

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**APPELLATE SIDE CIVIL JURISDICTION****WRIT PETITION NO. 1963 OF 2015**

Arun Dattatraya Narake,
Age____yrs., Occu : Agriculturist,
R/at. "Narake Wada", Shivaji Peth,
Kolhapur.

....Petitioner.

Vs.

1 Authorized Officer,
Kolhapur District Central Co-op. Bank Ltd.,
1092, E-Shahupuri,
Kolhapur and Regional Joint Director
(Sugar), Pune Region, Sakhar Sankul,
Shivaji Nagar, Pune.

2 Kolhapur District Central Co-op. Bank Ltd.,
1092, E-Shahupuri, Kolhapur.

3 The State of Maharashtra,
Through Minister of Co-operation,
Mantralaya, Mumbai-400 032.

....Respondents.

WITH**WRIT PETITION NO.1964 OF 2015**

Sandeep Arun Narake

....Petitioner.

Vs.

Authorized Officer, Kolhapur
District Central Co-op. Bank Ltd. & Ors.

....Respondents.

WITH**WRIT PETITION NO.1965 OF 2015**

Vishwas Bajirao Patil

....Petitioner.

Vs.

Authorized Officer, Kolhapur
District Central Co-op. Bank Ltd. & Ors.Respondents.

**WITH
WRIT PETITION NO.1966 OF 2015**

Amar Yashwant PatilPetitioner.
Vs.
Authorized Officer, Kolhapur
District Central Co-op. Bank Ltd. & Ors.Respondents.

**WITH
WRIT PETITION NO.1967 OF 2015**

Mahadevrao Ramchandra MahadikPetitioner.
Vs.
Authorized Officer, Kolhapur
District Central Co-op. Bank Ltd. & Ors.Respondents.

**WITH
WRIT PETITION NO.1968 OF 2015**

Anandrao Dnyandev Patil (Chuyekar)
Since Decd. Through Lrs
Shashikant A. Patil & Ors.Petitioners.
Vs.
Authorized Officer, Kolhapur
District Central Co-op. Bank Ltd. & Ors.Respondents.

**WITH
WRIT PETITION NO.1969 OF 2015**

Chandrakant Ganpatrao Savekar
Since Decd. Through LrsPetitioners.
Vs.
Authorized Officer, Kolhapur
District Central Co-op. Bank Ltd. & Ors.Respondents.

**WITH
WRIT PETITION NO.1970 OF 2015**

Narsing Gurunath PatilPetitioner.

Vs.

Authorized Officer, Kolhapur
District Central Co-op. Bank Ltd. & Ors.Respondents.

**WITH
WRIT PETITION NO.1971 OF 2015**

Pandurang Nivrutti Patil Alias
PN. Patil (Sadolikar)Petitioner.

Vs.

Authorized Officer, Kolhapur
District Central Co-op. Bank Ltd. & Ors.Respondents.

**WITH
WRIT PETITION NO.1972 OF 2015**

Satej Alias Banti Dnyandev PatilPetitioner.

Vs.

Authorized Officer, Kolhapur
District Central Co-op. Bank Ltd. & Ors.Respondents.

**WITH
WRIT PETITION NO.1973 OF 2015**

Baburao Shivram Kore (Since Decd.)
Through Lrs.Petitioners.

Vs.

Authorized Officer, Kolhapur
District Central Co-op. Bank Ltd. & Ors.Respondents.

**WITH
WRIT PETITION NO.1974 OF 2015**

Sou. Shakuntala Babaso Patil & Ors.Petitioners.

Vs.

Authorized Officer, Kolhapur
District Central Co-op. Bank Ltd. & Ors.Respondents.

**WITH
WRIT PETITION NO.1975 OF 2015**

Sadashivrao Dadoba Mandlik	Petitioner.
Vs.	
Authorized Officer, Kolhapur	
District Central Co-op. Bank Ltd. & Ors.	Respondents.

**WITH
WRIT PETITION NO.1976 OF 2015**

Kashinath Vhannappa Charati (Decd.)	
Through Lrs.	Petitioners.
Vs.	
Authorized Officer, Kolhapur	
District Central Co-op. Bank Ltd. & Ors.	Respondents.

