Santosh

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 5627 OF 2019

Arjun Fakira Bari
Age : 52 years, Occup. Agril.
R/o. Shirsoli,
Tq. & Dist . Jalgaon ... Petitioner

Versus

1] Divisional Joint Registrar,
Co-operative Societies,
Nashik
2] Deputy Registrar,
Co-operative Societies,
Nashik
3] Purnavad Nagari Sahakari
Patsanstha, Maryadit, Shirsoli,
Tq. & Dist . Jalgaon
Through its Manager
4] Special Recovery Officer,
Purnavad Nagari Sahakari
Patsanstha, Maryadit, Shirsoli,
Tq. & Dist . Jalgaon
5] Madhukar Fakira Bari,
Age : 50 years, Occup. Agril.
R/o. Shirsoli,
Tq. & Dist . Jalgaon
6] Kailas Kachru Patil,
Age : 45 years, Occup. Agril.
R/o. Shirsoli,
Tq. & Dist . Jalgaon
7] District Deputy Registrar,
(Co-operative Societies), Jalgaon
8] Mahendra Narayan Kedar
Age : 48 years, Occ : Business,
R/o. Shrikrushan Colony, Jagaon,
Tq. And Dist. Jalgaon
9] Anil Totaram Shimpi

Age : 45 years, Occup. Business,
R/o. Soyegaon,
Tq. & Dist. Aurangabad. ... **Respondents**

Mr. Subodh P. Shah, for the petitioner.

Mr. G. O. Wattamwar, AGP for respondent Nos. 1, 2 and 7.

Mr. V. D. Hon, Senior Advocate for respondent Nos.3 and 4.

Mr. Abasaheb Shinde for respondent Nos.8 and 9.

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CORAM : N.J. JAMADAR, J.
Reserved for Judgment on : 27th April 2021
Judgment Pronounced on : 25th May 2021
(THROUGH VIDEO CONFERENCE)

JUDGMENT :

1. Rule. Rule made returnable forthwith and with the consent of the counsels for the parties, heard finally at the stage of admission.

2. The challenge in this petition is to the judgment and order dated 12th April 2019 in Revision Application No.NIL/2011 passed by Divisional Joint Registrar, Co-operative Societies, Nashik, whereby the revision application preferred by the petitioner assailing the legality, propriety and correctness of the recovery certificate issued under section 101 of the Maharashtra Co-operative Societies Act, 1961 ('The Act, 1961') and the steps taken by respondent No.3-Society and respondent No.4, the Recovery Officer, to recover the amount thereunder, culminating in the order of confirmation of sale dated 31st March 2012 of agricultural land bearing Gat No. 49, ('the subject land') in favour of respondent Nos. 8 and 9-the Auction Purchasers, came to be dismissed.

3. The background facts leading to this petition can be summarized as under :-

(a) The petitioner had availed a loan of Rs.75,000/- from Purnavad Nagari Sahakari Patsanstha, Maryadit, Shirsoli - respondent No.3-Society. The loan was advanced on the terms and conditions incorporated in the sanction letter dated 18th October 2005. It was to be repaid within a period of 60 months thereof. Under the terms thereof, the petitioner and his father mortgaged an immovable property bearing House No.728 in favour of respondent No.3 under a Mortgage Deed, dated 21st Octoer, 2005 and thereby created security interest thereon.

(b) A part of loan amount, however, remained outstanding. It is the claim of the petitioner that the petitioner became aware of steps having been initiated by the respondent No.3

and Recovery Officer-respondent No.4, to recover the outstanding amount only when a notice of auction sale was published in the newspaper by the respondent Nos.3 and 4 on 6th September 2011. Thereupon, the petitioner claimed to have gathered relevant information.

(c) It transpired that the respondent No.3 had preferred an application on 8th October 2009 for grant of certificate under section 101 of the Act, 1961 though the entire amount had not fallen due. The District Deputy Registrar, Jalgaon-respondent No.7 issued the recovery certificate on 9th December 2009 in a mechanical manner without complying with the mandatory requirement of passing a reasoned order, in clear violation of Rule 86-A to 86-F of the Maharashtra Co-operative Societies Rules, 1961 ('Rules, 1961'). Armed with the said certificate, a demand notice was issued purportedly under Rule 107 of the Rules. Again, the demand notice did not comply with the requirements postulated by Rule 107(3) read with Rule 107(11)(b). The exact amount which was due and payable by the petitioner was not indicated therein, nor the outstanding interest was specifically mentioned. Even the particulars of the property which was proposed to be attached and sold in the event of default in payment of the due amount were not furnished.

(d) The respondent Nos. 3 and 4 proceeded to sell valuable subject land without following the statutory requirements. The petitioner asserts that in the face of the provisions contained in sub-rule (4) of Rule 107, it was incumbent upon the respondent Nos.3 and 4 to proceed against the mortgaged property, wherein security interest was created. There was thus no occasion for respondent Nos.3 and 4 to straightaway proceed against the subject land, which was not a mortgaged property. The auction was also in breach of sub-rule (10) of Rule 107 as the subject land was not at all attached before it was put on the block. The respondent Nos.3 and 4 sold the subject land illegally without prior attachment as envisaged under Rule 107(10) read with sub-rule 11(d).

(e) The respondent Nos.3 and 4, according to the petitioner, made a farce of auction sale on 18th October 2011. The subject land which admeasures 1 Hector and 31 Arc was sold for a throw away price of Rs.21,01,000/- to respondent Nos. 8 and 9. The market value of the subject land was then Rupees Two Crores. The auction sale was conducted even before the upset price was fixed. Moreover, the sale of the entire subject land which admeasured 3 Acre and 11 Are, was not at all warranted. In accordance with the rules, only that much of the property could have been sold which would fetch the price equivalent to the outstanding amount. Thus, for recovery of a sum of Rs. 1,31,769/- plus interest thereon, under the certificate dated 9th December 2009, the sale of the entire subject land, admeasuring 3 Acre and 11 Are, was wholly unwarranted and, on this count alone, the entire auction sale is vitiated.

(f) It is the claim of the petitioner that even after the auction sale, the petitioner made repeated efforts to pay the outstanding amount to respondent Nos. 3 and 4. The latter unlawfully prohibited the petitioner from exercising his right under Rule 107(13). Faced with such resistance and malafide action driven by the desire to divest the petitioner of the valuable agricultural land, the petitioner preferred revision application, being Revision Application No. Nil of 2011, before the respondent No.1. In the meanwhile, during the pendency of the said revision application, the respondent No.7 confirmed sale on 31st March 2012. Eventually, the respondent No.1 dismissed the revision application by judgment and order dated 16th May 2012 opining *inter alia* that the sale of the subject land for recovery of the amount in terms of the certificate dated 9th December 2009 was in conformity with the provisions of the Act and Rules and, thus, no interference was warranted in exercise of revisional jurisdiction.

4. Being aggrieved, the petitioner preferred writ petition being Writ Petition No. 7113 of 2012. By an order dated 29th August 2012, this Court restrained the respondents from taking any coercive steps against the petitioner on the condition of depositing an amount of Rs. 40,000/-. Eventually, the writ petition was partly allowed by judgment and order dated 1st August 2018, whereby this Court was persuaded to remand the matter back to the respondent No.1 for determination afresh after providing an effective opportunity to the parties, including liberty to carry out the necessary amendment, if any, in the proceeding before the revisional authority.

5. Post remand, the petitioner amended the revision application and assailed the legality, propriety and correctness of the order granting recovery certificate, dated 9th December 2009.

6. The respondent No.3-Society resisted the revision application by filing an affidavit in reply. The respondent Nos. 8 and 9-the auction purchasers also contested the revision application by filing an affidavit in reply.

