

(2017) 03 BOM CK 0015
In the Bombay High Court
Case No : Writ Petition No. 516 of 2006

Pradeep

APPELLANT

Vs

The Goa State Co-operative Bank Ltd.

RESPONDENT

Date of Decision : 21-03-2017

Acts Referred:

Constitution of India, 1950 — Article 226
Maharashtra State Co-operative Society Rules, 1985 — Rule 22(14)(I)
Multi-State Cooperative Societies Act, 1984 — Section 84

Citation : (2017) 3 AIRBomR 481 : (2017) 3 BCR 398 : (2017) 3 MhLJ 274

Hon'ble Judges : Anoop V. Mohta and Nutan D. Sardesai, JJ.

Bench : Division Bench

Advocate : Shri S.M. Volvoikar, Advocate, for the Petitioner; Shri S.R. Rivonkar, Advocate, for the Respondent No. 1; Ms. Neha Kholkar, AGA, for the Respondent No. 7; Shri A.F. Diniz, Advocate, for the Respondent No. 8; Shri H.D. Naik, Advocate, for the Intervenor

Final Decision : Dismissed

Judgement

Anoop V. Mohta, J.(Oral) - Petitioner, a borrower has, challenged the orders as his prayer to set aside Award dated 23.2.1998 and the Sale Certificate (first sale) were rejected. So also the prayers to quash and set aside the second sale and the sale deed dated 11.6.2006 executed by respondent no.1 (the bank) in favour of respondent no.8.

2. This Court initially had passed an order of status quo on 25th October, 2006. By an order dated 16th November, 2006 directed the petitioner to deposit the amount. The amount was deposited. On 20th December, 2006, this Court admitted the matter. The matter is called out for final hearing. Heard finally after 11 years.

3. The petitioner's mortgaged property is transferred to respondent no.8. The same was sold by the bank in second sale. The bank is not disputing the position. The record itself speaks, so also the orders passed by this Court. There was no

stay to the second sale initiated by the bank and, therefore, proceeded further.

4. The parties have relied upon the background events of the litigation by referring the submissions so filed. Multi-State Cooperative Societies Act, 1984 ("Act" for short) and the Maharashtra State Cooperative Society Rules, 1985 ("Rules" for short) are read and referred by the counsel appearing for the parties.

(a) On 17.8.1995 respondent no.1-Bank sanctioned loan of Rs.96,00,000/- to the petitioner. The petitioner and his sureties signed various bank documents and obtained the loan. The loan was secured by mortgaging property named as "Durgawadi" owned by Petitioner. Property known as "Mollans" (68262 sq.Mts., owned by Shri Ravindra Navelkar was also continued as security to the loan of petitioner. Loan was sanctioned to Petitioner for construction purpose.

(b) On 23.2.1998, the bank initiated recovery case against the petitioner and three sureties. Camp Court passed the award holding all the Principal borrower and three sureties jointly and severally liable to pay the loan dues of Rs. 1,51,58,684/- along with interest at 23% from 1.1.1998 till payment.

(c) On 21.9.2000, since the dues were not cleared, the Bank initiated execution proceedings against petitioner and three sureties. Property "Durgawadi" was put to auction. There were no bidders, therefore, the Bank purchased the same for Rs.87,46,200/- and adjusted the amount in loan account of the petitioner. On 22.9.2000, a Certificate of Sale was issued by the Sale and Recovery Officer in favour of the Bank. On 28.11.2000, since the loan was not fully satisfied, the property "Mallans" of Shri Ravindra Navelkar, the additional security was attached by the Sale and Recovery Officer under Rule 22.

(d) The petitioner did not apply to set aside the sale, under Rule 22 (14) (i) of the Rules. The sale confirmation was final in view of 14 (vi) of the Rules.

(e) After five years on 3.1.2003, petitioner filed a dispute before Arbitrator under Section 84 of the 2002 Act read with Rule 38 (14) challenging Award dated 23.2.1998, and sale dated 22.9.2000. On 21.9.2006 respondent no.2 (Camp Court) decided the dispute holding that he has no power to reopen the final award. On 29.3.2006, respondent no.1 (bank) sold the property purchased by it, as its property in Public auction to Mrs. Nirupa V. Pawar (respondent no.8) for Rs. 65,00,000/- and adjusted the amount in Loan Account.

