

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

WRIT PETITION NO.5646 OF 2022

**1. Shri.Vasantrao Chougule Nagari }
Sahakari Pat Sanstha Ltd. }
Through Manager, }
Having Its office At-532, E-Ward, Vyapari }
Peth, Shahupuri, Kolhapur-416001. }**

**2. The Special Recovery Officer, }
Shri.Vasantrao Chougule Nagari Sahakari }
Pat Sanstha Ltd. }
Having Its office At-532, E-Ward, Vyapari }
Peth, Shahupuri, Kolhapur-416001. }**

....Petitioners

Versus

**1. The State of Maharashtra }
Thr. Secretary, Dept. of Co-operation, }
Mantralaya, Mumbai. }**

**2. The Divisional Joint Registrar, }
Co-Operative Societies, Kolhapur Division, }
Kolhapur, Having His Office at-Udyog }
Bhavan, Assembly Road, Behind Collector }
Office, Kolhapur. }**

**3. The District Deputy Registrar }
Co-Operative Societies, Kolhapur, Having }
His Office At-204/kh/E-Ward, Bhu-Vikas }
Bank Building, 3rd Floor, Near Hotel Pearl, }
Kolhapur. }**

**NILAM
SANTOSH
KAMBLE**

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4. **Smt.Pramila Malgonda Bedkihaile** }
Age- Adult, Occ : Household }
5. **Jagannath Malgonda Bedkihaile** }
Age-Adult, Occ: Service }
6. **Chandrakant Malgonda Bedkihaile** }
Age-Adult, Occ: Service. }
7. **Sou. Kalpana Sanjay Kori** }
Age-Adult, Occ : Housewife }
All R/at Malkapur, Taluka-Shahuwadi, }
District-Kolhapur. }
-Respondents**

Mr.S.S. Patwardhan i/b Mr.Bhooshan R. Mandlik, for the Petitioners.

Ms.Vrushali Raje, AGP, for Respondent Nos.1 to 3-State.

Mr.Pradeep Dattajirao Dalvi a/w Ms.Priya Dalvi, for Respondent No.5.

CORAM : R.M. JOSHI, J.

RESERVED ON : 21st AUGUST 2024

PRONOUNCED ON : 02nd SEPTEMBER 2024

JUDGMENT :-

1. Rule. By consent heard finally at stage of admission.

2. The Petitioner being aggrieved by impugned order dated 3rd April 2019 passed in Revision Application No.20 of 2017 by Divisional Joint Registrar, Co-operative Societies,

Kolhapur, whereby the Sale Certificate dated 31st December 2016 was cancelled, has filed this Petition.

3. The version of both sides which led to the filing of the present Petition can be narrated in brief as under:-

The Petitioner is a Co-operative Credit Society. Malgonda Ramgonda Bedkihaile, availed loan of Rs.2,85,000/- from society on 30th March 2001. He however, did not return the entire amount of loan along with interest within stipulated time. As the borrower was in arrears, proceeding came to be instituted against him by the Petitioner No.1 Society under Section 101 of the Maharashtra Co-operative Societies Act, 1960 ('Act' for short). The recovery Certificate issued therein was put for execution under Section 156 of the Act. It is the case of the Petitioners that pursuant to the Recovery Certificate, auction sale of the property belonging to the borrower was done as per law on 16th January 2007 and thereafter Respondent No.3 granted Sale Confirmation Certificate on 21st March 2007.

4. It is the case of the Petitioner that, Respondent Nos.4 to 7 who are legal heirs of the deceased borrower filed Petition

No.181 of 2009 before the Divisional Joint Registrar challenging the Sale Certificate dated 31st March 2007. This Authority by passing order dated 15th January 2010 set aside Sale Confirmation Certificate and remanded the matter back to Respondent No.3 for reconsideration. The said remand was directed for the reason that opportunity of hearing as well as opportunity to deposit the bid amount according to Rule 107(13) of the Maharashtra Co-operative Societies Rules, 1961 ('Rules 1961' for short) was not given to Respondent Nos.4 and 7.

5. Pursuant to the said order dated 15th January 2010 the matter was heard by Respondent No.3 by giving opportunity of hearing to all the parties. An order dated 8th December 2014 came to be passed by Respondent No.3 rejecting the grant of Sale Confirmation Certificate. This order was challenged by filing Revision Application No.1 of 2015 under Section 154 of the Act before the Divisional Joint Registrar. This Application came to be allowed by setting aside order dated 8th December 2014. Once again the matter was remanded back for fresh decision to Respondent No.3. This Authority reconsidered the matter and

after hearing both sides passed order dated 31st December 2016 confirming said certificate as well as its issuance of Sale certificate and confirmation. This order was challenged before Divisional Joint Registrar by preferring Revision Application No.20 of 2017. The said Revision is allowed by order dated 3rd April 2019, and Sale Confirmation order as well as Sale Confirmation Certificate dated 31st December 2016 were set aside.