7. After appraisal of the pleadings, documents tendered for perusal and the submissions canvassed on behalf of the parties, the respondent No.1 was persuaded to again dismiss the revision application by the impugned judgment and order dated 12th April 2019. The Revisional Authority was of the view that the revision application was not tenable on multiple counts. First, since the petitioner had neither preferred application nor raised objection in the manner envisaged by Rule 107(12) to (14) of the Rules, 1961 the challenge to the auction sale in a revision under section 154 of the Act, 1960 was not competent. Second, in view of the failure of the petitioner to make pre-deposit envisaged by sub-section (2A) of section 154 of the Act, 1960, no application for revision could be entertained. Third, though the recovery certificate was issued on 9th December 2009 by the Deputy Registrar, Jalgaon, its legality was sought to be assailed by the petitioner by way of amendment in the year 2018. The challenge to the recovery certificate by way of a revision application, preferred in the year 2011, and the amendment thereto, in the year 2018, was, thus, barred by limitation. On merits, the revisional authority was of the view that there was no violation of the Rules, 1961 especially the prescriptions contained in Rule 107. Nor any substantial injury was caused to the petitioner by the sale of the entire subject land. The readiness and willingness to pay the due amount, sought to be shown by the petitioner, was a creature of an afterthought as the contemporaneous record and conduct of the petitioner did not substantiate the said claim. Holding thus, the revision application came to be dismissed.

8. Being further aggrieved, the petitioner has again invoked the writ jurisdiction of this Court. By an order dated 10th May 2019, this Court stayed the effect, implementation and operation of the auction sale and protected the possession of the petitioner over the subject land, subject to deposit of a sum of Rs.6,04,619/-, which was then stated to be outstanding.

9. The respondent Nos. 3 and 4 have resisted the petition by filing an affidavit in reply of Mr.Satish Keshavrao Waghmare, Special Recovery Officer. Respondent Nos.3 and 4 have endeavoured to support the impugned judgment and order and the reasons ascribed in support thereof. The tenability of the revision application before the respondent No.1 was sought to be questioned on the grounds, on which the revisional authority ruled against the petitioner. The respondent Nos. 3 and 4 also endeavoured to justify the action of auction sale of the subject land with reference to the steps initiated by respondent Nos.3 and 4, which were stated to be in conformity with the provisions of the Act and Rules.

10. Mr. Mahendra Narayan Kedar, respondent No.8 has sworn an affidavit on behalf of respondent Nos.8 and 9, in support of the impugned judgment and order. It was affirmed that the impugned order does not suffer from any error apparent on the face of the record which would justify interference at the hands of this court in exercise of writ jurisdiction. The respondent Nos. 8 and 9 endeavoured to demonstrate that the challenge to the impugned auction sale, on the count of breach of the provisions contained in Rules, 1961 especially Rule 107, is devoid of substance. In fact, in the absence of steps having been taken by the petitioner to assail the said auction sale by preferring an application to make the payment of the outstanding amount and/or raising objection to the sale, the challenge in the form of a revision was not at all maintainable. Even otherwise, according to respondent Nos. 8 and 9, no prejudice as such was caused to the petitioner as the subject land was sold for a consideration which was more than thrice the upset price fixed by respondent No.7. Thus, the respondent Nos.8 and 9 prayed for dismissal of the petition.

11. In the light of the aforesaid pleadings and facts, I have heard Mr. Subodh P. Shah, the learned counsel for the petitioner, Mr. G.O. Wattumvar, the learned AGP for respondent Nos. 1, 2 and 7, Mr. V .D. Hon, the learned Senior Counsel for respondent Nos. 3 and 4, and Mr. Abasaheb Shinde, the learned counsel for respondent Nos.8 and 9-auction purchasers. With the assistance of the learned counsels, I have also perused the material on record including the orders passed by the authorities below.

12. Mr. Shah, the learned Counsel for the petitioner, took a slew of exceptions to the impugned order and the underlying action of respondent nos.3 and 4 in effecting the sale of the subject land. First and foremost, according to Mr. Shah, the sale of the entire subject land which was disproportionately in excess of the land which ought to have been sold to recover the due amount is completely illegal and without jurisdiction. For a partly sum of less than Rs.2,00,000/-, the petitioner was divested of the source of livelihood, urged Mr. Shah. No effort was made to ascertain as to whether a part of the subject land could be sold to realise the due amount. The sale of the entire subject land was in flagrant violation of the proviso to sub-rule (15) of Rule 107, which prohibits sale of larger section of immovable property than may be sufficient to discharge the due amount, submitted Mr. Shah.

13. Secondly, respondent nos.3 and 4 were enjoined to proceed against the house property which was secured by a mortgage. The action on the part of respondent nos.3 and 4 not to proceed against the property in which security interest was created was malafide and in breach of the express mandate under sub-rule (4) of Rule 107 of the Rules, 1961. The action of respondent nos.3 and 4 to proceed against the subject land, though no security interest was credited therein, reflected the ulterior motive to divest the petitioner of the valuable property. Thirdly, the sale suffered from material irregularities which vitiated the entire action. The subject land was not attached in conformity with Rule 107 of the Rules, 1961 before it was put to sell. In fact, the sale suffered from the vice of illegality on account of no prior lawful attachment. It was strenuously urged that the upset price was fixed post the auction sale held on 18th October, 2011. This was clearly in breach of the mandatory requirements and vitiated the sale.

14. Mr. Shah made an endeavour to assail the legality and validity of the certificate dated 9th December, 2009, granted under Section 101 of the Act, 1960. It was urged that a bare perusal of the certificate would indicate that the certificate is not backed by a reasoned order. Mere certificate, sans any reasons for grant thereof, is legally unsustainable, urged Mr. Shah.

15. Mr. Shah would urge that the revisional authority committed a manifest error in brushing aside the aforesaid challenges to the impugned auction sale of the subject land by ascribing reasons which were not borne out by the contemporaneous record. The revisional authority was in error in arriving at the finding that the revision petition was not maintainable for want of measures by the petitioner under sub-rule (12) to (14) of Rule 107 of the Rules, 1961. The fact that the petitioner was constrained to approach the revisional authority as he was restrained from depositing the due amount was not property appreciated by the revisional authority and the hyper technical approach of the revisional authority vitiated the ultimate finding, submitted Mr. Shah.

16. In opposition to this, Mr. Hon, the learned Senior Counsel for respondent nos.3 and 4 stoutly supported the impugned judgment and order. At the outset, according to Mr. Hon it was not open for the petitioner to assail the certificate granted under Section 101 of the Act by way of a writ petition, as was sought to be done by the petitioner by preferring Writ Petition No.7113 of 2012. The challenge to the recovery certificate in Writ Petition No.7113 of 2012 was a ploy to avoid the pre-deposit mandated by sub-section (2A) of Section 154 of the Act, 1960. Nor the petitioner could have challenged the legality and validity of the recovery certificate, by way of amendment, post remand of the matter to revisional authority. The learned Divisional Joint Registrar was within his rights in negativing the challenge to the recovery certificate on the count of bar of limitation as well as non-deposit of 50% of the due amount in accordance with the provision of sub-section (2A) of Section 154 of the Act, 1960. Mr. Hon, thus, strenuously urged that in this writ petition the petitioner cannot be permitted to assail the legality and validity of the recovery certificate.

17. Mr. Hon would urge that the challenges to the impugned auction sale on the count that the subject land ought not to have been put to sale, in the face of availability of the mortgaged property, and that the entire subject land could not have been sold for recovery of the due amount, are matters which could have been lawfully agitated before the recovery officer under sub-rules (12) to (14) of the Rule 107. In the absence of any challenge thereto, in the manner prescribed by Rule 107, the revision against the order of confirmation of sale is not at all tenable. Respondent no.1 has ascribed justifiable reasons to record a finding that the revision petition itself was not maintainable. Even the claim of the petitioner that the petitioner was ready and willing to deposit the entire due amount is found by the revisional authority to be a subterfuge and creature of afterthought. Thus, this Court, in exercise of extraordinary writ jurisdiction, would not be justified in interfering with the order passed by the revisional authority, urged Mr. Hon.

18. Mr. Shinde, the learned Counsel for respondent nos.8 and 9, would urge that the entire endeavour of the petitioner is to deprive the respondent nos.8 and 9 of the valuable rights acquired in the capacity of the bonafide purchasers for value. Mr. Shinde, laid stress on the fact that the petitioner had not initially challenged the legality and validity of the recovery certificate, when the revision application was preferred in the year 2012. Thus, the petitioner cannot be now heard to question the legality and validity of the recovery certificate. In any event, according to Mr. Shinde, the revision could not have been entertained by respondent no.1 unless 50% of the due amount was deposited while challenging the impugned auction sale of subject land. In the circumstances, according to Mr. Shinde, respondent no.1 committed no error in dismissing the revision application.