(f) On 9.10.2006, the petitioner filed writ petition before this Court and challenged the auction sale by the Bank, in favour of respondent no.8. On 25.10.2006, this Court granted status quo in the petition. On 16.11.2006 this Court directed the petitioner to deposit legal dues of the bank in Court, with liberty to the petitioner to enter into MOU with third party in order to raise money.

5. The Apex Court in A.I.R.2016 SC 4248 (Ludovico Sagrado Goveia v. Cirila Rosa Maria Pinto and ors.) recently in the background of sale and purchase at an auction in execution arising out of the above Act though different matter observed that :-

.....

"The scheme of the 2002 Act which replaces the 1984 Act is a little different. Section 84 of the 2002 At corresponds to Section 74 and 76 of the 1984 Act".

.....

"It is thus clear that the proceeding in execution initiated under Section 85(c) of 1984 Act and pending before the authorities under the said Act prior to 19th September, 2002, would continue unhindered by the repeal of the 1984 Act by the 2002 Act".

6. The position of law, therefore, is clear that the parties are bound by the provisions of the Act (1982) and the Rules made thereunder for all the purposes. Now, we are restricting the present decision keeping in mind the position of law so referred above and also the facts and circumstances placed on record by the rival parties from their respective point of view.

7. The learned counsel for the petitioner has placed on record the list of copy of judgments along with his submissions in support of his case:-

- (i) Philomina Jose v. Federal Bank Ltd. and Ors. : (2006) 2 SCC 608;
- (ii) Karashiddayya Shiddayya Bennur v. Shree Gajanan Urban Cooperative Bank Ltd. and Anr.: A.I.R. (30) 1943 Bombay 288;
- (iii) Dnyaneshwar Pundalikrao Date v. Samata Cooperative Housing Society Ltd.& Anr. : 2004 (5) Bom.C.R. 384;
- (iv) Prakash V. Thakkar v. Nagpur Nagrik Sahakari Bank Ltd. : 2015 (1) BCR 846;
- (v) Suresh Prabhu v. Bombay Mercantile Coop. Bank Ltd. : 2008 (1) ALL M.R.232;
- (vi) Ramchandra Harishchandra Vatkar v. Jawaharnagar Cooperative Housing Society Ltd. and Anr.: 2002 (Supp.2) Bom.C.R. 225;
- (vii) Sunder Dass v. Ram Prakash:AIR 1977 SC 1201;
- (viii) S.P.Changalvaraya Naidu v. Jagannath 1994 (1) SCC 1;
- (ix) A.V.Papayya Sastry and Ors. v. Govt. of A.P. and Ors. : (2007) 4 SCC 221;
- (x) Adarsh Ginning and Pressing Factor v. State of Maharashtra and Ors.: 2007 (5) Bom.C.R.618.
- (xi)Desh Bandhu Gupta v. N.L. Anand and Rajinder Singh : (1994) 1 SCC 131;
- (xii) J. Rajiv Subramaniyan and Ar. v. Pandiyas and Ors.:(2014) 5 SCC 651;
- (xiii) C.N. Paramsivam v. Sunrise Plaza : (2013) 9 SCC 651;
- (xiv) Seethammal v. Senthil Finance and Ar. (1996) 8 SCC 5;
- (xv) UCO Bank v. Hmchandra Sarkar : (1990) 3 SCC 389;

(xvi) SJS Business Enterprises (P) Ltd. v. State of Bihar and Ors.: (2004) 7 SCS 166.;

(xvii) Whirlpool Corporation v. Registrar :A.I.R. 1999 SC 22, and

(xviii) Ludovico Sagrado Goveia v. Cirila Rosa Maria Pinto and Ors. : A.I.R.2016 SC 4248.

The learned counsel appearing for respondents have distinguished the same and based on the facts and documents and provisions of 1984 Act and Rules opposed the prayers of the petitioner.

8. There is no issue that the petitioner along with his surety applied for loan and the bank had granted loan to the business of real estate development/construction against the security of the property and as per then existing requirements executed various documents, and got loan. The parties, therefore, undisputedly acted upon those documents by accepting terms and conditions so reflected in the documents. This is admittedly a commercial transaction. All the parties bound to know the effect of the clauses of executed commercial documents.

