

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

**WRIT PETITION NO. 7336 OF 2014
WITH
CIVIL APPLICATION NO. 9204 OF 2015 IN WP 7336 OF 2014**

**BHAMABAI W/O TRIMBAK DHANWATE AND ANOTHER
VERSUS
M/S. DATTATRAYA LAXMAN TAKSALE, A PARTNERSHIP FIRM,
THROUGH ITS PARTNER BHANUDAS DATTATRAYA TAKSALE
AND ANOTHER**

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Advocate for the petitioners : Mr. R. A. Tambe
Advocate for respondent No.1 : Mr. P. N. Surwase
Advocate for respondent No.2 : Mr. N. S. Nansingka (absent)

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**CORAM : V. K. JADHAV, J.
RESERVED FOR ORDER ON : 08.02.2016
ORDER PRONOUNCED ON : 16.03.2016**

ORDER :-

1. By consent of learned counsel for respective parties, matter is heard finally at admission stage.
2. Being aggrieved by the common order passed below Exh.78 and Exh.83 in Regular Darkhast No.28 of 2012 (old Special Darkhast No.75 of 2003) by Civil Judge Junior Division, Rahata dated 02.08.2014, the present writ petition is preferred by the petitioners/original judgment debtors.

3. Brief facts giving rise to the present writ petition are as follows:

a) Respondent No.1, a Partnership Firm, had instituted Special Civil Suit No.54 of 1991 before learned Civil Judge Senior Division, Kopargaon for recovery of amount against the present petitioners and two other defendants. Learned Civil Judge Senior Division, Kopargaon, by judgment and order dated 23.04.1998, decreed the suit against defendant Nos. 1 to 3 with simple interest at the rate of 12 % per annum, with some other directions which are not necessary to mention here. In the year 2003, respondent No.1/original plaintiff initiated Darkhast proceedings before Civil Judge Junior Division, Kopargaon, which was later on transferred to Civil Judge Junior Division, Rahata, by filing Regular Darkhast No.28 of 2012 (old Special Darkhast No.75 of 2003).

b) In the said Darkhast proceedings, respondent No.1/original plaintiff filed application Exh.17 under Order XXI Rule 54 of the Code of Civil Procedure (for short "CPC") for attachment of two house properties belonging to the petitioners i.e. Grampanchayat House Nos. 100 and 101 situated at village Puntamba. Learned Judge of the executing court has attached the said properties by order dated 09.10.2006. Thereafter, respondent No.1/original decree holder filed application Exh.21 for issuance of sale proclamation for selling said

house properties under attachment. Accordingly, an auction sale was held in execution of said decree by following provisions contained in Order XXI Rule 64 and 66, respectively. Initially, three times the bid was conducted and the price quoted as the highest bid was not found satisfactory. Thus, as per order passed by the executing court dated 10.03.2008, a fresh bid was conducted. In view of provisions of Order XXI Rule 72 of CPC, respondent No.1/deGREE holder was permitted by the court to take part in the said bid. The decree holder was found to be the highest bidder and accordingly, bid of the decree holder came to be accepted by the executing court by passing order dated 10.03.2008. The executing court has accordingly directed the decree holder to deposit 1/4th of the amount of his bid forthwith. On the same day, the decree holder has deposited 1/4th of the bid amount before the executing court. Thereafter, the decree holder moved an application vide Exh.32 for subtracting remaining amount of the bid as ultimately remaining amount, if deposited by the decree holder, the said amount is required to be paid to him. The executing court has allowed the said application by order dated 18.03.2008. The decree holder has also deposited poundage fees vide Exh.34.

c) After accepting highest bid of the decree holder, the judgment debtors 1-A to 1-G appeared before the executing court and moved

application Exh.36 for grant of stay to the further proceedings on the ground that the original judgment debtor is dead. However, after moving said application, the judgment debtors remained absent besides the said sale is already confirmed and accordingly, the said application came to be rejected by the executing court by order dated 28.06.2011. During pendency of Darkhast, original decree holder also died and his legal representatives substituted him by moving application vide Exh.46.

d) During pendency of the proceedings, decree holder also sold the said property to one Suekha Borkale-present respondent No.2 under registered sale deed and informed the same to the court by filing pursis Exh.65. The decree holder has also moved application Exh.67 for getting possession of the property.

e) It appears from the record that the judgment debtors, thereafter, moved application Exh.71 raising objection about the auction procedure adopted. However, during pendency of the said application, petitioners/judgment debtors again moved application Exh.74 and thereby shown their willingness to deposit the decretal amount. By order dated 21.02.2014, the executing court granted permission to deposit the decretal amount. However, as per the said order, the judgment debtors have not deposited the amount.