19. To start with, it may be apposite to note uncontroverted facts in order to appreciate the aforesaid rival submissions in a proper perspective. It is indisputable that the petitioner had availed loan of Rs.75,000/- from respondent no.3 on the terms and conditions incorporated in the sanction letter dated 18th October, 2005. There is not much controversy over the fact that house property no.728 situated at Shirsoli was mortgaged to secure the said loan under the Deed of Mortgage dated 21st October, 2005. Certificate under Section 101 of the Act, 1960 for Rs.1,31,769/- with interest at the rate of 19% p.a. with effect from 1st July, 2009 came to be granted on 9th December, 2009. A demand notice was issued on 11th December, 2009. Indisputably, sale proclamation under Rule 107(11) of the Rules, 1961 was published on 6th September, 2011. The auction was held on 18th October, 2011. Respondent no.3 sought approval of respondent no.7 – District Deputy Registrar, Jalgaon, for upset price on 12th December, 2011. Respondent no.7 fixed the upset price at Rs.6,04,228/- by order dated 13th February, 2012.

Eventually, respondent no.7 confirmed the sale by order dated 31st March, 2012.

20. In the meanwhile, the petitioner preferred revision on 6th November, 2011. It is pertinent to note that in the revision application, the petitioner had initially not challenged the recovery certificate. The principal grievance of the petitioner was that the petitioner had not been allowed to deposit the due amount and discharge the liability, and the authorities were bent upon sale of the subject land in breach of the governing rules and principles of natural justice. The petitioner had made a substantive prayer that respondent nos.3 and 4 be directed to accept the repayment of the sum of Rs.1,31,769/- (certificated principal amount) and pass a receipt. Post remand, the petitioner amended the revision application and incorporated the challenge to the legality and validity of the recovery certificate dated 9th December, 2009 and prayed that it be quashed and set aside, in addition to a declaration that the auction sale dated 18th October, 2011 is null and void, and that the order of confirmation of sale dated 31st March, 2012, be quashed and set aside.

21. In the light of the aforesaid facts, at the threshold, the challenge to the legality and validity of recovery certificate dated

9th December, 2009 is required to be appreciated. Mr. Shah, the learned Counsel for the petitioner without disputing the position that initially the petitioner had not assailed the recovery certificate, made an endeavour to demonstrate that the recovery certificate is bereft of sanctity in view of the breach of the provisions contained in Rule 86F of the Rules, 1961 as it is sans reasons.

22. In order to lend support to the submission that a recovery certificate sans reasons is not legally sustainable, Mr. Shah placed reliance on the judgments of this Court in the cases of - ***Balasaheb Dhondiram Nikam vs. Joint Registrar Co-operative Societies, Kolhapur & others***[1] and ***Sandeep Polymers Pvt. Ltd. and others vs. State of Maharashtra and others***[2]**.**

23. Mr. Hon, the learned Senior Counsel, joined the issue by inviting the attention of the Court to the observations in paragraph 10 of the certificate, which according to Mr. Hon, spell out adequate reasons.

24. In the facts of the case, it does not seem warranted to delve deep into the question as to whether the recovery certificate is supported by reasons. Indubitably, the petitioner had not assailed the legality, validity and propriety of the

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recovery certificate initially. Undoubtedly, the petitioner incorporated a challenge to the recovery certificate by way of amendment, albeit post remand. It is not the case of the petitioner that the petitioner did comply with the requirement of pre-deposit envisaged by Section 154 (2A) of the Act, 1960. Nor the petitioner filed an application seeking condonation of delay in assailing the recovery certificate. In this backdrop, the revisional authority was justified in entering the finding that the challenge to the recovery certificate could not have been entertained beyond the prescribed period of limitation in the absence of an application for condonation of delay. Nor, the challenge could be entertained for want of pre-deposit.

25. In the aforesaid backdrop, the endeavour on behalf of the petitioner to now assail the recovery certificate on the count that it is not backed by a reasoned judgment, in the circumstances of the case, where the principal grievance of the petitioner revolves around the legality and propriety of the action initiated by respondent nos.3 and 4 to recover the certificated amount, by way of sale of the subject land, does not merit countenance. Thus, I am not persuaded to agree with the submission on behalf of the petitioner that the petitioner can legitimately assail the legality and validity of the recovery certificate.

26. This leads me to the core challenge of the legality and propriety of the impugned auction sale. The thrust of the submissions on behalf of the petitioner is that the entire action was vitiated by observance of the provisions contained in Rule 107 in breach. One, there was no propriety in straightway proceeding against the subject land when the loan was secured by mortgage of the house property. Two, the subject land was not attached before sale in conformity with the provisions of sub-rule (11) of Rule 107. Three, the subject land was sold by a farce of public auction on 18th October, 2011 even before the reserve price was fixed. Four, the entire subject land was sold in clear breach of the mandate contained in sub-rule (15) of Rule 107 that no larger portion of immovable property than sufficient to discharge the outstanding amount be sold.

27. Rule 107 contains a fasciculous of provisions for attachment and sale of property. In the context of the aforesaid challenges it may be expedient to extract the relevant sub-rules of Rule 107.

28. Sub-rule (3) of Rule 107 envisages issue of a demand notice specifying the due amount before any action to attach and sale the property is initiated. It reads as under:

> "**(3)** On receipt of such application, or when the Registrar is proceeding under Rule 84, the Recovery Officer shall verify the correctness and genuineness of the particulars set forth in the application with the records, if any, in the office of the Registrar and prepare a demand notice in writing in duplicate in the form specified by the Registrar, setting forth the name of the defaulter and the amount due and forward it to the Sale Officer."

29. Sub-rule (4) of Rule 107 prescribes the order of execution. It reads as under:

> "**(4)** Unless the applicant has expressed a desire that proceedings should be taken in a particular order as laid down in sub-rule (2), <u>execution shall ordinarily be taken</u> in the following manner:-
>
> **(i)** moveable property of the defaulter shall be first proceeded against, but this shall not preclude the immovable property being proceeded against simultaneously in case of necessity.
>
> **(ii)** if there is no moveable property, or if the sale proceeds of the moveable property or properties attached and sold are insufficient to meet in full the demand of the applicant, the immovable property mortgaged to the applicant, or other immovable property belonging to the defaulter may be proceeded against.

30. The relevant part of sub-rule (11) of Rule 107 which regulates the attachment and sale or sale without attachment of immovable property, reads as under:

> **"(11)** In the attachment and sale or sale without attachment of immovable property, the following rules shall be observed:-
>
> **(a)** The application presented under sub-rule (2) shall contain a description of the immovable property to be proceeded against, sufficient for its identification and in case such property can be identified by boundaries or numbers in a record of settlement of survey, the specification of such

boundaries or numbers and the specification of the defaulters share or interest in such property to the best of the belief of the applicant and so far as he has been able to ascertain it.

(b) The demand notice isued by the Recovery Officer under sub-rule (3) shall contain the name of the defaulter, the amount due, including the expenses, if any, and the batta to be paid to the person who shall serve the demand notice, the time allowed for payment and in case of non-payment, the particulars of the properties to be attached and sold or to be sold without attachment, as the case may be. After receiving the demand notice, the Sale Officer shall serve or cause to be served a copy of the demand notice upon the defaulter or upon some adult male member of his family at his usual place of residence, or upon his authorised agent or, if such personal service is not possible, shall affix a copy thereof on some conspicuous part of the immovable property about to be attached and sold or sold without attachment, as the case may be:

Provided that where the Recovery Officer is satisfied that a defaulter with intent to defeat or delay the execution, proceeding against him is about to dispose of the whole or any part of his property, the demand notice issued by the Recovery Officer under sub-rule (3) shall not allow any time to the defaulter for payment of the amount due by him and the property of the defaulter shall be attached forthwith.

(c) If the defaulter fails to pay* the amount specified in the demand notice within the time allowed, the Sale Officer shall proceed to attach and sell, or sell without attachment, as the case may be, the immovable property noted in the application for execution in the following manner.

