

(2017) 02 BOM CK 0101
In the Bombay High Court
Case No : Writ Petition No. 9895 Of 2011

Omkar Switchgears

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 07-02-2017

Acts Referred:

Constitution of India, 1950 — Article 226
Maharashtra Co-operative Societies Act, 1960 — Section 101

Citation : (2017) 2 AIRBomR 478 : (2017) 2 ALLMR 598 : (2017) 3 MhLJ 471

Hon'ble Judges : Sangitrao S. Patil, J.

Bench : Single Bench

Advocate : S.G . Dodya, Advocate with Mr. S.H. Navandar, Advocates, for the Petitioner; Mr. S.R. Yadav (Lonikar), A.G.P, for the Respondent Nos.1 and 2/ State; Mr. Rajendra S. Deshmukh, Advocate, for the Respondent Nos. 3 and 4; Mr. L.D. Vakil, Advocate, for the Respondent No. 8; None Appeared, for the Respondent Nos. 6 and 7 though served

Final Decision : Partly Allowed

Judgement

Sangitrao S. Patil, J.—Rule, returnable forthwith. With the consent of the learned counsel for the parties, heard finally.

2. The petitioners have prayed for quashing and setting aside the Recovery Certificates dated 26.12.2008, issued by respondent no.2?Deputy Registrar, Cooperative Societies, Aurangabad, in Dispute Nos.658 of 2008, 659 of 2008 and 660 of 2008 for recovery of the amounts of Rs.26,54,216/, Rs.1,25,42,797/and Rs.34,63,362/respectively, from the petitioners (a) and (b) and respondent no.7, who are the partners of "Omkar Switchgears", a registered partnership firm. They have further prayed for setting aside the auction sale held on 21.01.2010 and sale certificate dated 01.07.2011, issued by respondent no.4 Special Recovery Officer and respondent no.3?Cooperative Bank, in respect of the plot bearing No.F99, admeasuring 5,000 square meters, situate in Waluj Industrial Area, Ranjangaon, Taluka Gangapur, District Aurangabad, in favour of respondent no.8 the auction purchaser namely M/s. Technocraft Toolings.

3. The facts, in short, which are necessary for the purpose of deciding this Writ Petition, are that in order to recover the amounts advanced to the partnership firm of the petitioners, respondent no.2?Deputy Registrar, initiated recovery proceedings under Section 101 of the Maharashtra Cooperative Societies Act, 1960 ("the Act", for short) bearing Dispute Nos. 658 of 2008, 659 of 2008 and 660 of 2008 and ultimately issued certificates dated 26.12.2008 for recovery of the abovereferred amounts. The abovenumbered plot of the petitioners came to be attached for recovery of the amounts mentioned in the recovery certificates. Respondent no.4?Special Recovery Officer, issued proclamation dated 21.12.2009 for conducting auction sale of the attached plot of the petitioners, for realisation of the amounts shown in the recovery certificates. The said auction sale was scheduled to be held on 21.01.2010 at 12.00 noon, on the above mentioned plot itself. Accordingly, the auction sale was conducted on 21.01.2010, wherein five bidders participated. Respondent no.8 being the highest bidder, its bid for Rs.1,60,00,000/came to be accepted and after negotiations it came to be finalised at Rs.1,70,00,000/. Respondent no.8 deposited the amount of Rs.30,00,000/by issuing two cheques with respondent no.4 on the day the auction sale was conducted. After receiving the balance amount from respondent no.8, respondent no.4 delivered possession of the abovenumbered plot to respondent no.8 on 30.01.2010. Respondent no.4 further issued a sale certificate in respect of that plot in favour of respondent no.8 on 01.07.2011.

