
(2006) 07 BOM CK 0122
In the Bombay High Court
Case No : Writ Petition (L) No. 1527 of 2006

Niranjan D. Woody

APPELLANT

Vs

The South Indian Co-operative Bank Ltd. and Others

RESPONDENT

Date of Decision : 20-07-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 84, Order 21 Rule 85, Order 21 Rule 86, Order 21 Rule 87, Order 21 Rule 90
Constitution of India, 1950 — Article 226

Citation : (2006) 6 ALLMR 144 : (2006) 5 BomCR 587

Hon'ble Judges : D.Y. Chandrachud, J

Bench : Single Bench

Advocate : Aspi Chinoy, Umesh Shetty and Sharila D'Souza, instructed by Umesh Shetty and Co, for the Appellant; J.P. Cama instructed by N.N. Bhadrashete for Respondent Nos. 1, 4 and 5, J.J. Bhat and Anjali Chandurkar, instructed by Mulla and Mulla, for the Respondent

Judgement

D.Y. Chandrachud, J.—Rule, by consent of Counsel returnable forthwith. Counsel appearing on behalf of the Respondents waive service. By consent of Counsel and at their request taken up for hearing and final disposal.

2. The Petitioner owns a plot of land at Santacruz¹ on which there is a building consisting of a ground floor, two storeys and two garages. The Petitioner has a residential flat admeasuring 2435 sq.ft. therein. Apart from the residential flat of the Petitioner, the building is in the occupation of eight tenants. Until the Petitioner and his family came to be dispossessed, the residential flat was occupied by the Petitioner, his wife and son. The property was held jointly by the Petitioner with his father. The Petitioner's father expired in September 2005, leaving behind his last will and testament, by which the right, title and interest is bequeathed to the Petitioner.

3. On 20th July 2001, the Petitioner availed of an Over Draft Facility in the amount of Rs. 25 lakhs from the First Respondent against a mortgage of the

aforesaid immovable property. The First Respondent moved the Assistant Registrar, Co-operative Societies, for the recovery of its outstandings in a proceeding u/s 101 of the Maharashtra Co-operative Societies" Act, 1960. The Assistant Registrar issued a recovery certificate on 1st September 2004 in the amount of Rs. 45,14,081/- together with interest at the rate of 18% from 11th February 2004. The property was attached in pursuance of the recovery certificate. The property was put to auction sale in pursuance of a notice published by the First Respondent on 30th September 2005. The auction notice covered a total of twenty three different properties including the property which forms the subject matter of these proceedings. The auction was slated to take place on 14th November 2005 and the reserve price was fixed at Rs. 1,23,43,558/-. Prospective bidders were required to submit their offers on or before 15th October 2005 together with 10% of the amount of the reserve price as an earnest money deposit. The auction notice stipulated that in case the highest bidder fails to pay the price within the stipulated period, the earnest money would stand forfeited.

4. The Third Respondent submitted an offer in the amount of Rs. 1,24,50,000/- and on 14th November 2005, the First Respondent informed him of the acceptance of the offer. The balance of Rs. 1,12,14,000/- after giving due credit for the earnest money that had already been paid, was required to be paid within a period of fifteen days. The letter of acceptance stated that the auction was on "as is where is basis". The Third Respondent made an endorsement to the following effect at the foot of the letter of acceptance:

Received and accepted with following terms:

Note : you will have to give vacant possession of:

1. self occupied flat of 2200 sq.ft.
2. Common premises occupied by Fabrik Eng : 275 sq.ft. approx.
3. Garage (one) and
4. Marketable title as mentioned by us in tender submitted to you.

The Third Respondent addressed a letter dated 14th November 2005 to the First Respondent acknowledging receipt of the letter of acceptance. However, by his letter, the Third Respondent sought an extension of a period of thirty days for the payment of the balance.

