

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

WRIT PETITION NO. 5146 OF 2015

Rajabhau S/o Gurulingappa Halkude,
Age- 48 years, Occ. Agri.,
R/o Renapur, Tq. Renapur,
Dist. Latur

...PETITIONER
(Judgment Debtor/
Ori. Defendant.)

versus

Vijaykumar Satyanarayan Mundada,
Age- years, Occ- Business,
R/o New Adarsh Colony,
Proprietor- Ashwin Money Landor,
Latur, Tq. & Dist. Latur.

...RESPONDENT
(Decree Holder/
Ori. Plaintiff)

.....

Mr. Amey Subnis, Advocate holding for
Mr. V.D. Gunale, Advocate for Petitioner
Mr. S.S. Manale, Advocate for respondent

.....

CORAM : SUNIL P. DESHMUKH, J.

DATED : 18th JUNE, 2015

ORAL JUDGMENT :-

1. Rule. Rule made returnable forthwith. Heard the learned counsel for parties finally with consent.
2. Petition has been moved by the petitioner-original judgment debtor, aggrieved by common order dated 12-01-2015 on Exhibits - 20 and 30 in Regular Darkhast No. 51 of 2012 passed by 9th joint Civil Judge, Junior Division, Latur, whereunder, requests of present petitioner, for setting aside order of reissuing warrant of attachment and for permission to lead evidence to prove payment by him to decree holder, have been rejected.

3. Earlier, petitioner had moved application Exhibit-17 in the execution proceedings on 18-03-2014 referring to that the matter has been settled out of the court and he has paid certain amount to decree holder and had requested the court to grant some time to pay remaining amount pursuant to said settlement. Said application was rejected and on the very same day attachment warrant had been issued.

4. As such application Exhibit-20 had been moved by petitioner on 09-04-2014 referring to that the matter had been settled out of the court and out of agreed amount of Rs. 70,000/-, an amount of Rs. 60,000/- has been already paid to the decree holder and he had executed receipt therefor and had stated that balance amount of Rs. 10,000/- would be paid within two months.

5. Said application has been opposed by the decree holder, contending that he never received the amount and alleged that false and bogus receipt was prepared by the judgment debtor.

6. In view of aforesaid, judgment debtor moved application Exhibit-30, requesting the court to let him lead evidence, to prove the receipt acknowledging payment, by examining the witnesses.

7. Learned judge while deciding applications Exhibits - 20 and 30 referred to order XXI, rule 2 (1) and (2) of the Code of Civil Procedure (hereinafter referred to as "CPC" for the sake of brevity). According to learned Judge, since there is no request pursuant to sub-rule (2) of Rule 2 of Order XXI of the CPC, question of certification by judgment

debtor does not arise and hence the court has not recorded evidence. In respect of request under Exhibit-30, the court has observed that such permission could not be granted in view of Order XXI, Rule 2-A (b) of CPC, which provides that a payment or adjustment, which has not been certified or recorded as aforesaid, shall not be recognized by any court executing the decree. The court appears to have considered that judgment debtor claims to have paid amount of Rs. 60,000/- on 02-11-2013 to the decree holder and that the application had been moved after period referred to under Article 125 of the Limitation Act. The court refers to decision by Gujarat high court in the case of *Bithko Traders (through its partner Jyotiben P. Shah) and another Vs. V.M. Traders* reported in (1989) IGLR, 169, it has been observed that-

"the payment or adjustment can be certified at the instance of the judgment-debtor only if it is in the mode and the manner provided in clauses (a), (b) & (c) of sub-rule (2-A) and, as such, though section 47 of the CPC the executing court is required to decide all questions arising between the parties yet it is not applicable in cases where payment is not certified or recorded by the court",

and thus the rejected applications Exhibits- 20 and 30.

8. Order XXI, Ruled 1, 2, 2-A and 3 need reference and the same are reproduced below:

ORDER XXI-EXECUTION OF DECREES AND ORDERS

1. Modes of paying money under decree— (1) All money, payable under a decree shall be paid as follows, namely :—

(a) by deposit into the Court whose duty it is to execute the decree, or sent to that Court by postal money order or through a bank; or

(b) out of Court, to the decree-holder by postal money order or through a bank, or by any other mode wherein payment is

evidenced in writing; or

(c) otherwise, as the Court which made the decree, directs.

