(2001) 07 BOM CK 0054

In the Bombay High Court

Case No : Writ Petition No. 1412 of 2001

Smita Janak Thacker APPELLANT

Vs

Commissioner of Registrar, District Co-operative Societies, Pune and Others RESPONDENT

Date of Decision : 06-07-2001

Acts Referred:
Constitution of India, 1950 — Article 14

Citation : AIR 2002 Bom 58 : (2001) 4 ALLMR 644 : (2001) 4 BomCR 730 : (2002) 2 MhLj 44

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

Bench : Single Bench

Advocate : S.S. Naphade and A.M. Joshi, instructed by Thakordas and Madgaonkar, for the Appellant; R.M. Sawant, B.G. Vaidya and Wagale, for the Respondent

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Judgement

D.Y. Chandrachud, J.—The dispute in these proceedings arises in relation to the auction of residential property comprised of Flat No. 82-C, situated at Dadar Paschim Apartments, Dadar, Mumbai. In a dispute filed by the Fifth Respondent, which is a Co-operative Bank, against the borrower to whom the Bank had sanctioned a Bill Discounting Facility, the Co-operative Court by an award dated 28th June, 1995, decreed the claim of the Bank in the amount of Rs. 16,26,545/- as on 5th February, 1992 together with interest at the rate of 20% per annum. An execution certificate was thereafter issued by the Co-operative Court on 28th September, 1995, u/s 98 of the Maharashtra Cooperative Societies Act, 1960 ("the Act").

2. The award was then sought to be executed under the authority of the Fourth Respondent, who is the Special Recovery Officer duly empowered u/s 156 of the Act and Rule 107 of the Rules framed thereunder. The Fourth Respondent has been duly empowered by an order dated 19th April, 2001 passed by the Commissioner to act as a Special Recovery Officer, save and except in regard to determining the upset price for the purposes of auction sale.

3. Originally the upset or reserved price of the residential property, which was put up for auction, was fixed at Rs. 55.42 lakhs on 15th October, 1997 upon a valuation by the Government valuer. Subsequently, the upset price was reduced to Rs. 51.12 lakhs since there was no response in the public auction which was held. After the reduction of the upset price, public auctions are stated to have been held on 30th September, 1998 and 5th October, 1998 at which also there was no response.

4. On 7th August, 1999, an advertisement inviting bids for the purchase of the flat came to be published in the daily edition of the ''Loksatta'' for an auction which was to be held on 15th September, 1999. The terms and conditions governing the auction, inter alia , provided in Clause 10 that the sale would be knocked down in favour of the highest bidder. All bidders at the auction were required to deposit an amount of Rs. 25,000/- as earnest prior to the auction. The successful bidder was required to deposit 15% of the bid amount within one week of the sale and the balance together with registration fees within a period of 30 days. One of the terms and conditions was that the auction safe in favour of the successful bidder would stand confirmed upon the approval of the Registrar of the Co-operation Department,

5. At the auction, which was held on 15th September, 1999, the petitioner was declared as the highest bidder, the bid being in the amount of Rs. 37.01 lakhs. After the auction came to be held, the Special Recovery Officer addressed a letter dated 8th November, 1999 to the District Deputy Registrar seeking a reduction in the upset price from Rs. 51.12 lakhs to Rs. 37.01 lakhs. The Special Recovery Officer set out in his letter that the previous auctions which had been held had not resulted in any bid being forthcoming and that finally at the auction which was held on 15th September, 1999, the petitioner was the highest bidder with an offer of Rs. 37,01 lakhs. The approval of the District Deputy Registrar was consequently sought to the bid of the petitioner together with a plea for a reduction in the upset price. On 24th November, 1999, the Deputy Registrar intimated to the Special Recovery Officer a reduction in the upset price from Rs. 51.12 lakhs to Rs. 37.01 lakhs and his approval to the auction sale. The petitioner was informed by a letter dated 29th November, 1999 of the Special Recovery Officer of the acceptance of the bid and was called upon to deposit an amount of Rs. 37.01 lakhs within a period of 8 days. In response thereto, by a letter dated 8th December, 1999, the petitioner enclosed two cheques drawn on the Bank of India, respectively in the amount of Rs. 31,20,850/- and Rs. 5,55,150/- (the second being in substitution of an earlier cheque dated 6th December, 1999 in the like amount).