4. The learned Counsel for the petitioners submits that the partnership firm and the petitioners (a) and (b) were not the parties to the proceedings under Section 101 of the Act conducted before respondent no.2? Deputy Registrar. Their names were not mentioned in the applications filed by respondent no.3. Respondent no.2? Deputy Registrar did not issue notices to the partnership firm and all partners of the firm, though it was mandatory as per Rule 86B of the Maharashtra Cooperative Societies Rules, 1961 ("the M.C.S. Rules, 1961", for short) framed under the Act. He submits that respondent no.2 did not follow the principles of natural justice prior to issuing recovery certificates. He then submits that as per Rule 86E, it was mandatory on the part of respondent no.2 to ask respondent no.3 Society to prove the contents of its application and also to deal with the contention of defences. The petitioners should have been given an opportunity to file reply in support of their defence. On receiving the reply, respondent no.2 ought to have provided an opportunity of hearing to the parties. As per Rule 86F, after hearing the arguments of the parties, respondent no.2, was obliged to deliver a reasoned judgment and pass an order for the grant or rejection of the application and thereafter, should have issued the certificates in "Form V". He submits that these mandatory provisions have not been followed by respondent no.2 and, therefore, in view of the judgment in the case of Sundeep Polymers Pvt. Ltd. & Ors. v. State of Maharashtra & Ors., 2010 (6) All MR 550, the present Writ Petition would be maintainable and it would not be necessary for the petitioners to resort to the remedy of revision provided under Section 154 of the Act. He submits that for non compliance of the mandatory provisions referred

to above, the recovery certificates are liable to be quashed and set aside and consequently, the auction sale of the plot of the petitioners also is liable to be quashed and set aside.

5. As against this, the learned Counsel for respondent nos.3 and 4, on the basis of the affidavit in reply filed on their behalf, submits that in view of the alternate remedy available under Section 154 of the Act, the present Writ Petition is not maintainable. He submits that the petitioners and respondent no.7 had obtained loan amounts from respondent no.3 ? Bank and committed default in repaying the same. Therefore, recovery proceedings were required to be initiated against them. Respondent no.7 seems to have misrepresented before respondent no.2 that he had full authority to represent the partnership firm and its other partners and simply prayed for instalments for repayment of the loan. He submits that, in fact, petitioners (a) and (b) also were served with notices by respondent no.2 but they remained absent. He further submits that respondent no.2 has duly complied with the provisions of Section 101 as well as that of Rules 86B, 86E and 86F. He then submits that respondent no.2 followed due procedure as laid down in Rule 107 for attachment and sale of the above mentioned plot of the petitioners and respondent no.7. Respondent no. 4 issued proclamation well in advance. In fact, the petitioner (a) also was present at the time of public auction. The bid of respondent no.8 being highest, it came to be accepted and the sale was knocked in its favour. The learned Counsel submits that the recovery certificates as well as the auction sale being legal and proper, cannot be quashed and set aside. He, therefore, prays that the Writ Petition may be dismissed.

6. The learned Counsel for respondent no.8? Auction Purchaser submits that respondent no.8 is a bona fide purchaser for value of the abovenumbered plot. The petitioners or respondent no.7 did not raise any objection for the auction sale, when it was in progress or even thereafter as prescribed in Rule 107 of the Rules of 1961. After paying huge amount of Rs.1,70,00,000/to respondent no.3 towards price of the abovenumbered plot, the possession thereof was taken by respondent no.8. Respondent no.8 is using the said plot for industrial purpose. The name of respondent no.8 has been already recorded in the record of Maharashtra Industrial Development Corporation (M.I.D.C.). In the circumstances, auction sale of the abovenumbered plot cannot be set aside at this stage.

7. The learned Counsel for the petitioners filed rejoinder and produced the copies of the applications filed by respondent no.3?Bank for issuance of recovery certificates, wherein there is no mention of the names of the partnership firm and that of the petitioners (a) and (b) as parties to the proceedings before respondent no.2.