5. On 14th November 2005, the Petitioner filed a Writ Petition in this Court under Article 226 of the Constitution (WP 7806 of 2005) for impugning the recovery certificate issued u/s 101 of the Maharashtra Co-operative Societies" Act, 1960, and the attachment of the property. An ad-interim order was passed by a Learned Single Judge on 16th November 2005 by which the First Respondent was directed not to dispossess the Petitioner. The Third Respondent also made a statement that he will not transfer the property or create any third party rights

therein. The Third Respondent paid an amount of Rs. 6.45 lakhs being the balance required to complete the payment of 15% of the bid amount on 16th November 2005. The requirement of paying 15% of the total bid amount at the time of purchase is, as would be noticed hereafter, a mandatory requirement of Rule 107(11)(g) of the Maharashtra Co-operative Societies" Rules, 1961,

6. On 23rd November 2005, the Writ Petition filed by the Petitioner was disposed of since the Petitioner had an alternative remedy by way of a revision before the Divisional Joint Registrar of Co-operative Societies u/s 154A. The case of the Petitioner before the Court is that on 30th November 2005, the period stipulated in Rule 107(11)(h) for the payment of the balance 85% of the purchase price expired. Admittedly, the Third Respondent did not effect payment on or before that date. On 6th December 2005, the Petitioner filed two revision applications impugning the recovery certificate and the auction sale respectively and deposited therewith an amount of Rs. 26.16 lakhs in compliance with the mandatory requirement of pre-deposit u/s 154(2A). On 12th December 2005, the First Respondent addressed a communication to the Third Respondent extending the time to effect the balance payment until 25th December 2005. On the same day the auction purchaser informed the First Respondent that a cheque in the amount of Rs. 64.19 lakhs drawn on the First Respondent Bank and a further cheque in the amount of Rs. 41.50 drawn as an escrow payment in favour of his Advocate was kept ready. The auction purchaser sought an execution of the conveyance. The conveyance was executed by the First Respondent in favour of the Third Respondent on 12th December 2005. The conveyance records what are now admitted facts, namely that (i) The auction purchaser had paid Rs. 12,34,356/- prior to the bidding process; (ii) The auction purchaser's bid of Rs. 1,24,50,000/- was accepted by a letter dated 14th November 2005; (iii) The auction purchaser had paid a further amount of Rs. 6.45 lakhs on 16th November 2005; and (iv) The auction purchaser had paid an amount of Rs. 64.19 lakhs and deposited the balance of Rs. 41.50 lakhs with his Advocate to be kept in escrow until probate was obtained of the will executed by the Petitioner's late father.

7. The Revision Applications preferred by the Petitioner were dismissed by the Divisional Joint Registrar, Co-operative Societies on 28th February 2006. On 3rd March 2006, the Petitioner filed a second Writ Petition (W.P. 912 of 2006) impugning the orders passed by the Divisional Joint Registrar. On 16th March 2006, a Learned Single Judge of this Court relegated the Petitioner to the remedy of impugning the sale before the Recovery Officer under Rule 107(11)(f). The Recovery Officer was directed to dispose of the application within four weeks pending which, the status quo would continue. The Special Recovery Officer passed an order on 25th April 2006 upholding the auction sale. On the next day, a notice was received from the First Respondent by the Petitioner's wife stating that possession would be taken over at 11 a.m. on 27th April 2006. On 27th April 2006 a petition under Article 226 of the Constitution (W.P. 1769 of 2006) was instituted and it has been stated this was because the Revisional Authority u/s

154 was on leave. An ad-interim order was passed therein restraining the First Respondent and the auction purchaser from taking possession. However, it is common ground that by then the Fourth Respondent had forcibly evicted the Petitioner's wife and son from the premises and had taken possession. On 28th April 2006, an order was passed in the writ proceedings recording that possession had already been taken. However, the Petitioner was granted liberty to again move the Divisional Joint Registrar and parties were directed to maintain status quo for a period of two weeks. The impugned order was thereupon passed by the revisional authority on 12th June 2006 dismissing the Revision Application against the order of the Special Recovery Officer upholding the sale.

