(1999) 04 BOM CK 0051

In the Bombay High Court

Case No : Chamber Summons No. 216 of 1999 in Summary Suit No. 3931 of 1992

M/s. Nav Prabhat Enterprises — APPELLANT

Vs

Shree Ganesh Dyeing and Printing Works and others
 The Commissioner for Taking Accounts, High Court, Bombay and others
 The Abhyudaya Co-operative Bank Limited — RESPONDENT

Date of Decision : 19-04-1999

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 11, Order 21 Rule 2, 73
Constitution of India, 1950 — Article 234
Maharashtra Co-operative Societies Act, 1960 — Section 156, 91

Citation : (1999) 3 ALLMR 371 : (1999) 4 BomCR 462 : (1999) 3 MhLj 5

Hon'ble Judges : F.I. Rebello, J

Bench : Single Bench

Advocate : D.R. Zaiwala and Snehal Shah, instructed by Bilawala and Co., Ms. Rajni Iyer and D.M. Thakkar, instructed by Pragnya Thakkar and Co, for the Appellant;

Judgement

F.I. Rebello, J.—The applicant the Abhyudaya Co-operative Bank Limited has moved this Court in proceedings for execution taken out against the defendant No. 1. It is the case of the applicant that order dated 22nd January, 1999 passed by the Commissioner for Taking Account of this Court, be set aside and it be declared that the said order is illegal., bad-in-law and passed without any application of mind. There is also a prayer for interim relief in terms of prayer Clause (b) and some other reliefs which I need not advert to presently.

2. It is the case of the applicant that they had advanced money to defendant No. 1. In respect of the amount advanced, as defendant No. 1 failed to pay the amount, dispute was raised under the provisions of the Maharashtra Co-operative Societies Act. An Award came to be passed against the defendant No. 1 on 3rd July, 1995. The applicant thereafter proceeded to execute the said Award. On 22nd December, 1995 a certificate was issued in their favour to execute the

Award as arrears of land revenue. On 23rd December, 1995 a demand notice was issued u/s 156 of the Maharashtra Cooperative Societies Act. On 11th April, 1996, Flat No. B-6 situated at The Peddar Road Chandan Co-operative Housing Society Limited, Peddar Road, was attached in the course of the said execution proceedings.

In the meantime Chamber Summons No. 1212 of 1997 in Execution Application No. 86 of 1996 in Suit No. 3931 of 1994 came up for hearing and this Court by order dated 28th November, 1997 disposed of the said Chamber Summons in terms of the Consent Terms. It may be mentioned that one Mrs. Devyani Pradeep Sadh who is the wife of defendant No. 3 has claimed 50% right in the said flat. In the Consent Terms signed to which the applicant is not a party, the plaintiffs disputed the right of Mrs. Devyani Pradeep Sadh. However, without prejudice, it was agreed that the interest of Pradeep Rameshchandra Sadh in the suit flat would be sold. More relevant is Clause 6, which reads as under:-

"The Commissioner for Taking Accounts shall disburse the sale proceeds amongst the plaintiff and other judgment debtors of defendant No. 2 and the surplus if any shall be deposited with the Prothonotary and Senior Master to the credit of the defendant No. 2."

Pursuant to these Consent Terms, the suit flat came to be sold. The plaintiffs in Suit No. 3931 of 1994 M/s. Nav Prabhat Enterprises informed the applicant about the said order. By letter dated 24th April, 1998, the Special Recovery Officer (GR-1) wrote to the Commissioner, the respondent No. 1 herein, that the applicant had an Award in their favour and also an Execution Certificate and in terms thereof the amounts due and payable to the applicant was Rs. 17,02,328/-. It was also mentioned therein that the applicant Bank has an exclusive lien on Flat No. 6-B at Chandan Co-operative Housing Society. It was mentioned therein that the flat was put up for auction in the execution proceedings but the same could not be completed for various reasons. The Execution Officer requested the Commissioner that the sale proceeds of the above flat be remitted to him for total adjustment of Bank dues. The Commissioner, thereafter, heard claims by various decree-holders as also the applicant herein. By the impugned order dated 22nd January, 1999 the Commissioner for Taking Accounts rejected the claim filed on behalf of the applicant therein. It is in these circumstances that the present Chamber Summons has been moved by the applicant. One other aspect is that the Commissioner has on 3rd February, 1999 and 5th February, 1999 paid to the various decree-holders who had lodged claims an amount of Rs. 52,41,636/-. The present Chamber Summons was moved on 30th March, 1999.