(d) Where attachment is required before sale, the Sale Officer shall, if possible, cause a notice of attachment to be served on the defaulter personally. Where personal service is not possible, the notice shall be affixed in some conspicuous part of the defaulters last known residence, if any. The fact of attachment shall also be proclaimed by beat of drum or other customary mode at some place on, or adjacent to, such property and at such other place or places as the Recovery Officer may consider necessary to give due publicity to the sale. The attachment notice shall set forth that, unless the amount due with interest and expenses be paid within the date therein mentioned, the property will be brought to sale."

31. Sub-rule (15) of Rule 107 provides for sale of whole or a part only of the property to recover the due amount. It reads as under:

> "**(15)** It shall be lawful for the Sale Officer to sell the whole or any portion of the immovable property of a defaulter in discharge of money due :
>
> Provided that, so far as may be practicable, no larger section or portion of immovable property shall be sold than may be sufficient to discharge the amount due with interest and expenses of attachment, if any, and sale."

32. At this juncture, it is necessary to note that the respondents have questioned the very challenge to the impugned auction sale, by invoking the revisional jurisdiction of respondent no.1, on the ground that Rule 107 itself provides a mechanism to agitate the grievances as regards the regularity or legality of the auction sale. It was urged on behalf of the respondents that if at all the petitioner was desirous of depositing the entire due amount, nothing prevented the petitioner from obviating the auction sale by making the payment which he was statutorily entitled to make under sub-rule (12). Even after the sale, sub-rule (13) provides another opportunity to the borrower to make the payment and avoid the sale. Sub-rule (14) envisages an application to be made to the District Deputy Registrar to set aside the sale on the ground of material irregularity or mistake or fraud in publishing or in conducting it. In the case at hand, according to the respondents, the petitioner did not avail any of the remedies provided by sub-rules (12) to (14) of Rule 107 of the Rules, 1961, and thus, the challenge to the auction sale before the revisional authority was not legally competent.

33. Sub-rules (12) to (14) of Rule 107 read as under:

> "**(12)** Where prior to the date fixed for a sale, the defaulter or any person acting on his behalf or any person claiming an interest in the property sought to be sold tenders payment of the full amount due together with interest, batta and other expenses incurred in bringing the property to sale, including the expenses of attachment, if any, the Sale Officer shall forthwith release the property after cancelling, where the property has been attached, the order of attachment.
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> **(13)** **(i)** Where immovable property has been sold by the Sale Officer, any person either owning such property or holding any interest therein by virtue of a title acquired before such sale may apply to have the sale set aside on his depositing with the Recovery Officer:-
>
> **(a)** for payment to the purchaser a sum equal to 5 per cent of the purchase money; and
>
> **(b)** for payment to the applicant, the amount of arrears specified in the proclamation of sale as that for the recovery of which the sale was order together with interest thereon and the expenses of attachment, if any, and sale and other costs due in respect of such amount, less amount which may since the date of such proclamation have been received by the applicant.
>
> **(ii)** If such deposit and application are made within thirty days from the date of sale, the Recovery Officer shall pass an order setting aside the sale and shall repay to the purchaser, the purchase money so far as it has been deposited, together with the 5 per cent deposited by the applicant :
>
> Provided that if more persons than one have made deposit and application under this sub-rule, the application of the first depositor to the officer authorised to set aside the sale, shall be accepted.
>
> **(iii)** If a person applies under sub-rule (14) to set aside the sale of immovable property, he shall not be entitled to make an application under this sub rule.
>
> [**Provided** that, in case the Recovery Officer fails to handover, possession of the property for any reason within six months from the date of confirmation of the sale to the purchaser, amount deposited by the purchaser may be refunded to him on his demand.]

(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 Recovery Officer to set aside the sale on the ground of a material irregularity or mistake or fraud in publishing or conducing it:

Provided that 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.

(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 Recovery Officer shall make an order confirming 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 Recovery Officer 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."

34. From a plain reading of sub-rule (12), it becomes evident that the defaulter has a right to deposit the due amount together with interest and other charges and expenses in bringing the property to sale and thereby avoid the sale of the property at any time prior to the date fixed for the sale. In the event of such a deposit, the recovery officer is statutorily enjoined to forthwith release the property and, where required, cancel the order of attachment. This is an unqualified right of the defaulter to make the payment of due amount and prevent the sale of the property.

35. Sub-rule (13) comes into play after the auction sale. It provides an opportunity to the defaulter to make an application to have the sale set aside subject to deposit of the amount with the recovery officer: (a) for payment to the purchaser a sum equal to 5 percent of the purchase money and; (b) for payment to the creditor, the amount of arrears specified in the proclamation of sale. Clause (ii) casts a duty on the Recovery Officer to pass an order setting aside sale if such deposit and application are made within 30 days from the date of sale.

36. Sub-rule (14), which also comes into play after the auction sale, again provides an opportunity to the defaulter to make an application 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, within 30 days from the date of the sale. Here, having regard to the nature of the grounds on which the sale can be set aside, the defaulter is not enjoined to make payment, which is a condition precedent under sub-rule (13).

37. It thus becomes abundantly clear that a defaulter can avoid the sale, before the date fixed for the sale, by making the payment of the due amount. And, after the sale, the defaulter can seek setting aside of the sale either upon making payment as envisaged by sub-rule (13) or on the ground that the sale is vitiated by material irregularity or mistake or fraud, as provided sub-rule (14). The proviso to sub-rule (14), however, contains an interdict that the sale shall not 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.

38. In the case at hand, there is not much controversy over the fact that the petitioner did not make an application under sub-rules (12) and (13) of Rule 107. On the contrary, the petitioner's grievance was that he was not permitted to deposit the due amount though he was ready and willing to deposit the entire due amount. In this context, the learned Counsel for the respondents urged that the alleged readiness and willingness to deposit the entire due amount was a subterfuge and the petitioner having missed the bus to make payment within the stipulated period, could not have assailed the auction sale by invoking revisional jurisdiction.

39. To bolster up the aforesaid submissions, the learned Counsels for the respondents placed reliance on the judgments of this Court in the cases of ***Manager, Adarsh Mahila Nagri Sahakari Bank Ltd. and anr. vs. State of Maharashtra and ors***[3], ***Ramchandra Sitaram Mulik and another vs. Janata Nagari***

3 2012(2) of MR 566.

Sahakari Patsanstha Limited and others[4], Palus Sahakari Bank Ltd. and another vs. Sunil Shamrao Salunkhe and others[5], Shrirang Gajanan Hole vs. Special Recovery Officer, Ujani Mahila Gramin Bigar Sheti Sahakari Patsanstha Maryadit, Bhigawan[6], Hanumant Pandurang Deshmukh vs. Vitthal Maruti Bhosale and others[7] and Rajesh B. Yemkanmardi vs. Praful J. Padiya and others[8].

40. In the aforesaid line of decisions, this Court seems to have followed the pronouncement in the case of ***Adarsh Mahila*** (supra) wherein this Court had considered the question of tenability of revision against an order confirming the sale under sub-rule (14) of Rule 107. This Court after referring to the provisions contained in Section 154 of the Act and sub-rules (12) to (14) of Rule 107, (extracted above), observed that,

> "**9**. It is pertinent to note that the revision is possible either sue motu or on application in respect of only an order passed in a inquiry or proceeding by a Subordinate Officer of the revisional authority. Since respondent No. 4 did not avail opportunity under sub-rule (13) and did not avail remedy available to her under Sub-rule (14), the order confirming the sale was mere formality. He was not asked by respondent No. 4 not to pass such a order. Thus, it was not an order in real sense. Order is also an expression of opinion by judicial or quasi judicial authority after hearing the parties and after recording reasons for the same. Before an order is passed a judicial or quasi judicial authority hears submissions made

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4 2018(2) Mh.L.J. 245.
5 2018(5) Mh.L.J. 279.
6 2020(1) Mh.L.J. 502.
7 2021(2) Mh.L.J. 252.
8 2021(1) Mh.L.J. 301.

> by rival parties, applies his mind to the facts and law and then it comes to a conclusion forming an opinion as to what ultimate action is required to be taken in the case. In view of this, the order confirming the sale can not be said to be an order contemplated under section 154."