8. On behalf of the Petitioner it has been submitted that Rule 107(11)(g) of the Maharashtra Co-operative Societies' Rules, 1961 requires that an amount representing 15% of the price of the immovable property has to be deposited by the auction purchaser with the Sale Officer at the time of purchase and in default of such deposit, the property, it has been provided, shall forthwith be resold. In the present case, it was urged that the Third Respondent was informed by the Bank on 14th November 2005 of the acceptance of the bid. The Third Respondent had submitted an earnest money deposit representing 10% of the reserve price. The Third Respondent was, it was submitted, liable to make up the balance representing 15% of the total bid amount immediately on 14th November 2005 at the time of purchase. This the Third Respondent failed to pay and an amount of Rs. 6.45 lakhs representing the balance out of the 15% was deposited only on 16th November 2005. That apart, under Rule 107(11)(h), the remainder of the purchase money was required to be deposited within fifteen days from the date of sale. Counsel submitted that the First Respondent acted ultra vires the scope of its powers in extending the time for making the payment of the balance in breach of the mandate of Rule 107(11)(h) that the balance has to be paid within fifteen days of the date of sale. It was submitted that the First Respondent breached the mandatory condition of the Rule by not paying the remaining balance within a period of fifteen days from the sale of sale. The sale was, therefore, vitiated and was a nullity. Counsel submitted that the requirement prescribed by Clauses (g) and (h) of Sub-rule (11) of Rule 107 is mandatory and in the absence of strict compliance therewith, the sale is vitiated. In this regard, reliance is placed on judgments of the Supreme Court to which a reference would be made shortly hereafter. The correctness of this submission now falls for determination.

9. Rule 107 of the Maharashtra Co-operative Societies' Rules, 1961, lays down the procedure for attachment and sale of property. Under Sub-rule (10), the sale has to be by public auction to the highest bidder. The rule requires that the sale must be held after the expiry of not less than thirty days calculated from the date on which a notice of proclamation is affixed in the office of the Recovery Officer. Clause (g) of Sub-rule (11) of Rule 107 provides as follows:

(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 Sale Officer at the time of the purchase, and in default of such deposit, the property shall forthwith be re-sold:

The next requirement that is stipulated is in Clause (h) of Sub-rule (11) which is to the following effect:

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

Provided that, the time for payment of the cost of the stamp may, for good and sufficient reasons, be extended at the discretion of the Recovery Officer up to thirty 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).

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.

11. Counsel appearing on behalf of the First Respondent submits that the expression that is used in Clause (g) is "at the time of the purchase" while the expression in Clause (h) is "from the date of sale". An attempt was made on behalf of the First Respondent to submit that the requirement that 15% of the price of the immovable property be paid at the time of purchase means that the deposit has to be made when the conveyance is executed. Hence, it was urged that the requirement of paying of the remaining balance within fifteen days from the date of sale must mean within fifteen days from the date of the execution of

the conveyance. The submission cannot be accepted for the reason that it is in the teeth of the plain and grammatical meaning of the language of the rules. The Rules require firstly a payment of 15% of the price at the "time of purchase" and secondly, the payment of the balance within fifteen days from the "date of the sale". The expression "time of purchase" and the expression "date of sale" cannot mean to two different events. The time of purchase and the date of sale are but facets of the same transaction. Under the Rules, the sale is to be conducted by a public auction. The Sale Officer is undoubtedly entitled to decline to accept the highest bid when it is unduly low or for adequate reasons. The auction can be adjourned on the date on which it is fixed. However, once the auction takes place and the highest bid is accepted, the consequence thereof is to knock down the sale in favour of the highest bidder. It is at that time that the highest bidder must make a payment equivalent to 15% of the total price of the immovable property. The time of purchase under Clause (g) is the time when the bid is accepted. The payment of the remainder within fifteen days must be with reference to that date.

