

**(1987) 03 OHC CK 0018**  
**In the Orissa High Court**  
**Case No : Original Jurn. Case No. 12 of 1979**

Kela Gouda

APPELLANT

Vs

Krishna Panigrahi and Others

RESPONDENT

**Date of Decision :** 13-03-1987

**Acts Referred:**

Transfer of Property Act, 1882 — Section 69

**Citation :** AIR 1987 Ori 243

**Hon'ble Judges :** L. Rath, J;G.B. Patnaik, J

**Bench :** Division Bench

**Advocate :** B.B. Ratho, for the Appellant; R. Mohanty, (for No. 1) and Y.S.N. Murty, (for No. 2), for the Respondent

**Final Decision :** Allowed

## Judgement

L. Rath, J.—The petitioner, whose properties have been sold at the instance of the opposite party No. 2, the Land Development Bank, Aska, on account of loans incurred by him, challenges the sale in this petition under Art. 226 of the Constitution of India as being void. The petitioner availed two loans mortgaging his land measuring A. 10.50 of land. Since there was default in payment of loans, the opposite party No. 2 put the land to sale u/s 91 of the Orissa Co-operative Societies Act, 1962 (for short "the Act") on 11-6-1975 which was purchased by the opposite party No. 1 for Rs. 9,000/-. Subsequently, the opposite party No. 1 paid Rs. 6,000/- to the Bank towards the second loan of the petitioner and thus made the land free from all encumbrances.

2. A petition was filed on 11-7-1975 by the petitioner under para 1(4) of the schedule to the Act to set aside the sale. The application was rejected by the Principal Officer on 8-10-1975 on which date he also confirmed the sale. An appeal carried by the petitioner before the Deputy Registrar having failed, he preferred a revision before the Registrar, Cooperative Societies, Orissa who set aside the sale since the notice u/s 91(2) of the Act had not been served before effecting the sale and notice under Rule 141(3) had also not been served on the

petitioner before the sale was conducted. He also found that the provision of Rule 141(5) had not been observed in conducting the sale and that the application for setting aside the sale had been rejected without notice to the petitioner. On such findings, the sale as also the subsequent confirmation of it were set aside and the case was remanded to the Principal Officer to proceed afresh to conduct the sale. This order was challenged in a further revision before the State Government by the auction purchaser and the revision being allowed setting aside the order of the Registrar, the petitioner has moved this petition for quashing the order of the State Government.

3. Admittedly, notice u/s 91(2) of the Act and under Rule 141(3) of the Orissa Cooperative Societies Rules had not been served on the petitioner before conducting the sale as has been found in the order of the State Government. The relief however has been denied to the petitioner since firstly, it was held that the application of the petitioner to set aside the sale under para 1(4) of the schedule was not maintainable and that he could have made the application only under para 1(1) of the Schedule by depositing a sum equal to 5% of the purchase money for payment as compensation to the purchaser and the sum specified in the proclamation for sale for the recovery of which the sale had been ordered together with interest thereon and the expenses of attachment and other costs due; and secondly, the illegality, if any, for non-compliance of Section 91 (2) of the Act was not available to be pressed into service since u/s 94 of the Act such a grievance is to be remedied only in damages but however title of the purchaser cannot be questioned.

4. The contentions raised require careful consideration. A Division Bench decision of this Court reported in Ugramadhab Joshi Vs. The Assistant Registrar, Co-operative Societies and Others, dealing with the question held that compliance with the provisions of Section 91(2) are pre-conditions to be complied with for a sale u/s 91(1) and the sale held in contravention of such provisions is a nullity for which the sale was declared void and as not conferring any rights on the purchasers. It is however urged that the decision was rendered without considering effects of Section 94 of the Act which prescribes that for defects of compliance with the provisions u/s 91, the title of the purchaser is not to be defeated and that remedy of the person aggrieved would only be in damages and that hence the decision of the Court requires a reconsideration.

5. Section 91 of the Act is a specific provision for Land Development Banks authorising them to bring the mortgaged property to sale without intervention of the Court in case of default of payment of the mortgage money after hearing the objections, if any, of the mortgager, if such a power has been conferred upon them in the mortgage deed. Under Sub-section (2) the summary power so vested cannot be exercised unless and until a notice in writing requiring payment of the mortgage money or any part thereof, as the case may be, has been served upon the different categories of persons enumerated therein including any person who had an interest in or charge upon the property mortgaged or upon

the right to redeem the same and that after service of such notice a default has been made in payment of the mortgaged money or part thereof for three months. Section 94 of the Act may be quoted.

"94. Title of purchaser not to be questioned, -- Where any property is sold in exercise of a power of sale u/s 90 or 91, the title of the purchaser shall not be questioned on the ground that : --

(a) the circumstances required for authorising the sale had not arisen;

(b) due notice of the sale was not given;

(c) the power of sale was otherwise improperly or irregularly exercised;

but any person who has suffered any damage by an unauthorised, improper or irregular exercise of any such power shall have a remedy in damages against the State Land Development Bank or, as the case may be, the land development bank."

In terms of the section, the title of the purchaser is not to be questioned, when a sale is made either u/s 90 or 91, only if the provisions of Clause (a), (b) or (c) of Section 94 apply to the facts of the case. It is urged that an objection that the notice u/s 91(2) was not given is covered by Sub-clause (b) of Section 94 and that hence an objection to the sale by the petitioner on such count does not lie.

