**(2019) 06 BOM CK 0003**

**In the Bombay High Court**

**Case No :** Writ Petition No. 2406 Of 2018

Shrirang Gajanan Hole APPELLANT

Vs

Special Recovery Officer And Ors RESPONDENT

**Date of Decision :** 03-06-2019

**Acts Referred:**

Maharashtra Co¬operative Societies Act, 1960 — Section 101, 107(3)(I)(A), 154
Maharashtra Co-operative Society Rules, 1961 — Rule 107(4)(3), 107(14)(3)

**Citation :** (2019) 06 BOM CK 0003

**Hon'ble Judges :** S. S. Shinde J

**Bench :** Single Bench

**Advocate :** S.A. Tarale, G.S. Godbole, Shivraj Patni, Kaustubh Thipsay, S. H. Kankal, Prajakt M Arjunwadkar

**Final Decision :** Dismissed

## Judgement

1. By this Writ Petition the Petitioner challenges the order dated 27/11/2017 passed by Respondent No.5 i.e. the Divisional Joint Registrar, Co- operative Societies, Pune (Rural) by which order the application filed by the Petitioner in Revision Application No.297 of 2017, pending before Respondent No.5, for interim stay to the execution of public auction sale proceeding dated 24/10/2017 came to be rejected. By this Writ Petition the Petitioner further seeks direction to stay the auction proceeding under Rule 107 (14)(3) of the Maharashtra Co-operative Society Rule 1961 going on at the instance of Respondent Nos. 1 and 2 before Respondent No.6 in Application No.187/2017- 18 against the Petitioner.

2. The facts giving rise to filing of this Writ Petition, can in brief be stated as under :-

The Petitioner is a member of Respondent No.2 Society. It is the case of the Petitioner that Respondent No.2 Society has taken signature on the blank papers of the loan application, Karz Rokha and promissory note and executed mortgage deed in favour of Respondent No.2 Society. The said mortgage deed was executed on 06/05/2015 and registered in the office of the Sub Registrar. It is the case of the Petitioner that the society with malafide intention mis-utilized the signature on the blank papers made by the Petitioner and filed loan application with documents on 15/05/2015 and showed disbursement of loan for Rs.5 lakh in the name of the Petitioner. It is the case of the Petitioner that the Petitioner never received the alleged loan amount of Rs.5 Lakh. The society by playing fraud withdrew the amount of Rs.5 Lakh and the Petitioner has no knowledge of disbursement of loan. The Society obtained Ex-party Recovery Certificate on 05/08/2016 for Rs.4,68,336/-. It is further alleged that the Petitioner never received notice of hearing and Respondent No.3 - The Assistant Registrar issued recovery certificate within 21 days from the date of first hearing and therefore the issuance of said recovery certificate is without following due procedure prescribed under section 101 of the Maharashtra Co-operative Societies Act, 1960 (for short "the MCS Act") and Rule 86 of Maharashtra Co-operative Societies Rule, 1961 (for short "the said Rules"). The society charged compound interest and penal interest on the said loan amount but the karz rokha and promissory note showing the rate at 15% per annum single interest on the loan amount. It is alleged that the society has not properly maintained the loan account. It is also alleged that the demand notice dated 16/08/2016 issued by Respondent No.1 Special Recovery Officer is illegal. Pursuant to the said notice, Respondent No.1 attached the immovable mortgage property on 01/03/2017. It is further alleged that the Respondent Nos.1 and 2 have no right to attach the said property because the said property is mortgaged prior to filing the loan application. Thereafter Respondent No.1 issued possession notice on 04/02/2017. It is the case of the Petitioner that the Respondent No.1 has no legal right to take possession of the mortgage property, and, by publishing the possession notice directly in the news papers by Respondent Nos.1 and 2, without verifying the search report, is also illegal. Respondent No.1 - Special Recovery Officer thereafter issued and published public auction sale on 19/09/2017. The public auction sale took place and already over on 24/10/2017. It is the allegation of the Petitioner that Respondent Nos.1 and 2 prepared bogus proceeding of public auction sale dated 24/10/2017. The learned counsel for the Petitioner submitted that the upset price fixed by Respondent No.6 behind the back of the Petitioner is not admitted by the Petitioner.

