
(2023) 12 BOM CK 0059

In the Bombay High Court

Case No : Writ Petition No. 8475 Of 2022, Interim Application No. 16570 Of 2022

Swati Mangesh Sawant

APPELLANT

Vs

State Of Maharashtra And Ors

RESPONDENT

Date of Decision : 19-12-2023

Acts Referred:

Maharashtra Civil Services Rules, 1981 — Rule 107(5)A
Maharashtra Cooperative Societies Act, 1960 — Section 21A(3), 95, 96, 98, 99, 101, 101(1), 105, 154, 156

Citation : (2023) 12 BOM CK 0059

Hon'ble Judges : Sandeep V. Marne, J

Bench : Single Bench

Advocate : Uttam Rane, Chandrakant P. Deogirikar, Akshay Kapadia

Final Decision : Allowed

Judgement

Sandeep V. Marne, J

1. Rule. Rule made returnable forthwith. With the consent of the learned counsel appearing for the parties, Petition is taken up for hearing.

2. By this petition, Petitioner challenges the Notice issued by the Special Recovery Officer dated 12 March 2021 and Recovery Certificate dated 10 February 2020 issued by the Assistant Registrar of Cooperative Societies. Petitioner is neither a borrower nor a guarantor and the Recovery Certificate dated 10 February 2020 is not issued in his name and thus no amount is sought to be recovered from him. However, Notice dated 12 March 2021 is issued by the Special Recovery Officer proposing to attach immovable properties of the borrower. Petitioner has purchased Flat No.001/E-2, Shree Bhavdevi Krupa Co-operative Housing Society Ltd., Pramila Nagar, Dahisar, Mumbai-400 068 (the flat) from the borrower and she apprehends that the flat would be attached by the Recovery Officer for execution of the Recovery Certificate dated 10 February 2020 and has accordingly filed the present petition. The said flat is purchased by the Petitioner from the borrower. Apprehending attachment of the said flat, the

Petitioner has filed the present petition.

3. Briefly stated, facts of the case are that Respondent No.4 occupied a structure, which was coming in the alignment of work of Main Link Road undertaken by the Mumbai Metropolitan Region Development Authority (MMRDA). In his capacity as Project Affected Person, MMRDA allotted a tenement bearing Flat No. 001 in Building No. S-2E admeasuring 225 sq. ft carpet area towards permanent rehabilitation vide allotment letter dated 02 September 2008. One of the conditions stipulated in the allotment letter prohibited Respondent No.4 from selling or transferring the tenement for a period of ten years from the date of allotment.

4. Petitioner claims that by Agreement for Sale executed in September 2011, Respondent No. 4 agreed to sell the flat to him for consideration of Rs. 13,75,000/-. She claims that with execution of the said Agreement, she paid part consideration of Rs. 4,00,000/- to Respondent No.4 and agreed to pay the balance amount of Rs. 9,75,000/- within 30 days of handing over of peaceful and vacant position of the flat. It is Petitioner's case that on 4 October 2011, she paid balance amount of Rs.9,75,000/- to Respondent No.4 and that the entire sale transaction was complete. According to Petitioner, the Agreement could not be registered on account of prohibition on sale of flat for 10 years.

5. Respondent No.3 is a Cooperative Credit Society. Respondent No. 4 availed credit facilities from Respondent No.3-Society for purchase of vehicles for his touring business. By applications dated 21 March 2017 and 20 September 2017, Respondent No.4 availed credit facility of Rs. 7,50,000/- and Rs. 8,00,000/- respectively and executed the necessary loan documents. It is the case of Respondent No.4 that on account of COVID-19 outbreak, he could not pay the instalments of the loan to Respondent No.3-Society. Recovery proceedings were initiated by Respondent No.3-Society under the provisions of Section 101 of the Maharashtra Cooperative Societies Act, 1960 (MCS Act) against Respondent No.4 (Borrower) and Respondent Nos.5 and 6 (Guarantors). The Assistant Registrar issued Recovery Certificates dated 10 February 2020 for amounts of Rs.7,65,242/- and Rs.8,58,554/- with future interest at the rate of 14% per annum. The Recovery Officer of Respondent No.3-Society issued demand notice dated 27 February 2022 to Respondent Nos. 4 to 6. Further notices for attachment were issued on 11 March 2022 to Respondent Nos. 4 to 6. Since the amounts under the Recovery Certificates remained unpaid by Respondent Nos.4 to 6, the Recovery Officer decided to attach the immovable properties of Respondent No.4.

6. In the meantime, a registered Agreement for Sale came to be executed between the Petitioner and Respondent No.4 on 26 February 2021, under which the Flat was once again shown to have been transferred in the name of the Petitioner for consideration of Rs. 19,00,000/-. On the date of execution of Agreement for Sale, part consideration of Rs.5,000/- has been paid by Petitioner and the balance amount of Rs.18,95,000/- was agreed to be paid on the date of

handing over of peaceful and vacant possession of the Flat.

