IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

**WRIT PETITION NO. 11248 OF 2015**

Sudhakar R. Paricharak .. Petitioner
vs.
The Hon'ble Minister for Cooperation, Mantralaya, Mumbai and ors. .. Respondents

**WITH**

**WRIT PETITION (ST) NO. 15983 OF 2015**

Ratilal V. Gavade and ors. .. Petitioners
vs.
The Hon'ble Minister for Cooperation, Mantralaya, Mumbai and ors. .. Respondents

Mr. Y.S. Jahagirdar, Sr. Advocate i/b Mr. S.S. Kanetkar for the Petitioner in WP No. 11248/15.

Mr. G.S. Godbole a/w. S.C. Wakankar for the Petitioners in WP(St) No. 15983/2015.

Mr. S.D. Rayrikar, AGP for Respondent No.1 in both Petitions.
Mr. A.A. Kumbhakoni, Sr. Advocate alongiwth Mr. A.B. Borkar for Respondent No.3 in both Petitions.

**CORAM : M. S. SONAK, J.**

Date of Reserving the Judgment : 20 November 2015.
Date of Pronouncing the Judgment : 23 November 2015.

**JUDGMENT :-**

1] Rule in both these petitions. With the consent of and at the request of learned counsel for the parties, Rule is made returnable forthwith.

2] The challenge in these petitions is to the order/report dated 16 August 2012 submitted by the authorised Officer under Section 88 of the Maharashtra Cooperative Societies Act, 1960 (said Act) and the confirmation of the same by the Minister (Cooperation) by order dated 18 May 2015 made in Appeal No. 766 of 2012 under Section 152 of the said Act.

3] Amongst other contentions, Mr. Y.S. Jahagirdar, the learned senior advocate and Mr. G.S. Godbole, learned counsel for the the Petitioners, urged that there is hardly any consideration of the issues raised by the Petitioners by the Minister (Cooperation) against action under Section 88 of the said Act. The learned counsel pointed out that the impugned order dated 18 May 2015 acknowledges that the Society (Respondent No.3) of which the Petitioners were members of the Managing Committee has ultimately obtained a decree against M/s. New Vintage Tissue Tech Pvt. Ltd., Patkul (Company) which was entrusted with the contract for supply of plants/saplings, but proceeded to uphold the drastic action under Section 88 of the said Act against the Petitioners, primarily on the basis that the said Company had already mortgaged its assets to some other financial institution and therefore, the recovery of decreetal amount, would virtually, be impossible. The learned counsel for the Petitioners vehemently submitted that such reasoning is patently untenable and in any case, the parameters of Section 88 of the said Act as also several other contentions raised by the Petitioners in their memo of appeal, have not at all been considered by the appellate authority. For this reason, it was urged that the impugned order dated 18 May 2015 is liable to be set aside and the matter remanded to the Minister (Cooperation) for fresh decision in accordance with law.

4] The learned counsel for the Petitioners submitted that the proceedings under Section 88 of the said Act, which have very drastic consequences, including *inter alia* disqualification to take part in the cooperative movement cannot be initiated for any and every act of omission or commission. There has to be a categorical finding of misapplication of funds or misfeasance, in order that the predicates of Section 88 of the said Act are attracted. On basis of mere errors of judgments or on the basis that contract was awarded to some party, which has eventually defaulted in compliance, it is not permissible to initiate action under Section 88 of the said Act. In this regard, reliance was placed upon the decision in case of ***Shri. Gajanan Pandurang Shet Parkar & ors vs. L.D. Authorised Person of the Registrar of Cooperative Socieites & ors.***[1] and the decision of

1 1998(3) Bom.C.R.850

the Hon'ble Apex Court in case of ***Salim Akbarali Nanji Vs. Union of India & ors.***[2].