3. Dissatisfied by the public auction sale proceeding dated 24/10/2017, the Petitioner filed Revision Application under Section 154 of the MCS Act before Respondent No. 5 - Divisional Joint Registrar for setting aside the public auction sale and the proceedings dated 24/10/2017 made by Respondent Nos.1 and 2. Along with the said Revision Application, the Petitioner has filed an application for stay to the execution of public auction proceeding dated 24/10/2017 till final decision of the said Revision Application.

4. Respondent No.5 heard the said stay application of petitioner and after hearing the parties, by an order dated 27/11/2017 rejected the said stay application. It is observed by Respondent No.5 that Petitioner is a borrower of Respondent No.2 Society and, Respondent No.2 Society obtained recovery

 

certificate against the Petitioner. It is also observed by Respondent No.5 that the Petitioner did not challenge the said recovery certificate. Respondent No.5 observed that prima facie the recovery officer auctioned the property of the Petitioner on 24/10/2017 after issuing demand notice and attachment notice to the Petitioner and after obtaining upset price from District Deputy Registrar on 08/09/2017. It is also observed by Respondent No.5 in the order dated 27/11/2017 that on the day of auction 15% amount has been deposited by the auction purchaser. Respondent No.5 also observed that there is a provision to cancel the auction by depositing 5% more amount than the actual auction price by the Petitioner. Respondent No.5 after considering the material on record rejected the said stay application of the Petitioner by order dated 27/11/2016. It is the said order dated 27/11/2017 passed by Respondent No.5 which is taken exception to by way of the above Writ Petition.

5. It is contended on behalf of the learned counsel for the Petitioner Mr. Tarale that the public auction sale and the proceedings relating to the said public auction sale are illegal. It is also contended that Respondent Nos.1 and 2 did not follow the due procedure prescribed under the provisions of MCS Act. It is the contention of the learned counsel for the Petitioner that proper opportunity of hearing was not given to the Petitioner by Respondent Nos.1 and 2 to appear and obstruct the alleged public auction sale, hence, there is violation of principles of natural justice. It is also submitted that Respondent Nos.1 and 2 fixed the upset price behind the back of Petitioner, and the upset price is not admitted by the Petitioner. It is submitted that the market value of the said property is more than Rs.40 lakhs and Respondent No.6 i.e. District Deputy Registrar fixed the upset price only for Rs.24,65,000/- by issuing the order dated 08/09/2017 which is illegal. The valuation report is faulty as no calculations were taken place properly. It is further submitted that Respondent No.2, by playing fraud, succeeded to sell the property for lower price. It is also submitted that Respondent No.2 has taken the signatures of the Petitioner on blank papers, karz rokha and promissory note. He therefore submitted that Respondent No.2 misused the signatures made by the Petitioner on blank papers and filed loan application showing disbursement of loan for Rs.5 lakh in the name of Petitioner. The learned counsel for the Petitioner submitted that the Petitioner never received the amount of Rs.5 lakh. It is contended that the recovery certificate obtained by Respondent No.2 society is without following due procedure prescribed under the provisions of MCS Act. It is contended that though karz rokha and promissory note show 15% single interest, Respondent No.2 has illegally charged compound interest and penal interest on loan amount. He contended that Respondent No.2 has no right to attach the property which has been mortgaged prior to loan application. It is submitted that possession notice published in news paper by Respondent No.2 without verification of the search report is illegal. The subsequent public auction sale on 19/09/2017 is also illegal. The learned counsel for the Petitioner therefore prays that this Writ Petition may be allowed by setting aside the impugned order dated 27/11/2017 passed by Respondent No.5 as also the public

 

auction sale and their proceeding dated 24/10/2017 made by Respondent Nos.1 and 2.

