

Deenadayal Nagari Sahakari Bank Ltd. & Anr. Vs. Munjaji and Ors.

Civil Appeal No. 818 of 2022
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Full judgment text

Deenadayal Nagari Sahakari Bank Ltd. & Anr. Vs. Munjaji and Ors.

[Civil Appeal No. 818 of 2022]

Ratnakar S/o. Manikrao Gutte Vs. Munjaji and others

[Civil Appeal No. 819 of 2022]

M.R. Shah, J.

1. Feeling aggrieved and dissatisfied with the impugned judgment and order dated 30.07.2021 passed by the High Court of Judicature at Bombay, Bench at Aurangabad in Writ Petition No. 570 of 2012, by which the High Court has allowed the said writ petition preferred by respondent no.1 herein and has set aside the auction sale in respect of the lands in question and also ordered that the Sale Certificate dated 19.01.2011 executed by the appellant-bank in Civil Appeal No. 818/2022 in favour of the auction purchaser stands cancelled, both, the Bank as well as the auction purchaser have preferred the present appeals.

2. The facts leading to the present appeals in a nutshell are as under: One Vaishnavi Hatcheries Company Limited, of which respondent no.1 herein is the Director (hereinafter referred to as the 'borrower'), borrowed loan from the appellant-bank and one Vaidanath Nagari Sahakari Bank. As a security to the said loan, four properties, i.e., survey nos. 102, 440, 437 & 439 were mortgaged. Property survey No. 439 was mortgaged with Vaidanath Bank, property survey No. 437 was mortgaged with the appellant-bank and property survey Nos.440 & 102 were jointly mortgaged with the appellant-bank and Vaidanath Bank.

2.1 That the borrower defaulted in payment of the appellant-bank and Vaidanath Bank in the year 2010. Both the banks initiated separate recovery proceedings against respondent no.1 and the borrower. A Recovery Certificate dated 6.2.2010 was issued in favour of the appellant-bank under Section 101 of Maharashtra Co-operative Societies Act, 1960 (hereinafter referred to as the 'MCS Act, 1960'). According to the appellant-bank, a proclamation was published in the daily newspaper 'Sakal' on 22.02.2010 as well as on 23.02.2020, followed by the publication in the daily newspaper 'Sakal' on 24.02.2010. According to the appellant-bank, a proclamation as per Rule 107(11) of the Maharashtra Co-operative Societies Rules, 1961 (hereinafter referred to as the 'MCS Rules, 1961') was issued on 26.05.2010 giving 30 days' time to respondent no.1 to pay the amount.

2.2 That the Deputy Joint Registrar, Co-operative Societies fixed the upset price at Rs.98,10,000/- vide communication dated 26.07.2010. Vaidanath Bank also initiated the process of auction of the property in survey no. 439 in terms of the recovery certificate issued in its favour. The said proceedings so far as the Vaidanath Bank is concerned had attained finality. Upset price fixed by the Deputy Joint Registrar, Cooperative Societies was challenged by respondent no.1 by way of Revision Petition No. 58/2010 before the Divisional Joint Registrar.

2.3 The appellant-bank issued a tender notice to sell the mortgaged properties on 9.9.2010, which was published in the daily newspaper on 14.09.2010. On the date fixed for submission of tender, the Divisional Joint Registrar, Co-operative Societies granted stay of the auction proceedings in Revision Application No. 58/2010 filed by respondent no.1 herein. However, subsequently, the Divisional Joint Registrar dismissed the said Revision Application vide order dated 23.11.2010. On dismissal of the revision application and vacating the stay, bids were opened on 29.11.2010.

The appellant in Civil Appeal No. 819/2022 - Ratnakar Gutte was found to be the highest bidder and he offered the bid of Rs.1,26,00,000/-. The auction purchaser deposited 15% of the said amount on the same day, i.e., on 29.11.2010. Thereafter, an application was made to the District Deputy Registrar for seeking approval to accept the balance 85% of the amount from the auction purchaser which according to the bank

was required as per the circular issued by the Co-operative Commissioner & Registrar dated 23.07.2004. The approval was received from the District Deputy Registrar on 29.12.2010. Immediately on receipt of the approval, the auction purchaser deposited the remaining 85% of the amount on 12.01.2011, which was within 15 days from the date of approval.

