

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

903 WRIT PETITION NO. 1090 OF 2018

PRATIBHA JAWAHAR SHAH

VERSUS

**SHRI BALASAHEB SATBHAI
MERCHANTS CO OPERATIVE
BANK LTD THROUGH ITS
LIQUIDATOR ANIL & ANR.**

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Mr. Sk.Mazhar A.Jahagirdar, Advocate for
Petitioner.

Mr. R.N.Dhorde, Senior Counsel i/b

Mr. N.R.Bhavar, Advocate for R – 1.

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CORAM : V.L.ACHLIYA, J.

DATE : 4th MAY, 2018

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ORAL ORDER :

1. By this petition filed under Articles 226 and 227 of Constitution of India, the petitioner has challenged the order dated 14/12/2017 passed by Civil Judge [S.D.], Kopargaon in Spl. Darkhast No. 18/2009. By the impugned order, the executing Court has allowed the application Exh. 54 moved by respondent No. 1 – decree holder seeking amendment to the execution

application, and thereby allowed the respondent No. 1 – decree holder to include the property of the petitioner to be attached and sold in execution towards recovery against respondent No. 2 – Judgment Debtor.

2. Heard learned counsel for the petitioner and respondent No. 1. Perused the impugned order.

3. Before dealing with the submissions advanced, it is necessary to consider few facts leading to filing of the petition. It is admitted fact that the petitioner is a third party to the execution proceeding filed by the respondent No. 1 and there is no decree or executable order passed against the petitioner. The petitioner is a wife of respondent No. 2, against whom the respondent No. 1 has filed execution proceeding for recovery of amount as per the liability fixed in an enquiry conducted u/s 88 of Maharashtra Co-operative Societies Act. The respondent No. 1 has filed Special Darkhast No. 19/2009 as against respondent No. 2 in the Court of Civil Judge [S.D.], Kopergaon. The respondent No. 1 also initiated recovery proceeding against the borrowers to whom the loan was advanced and failed to repay the same by initiating the process of attachment and sale of their property. In the execution proceeding filed by the respondent No. 1 as against the respondent No. 2, the decree was sought to be executed by

attachment and sale of movable and immovable property of the respondent No. 2.

4. On 27/11/2016, the respondent No. 1/decreed holder filed application vide Exh. 54 before the executing Court seeking amendment to execution application filed vide Exh. 1. It is stated in the application seeking amendment to the execution application that the respondent No. 2/Judgment Debtor has deliberately avoided to repay the decretal amount. It is further stated that the respondent No. 2 is having joint Hindu family and the wife of the respondent No. 2 i.e. the petitioner owns immovable property in her name bearing G.No. 215/58/21 admeasuring 186.87.43 Sq. Meters within the limits of Municipal Council, Kopargaon, District Ahmednagar. By way of the application moved seeking amendment to the execution application, the respondent No. 1 sought permission to amend the execution application and to include the property of the petitioner in the schedule of property filed along with execution application [Exh. 1] so as to attach and sale said property by issuing warrant under Order XXI Rule 54 of C.P.C. Learned Judge of the trial Court pleased to pass order to issue notice to the respondent No. 2/Judgment Debtor as well as the petitioner. Pursuant to the notice issued by the Court, the petitioner appeared before the Court and filed Say vide Exh. 67 to the application [Exh. 54]. She has objected the

application moved by the respondent No. 1/deGREE holder. She has specifically objected the prayer of respondent No. 1 to amend the execution application and to include her property for sale and attachment towards execution of decree against the respondent No. 2. She has specifically pleaded that the property referred in the application is her self-acquired property and acquired the same by her own earning and the respondent No. 1 is not entitled to include the same in the property to be attached and sold in execution proceeding filed against respondent No. 2. It is pointed out that there is no decree passed against her. In absence of any decree and executable order against her, the property owned by her can not be attached and sold in execution proceeding filed against the respondent No. 2. She has further denied the contention of the petitioner that the property stands in her name is a joint family property. She has categorically stated that the property is her self acquired property. She has further pointed out as the petitioner is a third party to the execution proceeding, the respondent No. 1 has no right under C.P.C. to seek order against her. It is also contended out that there is no provision under C.P.C. to seek amendment to the execution application by filing application under Order 6 Rule 17 of C.P.C. as the proceeding u/s 21 of C.P.C. is in the nature of execution and not pleadings i.e. plaint and written statement which can be amended under Order 6 Rule 17 of C.P.C. She has

urged to reject the application.

5. The respondent No. 2 also filed Say vide Exh. 69 and categorically stated that the property referred in the application filed by respondent No. 2 is self acquired property of the petitioner and acquired by her out of her own earning. It is further stated that the financial condition of the father of the petitioner was very sound and she has purchased the property from her own income and amount received from her father. The sale consideration was paid to the vendor from the account of the petitioner. It is further stated that the house was constructed over the said plot by petitioner by securing loan in her own name.

