

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 1447 OF 2009

**RAJENDRA BALASAHEB KHAIRE
VERSUS
THE AHMEDNAGAR MERCHANT CO-OPERATIVE BANK AND
ANOTHER**

.....
Advocate for Petitioner : Mr. M. R. Sonawane
Advocate for respondent No. 1 : Mr. L. B. Pallod
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CORAM : V. K. JADHAV, J.

DATED : 22nd SEPTEMBER, 2015

P.C. :-

1. By this petition, the petitioner/original judgment debtor No. 1 has challenged the order passed by the learned Civil Judge (S.D.), Ahmednagar dated 05.12.2008 below Exh. 1 in Special Darkhast No. 83 of 2006.

2. The learned counsel for the petitioner submits that the learned Judge of the executing court has not at all followed the provisions of Order XXI Rule 38, 39 and 40 r/w Section 51 of Civil Procedure Code.

3. The learned counsel for respondent No. 1 submits that the learned Judge of the executing court has rightly directed to issue arrest warrant against the judgment debtor No. 1.

4. It appears that, initially, notice came to be issued under Order XXI Rule 37 of Civil Procedure Code to show cause to the petitioner/judgment debtor No. 1. In response to the said notice, the petitioner/judgment debtor No. 1 appeared before the executing court and filed his detailed reply at Exh. 15 (Exh. "B" page No. 16 of this petition). It further appears that without complying with the provisions of Order XXI Rule 39 of Civil Procedure Code, the learned Judge of the executing court has directed to issue warrant of arrest against the petitioner. No such warrant of arrest in execution of decree can be issued unless and until the decree holder pays into Court such sum as the Judge thinks sufficient for the subsistence of the judgment-debtor from the time of his arrest until he can be brought before the Court. It appears from the record and also admitted by the learned counsel for the parties that the learned Judge of the trial court has not passed any order directing the decree holder to deposit amount towards subsistence allowance. Apart from that, even though the petitioner/judgment debtor No. 1 appeared before the executing court, the learned Judge of the executing court has not taken recourse to the provisions of Order XXI Rule 40. Consequently, the decree holder has not adduced any evidence in support of his application for execution, nor the learned Judge of the executing court has taken into consideration the reply submitted by the petitioner/judgment debtor No. 1. Consequently, the impugned order

is bad in the eyes of law and the same is liable to be quashed and set aside. In view of this, I proceed to pass the following order :

ORDER

- I. The writ petition is hereby partly allowed.
- II. The impugned order dated 05.12.2008 passed by the Civil Judge (S.D), Ahmednagar below Exh.1 in Special Darkhast No. 83 of 2006 is hereby quashed and set aside.
- III. The learned Judge of the executing court shall pass appropriate orders in the execution petition having due regard to the provisions of Order XXI Rule 38 to 40.
- IV. The parties shall appear before the executing court on **06.10.2015.**
- V. The writ petition is disposed of.
- VI. In the circumstances, there shall be no order as to costs.

(V. K. JADHAV, J.)

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vre/-