5] The learned counsel for the Petitioners also contended that action under Section 88 of the said Act can be initiated or taken either by Registrar or the person authorised by him. Such person, has to necessarily be one in service of the Cooperative Department or the Government. In the present case, the person authorised, retired upon attaining the age of superannuation before the impugned action could be taken. Thereafter, neither was authority extended in the manner known to law nor could such authority have been extended, in view of concerned person ceasing to being in employment of Government. Analogy was purported to be drawn from disciplinary proceedings against bank employees and reliance was placed upon the decision of the Hon'ble Apex Court in case of ***Central Bank of India Vs. C. Bernard***[3], in which it is held that after retirement, the Bank Officer who had been appointed as Enquiry Officer as well as Disciplinary Authority, ceased to hold the office of Disciplinary Authority and was consequentially in competent to make any disciplinary orders.

2 2006(5) SCC 302
3 (1991) 1 SCC 319

6] Mr. S.D. Rayrikar, learned AGP for Respondent No.1 and Mr.A.A.Kumbhakoni, learned senior advocate for Respondent No.3 (Society) defended the impugned orders, by pointing out that the Petitioners awarded contracts for no less than four years to the Company without invitation of tenders. Such contract was awarded to the Company without even minimum verification of credentials, background, experience, capability or capacity of the Company in the matter of supply of plants/saplings. Further, without verification of the financial status of the Company, huge advances to the tune over Rs.54 Lacs were made to the Company. Despite defaults on the part of the Company, condition with regard to offer of security were relaxed. The cheque, which was handed in as and by way of security on the previous occasions was not even deposited in order to mitigate the losses. Ultimately, the Company failed to supply even a single sapling. The Special Auditors have investigated the matter and have recorded detailed findings as to the involvement of the Petitioners and the consequent losses to the Society. The recovery proceedings against the Company were initiated after the Petitioners ceased to be in Managing Committee, the decrees/orders for recovery are virtually paper decrees/orders as it is now discovered by the Company has huge liability with other financial institutions and the assets of the Company have been mortgaged by way of security towards such liabilities. Mr. Kumbhakoni, the learned senior advocate pointed out that the issue with regard to the jurisdiction of the authorised Officer to continue, post retirement was, not even raised before the Appellate Authority. For all these reasons, the learned counsel for the Respondent Nos.1 and 3 urged that these petition be dismissed.

7] The rival contentions now fall for determination.

8] The impugned report and order, *inter alia,* require the Petitioners as well as other Directors then in the management of the Society to pay an amount of Rs.1,32,15389/- alongwith interest at the rate of 15% per annum from 1 July 2012 towards the losses caused to the Society on account of acts of omission and commission on their part in the matter of award of contracts to the said Company and the consequent non-fulfillment of the terms of the contract by the said Company. The liability upon the Petitioners alongwith other Directors has been adjudged as joint and several.

9] After the matters were heard for considerable time, the learned counsel for the Petitioners were granted opportunity for taking instructions as to whether the Petitioners would be willing to deposit at least the principal amount with the Society, without prejudice to their rights and contentions. The learned counsel for the Petitioners have made statement that the said Company had already paid an amount of Rs.10 Lacs to the Society, which position is accepted by the learned senior advocate appearing for the Respondent No.3-Society. The learned counsel for the Petitioners stated that the Petitioners, without prejudice to their rights and contentions, would deposit an amount of Rs.1.22 Crores with the society within a period of four weeks. The learned counsel for the Petitioners, however, submitted that the Society may be directed to place such amounts in a separate Fixed Deposit, so that such amounts can abide by the orders that may be finally made, either in this petition or the appellate authority, should this Court be inclined to set aside the appeal order and remand the matter to the Appellate Authority for fresh consideration. The learned counsel for the Petitioners further submitted that in case the said company pays the amount of Rs.1.22 Crores alongwith interest to the Society, then necessary directions be issued to the Society to refund the amounts of Rs.1.22 Crores, which the Petitioners may have deposited with the Society.