41. In the case of ***Ramchandra Mulik*** (supra) after adverting to the pronouncement in the case of ***Adarsh Mahila*** (supra) it was held that in the absence of such challenge to the auction sale by making an application under Clause (i) sub-rule (14) of Rule 107, a defaulter cannot challenge the confirmation of sale by invoking the revisional jurisdiction. The subsequent judgments, including the latest judgment in the case of ***Rajesh Yemkanmardi*** (supra) take the view that in the absence of fraud, revision application under Section 154 of the Act against confirmation of sale and grant of sale certificate is not maintainable.

42. Mr. Shah, the learned Counsel for the petitioner would, however, urge that the aforesaid pronouncements do not govern the facts of the case at hand with equal force. A strenuous effort was made by Mr. Shah to draw home the point that since the action of respondent nos.3 and 4, in the case at hand, betrays a malafide desire to divest the petitioner of the subject land, at any cost, and in breach of the mandatory requirement it is akin to fraud and, thus, the fact that the petitioner had not resorted to the remedies under sub-rules (12) to (14) of Rule 107 would not come in the way of the petitioner. Mr. Shah would further urge that the very fact that the petitioner approached the revisional authority with a prayer that respondent nos.3 and 4 be directed to accept the due amount and pass the receipt would indicate that the petitioner was ready to make the payment, in substance, though the application may not have been in the form envisaged by sub-rule (13) of Rule 107.

43. To bolster up the aforesaid submission, Mr. Shah placed a strong reliance on a judgment of a learned Single Judge of this Court in the case of ***Manish Bijal Shah vs. Shankar Laxman Sutar***[9]***,*** wherein, this Court distinguished the decisions enunciated in ***Adarsh Mahila*** (supra) and the subsequent cases on the count that if a clear case of fraud is made out, non exercise of the statutory remedies, as envisaged by sub-rules (12) to (14) of Rule 107, would not constitute a bar for invoking revisional jurisdiction.

44. I have given anxious consideration to the aforesaid submissions. Generally, a person aggrieved by the auction sale of an immovable property has to work out his remedies as envisaged by the elaborate provisions contained in Rule 107. As indicated above, the provisions provide adequate opportunities to obviate the sale, before and after the sale, provided the

92018(2) Mh.L.J. 935.

specified amount is deposited and application is made within the stipulated period. Where the aggrieved person alleges material irregularity, mistake or fraud, he has an opportunity to question the sale on those grounds without making any deposit. In the face of these provisions, the invocation of revisional jurisdiction is held to be not permissible as the aggrieved person can agitate the grievance before the Recovery Officer or District Deputy Registrar as the case may be. However, these provisions cannot be said to be the sole repository of the remedy which an aggrieved person may have, especially where it could be demonstrated that the impugned action was wholly without jurisdiction or malafide and in flagrant violation of the provisions of the Act, 1960 and Rules, 1961. In such a situation, in my considered view, the writ Court cannot be precluded from examining the legality of the impugned auction, especially where the constitutional right to property is shown to have been blatantly infringed.

45. On the aforesaid touchstone, reverting to the grounds of challenge to the impugned auction sale, it may be appropriate to first deal with the submission on behalf of the petitioner that the sale is vitiated as the subject land was sold without a prior valid attachment. A three-pronged submission was advanced on behalf of the petitioner. One, in view of the provisions contained in sub-rule (10) of Rule 107 immovable property, which is not mortgaged, cannot be sold in execution of decree unless the property has been previously attached. In the case at hand, the subject land was not a mortgaged property. It was, therefore, incumbent upon respondent nos.3 and 4 to first make a valid attachment of the subject land. Two, the attachment order dated 19th July, 2011 was invalid as it did not comply with the prior requisites stipulated in clauses (a) and (b) of sub-rule (11) of Rule 107. Three, the attachment was not validly served on the petitioner in the manner prescribed by clause (d) of sub-rule (11).

46. Mr. Shah laid emphasis on the fact that the demand notice issued on 11th December, 2011 was not in confirmity with the provisions of sub-rule (3) of Rule 107. The exact amount which was due from the petitioner was not specified therein. Thus, the reference to the said demand notice in the attachment order dated 19th July, 2011, according to Mr. Shah, would not clothe validity to the attachment order dated 19th July, 2011.

47. It is true that sub-rule (3) of Rule 107 provides that a demand notice in the specified format be issued indicating the name of the defaulter and the amount due. In the demand notice dated 11th December, 2009, in question, there is reference to the certificated amount of Rs.1,31,769/- plus interest, surcharge and the expenses. In the very nature of the transaction, interest was to accrue each day. Thus, it would be taking a very hyper technical view of the matter to urge that the demand notice should specify the exact amount of interest and expenses. The fact that the demand notice dated 11th December, 2009 referred to the certificate issued by the Deputy Registrar on 9th December, 2009, wherein outstanding amount as of 1st July, 2009 was quantified at Rs.1,31,769/- and the interest thereon was also directed to be paid at the rate 19% p.a., gave a sufficient indication to the borrower as to what was due from the borrower. In the circumstances, the challenge to the order of attachment on the count that the demand notice dated 19th December, 2019 was defective, does not carry much conviction.

48. It was next urged that the order of attachment was not served on the petitioner. Mr. Shah would submit that the respondent bank has given up the claim that the order of attachment was duly served upon the petitioner as there is discrepancy in the signature on the receipt acknowledging the service of the demand notice, pressed into service on behalf of the bank. Mr. Shah made an endeavour to persuade the Court to compare and contrast the affidavits-in-reply filed on behalf of respondent nos.3 and 4 at various stages of the proceedings. The Revisional Court was of the view that since the petitioner had taken out the proceedings before the revenue authority to challenge the mutation entry in the revenue record regarding the attachment of the subject land, the claim of the petitioner that the attachment order was not duly served on him was unsustainable.

49. There is, *prima facie*, material on record to indicate that not only the attachment order was served on the petitioner but also that the petitioner pursued the remedies questioning the entries in the revenue record of the subject land on the basis of the said attachment order. At this juncture, this Court would not be justified in delving into the thicket of facts as to whether the attachment order was duly served on the petitioner. Thus, the challenge to the auction sale on the count that it was not preceded by a valid attachment order also falls through.

50. The exception to the auction sale on the count that the upset price was got fixed subsequent to the auction is, however, well grounded in facts. Indisputably, the upset price was fixed by the Deputy Registrar by order dated 13th February, 2012. It indicates that a communication soliciting fixing of upset price was forwarded by the Recovery Officer / respondent no.4 on 22nd December, 2011. The auction was already conducted on 18th October, 2011. In the backdrop of these indisputable facts the question which wrenches to the fore is of the consequences which entail the fixing of the upset price subsequent to auction.

51. The revisional authority was of the view that the determination of the upset price subsequent to the auction did not result in any substantial injury to the petitioner. On the aspect of the regularity of the procedure, the revisional authority took refuge in the fact that the second proviso to clause (f) of sub-rule (11), which enjoins the recovery officer to obtain prior approval of the Registrar to the upset price of the property before publication of proclamation of sale, came to be inserted on 30th August, 2014, subsequent to the sale in question. Thus, there was no statutory requirement to obtain prior approval of the Registrar to the upset price before proceeding with the sale of the property, when the auction in question took place. Even otherwise, since the Registrar fixed the upset price at Rs.6,04,228/- and the property was sold for Rs.21,01,000/- which was more than thrice the upset price, no prejudice was caused to the petitioner by determination of the upset price subsequently.

52. The revisional authority in order to draw support to its view that the then governing rules did not provide for determination of upset price, banked upon a division bench judgment of this court in the case of ***Suresh Narayan Rege vs. The Saraswat Co-operative Bank Limited and ors.***[10] wherein this Court had observed in paragraph 10 as under:

> "**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."

53. The learned Counsel for the respondents would urge that the aforesaid approach of the revisional authority is in consonance with law.

54. Mr. Shah, the learned Counsel for the petitioner, would urge that the aforesaid approach of respondent nos.3 and 4 and the revisional authority was totally perverse. Though, the second proviso to clause (f) mandating the approval to the upset price before proceeding with the sale, came to be inserted in the year 2014 yet, even prior thereto, the authorities were bound to obtain the prior approval for the determination of the upset price to promote transparency and fairness in the auction of the

10 2015(6) ALL MR 1.

immovable property. Reliance was sought to be placed on a circular dated 2nd March, 2009 issued by the Commissioner Co-operatives and Registrar Co-operative Societies, Pune, nominating the authorities from whom such approval for upset price was to be obtained.