7. The Recovery Officer presumed that the said flat continued to be in the ownership of Respondent No.4 and issued notices dated 12 March 2021 under Section 156 of the MCS Act read with Rule 107(5)A of the MCS Rules, 1981 for attachment of the flat on 27 March 2021. In the notice, address of Respondent No.4 was mentioned as that of the Flat. The Recovery Officer also sought protection from the Senior Police Inspector of Dahisar Police Station for carrying out the procedure of attachment. Apprehending that the Recovery Officer would attach and sale the flat, Petitioner has filed the present Petition challenging the Notices before Attachment dated 12 March 2021 as well as Recovery Certificates dated 12 February 2020. This Court by order dated 25 March 2021, restrained the Recovery Officer from attaching the flat. The interim order has been extended from time to time and continues to operate.

8. Mr. Rane, the learned counsel appearing for the Petitioner would submit that the said Flat no longer belongs to the Borrower-Respondent No.4 and therefore the same cannot be attached or sold for recovery of dues from Respondent No.4. That the flat has been sold to the Petitioner in the year 2011 after payment of entire amount of consideration by Petitioner to Respondent No.4. In support of his contention of payment of full amount of consideration, Mr. Rane has placed on record the bank statements of Petitioner's husband Mr. Mangesh Harishchandra Sawant. The Petitioner claims that possession of the flat was handed over to her in the year 2011 itself. That the registration could not be effected on account of restriction on transfer of the Flat in the allotment letter issued by the MMRDA. That after completion of the said period, a registered Agreement for Sale has been effected between the parties on 26 February 2021. He would submit that the Flat is otherwise not mortgaged by Respondent No.4 to secure repayment of credit facilities. That the Sale has not been effected for the purpose of avoiding payment of liability by Respondent No.4, but the same was sold long before availing credit facilities from Respondent No.3-Society. That the credit facilities were availed by Respondent No.4 for purchase of vehicles and it is not known as to whether the Society has attempted recovery by sale of the vehicles. That additionally, there are two guarantors to the loan from whom recovery could be effected. That in such circumstances, the Respondent No.3-Society cannot execute Recovery Certificates by sale of Flat, which is owned by Petitioner.

9. Per-contra, Mr. Deogirikar, the learned counsel appearing for Respondent No.3 would oppose the petition and submit that the Petition itself is not maintainable. He would submit that the Petitioner has challenged the Recovery Certificates directly before this Court without availing the alternate remedy of filing Revision under the provisions of Section 154 of the MCS Act. That Revision is not deliberately filed so as to avoid deposit of 50% amount mandated under Section 154 of the MCS Act. That the entire sale transaction shown to have been executed between the Petitioner and Respondent No.4 is bogus. That the

registered Agreement for Sale executed on 26 February 2021 is after issuance of the Recovery Certificate and therefore the same is void and not binding on the Society under the provisions of Section 99 of the MCS Act. That once Recovery Certificate was issued it was not lawful for Respondent No.4 to transfer any of his assets and such transfer is not binding on the Society. That even otherwise transfer of title in respect of the Flat has not actually taken place in favour of the Petitioner who has paid only an amount of Rs.5000/- by way of Agreement for Sale dated 26 February 2021. That therefore Respondent No.4 continues to own the Flat and therefore the Society is entitled to attach and sell the same for recovery of its dues. He would pray for dismissal of the petition.

10. Mr. Kapadia, the learned counsel appearing for Respondent No.4-Borrower would submit that the borrower is ready and willing to repay the outstanding loan amount of the Society. He would confirm sale of the Flat in favour of the Petitioner. He would submit that Respondent No.4 was without any income after COVID pandemic and that he has recently secured a job and is earning salary of Rs.15,000/-per month, out of which he is willing to pay an amount of Rs.10,000/- to the Society towards repayment of the loan.

11. Rival contentions of the parties now fall for my consideration.

12. A short question that is involved in the present petition is whether Respondent No.4-Credit Society can initiate proceedings to attach and/or to sell the Flat which was previously in the ownership of the borrower and now the ownership in respect thereof is claimed by Petitioner. To prove transfer of title, reliance is placed on two documents. Initially, Agreement for Sale is shown to have been executed in September 2011, under which Petitioner agreed to purchase the flat for consideration of Rs. 13,75,000/-. Petitioner has produced evidence of payment of the entire amount of consideration of Rs.

