

(2017) 11 BOM CK 0135
In the Bombay High Court
Case No : 624 of 2006

Mahesh Navelkar, (since deceased) represented by : Dilip
Ramchandra Suryaji Porob Navelkar, & Ors.

APPELLANT

Vs

Goa State C-operative Bank Ltd., & Ors.

RESPONDENT

Date of Decision : 08-11-2017

Acts Referred:

Constitution of India, Article 226 -
Multi-State Co-operative Societies (Privileges, Properties and Funds, Accounts, Audit,
Winding up and Execution of Decrees Orders and Decisions) Rules, 1985, Rule 22(1

Citation : (2017) 11 BOM CK 0135

Hon'ble Judges : N.M. Jamdar, Nutan D. Sardesai

Bench : DIVISON BENCH

Advocate : S.S. Kantak, Preetam Talaulkar, Falcao Reis, S.R. Rivonkar, A. F.
Diniz, H. D. Naik, P.P. Singh

Judgement

1. The Petitioner, a borrower of the Respondent No.1 Bank has called in question the Sale Certificate dated 22 September 2000 and the Award dated 19 February 1998. The Award had to be passed and the Sale Certificate had to be issued because of failure of the Petitioner to repay the loan taken from the Respondent Bank.

2. The Petitioner, as stated earlier, is the borrower of the Respondent No.1 Bank. Smt. Nirupa Pawar, the Respondent No.5 has now purchased the property in question from the Respondent Bank.

3. On 16 May 1996, the Respondent Bank had sanctioned a loan of Rs. 9500000/- to the Petitioner for construction and land development on the property being Plot D-1 of the larger property known as "Mallans", admeasuring 65000 sq. metres, surveyed under No.26/2 of Village Bainguinim, Tiswadi Taluka. The loan was availed by the Petitioner, however, the Petitioner failed to repay the amount. The Respondent Bank approached the Assistant Registrar of Cooperative Societies, Goa raising a dispute in respect of non-payment of loan by the

Petitioner. The dispute was numbered as Case No.ARCS/HQ/CC/ABN-21/97-98/475 The Petitioner, as Promoter of M/s. Highland Developers, and the two sureties, were joined as party Respondents. The notice issued by the Registrar on the address of the Petitioner, was served and the Petitioner remained present. Their sureties did not attend the proceedings. The Petitioner verified the documents such as Agreement for Sale, Demand Promissory Note, Final Notices, Statement of Loan Account at the hearing. The Petitioner admitted the claim of the Respondent Bank in writing and prayed for installments. In view of the clear admission of the Petitioner in writing, the Assistant Registrar disposed of the dispute by directing the Petitioner and the sureties to pay the amount of Rs. 13204617/-, together with interest at the rate of 22% per annum, from 1 January 1998 till settlement. The learned Assistant Registrar passed the award on 19 February 1998.

4. Since the Petitioner did not approach the Respondent Bank for any installments, nor paid the amount due, the property was put to auction on 21 February 2000. The Respondent Bank purchased the property for Rs. 22387000/- and the Sale Certificate was issued in favour of the Respondent Bank on 22 September 2000. The Respondent Bank closed the account of the Petitioner and called for tender on 25 March 2006 of the Property for the purpose of sale. The bid submitted by the Respondent Purchaser was accepted by the Respondent Bank. A Sale Deed in favour of the Respondent- Purchaser was executed on 6 June 2006 and possession was handed over to the Respondent Purchaser on 7 June 2006.

5. In the year 2006, the Petitioner took an objection in respect of the auction, as well as the sale certificate, contending that the Petitioner was not aware of the grant of sale certificate, as no notice was given to the Petitioner. Since the Respondent Bank did not furnish the relevant documents to the Petitioner, the Petitioner filed a Writ Petition in this Court, which was disposed of and the Respondent Bank furnished the relevant documents. The Petitioner, thereafter, filed the present Petition on 22 December 2006, challenging the auction dated 20 February 2000 and Sale Certificate dated 22 September 2000.

