(2015) 08 BOM CK 0188

In the Bombay High Court

Case No : Writ Petition No. 11424 of 2012

Suresh Narayan Rege APPELLANT

Vs

The Saraswat Coop. Bank Ltd. and Others RESPONDENT

Date of Decision : 19-08-2015

Acts Referred:

Constitution of India, 1950 — Article 226
Maharashtra Co-operative Societies Act, 1960 — Section 154, 91

Citation : (2015) 6 ABR 20 : (2015) 6 ALLMR 1 : (2016) 1 MhLj 326

Hon'ble Judges : N.H. Patil, J;S.B. Shukre, J

Bench : Division Bench

Advocate : Satish Shete and Amol Jawale i/by A.P. Steenson and Associates, for the Appellant; Bhupesh V. Samant, Advocates for the Respondent

Final Decision : Dismissed

Judgement

S.B. Shukre, J—By this writ petition, the petitioner has challenged the judgment and order dated 12.3.2012 passed in Revision Application No. 434/2006 by the Divisional Joint Registrar, Cooperative Societies Mumbai Division, Mumbai thereby refusing to set aside the sale of the property mortgaged by the petitioner to respondent no.1-Bank as a security for repayment of the loan amount borrowed by the petitioner''s concern M/s. Mohan Printery, Mumbai.

2. The petitioner had obtained a loan of approximately Rs. 22,00,000/- from respondent no.1 and as a security for repayment of the loan amount, the petitioner had mortgaged in favour of respondent no.1 his immovable property, situated at Unit No. 105, 106 and 107 in Udyog Mandir No. 1, Bhagoji Keer Marg, Mahim, Mumbai. The petitioner defaulted in making repayment of the loan amount and, therefore, dispute arose between the petitioner and respondent no.1 regarding recovery of loan amount. The dispute went before a Cooperative Court, Mumbai and an Award under Section 91 of the Maharashtra Cooperative Societies Act, 1960 was passed by consent of the parties. As per the Award, the petitioner was to make the payment to respondent no.1 by instalments. The

instalments were not paid and, therefore, execution proceedings were initiated by respondent no.1 and the subject property of the petition was attached. A writ petition was filed by the petitioner challenging the attachment. The said writ petition was dismissed and one month''s time was given to the petitioner to make payment as per order passed by the Division Bench of this Court in Writ Petition No. 2195/2002 on 9.9.2002. A review application filed against the said order dated 9.9.2002 also came to be dismissed by this court on 8.1.2003.

3. The petitioner had also filed a revision application under Section 154 of the Act being Revision Application No. 434/2006 before the Divisional Joint Registrar, Cooperative Societies, Mumbai challenging the attachment and sale notices, proclamation dated 10.5.2004, various orders passed in respect of the attachment and sale of the subject property and also the order of sale issued by the concerned Special Recovery Officer attached to respondent no.1. During the pendency of this revision application, it appears that the petitioner filed a writ petition being Writ Petition No. 5562/2009. In this petition, this court passed an order on 6.9.2011 directing the Divisional Joint Registrar to decide the revision application as expeditiously as possible and preferably within a period of six months.