**WITH
WRIT PETITION NO.2045 OF 2015**

Baburao Sattyappa Hajare & Ors.	Petitioners.
Vs.	
State of Maharashtra,	
Through Secretary, Dept. of Co-op. & Ors.	Respondents.

**WITH
WRIT PETITION NO.2046 OF 2015**

Tatyasaheb Ramgonda Patil & Ors.	Petitioners.
Vs.	
State of Maharashtra,	
Through Secretary, Dept. of Co-op. & Ors.	Respondents.

**WITH
WRIT PETITION NO.2066 OF 2015**

Jayant Govindrao Patil	Petitioner.
Vs.	
State of Maharashtra,	
Through Secretary, Dept. of Co-op. & Ors.	Respondents.

**WITH
WRIT PETITION NO.2067 OF 2015**

Prakash Kallappa Anna Awade

....Petitioner.

Vs.

State of Maharashtra,

Through Secretary, Dept. of Co-op. & Ors.

....Respondents.

Mr. Y.S. Jahagirdar, Senior Advocate i/by Mr. Amit Borkar for the Petitioners in all other Writ Petitions.

Mr. A.M. Savagave for the Petitioners in Writ Petition No. 2045 of 2015.

Mr. P.K. Dhakephalkar, Senior Advocate i/by Mr. S.S. Patwardhan with Mr. Ruturaj Pawar for the Petitioners in Writ Petition Nos. 2046 of 2015, 2066 of 2015 and 2067 of 2015.

Mr. Sunil Manohar, Advocate General a/w Mr. A.B. Vagyan, Government Pleader a/w Mr. C.P. Yadav, AGP for the State in all the matters.

Mr. A.S. Khandeparkar a/w Mr. P.D. Paranjape for the Bank in all matters.

Mr. A.Y. Sakhare, Senior Advocate a/w Mr. Joel Carlos for the Respondent-Minister of Cooperation in all matters.

**CORAM:- ANOOP V. MOHTA, J.
DATE :- 4 MARCH 2015.**

ORAL JUDGMENT:-

Rule. Rule is made returnable forthwith. By consent of parties, heard finally, in view of the urgency so expressed.

2 By this common order, I am inclined to dispose of all these Petitions as common issues, common Respondents and common orders are under challenge. The Respondents have also filed a common reply in all these Petitions.

3 Some of the Petitioners were ex-members of the managing committee of Respondent No.2-Kolhapur District Central Co-op. Bank Ltd. (for short, the Bank-society). Some of them are existing members of the “managing committee”. Respondent No.2 is the society registered under the provisions of Maharashtra Cooperative Societies Act, 1960 (MCS Act) and doing banking business being Federal Society and as other multipurpose and credit societies are its members. The society is authorised to grant a financial assistance to its member societies as per the provisions of the MCS Act, Rules and the Bye-laws. The said banking business is also regulated by the statutory directions issued from time to time by the Reserve Bank of India and National Agriculture and Rural Development Bank (NABARD). Under the bye-laws the executive committee and the managing committee of the Bank-society have power to sanction

loans to its members. Respondent No.3 is the State of Maharashtra and is also Appellate Authority as contemplated under Section 152, against the order under Section 88 of MCS Act.

4 The Petitioners have challenged impugned orders dated 18.02.2015 passed by Respondent No.3 and also the basic order dated 23.01.2015 passed by Respondent No.1. All the Petitioners have filed Appeals under Section 152 of the MCS Act on 2.2.2015 along with Applications for stay/interim relief. On 05.02.2014, Respondent No.3 had not granted any order and fixed the Stay Application for hearing on 23.02.2015. The Petitioners, therefore, preferred Writ Petitions. On 12.02.2015, all the Writ Petitions were disposed of with direction to Respondent No.3 to hear at least Stay Applications on 16.02.2015 instead of 23.02.2015, in view of urgency so expressed. I have observed that the matters be heard in accordance with law including to consider the aspect of principle of natural justice.