Even while passing order dated 28.02.2014 below Exh.74, the executing court has observed about the same. Thereafter, again the same type of application was moved by the judgment debtors vide Exh.78 and also subsequent application at Exh.83. Learned Judge of the executing court, by impugned order dated 02.08.2014, rejected both the applications Exh.78 and Exh.83 respectively. Hence this writ petition.

4. Learned counsel for the petitioners submits that the petitioners/judgment debtors filed application Exh.74 on 21.02.2014 requesting therein the executing court that they are ready to deposit the entire decretal amount and by accepting the amount, Darkhast may be disposed of. Learned counsel submits that on 21.02.2014 itself, the executing court has passed an order on the said application Exh.74 thereby permitting the petitioners to deposit the amount in the court. Learned counsel submits that there was no time limit to deposit the amount. Learned counsel submits that immediately thereafter, the petitioners/judgment debtors filed application Exh.75 requesting therein to grant some time for depositing the amount. The executing court has allowed the said application as a last chance. Learned counsel submits that on 28.02.2014, learned Judge of the executing court passed an order observing therein that no amount is deposited till that date and further, no extension of time was sought,

hence, the application Exh.74 deemed to have been rejected. Learned counsel submits that even in the order passed below Exh.75, there is no reference as to the limit of time extended. Learned counsel submits that on 14.03.2014, petitioner No.1 filed application Exh.78 and contended therein that the petitioner is ready to deposit amount of rupees one lac immediately and for the rest of the amount, she may be granted some time. Learned counsel submits that even on 14.07.2014, petitioner No.1 filed application Exh.83 contending therein that she is ready to deposit the entire amount and the same may kindly be accepted. Learned counsel submits that the executing court has erroneously rejected both the applications Exh.78 and Exh.83 by passing a common order.

5. Learned counsel for the petitioners submits that petitioner No.1 is an old age lady and she is looking after the execution proceedings after demise of her husband. Petitioner No.1 filed application Exh.71 thereby raising objection to the procedure adopted at the time of auction of the property and the said application is still pending. Learned counsel submits that the executing court has erred in rejecting application Exh.74 on 28.02.2014 on the ground that the amount is not deposited. Learned counsel submits that in the order dated 28.02.2014 passed below Exh.74 no outer limit of time is fixed for depositing the amount. Learned counsel submits that in view of

the provisions of Order XXI Rule 89 of CPC, the petitioner gets a reasonable time to deposit the amount. Learned counsel submits that the order below Exh.74 is perverse as the executing court has failed to exercise the jurisdiction vested in it in view of provisions of Order XXI Rule 89 of CPC. Learned counsel submits that the money decree was sought to be executed and it is not a decree for possession of the property. Learned counsel submits that the executing court ought to have considered this aspect and allowed the application Exh.74, 78 and 83 by exercising discretion judicially. Learned counsel submits that the properties under attachment are the ancestral properties of the petitioners and their sentiments are involved in it. Learned counsel further submits that petitioner No.1 being an illiterate lady, could not understand as to how and within what time the decretal amount is required to be deposited. Learned counsel further submits that the applications Exh.71 and Exh.77 are still pending and therefore, the sale cannot become absolute. Learned counsel for the petitioners, in order to substantiate his contentions placed reliance on the following cases:

1. ***Dadi Jagannadham vs. Jammulu Ramulu and others***, reported in **(2001) 7 Supreme Court Cases 71**,
2. ***Sukumar De vs. Bimala Auddy and others***, reported in **2014 (4) Mh.L.J. 501**,

3. ***Kancherla Lakshminarayana vs. Mattaparthi Shyamala and others***, reported in ***AIR 2008 Supreme Court 2069***,
 4. ***Nani Gopal Paul vs. T. Prasad Singh and others***, reported in ***AIR 1995 Supreme Court 1971*** and
 5. ***Raghunath Pradhani vs. Damodra Mahapatra and others***, reported in ***AIR 1978 Supreme Court 1820***.
6. Learned counsel for respondent No.1 submits that in order to seek cancellation of the sale under Order XXI Rule 89 of CPC, the deposit should have been made within a time limit from the date of auction and this period cannot be extended. Learned counsel submits that the said provision is in the nature of concession given to the judgment debtor and therefore, the provisions thereof must be strictly construed and complied with. Learned counsel submits that the petitioners herein have not complied with the mandatory requirements of deposit of amount. Clause (a) of Sub-rule (1) of Rule 89 of Order 21 of CPC required the applicant to deposit in court 5% of the purchase money for payment to the auction purchaser and deposit of requisite amount in the court is a condition precedent for setting aside the execution of sale and such amount must be paid within the period as specified in the Rules. Learned counsel submits that the deposit under Order XXI Rule 89 of CPC, if made after the time limit, the application is liable to be dismissed. Learned counsel submits that in the case in hand, there is no question of granting any

