(2018) 08 BOM CK 0045

In the Bombay High Court

Case No : Writ Petition No.11062 Of 2014

Amit Parasmal Modi APPELLANT

Vs

State Of Maharashtra, Through Minister For Co-Operation And Ors RESPONDENT

Date of Decision : 07-08-2018

Acts Referred:

Constitution of India, 1950 — Article 227
Maharashtra Co-operative Societies Act, 1960 — 101, 101(2), 149(9), 154
Maharashtra Land Revenue Code, 1966 — Section 243
Maharashtra Co-operative Societies Rule, 1961 — Rule 107, 107(11)(g) , 107(11)(h), 107(12), 107(13), 107(14), 107(14)(i), 107(19)(c)

Citation : (2018) 08 BOM CK 0045

Hon'ble Judges : R.D. DHANUKA, J

Bench : Single Bench

Advocate : R.D. Soni, V.R. Kasle, P.N. Joshi, .S.D. Rayrikar, R.S. Apte, Siddharth Wakankar

Final Decision : Dismissed

Judgement

1. By an order dated 21st July, 2014, this Court has put the parties to notice that this writ petition may be heard and disposed of finally at the stage of

admission. This Court has thus heard all the parties at length. The writ petition is thus being disposed off finally at the admission stage. Some of the

relevant facts for the purpose of deciding this writ petition are as under :

2. The respondent no.2 was a guarantor in respect of the loan transaction between the respondent no.5 and the principal borrower Mr.Ramkisan

Walmik Kajale. The said Mr.Ramkisan Walmik Kajale committed a default in making repayment of the loan to the respondent no.5 society. The

respondent no.2 also committed a default in making repayment of the loan as a guarantor to the respondent no.5. The respondent no.5 initiated the recovery proceedings under the provisions of section 101 of the Maharashtra Co-operative Societies Act, 1960 (for short the said â??MCS Actâ?)

against the said borrower Mr.Ramkisan Walmik Kajale and the respondent no.2. The Assistant Registrar, Co-operative Societies, Deola issued a

certificate under section 101(2) of the MCS Act in favour of the respondent no.5 for an amount of Rs.13,98,418/- with further interest thereon at the

rate of 18% p.a. from 30th November, 2009 onwards. The said recovery certificate has not been impugned either by the principal borrower

Mr.Ramkisan Walmik Kajale or by the respondent no.2. A Recovery Officer was appointed for the purpose of taking steps to execute the said

recovery certificate issued by the Assistant Registrar, Co-operative Societies in favour of the respondent no.5 society. A Special Recovery Officer

attached the property of the respondent no.2 under Rule 107 of the Maharashtra Co-operative Societies Rules, 1961 (for short the said â??MCS

Rulesâ??).

3. The Special Recovery Officer thereafter sought requisite permission from the Divisional Registrar of Co-operative Societies, Nashik Division for

carrying out the auction of the property of the respondent no.2. The said permission was granted by the Divisional Registrar of Co-operative Societies

on 10th October, 2012. The first auction was held by the Special Recovery Officer on 16th November, 2012 however no bid was received in response

to the said first auction.

4. The second auction was accordingly held on 15th March, 2013. The Divisional Registrar fixed the upset price in respect of the property of the

respondent no.2 as on 10th December, 2012 at Rs.44,00,000/-. The auction notices were issued on 16th May, 2012, 15th October, 2012 and 29th

February, 2013 in the daily newspaper â??Deshdootâ? at Nashik. Pursuant to the said public notices, the petitioner submitted his bid for total

consideration of Rs.47,00,000/and was the highest bidder. The Special Recovery Officer by his letter dated 13th April, 2013 addressed to the Assistant

Registrar of Cooperative Societies sought permission for confirmation of the sale as per the auction held in favour of the petitioner. The Assistant

Registrar, Co-operative Societies granted requisite permission to the Recovery Officer on 20th May, 2013. On 23rd May, 2013, the sale in favour of

the petitioner was confirmed and a sale certificate came to be issued by the

Special Recovery Officer.

5. On 23rd May, 2013 a Deed of Conveyance was executed in favour of the petitioner by the Administrator of Shri Ramchandra Vinayak Kothawade

Rural Non-Agricultural Credit Society Limited, Deola, District Nashik and the Special Recovery Officer. The Deed of Conveyance was duly

registered on payment of stamp duty of Rs.39,940/- and the registration fees of Rs.30,000/- in favour of the petitioner. The petitioner was put in

physical possession of the said property. The name of the petitioner was mutated in the revenue record by way of mutation entry no.11606 on 29th

August, 2013.