5 On 18.02.2015, Respondent No.3-State Government/Appellate Authority by the impugned orders, though granted interim protective reliefs, inspite of said apprehension, fixed the Appeals for

final hearing on 28.03.2015; permitted the proceedings under Section 98 to continue with further observation that no coercive measures be taken against the Petitioners, but on the condition that they should file a respective undertaking within seven days, stating that they will not alienate or create any third party interest in respect of the movable and/or immovable properties of the Petitioners and also directed them to furnish the details of their respective properties within seven days.

6 Some of the Petitioners, as stated, in view of time period so prescribed, submitted the details also. However, by these Petitions specific contention is raised that as there is no stay granted to the impugned order under Section 88 dated 23.01.2015, the said order itself will attract the disqualification as contemplated under Section 73(C) (A)(iii). That would result into disallowing them from participating in an ensuing election of most of the societies in the Kolhapur District, as the basic process of finalising a provisional/final list of the members of the respective societies has been started. In some of the societies, such steps are already proceeded further. So far as Respondent No.2-Bank-society is concerned, the process to finalise the provisional list is also initiated. The Petitioners, if are disqualified

at this stage, then they would be deprived of their rights to participate in the statutory elections of the societies inspite of pendency of their statutory Appeals so referred above. The challenge is also made revolving around part of the impugned order, whereby all the Petitioners are directed to provide the details of the properties within 7 days apart from the undertaking so referred above.

7 Normally, there is no question to interfere with the ad-interim conditional order so passed pending the Appeals. The learned Advocate General has made submissions in this regard referring to the judgment of Supreme Court in Kokkanda B. Poondacha and ors v. K. D. Ganapathi and anr,¹ wherein it is observed as under :

“8 In Surya Dev Rai case (2003) 6 SCC 675, the two-Judge Bench, after a detailed analysis of the various precedents on the scope of the High Court's powers under Articles 226 and 227 of the Constitution culled out nine proportions including the following : (SCC p. 695, para 38)

“38 (2) Interlocutory orders, passed by the courts subordinate to the High Court, against which remedy of revision has been excluded by CPC Amendment Act 46 of 1999 are nevertheless open to challenge in, and continue to be subject to, certiorari and supervisory jurisdiction of the High Court.

1 (2011) 12 SCC 600

(3) Certiorari, under Article 226 of the Constitution, is issued for correcting gross errors of jurisdiction i.e. when a subordinate court is found to have acted (I) without jurisdiction – by assuming jurisdiction where there exists none, or (ii) in excess of its jurisdiction-by overstepping or crossing the limits of jurisdiction, or (iii) acting in flagrant disregard of law or the rules of procedure or acting in violation of principles of natural justice where there is no procedure specified, and thereby occasioning failure of justice.

(4) Supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping the subordinate courts within the bounds of their jurisdiction. When [the] subordinate court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or the jurisdiction though available is being exercised by the court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby, the High Court may step into exercise its supervisory jurisdiction.

(5) Be it a writ of certiorari or the exercise of supervisory jurisdiction, none is available to correct mere errors of fact or of law unless the following requirements are satisfied :

(i) the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and

(ii) a grave injustice or gross failure of justice has occasioned thereby.”

8 All the learned counsel appearing for the parties read and referred Section 88 of MCS Act which is the source of the impugned

orders in question so also Rule 72 of the Maharashtra Cooperative societies Rules, 1961 (the MCS Rules). Both these provisions deal with the power of Registrar to assess damages against the delinquent promoters. Sections 88 and Rule 72 are reproduced as under :-

Section 88 - Power of Registrar to assess damages against delinquent promoters, etc.

(1) Where, in the course of or as a result of an audit under section 81 or an inquiry under section 83 or an inspection under section 84 or the winding up of a society, the Registrar is satisfied on the basis of the report made by the auditor or the person authorised to make inquiry under section 83 or the person authorised to inspect the books under section 84 or the Liquidator under section 105 or other wise that any person who has taken any part in the organisation or management of the society or any deceased, or past or present officer of the society has, within a period of five years prior to 1[the date of commencement of such audit or date of order for inquiry, inspection or] winding up, misapplied or retained, or become liable or accountable for, any money or property of the society, or has been guilty of misfeasance or breach of trust in relation to the society, the Registrar or a person authorised by him in that behalf may frame charges against such person or persons, and after giving a reasonable opportunity to the person concerned and in the case of a deceased person to his representative who inherits his estate, to answer the charge, make an order requiring him to repay or restore the money or property or any part thereof, with interest at such rate as the Registrar or the person authorised under this section may determine, or to contribute such sum to the assets of the society by way of compensation in regard to the

misapplication, retention, misfeasance or breach of trust, as he may determine.

