



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.12440 OF 2019

Shree Ganesh Sahakari Bank Ltd.

...Petitioner

Versus

Smt. Meghana Mahesh Takate & Ors.

...Respondents

Mr. Ashok B. Tajane a/w. Mr. Yogesh G. Thorat, for the Petitioner.

CORAM : MADHAV J. JAMDAR, J.

DATED : 16th OCTOBER 2023

JUDGMENT :

1. Heard Mr. Tajane a/w. Mr. Yogesh Thorat, learned Counsel appearing for the Petitioner. None appears for the Respondents although served.

2. By the present Writ Petition filed under Article 227 of the Constitution of India, the challenge is to the legality and validity of the Order dated 31st January 2017 passed by the learned Judge, Cooperative Court, Nashik on Exhibit-1 in Miscellaneous Application No.7 of 2014 as well as Order dated 28th March 2019 passed by the learned Member, Maharashtra State Cooperative Appellate Court at Mumbai in Appeal No.125 of 2018. By said impugned Order dated 31st January 2017, the Application for condonation of delay has been

Sonali

allowed and the *ex-parte* Judgment and Award passed in Cooperative Case No.571 of 2010 was set aside on the ground that no evidence to show the summons of the said case has been served on the Respondents and accordingly, said Co-operative Case No.571 of 2010 was restored to the file. By the impugned Order of the learned Appellate Court, the said Order dated 31st January 2017 was maintained, subject to payment of cost of Rs.4,000/-.

3. It is the contention of Mr. Tajane, learned counsel appearing for the Petitioner that the Respondents were served with the summons in said Cooperative Case No.571 of 2010. They sought adjournment and thereafter did not appear therefore, the learned Judge, Cooperative Court, Nashik by Order dated 25th November 2010 passed an *ex-parte* Judgment and Award. In the said *ex-parte* Judgment and Award, it is specifically mentioned that inspite of service of summons, the Opponents have not appeared. By the said Award, it has been held that the Disputants are entitled for recovery of sum of Rs.22,15,671/- from the Respondents jointly and severally and also along with future interest at the rate of 16% per annum and Rs.14,50,000/- w.e.f. 1st April 2010. Property of the Respondent No.1 is attached by earlier Order dated 23rd September 2010 passed below

Sonali

Exhibit-5 filed for attachment before Judgment in Co-operative Case No.571 of 2009.

4. It is significant to note that when the Bank took steps for execution of said Judgment and Award dated 25th November 2010, at that stage Respondents filed Miscellaneous Application No.7 of 2014 and sought setting aside of the *ex-parte* Award. It is specifically mentioned in the said Application for setting aside Award that the Respondents were never served with the summons or any notice of said Cooperative Case No.571 of 2010. The Petitioner-Cooperative Bank filed Reply to said Application dated 21st July 2014 *inter alia* stating that the summons and notice of the said Cooperative Case has been served on the Respondents and the same are at Exhibits 7 to 12 of the record of the said Cooperative Case. The evidence affidavit has been filed of the Respondent No.3 and he has been extensively cross-examined. The said cross-examination is reproduced hereinbelow for ready reference:-

“अर्जदारा तर्फे साक्षीदार श्री. महेश त्र्यंबक ताकाटे यांचा गैरअर्जदारातर्फे अँड
श्री वि. स. तळेकर यांचेमार्फत उलटतपास शपथेवर सुरू
मला प्रस्तुतच्या प्रकरणाबाबत काहिही माहिती नाही. सौ मेघना ताकाटे यांना
सुध्दा प्रस्तुतच्या प्रकरणाबाबत काहिही माहिती नाही. तसेच सौ मंगला

Sonali

दिलीप ताकाटे यांना सुध्दा प्रस्तुतच्या प्रकरणाबाबत काहिही माहिती आहे किंवा नाही हे मला माहिती नाही. माझ्या अर्जात व पुराव्याच्या प्रतिज्ञापत्रात काय लिहलेले आहे हे मला सांगता येणार नाही. दिलीप ताकाटे हा माझा भाऊ आहे. त्याची सही मला ओळखता येणार नाही. हे म्हणणे खरे आहे की, सौ मंगला व श्री दिलीप हे पती—पत्नी आहेत व ते कारसुळ ता निफाड जि नाशिक येथे एकत्र राहतात. मी माझी सही ओळखू शकतो. १० बी विंग अंबाजी नगर, अमृतधाम, पंचवटी नाशिक हा माझा योग्य व बरोबर पत्ता आहे. हे म्हणणे खरे आहे की, कारसुळ ता निफाड जि नाशिक हे माझे मुळ गांव आहे. हे म्हणणे खरे नाही की, कारसुळ येथे आमचे वडिलोपार्जित घर आहे. कारसुळ येथे माझी शेती आहे. साक्षीदार पुन्हा सांगतात की वडिलोपार्जित शेती आहे. नि ४ पत्तायादीवर अर्जदार म्हणून कोणाची सही आहे हे मला सांगता येणार नाही. अर्जावर अर्जदार क्रं १ म्हणून कोणाची सही आहे हे मी सांगू शकत नाही. नि २ ऐ प्रतिज्ञापत्रावरील सही कोणाची आहे हे मला सांगता येणार नाही. वकीलपत्र नि ३ वर पक्षकारांच्या सहयापैकी अनु क्रं १ ची सही कोणाची आहे ही मला सांगता येणार नाही. तसेच वकीलपत्राच्या अनु क्रं ३ वरील सही माझी नाही. नि २ वरील अर्जदार क्रं ३ ची सही माझी नाही. गणेश बॅकेला नोंदणीकृत गहाणखत करून दिले होते का हे मला सांगता येणार नाही. श्री नारायण वाळु नाठे यांना मी ओळखत नाही. कारसुळची गट क्रं २४० ची जमिन मला माहिती आहे. हे म्हणणे खरे आहे की, गट क्रं २४० ची जमिन माझी व मंगलाची आहे. पुराव्याचे प्रतिज्ञापत्र नि १९ वरील सहया माझ्या नाहीत. हे म्हणणे खरे नाही की, गणेश बॅकेचे पैसे बुडवण्याची माझी इच्छा आहे.