6. On 2nd May, 2000, the Special Recovery Officer addressed a letter to the petitioner intimating her that the Commissioner for Co-operation had appointed a Committee consisting of the Divisional Joint Registrar, the Deputy Registrar and the Divisional Joint Registrar (Audit) for determining the upset price. Together with the letter dated 2nd May, 2000, a copy of a letter dated 27th April, 2000

addressed by the Bank to the Divisional Joint Registrar was enclosed. The letter of the Bank referred to the constitution of the Committee by the Commissioner on 6th February, 2000 and sought the permission of the Competent Authority for effecting the sale in favour of the petitioner in terms of the auction which had been held in September 1999.

7. On 29th June, 2000, the petitioner wrote to the Divisional Joint Registrar seeking the expeditious completion of the transaction in her favour, recording that though she was the highest bidder and had paid the full purchase price on 8th December, 1999, the transaction in her favour was yet to be completed. On 20th October, 2000, a further letter was addressed by the petitioner''s Advocate recording that the petitioner had been advised by the Special Recovery Officer that the Divisional Joint Registrar had fixed the upset price at Rs. 40 lakhs instead of the price of Rs. 37.0) lakhs at which the petitioner was the highest bidder in the auction sale. Accordingly, by the said letter, the petitioner confirmed that she was willing to bid at the price of Rs. 40 lakhs which was fixed by the Divisional Joint Registrar.

8. On 23rd December, 2000, the Special Recovery Officer wrote to the petitioner referring to a letter dated 23rd November, 2000 of the Commissioner for Co-operation and informed the petitioner that since her bid was less than the Rs. 55 lakhs (the latter amount presumably being the one which was fixed by the Commissioner in the said intimation dated 23rd November, 2000), the bid of the petitioner could not be accepted. The petitioner was informed that if she was interested in purchasing the property for an amount of Rs. 55 lakhs, she may arrange to inform the Special Recovery Officer. The petitioner by her Advocate''s notice dated 16th April, 2001, protested against this course of action. On 17th May, 2001, a fresh auction notice came to be issued by the Special Recovery Officer by which the property was sought to be auctioned again on 7th June, 2001. At that stage, the petitioner instituted these proceedings under Articles 226 of the Constitution.

9. The grievance of the petitioner in the Writ Petition was that she was the highest bidder at the auction sale which was conducted on 15th September, 1999 and that in pursuance of the communication by the Deputy Registrar accepting her bid, the petitioner had even deposited the entire purchase price of Rs. 37.01 lakhs. The submission of the petitioner was that the attempt to refix the upset price after the sale was knocked down in her favour, was without the authority of law and was liable to be quashed. The Writ Petition came up for urgent orders and by an order dated 6th June, 2001, this Court permitted the fresh auction to proceed without prejudice to the rights and contentions of the petitioner in the Petition. The Court directed by its order dated 6th June, 2001 that the petitioner would be permitted to participate in the auction but, the statement of the learned Counsel was recorded to the effect that the petitioner, irrespective of the outcome of the auction agreed to stand by her existing bid of Rs. 40 lakhs, No final decision was, however, to be taken in pursuance of the auction. The

petitioner accordingly did bid at the auction and furnished a fresh bid in the amount of Rs. 45.50 lakhs which was the highest bid.

10. An affidavit dated 25th June, 2001 was filed by the Fifth Respondent-Bank in these proceedings. In the affidavit in reply, it was stated that the Commissioner in response to a letter sent by the Bank had directed the Bank on 30th October, 1999, not to sell the flat in auction for a price which was less than the upset price which had already been fixed. At that stage, as already noted earlier, the upset price had been fixed at Rs. 51.12 lakhs. Thereafter, it has been stated that the Commissioner by a further letter dated 1st January, 2000, once again directed the Bank not to auction the flat for less than the upset price. The Bank has stated in its affidavit that on 15th February, 2001, the Commissioner constituted a Committee consisting of the District Deputy Registrar, Divisional Joint Registrar and the District Deputy Joint Registrar (Audit) to fix the upset price of the flat. In response to the report of the Committee, the Commissioner by an intimation dated 23rd November, 2000, called upon the Bank to take possession of the flat and to auction it within a period of two years at a price not less than the upset price of Rs. 55 lakhs.