55. Mr. Shah also placed reliance on a judgment of this Court in the case of ***Smita Janak Thacker vs. Commissioner of Registrar, District Co-operative Societies, Pune & others***[11]**,** wherein it was enunciated that in conducting public auction it would be necessary for the respondents to observe greater degree of probity and regularity than has been demonstrated in the facts of the said 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 sanction of the higher authority for reduction in the upset price is arbitrary and illegal. Once a reserve 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.

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11 2002(2)Mh.L.J.44.

56. It is imperative to note that in the case at hand, had respondent no.4 proceeded on the premise that he was not at all enjoined to obtain the approval of the Registrar for the reserve or upset price, as there was no statutory requirement, different considerations would have came into play. On the contrary, the material on record indicates that respondent no.4 solicited approval for the upset price after about two months of the auction. The authorities, therefore, cannot be now permitted to turn around and contend that since the second proviso to clause (f) of sub-rule (11) came to be inserted in the year 2014 the determination of the upset price subsequently was of no consequence.

57. The determination of reserve or upset price before hand has a salutary purpose. It eliminates the element of arbitrariness in the conduct of auction sale and acceptance of the bids. The fixing of reserve price is with an avowed object of ensuring that the property is not sold below the minimum price, which the property has the potential to fetch. In the case at hand, having gone the full course of seeking the approval for the determination of the upset price, the authorities are not justified in asserting that the subsequent determination of the upset price made no difference. It would be contextually relevant to note that the order passed by the Registrar determining the upset price proceeds on the premise that the sale would be conducted in future and thus incorporates certain conditions as to how the auction sale should be conducted. It was simply a case of putting the cart ahead of the horse.

58. I am mindful of the fact that, this factor, by itself, may not be sufficient to vitiate the auction sale, unless serious prejudice is shown to have been caused to the petitioner. Yet, while considering the cumulative effect of the infirmities in the auction sale, urged on behalf of the petitioner, the effect of this malady may be required to be taken into account.

59. A strenuous effort was made on behalf of the petitioner to draw home the point that respondent nos.3 and 4 malafide proceeded against the subject land though security interest in the house property was created in favour of respondent no.3 – Society. The thrust of the submission on behalf of the petitioner was that sub-rule (4) of Rule 107 prescribes the order in which execution shall be ordinarily taken. The recovery has to be effected by proceeding against, first, movable property; second, the property mortgaged and, third, other immovable property belonging to the defaulter.

60. Respondent nos.3 and 4 asserted that it was not peremptory that only mortgaged property could be proceeded against for recovery of the outstanding amount. It was in the discretion of the society to proceed against any of the properties of the defaulter to recover the outstanding amount. In a further affidavit-in-reply filed on behalf of respondent no.4 an endeavour was made to assert that the mortgaged property stood in the name of the father of the petitioner and since the father of the petitioner had passed away, leaving behind a number of heirs including the petitioner, respondent no.4 considered it appropriate to proceed against the subject land as the petitioner was its exclusive owner. This stand of the respondent found favour with the revisional authority. It was thus observed that there was no provision which compelled a creditor to first proceed against the mortgaged property.

61. From a conjoint reading of sub-rule (2) and sub-rule (4) of Rule 107, it becomes evident that sub-rule (2) provides the applicant (the society effecting the recovery) to indicate the manner in which it wishes to proceed against the defaulter namely, against the immovable property mortgaged, other immovable property or the attachment of immovable property. In the absence of such election, sub-rule (4) ordains that execution shall ordinarily be taken first against movable property, in the absence of movable property or the sale proceeds of the movables being insufficient to meet in full the demand, the mortgaged immovable property, and then the other immovable property belonging to the defaulter.

62. From the phraseology of sub-rule (4) of Rule 107 extracted above, it would be rather hazardous to hold that the order in which the execution is to be levied has not been indicated by sub-rule (4). Undoubtedly it uses the expression ordinarily. Furthermore clause (i) in terms lays down that simultaneous execution can be proceeded against immovable property along with the movable property of the defaulter. However, the prescription of the order in which the recovery is to pursued against the defaulter cannot be said to be *de hors* any purpose. It is a measure to regulate the action of the authorities in execution proceedings. If the outstanding amount can be recovered by proceeding against movables, unless special circumstances exist, ordinarily execution cannot be levied against the immovable property. These rules are framed with an object of eliminating arbitrariness and sale of property, more than what is required, for meeting the demand. From this standpoint, the claim of the respondents that the society and the Recovery Officer had unfettered discretion in proceeding against the property they chose to, cannot be accede to.

63. Undoubtedly, the recovery of the outstanding amount, which, in a sense, constitutes public money, ought to be vigorously pursued. However, the power to levy execution is not totally unregulated or uncanalised. The recovery must adhere to the prescription in the Rules. The prescription that after the movables are exhausted, the recovery be pursued against the mortgaged property is not an empty proposition. Ordinarily, while advancing money the financial institutions ensure that the repayment is secured by creating interest in an asset of the borrower, of value equivalent to or more than the amount lent.

64. In the case at hand, the Mortgage Deed reveals that security interest was created in the house property. It was then valued at Rs.1,72,000/-. The security was thus more than adequate. It is not the case that the certificated amount and further interest and expenses could not have been recovered by proceeding against the mortgaged property. The contention on behalf of the respondents that since the father of the petitioner, who was the mortgagor, had passed away, it was not feasible to proceed against the mortgaged property is required to be stated to be repelled. It is trite that the mortgage binds the successor in interest of the mortgagor. The death of the latter does not absolve the successors in interest of the liability to pay the mortgage debt. What tilts the scale is the fact that no endeavor as such was made by respondent nos.3 and 4 to proceed against the mortgaged property. Had respondent nos.3 and 4 faced resistance in execution of the certificate qua the mortgaged property, a different situation would have arisen. On the contrary, it seems that, no effort was made to proceed against the mortgaged property.

65. The aforesaid factor is required to be kept in view while appreciating the prime challenge to the impugned auction sale on the count that the subject land, which was far excess in value than the outstanding amount, was put to sell with an oblique motive. Mr Shah, the learned Counsel for the petitioner, urged with a degree of vehemence that it is elementary that the authority to sell property of the defaulter for recovery of the due amount casts a responsibility to ensure that only that much property which would fetch the due amount is put to sale. The Executing Court or Officer, who is entrusted with the execution of decree or certificate for recovery, as the case may be, is duty bound to ensure that if a part of the property can be sold to fetch the proceeds sufficient to satisfy the decree, only that much part is sold and the debtor is not deprived of the entire property. This fundamental principle finds statutory expression in the form of proviso to sub-rule (15) of Rule 107, urged Mr. Shah.

66. Elaborating the submission, Mr Shah would urge that even in the absence of statutory prescription like the proviso to sub-rule (15), which proscribes sale of larger section or portion of immovable property than may be sufficient to discharge the outstanding amount, the courts have frown upon the practice of putting on the block larger portions of property for recovery of a relatively small or a minuscule amount.

67. To bolster up the aforesaid submissions, Mr. Shah placed a very strong reliance on the judgments of the Supreme Court in the cases of ***S. Mariyappa (Dead by L.Rs.) vs. Siddappa and another***[12]***, Sai Enterprises vs. Bhimreddy Laxmaiah and another***[13] and ***Ambati Narsayya vs. M. Subba Rao and another***[14]

68. In the case of ***Ambati Narsayya*** (supra) the question that arose before the Supreme Court was about the legality of the sale of 10 acres of land without considering whether a portion of the land could have been sold to satisfy the decree, for the sum of Rs.2,395.50. After adverting to the provisions of Order XXI

12(2005)10 SCC 235.
13(2007)13 SCC 576.
141989 Supp (2) SCC 693.

Rule 64, the Supreme Court enunciated the duty of the Executing Court, where a large property was sought to be proceeded against for recovery of a small amount, in the following words:.