6. Per contra, the learned counsel Mr. G S Godbole for Respondent Nos.1 and 2 submitted that Respondent No.2 advanced a loan of Rs.5,00,000/- to the Petitioner as agreed upon. It is also submitted that the Petitioner made 4 payments/installments to Respondent No.2 towards repayment of the said loan amount. Thereafter the Petitioner failed to pay the monthly installments of the said loan amount and did not repay the outstanding loan amount. It is also submitted that after carrying out an enquiry recovery certificate was issued. It is the contention of learned counsel for Respondent Nos.1 and 2 that the mortgaged property was auctioned, because of failure on the part of the Petitioner to repay the outstanding loan amount, after following due procedure as laid down under the provisions of MCS Act. It is further contended that though an opportunity was given to the Petitioner to re-pay the outstanding loan amount, the Petitioner did not avail of the said opportunity. It is submitted that even the Petitioner did not challenge the recovery certificate obtained by Respondent No.2 which has attained finality and the District Deputy Registrar, after considering the material placed before him, has rightly fixed the upset price, and hence there is no question of setting aside the impugned order and staying the public auction sale and their proceeding dated 24/10/2017 made Respondent Nos.1 and 2. The order dated 24/10/2017 passed by Respondent No.5 is proper and needs no interference at the hands of this Writ Court.

7. The learned AGP appearing for Respondent Nos.3, 5 and 6 submits that Respondent No.5, after considering the material on record, has rightly rejected the stay application of the petitioner by the impugned order dated 24/10/2017. He further submits that, there is no perversity in the reasoning given by Respondent No.5. He therefore submits that this writ petition may be dismissed.

8. Having heard the learned counsel for the parties, I have bestowed my anxious consideration to the rival contentions. It is an undisputed fact that the Petitioner is a member of Respondent No.2. It is required to be noted that in view of the failure on the part of the Petitioner to repay the outstanding loan amount, Respondent No.2 obtained recovery certificate for Rs.4,68,336/- against the Petitioner. It is pertinent to mention at this stage that the Petitioner did not challenge the said recovery certificate. hence the said recovery certificate has attained finality. Thereafter Respondent No.1 - Special Recovery Officer issued demand notice dated 16/08/2016 and attachment notice dated 07/10/2016 to the Petitioner. However, the Petitioner did not repay the outstanding loan amount, and therefore, the property of the Petitioner was attached. By an order dated 08/09/2017, District Deputy Registrar fixed the upset price of the property on the basis of the material placed before him. Thereafter Respondent No.1 Special Recovery Officer published a notice in the newspaper on 18/09/2017 regarding the auction sale of the property of the Petitioner. And it is thereafter on 24/10/2017 the property of the Petitioner was auctioned.

 

9. It is the grievance of the Petitioner that the valuation of the property attached is around Rs.70,00,000/- lakhs. My attention was drawn to a certificate dated 27/11/2017 issued by Hegde Associates - the approver valuers is at page No.32 of writ paper book wherein the fair market value of the property shown is Rs.69,00,000/-. However there is another valuation report dated 17/06/2017 issued by Government Registered Valuer Mr. Aslam Shaikh. According to the said valuation report, the fair market value of the property is Rs.24,65,000/-. The said valuation report is at Exhibit C of the writ paper book. It is pertinent to mention at this stage that when this writ petition has come before this Court for admission, this Court (Coram : R D Dhanuka, J) by an order dated 26/02/2018 issued notices to the Respondents and directed the District Deputy Registrar i.e. Respondent No.6 not to confirm the sale in favour of the successful bidder.