Sonali

मी पदवीधर असून कॉलेजमध्ये सन १९८९ पासून टेक्नीकल असिस्टंट म्हणून नोकरी करित आहे.

उलटतपास पूर्ण फेरतपास नाही.

वाचले पाहीले दाव्यात सामील केले.”

(Emphasis added)

The English translation of the same is as follows:-

“Cross-examination of Shri Mahesh Tryambak Takate, the witness on behalf of the Applicant, commenced by Adv. V. S. Talekar on behalf of the Non-Applicant, on Oath.

I do not know anything about the present matter. Even Sau. Meghna Takate does not know anything about the present matter. Similarly, I do not know as to whether Sau. Mangala Dilip Takate also knows anything about the present matter. **I cannot state as to what has been written in my application and in the Affidavit in lieu of evidence. Dilip Takate is my brother. I cannot identify his signature.** It is true to say that Sau. Mangala and Shri Dilip are husband-wife and they live together at Karsul, Tal. Niphad, District Nashik. I can identify my signature. 10, B-wing, Amrut Dham, Ambaji Nagar, Panchavati, Nashik is my proper and correct address. It is true to say that Karsul, Tal. Niphad, District Nashik is my native place. It is not true to say that there is our ancestral house at Karsul. I have agricultural land at

Sonali

Karsul. The witness again states that there is ancestral agricultural land. I cannot state as to whose signature as an Applicant appears on Memo of Address – Exhibit-4. I cannot state as to whose signature as an Applicant No.1 appears on the application. I cannot state as to whose signature appears on Affidavit-Exhibit-1A. I cannot state as to whose signature appears at Sr. No.1 from out of the signatures of the parties appearing on the Vakalatnama-Exhibit-2. Similarly, the signature appearing at Sr. No.3 on the Vakalatnama is not my signature. The signature of Applicant No.3 on Exhibit-1 is not my signature. I cannot state as to whether the registered Mortgage-Deed was executed in favour of the Ganesh Bank. I do not know Shri Narayan Balu Nathe. I am aware about the land bearing Gat No.240 situated at Karsul. It is true to say that the land bearing Gat No.240 belongs to Mangala and myself. The signatures appearing on Affidavit in lieu of evidence-Exhibit-19 are not my signatures. It is not true to say that I intend to dupe the Ganesh Bank's monies. I am a graduate and am working as a Technical Assistant in the College since the year 1989.

Cross examination completed.

No re-examination.

Read, seen and filed in the compilation of documents.”

Sonali

5. A perusal of the cross-examination of Respondent No.3 clearly shows that the Respondents are not placing true facts before the Court. The cross-examination clearly show that a clear attempt is made to mislead the Court. It is clear that as the Respondents have taken loan from the Petitioner Co-operative Bank and executed Mortgage Deed, the Respondents want to avoid payment of the said loan. Intention of the Respondents is very clear to avoid execution of said Judgment and Award.

6. By the impugned Order dated 31st January 2017, the learned Judge of Cooperative Court has held that summons was not served on the Respondents and therefore, set aside the said Judgment and Award dated 25th November 2010 and restored the said Cooperative Case No.57 of 2010 to the file. The said Order was challenged by the Petitioner-Cooperative Bank by filing Appeal No.25 of 2018 and the said Appeal was disposed of by the Order dated 28th March 2019 passed by the learned Member, Maharashtra State Cooperative Appellate Court at Mumbai by imposing cost of Rs.4,000/-.