6. We have heard Mr. S.S.Kantak, learned Senior Counsel for the Petitioners, Mr S.R. Rivonkar, learned Counsel for the Respondents No.1-Bank and 3, Mr. A. F. Diniz, learned Counsel appearing for the Respondent No.5-Purchaser and Mr. P.P. Singh, learned Counsel appearing for the Respondent No.6-Reserve Bank of India.

7. Mr. Kantak, learned Senior Counsel appearing for the Petitioner submitted : The Petitioner was not aware of the Auction and grant of Sale Certificate. The Petitioner came to know of the same in the year 2006 when the Petitioner came across the public notice in the newspaper for sale of the Property. It is that time the Petitioner became aware that the property was purchased by the Respondent Bank in an auction. The Petitioner, therefore, could not avail of any remedy under the Multi-State Co-operative Societies (Privileges, Properties and Funds, Accounts, Audit, Winding up and Execution of Decrees Orders and Decisions)

Rules, 1985. The Sale Certificate having been granted, the only remedy is to challenge the same is by way of a writ petition. The action of the Respondent Bank is illegal, arbitrary and opposed to public interest. No demand notice was issued to the Petitioner. The remark "unclaimed", relied upon by the Bank to show service, is not a good service. From the documents furnished by the Respondent Bank, it is clear that the sale was postponed without fresh notice, which is contrary to the Rules and the auction notice did not provide for any valuation or any offset price was indicated. The Bank has breached the provisions of the Rules of 1985, more particularly Rule 22, sub-Rule (11) thereof. The Bank sold the property only for the purpose of recovery of its own loan amount and not for getting the best possible market price, because of which the Petitioner has been put to great loss. Since the procedure under Rule 22 has not been followed, the Petitioner lost various opportunities, including that of approaching the Bank to pay the amount, which is an opportunity given to every borrower who receives a demand notice. In view of the law laid down in *Smita Janak Thacker vs. Commissioner of Registrar, District Cooperative Societies, Pune and ors*, [2002(2) Mh.L.J.44] and *Ram Kishun & Ors. Vs. State of Uttar Pradesh & ors*, (2012) 11 SCC 511, the procedure adopted by the Respondent Bank, being opposed to Rule 22(11) of the Rules of 1985, is bad and the Auction and Sale Certificate must be set aside. The Petitioner is ready to pay the double the price at which the Respondent Purchaser has purchased the property as it is clear from the record that the Respondent Bank sold the property to the Respondent Purchaser at grossly undervalued price.

8. Mr. Rivonkar, learned Advocate for the Respondent Bank and Mr. Diniz, learned Advocate for the Respondent Purchaser submitted : The Petition is hopelessly barred by laches and that the Petitioner has deliberately not availed of the remedy under sub-Rule (14) of Rule 22 of the Rules of 1985 to avoid any kind of deposit since the rule mandates that the borrower, if wants to set aside the sale, must deposit the amount due. The Petitioner had full knowledge of the Auction and consequential Sale Certificate. The Petitioner is not a rustic villager, but a developer, whose profession is land dealings. Since the Petitioner chose not to avail of the remedy provided under Rule 22, sub-Rule (14), no equity can arise in favour of the Petitioner, who has approached this Court six years after the Sale Certificate was granted. The Respondent Purchaser has legitimately purchased the property by a registered sale deed and is in possession since last more than 11 years and cannot be dispossessed nor any order can be passed against the Respondent Purchaser. Mr. Singh submitted that the Reserve Bank of India is needlessly joined as a Respondent.

9. Since the arguments advanced by the learned Counsel appearing for the parties revolve around the provisions of Rules of 1985, more particularly Rule 22, we will first proceed to analyse the scheme of Rule 22 of the Rules of 1985.