6. On the other hand, it is a case of Respondent Nos.4 to 7 that they are heirs of borrower. According to them borrower died on 9th March 2005. It is averred in reply that the Petitioner-Society and Petitioner No.2 Sales Officer had given a notice for auction on 11th December 2006 and it was told to them about death of the borrower occurred on 9th March 2005. It is alleged that, inspite of the knowledge of the fact of the death of the borrower the Petitioner's auctioned property on 16th January 2007 and Sale Certificate was issued on 21st March 2007. It is claimed by these Respondents that as per provisions of Rule 107(14) of the Rules 1961, it was the duty of the Registrar to look into the proceedings initiated by the Sale Officer and only after

due satisfaction that the procedure followed by the Sale Officer is in accordance with law, Sale Certificate could have been issued. It is stated that, Respondent No.3 has failed to discharge his duty and therefore the heirs of borrower had to challenge the said action by way of Revision Application No.81 of 2009. It is specifically claimed by these Respondents that, there is no obligation/burden upon the heirs of the borrowers to inform the Petitioner about his death and infact Petitioners had knowledge of said fact, but, still they proceeded with sale of property of deceased. It is claimed that, these Respondents have sent letter dated 29th December 2014 addressed to the Petitioners, specifying that Respondent No.6 has issued cheque drawn of State Bank of India for sum of Rs.6,56,250/- towards the sale price and 5% interest thereon. According to the Respondents the cheque was tried to be presented to the Sale Officer as well as Manager of the Petitioner No.1-Society but since they refused to accept the same, it was sent along with a letter under Registered Post Acknowledgment. The said letter was returned back to the Respondents with the postal remark “refused” on 6th January

2015.

7. The learned counsel for the Petitioners submits that in facts and circumstances of the case and having regard to the provisions of Act and Rules 1961, the order impugned cannot be sustained. It is his further submission that, the Sale Certificate issued by the Deputy Registrar could not have been challenged, without any challenge to the auction sale. According to him it was not open for the Respondents to challenge the Sale Certificate and confirmation thereof by preferring the Revision Application under Section 154(2) of the Act. In support of his submissions he placed reliance on the judgment in the case of ***Ramchandra Sitaram Mulik & Anr V/s. Janta Nagri Sahakari Patsanstha*¹**. It is his further submission that, in any case as per Rule 107 of the Rules 1961, there cannot be any setting aside of the Certificate of Sale or even auction Sale unless it is proved that the same has been done/obtained by fraud. As here in this case no allegation of the fraud, nor the same has been made of substantiated, order of cancellation of the Sale Certificate cannot

¹ 2018(2) Mh.L.J. 245

sustain.

8. The learned counsel for the contesting Respondents vehemently opposed the said submission by contending that Section 107 is complete code in respect of the attachment and sale of the properties under Section 156 of the Act. According to him attachment as well Sale of the property ought to have been done in compliance of these provisions and auction sale since has been effected against property of the deceased person, is not tenable in law. He further argued by referring to Rule 107(13) that in case the borrower or the legal heirs of the borrower offer the sale price along with 5% interest thereon, it is obligatory on the part of the Sale Officer as well as society to accept the said money and to cancel the auction sale. It is his submission that, letter dated 5th January 2015 clearly indicates about a cheque of Rs.6,56,250/- being sent by Respondent No.6 to these authorities and failure on their part to accept the same is in contravention of the relevant Rules. It is his further submission that, once it is held that, the sale of the property of the deceased has been affected, the same is *void-ab-into* and as such the

opportunity of hearing ought to have been given to the heirs of the deceased borrowers at that stage itself. In absence thereof, the auction sale as well as the sale certificate do not sustain.

9. At the outset, certain relevant facts undisputed as well as disputed are required recorded for the sake of better understanding of the case.

(i) Malgonda Ramgonda Bedkihale, obtained mortgage loan of Rs.2,85,000/- from Petitioner society on 30th March 2001.

(ii) Since loan was not repaid, recovery certificate dated 9th December 2021 came to be issued against borrower under Section 101 of the Act for recovery of Rs.5,08,655/- with 18% interest till recovery. There is no challenge to this order and as such it has attained finality.

(iii) Property situated at House No.177, 'B'-Ward, Malkapur, was sought to be auctioned for recovery of amount due.