2.4 A Sale Certificate was issued in favour of the auction purchaser on 17.01.2011 and the sale deed was also executed in favour of the auction purchaser on 19.01.2011. No further steps were taken by respondent no.1 immediately. He also did not come forward to deposit 5% of the amount equal to the purchase money within 30 days from the date of the sale so as to seek setting aside of the sale in terms of Rule 107(13) of the MCS Rules, 1961. No objection was raised before the Recovery Officer about any irregularity or fraud as required under Rule 107(14) of the MCS Rules, 1961. It appears that the officers of the bank went to take possession of the property, they were attacked and therefore the officers of the bank lodged an FIR on 24.02.2011 for an attack on them while acquiring possession of the property.

2.5 Thereafter, respondent no.1 challenged the auction proceedings before the Divisional Joint Registrar by way of Revision Application No. 11/2011 under section 154 of the MCS Act, 1960. Respondent no.1 filed an FIR being FIR No. 138/2011 alleging that the mortgaged deed of the property and sale deed with respect to land survey no. 437 (to the extent of 34R) and land survey no. 440 (to the extent of 72R) are illegal. Vide order dated 13.04.2011, the Divisional Joint Registrar dismissed Revision Application No. 11/2011 filed by respondent no.1 herein.

Respondent no.1 filed Writ Petition No. 570/2012 before the High Court challenging order dated 13.04.2011 in Revision Application No. 11/2011 passed by the Divisional Joint Registrar upholding the auction proceedings. Respondent no.1 also challenged Recovery Certificate dated 6.2.2010 before the High Court by filing two writ petitions, i.e., Writ Petition No. 4618/2011 & Writ Petition No. 9282/2011. Both, Writ Petition No. 4618/2011 & Writ Petition No. 9282/2011 came to be dismissed by the High Court, vide order dated 20.02.2012. By judgment and order dated 23.09.2013, the High Court quashed the criminal proceedings initiated by respondent no.1 against the officers of the bank and others concerned vide FIR No. 138/2011.

2.6 Feeling aggrieved and dissatisfied with the order passed by the learned Single Judge in Writ Petition No. 4618/2011, respondent no.1 preferred Letters Patent Appeal No. 130/2012. The same came up for hearing before the Division Bench on 5.3.2014. Respondent no.1 withdrew the said Letters Patent Appeal and therefore the said LPA No. 130/2012 came to be dismissed as withdrawn.

2.7 By the impugned judgment and order dated 30.07.2021, the High Court has allowed Writ Petition No. 570/2012 challenging order dated 13.04.2011 passed by the Divisional Joint Registrar in Revision Application No. 11/2011 upholding the auction proceedings and consequently has set aside the auction sale in respect of lands survey nos. 440, 437 and 102 dated 29.11.2010. By the impugned judgment and order, the High Court has also set aside the Sale Certificate in favour of the auction purchaser dated 19.01.2011.

The High Court has directed the appellant-bank to refund the sale price to the auction purchaser along with interest @ 10% per annum from the date of deposit till payment. From the impugned judgment and order passed by the High Court, it appears that the High Court has allowed the writ petition and set aside the auction sale on the ground that there was a noncompliance of mandatory provisions of Rule 107(11) (e) (f) and Rule 107(11)(h) of the MCS Rules, 1961.

2.8 Feeling aggrieved and dissatisfied with the impugned judgment and order passed by the High Court, the bank as well as the auction purchaser both have preferred the present appeals.

3. Shri Sudhanshu S. Choudhari, learned counsel appearing on behalf of the appellants in Civil Appeal No. 818/2022 has vehemently submitted that, as such, respondent no.1 has not deposited even a farthing towards the loan amount since 2010. It is submitted that he even did not deposit the amount in terms of the proclamation dated 26.05.2010, nor did he deposit the 5% amount in terms of Rule 107(13) of the MCS Rules, 1961 for seeking setting aside the auction/sale.

3.1 It is contended that the High Court has not properly appreciated the fact that in the earlier two rounds of litigation, respondent no.1 - borrower failed, i.e., in his challenge to the recovery proceedings and challenge to the base price. It is submitted that this is the third attempt to stall the recovery of public money.