6. On a plain reading of the Section 94(b), the submission is wholly untenable. Whereas notice referred to u/s 94(b) is a notice of the sale, the notice u/s 91(2) is one which requires payment of the mortgage money or part thereof. The two notices are completely different from each other and hence it must be held that Section 94 has no application when a sale conducted u/s 91(1) is challenged on the ground of non-service of any notice u/s 91(2). The sale in the instant case admittedly having been held without serving the notice u/s 91(2), it is void and did not confer any right on the purchaser. The decision of this Court in Ugramadhab Joshi Vs. The Assistant Registrar, Co-operative Societies and Others, thus fully applies and does not require any reconsideration.

7. Faced with such difficulty, a further contention is raised that even if the sale was held in contravention of Section 91 (2), yet objection to it could be taken by the petitioner only in accordance with para 1(1) of the schedule by deposit of the required amounts as stated therein and that an application otherwise to set aside the sale on the ground of irregularity, mistake or fraud was not maintainable.

8. The State Government in its revisional order was of the view that so far as the sale is effected u/s 91 of the Act, only para 1 of the schedule is attracted and not the other provisions of it which are applicable only when the Land Development Bank files a dispute and obtains an award and proceeds to execute the award by initiating action u/s 103 of the Act. The mention of para 1 of the schedule in the order is apparently a mistake for para 1(1) since all other relevant sub-paragraphs are also of para 1.

9. There is no warrant for the view that a sale u/s 91 of the Act attracts only para 1(1) of the schedule and not the other sub-paragraphs. The schedule purportedly relates to Section 103(4) of the Act and deals with applications to set aside the sale, confirmation of sale and other matters. Section 103(4) provides that provisions contained in the schedule shall apply in respect of execution proceedings taken u/s 103(1)(c). Section 103 is the provision for execution of orders etc. and stipulates that every order made by the Registrar under Sections 67(2), 102 and 108(1), every decision or award made u/s 70, every order made by the liquidator u/s 75 and every order made under Sections 109, 111, 112, 113 and 114 shall be executed, amongst other methods, u/s 103(1)(c) which is as follows : --

"(c) be executed by the Registrar or any other person subordinate to him empowered by the Registrar in this behalf by the attachment and sale or sale without attachment of any property of the person or a society against whom the order, decision or award has been obtained or passed."

While Section 103(a) and (b) provides for execution of orders, decisions or awards either as a decree of the Civil Court or as arrears of land revenue, Sub-clause (c) thereof provides for execution by attachment and sale or sale without attachment either by the Registrar or by any person subordinate to him and empowered by him in that behalf. The schedule to the Act makes elaborate provisions for setting aside the sale as also for its confirmation and other connected provisions. No doubt, Section 91 is only mentioned in para 1(1) of the schedule but however the application to set aside the sale under other provisions of the paragraph are not excluded. Sub-paragraphs (1) to (4) of para 1 to the schedule each provide alternative modes to get the sale set aside and can be invoked whenever circumstances so warrant. They contemplate different situations and depending upon the situation, the person aggrieved may take to them to have the sale set aside. So far as sub-para (1) is concerned, it is a mandatory provision in which there is no option in the Registrar but to set aside the sale once the necessary deposit is made. No decision making by him is involved at all. However so far as sub-para (2) is concerned, the sale is to be set aside only if the Registrar comes to the conclusion that there has been material irregularity or mistake or fraud in publishing or conducting the sale. Sub-para (5), which states that a person seeking to set aside the sale under sub-para (2) cannot file an application under sub-para (1) unless he withdraws his application under sub-para (2), gives a cue that the different sub-paragraphs (1) to (4) are independent and alternative modes. Thus an application under sub-para (4) is only to bring to the notice of the principal officer that the mandatory provisions of Section 91(2) have not been complied with and hence the sale is void. The Registrar had thus ample powers in his revisional capacity to set aside the sale and hence his decision could not be set aside by the State Government on the view that an application under sub-para (4) did not lie.

10. Apart from the fact that the notice u/s 91(2) had not been served on the

petitioner it has also been found that there was non-compliance of Rule 141(3) of the Rules. Rule 141 lays down the procedure for application for sale and manner of the sale after the notice period u/s 91(2) has expired. The Land Development Bank to which loan is due, is to wait for three months from the date of service of notice u/s 91(2) and after considering any objections received to such notice, is to make an application to the Principal Officer for sale of the mortgaged property. The application made to the Principal Officer is to be in the prescribed form and is to contain the particulars required in Rule 141(2) as also contain a report regarding the manner of service of notice u/s 91(2) of the Act. On receipt of such application, the Principal Officer is to give notice under Rule 141(3) by registered post to all the persons named in the application regarding his intention to sale the property unless the amount is paid within a time to be allowed by him. The entire procedure is mandatory and does not admit of any exception. Since the sale is without intervention of the Court, it must be construed that all the provisions are to be rigorously complied with and that if the successive stages of the procedure are violated, the sale would be invalid.

11. In the result, the writ application must succeed and the order of the State Government in Annexure-4 is set aside and the order of the Registrar is restored. A writ of certiorari be issued accordingly. Hearing fee is assessed at Rs. 200/-.

G.B. Patnaik, J.

12. I agree.