(iv) Notice of auction was published in local news paper on 14th December 2006. (In affidavit-in-reply Respondents admit such notice being served on 11th December 2006).

(v) Upset price was finalised. (There is no

challenge to upset price being not fixed property). Auction sale was effected/completed on 16th January 2007.

(vi) On 21st March 2007 Sale certificate is issued.

(vii) Auction purchaser was put into possession of house (Civil Court in RCS No.25/2011, has restrained contesting Respondents from causing interference in the possession of auction purchase over subject property).

(viii) Contesting Respondents/heirs of borrower challenged action of issuance of Sale Certificate in Revision Application No.181 of 2009 and order passed thereafter as referred herein above).

(ix) Criminal Complaint filed against the Petitioner and auction purchaser was dismissed.

(x) For the first time after about 7 years of auction Respondent Nos.4 to 7 made offer of auction price plus 5% amount on 29th December 2014.

10. No dispute can be made about the proposition that, Rule 107 is a complete Code in respect of procedure to be adopted for attachment and sale of the property under Section

156 of the Act. In the instant case there is no dispute about the fact that borrower was defaulter of loan and a recovery certificate has been issued under Section 101 of the Act and said certificate is sought to be executed under provisions of Section 156 of the Act. Amount due from borrower was sought to be recovered by attachment and sale of immovable property i.e. house belonging to borrower.

11. Rule 107(10) contemplates that no sale of immovable property can be undertaken unless the property is previously attached, however in case of mortgage of property, there is no need to attach the same. In the instant case the contesting Respondents herein have not come out with the case that the auction sale is bad in law for want of the compliance of Rule 107(10). It is thus clear that, for want of any specific objection raised by the Respondents, it cannot be said that there is non-compliance of the Rule 107(10) of the Rules 1961. Clause(2) of the said Rule contemplates service of demand notice to the defaulter, it is not the case of the Respondents that no such notice was issued. On the contrary, it is case of the Petitioners and it is

also reflected from the impugned orders that, the Petitioner's did issue notice to the borrower and the notice was also published in the newspaper. Once the Petitioner has established that the notice was issued as contemplated by this Rule, the burden is on the Respondents to prove contrary. The Respondents do not claim non-issuance of such notice but it is alleged that the Petitioners has sold the property belonging to the borrower in spite of the knowledge of the fact that the borrower is dead. Neither in affidavit-in-reply it is specifically stated as to how these Respondents informed to the Petitioners about the death of the borrower before auction sale was conducted nor any documentary evidence is placed before any authority or even in this Petition, to that extent. Perusal of the letter dated 5th January 2015 filed along with the affidavit-in-reply also does not whisper anything in this regard. What has been contended in the said letter is that the auction was conducted without issuing notice to the legal representatives of the borrower. Unless it is intimated to the Petitioner Society or Sale Officer, that borrower is dead, question of issuance of notice to Respondents does not arise.

This evidence of intimation of death of borrower to the Petitioners is absent in this case.

12. In order to accept the contention of the Respondents that, the auction sale has been effected behind their back, it has to be first established that the Petitioners have knowledge about the death of the borrower. If there is no contention of these Respondents about such intimation with cogent proof thereof it cannot be held that the Petitioners have knowledge of the said fact and in spite of the same they proceeded to sale the dwelling house of the borrower in auction. Thus, this is not the case of property of borrower being auctioned fraudulently. It is pertinent to note that, the property of the borrower which was sold in auction is a dwelling house. Moreover, there is no dispute made about fact that pursuant to the auction sale, possession of the property has been handed over to the auction purchaser. As since obstruction was caused by the Respondent to the peaceful possession, Civil Suit has been filed in the year 2011 seeking injunction against them and temporary injunction has been granted against Respondent Nos.4 and 7, for not causing

interference in possession of purchaser over subject property.

13. Heavy reliance is sought to be placed by Respondents on Rule 107(13), which reads thus:-

107(13) :-

(i) Where immovable property has been sold by the Sale 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 immovable property, he shall not be entitled to make an application under this sub-rule

14. This Rule indicates that, after effecting the auction sale, an opportunity is available for the borrower to raise

objection to the sale within one month of the auction. Rule 107(13) contemplates that, the borrower or legal representatives in case of the death of the borrower may offer the sale price along with additional 5% amount. In the instance case, auction sale has been effected on 16th January 2007. There is no material on record to indicate that, within one month of the auction sale the legal representatives of deceased borrower have offered the payment of the outstanding dues plus 5% of bid amount.

15. Admittedly, for the first time the Respondents offered such payment in the year 2015 i.e. on 5th January 2015. If no such objection is raised or the amount is offered within a period of a month from auction Sale, it is open for the authorities to confirm the sale.