6. The respondent no.2 thereafter filed an appeal under section 243 of the Maharashtra Land Revenue Code, 1966 and challenged the said mutation

entry dated 29th August, 2013 in the name of the petitioner before the Sub-Divisional Officer, Chandwad. In the said appeal filed by the respondent

no.2, it was contended that the respondent no.2 was not given any notice before carrying out the auction of his property and thus the sale was liable to

be cancelled and set aside and the mutation entry in favour of the petitioner is also liable to be cancelled. The petitioner opposed the said appeal filed

by the respondent no.2 before the learned Sub-Divisional Officer. Learned Sub-Divisional Officer passed an order on 14th March, 2013 thereby

dismissing the said appeal filed by the respondent no.2.

7. The respondent no.2 thereafter filed a Revision Application under section 154 of the Maharashtra Co-operative Societies Act, 1960 before the

learned Minister of Co-operation being Revision Application No.689 of 2013. In the said revision application, the respondent no.2 challenged the

auction sale dated 4th June, 2013 executed by the Administrator of the respondent no.5 and the Special Recovery Officer in favour of the petitioner.

The said revision application filed by the respondent no.2 under section 154 of the said MCS Act was resisted by the petitioner as well as by the

Special Recovery Officer on various grounds including on the ground of maintainability of the said revision application.

8. By an order dated 15th April, 2014, the learned Minister allowed the said revision application filed by the respondent no.2. It has been held by the

learned Minister that it was incumbent upon the Recovery Officer to get a fresh sanction for seeking re-auction of the property of the respondent no.2

and to fix a new upset price. It is also held by the learned Minister that the Recovery Officer fixed the price of the said property on the date of auction

which was more than the upset price and therefore, the sale could not be termed as proper. The respondent no.2 was not given an opportunity to

participate in the auction process.

9. Being aggrieved by the said order dated 15th April, 2014, passed by the learned Minister for Co-operation, the petitioner who is the auction

purchaser of the said property filed this writ petition under Article 227 of the Constitution of India on various grounds.

10. Mr.Soni, learned counsel appearing for the petitioner invited my attention to various exhibits to the writ petition and submits that neither the

principal borrower nor the respondent no.2 who was the guarantor challenged the recovery certificate issued by the learned Assistant Register in

favour of the respondent no.5 society and the said recovery certificate has attained finality. He submits that the Special Recovery Officer had

obtained a permission from the Assistant Registrar for carrying out the auction of the property of the respondent no.2. The said permission was

granted in favour of the Special Recovery Officer. The upset price was also fixed by the Divisional Registrar on 10th December, 2012 at

Rs.44,00,000/-. The Special Recovery Officer had issued the auction notices dated 16th May, 2012, 15th October, 2012 and 29th February, 2013 in

daily newspaper â??Deshdootâ?? at Nashik. The bid submitted by the petitioner was highest at Rs.47,00,000/-.

11. It is submitted that the said auction sale was therefore confirmed by the concerned authority and the sale certificate was issued in favour of the

petitioner on 23rd May, 2013. The Deed of Conveyance is already executed in favour of the petitioner on 23rd May, 2013 and the said sale deed is

duly registered on 23rd May, 2013 on payment of stamp duty and registration charges in favour of the petitioner.

12. It is submitted by the learned counsel that the proceedings filed by the respondent no.2 under the provisions of the Maharashtra Land Revenue

Code challenging the mutation entry in favour of the petitioner also came to be dismissed by the Sub-Divisional Officer. He submits that the remedy of

the respondent no.2, if any, was under Rule 107(12), (13) or (14) of the MCS Rules after complying with the mandatory conditions mentioned therein.

He submits that the respondent no.2 not having availed of the opportunity under the said provisions of the MCS Rules by complying with the conditions

therein and thus could not have filed a revision application directly before the learned Minister under section 154 of the MCS Act. In support of this

submission, learned counsel for the petitioner placed reliance on the judgment of this Court in case of The Manager, Adarsh Mahila Nagri Sahakari

Bank Limited & Anr. vs. The State of Maharashtra & Ors. 2012(2) ALL MR 566, judgment of this Court in case of Ramchandra Sitaram Mulik &

Anr. vs. Janata Nagari Sahakari Patsanstha Ltd. & Ors. 2018(2) Mh.L.J. 245 and the judgment of this Court in case of Manisha Bijal Shah vs.