12. The interpretation which should be placed on the provisions of Rule 107(11) is illuminated by judgments of the Supreme Court construing the provisions of Rules 84, 85, 86 and 87 of Order 21 of the Code of Civil Procedure, 1908. Without digressing from the main subject of the present discussion, it would be appropriate to place the provisions of Rule 107 of the Maharashtra Co-operative Societies' Rules, 1961 in juxtaposition with the provisions of Rules 84, 85, 86 and 87 of Order 21 of the Code of Civil Procedure, 1908:

Rule 107 of MCS Rules, 1961 Code of Civil Procedure, 1908 as amended and as applicable in Bombay. Rule 107(11)(g): 84. Deposit by purchaser and re-sale on default- "(g) A sum of money equal to 15 -(1) On every sale of immovable per cent of the price of the property the person declared to immovable property shall be be the purchaser shall pay deposited by the purchaser in immediately after such the hands of the Sale Officer at declaration a deposit of twentyfive the time of the purchase, and in per cent on the amount of default of such deposit, the his purchase money to the property shall forthwith be resold:" officer or other person conducting the sale and in default of such deposit, the property shall forthwith be resold.

"(h) The remainder of the -85. Time for payment in full of purchase money and the purchase-money - The full amount required for the general amount of purchase-money stamp for the sale certificate payable shall be paid by the shall be paid within fifteen days purchaser into Court before the from the date of sale: Court closes on the fifteenth day from the sale of the property: Provided that, the time for Provided that, in calculating payment of the cost of the stamp the amount to be so paid into may, for good and sufficient Court, the purchaser shall have reasons, be extended at the the advantage of any set-off to discretion of the Recovery which he may be entitled under Officer up to thirty days from the Rule 72. date of sale: High Court Amendments Provided further that, in

(Bombay): calculating the amounts to be For the existing Rule 85, purchaser shall have the paid under this clause, the advantage of any set off to substitute the following rule and which he may be entitled under marginal note:- clause (k)." "85. Time for payment in full of purchase money- The full amount of purchase money payable, together with the amount required for the general stamp paper for the certificate under Rule 94, shall be paid by the purchaser into Court before the Court closes on the 15th day from the date of the sale of the property: Provided further that, if as a result of some bonafide mistake or miscalculation the amount deposited falls short of the full amount of the purchase-money, the Court may in its discretion, allow the shortfall to be made up after fifteen days of the sale, and if the full amount of the purchase-money is deposited within such time as the Court may allow, the Court may condone the delay, if it considers it just and proper to do so. Explanation:- When an amount is tendered in Court on any day after 1.00 P.M. but is not accepted by the Court and is paid into Court on the next working day between 11.00 A.M. and 1.00 P.M., the payment shall be deemed to have been made on the day on which the tender is made." - (1.10.1983) (i) In default of payment within 86. Procedure in default of the period mentioned in the last payment - In default of payment preceding clause, the deposit within the period mentioned in may, if the Recovery Officer the last preceding rule, the thinks fit, after defraying the deposit may, if the Court thinks expenses of the sale, be fit, after defraying the expenses forfeited to the State of the sale, be forfeited to the Government and the defaulting Government and the property purchaser shall forfeit all claims shall be re-sold, and the to the property or to any part of defaulting purchaser shall forfeit the sum for which it may all claim to the property or to any subsequently be sold. part of the sum for which it may subsequently be sold. (j) Every resale or immovable 87. Notification on re-sale - Every re-sale of immovable Every re-sale of immovable property, in default of payment property, in default of payment of the purchase-money within of the purchase-money within the period allowed for such the period allowed for such payment, shall be made after payment, shall be made after the issue of a fresh proclamation the issue of a fresh proclamation in the manner and for the period in the manner and for the period hereinbefore prescribed for the hereinbefore prescribed for the sale. sale. High Court Amendments - (Bombay)- In Rule 87, for the words "of the purchase money" substitute the words "of the amounts mentioned in Rule 85" (1.10.1983)

