consideration of this Court is ‘whether the revision application filed by the petitioner under section 154 of the MCS Act was at all maintainable’ before the Divisional Joint Registrar. A perusal of the impugned order passed by the Divisional Joint Registrar clearly indicates that the issue of maintainability of the said revision was raised by the respondent No. 1. Though the argument was narrated in the impugned order passed by the Divisional Joint Registrar, the learned Divisional Joint Registrar did not deal with the said argument and decided the matter on merits. Under section 154(2), a revision is maintainable before the State Government or before the Registrar as the case may be, if an order is passed by any other officer other than the Registrar, Additional Registrar or the Joint Registrar. In this case, the petitioners have filed Revision Application No. 624 of 2012 against the sale certificate issued by the Deputy Registrar. The sale of the property could have been challenged by the petitioners before the Sale Officer before the time contemplated under rule 107. In my view, the learned counsel for the respondent No. 1 is right in his submission that the revision itself was not maintainable before the Divisional Joint Registrar under Section 154 of the MCS Act in view of the fact that sale and confirmation certificate issued by Deputy Registrar was not an order.”

Similar observations are found in the case of Amit P. Modi (supra). Learned Single Judge of this Court has observed thus :-

“29. This court in case of Ramchandra Sitaram Mulik and another vs. Janata Nagari Sahakari Patsanstha Ltd., Hupari and others, MANU/MH/0088/2018 : 2018(2) Mh.L.J. 245 has after adverting to the judgment of this court in case of The Manager, Adarsh Mahila Nagri Sahakari Bank Ltd. & Anr. (supra) and several other judgments held that the sale of the property could have been challenged by the borrower before the sale officer within the time contemplated under rule 107. The borrower not having exercised that right under rule 107(13), the revision itself was not maintainable under section 154 of the MCS Act in view of the fact that the sale and confirmation certificate issued by the Deputy Registrar was not an order.”

It is true that the petitioner/borrower has not exercised the right under Rule 107(13) of MCS Rules. Therefore, it was not competent for the petitioner to prefer revision before the Divisional Joint Registrar under Section 154 of the MCS Act.

32. In the case of Ramchandra Mulik (supra) there was total compliance of Rule 107(11)(g) and (h). 15% of the purchase amount and 85% of the purchase amount were deposited within the time frame prescribed by these two rules. Therefore, the facts in the case of Ramchandra Mulik are totally different.

33. Learned counsel Shri Salunke has placed reliance on

unreported judgment of learned Single Judge of this Court in the case of Arjun Fakira Bari vs. Divisional Joint Registrar, Nashik in Writ Petition No. 5627/2019. In this case, the District Deputy Registrar had issued recovery certificate in a mechanical manner without complying with the mandatory requirements of passing a reasoned order. In this case, the Recovery Officer sought approval of the District Deputy Registrar for upset price on 12th December 2011 after conducting auction on 18th October, 2011. Upset price was fixed by order dated 13th February, 2011. The learned Single Judge of this Court observed in paragraph No. 44 of judgment as under :-

“44. I have given anxious consideration to the aforesaid submissions. Generally, a person aggrieved by the auction sale of an immovable property has to work out his remedies as envisaged by the elaborate provisions contained in Rule 107. As indicated above, the provisions provide adequate opportunities to obviate the sale, before and after the sale, provided the specified amount is deposited and application is made within the stipulated period. Where the aggrieved person alleges material irregularity, mistake or fraud, he has an opportunity to question the sale on those grounds without making any deposit. In the fact of these provisions, the invocation of revisional jurisdiction is held to be not permissible as the aggrieved person can agitate the grievance before the Recovery Officer or District Deputy Registrar as the case may be. However, these provisions cannot be said to be the sole repository of the remedy which an aggrieved person may have, especially where it could be demonstrated that the impugned action

was wholly without jurisdiction or malafide and in flagrant violation of the provisions of the Act, 1960 and Rules, 1961. In such a situation, in my considered view, the writ Court cannot be precluded from examining the legality of the impugned auction, especially where the constitutional right to property is shown to have been blatantly infringed.

34. From the aforequoted observations, it is clear that if there is flagrant violation of rules, the writ Court cannot ignore all these illegalities. In the case at hand, there are blatant illegalities committed by the Recovery Officer. Provisions of Rule 107(11)(h) were followed in breach. Learned counsel Shri Deshmukh argued that respondent No. 4- bank and respondent no. 5-Recovery Officer did not accept remainder of purchase money as they waited for confirmation of sale from the District Deputy Registrar. The blame squarely goes to respondents No. 4 and 5 and not the purchaser. I cannot persuade myself to accept these submissions. No document is placed on record in support of his submission. The Honourable Supreme Court in the case of M/s Shilpa Industries(supra) has held that non-observance of mandatory requirement of payment of 85% of the purchase money within 15 days from the date of sale vitiates sale. Therefore, the writ Court cannot ignore such blatant illegalities.

35. In the case at hand, this is not the only illegality. Auction was not held in accordance with Rule 107(11)(e). Fresh proclamation ought to have been issued which was not done by respondent No. 5 – Special Recovery Officer. In the proclamation dated 9th September, 2010, 30 days notice of auction was not given. All these illegalities cannot be ignored by the writ Court. Therefore, in my considered opinion, the sale is a nullity.

36. Therefore, for the reasons given above, writ petition will have to be allowed. Hence the following order :-

ORDER

- i) Writ petition is allowed.
- ii) Auction sale in respect of lands Block No. 440, 437 and 102 dated 29th November, 2010 in favour of respondent No. 9 stands set aside.
- iii) Sale certificate dated 19th January, 2011, executed by respondent No. 4 in favour of respondent No.9 stands cancelled.
- iv) Respondent No. 4 shall refund the sale price to respondent No. 9 along with interest at the rate of 10% per annum from the date of deposit till payment, within a period of six weeks from today.

Rule made absolute in aforesaid terms. No order as to costs.

(M. G. SEWLIKAR)
Judge

dyb

LATER ON :

37. Learned counsel Shri Deshmukh submits that respondent Nos. 4 and 5 want to challenge this decision for which they need 8 weeks time and till then seeks for stay of this order.

38. Operation of this order shall remain stayed for a period of six weeks from today.

(M. G. SEWLIKAR)
Judge

dyb