

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.3465 OF 2015

The Ratnakar Bank Limited	]	
having its Regd. Office at	]	
1 st Lane, Shahupuri,	]	
Kolhapur – 416-001	]	 Petitioner.

Versus

1]	The State of Maharashtra	]	
	Through the Office of the Government	]	
	Pleader, Having his office at PWD	]	 Deleted
	Building, High Court, Bombay.	]	
		]	
2]	Ld. 6 th Joint Civil Judge, Junior Division	]	 Deleted
	Kolhapur.	]	
		]	
3]	Ushadevi Rajaram Nimbalkar	]	
	Age 72 years, Occ : Housemaker	]	
		]	
4]	Amarja Rajaram Nimbalkar	]	
	Age 46 years, Occ : Architect	]	
		]	
5]	Bajaji Rajaram Nimbalkar	]	
	Age : 45 years, Occ : Agriculture	]	
		]	
	All residing at C.T.S. No.2113,	]	
	Padma Castle Bunglow	]	
	`E' Ward, Tararani Chowk, Kolhapur	]	 Respondents.

Mr. P K Dhakephalkar, Senior Advocate with Mr. Ashish Gatagat i/by Vidhi Partners for the Petitioner.

Mr. N V Bandiwadekar with Mr. Sagar Mane for the Respondents.

Respondent Nos.1 and 2 deleted by order dated 11/09/2015.

CORAM : R. M. SAVANT, J.
DATE : 11th September 2015

ORAL JUDGMENT

1 At the outset the learned Senior Counsel appearing on behalf of the Petitioner Shri P K Dhakephalkar seeks deletion of the Respondent Nos.1 and 2 on the ground that they are formal parties in the context of the challenge raised in the above Petition. The said Respondents are accordingly deleted at the risk of the Petitioner. Amendment to be carried out forthwith.

2 Rule with the consent of the learned counsel for the parties made returnable forthwith and heard.

3 The writ jurisdiction of this Court is invoked against the order dated 19/08/2014 passed by the learned Civil Judge, Junior Division, Kolhapur by which order the learned Judge has framed four issues which are numbered from (A) to (D) as the issues to be tried whilst deciding the objections raised vide Exhibit 75 by the Respondent Nos. 3 to 5.

4 It is not necessary to burden this order with unnecessary details. Suffice it would be to state that the said objections have been raised in the Execution Proceedings which have been filed for execution of the decree dated 25/06/1974 passed in Special Civil Suit No.22 of 1973 in favour of the Petitioner-Bank. It is pursuant to the decree that was passed that the Petitioner Bank filed Special Darkhast No.72 of 1976 for execution of the said decree on

18/06/1976. The Executing Court i.e. the learned Civil Judge Senior Division, Kolhapur granted permission to auction the mortgaged property. It seems that since there was a lukewarm response to the auction as no bids were received pursuant to the auction which has held on 03/08/1979, the Petitioner Bank thereafter obtained permission of the Executing Court to itself purchase the suit property, which was granted. The Petitioner Bank accordingly purchased the mortgaged property for an amount proportionate to the outstanding dues. The Executing Court accordingly on 10/03/1980 granted a Sale Certificate in favour of the Petitioner Bank in respect of the said mortgaged property which the Petitioner Bank had purchased in auction. The Petitioner Bank thereafter on 03/05/1980 filed Misc. Application No.1351 of 1980 for being delivered the possession. It is during the pendency of the said application, one of the Judgment Debtors i.e. Rajaram Nimbalkar expired on 08/11/1981. the Executing Court allowed the Respondent Nos. 3 to 5 and one Mr. Dhairyasheel Nimbalkar and one Ms. Sushila Nimbalkar being brought on record as his legal heirs and representatives.