3. At the hearing of the Chamber Summons on behalf of the applicant it is contended that the respondent No. 1 misdirected himself in law in rejecting their claim. It is contended that in terms of section 73 of the Code of Civil Procedure, 1908 their claim also ought to have been considered and decided. Their claim was a claim in proceedings for execution. The rejection therefore is without

jurisdiction.

On behalf of the plaintiffs it is contended that the Chamber Summons is not maintainable as the same has been taken out after the sale had been confirmed by this Court and the purchaser put in possession and sale proceeds rateably distributed amongst the judgment debtors. It is contended that in the circumstances the remedy for the applicant is to file a civil suit, if in law they are so entitled to. Secondly, it is contended that apart from the plaintiff the money has been disbursed amongst various other decree-holders who had filed application in execution. The said parties are not parties to the Chamber Summons and as such also the Chamber Summons is not maintainable as parties liable to be aggrieved are not before this Court. Thirdly, it is contended that the applicants who were executing the Award through the revenue authority could not get their claim settled in the proceedings as there was no application for execution pending in this Court. It is, therefore, contended that for all the foregoing reasons the Chamber Summons be rejected.

4. At the outset, reference may be made to section 73 of the Code of Civil Procedure. Section 73 provides that where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court for the execution of the decrees for the payment of money passed against the same judgment debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realisation, shall be rateably distributed among all such persons. Order XXI, Rule 11 of the CPC provides the manner in which an application for execution has to be filed. A reading therefore of section 73 of the CPC mandates that if before the receipt of assets an application is made to the Court for the execution of decree for payment of money passed against the same judgment debtor, the assets shall be rateably distributed amongst all such persons. Based on this section, plaintiffs contend that as the applicants have not filed any application for execution before this Court and if such application is not pending before this Court, the Commissioner was right in rejecting the application. Sub-section (2) of section 73 sets out that where all or any of the assets liable to be rateably distributed under this section are paid to a person not entitled to receive the same, any person so entitled may sue such person to compel him to refund the assets. Sub-section (2) therefore may not be of much assistance as it is not the case of the applicant that the plaintiffs and the other decree-holders were not persons who were not entitled to receive the same. All that the applicants contend is that their claim for rateable distribution also be considered. It is in this background the question will have to be decided.

The first question that will have to be answered is whether the issue is res Integra and/ or if the law has been decided by any other High Court, the principle decided by that Court should also be followed by this Court. Both the parties have cited judgments for and against the proposition. I will, therefore, firstly deal with the said judgments.

5. On behalf of the plaintiffs reliance was placed on the judgment of a Single

Judge of this Court in the case of Nimbaji Tulsiram and another v. Vadia Venkati and others, 1892(35) ILR 683. The relevant issue there was whether a decree-holder in a decree passed by the Small Causes Court without having the decree transferred to this Court was entitled to share in the amounts in possession of this Court. A Single Judge of this Court held that if the decree was not transferred to this Court before realisation of the said securities, he was not entitled to the share. The judgment was under the old Code. The next judgment relied upon is in the case of Fulsinh Kesri Sinhji Vs. Vallabhdas Hargovandas and Another, . A learned Single Judge of the Gujarat High Court was considering an issue whether an application for execution made under order XXI, Rule 11 of the CPC if it did not contain the particulars mentioned in sub-rule (2) of Rule 11 would amount to an application for execution by way of rateable distribution. In other words, what emerges from the said judgment is that an application for execution must be there before this Court but not necessarily containing all particulars as required under Order XXI, Rule 2. The last judgment cited is in the case of The Ranchi Khunti Central Co-operative Bank Ltd. Vs. Prem Prakash Bagroy and Others, . In that case the issue before the Court was also in respect of an Award which was obtained. Several questions were raised before the Division Bench of the Patna High Court. In that case an application for execution of an Award was pending before the Revenue Authorities. There was no application for execution filed in the Civil Court, where the proceeds were held. In that context the question arose when the petitioner was seeking to execute the Award through the revenue or any other authority could claim rateable distribution in the assets held by a Civil Court in execution of a decree. The Division Bench of the Patna High Court held that to get rateable distribution, the claimant must have applied to the Civil Court where the proceeds are held if section 75 is to be applied.