9. One of the documents, Sanction letter dated 17.8.1995 reflects one important condition as the same is in issue reads as under:-

"Applicant and the sureties should be enrolled as nominal members of the Bank and they should execute the documents in respect of this facility at our Panaji Branch".

10. Therefore, the submission that the petitioner was never a "nominal member" of the bank as required before initiating any proceedings prescribed, as contemplated under the provisions is unacceptable. The petitioner, as well as, the surety should be enrolled as nominal member of the bank and they should execute the documents in respect of these facilities which admittedly they have signed, in our view, cannot be now permitted to say that they are not "nominal members" of the bank.

11. The Act and the provisions empower the bank/society to initiate action for recovery of the loan amount but within the framework of law. The petitioner has failed to make the payment as agreed. The bank had no option but invoke the provisions which should be effective and efficacious. The statutory provision, therefore, so available against the members, covers "nominal members" of the bank for the purpose of such recovery. There is nothing on record to show at the time of taking loan by the petitioner and/or even later stages insisted and/or called upon the bank to complete the formalities of a "nominal member" of the bank. All acted at the relevant time within the framework of law and under clear understanding of commercial documents and proceeded accordingly.

12. The reference to the judgments and the other provisions of the Co-operative Societies Act is of no assistance. The membership of the petitioner was never the

issue at the relevant time of taking loan and/or immediately thereafter. Such parties/person cannot be permitted to deny the existence of the signed documents and its effect in law.

13. The bank needed to initiate the proceedings before the appropriate forum. The petitioner never filed any written statement objecting in the case raising specific objections. Ultimately, on 23.2.1998, the Assistant Registrar of Co-operative Societies had passed the judgments against the petitioner and the sureties holding that they are jointly and severally liable to pay the amount to the tune of Rs. 1,51,58,641/- with interest @ 23% .

14. Strikingly, the petitioner did not challenge even the order and the amount and the same has attained finality. The contentions, rest upon the judgments, so referred above, ought to have been raised, at the appropriate stage as there are various factual aspects involved. The commercial documents are clear and so also its effect, as parties have already acted upon. The petitioner has made submission that this is a case of fraud, misrepresentation, suppression of facts and therefore, in any way, irrespective of that fact that he failed to raise objection at the relevant time, the Court must accept the case of fraud so alleged. The law, with regard to the fraud, misrepresentation is very clear, needs no discussion.

However, it is clear that one who alleges the fraud and misrepresentation and suppression of fact, needs to raise such issues rest upon the supporting material and evidence at the relevant time, in accordance with law. There are no material to justify the same, mere delayed allegations are not sufficient. In the present case, as the submission of adverse inference is also raised that in spite of repeated requests and orders, no documents were supplied/placed on record referring to the sale transactions. Such vague and uncertain allegations are sufficient to interfere with the Bank actions, based upon the provision of law.

15. We have keeping in mind also the factual background that after the award was passed, the sale was proceeded of the property on 21.9.2000. There was no bidder. The respondent bank, therefore, purchased the same for an amount of Rs.87,46,200/-. The petitioner ought to have initiated proceedings as contemplated under Rule 22 (14) (I) of Rules 1985 to set aside the sale. Nothing was done. The Sale Officer, therefore, confirmed the sale in view of Clause (vi) sub-rule (14) of Rule 22 of the Rules, 1985. The sale confirmation was finalised on 23.9.2000, as the amount was not paid and, therefore, even the property of the surety was attached, by the Recovery Officer under Rule 22 of the Rules 1985, on 28.11.2000. The whole proceedings, therefore, in the background has attained finality. Therefore, for all the purposes and action were initiated in accordance with law by the concerned.