3.2 It is further urged that as such the High Court has not properly appreciated and/or considered that the properties at Survey Nos. 440 & 102 were jointly mortgaged to the appellant-bank and the Vaidanath Bank and were inseparable. It is submitted that out of the auction amount, Rs. 47 lakhs were paid to Vaidanath Bank and despite the above fact, Vaidanath Bank was not made party before the High Court. It is submitted that in writ petition No. 570/2012, as such, there was no challenge to the auction sale of properties bearing survey nos. 102 & 440, jointly mortgaged with the appellant-bank and the Vaidanath Bank.

3.3 It is further contended by learned counsel appearing on behalf of the appellant-bank that once having held by the High Court that since respondent no.1 did not exercise the right under Rule 107(13), Revision Application No. 11/2011 under Section 154 of the MCS Act, 1960 was not maintainable, thereafter it was not open for the High Court to pass the impugned judgment and order in the writ petition in which the order passed in the revision application was under challenge.

3.4 It is submitted that in the present case, Vaishnavi Hatcheries was the borrower and respondent no.1 is the only Director of the borrower. It is submitted that the borrower - Vaishnavi Hatcheries has accepted the auction as it has not challenged the same. It is therefore submitted that challenge to the auction/sale by respondent no.1 as a director in his individual capacity was not maintainable. 3.5 It is further contended that as such respondent no.1 did not raise any objection before the Recovery Officer in terms of Rule 107(14) of the MCS Rules, 1961.

That in view of the proviso to the said Rule, no sale could be set aside on the ground of irregularity, mistake or fraud unless the Recovery Officer is satisfied that the applicant has sustained substantial injury due to it. It is submitted that in fact the order of the High Court would cause substantial injury to respondent no.1 as he will have to pay interest at the rate of 15% per annum from the date of default, i.e., from 2010 till date. It is submitted that the amount if calculated at present would come to Rs. 3,54,58,836/- and after addition of 10% to be paid to the auction purchaser, the amount would be Rs.6,15,05,589/-.

3.6 It is further submitted that the High Court has not properly considered the conduct on the part of respondent no.1. This is because respondent no.1 has filed several proceedings in several Courts to stall the recovery of the outstanding debt. It is submitted that at this stage, to initiate a fresh process would cause substantial injury to the appellant as the life of the machinery auctioned was only three years and the appellant will not be able to recover the amount which is public money. It is submitted that the High Court has even erroneously asked the appellant-bank to repay the sale price to the auction purchaser along with interest at the rate of 10% per annum from the date of deposit till payment, which is in the nature of a penalty against the bank.

3.7 It is further urged that even otherwise, on facts also, the High Court has erred in observing and holding that there was a breach of Rules 107(11)(e), (f) & (h) of the MCS Rules, 1961. That the High Court has committed a grave error in observing and holding that in terms of Rule 107(11)(e) and (f), there was no gap of thirty days between the proclamation and the sale. It is stated that the date of proclamation was 20.02.2010 and 26.05.2010 and the date of auction was 28.09.2020. Therefore, there was a clear gap of thirty days between the two. It is submitted that the High Court has erroneously taken the date of publication of notice as the date of proclamation.

3.8 It is further submitted that the High Court has also committed an error in holding that there was a breach of Rule 107(11)(f) by not issuing a fresh proclamation. That the High Court has erred in holding that in terms of Rule 107(11)(f), a fresh proclamation was required to be issued since the auction was adjourned for more than seven days. It is urged that the High Court has not considered that in terms of proviso to Rule 107(11)(f), only where the Recovery Officer or the Sale Officer in his discretion adjourns the sale for a period longer than seven days, a fresh proclamation was required to be issued.

That in the instant case, there was no such discretion exercised either by the Recovery Officer or the Sale Officer. It is submitted that the sale was required to be adjourned as there was a stay of the auction granted on the very date fixed for it by the Divisional Joint Registrar vide order dated 28.09.2010 at the instance of respondent no.1, which came to be vacated on 23.11.2010 and thereafter within a period of seven days the auction was held.