4. It has emerged from the record that the petitioner apart from filing the said revision application, kept on moving the High Court by initiating further rounds of litigation. A Writ Petition No. 2125/2004 was filed by the petitioner seeking various reliefs and one of the reliefs sought was stay of the execution of decree granted by the Cooperative Court. This petition was dismissed in limini by the learned Single Judge of this Court on 30.8.2004. An appeal being Appeal No. 736/2005 was preferred against the said order before the Division Bench of this Court. This appeal was also dismissed by the Division Bench by its order passed on 27.9.2005. At that time, a statement was made on behalf of the petitioner by his learned counsel on instructions that the machinery belonging to the petitioner kept separately by the Bank in a godown, would be removed by the petitioner within a period of six weeks. In another writ petition being Writ Petition No. 5562/2009, a statement was made by the learned counsel for the petitioner on instructions that the petitioner shall remove his machinery lying in the godown of the respondent-Bank within a period of four weeks which was recorded by this Court. In the same petition, on 8.4.2010, minutes of order came to be recorded. It was specifically mentioned therein that if goods were not removed by the petitioner from the godown on or before 26.4.2010, respondent no.3-Bank (respondent no.1 in the present petition) shall be at liberty to sell the goods by auction/treaty and deposit the sale proceeds in the court. Pursuant to these minutes of order dated 8.4.2010, the sale proceeds of scrap machinery and other articles were deposited through a Pay Order bearing No. 195629 drawn on Saraswat Co-operative Bank Ltd. Fort Branch, Mumbai dated 8.6.2010.

5. Thereafter, as directed by this court, the Divisional Joint Registrar decided the revision application bearing No. 434/2006 and rejected the same by his order

passed on 12.3.2012. Now, the petitioner has challenged this very order and in its wake has also once again raised almost the same challenges which he had raised earlier before this court by filing various writ petitions.

6. We have heard Mr. Satish Shete a/w Mr. Amol Jawale i/by A.P. Steenson & Associates for the Petitioner, Mr. Bhupesh V. Samant, learned counsel for Respondent No. 1 and Mr. P.G. Sawant, learned A.G.P. for Respondent No. 9. We have also gone through the record of the writ petition with the assistance of learned counsel and learned AGP appearing for the respective parties.

7. Learned counsel for the petitioner submits that in effecting the sale of the subject property, the Special Recovery Officer has violated the provisions of Rule 107, sub-rules (11) (g) and (11) (h) of the Maharashtra Cooperative Societies Rules, 1961 (hereinafter referred to as "the Rules"). He submits that the sale proclamation did not mention any reserve price and the balance amount, as required under the said provisions, was not paid by the auction purchasers, the respondent nos.5 to 7, within 15 days from the date of the sale. He submits that these provisions are mandatory in nature and as they have not been complied with, the entire sale has been vitiated.

8. Learned counsel for respondent no.1 submits that the sale has taken place in August-2004 and the entire process of sale including the execution of consent decree granted by the Cooperative Court came to be challenged by the petitioner through various rounds of litigation and the petitioner has not succeeded any where. He submits, after the rights of the parties having been conclusively determined in these proceedings, now the petitioner cannot be permitted to raise a dispute in respect of the rights of the parties all over again. He further submits that there is not a single instance brought to the notice of the court by the petitioner showing as to how the provisions of Rule 107, sub-rules (11)(g) and (11)(h) have been violated in the instance case. Therefore, according to him, the writ petition deserves to be dismissed.

9. Learned AGP appearing for respondent no.9 has submitted that an appropriate order may be passed in the matter.

10. The first objection of the learned counsel for the petitioner is in respect of non mentioning of reserve price in the sale notice as required under Rule 107 (11) (g) of the Rules. However, upon perusal of Rule 107 which relates to sale of immovable property in execution of a decree, we could not come across any provision therein mandatorily requiring fixation of reserve price in the sale notice nor could learned counsel for the petitioner point out to us presence of any such provision therein. The objection so taken, therefore, cannot be accepted and is rejected.

11. The next contention of learned counsel for the petitioner is about the entire sale being null and void because of failure of the auction purchasers, respondent nos.5 to 7, to pay remainder of purchase money within 15 days from the date of sale. According to him, this provision of law as contained in Rule 107 (10)(h) of

the Rules is mandatory in nature and its non compliance is not a mere irregularity but an illegality which renders the entire sale as nullity.