16. The petitioner though not a member of the society as contemplated and as contended on 3rd January, 2003 after more than five years from the date of award, filed the application under Section 84 of the Multi-State Cooperative

Society Act, 2002 read with Rule 37 of it (in view of change of position of law) from 2002. The learned counsel appearing for the petitioner has read out various averments made in the application as well as finding given by the Authorities. We have also noticed the petitioner did not challenge the award, on its own merits. His application and the averments so made revolving around only to set aside the sale and the challenged the action of the bank and prayed for refund of the amount. This is in the background, by contending for the first time, that the respondent bank is deemed to have purchased the property for Rs.1,89,50,000/- and, therefore, adjust the amount and refund amount after adjustment. Such is not the position of law and neither there is such material to justify it. The respondent/bank, therefore, contested the Arbitrator's jurisdiction to entertain such application. The Arbitrator disposed of it by placing the matter before the Registrar of Co-operative (Camp Court). It was heard accordingly in pursuance to the order passed by this Court dated 28.9.2005 as both the parties also agreed on the point of jurisdiction of transfer to deal with application. We are not concerned with the background litigations as ultimately, we have to see the prayers and the related pleadings so made by the petitioner made in such application or even in the writ petition.

17. This was definitely the second sale of the property. As noted in first sale the bank themselves purchased the property. The bank to recover the loan amount and decided to sale such property. After completion of all the formalities, respondent no.8 being the highest bidder of Rs.65 lakhs paid the entire amount on 11.6.2006. and accordingly sale deed was executed by the bank in his favour. The case is even of the bank that the possession of the property was handed over by the bank to respondent no.8 pursuant to the sale. Though the petitioner is agitating the various issues, there is material to place on record, specifically when there was no challenge raised at the relevant time to the award as well as, and the first sale in the year 2003 itself. Petitioner was not owner of the property after first sale itself. The case that he got knowledge some time in the year 2006 and therefore, filed application with objection, in facts and circumstances, is unacceptable. The sale deed therefore presented before respondent no.5 on 11.7.2006 for registration. The same is still pending because of pending this writ petition.

18. In the meantime, respondent no.2 decided the application filed by the petitioner on 21st November, 2006 by holding that such application is not maintainable as the dispute was decided on merit. The power of Arbitrator/Registrar is different than the power and sale by the Recovery Officer, in execution. Having once held that there is no jurisdiction, there is no question of making any observation for or against the parties, while deciding or disposing of such application. The application is without jurisdiction and so also the authorities power and any such adverse observation even made. In the facts and circumstances, it is impermissible.

19. As noted above, the petitioner filed another Writ Petition raising various

issues including the alleged fraud around second sale. The submission that the fraud was committed because of valuation of the property so shown, was lower than the earlier one. This ought not to have submitted by the material documents and substance at the proper time. Once the first sale is confirmed, the petitioner has no role to play as last the title/ownership specifically when no challenge was raised at the appropriate time to the first sale. The allegation of fraud and under what circumstances those properties valuation were made at the time of second sale, just cannot be gone into for first time in writ jurisdiction merely because the petitioner has agitated that issue for the first time in writ jurisdiction at late stage. Even the allegation that the sale certificate is fabricated and fraudulent document and the respondent bank failed to bring such proceedings on record, is of no assistance, considering the scope and purpose of writ jurisdiction, keeping in mind the background and undisputed position on record, the remedy is elsewhere, if available.

20. The Camp Courts" observation while condoning the petitioner delay in challenging the award, as well as, the sale on the ground of lack of jurisdiction, that itself, is not sufficient to revoke and accept the challenge to the award passed and the sale so conducted and confirmed long back. It is not sufficient to go into validity and/or the sale so conducted by the bank at the relevant time by following the due procedure of law. The market rate and/or valuation less or more or increase or decrease of price need to be tested in the background of litigation and circumstances of the case by raising objection at proper stage. Mere allegation of fraud or lack of jurisdiction, that itself, is not sufficient to accept the case in this writ jurisdiction. The fact remained that on 21.1.2006, itself again in the factual background of the sale transaction and transfer of property, by following the due procedure of law, has attained finality.

21. This Court, on 25.10.2006 and 22.12.2006 even if entertained and pass the interim order directed to maintain status quo that in no way sufficient to interfere with the proceedings so initiated firstly in favour of the bank and secondly concluded in favour of respondent no.8. We have decided the writ petition finally for above reasons.