2[Provided that, proceedings under this sub-section, shall be completed by the authorised person within a period of two years from the date of issue of order by the Registrar:

Provided further that, the Registrar may, after recording the reasons therefor, extend the said period for a maximum period of six months.]

(2) The Registrar or the person authorised under sub-section (1) in making any order under this section, may provide therein for the payment of the cost or any part thereof, as he thinks just, and he may direct that such costs or any part thereof shall be recovered from the person against whom the order has been issued.

(3) This section shall apply, notwithstanding that the act is one for which the person concerned may be criminally responsible.

Rule 72. Procedure for assessing damages against delinquent promoters, etc. under Section 88

(1) On receipt of a report referred to in Section 88 or otherwise, the Registrar or any other person authorised by him may make such further inquiries as he may deem necessary regarding the extent to which the person who has taken any part in the organisation or management of a society or any deceased, past or present officer of the society has misapplied or retained, or become liable or accountable for, any money or property of the society, or has committed misfeasance or breach of trust in

relation to the society. [In case of deceased person, the society shall furnish information regarding his representative who inherits his estate].

(2) On the completion of the further inquiries under sub-rule (1), where necessary, the Registrar or the person authorised by him shall issue a notice to the person or persons concerned furnishing him or them with particulars of the acts of misapplication, retention, misfeasance or breach of trust and the extent of his or their liability involved therein and calling upon him or them to put in statement in his or their defence within fifteen days of the date of issue of the notice.

(3) On receipt of the statements referred to in sub-rule (2), the Registrar or the person authorised by him, if he is satisfied that there are reasonable grounds for holding the person or persons liable, shall frame charges.

(4) The person or persons concerned shall, after the charges are framed be asked to put in his statement in defence and to indicate the documentary or oral evidence which he would like to produce. The Registrar or the person authorised by him may permit production of other documentary or oral evidence, if considered necessary subsequently.

(5) The Registrar or the person authorised by him shall thereafter record the evidence led by the society or the person or persons concerned and take on record the documents proved by them and shall thereafter fix a date for hearing arguments of both the parties.

(6) On the day fixed for hearing under sub-rule (5), the Registrar or the person authorised by him, shall hear the arguments and may pass his final orders on the same day or any date fixed by him within sixty

days from the date on which the hearing was completed. On the date so fixed, 1[the Registrar or, as the case may be, the person authorised by him shall make his final order] either ordering repayment of the money or return of the property to the society together with interest at such rate as may be specified by him or to contribute such amount to the assets of the society by way of compensation in regard to misapplication, retention, misfeasance or breach of trust as may be determined or may reject the claim submitted on behalf of the society.

(7) The Registrar or the person authorised by him, may also provide in his order for the payment of the cost of the proceeding under this rule or any part of such cost as he thinks just.

(8) The Registrar or the person authorised by him shall furnish a copy of his order, under sub-rule (6) to the party concerned within ten days of the date on which he makes his final order.”

9 The above provision itself shows that Sections 81, 83 and 84 should be the foundation to initiate proceedings under Section 88 of MCS Act. In the present case, there is no issue that the impugned orders are passed on the basis of a result of an audit under Section 81. No inquiry under Section 84 and/or such related provisions had been invoked.

10 Chapter VIII deals with the aspects of audit, inquiry,

inspection and supervision. Sections 81 to 90 are the sections for the related facets so referred above. The whole chapter, therefore, needs to be read together specifically when it comes to inquiry and/or action under Section 88 of the MCS Act. There are connected and related Rules also which are required to be followed by all the parties.