8. Perused the original records of the abovenumbered disputes. Though the names of the partnership firm and that of petitioners (a) and (b) are shown in the applications in the said records, it is quite obvious from the manner in which they are mentioned therein that the said names have been inserted

subsequently. The copies of the applications produced by the petitioners with their rejoinder do not bear their names. Had the names of partnership firm and that of the petitioners (a) and (b) really been mentioned in the applications under Section 101, the said names would have certainly appeared on the copies of applications supplied by respondent no.3 to the petitioners. The absence of their names in the copies of the applications supplied to them clearly indicates that they were not made parties to the said proceedings. Since the partnership firm as well as the petitioners (a) and (b) were not at all the parties to the proceedings under Section 101 of the Act, it cannot be said that they were given notices of the said proceedings as required by Rule 86B. As a matter of fact, there is no record to show that the petitioners were served with the notices by respondent no.2.

9. The learned Counsel for respondent nos.3 and 4 submits that respondent no.7 had been authorised by the petitioners (a) and (b) to deal with accounts maintained with respondent no.3 vide letter at Annexure R1. He submits that as per the letter dated 18.11.2004, the said partners of the firm had authorised respondent no.7 to sign the documents i.e. cheques and related documents to carry out business of the said firm. Therefore, according to him, respondent no.7 appeared before respondent no.2 as an authorised representative on behalf of the other partners of the firm. I am not inclined to accept this contention. The authority letter referred to above was limited to the banking transactions with respondent no.3 on behalf of the partnership firm. There was no letter of authority or Power of Attorney Deed executed by the petitioners (a) and (b) authorising him to act as their authorised representative to defend the proceedings before respondent no.2. In the circumstances, respondent no.7 cannot be said to be an authorised representative of the petitioners.

10. In the reply filed by respondent no.2, it is specifically mentioned that the notices were not issued to the petitioners as their Power of Attorney Holder i.e. respondent no.7, was present on 14.10.2008 for hearing on their behalf. As stated above, the petitioners were neither the parties to the applications under Section 101 of the Act, nor they had authorised respondent no.7 to represent them before respondent no.2. No Power of Attorney deed was produced by respondent no.7 before respondent no.2. In the circumstances, it would be clear that there is breach on the part of respondent no.2 in compliance of the mandatory provisions of Rule 86B.

11. The date of hearing seems to have been fixed as 14.10.2008. The recovery certificates admittedly have been issued on 26.12.2008. Upon perusal of the original records of the abovenumbered disputes, except recovery certificates issued under Rule 86F in "Form V", I did not find any reasoned judgment or order for grant of such certificates. As such, there is clear breach of Rule 86F by respondent no.2.

12. In the cases of Sundeep Polymers Pvt.Ltd. & Ors. (supra) and Writ Petition No.2070 of 2010 (Vitthal Laxman Fatangare v. The State of Maharashtra and

others) with connected Writ Petitions decided by the Bombay High Court on 27.07.2010, the recovery certificates were issued without giving an opportunity of hearing to the persons against whom the certificates were issued under Section 101 and that too without passing a reasoned order. It was held that it is mandatory for the Authorities to follow the Rules provided in Chapter VIIIA of the M.C.S. Rules, 1961 while issuing recovery certificates and therefore, the recovery certificates issued in violation of the said Rules, must be held to be invalid and bad in law and need to be struck down. The ratio laid down in these judgments is squarely applicable to the facts of the present case. Consequently, the recovery certificates issued by respondent no.2, in violation of Rules 86B, 86E and 86F, are liable to be quashed and set aside.

13. The learned Counsel for respondent no.8 submits that respondent no.8 is a bona fide purchaser of the above numbered plot for value without notice of any irregularity or illegality in the proceedings under Section 101 of the Act. The public auction was conducted by respondent no.4 as per the procedure laid down in the Act and Rules. Respondent no.8 has paid a huge amount of Rs.1,70,00,000/for purchasing the said plot. After purchasing the said plot, respondent no.8 has started using it for industrial purpose. Respondent no. 8 has developed the said plot. In the circumstances, the auction sale in respect of the said plot cannot be set aside. On the other hand, the learned Counsel for the petitioners submits that since recovery certificates are void ab initio, the auction sale based on the said recovery certificates is liable to be quashed and set aside.

