

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
FIRST APPEAL NO. 370 OF 2016
alongwith
CIVIL APPLICATION NO. 145 OF 2016**

Mr. Suhas Anandrao Pawar & ors. ... Appellants

Vs.

The Cosmos Co-operative Bank Ltd.
& ors. ... Respondents

Mr. Kiran Bapat i/by Mr. Avinash H. Fatangare, Advocate for the appellants.

Mr. Rishab Shah alongwith Mr. Saurabh R. Chitnis i/by Raval Shah & Co., for respondent no.1

Mr. P. S. Dani, Senior Counsel i/by Mr. Abhijit P. Kulkarni, Advocate for respondent no.5

Coram : **Smt. R. P. SondurBaldota, J.**

Date : 17th March, 2016.

P. C.

1 This appeal is directed against the order dtd.5th January, 2016, by which the executing court dismissed three applications filed in the execution proceedings i.e. Exhibits 46, 53 and 59. The operative part of the order describes the three applications as the applications praying for stay to the further

process of auction sale. The appellants herein are concerned with only of the applications i.e. the application at Exhibit 46. Hence, their appeals would be restricted to the order on Exhibit 46. By that application, the applicants sought three prayers, (i) dismissal of the Darkhast proceedings for suppression of material facts from the court, (ii) declaration that the arbitration award dtd. 20th June, 2013, which was put into execution is a nullity and (iii) an opportunity to the applicants for determination of their right, title and interest in the two properties sought to be auctioned by way of execution.

2 The properties in respect of which the auction is taking place are described at para one of the application. It includes two apartments i.e. apartment no.1 and apartment no.2, situate in Chintamani Apartments, Shivaji Nagar, Pune. Perusal of paragraphs 3 and 4 of the application make it abundantly clear that the appellants herein are not concerned with one of the apartments i.e. apartment no.2. Therefore, though the averments in the application as well as the prayers therein do not restrict the application to apartment no.1, any consideration of the claim of the appellants will have to be restricted to apartment no.1. In other words, there can be no impediment by way of the application filed by the appellants herein into completion of the auction and sale of apartment no.2. Mr. Bapat, the learned advocate for the appellants in fairness concedes to this position.

3 The brief facts leading to the application of the appellants and the order passed thereon is that respondent no.1 filed arbitral proceedings against respondents no.2 to 4 for recovery of a sum of Rs.51,31,47,389/- alongwith the interest thereon towards repayment of term loan given to respondents no.2 to 4. The arbitral proceedings culminated into awards dtd.20th June, 2013, by which respondents no.2 to 4 were directed to pay amount of Rs.21,56,44,422/- to respondent no.1 together with interest @ 16% per annum and pay an amount of Rs.29,75,02,967/- alongwith the interest @ 16% per annum.

4 Respondent no.1 later put the arbitral award in execution by attaching the two apartments described above. Only after the procedure for auction and sale had substantially progressed that the appellants herein filed the applications for the reliefs described above. The executing court observed that the appellants were well aware of the execution proceedings and had come to the court at the last minute only to defeat execution of the award. Mr. Dani, the learned Senior Counsel appearing for respondent no.5, the auction purchaser points out to the court that husband of appellant no.2 had participated in the auction and offered to purchase the property at a substantial amount. This would also indicate that the appellants were well aware of all the stages of the execution proceedings.

5 Mr. Bapat submits that the executing court has erred in treating the application at Exhibit 46 as only for stay of the execution proceedings. The claim of the appellants to apartment no.1 is that they are its co-owners along with respondent no.3. They contend that though the apartment was purchased in the name of Anandrao, it was not his individual property because it was acquired with the income of the joint family property. As such, it belongs to the HUF of the appellants and other members including one of the judgment debtors.

6 It appears that the executing court lost sight of the above claim of the appellants of their independent right to the apartment. In view of this claim it was necessary for the executing court to decide the application as the application under Order XXI Rule 97 to be decided in accordance with Rule 101 Code of Civil Procedure. It could not have disposed off the application, alongwith the other two applications, which were purely in the nature of interim reliefs. The learned Judge could have only refused the interim relief on the application and ought to have been given an opportunity to the appellants to have claim established by evidence available with them. Therefore, the First Appeal is partly allowed. The part of the impugned order dismissing the application at Exhibit 46 is set aside. Exhibit 46 is restored to file for consideration of prayer clause (c) alone restricted to apartment no.1, described at paragraph 1 of the application. The executing court shall hear and dispose off

the application on / or before 30th July, 2016.

7 Since the application is to be decided finally for consideration for the rights of the appellants, further execution proceedings in respect of apartment no.1 are stayed, pending the hearing of Exhibit 46.

(Smt. R. P. SondurBaldota, J.)