11. The Bank has also adverted to the fact that on 7th July, 2000, the Sixth and Seventh respondents to those proceedings approached the Bank after the auction sale which resulted in the highest bid being that of the petitioner and offered to purchase the flat for Rs. 38.01 lakhs. The Bank has stated that it had not taken any action on the basis of the offer submitted by the Sixth and Seventh Respondent since it was made after the auction sale was conducted. The Bank has then stated in its affidavit that the order which was passed on 23rd November, 2000 by the Commissioner for Co-operation was challenged by the original Judgment Debtor and Guarantor, one Shri Gokhale before the Minister of State, who by an order dated 27th February, 2001 set aside the order of the Commissioner for Co-operation dated 23rd November, 2000 and directed that the flat be sold to the Sixth and Seventh Respondents by accepting their offer of Rs. 38.01 lakhs. Having said this, the said Bank has made the following averment in its affidavit in reply :

"It seems one Godse who had also given his offer had preferred an appeal against the said Order of the Hon''ble Minister. Shri Godse vide his letter dated 7-6-2001 has inter alia informed the Respondent No. 5, that he is willing to offer Rs. 42 lakhs and that the Hon''ble Minister had set aside the Ministerial Order dated 27-2-2001 and has directed that State Co-operation Department to issue instructions to the Respondent No. 5 that the flat can be sold by Open Auction."

Thus, from the affidavit in reply, which was filed by the Bank, what came before the Court was that the Minister of State for Co-operation had passed an order on 27th February, 2001 by which he had set aside the order of the Commissioner for Co-operation dated 23rd November, 2000, fixing the upset price of Rs. 55 lakhs. The Minister had simultaneously in his aforesaid order directed the Bank to accept the unsolicited bid of the Sixth and Seventh Respondents in the amount of

Rs. 38.01 lakhs. All this had evidently taken place without notice to the petitioner. In view of these developments which were pointed out in the affidavit filed by the Bank, by an order dated 25th June, 2001, liberty was granted to the petitioner to amend the petition so as to implead the Sixth and Seventh Respondents in whose favour the Minister of State for Co-operation had passed an order on 27th February, 2001. The Petition was amended so as to challenge the order of the Minister dated 27th February, 2001 and to bring the Sixth and Seventh Respondents on the record before the Court. The Sixth and Seventh Respondents have appeared in these proceedings.

12. On behalf of the petitioner, a serious grievance has been made of the manner in which each one of the authorities concerned in the present case the fifth Respondent-Bank, the Special Recovery Officer, the Commissioner for Cooperation and the Minister of State for Co-operation have proceeded to act in the matter. The learned Counsel has made a grievance about the complete lack of transparency in the auction process and of the manner in which orders have been passed behind the back of the petitioner, inter alia, by the Minister of State for Co-operation. The learned Counsel has submitted that the entire process by which despite the highest bid submitted by the petitioner in the amount of Rs. 37.01 lakhs which came to be accepted by the authorities on 29th November, 2000, various executive authorities have attempted to act de hors any statutory provision is without authority of law. The learned Counsel submitted that the authority which is conferred upon the Special Recovery Officer u/s 156 of the Act is subject to the Rules which have been framed under the Act and the intervention by various authorities in the Co-operation Department is not relatable either to the provisions of the Rules nor for that matter the revisional jurisdiction which is vested in the State Government by Section 154 of the Act.