The provisions of Rules 84, 85 and 86 of Order 21 came up for consideration before the Supreme Court in Manilal Mohanlal Shah and Others Vs. Sardar Sayed Ahmed Sayed Mahamad and Another, To recapitulate, Order 21 Rule 84 requires on every sale of immovable property the person who is declared to be the purchaser to deposit 25% of the amount of the purchase money, immediately after such declaration. The full amount of purchase money is to be paid before the close of the fifteenth day from the sale of the property under Order 21, Rule 85. In default, Rule 86 provides that the deposit may, after defraying the

expenses of the sale, be forfeited to Government and the property shall be resold. In Manilal an application was filed under Order 21 Rule 90, inter alia, on the ground that the payment not having been effected within the period prescribed by Rules 84 and 85, the sale became void and was a nullity. The Court before which the application was filed held that the application under Rule 90 was barred by limitation, but the sale being void and not being a mere irregularity, the Court was bound to resell the property irrespective of any application being made by the judgment-debtor. The Supreme Court considered whether the failure to make the deposit under Rules 84 and 85 was only a material irregularity in the sale which could only be set aside under Rule 90 of Order 21 or whether it was wholly void. The submission was that the application under Order 21 Rule 90 was barred by limitation and a mere failure to make the deposit under Rules 84 and 85 is only a material irregularity. It was also argued before the Supreme Court that the Court having once allowed the set-off and condoned the failure to deposit, the mistake of the Court should not be allowed to prejudice the purchasers who would certainly have deposited the purchase price but for the mistake. The Supreme Court held that both the contentions were "devoid of substance". (Para 6 at Page 350)²

The Supreme Court held as follows:

The provision regarding the deposit of 25 per cent by the purchaser other than the decree-holder is mandatory as the language of the rule suggests. The full amount of the purchase-money must be paid within fifteen days from the date of the sale but the decree-holder is entitled to the advantage of a set-off. The provision for payment is, however, mandatory.... (Rule 85). If the payment is not made within the period of fifteen days, the court has the discretion to forfeit the deposit, and there the discretion ends but the obligation of the court to resell the property is imperative. A further consequence of non-payment is that the defaulting purchaser forfeits all claims to the property.... (Rule 86).

Having examined the language of the relevant rules and the judicial decisions bearing upon the subject we are of opinion that the provisions of the rules requiring the deposit of 25 per cent of the purchase money immediately on the person being declared as a purchaser and the payment of the balance within 15 days of the sale are mandatory and upon noncompliance with these provisions there is no sale at all. The rules do not contemplate that there can be any sale in favour of a purchaser without depositing 25 per cent of the purchase money in the first instance and the balance within 15 days. When there is no sale within the contemplation of these rules, there can be no question, of material irregularity in the conduct of the sale. Nonpayment of the price on the part of the defaulting purchaser renders the sale proceedings as a complete nullity. The very fact that the Court is bound to resell the property in the event of a default shows that the previous proceedings for sale are completely wiped out as if they do not exist in the eye of law. We hold, therefore, that in the circumstances of the present case there was no sale and the purchasers acquired no rights at all.

It was urged before us that the Court could allow a setoff in execution proceedings under its inherent powers apart from the provisions of Order XXI, Rule 19 of the Civil Procedure Code. We do not think that the inherent powers of the Court could be invoked to circumvent the mandatory provisions of the Code and relieve the purchasers of their obligation to make the deposit.

The judgment of the Supreme Court in Manilal's case was followed by a Bench of two Learned Judges in Balram v. Ilam Singh. 1997 (1) Mh. L.J. 687 Following the law laid down in Manilal's case, the Supreme Court held as follows:

It is to be noted that the argument that it is only a material irregularity in the sale to attract Rule 90 instead of Rule 85 was expressly rejected; and it was clearly held that Rule 85 being mandatory, its non-compliance renders the sale proceedings a complete nullity requiring the executing Court to proceed under Rule 86 and property has to be resold unless the judgment-debtor satisfies the decree by making the payment before the resale. The argument that the executing court has inherent power to extend time on the ground of its own mistake was also expressly rejected. In our opinion the contentions of the learned Counsel for the appellant are fully negated by this decision of the Court.