6. By the impugned order, the trial Court has allowed the application Exh. 54 to amend the application and to include the property in the schedule of the property to be attached and sold in execution of the proceeding. It is observed that though the property purchased vide sale deed dated 03/04/1984 executed the name of petitioner but in the sale deed, her occupation is shown as household work. On the basis of occupation of petitioner mentioned in the sale deed as household work, the trial Court has observed that there is no evidence to show that the petitioner has purchased the property out of her own earning and it is her self-acquired property and she has failed to produce concrete evidence to show that the

property was purchased by the petitioner out of her own income. On the basis of occupation mentioned in the sale deed, the trial Court has inferred that the property is a joint family property and allowed the application. Being aggrieved, the petitioner – third party to execution has preferred this petition.

7. Mr. Jahagirdar, learned counsel for the petitioner assailed the impugned order with the contention that the order passed by the trial Court is unsustainable in law. By referring the order passed, learned counsel submits that the order passed by executing Court is perverse and contrary to law. It is pointed out that it is the case of the respondent No. 2 that the property in question is a joint family property. The respondent No. 1 has not produced any evidence to show that the property is a joint family property. Except the bare averment made that the property is joint family property, nothing is produced to support the contention of respondent No. 1. On the contrary, the petitioner has produced the sale deed which was executed way-back in the year 1984 of purchase of the property in her own name. Only for the reason that occupation of the petitioner is shown as household work, the trial Court has inferred that the property is not self-acquired property of the petitioner. It is contended that as the petitioner has approached with the case that property is a joint family property, the burden to establish that the

property is joint family property rest upon the respondent No. 1. The respondent No. 1 has produced no evidence in support of his case. It is contended that the observations made by the trial Court that the petitioner has failed to produced evidence, are strange and contrary to law. It is not the burden of the petitioner to show that the property is not joint family property and it is her self-acquired property. Since the respondent No. 2 has asserted that it is joint family property, it was for the respondent No. 1 to produce such evidence and not the petitioner. It is, therefore, contended that the reasons and findings recorded by the trial Court are totally perverse and as against the basic principles of burden of proof. It is further contended that there is no provision under law to entertain such application seeking amendment to execution application. It is pointed out that Order 6 Rule 17 of C.P.C. has no applicability to execution proceeding as only pleadings i.e. plaint or written statement can be amended by recourse to said provision. Though the petitioner has raised the objection as to maintainability of application, the same was not considered and decided by the trial Court. It is further pointed out that there is no provision under Order XXI to entertain such application against the 3rd party and that too to include the property of third party to be attached and sold in execution proceeding without any decree passed against such person. It is further contended

that by virtue of Section 14 of Hindu Succession Act, the property being the absolute property of the petitioner, the same is not liable for attachment and sale in execution proceeding towards the execution of decree against the respondent No. 2. It is further contended that the proceeding before the executing Court is untenable for the reason that the period of six years has lapsed since the date of appointment of Liquidator and by virtue of Section 109 of Maharashtra Co-operative Societies Act, the appointment of Liquidator can not be continued beyond six years. It is further contended that the impugned order is perverse and exercise of jurisdiction not vested with the executing Court and urge to set aside the same.

8. On the other hand, Mr. R.N.Dhorde, learned Senior Counsel appearing for the respondent No. 1 supported the order passed by the executing Court and submits that the order is passed on due appreciation of rival pleadings. It is contended that the petitioner is a wife of respondent No. 2 and they are members of joint Hindu family. It is contended that though the plot is shown to be purchased in the name of the petitioner, the loan of Rs. 3 Lakhs was obtained for construction of the house over the plot stand in the name of the petitioner. The loan of Rs. 3 Lakhs secured by the petitioner from the respondent No. 1 was obtained, wherein the respondent No. 2

was a guarantor. It is further contended that some of the instalments towards the repayment of loan were paid in cash by the respondent No. 2 or some of the receipts the signature of respondent No. 2 appears as person who paid amount. In this back-ground, learned Senior Counsel submits that the order passed by trial Court calls for no interference in writ jurisdiction. So far as the contention raised by the petitioner that the tenure of the Liquidator has come to an end, learned Senior Counsel submits that the same is not the subject matter of challenge in this petition and more over the proceeding filed before the trial Court is the execution proceeding filed towards recovery of amount as per the liability fixed u/s 88 of the Maharashtra Co-operative Societies Act the proceeding is maintainable. In this back-ground, learned Senior counsel urge to dismiss the petition.