12. The proposition of law canvassed before this court by the learned counsel for the petitioner that Rule 107 (10)(h) of the Rules is mandatory in nature and non compliance therewith makes the sale a nullity is well settled. In the case of Shilpa Shares and Securities and Others Vs. The National Co-operative Bank Ltd. and Others, (2007) 6 JT 402 : (2007) 6 SCALE 545 : (2007) 12 SCC 165 : (2007) 5 SCR 1128 , the Hon''ble Apex Court has held that non compliance with this provision is not a mere irregularity but something which renders the sale a nullity.

13. The question, whether there has been a non compliance with the afore-stated rule or not, however, is a question of fact and has to be determined on the basis of either facts admitted or proved in evidence. In exercise of writ jurisdiction under Article 226 of the Constitution of India which has been invoked by the petitioner in the present case, any determination of such a question could only be on the basis of admitted facts. In the present case, the contention of non compliance with the said mandatory requirement of law has been disputed by the respondent no.1. No such material as bringing on record uncontroverted facts leading to a conclusive finding about non compliance with the said requirement of law has been produced on record by the petitioner.

14. That apart, in the earlier rounds of litigation before this Court as well as the Hon''ble Apex Court, where the dispute about consent award, the execution of the consent decree and sale proceedings initiated by the Special Recovery Officer had reached, the legality and correctness of the consent decree as well as the sale proceedings have been upheld. Even when Appeal No. 736/2005 arising out of Writ Petition No. 2125/2004 came up for hearing on 27.9.2005 before the Division Bench of this Court, the petitioner had an opportunity to raise the challenge now being raised by him. On that day, the then learned counsel appearing for the respondent no.1 by making a statement brought to the notice of the court that factory premises, the subject matter of the present petition, were already sold in August-2004 and that sale proceeds thereof were in excess of the decretal amount. It was also stated before the court on behalf of the respondent no.1 that after adjusting the decretal amount, the balance amount of the sale proceeds was still lying with the respondent no.1 and in spite of repeated requests made to the petitioner for taking back the balance amount, the petitioner did not choose to claim it. It was also stated by the then learned counsel for the respondent no.1 that the petitioner was at liberty to take away the machinery kept separately by the Bank in a godown. On that day, the petitioner was personally present and on his instructions, his learned counsel made a statement before the court that within a period of six weeks, the machinery belonging to him would be removed.

15. It is also not in dispute that the petitioner in another Writ Petition No. 5562/2009, gave a categorical undertaking on 8.4.2010 to the learned Single

Judge of this court that he would remove all goods from the godown or sell them on the spot on or before 26.4.2010. He also gave an undertaking to the court that he would abide by the order of Division Bench of this Court passed on 27.9.2005.

16. It could be seen from the above that in all these proceedings no challenge to the sale which had been completed long back on the ground that remainder of the balance amount of the purchase price was not paid within stipulated time by the auction purchasers was not made. On the contrary, the petitioner''s conduct was such as to accept the sale of the subject property by respondent no.1 which has resulted in settling finally the rights between the parties.

17. Learned counsel for the petitioner has also submitted that non compliance with the afore-stated provisions of law has resulted in substantial injury and, therefore, the sale was null and void. For this submission, he has placed reliance on the case of Manilal Mohanlal Shah and Others Vs. Sardar Sayed Ahmed Sayed Mahamad and Another, AIR 1954 SC 349 : (1955) 1 SCR 108 .

18. Learned counsel for the respondent no.1, placing reliance on the case of Jaswantlal Natvarlal Thakkar Vs. Sushilaben Manilal Dangarwala and others, AIR 1991 SC 770 : (1991) 2 SCC 691 Supp , submits that the material irregularities in conduct of sale must also be shown through evidence to have caused some substantial injury to the petitioner in order to hold the sale as null and void.

19. There is no dispute about the principle of law that whenever there is a material irregularity or illegality in conduct of sale and it causes substantial injury to the borrower, the sale is liable to be set aside. However, in the instant case, the petitioner has not demonstrated any substantial injury having been caused to him.

20. In the result, we find that there is no merit in this petition and it deserves to be dismissed. The petition stands dismissed.