6. As against this on behalf of the applicant reliance was placed in the case of Zumberlal Chotelal Agarwal & another v. Sitaram and others AIR 1937 Nag 80. A learned Single Judge of the Nagpur High Court (Vivean Bose, J., as he then was) held that for section 73 to be applicable that there must be an application for execution before the assets are received by the Court entitled to receive them. Next judgment is a judgment of the Full Bench of the Andhra Pradesh High Court in the case of Commercial and industrial Bank Limited v. Mir Sarfaraz Ali Khan AIR 1956 And Prad 65. In that case what was under consideration was section 63 of the Andhra Pradesh CPC which is in para materia with section 73 of the Code of Civil Procedure, 1908. The Full Bench held that for the section to be attracted it is required that the decree holder must have a money decree against the same person and that he must have applied for execution of that decree before the assets were received by the Court distributing them. It is only in these circumstances that the section would apply. Reliance was placed on the judgment in the case of Onkar Rajaram Wathodkar v. Ramnarayan Khatod & Sons 1984 Mh.L.J. 453. In that case also what was in issue before the Court was execution of an Award. The question arising here did not arise therein. All that arose down

there was if an Award had been obtained in order to execute the Award, which would be the Court where the application could be moved. That judgment is of no assistance. The last judgment is a judgment of this Court in the case of Maharashtra Co-operative Courts'' Bar Association and Others Vs. State of Maharashtra and Others, . The issue before the learned Single Judge therein was entirely different. The question there was whether the Co-operative Court is a ''Court''. The issue arose on the question of appointment of judges to the Co-operative Court without consultation with the High Court under Article 234 of the Constitution of India. That judgment is therefore of no assistance in so far as the issue involved herein.

7. It is, however, contended on behalf of the applicant that once proceedings for execution were taken out by the applicant before the authorities under the Maharashtra Co-operative Societies Act and the claim before this Court was filed by the Executing Officer that is a proceeding for execution and consequently the respondent No. 1 acted without jurisdiction in rejecting the said contention.

I am afraid, I am not in a position to accept the said submission. What section 73 contemplates is an application for execution before the Court wherein the proceeds are lying. Mere information conveyed or even a certificate to the Registry would not be an application for execution in terms of Order XXI of the Code of Civil Procedure, 1908. The weight of the authorities including judgments cited on behalf of the plaintiffs at the Bar are in support of the proposition that there must be application for execution before Civil Court where the amount stands deposited. The Court u/s 73 would exercise jurisdiction only in the event there is an application for execution. If there is no application for execution then any claim of which notice is given by any other executing authority does not amount to an application under Order XXI, Rule 11 to be an application for execution. In the instant case, it is no doubt true that the applicant had applied for execution of Award and it was sought to be executed as an arrears of land revenue. The claim by the Execution Officer to the Commissioner would not amount to transfer of decree or an application for execution before this Court without in fact an application for execution of decree being filed. In that light of the matter the contention on behalf of the plaintiffs must be accepted.

8. Once I have accepted the contention that there was no claim application properly filed by the applicant before this Court, I find no merit in the present Chamber Summons. I am in respectful agreement with the view of the Patna High Court, the Gujarat High Court and for that matter the view taken by the Full Bench of the Andhra Pradesh High Court while interpreting section 371 of the Andhra Pradesh CPC which is in para materia with section 73 of the Code of Civil Procedure. Having said so, I need not deal with the other contentions.

9. It is, however, made clear that disposal of this Chamber Summons will not in any manner affect the right of the applicant herein to proceed to execute the Award against the defendant No. 2. It is also made clear that the Consent Terms filed in Chamber Summons No. 1212 of 1997 in Execution Application No. 86 of

1996 in suit No. 3931 of 1994 would not be binding on the applicant as they were not party to the said proceedings. More so, in respect of their contentions that it is the defendant No. 2 alone who was the owner of the flat and the applicant in the said Chamber Summons, is the daughter-in-law Devyani Shah had no right in the said flat.

10. With the above observations, Chamber Summons is rejected.

11. In the circumstances of the case, there shall be no order as to costs.

12. Chamber Summons rejected.