11 The plain reading of these sections clearly contemplates the respective obligations of the members/managing committee, general body of the society and related and connected officers of the Department. The mechanism is clear that in case of defaults by the members and/or by the managing committee or even in case of irregularities, the Department's officers basically the Registrar to take appropriate action as and when necessary specifically in every financial year. The procedure/mechanism is also provided in case of defaults and on non-compliance of those provisions by the members/managing committee. The point, in the present case, is the audit and/or audit reports of the societies as that is the foundation to initiate proceedings under Section 88 .

12 The role of auditor and/or statutory audit provides and

contemplates various stages of every society which are governed by these provisions. The auditor's reports, therefore, need to provide all particulars of the defects or the irregularities of the Bank/society in case of financial irregularities, mis-appropriation and/or embezzlement of funds or fraud. It is also an obligation of the auditor or auditing firm to investigate and report the *modus operandi* and the entrustment and the amount involved. The accounting irregularity and their implication on the financial statements to be indicated in detail in the report with the corresponding effects on the profit and the loss. Even the functioning of the Committee, sub-committee of the society needs to be checked and if any irregularities or violations are observed or reported, it is necessary to fix the responsibility for such irregularities or violations. All these definitely required to be with the assistance and help, apart from the relevant records of the society and required to be maintained by them, on day to day basis and as the same is necessary for completion of audit and all other requisite mandate of the above provisions.

13 Most of the Petitioners were in the managing committee even prior to 2002 and some of them are still there. In the present

case, the stated gross irregularities in the functioning of the Bank noted in the audit report of 2002-2003 to 2006-2007 and an inquiry was initiated in the year 2007. It is stated that after conducting the detailed inquiry the final report was passed. This has also a foundation of statutory inspection by the NABARD under the Banking Regulation Act as on 31.03.2008. They noticed the deteriorating financial position and, therefore, directed to take action immediately safeguarding the interest of the depositors and the public at large. The Reserve Bank of India also forwarded a requisition to take action in terms of subsection (I) (iii) of Section 110 (A) of MCS Act to supersede the Board of Directors of Respondent No.2-Bank. The Board of Administrator was therefore appointed on 12.11.2009. The basic charges raised against the Petitioners, being member of managing committee of the Bank/society, that in breach of bye-laws and clear instructions of NABARD and Reserve Bank of India, during the financial year 2002-2007, various loans were disbursed without seeking any proper security. The Board of Directors, at the relevant time, though Respondent – Bank was actually in loss during the period 2006-2007, shown in profit, and without complying the provisions of Section 11 (I) of the Banking Regulation Act disbursed the dividends

for the year 2006-2007. This act, according to the Department, is in violation of their circular and the provision of Section 67 of MCS Act and the bye-laws.

14 This recording of irregularities and specifically when it involves the concerned office bearers, needs to be concluded with a clear finding of breach of trust, malfeasance, mis-application, mis-appropriation and embezzlement and the actual loss caused to the society. The distribution of dividends, though initiated, ultimately resulted into a general body decision. The stated obligation of liability and/or mis-deed and/or irregularities by the managing committee also required to be tested in this background of the ultimate decision by the general body. The alleged false and/or fabricated financial report of the year 2006-2007, which was the basis of distribution of dividend, now stated to be based upon the fabrication of account/documents, needs to be tested by giving opportunity to all the concerned. The various irregularities committed by the Board of Directors, as noted, by the special auditor of District Central Cooperative Bank, Kolhapur, directed to make an inquiry as provided in the MCS Act and appointed inquiry officer,

who started inquiry in the year 2009. The basic order dated 23.01.2015 under Section 88 of the MCS Act is the result of the said inquiry.

15 The decision, whether taken, based upon the statutory procedures so prescribed and provided under the MCS Act and the Rules, apart from the principles of natural justice and the mandate of Respondent's officers to deal with such situation by giving equal opportunity to all the concerned, in my view, just cannot be overlooked, merely because the alleged fraud and/or loss is to the extent of Rs.147 crores, now stated to be 161 crores. If the Statute provides action to be initiated and the guilty must be punished and if necessary by taking steps to recover the amount from such delinquent, but if such statute itself provide the mandate the concerned officers to deal with the situation before arriving at the conclusion of loss to the society, they must follow it strictly. The basic requisite of giving opportunity at every stages to all the concerned as the effect of such order under Section 88 of the MCS Act automatically give effect of the statutory disqualification as contemplated under Section 73(CA) of the MCS Act, which is reproduced as under:

[73CA. 3[Disqualification of committee and its members.]