> "**7**. It is of importance to note from this provision that in all execution proceedings, the Court has to first decide whether it is necessary to bring the entire attached proper- ty to sale or such portion thereof as may seem necessary to satisfy the decree. If the property is large and the decree to be satisfied is small, the Court must bring only such portion of the property, the proceeds of which would be sufficient to satisfy the claim of the decree holder. It is immaterial whether the property is one or several. Even if the property is one, if a separate portion could be sold without violating any provision of law only such portion of the property should be sold. This, in our opinion, is not just a discretion, but an obligation imposed on the Court. Care must be taken to put only such portion of the property to sale the consideration of which is sufficient to meet the claim in the execution petition. The sale held without examining this aspect and not in conformity with this requirement would be illegal and without jurisdiction."
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> (emphasis supplied)

69. In the aforesaid case, the Supreme Court placed reliance on the following observations in the case of ***Takkaseela Pedda Subba Reddi vs. Pujari Padmavathamma***[15]***.***

> "Under this provision the executing court derives jurisdiction to sell properties attached only to the point at which the decree is fully satisfied. The words 'necessary to satisfy the decree' clearly indicate that no sale can be allowed beyond the deretal amount mentioned in the sale proclamation. In other words, where the sale fetches a price equal to or higher than the amount mentioned in the sale proclamation and is sufficient to satisfy the decree, no further sale should be held and the court should stop at the stage."

70. In the case of ***S. Mariyappa*** (supra) the decretal debt was of rupees 8,000/- for recovery of which one acre of agriculture

15(1977)3 SCC 337.

land was sold without considering the question as to whether sale of only a part of the property would be sufficient to meet the decretal debt. The Supreme Court, after adverting to the previous pronouncement in the case of ***Desh Bandhu Gupta vs. N. L. Anand***[16], set aside the sale for the reason that executing court had not observed its statutory duties. The following observation in the case of ***Desh Bandhu Gupta*** (supra) were extracted with approval:

> "**14**. Proviso to Sub-rule (4) of Rule 17 of Order 21 provides the procedure to receive the application for execution of the decree. In the case of a decree for payment of money, the value of the property attached shall, as nearly as may be, correspondent with the amount due under the decree. Rule 64 of Order 21 charges the Executing Court that it may order attaching of any property to the extent that "such portion thereof as may seen necessary to satisfy the decree would be sold". It is also enjoined under Sub-rule (2)(a) of Rule 66 of Order 21 that where a part of the property would be sufficient to satisfy the decree the same be sold by public auction. Form 27 of appendix E of the schedule also directs the court auctioneer to sell so much of the said property as shall realise the sum in the said decree and costs. The Code, therefore, has taken special care charging the duty on the Executing Court and it has a salutary duty and a legislative mandate to apply its mind before setting the terms of proclamation and satisfy that if part of such property as seems necessary to satisfy the decree should be sold if the sale proceeds or portion thereof is sufficient to payment to the decree-holder or the person entitled under the decree to receive the amount and so much of that property alone should be ordered to be sold in execution. In *Ambati Narasayya v. M. Subba Rao*, this Court held that it is the duty cast upon the court under Order 21 Rule 64 to sell only such property or a portion thereof as may be necessary to satisfy the decree. It is a mandate of the legislature which cannot be ignored. Therein for execution of a decree of a sum of Rs. 2,000 and costs, the appellant's 10 acres land was brought to sale which was purchased for a sum of Rs. 17,000 subject to discharge of a prior mortgage of Rs. 2,000. This Court held that without the court's

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16(1994)1 SCC 131.

examining whether a portion of the property could be sold, the sale held was not in conformity with the requirement of Order 21 Rule 64 and it was held to be illegal and without jurisdiction. The sale was set aside and the court was directed to put the judgment-debtor in possession of the land and to refund the same amount to the auction-purchaser. Further direction was given to execute the decree in accordance with law. In *Mangal Prasad v. Krishna Kumar Maheshwari [1992 Supp (3) SCC 31]* a shop was sold to realise a decree debt of about Rs. 29,000 and the sale price at the auction was Rs. One lakh and odd. This Court finding that it is excessive execution, set aside the sale and directed return of the same amount to the auction-purchaser with interest @ 12%. In *Takaseela Pedda Subba Reddy v. Pujari Padmavathamma [(1997) 3 SCC 337]*, to recover the decree debt in two decrees, the properties situated in two different villages were brought to sale. In the first instance the property in 'D' village fatched a sum of Rs. 16,880, which was sufficient to satisfy the decretal amount. The property in 'G' village was also sold which fetched a sum of Rs. 12,000. This Court set aside the sale of 'G' village. Admittedly the side in sale is to the extent of 550 sq. yards, situated in a commercial area around which the petroleum installations are established. Though, as contended by Shri Madhava Reddy, that there may be building regulation for division of the property into portions, but the court made no attempt to sell a portion of the property, may be 100 yards or 150 yards out of it, or whether undivided portion thereof would have satisfied the decree debt. It could be legitimately concluded that the court did not apply its mind at all to this aspect as well."

71. In the case of ***Sai Enterprises*** (supra), the Supreme Court again adverted to the provisions contained in Order XXI Rule 64 and observed that the expression, "necessary to satisfy the decree" contained in Rule 64 clearly indicates the legislative intent that no sale can be allowed beyond the decretal amount mentioned in the sale proclamation. The duty cast upon the Court to sell only such portion or portion thereof as is necessary to satisfy the decree is a mandate of the legislature which cannot be ignored.

72. It is imperative to note that in the aforesaid pronouncements the Supreme Court has spelled out a solemn duty on the part of the executing court to bring only such portion of the property for sale the proceeds of which would be sufficient to satisfy the decretal debt and went on to hold that the sale held without examining this aspect and in violation of this statutory mandate would be illegal and without jurisdiction, by construing the expression, “necessary to satisfy the decree” as incorporating the statutory obligation. The reason is not far to seek. The sale of the immovable property of the debtor draws its legitimacy from the mandate of recovery of decretal debt. The object of sale of immovable property is neither to deprive the debtor of the property nor to expropriate the debtor of a valuable property for a relatively small debt. If a large property is allowed to be sold in execution of a decree for a small amount, which the debtor is not able to satisfy on account of the circumstances in which he finds himself, the instrumentality of law is prone to abuse in as much as the debtor would be expropriated of a valuable property in an involuntary sale.

73. In the case at hand, the proviso to sub-rule (15) is worded in a language which is more peremptory and authoritative than the expression, “necessary to satisfy the decree” used in Rule 64 of Order XXI. It commands that, so far as may be practicable, no larger section or portion of the immovable property shall be sold than may be sufficient to discharge the due amount. The main part of sub-rule (15) empowers the Recovery Officer to sale the whole or any portion of immovable property of a defaulter. Sub-rule (15) thus enjoins the Recovery Officer to examine the feasibility of the sale of a portion of the property sufficient to discharge the decretal debt. A failure to discharge this obligation, which is in the nature of a trust, has the propensity to vitiate the sale.

74. Reverting to the facts of the case, indisputably, the certificated amount was Rs.1,31,769/- plus interest and expenses of recovery. The attachment order dated 19th July, 2011 refers to the very same amount. The copy of the statement of loan account reveals that as of 31st October, 2011 (the end of the month in which the auction sale was held) the outstanding amount was Rs.1,75,369/-. Evidently, for the recovery of the said amount the agricultural land admeasuring 3 Acre and 11 Are was brought to sell. It can hardly be gainsaid that the subject land was disproportionately large to the decreal debt.

There is no material on record to indicate that any effort, much less a genuine one, was made to ascertain as to whether the decretal debt could be recovered by selling a portion of the subject land.

75. The revisional authority negatived the aforesaid challenge on the ground that the subject land constituted an entire Gat number (unit) and its division was not feasible. Moreover, since no objection was raised before the Recovery Officer, the said challenge was not sustainable before the revisional authority.

76. The aforesaid approach of the revisional authority, in my considered view, is not commendable. The matter ought to have been considered through the prism that the Rules cast an express obligation upon the Recovery Officer not to sell a large portion of the property than required to discharge the decretal debt. As indicated above, the recovery officer had no unbridled authority to put on the block immovable property which he chose to. The element of proportionality of the property brought to sell to the amount to be recovered ought to have been adverted to by the Recovery Officer.