13. Before dealing with the submissions which have been urged on behalf of the petitioner, a reference may be made to Section 156 of the Act under which the Registrar is vested with the authority to recover certain sums due by the process of attachment and sale of property. Section 156 of the Maharashtra Cooperative Societies Act, 1960 provides as follows:

"156. Registrar''s powers to recover certain sums by attachment and sale of property. (1) The Registrar or any officer subordinate to him and empowered by him in this behalf or an officer of such society as may be notified by the State Government, who is empowered by the Registrar in this behalf may, subject to such rules as may be made by the State Government, but without prejudice, to any other mode of recovery provided by or under this Act, recover -

(a) any amount due under a decree or order of a Civil Court obtained by a society;

(b) any amount due under a decision, award or order of the Registrar, Co-operative Court or Liquidator or Co-operative Appellate Court;

(c) any sum awarded by way of costs under this Act;

(d) any sum ordered to be paid under this Act as a contribution to the assets of the Society;

(e) any amount due under a certificate granted by the Registrar under Sub-section (1) or (2) of Section 101 or under Sub-section (1) of Section 137; together with interest, if any, due on such amount or sum and the costs of process according to the scales of fees laid down by the Registrar, from time to time, by the attachment and sale or by sale without attachment of the property of the person against whom such decree, decision, award or order has been obtained or passed.

(2) the Registrar or the officer empowered by him shall be deemed, when exercising the powers under the foregoing sub-section, or when passing any orders on any application made to him for such recovery, to be Civil Court for the purposes of Article 136 in the Schedule to the Indian Limitation Act, 1963."

The power of recovery which is vested in the Registrar or in a subordinate officer who may be empowered by him as well as the power which is vested upon an officer of the society notified by the State Government is subject to such rules as may be made by the State Government. In exercise of the power which has been conferred by Section 156 of the Act, the State Government has framed Rules and the relevant Rule in this regard is Rule 107 of the Maharashtra Co-operative Societies Rules, 1961. Rule 107 lays down the procedure for attachment and sale of property u/s 156 of the Act. The rules which are to be observed in effecting the attachment and sale are, inter alia, provided in Sub-rule (11) of Rule 107. Clause (e) of Sub-rule (11), inter alia , provides for the proclamation of sale and Clause (f) lays down that the sale shall be by public auction to the highest bidder. The proviso to Clause (f) specifies that it shall be open to the Sale Officer to decline to accept the highest bid where the price offered appears to be unduly low or for any other adequate reason. The Recovery Officer is empowered in his discretion to adjourn the sale to a specified day and hour, recording his reason or such adjournment. Where a sale is so adjourned for a longer period than seven days, a fresh proclamation under Clause (e) shall be made, unless the defaulter consents to waive it. Clause (g) of Sub-rule (11) provides that a sum equal to 15 per cent of the price of the immovable property is to be deposited by the purchaser in the hands of the Sale Officer at the time of the purchase and under Clause (h), the remainder of the purchase money is required to be deposited within 15 days from the date of sale.

14. The Special Recovery Officer exercises the power which is vested in him u/s 156 of the Act read with Rule 107. On 19th April, 2001, the Commissioner for Co-operation has authorised the Fourth Respondent to act as a Special Recovery Officer save and except for determining the upset price for the purposes of auction sale. The officers who are empowered to conduct sales under the provisions of the Maharashtra Co-operative Societies Act, 1960, must do so in accordance with law and must abide scrupulously by the requirements of the Rules. Auction sales must be conducted in a fair and transparent manner

because the authorities to whom statutory powers u/s 156 are vested are public authorities who are bound by the mandate of law and by the requirement of Article 14 of the Constitution. Their conduct has to be fair, reasonable and transparent. In many cases such as the present, auctions are held to recover outstanding dues of co-operative banks under the Act. Public interest demands that the best and highest price should be realised and the sale be conducted expeditiously to achieve the realisation of dues of the banks or financial institutions. The authorities must act in accordance with objective norms. Ad hoc decisions and expediency is liable to grave abuse and give rise to grave apprehensions as regards the fairness of the process. A decision of the Competent Authority may be revisable in exercise of the revisional powers which are vested in the State Government and the Registrar u/s 154 of the Act. The exercise of power by the authorities of the Co-operation Department must, however, be referable to a provision of statute and must be exercised strictly within the parameters of the statute. The intervention by the authorities otherwise than under the provisions of the statute and divorced from any statutory provision or rule is otherwise liable to give rise to a situation where, as in the present case, there is a serious grievance of a misuse of power. The Registrar u/s 3 of the Act is entitled to exercise superintendence and control over his subordinates. Similarly when a Special Recovery Officer is appointed u/s 156 of the Act, the exercise of power by the Recovery Officer and the superintendence and control which is sought to be exercised over him must fall within the four comers of law. Section 156 itself provides that the Recovery Officer in the exercise of the power of recovery is subject to the Rules which are made by the State Government under the Act.

