
(2011) 12 BOM CK 0099
In the Bombay High Court
Case No : Writ Petition No. 9869 of 2011

Ushadevi Rajaram Nimbalkar and Others	APPELLANT
Vs	
The Ratnakar Bank Limited	RESPONDENT

Date of Decision : 21-12-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 95, Order 21 Rule 97

Citation : (2012) 2 ALLMR 162 : (2012) 6 BomCR 335 : (2012) 2 MhLj 193

Hon'ble Judges : R.M. Savant, J

Bench : Single Bench

Advocate : Ravi Kadam, A.G. with Mr. V.M. Thorat with Mr. Pratap Patil, for the Appellant; P.S. Dani with Ms Gargi Bhagwat instructed by M/s. Divekar and Company, for the Respondent

Judgement

R.M. Savant, J.—Rule. With the consent of the parties made returnable forthwith and heard.

2. The above Petition takes exception to the Order dated 2462011 passed by the Learned Civil Judge Junior Division, Kolhapur, by which Order, the Misc Application No.1351 of 1980 came to be disposed of by observing that since the objector is dead, the objections are "filed" for want of the objector.

3. It is not necessary to burden this order with unnecessary facts. However, suffice it to say, that there is a money decree passed in favour of the Bank which is dated 2561974. The execution proceedings for executing the said decree were set in motion and the property in question which was mortgaged was permitted to be auctioned. Pursuant to the said auction, the Respondent Bank itself purchased the said property as there was no other buyer. On 351980 the Respondent Bank filed Misc Application No.1351 of 1980 before the executing Court under Order 21 Rule 95 of the CPC for possession of the property on the basis of the sale certificate. At the relevant time since the Judgment Debtor Rajaram Dadasaheb Nimbalkar had died, as a consequence his son Dhairasheel Rajaram Nimbalkar and daughter Supriya Rajaram Nimbalkar were brought on

record as heirs and legal representatives of deceased Judgment Debtor Rajaram Dadasaheb Nimbalkar. The said Dhaiyrasheel Rajaram Nimbalkar filed his objection to the said Misc Application No.1351 of 1980 vide Exhibit 50 thereby opposing the said Application on the grounds mentioned therein. A separate objection application was also filed at Exhibit 75 by the Petitioner Nos.1 and 3 herein and Supriya Nimbalkar adopting the objections raised by Dhaiyrasheel Rajaram Nimbalkar. The Executing Court by Order dated 671991 was pleased to dismiss the said Misc Application No.1351 of 1980 filed by the Bank on the ground that the property was HUF property and the objectors were still minors and their rights were required to be protected. The Respondent Bank challenged the aforesaid order dated 671991 by filing a Civil Revision Application No.778 of 1991 in this Court. During the pendency of the the said Civil Revision Application, Dhaiyrasheel Rajaram Nimbalkar also died, as a consequence of which Mayura Dhaiyrasheel Nimbalkar his wife was brought on record of the Civil Revision Application. this Court by a consent Order dated 762001 disposed of the Civil Revision Application by setting aside the order dated 671991 and the executing Court was directed to treat the objections filed vide Exhibit 50 and Exhibit 75 as raised under Order 21 Rule 97 of the Civil Procedure Code. The Executing Court was directed to decide the said objections on their own merits.

4. Thereafter, it appears that the applications were filed by the bank for issuing fresh notices to the heirs of the deceased Rajaram Dadasaheb Nimbalkar, except the heirs of the Dhaiyrasheel Nimbalkar who had also died. It appears that the Executing Court on 1282003 passed an Order on the said Application to reissue notices to Ushadevi Rajaram Nimbalkar and Dhaiyrasheel Rajaram Nimbalkar. Pursuant to the said notices, the Petitioners herein appeared in the said execution proceeding and informed the Executing Court that Dhaiyrasheel Rajaram Nimbalkar had died and that Supriya Rajaram Nimbalkar who was the other heir of the Judgment Debtor Rajaram Dadasaheb Nimbalkar had got married and her name after marriage was Surpriya Ruturaj Jadhav and she was not residing with the Petitioners. It appears that thereafter the bank took steps to serve the unserved Respondents. The said application was allowed by the Executing Court by Order dated 2392005. However, the heirs of the deceased Dhaiyrasheel Nimbalkar were not brought on record and hence notice to them was not served.

5. It appears that on 662006 the Respondent bank filed an Application Exhibit 129 to set aside the objections filed by Dhaiyrasheel Rajaram Nimbalkar at Exhibit 50, inter alia on various grounds. The Petitioners filed their reply to the said Application and contended that the objections of Dhaiyrasheel Rajaram Nimbalkar through his heirs as also objections filed by the present Petitioners are required to be considered. The Executing Court as indicated above, has by the impugned Order dated 2462011 closed the said Misc Application in view of the fact that the objector Dhaiyrasheel Rajaram Nimbalkar is dead. It is the said Order which is under challenge in the above Petition.

6. Heard the Learned Counsel for the parties.

It is an undisputed position that both the Dhaiyrasheel Rajaram Nimbalkar and the present Petitioners had filed their objection applications. The objections of Dhaiyrasheel Rajaram Nimbalkar were at Exhibit 50 and so far as the objections of the present Petitioners are concerned they were at Exhibit 75. In terms of the Order dated 671991 passed by this Court (V.C.Daga, J.) the said objections were to be considered on the touchstone of Order 21 Rule 97 of the CPC. The fact that Dhaiyrasheel Rajaram Nimbalkar had died, was brought to the notice of this Court in the Civil Revision Application as also the Executing Court vide application Exhibit 122. Since there were two sets of objections Exhibit 50 and Exhibit 75, the Executing Court in terms of the directions of this Court was obligated to consider the said two sets of objections by the two sets of objectors. However, inspite of the fact that the death of the said Dhaiyrasheel Rajaram Nimbalkar and the names of his heirs being brought to the notice of the Executing Court, no notices were issued to the said heirs of Dhaiyrasheel Rajaram Nimbalkar.

7. Apart from this, the Executing Court has not considered the objections raised by the Petitioners herein though they were to the same extent as those of the said Dhaiyrasheel Rajaram Nimbalkar. The Learned Counsel Shri Dani appearing for the Respondent Bank does not dispute this position. As can be seen from the impugned Order, the Executing Court has closed the proceedings on the ground that the objector is dead without even advertng to the objections filed by the present Petitioners at Exhibit 75. In my view, therefore, the Order impugned would have to be partly set aside and modified and hence the following directions:

(i) The impugned Order would operate only in so far as objections to Dhaiyrasheel Nimbalkar Exhibit 50 are concerned.

(ii) In so far as, the objections filed by the Petitioners are concerned, the Executing Court would decide the same in terms of the directions contained in the Order dated 762001, passed in Civil Revision Application No.778 of 1991.

(iii) Though the impugned Order has been set aside and modified to the aforesaid extent, this Court has not expressed any opinion as regards any application that would be filed by the heirs of the Dhaiyrasheel Nimbalkar for the Order being set aside against them also. In the event such an application is filed the same would be considered by the Executing Court on its own merits and in accordance with law.

(iv) The objections Exhibit 75 on remand be considered by the Executing Court within a period of two months from the appearance of the parties before it. The parties to appear before the Executing Court on 912012 at 3.00 p.m.

8. Rule is accordingly made absolute in the aforesaid terms with parties to bear their respective costs.