10. Rule 22 of the Rules of 1985 deals with the procedure in execution of decrees, orders and decisions and falls under Chapter V of Rules of 1985. Rule

22 contemplates that any decree-holder can apply to the Recovery Officer for the purpose of putting the property to sale in execution of the decree. The modalities for making such application have been provided for and the steps to be taken by the Sale Officer have been listed under Clause (1) to sub-Rule (10). Sub- Rule (11) which is an important sub-rule, states that when an application is presented for attachment and sale, or sale without attachment of immoveable property, the Recovery Officer would issue a demand notice, calling upon the defaulter to pay the amount. The demand notice would specify the time allowed for payment and that if the amount is not paid, it will be sold in auction. Even after receipt of the demand notice no steps are taken by the defaulter, then the Sale Officer would proceed to take further steps of proclamation of sale. Sub-Rule (11)(e) of Rule 22 deals with proclamation of sale. The proclamation notice needs to indicate the details of the property to be sold, any encumbrance to which the property is liable, the amount for the recovery of which sale is ordered, and every other matter which the Sale Officer considers material for a purchaser to know in order to judge the nature and value of the property. Proviso to Clause (f) of sub-Rule (11) empowers the Sale Officer in his discretion to adjourn the sale to a specified date, recording reasons for such an adjournment and when the sale is adjourned for a longer period than 7 days, a fresh proclamation has to be issued. Sub-Rule (11), Clause (k) permits the Decree-holder to purchase the property and the purchase money and the amount due on the decree is to be set off against one another.

11. Rule 22(12) of the Rules of 1985 provides that prior to the date fixed for a sale, the defaulter or any person acting on his behalf tenders payment of the full amount due, together with interest, bhatta and other expenses, the Sale Officer would forthwith release the property after cancelling, if there is an attachment. As per sub-Rule (13), where immovable property is sold, any person owning such property or holding an interest therein can apply to have the sale set aside by depositing the payment to the purchaser a sum equal to 5 percent of the purchase money and for payment, the amount of the arrears specified in the proclamation of sale. Such application and deposit have to be made within 30 days and if such an application is made and amount deposited within 30 days, the Recovery Officer is empowered to pass an order setting aside the sale and repay the amount to the purchaser. Sub-Rule (14) lays down that such an application can be made within 30 days to set aside the sale on the ground of material irregularity or mistake or fraud in conducting the sale. If no such application is made nor any deposit is made within a period of 30 days, then the Recovery Officer has to proceed with confirmation of the sale and issue a sale certificate. The order passed under sub-Rule (14) by issuing the Sale Certificate is not liable to be questioned in any suit or legal proceeding.

12. This broadly is the scheme of the Rules of 1985 governing the auction and sale of a property of a defaulter pursuant to an Award. Analysis of Rule 22 would indicate that it is a selfcontained code which provides a methodology to put the property of a defaulter to sale. Sub-Rule 14 gives opportunity to the debtor to

get the sale set aside. The Rules stipulate that if no challenge is levied within time limit, the Sale Certificate issued is final.

13. Two aspects emerge. Firstly, whether the Petitioner had knowledge of the auction proceedings and could apply under Rule 22, sub-Rule (14) to set aside the Sale. If the Petitioner had knowledge of the auction proceedings and could apply to set aside the sale under Rule 22(14), then the question is whether a concluded sale in favour of the Respondent Bank and further sale in favour of Respondent Purchaser after a lapse of 6 years could be called in question at the behest of the Petitioner. The second facet would be, if the Petitioner had no knowledge of the auction proceedings and had no opportunity to question the action by taking recourse to Rule 22(14) and is permitted to question the auction and the sale certificate, then whether the auction and sale certificate are valid in law. In our opinion, the knowledge of the Petitioner and the opportunity to challenge the Auction and Sale Certificate is an issue which is most material for consideration. Therefore, we take this issue for consideration at the forefront.

14. Mr. Diniz, the learned Counsel for the Respondent Purchaser pointed out that in the Petition there is no specific assertion that the Petitioner was not aware of the entire proceedings. All that the Petitioner has asserted is that the Petitioner was not aware of the Auction and Sale Certificate. An additional affidavit has been filed on behalf of the Respondent Bank wherein the Respondent Bank, on oath, has made the following averments :

"4. In furtherance of the said Execution Application, the Recovery Officer issued Demand Notice dated 12/6/1998, under Rule 22, sub- Rule(11), clause (b) of the Multi State Co-op. Societies Rules 1985 (hereinafter referred to as "the said Rules") to M/s. Highland Developers, through its Prop. Shri Mahesh R.P. Navelkar, the Petitioner herein, at his address at 26/2, Bainguinim, Tiswadi, Goa, which is his registered address being the address indicated in loan application and also against two sureties Shri Yashpal Raikar and Shri Sandeep Naik by Registered Post AD. In the said Demand Notice it is clearly indicated to clear the demand outstanding dues within 15 days. The said notices were issued under Registered Post A/D, to the Petitioner and the two sureties in due course of business as per Rule 22 of the said Rules. Hereto annexed and marked as "Ammexire-R7" is the copy of the said Demand Notice dated 12/6/1998.