5 The said Dhairyasheel Nimbalkar filed his objection (Exhibit 50) to the application filed for possession being Misc. Application No.1351 of 1980 filed by the Petitioner Bank. The objection raised by the said Dhairyasheel Nimbalkar was to the effect that the mortgaged property is an undivided property belonging to the Hindu Joint Family/ancestral property and therefore

could not have been mortgaged or sold in auction. The Respondent Nos.3 to 5 also raised objections by adopting the objections raised by Dhairyasheel Nimbalkar at Exhibit 50. The objection of the Respondent Nos.3 to 5 was numbered as Exhibit 75. The said Misc. Application No.1351 of 1980 filed by the Petitioner Bank was dismissed by the Executing Court on the ground that the property was HUF property and the Objectors were minors and their rights need to be protected. The Petitioner Bank challenged the said order dated 06/07/1991 by way of Civil Revision Application No.778 of 1991. The said Civil Revision Application came to be admitted. During the pendency of the said Civil Revision Application, Dhairyasheel Nimbalkar expired, pursuant to which his wife Smt. Mayura Dhairyasheel Nimbalkar was brought on record of the Civil Revision Application on 10/07/1992. The said Civil Revision Application thereafter reached hearing on 07/06/2001. A learned Single Judge of this Court Shri V.C.Daga, J. as His Lordship then was, by consent of the parties set aside the order dated 06/07/1991 passed by the Executing Court i.e. the learned Civil Judge Junior Division, Kolhapur and remanded the matter back to the Executing Court and directed the Executing Court to treat the application (Exhibit 50) filed by Dhairyasheel Nimbalkar and the application (Exhibit 75) filed by the other heirs of Rajaram Nimbalkar as the Applications filed under Order XXI Rule 97 of the Code of Civil Procedure. In the context of the present Petition the following observation made by the learned Single Judge is relevant, which for the sake of ready reference is

reproduced herein under :-

“Considering the nature of purshis and objection raised, I do not see any difficulty in setting aside the impugned order by consent of the parties and directing the executing court to prima facie treat those objections as raised by the Respondents under O.21 R.97 of the CPC. It shall be open to the Petitioner -decree holder to raise all possible defence in reply as may be available in law to challenge and meet the objections raised by the Respondents including maintainability thereof under O.21 R. 97 C.P.C. or any other provisions of law for the time being in force. The executing Court shall decide the said objections on its own merit. In view of this, the impugned order dated 6.7.1991, passed by the Civil Judge, SD, Kolhapur is set aside by consent of parties.”

It appears that the Petitioner Bank did not file any reply to the objections raised on behalf of the said heirs of Rajaram Nimbalkar i.e. to the Applications (Exhibits 50 and 75).

6 The Executing Court by the impugned order held that it would be appropriate to frame the following four issues :-

- A] Whether the auction of suit property is legal ?
- B] Whether the main application is bad for non joinder of necessary parties?
- C] Whether the applicant bank had right to purchase the property in auction?

D] Whether legal heirs of deceased Dadasaheb Nimbalkar and Rajaram Nimbalkar have right to take objections to this proceeding?

It is aggrieved by the framing of the said four issues that the instant Petition has been filed by the Petitioner-Bank.

7 It is the contention of the learned Senior Counsel appearing for the Petitioner Bank Shri Dhakephalkar that the Executing Court has erred in framing the said four issues as only those issues can be framed which arise between the parties and no other. The learned Senior Counsel in support of the said contention sought to place reliance on the judgment of the Apex Court reported in (1998) 3 SCC 723 in the matter of Silverline Forum Pvt. Ltd v/s. Rajiv Trust and another wherein the Apex Court has held that only those issues can be framed which issues arise on account of questions which have legally arisen between the parties to the proceeding and must be relevant to the adjudication. The learned Senior Counsel would therefore contend that framing of Issue Nos. A, C and D as above was not warranted and apart from Issue No.B, the only issue, which would arise namely whether the objectors prove that they have independent right and whether they are bound by the decree, was required to be framed.

8 Per contra, the learned counsel appearing for the Respondent Nos.3 to 5 Shri Bandiwadekar would contend that in the light of Exhibit 75 wherein the Respondent Nos.3 to 5 have questioned the auction as also asserted that they had an independent right, that the said issues arise. The learned counsel in support of his said contention sought to place reliance on the judgment of the Apex Court reported in **AIR 2002 SC 251** in the matter of **N.S.S Narayana Sarma and others v/s. M/s. Goldstone Exports (P) Ltd and others** wherein the Apex Court has held that the Executing Court is competent to consider all issues raised by the persons offering obstruction against execution of the decree and pass appropriate orders. It is the submission of the learned counsel for the Respondent Nos.3 to 5 that the issues which have framed arise out of the objections raised by the Objectors vide Exhibit 50 and Exhibit 75.