[(A1) In the case of a society, which gives loans to members for purchasing machinery, implements, equipments, commodities or other goods, or which deals in such goods, no member, who or whose member of the family is a dealer in such goods or is a director of a company or a partner in a firm carrying on business in such goods, in the area of operation of the society shall be eligible for being elected or nominated as a member of the committee of such society;

(1) Without prejudice to the other provisions of this Act or the rules made thereunder in relation to the disqualification of being member of a committee, no person shall be eligible for being appointed, nominated, elected, co-opted or, for being a member of a committee, if he-

.....

.....

(iii) has been held responsible under section 79 or 88 or has been held responsible for payment of costs of inquiry under section 85; or

(iv) has incurred any disqualification under this Act or the rules made thereunder; or

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16 This is the basic contention apart from the condition order in all the matters as the learned Appellate Authority having noted the case and submission of the Petitioners though has granted the interim relief/protection pending the Appeals so recorded above, but subject

to the conditions. The Petitioners prayer throughout was to stay the order itself. The same was not granted. The above statutory consequence has taken it's effect immediately.

17 All the counsel read and referred impugned orders dated 25.01.2015 and 18.02.2015. So far as the main Appeals arising out of the basic orders under Section 88 are concerned, the same are pending for final adjudication. I am inclining to deal with the reasons and/or the submissions so raised specifically revolving the issues which are relevant and essential to conclude and/or initiate such drastic action as contemplated under Section 88 read with Section 73(C) (A)(iii). It is necessary for the concerned basic officer and the Appellate Authorities to deal with the same at appropriate stages. We have to consider the process and steps right from the initiation of action so contemplated under Section 81 till it's conclusion to award damages amount so arrived at under Section 88 based upon the audit reports. The cause of action and/or events prior to the amendment to MCS Act and it's applicability to such events, also need consideration.

18 Both the Respondents have filed their reply to oppose the

Petitions on 2.3.2015 by stating to be for Respondent No.3, though it is filed by Officer, who has passed impugned order dated 23.1.2015. Respondent No.2-Bank-society's affidavit is also of same date i.e. 2.3.2015. In both these affidavits, the materials/supporting documents are placed on record including subsequent balance-sheet as on 31.01.2015 and even of prior to earlier year. The specific averments by the Petitioners in all these matters that inspite of closing for order on 31.07.2014, the impugned order was passed on 23.01.2015 by Respondent No.1. This is admittedly beyond the statutory period of 60 days as contemplated under the provisions of the Act. In *Anil Rai v. State of Bihar*,² the Supreme Court has noted "The pronouncements should not be permitted to go beyond two months". Here there is no even justification for five months unexplained delay.

19 Positive averments are made in paragraphs 10 and 24 which read as under :

"10 The Petitioner states that, the Respondent No.2 also filed its reply on 09.09.2011 and pointed out that, the Respondent No.2 is ready to co-operate with

2 (2001) 7 SCC 318

the inquiry u/s.88 of the said Act. The Petitioner states that though it was mandatory under Rule-72(5) of MCS Rules, for the society i.e. Respondent No.2 to lead oral evidence and examine its witnesses, the Respondent No.2 made conscious decision not to lead any oral evidence in the said enquiry. It is pertinent to note that, failure to lead oral evidence on behalf of Respondent No.2 has resulted into the consequence that, all the audit report and special report dated 10.04.2007, which are the basis of enquiry u/s. 88 remained not proved and there was absolutely no document on the record of Respondent No.1 which was proved by Respondent No.2 by leading oral evidence. The Petitioner filed various applications before Respondent No.1 seeking supply of copies of Audit reports and Special Report which was the basis of holding of enquiry against the Petitioner, but inspite of filing of several applications, the copies of audit reports from 2002-2007 are not supplied to the Petitioner. The decision on the part of Respondent No.2 not to enter into witness box was taken only with the view that the deficiencies, inaccuracies and illegalities of audit report from 2002-2007 are not supplied to the Petitioner. The decision on the part of Respondent No.2 not to enter into witness box was taken only with the view that the deficiencies, inaccuracies and illegalities of audit report from 2002-2007 should not come on record of Respondent No.1. The Petitioner states that, some of the delinquent also filed an application for cross examination of auditor which was rejected by the Respondent No.1 as there was no evidence led by the Respondent No.2. The Petitioner states that, the matter was extensively argued on behalf of Advocates appearing for respective delinquent on or before 31.07.2014. It is pertinent to note that, though the argument was concluded on 31.07.2014, it appears that, after the conclusion of arguments, the Respondent No.1 has visited office of Respondent No.2 and has taken inspection of documents in relation to inquiry in question and collected various information from