3.9 Making the above submissions, it is prayed to allow the present appeal and to quash and set aside the impugned judgment and order passed by the High Court.

4. Shri Nishant Katneshwarkar, learned counsel appearing on behalf of the auction purchaser, while adopting the submissions made on behalf of the appellant-bank, has further submitted that the High Court has erred in holding that the auction purchaser did not deposit the balance 85% amount within the stipulated time. It is submitted that as per circular dated 23.07.2004 issued by the Cooperative Commissioner & Registrar, Cooperative Societies, all the proposals for sale confirmation were required to be submitted to the Assistant Registrar/District Deputy Registrar. It is submitted that in the present case the bids were opened and tender was allotted to the auction purchaser as he was the highest bidder and he deposited 15% of the amount on 29.11.2010.

That an application was made to the District Deputy Registrar for seeking his approval and to accept the balance 85% of the amount. That the same was required as per circular dated 23.07.2004. That the approval was received from the District Deputy Registrar on 29.12.2010 and immediately thereafter within a period of 15 days, i.e., on 12.01.2011, the auction purchaser had deposited the remaining 85% of the amount and thereafter the sale certificate came to be issued in favour of the auction purchaser on 17.01.2011. It is submitted that therefore the High Court has erred in observing that the auction purchaser did not deposit the 85% of the balance amount of sale consideration within the stipulated time provided under the Rules. It is urged that therefore the High Court has committed a grave error in setting aside the entire sale which was held in 2010/2011.

5. The present appeals are vehemently opposed by Shri Santosh Paul, learned Senior Advocate appearing on behalf of respondent no.1. It is submitted that in the present case, the High Court has rightly held that the auction sale was in contravention of Rules 107(11)(e), 107(11) (f), 107(11)(g) & 107(11)(h) of the MCS Rules, 1961.

5.1 It is submitted that according to Rule 107(11)(e) of the MCS Rules, 1961, the proclamation was to be published thirty days before the date for sale. But in the instant case, no such proclamation was made for the auction sale held on 29.11.2010. It is submitted that the proclamation was issued on 09.09.2010 and was published on 14.09.2010 for opening of tender on 28.09.2010, which was within the period of thirty days from the date of proclamation. It is submitted, therefore the High Court has rightly held that the auction was in breach of Rule 107(11)(e) of the MCS Rules, 1961.

5.2 It is further submitted that as per second proviso to Rule 107 (11) (f) of the MCS rules, if, for any reason, the sale has been postponed beyond seven days, a fresh proclamation is required to be issued. It is contended that in the present case, the Divisional Registrar stayed the auction and the proclamation of auction by order dated 28.09.2010 and the revision was dismissed on 23.11.2010. The auction was scheduled to be held on 28.09.2010 but the auction was actually held after 61 days, i.e., on 29.11.2010 without a fresh proclamation as mandated by second proviso to Rule 107(11)(f) of the Rules. It is submitted that second proviso to Rule 107(11)(f) clearly stipulates the mandate of issuing a fresh proclamation. It does not state that the fresh proclamation is not necessary if there is a stay by higher authorities/Courts. It is contended that in the absence of the fresh proclamation, auction held on 29.11.2010 is a nullity.

5.3 It is submitted that the underlying purpose of issuing a fresh proclamation before an auction is to obtain the best financial return for the property and to oversee a free and fair competition amongst buyers. It is submitted that the High Court is right in setting aside the auction sale which was in breach of Rule 107(11)(f) of the Rules.

5.4 It is further submitted that in the present case the property in question was sold for an amount of Rs.1,26,00,000/- and the very purchaser valued the same property in four months at Rs.4,91,00,000/-. It is submitted that in the absence of a fresh proclamation only three related parties participated in the auction and therefore the property in question was sold at a very low price.

5.5 It is further submitted that as per Rules 107(11) (g) & (h), it is mandatory that the auction purchaser deposits 15% of the price immediately and that he also deposits the remainder 85% within a period of fifteen days from the date of sale. It is submitted that in the present case, the auction purchaser deposited 15% of the sale price on 29.11.2010 and the remaining amount was paid after 44 days on 12.01.2011. This is a clear breach of Rules 107(11) (g) & (h). It is submitted that the High Court is right in setting aside the sale in favour of the auction purchaser.