(2) Where any payment is made under clause (a) or clause (c) of sub rule (1), the judgment-debtor shall give notice thereof to the decree-holder either through the Court or directly to him by registered post, acknowledgment due.

(3)

(a) ...

(b)

(c)

(d)

(e)

(4)

(5) On any amount paid under clause (b) of sub-rule (1) interest, if any, shall cease to run from the date of such payment :

2. Payment out of Court to decree-holder—

(1) Where any money payable under a decree of any kind is paid out of Court. [or decree of any kind is otherwise adjusted] in whole or in part to the satisfaction of the decree-holder, the decree- holder shall certify such payment or adjustment to the Court whose duty it is to execute the decree, and the Court shall record the same accordingly.

(2) The judgment-debtor [or any person who has become surety for the judgment-debtor] also may inform the Court of such payment or adjustment, and apply to the Court to issue a notice to the decree- holder to show cause, on a day to be fixed by the Court, why such payment or adjustment should not be recorded as certified; and if, after service of such notice, the decree-holder fails to show cause why the payment or adjustment should not be recorded as certified, the Court record the same accordingly.

[(2-A) No payment or adjustment shall be recorded at the instance of the judgment- debtor unless—

(a) the payment is made in the manner provided in rule 1; or

(b) the payment or adjustment is proved by documentary evidence; or

(c) the payment or adjustment is admitted by, or on behalf of, the decree-holder in his reply to the notice given under sub-rule (2) of rule 1, or before the Court.]

(3) A payment or adjustment, which has not been certified or recorded as aforesaid, shall not be recognised by any Court executing the decree.

9. Looking at aforesaid, it cannot be said that judgment debtor had not informed the court about payment or adjustment. Though procedurally, ostensibly petitioner did not make formal application for issuing notice to the decree holder in this matter application has been moved for opportunity to lead evidence as such, notice may be an implicit aspect which may be given proper treatment and deemed appropriate in the peculiar facts of the case towards compliance of procedural requirements and such a request could be considered. Purport underlying the rules does indicate that in the event of dispute, the parties would be have an opportunity to lead evidence in view of clause (b) of Rule 2-A whereunder documentary evidence could be possible.

10. In view of this and also looking at that the requests under Exhibits-20 and 30 had been declined by the court on the ground the same cannot be considered as applications had been delayed and the applicant had not tendered the explanation for the same, the petitioner under the circumstances deserves to be given opportunity on that count as well.

11. In view aforesaid, I deem it appropriate to set aside order dated 12-01-2015 on Exhibits-20 and 30 in Regular Darkhast No. 51 of 2012 passed by learned 9th Joint Civil Judge Junior Division, Latur and remand the matter for fresh consideration of Exhibits - 20 and 30 including an opportunity in respect of ground of limitation.

12. Accordingly, the order impugned in this petition stands set aside. Applications Exhibit- 20 and 30 are restored to their original position as had been subsisting before passing of the impugned order. The matter is remanded to trial court for fresh consideration on Exhibits-20 and 30 with opportunity to the petitioner to contest ground of limitation. It is also open for the respondent to resist the applications on merits.

13. Writ petition is allowed accordingly. Rule is made absolute in aforesaid terms.

Sd/-

(SUNIL P. DESHMUKH, J.)

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(3) Where money is paid by postal money order or through a bank under clause (a) or clause (b) of sub-rule (1), the money order or payment through bank, as the case may be, shall accurately state the following particulars, namely : —

(a) the number of the original suit;

(b) the names of the parties or where there are more than two plaintiffs or more than two defendants, as the case may be, the names of the first two plaintiffs and the first two defendants;

(c) how the money remitted is to be adjusted, that is to say, whether it is towards the principal, interest or costs;

(d) the number of the execution case of the Court, where such case is pending; and

(e) the name and address of the payer.

(4) On any amount paid under clause (a) or clause (c) of sub-rule (1) interest, if any, shall cease to run from the date of service of the notice referred to in sub-rule (2).

(5) On any amount paid under clause (b) of sub-rule (1) interest, if any, shall cease to run from the date of such payment :

Provided that, where the decree-holder refuses to accept the postal order or payment through a bank, interest shall cease to run from the date on which the money was tendered to him, or where he avoids acceptance of the postal money order or payment through bank, interest shall cease to run from the date on which money would have been tendered to him in the ordinary course of business of the postal authorities or the bank, as the case may be.]