9 Having heard the learned counsel for the parties, the question that arises for consideration is whether there is warrant to frame the issues which have been framed by the Executing Court. Before answering the said issues, it would be apposite to re-visit the facts. As indicated above the decree in question has been passed as long back as on 25/06/1974. The decree was thereafter put in execution in the year 1976. The notice of auction was issued on 03/08/1979, and it is pursuant to the permission granted by the Executing Court that the Petitioner Bank purchased the property for the amount

proportionate to the outstanding dues and the Sale Certificate came to be issued in favour of the Petitioner on 10/03/1980.

10 Now coming to the Application (Exhibit 75), no doubt that a learned Single Judge of this Court has directed that the said application is to be treated as one under Order XXI Rule 97 of the Code of Civil Procedure and that the decree holder i.e. the Petitioner Bank is entitled to raise such defences as are available by filing reply. As indicated above no reply has been filed on behalf of the Petitioner Bank. However, the facts as narrated herein above are undisputed. In so far as Exhibit 50 is concerned, the said application is also to be treated as an application under Order XXI Rule 97 of the Code of Civil Procedure and filed by Dhairyasheel Nimbalkar who is also one of the heirs of Rajaram Nimbalkar being his son. The said application is now being prosecuted by the heirs of Dhairyasheel Nimbalkar. The decree is being questioned on the ground that the property could not have been mortgaged as the said property was HUF/ancestral property and therefore the Objectors have an independent right. Hence the issue which is required to be established by the Objectors is whether they have any independent right in the mortgaged property and therefore whether they are bound by the decree. It is required to be borne in mind that the objections can only be to the execution of the decree and therefore the objections are to be such as impinges upon the decree and not the events which have taken place post the decree. In the instant case, the

Executing Court seems to have framed the Issues A and C which revolve around the legality of the auction in view of the fact that the Objectors have raised the said issues in the application (Exhibit 75). The said issues therefore revolve around the events which have occurred post the decree. The Executing Court was required to consider whether the said issues are germane to the adjudication of the application which is one filed under Order XXI Rule 97 of the Code of Civil Procedure. Merely because in an application under Rule 97 all questions arising between the parties have to be adjudicated in the manner of a suit, the same would not mean that the scope of the inquiry is to be enlarged to such an extent that any and every issue is required to be framed on the basis of the pleadings. The defining aspect as indicated above is as to whether the Objectors have a right to object which they can only be established if they show that they have an independent right in the property. If once they prove such a right than the same would undoubtedly have an effect on the execution of the decree. As indicated above, the Issues A and C relate to the events which had taken place post the decree and therefore do not have any relevance in so far as execution of the decree is concerned. The said issues have no nexus with the legality or otherwise of the decree. The learned counsel for the Respondent Nos. 3 to 5 made a valiant attempt to contend that since no reply has been filed to the applications Exhibits 50 and 75, the issues that have been framed may therefore not be interfered with.

11 In my view, it is not possible to accept the said contention of the learned counsel for the Respondent Nos.3 to 5, as though no reply has been filed, the issues which are only germane to the adjudication under Order XXI Rule 97 are required to be framed and the scope of the enquiry is therefore not required to be unnecessarily enlarged. In my view, therefore, the impugned order dated 19/08/2014 is required to be quashed and set aside to the extent it frames the said four issues which have been adverted to herein above. The said four issues would stand substituted by the following two issues :-

- A] Whether the main application is bad for non joinder of necessary parties?
- B] Whether the Objectors establish their independent right qua the mortgaged/auctioned property ? And consequentially whether they prove that they are not bound by the decree ?

The Executing Court is directed to try the aforesaid two issues whilst adjudicating the application (Exhibit 75) by giving proper opportunity to the parties. The above Writ Petition is allowed to the aforesaid extent. Rule is accordingly made absolute in the aforesaid terms with parties to bear their respective costs of the Petition.

[R.M.SAVANT, J]

Certified to be true and correct copy of the original signed Judgment.