5.6 It is submitted that in the case of *Shilpa Shares and Securities and others vs. National Cooperative Bank Limited*, reported in (2007) 12 SCC 165 wherein the very same Rules 107(11) (g) & (h) were under consideration and admittedly like in the present case the amount of remaining 85% was not paid within

fifteen days from the date of sale, following the earlier decision of this Court in the case of Balram vs. Ilam Singh, reported in (1996) 5 SCC 705, it has been held that failure to pay 85% of the purchase money within stipulated time renders the auction sale a nullity and that there was no valid auction sale. It is submitted that in the aforesaid decision it is held that failure to deposit the amount within the stipulated time vitiates the auction process.

5.7 Now insofar as the reliance placed upon Section 154 of the MCS Act, 1960 by the bank is concerned, it is submitted that the said provision cannot be pressed into service when the auction has been held in a completely illegal manner and in blatant violation of the rules which are mandatory in nature. It is contended that in the present case as there was no fresh proclamation issued and the auction was hastily conducted after the stay was vacated, therefore the High Court has rightly entertained the writ petition and has rightly set aside the auction sale.

5.8 Relying upon the decisions of this Court in the cases of Ram Kishun vs. State of Uttar Pradesh, reported in (2012) 11 SCC 511 and J. Rajiv Subramaniyan vs. Pandiyas, reported in (2014) 5 SCC 651, it is vehemently submitted by the learned Senior Advocate appearing on behalf of the respondent - borrower that as observed by this Court in the aforesaid two decisions the bank has to act fairly and all efforts should be made to get the best price for the mortgaged property.

It is submitted that in the aforesaid decisions, it is held that the condition precedent for taking away someone's property or disposing of the secured assets is that the authority must ensure compliance with the statutory provisions. It is submitted that in the present case, while conducting the auction sale and selling the property, the statutory provisions have not been followed and in fact the property in question was sold at a lower price and therefore the High Court has rightly quashed and set aside the auction as well as the sale in favour of the auction purchaser.

5.9 Making the above submissions and relying upon the aforesaid decisions, it is prayed to dismiss the present appeals.

6. We have heard the learned counsel for the respective parties at length. By the impugned judgment and order, the High Court has set aside the auction sale conducted on 29.11.2010 and has cancelled the Sale Certificate dated 19.01.2011 in favour of the auction purchaser on the ground that the auction sale/sale was in breach of Rules 107(11) (e), (f), (g) & (h) of the MCS Rules, 1961.

6.1 What was challenged before the High Court was the order passed by the Divisional Joint Registrar passed in Revision Application No. 11/2011 under Section 154 of the MCS Act, 1960. However, it is required to be noted that even the High Court in the impugned judgment and order has specifically observed in paragraph 31 that as the borrower did not exercise the right under Rule 107(13) of the MCS Rules, it was not competent for the borrower to prefer revision before the Divisional Joint Registrar under Section 154 of the MCS Act, 1960. Therefore, once the revision application before the Divisional Joint Registrar under Section 154 of the MCS Act, 1960 was held to be not maintainable and/or competent at the instance of the borrower - respondent no.1 herein, thereafter the High Court ought not to have considered the writ petition on merits.

7. Even otherwise on merits also, the High Court has erred in entertaining the writ petition filed by the borrower and quashing and setting aside the auction sale/sale by not bearing in mind the following aspects: firstly, that after conducting the auction sale and sale of the property in favour of the auction purchaser, the borrower never applied to the Recovery Officer to set aside the sale on the grounds of material irregularity, mistake or fraud in publishing or conducting it; secondly, as per proviso to Rule 107(14)(i) of the MCS Rules, no sale shall be set aside on the ground of irregularity or fraud unless the Recovery Officer is satisfied that the applicant has sustained substantial injury by reason of such irregularity, mistake or fraud; and thirdly, as per Rule 107(14)(iii), on the expiration of thirty days from the date of sale, if no application to have the sale set aside is made or if such application has been made and rejected, the Recovery Officer shall make an order confirming the sale. Rule 107(14) reads as under:

"(14)(i) At any time within thirty days from the date of the sale of immovable property, the applicant or any person entitled to share in a rateable distribution of the assets or whose interests are affected by the sale, may apply to the [District Deputy Registrar] to set aside the sale on the ground of a material irregularity or mistake or fraud in publishing or conducting it: Provided that no sale shall be set aside on the ground of irregularity or fraud unless the [District Deputy Registrar] is satisfied that the applicant has sustained substantial injury by reason of such irregularity, mistake or fraud.