5. Since the Petitioner failed to pay the amount specified in the Demand Notice within given time, the Sales and Recovery Officer proceeded to sell the mortgaged immovable property of the Petitioner under procedure provided under clause (e) to subrule (11) of Rule 22, of the said Rules, by issuing Proclamation of Sale notice dated 14/8/2000, notifying the auction of the mortgaged property on 15/9/2000 at 3.30 p.m. giving the description of the property as also the total dues. The said proclamation notice was duly published in daily newspaper "Gomantak" a Marathi daily, dated 18/8/2000, as also individual notice was sent to the petitioner by Reg. A/D. at Petitioner's registered address on 18/8/2000. However, the envelope containing the said proclamation notice was returned

back with postal remark "unclaimed returned to the sender" and also with a remark "intimated on 19/8/2000". Hereto annexed and marked as "Annexrue-R8 colly", are the copies of Newspaper publication dated 18/8/2000 and the copy of proclamation notice along with postal envelope with the remarks."

15. A demand notice was issued to the Petitioner by Registered Post A/D. Notices were also issued to the two sureties which, in regular course of conduct would be served on the Petitioner. This notice was sent on the same address on which earlier notices were served. The proclamation of sale was published in daily newspaper, as well as individual notice was sent to the Petitioner. The individual notice was returned with the remark that it was intimated on 19/8/2000 and was unclaimed. The notice was sent to the same registered address which was given in the Award and on the same address on which the notice of recovery proceedings was sent. Mr. Kantak, the learned Senior Counsel for the Petitioner sought to contend that "unclaimed" is not a good service, while Mr. Diniz and Mr. Rivonkar, the learned Counsel for the Respondents, relying on the decision of the learned Single Judge of this Court in Arbitration Petition No.1422 of 2015 in the case of Jenjon Retail and Services Pvt. Ltd., vs. Lavasa Corporation Ltd., contended that remark "unclaimed" is a good service. As regards the contention raised by Mr. Kantak of non-issuance of demand notice to the Petitioner, firstly, we find that a notice was sent by Registered Post A/D at the same address on which it was earlier sent and that a statement to that effect has been made by the Respondent Bank on oath. Considering the evidence on record cumulatively, we do not find any reason to disbelieve the version of the Respondent Bank and in a regular course of business a notice sent by Registered Post is presumed to have been served.

16. Furthermore, what we are considering is a challenge to the Auction and Sale Certificate by the debtor after a lapse of six years and it is in that context we will have to look into the pieces of evidence on record cumulatively and draw an inference therefrom and consider the arguments regarding service of notice in that context. If we have to overlook the gross delay, we will have to be convinced that the Petitioner's claim that the Petitioner acquired knowledge of the Auction and Sale Certificate only in the year 2006, is believable. Since it is the case of the Petitioner that the Petitioner came across a newspaper publication by the Respondent No.1 Bank in the year 2006, it is clear that the Petitioner is in habit of reading newspapers and following up the news regarding putting up of properties for sale. If the Petitioner could get the knowledge from newspapers in the year 2006, why the Petitioner could not come across the earlier proclamation issued by the Respondent Bank in the daily news paper, is not explained. The Petitioner had availed of a loan of Rs. 9500000/- which, in the year 1996, was a substantial amount and the property admeasuring about 65000 sq. metres was mortgaged. Thus, the amount of loan was substantial and also the property was fairly large. The Petitioner is a developer by profession. Any businessman who takes a loan of such a huge amount would naturally follow the progress of the loan proceedings with keen interest. It was not as if the Petitioner was a rustic