Shankar Laxman Sutar & Ors. 2018(4) Bom.C.R. 300.

13. It is submitted by the learned counsel for the petitioner that the petitioner has paid the entire consideration pursuant to the confirmation of sale in

favour of the petitioner, which was conducted after complying with all the requisite provisions for carrying out the auction of the property of the

respondent no.2 and has been in possession of the said property as an exclusive owner thereof. The respondent no.2 cannot plead ignorance of the

auction of the property conducted by the Special Recovery Officer which was conducted after issuing various public notices in the newspaper from

time to time. The respondent no.2 having failed in the revenue proceedings filed under the provisions of the Maharashtra Land Revenue Code, 1966

had filed a frivolous revision application under section 154 of the MCS Act directly before the learned Minister for Co-operation.

14. Learned counsel for the petitioner invited my attention to the findings recorded by the learned Minister thereby setting aside the auction sale in

favour of the petitioner. He submits that each and every finding of the learned Minister is totally perverse. The auction sale had taken place within six

months from the date of fixing of the upset price. The upset price was fixed by the Divisional Commissioner in accordance with law. At no stage, the

respondent no.2 challenged any orders inspite of the public notices issued by the Special Recovery Officer on three occasions by filing any application

under Rule 107(12), (13) or (14) of the MCS Rules.

15. Mr.P.N. Joshi, learned counsel for the respondent no.2 on the other hand submits that the alleged sale transaction in favour of the petitioner is in

gross violation of Rule 107(11) (g) and rule 107(11) (h) of the MCS Rules, 1961.

It is submitted that the petitioner has neither paid 15% of the bid

amount nor 85% thereof within the time contemplated under the said provisions of the MCS Rules,1961. The auction sale in favour of the petitioner

thus was nullity and thus the said property was required to be re-auctioned by the special recovery officer.

16. It is submitted that the respondent no.2 was not heard or was not even issued any show cause notice before granting permission for fixing auction

twice dated 10th December,2012. He submits that the market value of the said property was much more than the upset price fixed by the authority.

No opportunity of being heard was provided to the respondent no.2 before fixing an upset price.

17. In support of this submission, learned counsel for the respondent no.2 placed reliance on the judgment of Supreme Court in case of M/s.Shilpa

Shares and Securities and others vs. The National Co-operative Bank Ltd. and others, 2007(12) SCC 165 and in particular paragraphs 4 to 7.

18. It is submitted by the learned counsel that the learned Minister was thus justifying in interferring with the impugned sale proceedings conducted by

the Special Recovery Officer by exercising its power under section 154 of the MCS Act and thus the said order cannot be interferred with by this

court in this petition filed under Article 227 of the Constitution of India.

19. It is submitted by the learned counsel that even against the order of Special Recovery Officer, the learned Minister could exercise such powers

under section 154 of the MCS Act and thus the respondent no.2 was not required to challenge the said auction proceedings before the Divisional Joint

Registrar or to adopt any proceedings under Rule 107 of the MCS Rules. In support of this submission, learned counsel placed reliance on the

judgment of this court in case of Sangli Sahakari Bank Ltd. Bombay vs. Divisional Joint Registrar, Bombay and others, 2002(2) Mh.L.J. 948 and in

particular paragraphs 6 and 7.

20. Mr.Rayrikar, learned A.G.P. for the respondent nos. 3 and 4 supported the findings rendered by the learned Minister and would submit that this

court shall not interfere with the impugned order passed by the learned Minister.

21. Mr.Apte, learned senior counsel for the respondent nos. 5 and 6 supported the case of the petitioner and would submit that before auctioning the

property of the respondent no.2, three public notices were issued in the newspaper. The respondent no.2 was fully aware of the auction sale of his

property but did not take any objection and also did not file any application under Rule 107(12), (13) or (14) of the MCS Rules and justified the action

on the part of the Special Recovery Officer in auctioning the property of the respondent no.2. He submits that the auction is already completed long

back. A sale deed is already registered in favour of the petitioner. The petitioner has already paid the entire consideration to the respondent no.5 and

has been placed in possession of the property.