15. In the present case, at every stage, the process of auction has taken place in defiance of well established principles and procedures. The upset price which had initially been fixed at Rs. 55.42 lakhs on 15th October, 1997 had been reduced subsequently to Rs. 51.12 lakhs. When the auction sale came to be conducted on 15th September, 1999, the upset price which had been fixed was Rs. 51.12 lakhs. The bid which was submitted by the petitioner in the amount of Rs. 37.01 lakhs, even if it was the highest bid, was lower than the upset price. Notwithstanding this, the bid which was submitted by the petitioner was accepted and on the basis of the bid submitted by the petitioner, a request was made by the Special Recovery Officer to the District Deputy Registrar to reduce the upset price from Rs. 51.12 lakhs to Rs. 37.01 lakhs. Such a procedure is ex-facie arbitrary. The upset or reserved price at an auction must be fixed and determined before the commencement of the auction process. Once the auction has been held on the basis of the upset price which is determined prior to the commencement of the auction, the process would be susceptible to grave public danger if the officers of the Co-operation Department were to be permitted to seek a reduction in the upset price thereafter because the highest bid did not measure upto the upset price. As the facts of the present case would show, the upset price was sought to be reduced from Rs. 51.12 lakhs to Rs. 37.01 lakhs

without any real application of mind to the question as to whether the bid which was submitted by the petitioner did at all meet the fair market value then prevailing of the property. In response to the request which was made by the Special Recovery Officer on 8th November, 1999, the District Deputy Registrar, reduced the upset price from Rs. 51.12 lakhs to Rs. 37.01 lakhs. The reduction in upset price was sought from Rs. 51.12 lakhs to Rs. 37.01 lakhs not because the later figure represented the revised fair market value but because that was what was quoted by the highest bidder. The District Deputy Registrar accepted the proposed reduction.

16. Following this reduction in the upset price, the offer made by the petitioner was accepted and the petitioner deposited the purchase price of Rs. 37.01 lakhs. Thereafter, a fresh attempt was then made to refix the upset price and the petitioner was called upon to communicate his acceptance of a revised figure of Rs. 40 lakhs. The petitioner seems to have been responding to an oral request because her Advocates'' letter dated 20th October, 2000 revising the bid to Rs. 40 lakhs does not refer to any written communication calling upon her to revise her bid. The petitioner did so and communicated by her Advocate''s letter dated 20th October, 2000 that she was willing to pay a higher price of Rs. 40 lakhs. In the meantime, a fresh Committee was constituted by the Commissioner and in pursuance of the report of the Committee, the Commissioner Communicated on 23rd November, 2000 to the Bank that it should not accept any bid at a price less than Rs. 55 lakhs. In the meantime, as already noted earlier, the petitioner had increased her offer to Rs. 40 lakhs and all this appears to have been in pursuance of an oral communication of the Special Recovery Officer. The Special Recovery Officer seems to have done this on the basis of some direction, oral or otherwise of the Divisional Joint Registrar. The entire process reveals a complete lack of transparency in the process of holding and conducting the auction sale. What follows subsequently is reflective of the complete lack of propriety and regularity in the auction process.

17. After the Commissioner addressed a communication dated 23rd November, 2000 informing the Bank that the upset price has been fixed at Rs. 55 lakhs and that the property should not be sold at any price lower than the upset price, the Minister of State for Co-operation was moved by one of the original Judgment Debtors. The Minister set aside the order dated 23rd November, 2000 of the Commissioner and directed that the offer which was made by the Sixth and Seventh Respondents in the amount of Rs. 38.01 of lakhs be accepted. The Minister was duly informed of the fact that at the auction sale which had been conducted in September 1999, the petitioner had offered a bid of Rs. 37.01 lakhs. This found mention in the order which was passed by the Minister for Cooperation on 27th February, 2001, but the subsequent enhancement of the price to Rs. 40 lakhs by the petitioner on 20th October, 2000 does not find mention in the order. By his order dated 27th February, 2001, the Minister directed the Bank to accept the bid of Rs. 38.01 lakhs made by the Sixth and Seventh Respondents. This direction by the Minister for Co-operation is ex-fade