13,75,000/- to Respondent No.4. She also claims possession of the flat being handed over to her on payment of the entire amount of consideration. It is Petitioner's case that registered Agreement with Respondent No.4 could not be executed at that time on account of restriction imposed by MMRDA on transfer of the Flat for a period of 10 years. After completion of period of 10 years, an Agreement for Sale dated 26 February 2021 is executed and registered between the Petitioner and Respondent No.4. However, instead of making any reference to the earlier Agreement dated September 2011, the Agreement for Sale dated 26 February 2021 creates a picture as if a fresh transfer is effected by that document. This is possibly done to steer clear of any reference to the transfer transaction of 2011 so as to avoid attraction of any action by MMRDA. Be that as it may. This Court is not concerned with the issue of permissibility of such transfer in the light of restriction put by MMRDA. The fact however remains that out of the agreed amount of consideration of Rs. 19,00,000/-, only an amount of Rs.5,000/- is shown to have been paid on 1 March 2021 and the balance amount of consideration of Rs.18,95,000/- was to be paid on the date of handing over of the peaceful and vacant possession of the Flat to the Petitioner. If the entire

purchase price of Rs.13,75,000/- agreed in the year 2011 was already paid by the Petitioner to Respondent No.4, it is incomprehensible as to why consideration of Rs.19,00,000/- is shown to be payable under the Agreement for Sale dated 26 February 2021. Under that Agreement, the entire amount of Rs. 19,00,000/- is shown to be payable afresh to Respondent No.4. After execution of Agreement for Sale dated 26 February 2021, Respondent No.4 has executed Statement of Admission dated 2 April 2021 addressed to the Respondent No.3-Society in which he has admitted execution of Agreement in the year 2011 and receipt of consideration of Rs.13,75,000/-. He has also admitted that possession of the Flat is with the Petitioner since 2011. He requested the Society to grant additional instalments for repayment of the loan. In this manner, Respondent No.4 admits that the sale transaction is completed in favour of the Petitioner. He has not claimed any further amount from the Petitioner under the Agreement for Sale dated 26 February 2021.

13. Mr. Deogirikar has placed strong reliance on the provisions of Section 99 of the MCS Act in support of his contention that the transfer effected after issuance of the recovery certificate is not binding on the Society. Section 99 reads thus :

99. Private transfer of Property made after issuance of certificate void against society.

Any private transfer or delivery of, or encumbrance or charge on, property made or created after the issue of the certificate of the Registrar, Co-operative Court, Liquidator or Assistant/Registrar, as the case may be, under section 98 shall be null and void as against the society on whose application the said certificate was issued.

14. Thus, under Section 99, any private transfer of property made or created after issuance of certificate by Registrar under Section

98 is null and void against the Society, on whose application such Certificate is issued. Thus, the provisions of Section 99 apply only in respect of the Certificates issued under section 98. It would therefore be apposite to refer to the provisions of section 98, which reads thus :

98. Money how recovered.

Every order passed by the Official Assignee of a de-registered society under sub-section (3) of section 21A or every order passed by the Registrar or an authorised officer by him under section 88 or by the Registrar or the Co-operative Court under section 95 or by the Co-operative Court under section 96, every order passed in appeal under the last preceding section, every order passed by a Liquidator under section 105, every order passed by the State Government in appeal against orders passed under section 105 and every order passed by the State Government or by the Registrar in revision under section 154 or every order passed by the Registrar for recovery under this Act shall, if not carried out,—

(a) On a certificate signed by the Official Assignee or the Registrar or the Co-operative Court or a Liquidator, be deemed to be a decree of a Civil Court, and shall be executed in the same manner as a decree of such Court, or

(b) be executed according to the law and under the rules for the time being in force for the recovery of arrears of land revenue:

Provided that, any application for the recovery in such manner of any such sum shall be made by the Collector, and shall be accompanied by a certificate signed by the Registrar or Co-operative Court, Such application shall be made within twelve years from the date fixed in the order and if no such date is fixed, from the date of the order.

15. Section 98 thus deals with recovery of money covered by order or certificate issued by the official assignee or registrar for recovery of dues under the Act. The Section provides that such recovery can be made by treating the order or certificate as decree of a civil court and as arrears of land revenue. The execution under Section

98 could be done on an application by the Collector.

16. in *Vithal Yadav Mhase v. Amdar Balasaheb Thorat Nagari Sahakari Path Sanstha Maryadit*, (2001) 3 Mah LJ 650 : (2002) this Court held that recovery certificate issued by the Registrar under Section 101 can be executed under Section 156 of the MCS Act and not under Section 98. This Court held as under:

3. Apparently, therefore, whenever the certificate is issued by the Registrar under sub-section (1) of section 101 of the said Act, the mode described for recovery of the amount is under section 156 of the said Act and not by taking resort to section 98 of the said Act. Being so, the impugned orders which have been passed taking shelter of the provisions of section 98 of the said Act cannot be sustained in the facts and circumstances of the case and are liable to be quashed and set aside.