7. A perusal of record clearly shows that as per the Exhibits 7 to 10, Show Cause Notice and summons have been served on the Respondents. Apart from that what is significant to note is that on

Sonali

27th August 2010, the Application bearing Exhibit 11 has been filed on behalf of the Respondent Nos.1 to 3 seeking time to file reply in said Co-operative Case No.57 of 2010. The said Application was allowed by the learned Judge, Cooperative Court. The said Application at Exhibit-11 and Order passed thereon reads as under:-

“याकामी प्र. वादी नं. १ ते ३ तर्फे विनंती अर्ज की, सदर दाव्यात प्र. वादी नं. १ ते ३ यांना कारणे दाखवा नोटीस व समन्स मिळालेले आहे. परंतु प्र. वादी नं. १ ते ३ यांचे वकील बाहेरगावी गेलेले असल्याने आजरोजी जबाब/कैफियत देता येवू शकत नाही. त्यामुळे प्रवादी नं. १ ते ३ यांना जबाब/कैफियत देणेकामी पुढील मुदत मिळावी.

हा विनंती अर्ज

सौ मंगला दिलीपराव लाकाटे

प्र वादी नं.१

नाशिक

(Emphasis added)

The English translation of the same reads as under:-

“In this matter, the Request Application on behalf of Defendant Nos. 1 to 3 is submitted as under:

In the present suit, **Defendant Nos. 1 to 3 have received a Show Cause Notice and a Summons.** However, as the Advocate for Defendant Nos. 1 to 3 has gone outstation, today, they are unable to submit their statements/written statement.

Hence, it is humbly prayed that, **further time may please**

Sonali

be granted to Defendant Nos. 1 to 3 to submit their statements / written statement. Hence, this Request Application.”

8. Although the said Application at Exhibit-11 is styled in the manner that it has been filed on behalf of all the Respondents, the said Application has been signed only by Respondent Nos.1 and 2 and therefore, learned Cooperative Court has passed the following Order on 27th August 2010:-

“Disputants & his Adv. Present.
Adj appl. for opp. No 1 & 2 allowed.
Opp 3 absent. exparte
c/say/w.s. for 14/9
s/d”

Thus, it is clear that adjournment Application of Opponent Nos.1 and 2 has been allowed by the learned Judge, Cooperative Court and as far as the Opponent No.3 is concerned, it is recorded that he is absent and Order to proceed ex-parte against him was passed. The Roznama clearly shows that thereafter, on all dates the Respondents have remained absent and ultimately ex-parte Judgment and Award was passed on 25th November 2010.

9. It is significant to note that the Respondents have been served with the Suit summons and they have appeared in the case and

Sonali

sought adjournment and inspite of that, in the Application seeking setting aside of Judgment and Award, it has been falsely stated that the Respondents have not received any notice or Suit summons of the said Cooperative Case. It is further significant to note that a learned Single Judge issued notice in this Writ Petition by Order dated 8th January 2020 and the Respondents were served. The office note shows that the Respondents were served as per Bailiff report. It is further significant to note that as inspite of service, none appeared for the Respondents and therefore, a learned Single Judge by Order dated 9th March 2022, issued fresh notice and further directed that notice to indicate that if Respondents failed to appear, the Court would be constrained to proceed ex-parte against them. It is fruther significant to note that inspite of receipt of said notice, the Respondents have not appeared in the matter. Therefore, following Order is passed on 21st August 2023:-

- “1. Heard learned counsel appearing for the Petitioner.
2. A learned Single Judge by order dated 8th January 2020 issued notice to the Respondents and directed the learned Judge, Co-operative Court, Nashik not to proceed further.
3. By order dated 9th March 2022, the learned Single

Sonali

Judge noted that although the Respondents are served, none appears for the Respondents and therefore, directed the Registry to issue fresh notice indicating that if the Respondents fail to appear, the Court would be constrained to proceed ex-parte against them.

4. As per the office noting dated 30th June 2023, the Respondents are served. As none appears for the Respondents, for giving one more and last opportunity, stand over to 24th August 2023. It is made clear that on that date, the Writ Petition will be heard finally, subject to the convenience of the Court.”

(Emphasis added)

It is significant to note that inspite of service, Respondents are not appearing.

10. This is a case where huge amount is due towards the Petitioner, which is a Cooperative Bank. The Respondents have come up with a totally false case that Suit summons has not been served. In the impugned Orders, it is specifically stated that the Court should adopt liberal approach while considering the delay condonation Application. However, this is a case where the Respondents have come up with totally false case that suit summons has never been served on them. The orders of condonation of delay and setting aside

Sonali

ex-parte decrees are discretionary orders. The discretion is to be exercised in judicious and reasonable manner. Such discretion is not to be exercised in favour of litigants who come up with totally false case and misleads the Court. It is settled legal position that the litigants should approach the Court with clean hands.

11. Accordingly, as the Respondents have come up with a totally false case, this is not a case where the delay can be condoned and *ex-parte* Award granted in favour of the Petitioner can be set aside.

12. Accordingly, the impugned Order dated 31st January 2017 passed by the learned Cooperative Court, Nashik in Miscellaneous Application No.7 of 2014 as well as the Order dated 28th March 2019 passed by the learned Member, Maharashtra State Cooperative Appellate Court at Mumbai in Appeal No.125 of 2018 are quashed and set aside and the said Miscellaneous Application No.7 of 2014 is dismissed with cost.

13. The Writ Petition is disposed of in above terms with no order as to costs.

[MADHAV J. JAMDAR, J.]