77. The contention on behalf of the respondents that there was no other go but to sale the entire subject land is too specious. The said contention does not appeal to human credulity. Firstly, it lacks the element of spontaneity. The said contention was not raised at the first possible property. On the contrary, the authorities took a bold defence that it was in the discretion of the authorities to proceed against the property they considered appropriate. Secondly, the said contention is bald one. There is not a shred of material to indicate that the authorities made an endavour to ascertain whether the subject land was divisible and a portion thereof could be put to sell. The revisional authority could not have accepted such a bald assertion without any contemporaneous record and conduct to lend support thereto.

78. It would be contextually relevant to note that in the case of ***Ambati Narasayya*** (supra) a feeble attempt, like the one at hand, to show that the agriculture land sold therein was indivisible was made on behalf of the respondents therein and the Supreme Court strongly repelled such contention, in the following words:

> "**9**. We may again hark back to the case of the appellant. The amount claimed in the execution petition was about Rs.2,400. To realize that amount the land measuring 10 acres was sold for Rs. 17,000. The appellate court has stated that the land being one, could not have been divided. Shri Ganesh, learned counsel for the respondent sought to justify that view. But we find it difficult to appreciate that reason. It seems to be against common sense. The land is not indivisible. Nor division is impracticable or undesirable. Out of 10 acres, the Court could have conveniently demarcated a portion and sold it. Unfortunately, no such attempt was made and it was not even thought of. The Court has blind

> fold sold the entire property. This is a usual feature which we have noticed in most of the execution cases. We must deprecate this tendency. There is a duty cast upon .the Court to sell only such property or a portion thereof as necessary to satisfy the decree. It is a mandate of the legislature which cannot be ignored. We cannot, therefore, sustain the im- pugned sale. It must be set aside being in contravention of the provisions of Rule 64, Order XXI CPC."
>
> (emphasis supplied)

79. The aforesaid pronouncement governs the facts of the instant case with equal force. The endeavour on the part of the respondents to show that the subject land was required to be sold as a whole unit as it was indivisible is a lame excuse.

80. At this juncture, the aspects of determination of the upset price subsequent to the auction sale and not proceeding against the mortgaged property assume significance. Determination of upset price, prior to the auction sale, would have given, in the least, the Recovery Officer an indication as to what was the potential of the subject land and by what proportion it exceeded the amount to be recovered under the certificate. Conversely, the failure to proceed against the mortgaged property, without a legally sustainable reason, even though the value thereof was equivalent to the outstanding amount cannot be said to be inconsequential or immaterial. In the totality of the circumstances, if all these infirmities are considered in juxtaposition with each other, then the legality and validity of the auction sale becomes suspect. The last element of sale of the entire subject land without considering the aspect as to weather a sale of the portion thereof would have served the purpose of the recovery of the certificated amount renders the sale illegal and without jurisdiction.

81. A profitable reference in this context can be made to a judgment of the Supreme Court in the case of ***Mathew Varghese vs. M. Amritha Kumar and others***[17]**,** wherein while emphasizing the need to scrupulously pursue the action to recover the loan amount expeditiously, the Supreme Court reminded that the secured creditor should so conduct his actions that the constitutional right to property is preserved, rather than it being deprived of. The Supreme Court in paragraph 42 of the judgment extracted following observations in the case of ***Ram Kishun vs. State of U.P.***[18] and thereafter enunciated the proposition:

> "**42**. In *Ram Kishun*, paras 13, 14 and 28 are relevant for our purpose, which are as under:
>
> "**13**. Undoubtedly, public money should be recovered and recovery should be made expeditiously. But it does not mean that the financial institutions which are concerned only with the recovery of their loans, may be permitted to behave like property dealers and be permitted further to dispose of the secured assets in any unreasonable or arbitrary manner in flagrant violation of the statutory provisions.
>
> **14**. A right to hold property is a constitutional right as well as a human right. A person cannot be deprived of his property except in accordance with the provisions of a

17(2014) 5 Supreme Court Cases 610.

18(2012)11 SCC 511.

statute. (Vide Lachhman Dass v. Jagat Ram 2007 10 SCC 448 and *State of M.P v. Narmada Bachao Andolan* 2011 7 SCC 639.) Thus, 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.

*   *   *

28. In view of the above, the law can be summarised to the effect that the recovery of the public dues must be made strictly in accordance with the procedure prescribed by law. The liability of a surety is coextensive with that of the principal debtor. In case there are more than one surety the liability is to be divided equally among the sureties for unpaid amount of loan. Once the sale has been confirmed it cannot be set aside unless a fundamental procedural error has occurred or sale certificate had been obtained by misrepresentation or fraud." (emphasis added)

43. <u>The above principles laid down by this Court also make it clear that though the recovery of public dues should be made expeditiously, it should be in accordance with the procedure prescribed by law and that it should not frustrate a constitutional right, as well as the human right of a person to hold a property and that in the event of a fundamental procedural error occurred in a sale, the same can be set aside</u>."

(emphasis supplied)

82. The aforesaid pronouncements are on all four with the facts of the case at hand. I am, therefore, persuaded to hold that the auction sale suffered from fundamental error in law and resulted in serious prejudice to the petitioner. The question as to whether the stated claim of the petitioner that he was ready and willing to pay the entire due amount and discharge the debt was genuine, in the aforesaid backdrop, pales in significance. Nor the failure of the petitioner to avail the remedies under sub-rules (12) to (14) of Rule 107, even if taken at par, clothes legality to the impugned auction sale. Thus, I am persuaded to set aside the auction sale held on 18th October, 2011 and confirmed by order dated 31st March, 2012.

83. This takes me to the modulation of the reliefs. Pursuant to the orders passed by this Court on 28th September, 2012 and 10th May, 2019, the petitioner has deposited a sum of Rs.6,04,619/-. Indisputably, by virtue of the interim orders passed by his Court, the petitioner is still in possession of the subject land and the sale certificate dated 20th May, 2012, executed by respondent no.4 in favour of respondent nos.8 and 9, and registered on 10th July, 2012, has not been given effect to.

84. It seems that the petitioner has deposited the amount due under the certificate dated 9th December, 2009, as of 31st January, 2019. It is, however, clarified that this Court has not considered the aspect of the amount actually due and payable by the petitioner to respondent no.3, under said certificate. Thus, respondent no.3 would be at liberty to recover from the petitioner the amount which still remains due and payable, if any, under the recovery certificate dated 9th December, 2009, in accordance with the provisions of the Act, 1960 and Rules, 1961. With this clarification, it may be in the fitness of things to direct that the amount deposited by the petitioner pursuant to the orders of this Court be paid to respondent no.3, along with interest accrued thereon. Respondent no.3 - Society, in turn, is required to be directed to refund the amount of Rs.21,01,000/-, the sale price paid by respondent nos.8 and 9 - the auction purchasers. Since respondent no.3 - Society has utilized the said amount, it would be appropriate to direct respondent no.3 - Society to refund the said amount along with interest at the rate of 10% per annum from the date of deposit.

85. Hence the following order;

: O r d e r :

(i) The petition stands partly allowed.

(ii) The auction sale in respect of the subject land dated 18^{th} October, 2011, in favour of respondent nos.8 and 9, confirmed by respondent no.7 by order dated 31^{st} March, 2012, stands set aside.

(iii) The sale certificate executed by respondent no.4 in favour of respondent nos.8 and 9 on 20^{th} May, 2012 and registered on 10^{th} July, 2012, stands cancelled.

(iv) The amount of Rs.6,04,619/- deposited by the petitioner in this Court, along with interest accrued thereon, be paid to respondent no.3.

(v) Respondent no.3 shall refund the sale price of Rs.21,01,000/- to respondent nos.8 and 9 along with interest at the rate of 10% p.a. from the date of deposit till payment within the period of six weeks from today.

(vi) In the circumstances, there shall be no order as to costs.

Rule made absolute in aforesaid terms.

[N. J. JAMADAR, J.]

At this stage, Mr. Hon, the learned Counsel for respondent nos.3 and 4, seeks stay to the execution and operation of this judgment and order for a period of six weeks.

In the backdrop of the nature of the order passed by this Court, it may be expedient to stay the execution and operation of this order. Thus the execution and operation of this order stands stayed for the period of six weeks from today.

In the meanwhile, the interim order passed by this Court dated 10th May, 2019, would continue to operate.

[N. J. JAMADAR, J.]