17. However in *Akole Taluka v. Punaji*, (2019) 6 Mah LJ 917 this Court held it is for a party to choose the forum for execution of recovery certificate wither under Section 156 or through a civil court under Section 98 of the Act. This Court held as under:

12. From the discussion made by the learned Civil Judge in the impugned order, it is quite evident that, the learned Judge could not distinguish between the execution of the Award passed under section 96 of the Act and the recovery certificate issued under section 101 of the Act. As has been observed by this Court in *Vithal Yadav Mhase v. Amdar Balasaheb Thorat Nagari Sahakari Path Sanstha Maryadit*, 2001 (3) Mh.L.J. 650, where recovery certificate is issued by Registrar under section 101(1) of the Maharashtra Co-operative Societies Act, 1960, the mode prescribed for recovery of the amount is under section 156 of the said Act and recourse cannot be taken to section 98 of the said Act, whereas as held by this Court in the case of *Onkar Rajaram Wathodkar* (cited supra), it is

open for the party in whose favour the Award has been passed under section 96 of the Act to select a particular forum of execution and if the party wants to get the said Award executed like a decree of the Civil Court, the Civil Court of local jurisdiction cannot refuse to execute the said Award.

18. In the present case, Respondent No. 3-Society has not opted for execution of recovery certificate by way of application by Collector to the Civil Court under Section 98 of the MCS Act. On the contrary it has chosen to execute the same by taking recourse to Section 156 of the Act. Therefore provisions of Section 98 would have no application to the present case and consequently provisions of Section 99 would also not have any application.

19. Mr. Deogirikar has also raised objection of availability of alternate remedy of filing revision to challenge recovery Certificate. There is no substantive challenge to the Recovery Certificate dated 10 February 2020. However, an interim relief is prayed in respect of the said Recovery Certificates in the present petition. It is Mr. Deogirikar's contention that the Recovery Certificates are also indirectly under challenge. Even if the contention is accepted, in my view it is not at all necessary for the Petitioner to challenge the Recovery Certificates. Petitioner's case is simple. She says that the Bank cannot execute the Recovery Certificate by attaching the flat which is no longer owned by the Borrower. It is an admitted position that the flat was never mortgaged with the society. Thus, there was no prohibition on sale or transfer of the Flat by Respondent No.4 to Petitioner. To seek a relief of non-executability of Recovery Certificate against the flat owned by the Petitioner, it was not at all necessary for her to challenge the Recovery Certificates. Therefore the so-called indirect prayer to challenge Recovery Certificates in my view is unnecessary. Under Section 154 of the MCS Act, a third person cannot seek relief of non-executability of recovery certificate against property owned by him/her. It therefore cannot be stated that Petitioner has an alternate or equally efficacious remedy of filing Revision under Section 154 of the MCS Act to challenge the action of the Recovery Officer to attach or sell Petitioner's flat. The objection of alternate remedy, therefore, deserves rejection.

20. Considering the overall conspectus of the case, it is seen that the Petitioner had agreed to purchase the Flat from Respondent No.4 in the year 2011 itself and had parted with the entire consideration of Rs.13,75,000/-. The said transaction remained incomplete possibly on account of restriction by MMRDA for selling the flat for 10 years. For removing that lacuna, a registered document for Sale is executed on 26 February 2021. The Agreement for Sale dated 26 February 2021 is not happily drafted, which envisages payment of amount of Rs.18,95,000/- to Respondent No.4 who had already pocketed the entire amount of consideration in the year 2011 itself. However this is not a competing claim between the Petitioner and Respondent No.4 about completion or otherwise of the sale transaction. It is not the case of Respondent No.4 that the sale transaction is not complete. He has infact admitted that he has received the entire amount of consideration. He further admits that Petitioner has been in

possession of the Flat since the year 2011 and that the transaction is complete. The Society would not be in a position to seek a declaration that the sale transaction is incomplete by way of a sidewind while seeking to enforce the Recovery Certificate issued in its favour. In my view, therefore Respondent No.3-Society cannot be permitted to attach the Flat of the Petitioner for effecting recovery of amounts due from Respondent No.4.

21. Accordingly, the Petition succeeds. The impugned Notice before attachment dated 12 March 2021 is set aside. It is however clarified that this Court has not gone into the issue of correctness of the Recovery Certificate or into the liability of the borrower to repay the loan amount to the society. All contentions in this regard are kept open. It is for the Society to either accept the offer made by Respondent No.4 for repayment of the credit facilities by way of instalments or to proceed to attach other properties of Respondent No. 4 or of the Guarantors.

22. With the above observations, the Writ Petition is allowed and disposed of without any order as to costs. Rule is made absolute.