22. Mr.Soni, learned counsel for the petitioner distinguished the judgment of Supreme Court in case of M/s.Shilpa Shares and Securities and others

(supra) and judgment of this court in case of Sangli Sahakari Bank Ltd. Bombay (supra) on the ground that the facts before both the courts were

totally different. He submits that the question as to whether the petitioner had paid the amount as contemplated by Rule 107(11)(g) or (h) of the MCS

Rules or not is a finding of fact. Since the respondent no.2 did not file any application for setting aside the auction sale by complying with the condition

under section 107(12), (13) or (14), the respondent no.2 could not have filed the revision application directly under section 154 and that also before the

learned Minister. The said revision application was not at all maintainable.

Â Â REASONS AND CONCLUSIONS :

23. It is not in dispute that the respondent no.2 was a guarantor in respect of the loan granted by the respondent no.5 society to Mr.Ramkisan Walmik

Kajale. The said Mr.Ramkisan Walmik Kajale and also the respondent no.2 had committed default in making repayment of the said loan to the

respondent no.5. The respondent no.5 thereafter filed an application for issuance of recovery certificate under section 101 of the MCS Act against the

said borrower and also the respondent no.2. The Assistant Registrar passed an order under section 101 and issued a recovery certificate in favour of

the respondent no.5 society and against the said borrower and the respondent no.2. Admittedly the recovery certificate was neither impugned by the

said borrower nor by the respondent no.2.

24. A Special Recovery Officer was appointed to execute the said recovery certificate. The said Special Recovery Officer thereafter obtained a

requisite permission of Divisional Registrar of Co-operative Societies, Nashik Division for initiation of auction proceedings. The said Special Recovery

Officer was granted permission on 10th October,2012. An upset price was also fixed by the Divisional Registrar for the property of the respondent

no.2 on 10th December,2012 for a sum of Rs.44,00,000/-.

25. A perusal of the record indicates that the recovery officer has issued three auction notices in the daily newspapers 'Deshdoot' of Nashik on 16th

May 2012, 15th October 2012 and 29th February 2013. The petitioner had submitted its bid for a total consideration of Rs.47,00,000/- which was more

than upset price. The petitioner was the highest bidder. The auction sale was accordingly confirmed in favour of the petitioner and a sale certificate

came to be issued on 23rd May,2013.

26. It is not in dispute that pursuant to the said sale certificate issued in favour of the petitioner, a deed of conveyance has been already executed in

respect of the said property of the respondent no.2 in favour of the petitioner by the administrator of the respondent no.5 society on 23rd May,2013.

The said deed of conveyance was duly registered on payment of Rs.3,99,400/- and the registration fees of Rs.30,000/- with the office of the Sub-

Registrar, Deola. The petitioner has been in possession of the said property by the respondent no.5 since then. The name of the petitioner is also

entered in the mutation entry.

27. It is not in dispute that the respondent no.2 thereafter had challenged the said mutation entry by filing an appeal under section 243 of the

Maharashtra Land Revenue Code, 1966 before the SubDivisional Officer, Chandwad challenging the said mutation entry. The said appeal filed by the

respondent no.2 was dismissed by the order dated 14th March, 2013. The respondent no.2 did not file any application under Rule 107(12), (13) or (14)

of the said MCS Rules inter alia praying for setting aside the said auction by complying with the conditions prescribed under the said rules within the

time contemplated therein or otherwise. The respondent no.2 also did not apply for setting aside the said auction on the ground of the alleged material

irregularity or mistake or fraud in publishing or conducting the auction.

28. This court in case of The Manager, Adarsh Mahila Nagri Sahakari Bank Ltd. & Anr. vs. The State of Maharashtra & Ors., 2012(2) All M.R.566

has held that the revision application under section 154 is possible either suo motu or on application in respect of only an order passed in a inquiry or

proceeding by a subordinate officer of the revisional authority. This court held that since the borrower had not availed of the opportunity under sub rule

13 or subrule 14 of the rule 107, the order confirming the sale was mere formality. This court held that the revision application in these circumstances

under section 154 of the MCS Act was not maintainable. The judgment of this court in case of The Manager, Adarsh Mahila Nagri Sahakari Bank

Ltd. & Anr. (supra) squarely applies to the facts of this case.

29. This court in case of Ramchandra Sitaram Mulik and another vs. Janata Nagari Sahakari Patsanstha Ltd.,Hupari and others, 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.