outer limit while passing order below Exh.74. Even the execution court, on the same day, allowed the application Exh.75 granting time as a last chance for complying with the provisions of Order XXI Rule 89 Sub-rule (1) clause (a) and (b), respectively. Learned counsel submits that the petitioners filed application Exh.71 raising various objections therein to set aside the sale on the ground of irregularity. Learned counsel submits that the said application Exh.71 came to be filed on 21.11.2013 and pending the said application, the petitioners submitted an application on 21.02.2014 at Exh.74 under Order XXI Rule 89 of CPC. Learned counsel submits that in view of the provisions of Order XXI Rule 89, the application of judgment debtor filed under this Rule cannot be considered unless he withdraws his application filed under Order XXI Rule 90. Learned counsel submits that even then, the executing court has granted concession to the petitioners/judgment debtors to deposit amount for setting aside the sale as provided under Order XXI Rule 89 of CPC. Learned counsel submits that the petitioners now cannot make any grievance about the pendency of the said application Exh.71 which requires to be treated as withdrawn by them. Learned counsel submits that the petitioners submitted application Exh.78 on 14.03.2014 for grant of further time as the petitioners are not able to deposit the entire amount. Finally, the petitioners filed application Exh.83 dated 14.07.2014, i.e. five months after filing of application Exh.74 dated

21.02.2014, requesting therein that the petitioners are ready to deposit the entire amount and the same may be accepted. Learned counsel submits that this is beyond the period of limitation and the petitioners/judgment debtors are just giving false assurances of depositing the decretal amount before the court and in fact, they are not ready and willing to deposit the decretal amount. Learned counsel submits that the executing court has therefore, rightly rejected the applications Exh.78 and Exh.83 by passing the impugned common order.

7. Learned counsel for respondent No.1, in order to substantiate his contentions, placed reliance on the decisions in following two cases:

1. ***Munni Lal vs. Smt. Sona and others***, reported in ***AIR 1982 Allahabad 29*** and
2. ***Ram Karan Gupta vs. J.S. Exam Ltd. and others***, reported in ***AIR 2013 Supreme Court 24***.

8. Counsel for respondent No.2 is absent.

9. It appears from the record that the property under attachment was put to sale way back in the year 2008. In the said process, since the highest bid was not found satisfactory, the executing court, by

order dated 10.03.2008, directed conducting of a fresh bid and accordingly, it was again conducted. It is a part of record that the executing court permitted the decree holder to take part in the said bid and accordingly, highest bid of the decree holder came to be accepted by order dated 10.03.2008. Accordingly, as directed by the court, the decree holder deposited 1/4th of the bid amount i.e. Rs. 26,250/- on the same day. The decree holder has thereafter, moved application Exh.32 for subtracting remaining amount as the amount of bid was required to be paid to the decree holder and none else. The said application is allowed by the court by passing order dated 18.03.2008.

10. On 21.11.2013, the petitioners/judgment debtors filed application Exh.71 raising various objections therein for setting aside the sale on the ground of irregularity and fraud. The decree holder has also strongly resisted the said application by filing say at Exh.72. However, during pendency of the said application Exh.71, the petitioners/judgment debtors filed application Exh.74 under Order XXI Rule 89 of CPC for setting aside the sale on deposit. This application Exh.74 was moved by the petitioners/judgment debtors almost six years after the sale of the properties under attachment by auction. The limitation period of filing application and making deposit is 60 days. Even then, the executing court, by order dated

21.02.2014, granted permission to the petitioners/judgment debtors to deposit the decretal amount. The executing court is not empowered to entertain such application and bound to confirm the sale. So far as the application Exh.71 is concerned, the same shall be deemed to have been withdrawn in view of application filed at Exh.74. It appears that even after filing application Exh.74 and even though the court has granted concession to the petitioners/judgment debtors to deposit the entire amount and even after seeking time from the court to deposit the decretal amount, the petitioners/judgment debtors failed to deposit the amount before the court. Even assuming that the said period of limitation is extended because of the order passed by the executing court below Exh.74, still the fact remains that petitioners/judgment debtors have not deposited the amount and submitted an application Exh.83 in the month of July 2014.

11. In view of the above discussion, I do not find any fault in the impugned order. Learned Judge of the executing court, by impugned order dated 02.08.2014, has rightly held that the court is not empowered to extend the time limit and to set aside the sale. Learned Judge of the executing court has rightly rejected the applications Exh.78 and Exh.83. There is no substance in the writ petition. The writ petition is, thus, liable to be dismissed. Hence the

following order :

O R D E R

- I. The writ petition is hereby dismissed. In the circumstances, there shall be no order as to costs.
- II. In view of dismissal of Writ Petition, Civil Application No. 9204 of 2015 is disposed of.
- III. The record and proceedings be returned to the executing court forthwith.

(V. K. JADHAV, J.)

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