The requirement of depositing the full amount of purchase money within a period of fifteen days from the date of sale was similarly held to be mandatory, brooking no exception:

It is also to be noted that the duty to pay the full amount of purchase money within the prescribed period of 15 days from the date of sale of the property is cast on the purchaser by virtue of Rule 85 of Order 21 and therefore, the entire responsibility to make full compliance of the mandatory provision is his.

The decision in Manilal has also been followed by a Learned Single Judge of this Court in Jagdish Radhakisan Kayasth Vs. Ramesh N. Wagh and Others, In that case, the auction purchaser failed to deposit 25% of the purchase price on the date of the auction until 5.30 p.m. and an extension of time sought was refused by the Executing Court. The auction purchaser deposited the entire amount on the next day. The Learned Single Judge held that since there was a failure on the part of the auction purchaser to comply with the mandatory condition of deposit under Rule 84(1), the auction cannot be regarded as legal and valid in the eye of law.

13. Counsel appearing on behalf of the First Respondent, however, sought to distinguish the judgments of the Supreme Court by adverting to the difference in the language used by the legislature in Rules 84, 85 and 86 of Order 21 of the Code of Civil Procedure, 1908 as contradistinguished from the terminology used in Clauses (g) and (h) of Rule 107(11) of the Maharashtra Cooperative Societies' Rules, 1961. The two provisions have been juxtaposed together for the purpose of comparison. In my view, the differences in terminology are superficial. In any event, for the reasons now indicated, those differences would not justify a departure from the law laid down by the Supreme Court while construing

analogous statutory provisions. Rule 84 mandates a deposit of 25% on every sale of immovable property by the person declared to be the purchaser immediately after such declaration. Rule 107(11)(g) requires a deposit of a sum of money equal to 15% of the price at the time of purchase. The words, "at the time of purchase" in the case of an auction must mean the same thing as the words "on every sale of immovable property" that are used in Rule 84(1). "At the time of purchase" must necessarily mean at the time when the auction purchaser is informed of the acceptance of his bid. As in the case of Rule 84(1), Rule 107(11)(g) provides that in default of such deposit, the property shall forthwith be resold. Similarly, in so far as Rule 107(11)(h) is concerned, the remainder has to be paid within fifteen days from the date of sale. Rule 85 of Order 21, similarly provides that the full amount of the purchase money has to be paid before the fifteenth day of the sale of the property. The consequences of default are provided in similar terms both in Rule 107(11)(i) of the Maharashtra Co operative Societies' Rules, 1961 and in Rule 86 of Order 21. Both sets of provisions - the provisions of Order 21 being statutory and those of Rule 107 being subordinate legislation - emphasise the fundamental principle that the mandate of deposit within the period stipulated has to be complied with strictly. In the absence of compliance with the mandatory requirement, the sale itself is no sale in the eyes of law. In default of compliance, the sale is rendered a nullity.

14. A faint attempt was made on behalf of the First Respondent to submit that the Petitioner has chosen to espouse the remedy under Sub-rule (14) of Rule 107 and must be bound by the limitation of the remedy which he chose. Counsel appearing on behalf of the First Respondent submitted that if the consequence of a default in the mandatory condition of deposit is that the sale itself is vitiated, then it would not be open to the Petitioner to apply for setting aside the sale on the ground of a material irregularity, mistake or fraud within the meaning of Sub-rule (14) of Rule 107. The submission has only to be stated to be rejected. It must be noted that even before the Supreme Court in Manilal's case, the initial Court had been moved in an application under Order 21 Rule 90 of the Code of Civil Procedure, 1908 and the submission that was urged was that since the application was belated, the challenge was bound to fail. The Supreme Court rejected the submission holding that once the sale itself was a nullity in default of compliance with the mandatory condition of deposit there was no question of a material irregularity in the conduct of sale; the previous proceedings for sale were completely wiped out and there was no sale that existed in the eye of law.