30. This court also considered the fact that the borrower had not paid any dues together with interest bhatta and other expenses incurred in bringing

the property to sell, including the expenses of attachment before the Sale Officer under rule 107(12) of MCS Rules and thus the said property was

rightly not released after cancelling the sale by the Sale Officer. The borrower had also no applied for setting aside the sale within the time

contemplated under Rule 107(14)(i) of MCS Rules and thus the sale of the properties effected by the Special Recovery Officer not having been

challenged by the borrower had attained finality. In my view, the said judgment squarely applies to the facts of this case. The revision application thus

filed by the respondent no.2 before the learned Minister under section 154 of the MCS Act was not at all maintainable. The respondent no.2 not

having filed any application under rule 107(12) (13) or (14), the auction sale in favour of the petitioner has attained finality.

31. Insofar as the alleged material irregularity canvassed by the learned counsel for the respondents before this court in accepting the bid of the

petitioner and confirming the sale in favour of the petitioner allegedly in violation of section 107(11)(g) or (h) is concerned, it is an admitted position

that the respondent no.2 did not raise any objection when his property was put to auction by issuing three auction notices in the newspaper. He also

did not challenge the auction on the ground of alleged fraud or irregularity under rule 107(14) of the MCS rules and thus cannot be allowed to raise

that issue in these proceedings.

32. Be that as it may, the learned Minister has not set aside the auction sale on this ground. The issue as to whether the petitioner has paid the amount

as contemplated under rule 107(11)(g) or (h) or not is a question of fact which ought to have been raised by the respondent no.2 by filing an

appropriate application under rule 107(12),(13) or (14) and not for the first time in the revision application or before this court in this writ petition under

Article 227. The judgment of Supreme Court in case of M/s.Shilpa Shares and Securities and others (supra) thus would not assist the case of the

respondent no.2.

33. This court in case of Manisha Bijal Shah (supra) has held that if the lender or authority had played fraud upon the borrower or the guarantor, the

second revision application under section 154 of the MCS Act was maintainable. In my view, the said judgment of this court would not assist the case

of the respondent no.2. Neither the respondent no.2 had applied for setting aside the auction sale by filing an application under rule 107(14) of the

MCS Rules nor had demonstrated any such alleged fraud or material irregularity before the learned Minister or before this court. The revision

application filed by the respondent no.2 directly before the learned Minister was thus not maintainable.

34. Insofar as judgment of this court in case of Sangli Sahakari Bank Ltd. Bombay (supra) relied upon by Mr.Joshi, learned counsel for the respondent

no.2 is concerned, this court in the said judgment has held that the authority referred in section 154 of the MCS Act have revisionary jurisdiction to

correct errors in the orders or decisions of the authorities than those referred in sub-section 9 of section 149. Rule 107(19)(c) cannot be read de hors

section 154 of the MCS Act. In my view the said judgment of this court in case of Sangli Sahakari Bank Ltd. Bombay (supra) would not even

remotedly apply to the facts of this case and would not assist the case of the respondent no.2.

35. I am thus not inclined to accept the submission of the learned counsel for the respondent no.2 that the respondent no.2 was not issued any notice

by the Divisional Registrar before deciding the upset price or was not given any notice by the Special Recovery Officer before conducting auction of

the property of the respondent no.2.

36. Insofar as the issuance of the notice upon the respondent no.2 is concerned, it is brought on record by the learned counsel for the petitioner as well

as by the respondent nos. 5 and 6 that three auction notices were published in the newspaper having circulation at Nashik. The respondent no.2 was

thus deemed to have been aware of the said auction proceedings.

37. Insofar as submission of the learned counsel for the respondent no.2 that the value of the property of the respondent no.2 was much more than the

bid submitted by the petitioner is concerned, the respondent no.2 could have challenged the auction sale on this ground also by filing an application

under rule 107(12), (13) or (14) of the MCS Rules. It is not in dispute that the bid amount of the petitioner was Rs.47,00,000/- as against the upset

price of Rs.44,00,000/- and being highest, was rightly accepted by the Special Recovery Officer and was rightly issued a sale confirmation certificate

by the authority. It is also not in dispute that the borrower also did not challenge the recovery certificate issued under section 101 or the auction sale

proceedings. In my view, the alleged powers exercised by the learned Minister for Co-operation purported under section 154 of the MCS Act and the

order passed based thereon is totally without jurisdiction.

38. I, therefore, pass the following order :-

(a) The impugned order dated 15th April, 2014 passed by the learned Minister allowing the Revision Application No.689 of 2013 is quashed and set

aside.

(b) Revision Application No.689 of 2013 filed by therespondent no.2 is dismissed.

(c) Rule is made absolute in terms of prayer clause (a).

(d) There shall be no order as to costs.