Respondent No.2, and has relied on those documents which have become part of enquiry after conclusion of arguments of delinquent. The result is that, the material which is used against the Petitioner is not confronted to the Petitioner and therefore the enquiry and its findings are based on unproved documents and those documents which were received by the Respondent No.1 after completion of arguments. The Respondent No.1 thereafter on 23.01.2015 was pleased to pass impugned order.

24 The Petitioner submits that, except four audit reports from 2002 to 2007, a special audit report of the year 2007 and a chart submitted by the Bank at the time of enquiry, no other document was on record of the Respondent No.1 till the completion of arguments i.e. on 31.07.2014 inquiry 4. Therefore entire material reflected at Annexure-A by the Respondent No.1 has been obtained behind back of Petitioner after conclusion of arguments on 31.07.2014.”

20 Similar averments are made in all the matters. The specific grounds are raised by the Petitioners revolving around the procedural lacuna apart from the breach of principles of natural justice. No specific denial is made in the affidavit filed by both the contesting Respondents on this aspect. The Court is not only concerned with the ultimate finding and/or result but the Court is definitely concerned also with the basic and statutory procedures, followed by the concerned Respondents before arriving at such drastic conclusion. The basic principle and/or procedure needs to be

followed by the Registrar and/or the Inquiry Officer, after initiation and/or while dealing with the respective denial so made by the Petitioners in their reply to the basic show cause notice and so also reply to the charges so framed during Section 88 Inquiry based upon then existing material. I have noted all these aspects which have not been dealt with, which according to me, ought to have been dealt with before arriving at the conclusion and the figure so referred above, stating it to be loss caused to the society.

21 The stated loss to the society is definitely a matter of concern as it involves public interest also. But to arrive to that conclusion and imposing such liability, a clear foundation of reasons supported by proved documents and that is also after giving equal opportunity to all the concerned, is a must.

22 The Petitioners have raised specific grounds and denied the charges of alleged irregularities and/or the alleged misfeasance, breach of trust, mis-appropriation, based upon the show cause notice and the charges so framed based upon then existing material available with the Department.

23 The case of Petitioners is also that the Respondents never provided copies of audit report from 2002-2007 and special report, inspite of several applications. The case of the State Government is that those audit reports including the special audit of the year 2007 submitted by the Bank at the time of inquiry, were on the record of Respondent No.1. This contention is also a matter which requires consideration. This goes to the root of the matter when it comes to giving an equal and fair opportunity to all the parties. There is no dispute that Respondent – Bank has not entered into witness-box to support and/or prove the audit reports or other documents and its contents. There is no provision under the Act that such audit report binds all the parties automatically, the moment the report is submitted. The provisions are otherwise that if there is any irregularity in the audit report, the concerned officer needs to verify and/or point out to the society and even to take steps to correct and rectify such audit report which, according to the Department, are irregularities and/or are not correct. These audit reports, if are the foundation of initiation of proceedings under Section 88, this itself means there should have been a clear conclusion against the

Petitioners/those officers that they have committed these defaults and the action falls within the ambit of malfeasance, breach of trust.