ultra vires and illegal. The Minister for Co-operation has acted in excess of his jurisdiction and completely contrary to the basic principles of law in directing that the unsolicited bid of Rs. 38.01 lakhs made by the Sixth and Seventh Respondents after the auction process was concluded should be accepted. The procedure which has been followed in the present case is fundamentally flawed and would lead to a complete destruction of fairness and transparency in the auction process.

18. The Fifth Respondent - Bank in its affidavit in reply has stated that the order of Minister dated 27th February, 2001 was in fact, set aside by the Minister on ''an appeal'' preferred by one Godse. According to the Bank, the Minister has subsequently issued an instruction to the effect that the flat be sold by open auction. In view of the averment which was contained in para 5 of the affidavit of the Bank dated 25th June, 2001, the learned Government Pleader was called upon to seek instructions as to whether the order dated 27th February, 2001 by the Minister of State for Co-operation had in fact, been superseded by him as stated by the Bank. On seeking instructions, the learned Government Pleader informed the Court that the Minister had in fact not revoked his order dated 27th February, 2001 and what has been stated in the reply filed by the Bank in these proceedings is unfounded and incorrect. The learned Counsel for the Bank fairly stated that the Bank decided to hold a fresh auction on 7th June, 2001 on the basis and footing that the Minister for Co-operation had cancelled his discretion dated 27th February, 2001 and had permitted a fresh auction to be held. There was however no order passed by the Minister for Co-operation cancelling his direction dated 27th February, 2001.

19. Having regard to the unsatisfactory nature of the conduct of the respondents in the present matter, the learned Counsel appearing for all the contesting parties have fairly stated before the Court that it would be only appropriate and proper that a fresh auction be held. The Court however, expresses its disapproval of the manner in which -the authorities have proceeded in the present case. In conducting public auctions, it would be necessary for the Respondents to observe a greater degree of probity and regularity than has been demonstrated in the facts of the present case. For one thing, the Respondents must ensure in future that the upset price is determined prior to the auction and that once the upset price is fixed, a bid which does not measure upto the upset price is rejected. The procedure of accepting the highest bid if it is below the upset price and thereafter seeking the sanction of a higher authority for reduction in the upset price is arbitrary and illegal. Once a reserved or upset price is fixed, that price must necessarily be the governing price for the purposes of evaluating the bids which are received at the ensuing auction. Moreover, it must be noted that in the present case, that the learned Government Pleader has fairly stated that there is no statutory provision under which the Special Recovery Officer is required to seek the approval of the authorities concerned at every stage. (The determination of the upset price, however, is not within the powers of the Special Recovery Officer in view of the notification dated 19th April, 2001). Undoubtedly,

the appropriate authorities, under Sections 152 and 154 of the Maharashtra Cooperative Societies Act, 1960 have sufficient appellate and revisional powers to correct an error or illegality. Similarly, the power of superintendence and control which is vested in the superior authorities must be exercised in accordance with the provisions of the Act and the Rules framed thereunder. Uncharted executive discretion, as the facts of the present case would show is liable to grave misuse.

20. In the circumstances, the present petition will have to be allowed by setting aside the order dated 27th February, 2001 passed by the Minister of State for Co-operation. A fresh auction should now be held for the sale of the property in question. The Competent Authority shall within four weeks fix the reserve price for the purposes of the auction which in the facts and circumstances of the case shall not be below Rs. 40 lakhs. The statement made on behalf of the petitioner during the pendency of these proceedings that the petitioner would not bid at an amount less than 40 lakhs is also recorded. After the upset price is fixed by the Competent Authority, which shall necessarily have to be kept in a sealed cover, the process of auction shall be conducted within the period of (sic) in accordance with law having regard to the provisions of the Act and Rule 107 of the Maharashtra Co-operative Societies Rules, 1961. The petition is accordingly disposed of. There shall be no order as to costs.