- (ii) If the application be allowed, the Recovery shall set aside the sale and may direct a fresh one
- (iii) On the expiration of thirty days from the date of sale, if no application to have the sale set aside is made or if such application has been made and rejected, the [District Deputy Registrar] shall make an order confirming the sale;
- Provided that if he shall have reason to believe that the sale ought to be set aside notwithstanding that no such application has been made or on grounds other than those alleged in any application which has been made and rejected, he may, after recording his reasons in writing, set aside the sale.
- (iv) Whenever the sale of any immovable property is not so confirmed or is set aside, the deposit or the purchase money, as the case may be, shall be returned to the purchaser.
- (v) After the confirmation of any such sale, the [District Deputy Registrar] shall grant a certificate of sale bearing his seal and signature to the purchaser, and such certificate shall state the property sold and the name of the purchaser."

7.1 In the present case, Sale Certificate was issued in favour of the auction purchaser on 19.01.2011 after a period of thirty days from holding the auction sale. At this stage, it is required to be noted that even the Sale Certificate was issued by the Bank/Recovery Officer only after the receipt of the approval of the District Deputy Registrar. While approving the sale, the District Deputy Registrar noted in the approval dated 29.11.2010 that the valuation of the land was determined at Rs. 98,10,000/- according to the letter issued by the Government approved Valuer dated 10.06.2010 which was the upset price and the amount realised was Rs.1,26,00,000/-, which is higher than the upset price.

Therefore, as such, even the District Deputy Registrar also did not doubt the valuation and the amount realised, i.e., Rs. 1,26,00,000/- against the upset price of Rs.98,10,000/-. Therefore, once the borrower failed to apply to the Recovery Officer to set aside the auction sale on the grounds of material irregularity, mistake or fraud in publishing or conducting the auction sale within a period of thirty days from the date of sale of immovable property, thereafter it was not open for the borrower to challenge the sale on the ground of material irregularity. All the grounds on which the High Court has set aside the auction sale/sale were available with the borrower and the borrower did not apply to set aside the sale on the said grounds of material irregularity, mistake or fraud.

Therefore, once the borrower failed to apply to the Recovery Officer to set aside the sale on the ground of material irregularity within a period of thirty days from the date of sale of the immovable property and thereafter the Sale Certificate has been issued, normally the borrower cannot be permitted to challenge the same subsequently, having not raised any objection at the appropriate time and stage as per the statute, otherwise the statutory provisions would become nugatory and unworkable.

7.2 It is also required to be noted that even under Rule 107(14)(i) of the MCS Rules, 1961, no sale shall be set aside on the ground of material irregularity, mistake or fraud unless the Recovery Officer is satisfied that the applicant had sustained substantial injury by reason of such irregularity, mistake or fraud. In the present case, there is no finding recorded by the High Court that the borrower had sustained substantial injury and by reason of such irregularity the auction sale had to be set aside. Under the above circumstances also, setting aside of auction sale/sale by the High Court is just contrary to the proviso to Rule 107(14)(i) of the MCS Rules, 1961.

8. One another ground on which the High Court has set aside the auction sale is that as the auction was postponed by seven days, fresh proclamation ought to have been issued. Therefore, according to the High Court, not issuing the fresh proclamation and conducting/holding the auction was in breach of Rule 107(11)(f) of the MCS Rules. The High Court has also observed and held that as the auction was held/conducted within a period of thirty days from the date of issuance of proclamation, the same is in violation of Rule 107(11)(f) of the MCS Rules. Rule 107(11)(f) of the MCS Rules reads as under:

"(f) When any immovable property is sold under these rules, the sale shall be subject to the prior encumbrances on the property, if any. The applicant shall, when the amount for the realisation of which the sale is held exceeds Rs. 100, furnish to the Sale Officer within such time as may be fixed by him or by the Recovery Officer, an encumbrance certificate from the Registration Department for the period of not less than twelve years prior to the date of attachment of the property sought to be sold, or in cases falling under the proviso to sub-rule (10), prior to the date of the application for execution. The time for production of the encumbrance certificate may be extended at the discretion of the Sale Officer or the Recovery Officer, as

the case may be.