10. In the present case, the recovery certificate under section 101 of the MCS has been obtained by Respondent No.2 against the Petitioner, a demand notice as also the attachment notice were issued to the Petitioner, it is after the Petitioner failed to repay the outstanding amount of loan, that the property of the Petitioner was attached and thereafter the District Deputy Registrar fixed the upset price of the property on the basis of the material placed before him. Thereafter the property of the Petitioner has been put in auction sale on 24/10/2017 after publishing notice in the news paper and after obtaining upset price fixed from the District Deputy Registrar. Accordingly property auction sale took place. The auction purchaser has deposited 15% amount of the auction price on the very same day. It is pertinent to mentioned at this stage that the Petitioner did not challenge the recovery certificate. Though there is provision under Section 107(3)(I)(A) of the MCS Act to get the auction cancelled by depositing 5% more amount than the auction price, however, the Petitioner did not avail of such remedy/liberty as observed by the Revisionary Authority in the impugned order. It is at the stage of confirmation of property auction sale, that the Petitioner has made grievance about the valuation of the property and the fixation of upset price. The auction sale of the property took place on 24/10/2017. The certificate dated 27/11/2017 issued by Hegde Associates showing the valuation of property as Rs.69,00,000/-, has been issued after the auction sale of the property. If the Petitioner has any grievance about the upset price, he should have put on record the material to that effect before effecting the auction. After auction is over the Petitioner has raised such a grievance which in my view is nothing but to stall the confirmation of sale.

11. In so far as the allegation as regards violation of principles of natural justice is concerned, demand notice as also attachment notice were issued to the petitioner by the authorities. In so far as the allegation of the Petitioner as regards the fixation of upset price by Respondent No.6 behind his back is concerned, it is pertinent to mention at this stage that Respondent No.6, while fixing the upset price, has recorded in his order dated 08/09/2017 that On 01/08/2017 the Petitioner himself remain present for hearing, and as the Petitioner wishes to submit valuation report from government approved valuer,

 

the hearing was adjourned to 14/08/2017. On 14/08/2017 though Petitioner was present, he did not submit the valuation report. Hence the hearing was adjourned to 28/08/2017. On the said date the Petitioner was absent. Respondent No.6 therefore recorded a findings that even though proper opportunity was given to the Petitioner to submit the valuation report , neither the Petitioner submitted the report nor placed his submission on record. Thereafter Respondent No.6 passed the order dated 08/09/2017 fixing the upset price of the property. In my view, the said allegation of the Petitioner as regards violation of principles of natural justice is rhetorical, without any details and the prejudice caused thereby.

12. Respondent No.5 has rightly rejected the stay application of the Petitioner. There is no perversity in findings recorded by Respondent No.5. I do not find any illegality or infirmity in the order passed by Respondent No.5 in rejecting the stay application. This Court, in exercise of its writ jurisdiction, is loathe to interfere with the order passed by Respondent No.5. There is no merit in the Writ Petition. The Writ Petition stands rejected. The ad-interim relief, which is granted by order dated 26/02/2018 by this Court whereby directing the District Deputy Registrar not to confirm the sale in favour of the successful bidder, and the same has been continued by the order dated 25th April 2019 till the pronouncement of the judgment, stands vacated.

13. Respondent No.5 has issued notice under Rule 107(4)(3) of the said Rules to the Petitioner to remain present in the office of the District Deputy Registrar for confirmation of auction sale. The Petitioner has filed this Writ Petition on 19/02/2018 and, by an order dated 26/02/2018 obtained a stay to the confirmation of sale in favour of the successful bidder. Be that as it may, this Court has come to a conclusion that the Petitioner should have madea grievance in respect of upset price before the auction and should have put on record the material to that effect before effecting the auction sale.. Needless to state that the observations made herein above are confined to the adjudication of the present Writ Petition arising out of the order of rejection of stay application. filed. by. the. Petitioner. in. pending. Revision. Application. Respondent No.5 to decide the said Revision Application expeditiously on its own merits and in accordance with law without influencing the observations made herein above.

[S. S. SHINDE , J]

After Pronouncement :-

Date : 03rd June 2019

At this stage, the learned counsel appearing for the Petitioner prays for continuation of ad-interim relief for further period of eight weeks, which was in force during pendency of this Petition. The said prayer is vehemently opposed by the learned counsel appearing for the Respondents on the ground that the auction purchaser has deposited the entire amount in the Bank, and due to pendency of the proceedings, the auction sale is not confirmed. Keeping in view of the submissions made across the bar by the learned counsel for the Respondents, the prayer for continuation of the ad-interim relief stands rejected.

 