9. In order to appreciate the submissions advanced, I have perused the application moved by the respondent No. 1 to amend and to include the property owned by the petitioner to be attached and sold in the execution proceeding filed vide Exh. 54, Say filed by the petitioner and the order passed by the Trial Court. In my view, the order passed by the trial Court is passed in a most casual and cryptic manner. The contentions raised by the petitioner were not taken into consideration while deciding the application. The petitioner has objected the

application by raising specific objection to effect that the provisions of Order VI Rule 17 of C.P.C. can not be invoked to amend the execution application and claim relief against the third party. Under the guise of application moved for amendment in the execution application, the property of third person can not be attached and sold in execution proceeding. The objection raised by petitioner as to maintainability of application not at all considered and decided by executing Court.

10. In the application filed seeking amendment itself it is mentioned that the property stands in the name of the petitioner and acquired by herself. However, the property is sought to be attached and sold in execution of decree against the respondent No. 2 with the contention that the petitioner is a wife of respondent No. 2 and the family of the petitioner and respondent No. 2 is a joint Hindu family. There is no specific pleading nor there is any evidence produced to show that the property is not the self-acquired property of the petitioner but it is joint Hindu family property acquired with the earnings of joint Hindu family. Undisputedly, the sale deed of the property stands in the name of the petitioner. She has purchased the property from the vendor vide sale deed dated 03/04/1984 for the sale consideration of Rs. 6,537/-. The property was purchased much before the petitioner was the Chairman/Director of

the respondent No. 1 – bank leading to initiation of enquiry u/s 88 of the Maharashtra Co-operative Societies Act to recover the losses caused to the bank. As per the case of the respondent No. 1, the construction was raised over the plot purchased by the petitioner by securing the loan of Rs. 3 Lakhs. The loan was advanced and paid to the petitioner, the respondent No. 2 was shown as guarantor to the loan advanced to the petitioner. The fact that the respondent No. 2 was a guarantor itself prima facie support the case of petitioner that the property is owned and purchased from her own funds and not the joint family property. The receipts of payment of instalment of the loan amount produced along with affidavit in reply by the respondent No. 1 itself show that receipts were issued in the name of the petitioner and not the respondent No. 2 towards payment of loan amount. Only for the reason that the receipt issued in the name of the petitioner, the signature of respondent No. 2 appears as person depositing the amount the inference can not be drawn that the property is a joint Hindu family property and liable for attachment towards the execution of decree against the respondent No. 2.

11. It is rather strange to note that the trial Court has observed that the property is not self-acquired property of the petitioner but it is joint Hindu family property only on the basis of the occupation of the

petitioner mentioned in the sale deed dated 03/04/1984. On the basis of occupation of the petitioner shown as household work in the sale deed, learned Judge has drawn the inference that the petitioner had no source of income to purchase the property. Such conclusions are perse incorrect and contrary to law. Only for the reason the occupation of person is shown as household, the inference can not be drawn that such woman have no source of income and she can not acquire property in her own name.

12. It is also surprising to note that the trial Court has observed that the petitioner has failed to prove that property in question is her self-acquired property. The trial Court has failed to take into consideration that it is the case of the respondent No. 1 that the property is joint Hindu family property and liable for attachment. Since it is asserted by the respondent No. 1 that it is joint Hindu family property and same has been denied by the petitioner, the burden to prove this fact rest upon the respondent No. 1 and not the petitioner.

13. So also, the contention of petitioner that the property in question is absolute property of petitioner and not liable for attachment in view of Section 14 of Hindu Succession Act also not dealt by trial Court.

14. Thus, considering the impugned order passed in

the light of overall facts of the case, I am of the view that the order passed is perverse, contrary to settled principles of law and the executing Court has exceeded its jurisdiction in passing the order. The order has been passed without dealing with the contention raised by the petitioner and proper opportunity of hearing being given to both sides. The issue of maintainability of application also not considered and decided by the executing Court. I am, therefore, of the view that the impugned order deserves to set aside and case be remanded back to executing Court to decide the application afresh by giving opportunity of hearing to both sides. Accordingly, the petition is allowed in terms of prayer clause 'B'. The impugned order is set aside. The case is remanded back to the trial Court to decide the application [Exh.54] afresh by giving due opportunity of hearing to both sides. Liberty granted to both sides to raise additional grounds and to produce the documents in support of their respective contentions.

15. It is clarified that the observations made above are made for the limited purpose for deciding the present petition and same shall not be construed as observations made as to the merit of the matter. The Trial Court is directed to decide the application on its own merit without influenced by any of the observations made above during the course of passing of this order.

16. Writ Petition is allowed and disposed of in above terms.

[V.L.ACHLIYA, J.]

KNP/W.P. 1090.2018