The sale shall be by public auction to the highest bidder: Provided 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 other adequate reasons: Provided further that the Recovery Officer or the Sale Officer may, in his discretion, adjourn the sale to a specified day and hour, recording his reason for 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. The sale shall be held after the expiry of not less than thirty days calculated from the date on which notice of the proclamation was affixed in the office of the Recovery Officer.

The time and place of sale shall be fixed by the Recovery Officer and the place of sale shall be the village where the property to be sold is situated or such adjoining prominent place of public resort as may be fixed by the Recovery Officer: Provided that in cases where an encumbrance certificate is not obtainable owing to the destruction of the connected records, an affidavit from the village Talathi or corresponding officer in regard to the encumbrances known to him supported by a certificate from the Registration Department that the encumbrance certificate cannot be granted owing to the destruction of the connected records shall be accepted in place of an encumbrance certificate."

8.1 In the present case, the tender notice was issued and published in the daily newspaper on 9.9.2010. The date fixed for submission of the tender was 28.09.2010. At the last moment, i.e., on 28.09.2010, the borrower filed revision application no. 58/2010 before the Divisional Joint Registrar challenging the auction proceedings and the Divisional Joint Registrar granted stay of the auction proceedings on 28.09.2010. The revision application came to be dismissed by the Divisional Joint Registrar vide order dated 23.11.2010. On dismissal of the revision application and vacating the stay against the auction proceedings, the bank/Recovery Officer opened the bids on 29.11.2010 in which the auction purchaser was found to be the highest bidder who offered Rs.1,26,00,000/- against the upset price of Rs. 98,10,000/-. Therefore, as such, within a period of seven days from the date of vacating stay and dismissal of the revision application, the auction was held.

Therefore, it cannot be said that the auction sale was in breach of Rule 107(11)(f) of the MCS Rules. The period during which the stay was in operation was to be excluded. Even otherwise, proviso to Rule 107(11)(f) is applicable to issue a fresh proclamation in case the sale is adjourned for a longer period than seven days by the Recovery Officer or the Sale Officer. The said proviso is not applicable in a case where at the last moment the borrower obtains a stay of the auction which is vacated after some time, i.e., after a period of seven days.

Once the sale was required to be adjourned because of the stay order obtained by the borrower and the stay continued for more than seven days which came to be vacated subsequently, how such a person/borrower can be permitted to take the benefit of his action of obtaining the stay and thereafter to contend that even if the sale was adjourned for more than seven days due to the stay order obtained by him, there shall be a fresh proclamation. This can be said to be giving a premium to such a borrower.

If the contention/submission on behalf of the borrower is accepted that second proviso to Rule 107(11)(f) does not state that the fresh proclamation is not necessary if there is a stay of auction by higher authorities/Courts, in that case, every dishonest borrower who wants to scuttle or delay the auction/sale will approach the Court/appropriate authority at the eleventh hour and obtain stay of the auction which may continue for more than seven days and he would then contend that as more than seven days have passed, fresh proclamation has to be issued. The aforesaid position cannot be accepted.

9. Now insofar as the finding recorded by the High Court that the auction was conducted/held within a period of thirty days from the date of proclamation and therefore there is a breach of Rule 107(11)(f) is concerned, it appears that the High Court has considered 09.09.2010 as the date of proclamation. However, it is to be noted that 09.09.2010 was the date on which the tender notice indicating the date of auction/sale was issued. The same was published in the daily newspaper on 14.09.2010 fixing the date of auction/sale on 28.09.2010.

It was not a proclamation. Prior thereto, the proclamation/public notice dated 20.02.2010 was published in the daily newspaper 'Sakal' on 22.02.2010, 23.02.2010 and 24.02.2010. Even thereafter also, Public Advertisement dated 26.05.2010, which also can be said to be a proclamation as per Rule 107(11)(f) of the MCS Rules, 1961, was issued. Therefore, the High Court is factually incorrect in concluding that the auction sale was in breach of Rule 107(11)(f) of the MCS Rules, 1961.