villager and that the amount was so trivial, that in daily routine the Petitioner would forget about the factum of loan. The Petitioner is not an outsider. He was a local businessman. When the recovery proceedings were filed against the Petitioner, notices were served on the Petitioner at the address given, the Petitioner appeared in the proceedings on 19 February 1998 and sought time to pay the amount in installments. Thereafter, the Award was passed recording the statement of the Petitioner. The Petitioner, therefore, knew in February 1998 itself that he had to pay an amount of Rs. 13204617/-, together with interest at the rate of 22% per annum or the property would be put for sale. This was not a small liability to forget. Any businessman facing prospects of attachment for non-payment of dues and his commitment to pay installments would follow the further progress. As per the Petitioner's case, the Petitioner's knowledge of the entire proceedings, strangely ceased on 19 February 1998. The Petitioner suddenly stopped thinking about the loan liability and prospect of attachment, only to be remembered of the position in the year 2006 when the Respondent Bank issued an advertisement for sale of the property to the Respondent Purchaser. To put it most mildly, this case of the Petitioner is entirely unbelievable. We are not at all convinced that the Petitioner had no knowledge of the auction proceedings held in the year 2000.

17. Once we come to the conclusion that the theory of the Petitioner that the Petitioner had no knowledge whatsoever of the auction sale and sale certificate, then the question of laches on the part of the Petitioner becomes most relevant in the context of the jurisdiction the Petitioner seeks to invoke. The sale of the property took place on 22 September 2000. The property was purchased by the Respondent Bank on that day. Thereafter, notice was issued by the Respondent Bank for putting up the property to sale on 25 March 2005 and it is in the year 2006 that the Petitioner seems to have taken steps to question the sale. If the Petitioner knew about the factum of putting up the property for auction by the Respondent Bank in 1998 and could apply to set it aside that there is no cogent reason for this lapse, we cannot be oblivious of the equities that have arisen in favour of the Respondent Purchaser. When we consider the challenge of the Petitioner under Article 226 of the Constitution of India, which is also an equity jurisdiction, the conduct of the parties will have to be taken into consideration.

18. Mr. Diniz has drawn our attention to Rule 22, sub-Rule (13) which stipulates that if a debtor wishes to set aside a sale he has to deposit the full amount, as well as a sum equal to 5 percent of the purchase money. It seems clear to us that the Petitioner did not avail of the opportunity under Rule 22(14) to avoid any re-payment. It is only when the property was further put to sale and by passage of time the prices have gone up that the Petitioner has chosen to challenge the action of the Respondent Bank and has come up with an offer of purchase.

19. The argument advanced by Mr. Kantak regarding postponement of the sale and that a fresh notice had to be issued, could have been taken by the Petitioner

if proceedings under Section 22(14) were filed. Further, it has been pointed out by Mr. Rivonkar that as per second proviso to Rule 22(11)(f), a fresh proclamation is necessary only if the sale is adjourned beyond the period of 7 days. It is pointed out that the sale was adjourned from 15 September 2000, to 21 September 2000 within the period of 7 days. Therefore, we do not find any merit in this argument of Mr. Kantak.

20. As far as the argument of Mr. Kantak that no particulars were given when the notice was issued putting the property to auction, Rule 22(11)(e) requires details such as the property to be sold, any encumbrance, the amount for recovery and every other matter which the Sale Officer considers material. The notice gave details of the property, encumbrance and the amount. As far as valuation and other aspects are concerned, since we have held that the Petitioner had the knowledge of the proceedings, the Petitioner could have taken this issue if the Petitioner had filed proceedings under Rule 22(14). As stated earlier, Rule 22(14) gives an opportunity to set aside the sale on the ground of material irregularity, mistake and fraud. Arguments advanced by Mr. Kantak now, were available to the Petitioner if the Petitioner had approached or filed an application under Rule 22(14).