10] If the memo of appeal instituted by the Petitioners is perused, then it does appear that several grounds were raised therein. In particular, it has been the case of the Petitioners that action under Section 88 of the said Act, which involves drastic consequences, both pecuniary as well as reputational, cannot be initiated unless there are categorical findings with regard to misapplication, retention, misfeasance or breach of trust in relation to the Society. In this case, it is pointed out that there is no case made out of either retention, misfeasance or breach of trust. The case made out, at the highest relates to allegations of misapplication. In this regard, it is submitted that even misapplication of money or property cannot be equated with a routine commercial decision collectively adopted by the members of Managing Committee, just because such commercial decision has been ultimately found to be imprudent. The contention is that mere errors in business judgment, are by no means sufficient to warrant action under Section 88 of the said Act. Though not in the memo of appeal, the Petitioners have also urged that the authorised Officer ceased to have authority to make the impugned order post his retirement from service.

11] From the perusal of appeal dismissal order, it does transpire that the fundamental contentions of the Petitioners have not been considered by the Appellate Authority with the necessary seriousness, which such contention warranted. No doubt, it is true, as pointed out by Mr. Kumbhakoni, learned senior advocate for the Society (Respondent No.3) that the order of affirmance need not contain elaborate reasons. However, notwithstanding such principle, the order of Appellate Authority is required to indicate at least briefly that major contentions raised by the parties have been duly considered. In this case, the main reason for dismissal of the appeal is that though the Society has obtained decrees/orders for recovery of amounts against the Company, the said Company has already mortgaged its assets to banks and financial institutions against the liabilities created by the said Company. For these reasons, the Appellate Authority has held that there is no likelihood of recovery of amounts due to the Society from the said Company. If, the entire range of the facts and circumstances were to be considered, then this may not be an irrelevant circumstance. However, the Appellate Authority was required to at least consider the entire range of facts and circumstances alongwith the contentions raised by the Petitioners in their memo of appeal. The appeal ought not to have been dismissed on the sole ground that the recoveries from the said Company would be difficult.

12] This Court, *in the case of Gajanan Pandurang Shet Parkar (supra),* has held that expressions like '*misapplied*', '*misfeasance*', and '*breach of trust*' relate to acts of omission and commission, which may, in a given case, be separate and distinct. For this purpose, the Appellate Authority is required to scan the record and bestow *quasi judicial* consideration upon the issues raised. The provisions contained in Section 88 of the said Act also contemplate the application of mind to the role that may have been played by the individual Managing Committee Members and not merely some general considerations with regard to the liability of entire Managing Committee in the context of acts of omission and commission, which have resulted in loss or damage to the Society.

13] The Hon'ble Apex Court in case of *Salim Nanji (supra),* in the context of action against the banks under the provisions of Banking Regulation Act 1949, has held that it is no doubt true that the amounts advanced by banks must be recovered. Such debts should not be permitted to become non-performing assets. However, one cannot lose sight of the realities of the situation. Having regard to the nature of banking business, it is possible that the Bank may commit an error of judgment in advancing funds to a particular party or industry. It may be that on account of other factors beyond its control, or even beyond the control of the borrowers, it may become difficult, or even impossible to recover the loan advanced in accordance with the schedule of re-payment, or to recover the loan at all. These are risks inherent in the banking business, though a wise banker with foresight and anticipation may reduce such risks to the minimum level. One cannot however, jump to the conclusion that only because some of the debts have become bad, there is lack of proper management of the Bank, or that the conduct of the Bank is dishonest or *mala fide*. In a given case, there may be evidence of such mismanagement or dishonest conduct, but in the absence of any such accusation, one cannot draw an adverse inference against the Bank.