10. Now insofar as the finding recorded by the High Court and reliance placed upon the decisions of this Court in the cases of Shilpa Shares and Securities (supra) and Balram (supra) that there was a breach of Rule 107(11)(g) & (h) of the MCS Rules by not depositing the balance 85% sale consideration within a period of 15 days is concerned, the same is also factually incorrect. The bids were opened on 29.11.2010 and the auction purchaser was found to be the highest bidder who offered Rs. 1,26,00,000/-. On the very day, he deposited 15% of the sale consideration.

On 01.12.2010, an application was made to the District Deputy Registrar, which was required as per circular dated 23.07.2004 issued by the Co-operative Commissioner & Registrar, Cooperative Societies. The District Deputy Registrar approved the said proposal which was received on 29.12.2010 and within a period of fifteen days from the date of such approval, the auction purchaser deposited the remaining 85% of the amount. Therefore, it cannot be said that there was any breach of Rule 107(11)(g) & (h) of the MCS Rules, 1961 as observed and held by the High Court.

11. Even the conduct on the part of the borrower is also required to be noted and considered at this stage. A huge sum of Rs. 3,54,58,836/- was due and payable. He has not paid/deposited even a farthing towards the loan amount since 2010. However instead, he lodged an FIR against the Bank Officers alleging that the mortgaged deeds of the property and sale deed of the land Ghat No. 437 (to the extent of 34R) and Ghat No. 440 (to the extent of 72R) are illegal. The said criminal proceedings came to be quashed by the High Court vide order dated 23.09.2013.

Number of proceedings were initiated by the borrower and all efforts were made by him to delay the auction/sale of the mortgaged properties without paying a single rupee. Pursuant to the proclamation issued on 26.05.2010 under Rule 107(11) of the MCS Rules, 1961, thirty days' time was given to the concerned borrower to repay the debt, but no steps were taken by him. The borrower was fully aware of this publication. Thereafter, public notice was issued on 09.09.2010, which was published on 14.09.2010 fixing the date of sale/auction on 28.09.2010.

On that day, stay order was obtained by the borrower. Before the High Court, it was the third round of litigation initiated by the borrower. In the first round of litigation, he challenged the upset price fixed by the Divisional Joint Registrar which was filed on 28.09.2010 being the last date of submission of the tender. The said revision application No. 58/2010 came to be dismissed by the Divisional Joint Registrar on 23.11.2010. Thereafter, the auction was held and the sale certificate was issued in favour of the auction purchaser on 17.01.2011 and the sale deed was executed in favour of the auction purchaser on 19.01.2011.

Even at that stage also, he could have applied for setting aside the sale by depositing 5% of the amount equal to the purchase money in terms of Rule 107(13) but the borrower failed to avail the said opportunity. He even did not raise any objection before the Recovery Officer about the alleged material irregularity as required under Rule 107(14). Instead, he challenged the auction proceedings before the Divisional Joint Registrar by way of revision application No. 11/2011 under Section 154 of the MCS Act, 1960, which even as observed by the High Court was not competent at the instance of the borrower. From the aforesaid, it is clear that at every stage without paying a single rupee due and payable, the borrower tried to stall the auction/sale proceedings.

12. Now insofar as the reliance placed upon the decisions of this Court in the cases of Shilpa Shares and Securities (supra) and Balram (supra) by the learned counsel appearing on behalf of the borrower is concerned, the same shall not be applicable to the facts of the case on hand, in view of our findings recorded hereinabove.

13. In view of the above discussion and for the reasons stated above, the present appeals succeed. The impugned judgment and order dated 30.07.2021 passed by the High Court of Bombay, Bench at Aurangabad in Writ Petition No. 570/2012 is hereby quashed and set aside and consequently Writ Petition No. 570/2012 filed by the borrower/respondent no.1 herein stands dismissed. The present appeals are accordingly allowed. However, there shall be no order as to costs.

Source disclosure: Complete sanitized public judgment text retained for research. Official-primary replacement and later-history closure remain pending.

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