21. Mr. Kantak contended that the Respondent Bank could not have purchased the property and the property was purchased not for recovery of the market price, but it was put to sale only to recover the dues. Under the Rules, there is no impediment in the way of the decree-holder to purchase the property if there are no bidders available. Rule 22(11)(k) provides that if the Decree-holder purchases the property, the purchase money and the amount due on the decree shall be set off against one another and the Sale Officer will enter satisfaction of the decree in whole or in part. We find that there is no illegality in the action of the Respondent Bank in purchasing the property by itself. Mr. Rivonkar pointed out that as per the Reserve Bank of India Guidelines a non-performing asset has to be sold, therefore, it was sold to the Purchasers. Further the Petitioner cannot question the action of the Bank to sale the property to third party Purchaser as the Petitioner had ceased to be an owner when the sale was completed in favour of the Bank. If the Petitioner was of the opinion that the property was put to sale for a lesser value, nothing prevented the Petitioner from appearing in the proceedings to oppose the same or by depositing the amount, file proceedings thereafter under Rule 22(14).

22. Mr. Rivonkar has placed on record a copy of the Judgment and Order passed by the Division Bench (Mohta & Reis, JJ.) in Writ Petition No. 516/2006 where, in identical circumstances award and sale certificate were challenged by a relative of the present Petitioner in respect of his loan from the same Respondent Bank. In that case also since the debt was not paid, the Bank proceeded to put the property to auction and the Bank purchased the property. The certificate of sale was issued on 22 September 2000. The property was sold to third party purchaser. The Petitioner therein did not apply to set aside the Order under Rule

22(14)(i) of the Rules and the sale confirmation became final in view of Rule 22(14)(vi). On 9 October 2006, the Petitioner filed the Petition and challenged the auction sale. In the meanwhile, the property was purchased by the private Respondent from the Bank. The Division Bench dismissed the Petition, inter alia, on the ground of laches. The Division Bench did not believe the version of the Petitioner therein that he got knowledge of the sale of the year 2000 only in the year 2006. Mr. Rivonkar, states that a Special Leave to Appeal (C) No.18854/2017, challenging the decision of the Division Bench was dismissed on 21 August 2017.

23. Turning now to the decisions cited by Mr. Kantak which, in our respectfully opinion, are not relevant in the facts of the present case, where we are convinced that the Petitioner had knowledge of the proclamation and approached the Court with gross delay and laches. All the decisions cited do not arise from such factual position.

24. In the case of *Smita Janak Thacker*, [2002 (2) Mh.L.J. 44] when the execution proceedings were initiated, an Award was passed and purchase price was fixed, an objection was taken immediately. It was not a case where the Borrower had approached the Court allowing sale to be completed without raising any objection inspite of knowledge up with gross laches. In the case of *Ram Kishun & Ors.*, (2012) 11 SCC 511 the issue came up for consideration before the Apex Court from an order passed by the Allahabad High Court which had confirmed the order passed by the Board of Revenue and other revenue officials. A recovery certificate was issued and the Appellants had raised objections that instead of putting their property to action, the loan amount be recovered from the legal heirs of the borrower, since the Appellants were sons of the surety. It was stated that the debtor had left huge movable and immovable properties which could satisfy the bank loan amount and the surety need not be proceeded with. The objections were rejected. Ultimately, the Apex Court did not interfere with the decision of the High Court which had rejected the case of the Appellants on the ground of delay.

25. Thus, as stated earlier, in none of the cases the borrower had knowingly kept silent till the property was sold to the third purchaser by the Bank having purchased it for itself in the auction. The Petitioner has not placed on record any decision to indicate that a borrower, who had an opportunity under Rule 22(14) to get the sale set aside by depositing the amount, even if he does not avail of the same and challenges the further sale with gross laches, the Courts have set aside the sale at his instance. On the contrary, an identical challenge has been negated by the Division Bench of this Court in Writ Petition No.516/2006, which decision has been confirmed by the Apex Court.

26. A Sale Certificate must be given its due sanctity. If the concluded Sale Certificates are casually reopened at the behest of a party who approaches the Court with gross laches, the intent behind attaching finality to the sale will be lost.

27. In the circumstances, no case is made out by the Petitioner for exercise of extraordinary jurisdiction of this Court under Article 226 of the Constitution of India. The Writ Petition is dismissed. Rule is discharged. No order as to costs.