22. The commercial transactions thus having entered by and between parties need to be proceeded further. So also as it is difficult for the Court or disturbed the rights so created based upon commercial documents. All the consequences, therefore, to follow once transactions and the proceedings so initiated are well within the framework of law and specifically when no Court/Authority interfered with any order as appropriate time, there was no such application raised, including the objection about the membership, jurisdiction, fraud or misrepresentation and required material particulars. The High Court in writ jurisdiction to entertain and reopen the issues at the instance of such petitioner, is also unacceptable.

23. Even the law with regard to the redemption and/or suit for foreclosure or sale of mortgaged property under Order 34, Rule 5 (1) of CPC, so referred, in

view of the above background, is of no assistance to accept the petitioner case. The position of law so declared in the judgment so cited, need no discussion, as it is settled and as we have to consider facts and circumstances of each case first, keeping in mind the position of law. The facts so pleaded in every aspects, apart from the conduct of the parties, and delay and/or not taking with appropriate steps at the relevant time, the raising submission, by invoking these provisions of law only, we are not inclined to accept the same.

24. The award is nullity, therefore, at any stage, it can be looked into or interfere even by the Executing Court is also settled position of law. Mere allegations of fraud and misrepresentation that itself is not sufficient specifically on facts that the petitioner being nominal member having executed and accepted various documents and obtained loan, he cannot be permitted to deny the said conditions, specifically when it come to the stage of re-payment of loan to the bank.

25. Even with regard to the submission revolving around Sections 74, 87 of Act 1984, that the Court has stayed those provision and, therefore, there was no question of deciding the dispute by invoking these provision is also unacceptable. After going through the notification and stay orders so referred, we are of the view that there was no such stay to the effect and operation of Sections 74 and/or 87 of 1984 for all the times. These sections are basic heart of dispute resolutions mechanisms available for the bank and again the defaulter parties. The limited stay even if to the part of section, in no way, sufficient to mean that the whole section and all actions arising out of the same were stayed. The submission that, therefore, award being nullity is also unacceptable on this ground.

26. We have also noted that there is no total bar that the bank cannot purchase such property in these existing circumstances. At appropriate stage, if it takes such policy decision, keeping in mind the future of such property and/or intent to take steps and to sale it further, in second sale, as there was no specific challenge raised at any appropriate time. Mere allegation of fraud in the background, is of no assistance to disturb such transaction and/or proceedings which are initiated by the financial institution/bank by following the due procedure of law.

27. Having once comes to the above conclusion based upon the fact and circumstances of this case, the Supreme Court judgment in *Philomina Jose* (supra) as relied upon is of no assistance. There is no question of limitation issue involved here and so also the right of petitioner redeemed the subject mortgaged property. The judgment in *Karashiddayya Bennur* (supra) is also of no assistance as we have already observed that the petitioner was "nominal member" and, therefore, bound by the provisions of law and the action so initiated under the same. The documentary evidence itself supports the case that the petitioner was at least "nominal member". There was no bar of initiating such action and specifically when there was no issue/objection raised immediately. Therefore,

Prakash (supra) and Suresh (supra) are of no assistance. Ramchandra (supra) as relied, therefore, is of no way to decide the issues involved in the present case. As we have held that the impugned action is within the framework of law and record and the authorities acted within the jurisdiction, Supreme Court judgment Sunder Dass (supra) is no way support the case of the petitioner. Even A.V. Pappayya (supra) is of no assistance for the reasons so recorded accordingly. Adarsh Ginning (supra) as relied is un-applicable on fact of the case in hand specially for the above recorded reason. Here is not a case of no notice to the borrower before conduct of sale. Therefore, Desh Bandhu Gupta (supra) and the ratio laid down in that judgment is of no assistance to support the petitioner's case. So is J. Rajiv Subramaniyan (supra). The respondents herein have followed the basic procedure and Rules as applicable at that time. Therefore, the fact and ratio of C.N. Paramsivam (supra) is of no assistance. The amount/payment deposited in the Court pursuant to the order passed by this Court, that itself, cannot be read and/or for the entire amount due the respondent bank has been duly paid. The respondent bank has taken action based upon the then existing facts of no payment on demand and the provision. Admittedly, there was no challenge raised or objection filed that itself concluded the situation. The actions so initiated by the bank in no way can be stated to be contrary to law. Therefore, SJS Business Enterprises (supra) on fact itself distinct and distinguishable. Ludovico Sagrado Goveia (supra) is also of no assistance as petitioner in case in hand never raised appropriate application within time before conclusion of first sale. Therefore, there was no question of holding that sale in question was in violation of provisions of Rule 22 of the Rules as no case was made out by the petitioner to set aside even the second sale and consequent action arising out of the same.