14. As seen from the original records, respondent no.7 who is one of the partners of the petitioner firm, was duly served with the notice of the proceedings conducted by respondent no.2, prior to issuing recovery certificates. The recovery certificates show that respondent no.7 was present during the said proceedings. The sheet recording bids has been produced on record, which shows that the petitioner (a) was present at the time of the auction on 21.01.2010. This fact has been specifically mentioned in para 11 of the affidavit in reply filed on behalf of respondent nos.3 and 4. The petitioner (a) has not denied this fact by filing rejoinder. If the petitioner (a) had any grievance against the auction sale of the abovenumbered plot, he ought to have raised objection to that effect when respondent no.4 was conducting the auction sale. The petitioners themselves have stated in para 3 of the petition that the proclamation of auction sale was published on 21.12.2009 in "Daily bona fide; and then immediately they approached respondent no.3?Bank to inquire about the proceedings in which the property of the partnership firm was being sold by auction. As such, the petitioners were aware about the proposed auction sale on 21.12.2009 itself. However, they did not raise any objection before respondent no.4 to avoid auction sale. The petitioner (a) remained totally silent at the time of finalization of auction sale in favour of respondent no.8. The petitioners should have followed the provisions of bona fide(12), (13) or (14) of Rule 107 and should have avoided the auction sale. Though they were fully aware of the proposed auction sale, they tried to show ignorance about that fact. This

amounts to suppression of material facts. If that be so, they cannot claim any equitable relief by invoking the writ jurisdiction of this Court. Moreover, respondent no.8 has purchased the abovenumbered plot for a valuable consideration of Rs.1,70,00,000/-. There is nothing in the petition to show that the said amount was not representing proper and adequate value of the abovenumbered plot. It is, thus, clear that respondent no.8 has paid a valuable consideration for purchasing of the said plot. Respondent no.8 cannot be said to have any knowledge about the deficiencies in the recovery proceedings conducted by respondent no.2. There is nothing in the petition to show that respondent no.8 purchased the abovenumbered plot with malafide intention. It is, thus, clear that respondent no.8 is a bona fide purchaser for value of the above numbered plot.

15. Here, reference may be made to the judgment in the case of Padanathil Rugmini Amma v. P.K. Abdulla, AIR 1996 SC 1204, wherein it is observed in paragraph 15 as under :-

"15. The distinction between a stranger who purchases at an auction sale and an assignee from a decreeholder purchaser at an auction sale is quite clear. Persons who purchase at a Court auction who are strangers to the decree are afforded protection by the Court because they are not in any way connected with the decree. Unless they are assured of title; the Court auction would not fetch a good price and would be detrimental to the decreeholder. The policy, therefore, is to protect such purchasers. This policy cannot extend to those outsiders who do not purchase at a court auction. When outsiders purchase from a decreeholder who is an auction purchaser clearly their title is dependant upon the title of decreeholder auction purchaser. It is a defeasible title liable to be defeated if the decree is set aside. A person who takes an assignment of the property from such a purchaser is expected to be aware of the defeasibility of the title of his assignor. He has not purchased the property through the court at all. There is, therefore, no question of the court extending any protection to him. The doctrine of a bona fide purchaser for value also cannot extend to such an outsider who derives his title through a decreeholder auction purchaser. He is aware or is expected to be aware of the nature of the title derived by his seller who is a decreeholder auction purchaser."

In view of the above legal position, even if the recovery certificates issued by respondent no.2 are quashed and set aside, the above numbered plot cannot be taken back from respondent no.8, who is a stranger/bona fide purchaser for value qua the said plot.