15. On behalf of the auction purchaser, it has been submitted that the Petitioner is disentitled to relief under Article 226 of the Constitution on account of his own conduct. Counsel submitted that on 19th October 2005, the Petitioner had addressed a letter to the First Respondent requesting the postponement of the public auction by a period of three weeks to enable the Petitioner to complete a transaction of sale with a buyer. The Petitioner had agreed that if the process was not completed within a period of three weeks, the Bank would be entitled to enforce the mortgage and realise its dues without any further notice. It appears

that a Memorandum of Understanding was entered into on 18th October 2005 with the Third Respondent. The MOU stipulated that the price for the proposed sale was to be mutually settled and that the sale would be completed within a period of three weeks from the date thereof, time being of the essence. For whatever reason, the MOU between the Petitioner and the Third Respondent did not fructify into an agreement. That however, cannot defeat the statutory rights of the Petitioner once the Bank set the sale process in motion. The statement by the Petitioner in his letter dated 19th October 2005 that the Bank would be at liberty to release the mortgage without further notice to him was not a carte blanche for the Bank to sell the property in any manner save and except in accordance with the provisions of law. The Petitioner, at the highest, had waived the requirement of a notice to him. What has happened in the case is a clear and patent illegality. This Court would not be justified in ignoring the illegality. The binding principles of law laid down in successive decisions of the Supreme Court could not have been deviated from for any reason whatsoever, whether on the purported ground of equity set up by the auction purchaser or otherwise. Moreover, the equities of the auction purchaser can be adequately safeguarded by the directions which I propose to issue in the matter. But it would necessitate recording at this stage that the auction purchaser failed to comply with the mandate of law. 15% of the sale consideration was not deposited on 4th November 2005, at the time of purchase but thereafter. The deposit representing the balance 85% of the purchase price was sought to be made only on 12th December 2005, much after the expiry of a period of 15 days of the date of sale. Moreover, even at that stage an amount of Rs. 64.19 lakhs was paid to the Bank and it is not disputed that an amount of Rs. 41.50 lakhs was kept by the Third Respondent with his Advocate in escrow to be paid to the Bank at a subsequent date. The amount placed in escrow is stated to have been released to the Bank on 22nd February 2006.

16. The legality of the order passed by the Divisional Joint Registrar on 12th June 2006 has to be addressed. Before the Divisional Joint Registrar it was specifically contended that there was a failure on the part of the Third Respondent to deposit 15% of the purchase price immediately upon the acceptance of the offer. Surprisingly, on behalf of the Bank, a palpably incorrect statement was made to the effect that "on the day of receiving the acceptance Respondent No. 3 had paid Rs. 6.48 lakhs and thus a total amount received by the Bank was Rs. 18,82,000/- which was more than 15% of the purchase price". (emphasis supplied). The Divisional Joint Registrar held thus:

It is admitted fact that the Respondent No. 3 has complied with the auction notice by depositing 10% of the Reserve Price i.e. Rs. 12,36,000/-. Thereafter, Respondent No. 3 has deposited Rs. 6,48,000/- immediately on acceptance of the offer by the SRO and, therefore, there is a compliance of Sub-rule 11(g) of Rule 107 of MCS Rules, 1961 as has been rightly observed by the Respondent No. 5 SRO in the impugned order.

The finding that the Third Respondent had deposited Rs. 6.48 lakhs immediately on the acceptance of his offer is patently erroneous and contrary to the record. The offer was accepted on 14th November 2005 while the payment of Rs. 6.48 lakhs was effected on 16th November 2005. This position is undisputed. Then in so far as the requirement of Rule 107(11)(h) is concerned, the Divisional Joint Registrar dismissed the contention of the Petitioner with the following observations:

It is the fact that Sub-rule 11(h) of Rule 107 of the MCS Rules, 1961 provides payment of remaining amount within 15 days. However, auction took place on 14.11.2005. Writ Petition was filed by Applicant on 14- 11-2005 in which Hon"ble High Court Mumbai has directed the Bank not to dispossess the Applicant. However, while disposing of the Writ Petition No. 7806 of 2005 Hon"ble High Court directed to continue the earlier orders for two weeks, and, therefore, due to these litigations Auction Purchaser was not in a position to get the vacant possession of the purchase property and, therefore, the stand taken by the Auction Purchaser demanding the extension of time for balance payment was rightly considered by the Bank and SRO and granted the extension of time for effecting remaining payment, and therefore, I agree with the observations of Respondent No. 5 SRO in the impugned order.