28. Before concluding, we have to note the orders passed by this Court while admitting the petition. By affidavit dated 15.02.2016 to the application filed by the petitioner for his claim of refund of Rs.40,53,299.85, following averments are made by the Bank:

"3. Since recovery was not forthcoming the Bank attached the mortgage properties. Property "Durgawadi" was first put for auction by publishing proclamation notices, however no bidders came forward in spite of several notices, the Bank acquired the said property for Rs.87,46,200/- on 21/09/2000 in part satisfaction of loan dues of the petitioner when balance in loan account was Rs.1,85,70,894.33 excluding interest receivable.

4. Second property "Mallans" admeasuring 68262 sq. mts. was put up for public auction and sold for highest bid of Rs.1,36,52,400/- from Mrs. Nirupa U. Pawar by the Sales and Recovery Officer and accordingly Certificate of Sale dated 17/05/2006 was issued in her name. Out of said sale proceeds amount of Rs.1,02,55,852.16 was adjusted to the loan account of petitioner towards principal amount outstanding as on 24/06/2006 and remaining balance of Rs. 33,96,547.84 was kept at sundry creditors account with Head Office at first place

for adjusting towards Overdue Interest Receivable account of the Petitioner, which was accordingly adjusted on 27/09/2006, with outstanding overdue interest receivable of Rs.1,28,56,816.16.

6. I say that the Writ petition no.498/2006 filed by the Surety Shri Ravindra C.P. Navelkar, was withdrawn unconditionally by him, accordingly said writ petition was dismissed as withdrawn by Order dated 23/12/2009. The said order was further modified by order dated 05/01/2010 in MCA No.10/2010 allowing the petitioner to take refund of Rs.2,00,05,219/- without interest, from the entire amount of Rs.4,68,73,591/- deposited at sundry account, with residual amount of Rs.2,68,68,372.15 therein.

7. I say that thereafter, upon application bearing MCA No. 88/2016 in above writ petition moved by the petitioner, the Hon'ble Court by Order dated 15/02/2010 allowed the Respondent Bank to recover the outstanding overdue Interest Receivable amounting Rs.1,28,56,816.16 towards loan account of petitioner and directed to refund balance which works out to Rs.1,40,11,55.99. Accordingly, an amount of Rs.1,28,56,819.16 was adjusted to Overdue Interest Receivable amount of the petitioner and an amount of Rs.1,40,11,555.99 was refunded to the petitioner and an amount of Rs.1,40,11,555.99 was refunded to the petitioner on 24/02/2010.

8. It is submitted upon final refund of Rs.1,40,11,555.99 nothing remains with the Bank and therefore application of the petitioner to refund purported amount of Rs.40,53,299.85 does not arise and hence the Petitioners claim for Rs.40,53,299.85 is a fraudulent claim."

Above undisputed position make position very clear that even the surety never challenged the award and the sale and all the actions. He accepted the amount and withdrew his petition. The petitioner challenge, therefore, so raised, in this petition is unsustainable.

29. Therefore, in view of the above order, ultimately bank is required to consider the claim and rival claim, so far as the adjustment of the amount is concerned, we are inclined to permit the petitioner to move a representation within two weeks in this regard, referring to the stated adjustment and/or claim so raised. The respondent bank to decide the same, as early as possible, preferably within four weeks thereof, in accordance with law, keeping in mind above facts and the law. Therefore, resultant order:

ORDER

a) Writ Petition is dismissed.

b) Interim order passed in the writ petition are vacated, however, with liberty to the petitioner to apply for adjustment and refund of amount, if any, within two weeks. The respondent to deal with the same in accordance with law within four weeks thereafter.

- c) Leave is granted to petitioner to invoke appropriate available remedy, if any, available, in accordance with law.
- d) Rule discharged accordingly. No costs.