16. The learned Counsel for the petitioners pointed out the letter dated 09.08.2010 addressed by respondent no.3 to Marathwada Auto Compo Pvt. Ltd., wherein it is mentioned that the offer of the said company to purchase the abovenumbered plot has been rejected and the earnest money of Rs.30,00,000/ deposited by the said company with respondent no.3, was forfeited. The learned Counsel submits that when the bid of the Marathwada Auto Compo Pvt. Ltd. was

accepted, there was no question of auction sale being knocked in favour of respondent no.8. He, therefore, submits that the auction sale in favour of respondent no.8 is not genuine one. I do not find any substance in this contention. The letter dated 09.08.2010 has been addressed to Marathwada Auto Compo Pvt. Ltd. by respondent no.3 and not by the Special Recovery Officer? respondent no.4, who conducted auction sale. It seems that as per the letter dated 21.01.2010, the said company had expressed interest in purchasing the abovenumbered plot independent of the offer made in auction sale. The said private deal cannot be connected with the auction sale that was conducted by respondent no.4. The auction sheet dated 21.01.2010 shows that the Marathwada Auto Compo Pvt. Ltd. also had placed a bid but that was lower than that of respondent no.8. In the circumstances, the letter dated 09.08.2010, would not have any adverse effect on the auction sale of the abovenumbered plot conducted by respondent no.4 on 21.01.2010.

17. The learned Counsel for the petitioners cited the case of Niranjana D. Woody v. The South Indian Coop. Bank Ltd. & Ors., 2006 (6) All MR 144, wherein it is held that the requirement of depositing 15% of price at the time of purchase of property, as under Rule 107 (11) (g), is mandatory. If the said requirement is not fulfilled, the auction sale would not be a sale in the eyes of law. In default of compliance, the sale is rendered as a nullity. In the present case, there is nothing on record to show that respondent no.8 did not comply with the provisions of Rule 107 (11)(g). On the contrary, the letter dated 21.01.2010 issued by respondent no.8 shows that the cheques in the sum of Rs.30,00,000/(which amount was much more than 15% of the auction price) were handed over by respondent no.8 to respondent no.3 on 21.01.2010 itself. The plot subject matter of the auction sale was given in possession of respondent no.8 on 30.01.2010. It is not the case of the petitioners that respondent no.8 failed to pay the entire purchase money within one month from the date of auction sale. In the circumstances, the abovesaid case would be of no help to the petitioners to set aside the auction sale.

18. The learned Counsel further relied on the case of Peoples Education Society, Jat and others v. Manohar Shivappa Modhi (Dr.) and others, 2009 (2) Mh.L.J. 745, wherein it is held that a judgment, decree or order obtained by playing fraud on the Court, Tribunal or Authority is a nullity and nonest in the eyes of law. In my view, the said judgment has no bearing on the facts of the present case, since the recovery certificates are liable to be quashed and set aside for non compliance of the mandatory provisions of Rule 86B, 86E and 86F and not on the ground of fraud.

19. To sum up, it may be stated that the recovery certificates issued by respondent no.2 are liable to be quashed and set aside. However, respondent no.8 being a stranger bona fide purchaser qua the aboveresferred plot, cannot be ordered to restore possession of the said plot to the petitioners. The sale certificate as well as Deed of Assignment dated 13.09.2011 executed by

respondent no.4 in favour of respondent no.8, therefore, are not liable to be quashed and set aside.

20. In the case of Vitthal Laxman Fatangare (supra), while setting aside the recovery certificates, this Court directed the Deputy Registrar to conduct de novo enquiry as prescribed in the Rules. In the present case also the same course will have to be directed to be adopted by Deputy Registrar. If ultimately the petitioners succeed in establishing before the Deputy Registrar that nothing was due and payable from them to respondent no.3Bank, they would be entitled the amount paid by respondent no.8 towards purchase price of the abovenumbered plot along with interest at the appropriate rate.

21. In the circumstances discussed above, the recovery certificates dated 26.12.2008 issued by respondent no.2 Deputy Registrar are quashed and set aside. Respondent no.2 is directed to conduct de novo enquiry as prescribed under the Rules of 1961 and complete enquiry within four months from today. The claim of the petitioners for setting aside auction sale in respect of the abovenumbered plot is rejected.

22. The Writ Petition is allowed partly. Rule is made absolute partly in the above terms. No costs.