The Divisional Joint Registrar has clearly lost sight of the fact that the mandatory requirement of Rule 107(11)(h) could not have been relaxed by the First Respondent for the purported reason that in Writ Petition 7806 of 2006 this Court had directed the Bank not to dispossess the Petitioner during the pendency of the revision. The reasons which have weighed with the Divisional Joint Registrar are ex-facie fallacious. The order of the Divisional Joint Registrar ignores the absence of power in the First Respondent to deviate from the mandatory time schedule laid down in the rules for the payment of the purchase price.

17. In these proceedings, as in any other proceedings under Article 226 of the Constitution, the relief would have to be moulded in a manner which would subserve the ends of justice. During the course of the hearing of this petition, I had called upon Counsel for the Petitioner to inform the Court as to whether the Petitioner is willing to pay the entire decretal dues of the Bank without any further delay. A statement has been made before the Court by Senior Counsel appearing on behalf of the Petitioner that the Petitioner is ready to do so immediately, and in any case within a period of one week from today. Counsel appearing on behalf of the Petitioner has also agreed to pay interest to the Third Respondent computed at the rate of 12% per annum from the date from which the respective payments were made by the Third Respondent to the First Respondent Bank. Counsel for the parties have placed on the record signed statements quantifying the amount due and payable under the recovery certificate and the payment required to be made to the Third Respondent of interest at the rate of 12%. These statements are taken on record and marked "X".

18. In these circumstances, the petition has to be allowed and is accordingly allowed in the following terms:

(i) The impugned order dated 12th June 2006 passed by the Divisional Joint Registrar, Co-operative Societies is quashed and set aside. The revision preferred by the Petitioner u/s 154 of the Maharashtra Co-operative Societies" Act, 1960, against the decision of the Special Recovery Officer shall accordingly stand allowed. The sale in favour of the Third Respondent is a nullity;

(ii) The Petitioner has undertaken to pay the full decretal amount to the First Respondent under the recovery certificate dated 1st September 2004 within one week from today. The amount due and payable is quantified in a signed statement placed on the record of this proceeding by Counsel for the First Respondent and the Petitioner at Rs. 24,41,195/-;

(iii) The Petitioner shall pay over to the Third Respondent interest at the rate of 12% per annum on the payments made by the Third Respondent to the First Respondent from the date on which each of the payments has been made. The amount payable has been quantified, in a signed statement placed by Counsel for the parties on the record, at Rs. 8,31,980/-. The aforesaid payments shall be made within a period of one week from today; and

(iv) Upon receipt of the amount due under the recovery certificate from the Petitioner, the First Respondent shall refund to the Third Respondent the amount representing the sale consideration received from the Third Respondent at the auction sale forthwith.

19. The petition is accordingly disposed of in these terms. There shall be no order as to costs.

1. Plot No. 52/1, 5th Road, TPS-III, Golibar, Santacruz (East), Mumbai-400 055

2. The judgment of the Supreme Court in para 6 reads as follows: The principal question which falls to be considered is whether the failure to make the deposit under Order 21, m Rules 84, and 85 is only a material irregularity in the sale which can only be set aside under Rule 90 or whether it is wholly void. It is argued that the case falls within the former category and the application under Rule 90 being barred by limitation, the sale cannot be set aside. It is also contended that the Court having once allowed the set-off and condoned the failure to deposit, the mistake of the Court should not be allowed to prejudice the purchasers who would certainly have deposited the purchase price but for the mistake. We are of the opinion that both the contentions are devoid of substance. In order to resolve this controversy a reference to the relevant rules of Order XXI of the CPC will be necessary. These Rules are 72, 84, 85 and 86