16. As reflected in affidavit-in-reply of Respondent Nos.4 to 7, if it is contention of these contention of these Respondents about notice being given by Petitioner on 11th December 2006, it was open for them to offer full amount due together with interest, bhatta and after expenses incurred in purchasing the property to sale, including expenses of attachment and on payment of the

same and in that event, Sale Officer was obliged to forthwith release the property under Rule 107(12). However, no offer was made at that time by Respondents to make payment in compliance.

17. At this stage it would be relevant to take note of Rule 107(14) which permits any person who is been affected by sale of immovable property to apply within 30 days thereof to District Deputy Registrar to set aside the sale on the ground of material irregularity. The said provisions is reproduced thus :-

Rule 107(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 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 that the applicant has sustained substantial injury by reason of such irregularity, mistake or fraud.

(ii) If the application be allowed, the Recovery shall set aside the sale and may direct a fresh one.

(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 Recovery Officer shall make an order confirming the sale ;

Provided that if he shall have reason to believe that the sale ought to be set aside notwithstanding that no such application has been made or on grounds other than those alleged in any application which has been made and rejected, he may, after recording his reasons in writing, set aside the sale.

(iv) Whenever the sale of any immovable 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 Recovery Officer 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.

18. Sub Rule (iii) permits District Deputy Registrar to make an order of confirmation of the sale if on the expiration of thirty days of the date of sale, no Application is filed for setting aside the sale. In the instance case no Application was filed for setting aside the sale within a period of 30 days as contemplated by this provision. Moreover, the facts as they stood at the time of issuance of sale certificate, Recovery Officer had no reason to believe that sale ought to be set aside, notwithstanding that no such Application has been made to set aside sale. Thus at the relevant time no such situation occurred for Recovery Officer not to issue Sale Certificate and subsequent confirmation thereof.

Thus there was no legal impediment for District Deputy Registrar to confirm certification of the sale.

19. Perusal of the impugned order indicates that, it is observed by the Divisional Joint Registrar that it was duty of District Deputy Registrar to ascertain the validity of the auction sale on the ground of the death of borrower as on the day of the said auction. However, as observed above, for want of any objection being raised by heirs of borrower of any challenge to the auction sale or offer of payment, of dues, it was not incumbent on the part of authority to hold so. The authority therefore fell in error in appreciating relevant rules in the facts and circumstances of the case.

20. Proviso to 14(i) states 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. Apart from the fact that auction sale has not been challenged herein, neither fraud has been alleged nor proved. Meaning thereby owing to this Rule, even if there is irregularity or fraud the same cannot

become a ground for setting aside auction sale of immovable property, unless the Applicant establishes to have sustained substantial injuries for the reason of sale of the said property.

21. Even if it is accepted that the sale was effected as on 16th January 2007 i.e. after death of original borrower, in absence of any evidence on record indicating the knowledge of the Petitioner's about the said death, it cannot be held that, there is any fraud, irregularity or mistake in the auction. Since, Respondents have failed to substantiate the fact of the knowledge of the Petitioner about the death of the borrower, it cannot be held that, this is a case of the fraud being played by the Petitioners.

22. Be as it may, the auction was in respect of dwelling house. Undisputedly, after auction and receipt of the entire sale price, purchaser was put into the physical possession of the said house. The first proceeding was initiated by contesting Respondents in the year 2009 i.e. under the Act. Thus, at any rate it cannot be accepted that the contesting Respondents did not have knowledge about the sale of the house and occupation

thereof by the purchaser. In spite of this, these Respondents have failed to take any appropriate steps as contemplated by the Rules in order to set aside the auction sale. As recorded herein above, the alleged offer in compliance of Rule 107(13) was made for first time after about 7 years of the completion of the sale. It is thus clear that, the contesting Respondents have failed to establish any substantial injury being caused to them by sale of immovable property.

23. The Divisional Joint Registrar while entertaining the challenge to the confirmation of the Sale Certificate has gone into the issue with regard to the validity of the auction which was never challenged by the Respondents. The order impugned has been passed in complete ignorance of facts and provisions of Act, more particularly Rule 107. The Revisional Authority therefore, has committed error of law while entertaining and allowing the Revision Application and setting aside the Sale Certificate and confirmation thereof issue under Rule 107(14)(3) and 107(14)(5) of Rules of 1961. The Petition therefore, deserves to be allowed and accordingly allowed in terms of prayer clause (a). The

impugned order stands set aside. The Revision Proceeding bearing No.20 of 2017 stands dismissed.

24. All pending Civil and Interim Applications are disposed of.

(R.M. JOSHI, J.)