14] The Appellate Authority in the present case, was required to bestow consideration at least upon the main points urged by the

Petitioners, namely that the predicates of Section 88 of the said Act were not at all attracted to the facts and circumstances of the present case. Non-consideration of this fundamental contention, alongwith several other contentions which have been raised in the memo of appeal, virtually amounts to non-exercise of appellate jurisdiction statutorily provided by the legislature under Section 152 of the said Act. Needless to add that the Appellate Authority is also required to consider the contentions raised, *inter alia,* by the Society to the effect that the predicates of Section 88 of the said Act had indeed been complied with and the action taken was very much warranted in the facts and circumstances of the case.

15] In this view of the matter, it would be appropriate if the impugned order dated 18 May 2015 made by the Appellate Authority is set aside and the matter is remanded to the Appellate Authority for fresh consideration in accordance with law. At this stage, there is no reason to interfere with the report/action dated 16 August 2012 under Section 88 of the said Act, particularly as none of the Petitioners continue in management of Society. However, taking into consideration the offer made by the Petitioners, without prejudice to their rights and contentions, to deposit with the Society an amount of Rs.1.22 Crores as aforesaid, it will be appropriate, if there is a stay upon the enquiry report/action dated 16 August 2012 under Section 88 of the said Act. This, at least to a certain extent, will protect the interest of Society, which is said to have been incurred a loss of Rs.1.32 Crores or thereabouts on account of alleged acts of omission and commission by the Petitioners and other Directors, who were then in the management of the Society.

16] Accordingly, these petitions are disposed of with the following order:

a] The impugned order dated 18 May 2015 made by the Respondent No.1 is quashed and set aside;

b] The Respondent No.1 is directed to rehear the Petitioners' appeal and dispose of the same in accordance with law and on its own merits as expeditiously as possible and in any case within a period of three months from today;

c] During pendency of the appeal, before the Respondent No.1, there shall be a stay on the inquiry report/action dated 16 August 2012 under Section 88 of the said Act. In case, the appeal is decided against the Petitioners, this interim relief to continue for a period of two weeks from the date of communication of appeal dismissal order upon the Petitioners. The Appellate Authority is requested to fix a date for the pronouncement of the decision in the appeal, so that there is no controversy about the date of communication of the order;

d] The stay or interim relief as aforesaid is subject to the Petitioners depositing with the Society an amount of Rs.1.22 Crores, without prejudice to their rights and contentions, within a period of four weeks from today. In case, the amount of Rs.1.22 Crores is not deposited within a period of four weeks from today, then the stay/interim order herein made, shall stand vacated, without further reference to this Court;

e] It is made clear that the without prejudice offer for deposit of Rs.1.22 Crores with the Society, within a period of four weeks from today, is one of the substantial considerations for grant of stay/interim relief as aforesaid. Therefore, the Petitioners are directed to honour their offer, without prejudice to their rights and contentions and to deposit the amount of Rs.1.22 Crores with the Society within a period of four weeks from today, without any excuse or without seeking any further time for the deposit of same;

f] The amount so deposited by the Petitioners, without prejudice to their rights and contentions shall abide by the final orders that may be made by the Appellate Authority or the Court, as the case may be. There is no case, however, made out to require the Society to retain the said amount in a separate Fixed Deposit Account, considering the facts and circumstances of the present case. Similarly, the issue of refund, should the Company pay the said amount is hypothetical and therefore, it is not possible to make any orders in that regard, at this stage. However, should such eventuality arise, the Petitioners are at liberty to apply to the Appellate Authority, which shall make appropriate orders in accordance with law, upon such application;

g] The Petitioners are granted leave to amend their memo of appeal by raising any further grounds therein. Copies of such amended memo of appeal to be furnished to the Respondents. The Respondents are also granted liberty to file appropriate response. The amendment to be carried out within a period of two weeks from the today and the response thereto by the Respondents within a period of two weeks thereafter; and

h] It is made clear that all contentions of all parties are kept open for decision by the Appellate Authority-Respondent No.1. The Respondent No.1 need not be influenced by *prima-facie* observations made in this order.

17] Rule is made absolute to the aforesaid extent. There shall, however, be no order as to costs.

(M.S. SONAK, J.)