24 Section 88 and the relevant Rules, if further proceed with the assessment of damages for the alleged loss, the Authority, for the first time, in my view, ought not and could not have taken decision that the Petitioners are the defaulters so recorded above in such fashion, without following the basic rules of law. The statement is also made that in audit reports, there is no conclusion that alleged debts are irrecoverable dues in terms of Rule 49. Non-supply of documents so asked for including these audit reports, therefore, was important facet of giving opportunity to the Petitioners. Same is missing here. Respondent's decision not to lead evidence specifically when they require to prove their own documents which is mandate of the provision itself also deprived the Petitioners from cross-examining those officers/auditors. The right to cross-examine, apart from equal opportunity is important and relevant facet of any procedural law specifically which leads into the conclusion against such person. The principle of Evidence Act and the related laws ought not to have been overlooked by the concerned Authorities at every relevant time and

stages. If they have followed all these procedure and if they have a reason, let the Appellate authority deal with all these aspects in detail which, in my view, relevant factor before assessing the alleged damages.

25 Section 88 contemplates inquiry and provides for power and authority to assess the damages. The law of damages/compensation has various facets. It may be nil and it may be thrice and/or four times than the amount so involved. Therefore, the process of assessing damages itself requires trial. This is not the case where the Petitioners and/or such persons have admitted the amount and so also it is not the case of Respondent-Bank that they have assessed and/or there is a clear report with reasons that the society has suffered loss of particular amount on the date of the audit reports and the role and liability of the respective members of the committee.

26 All the counsel have pointed out and there is no case/dispute about the pending litigations and/or trials against the concerned borrower and/or guarantor of those societies, as the

amounts were due and recoverable from them even as per the Respondent No.2-Bank. No proceedings and/or issue was raised to point out the defaults, including the alleged fraud and/or intentional inaction and/or action that resulted into loss to the Bank and recorded accordingly in every year audit reports from 2002-2007 onwards, or even earlier to that. The obligations of respective officer's, therefore, also needs to be tested when it comes to taking action against the management or its officers after so many years. I am not concluding the issues, neither I am taking final decision on the merits by observing this, but I am definitely observing that these are requisites and the legal formalities need to be completed by giving equal opportunities. This also means the reasons while coming to any conclusion for or against the society or its managing committee members. The justification, even if any, for such proceeding, again required to be dealt with by the Appellate Authority.

27 The respective amounts are mentioned in the order which stated to be the amount of damages recoverable from the concerned Petitioners. This is on the foundation that the Bank has suffered loss of the amount so referred above. Under the MCS Act and the MCS

Rules, there is no formula whatsoever prescribed and/or neither it is agreed formula, whereby the damages can be assessed in such fashion and/or it is settled law and/or practice that the Department and/or the Bank has followed to justify it. The Appellate Authority and/or the concerned Authority needs to deal with in absence of any specific formula and/or policy so placed on record if any which entitles the officers and/or the Authority to assess such damages without any detailed particulars, referring to the individual persons act and/or inaction. The amount only mentioned in the chart so placed on record against the individual persons, but no justification and/or reason is provided for arriving at particular amount as damages which needs to be recovered from such individual members.

28 The loss suffered is only because the Petitioners action and/or inaction, though at the relevant time, out of 65 loans, 28 loans have been recovered and five are not in default and 28 loans, as stated to be in defaults. This is in the background that at the relevant time, the court proceedings for recovery of these amounts have been filed. The disputes for the pending recovery are still pending. The reason for non-recovery, though proceedings initiated, whether that

itself can be treated as a loss to the Bank when the audit reports as submitted every year there was no such reasoned conclusion.

29 The Apex Court, while dealing with the banking laws and their problems and mechanism to recover the amount has noted as under, in *Salim Akbarali Nanji v. Union of India*,³.

“27 It is no doubt true that 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 repayment, 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. In the instant case, though some of the debts have to be written-off, with little chance of substantial recovery, we cannot lose sight of the fact that the Bank has generated considerable operating profits and has built up a

3 (2006) 5 SCC 302

substantial general reserve over the years, against which the debts written-off have been adjusted.”

30 The Respondents, throughout in their reply resisted and stated irregularities by specific reply, including their power to grant loan to the members as contemplated in Rule 42. There is no total bar that such society cannot grant loan without taking security of movable and/or immovable properties. However, certain conditions need to be noted. Rule 42 of MCS Rules reads as under :

“42. Regulation of loans to be granted by societies-

(1) In case of grant of loans against security of moveable or immovable property, the lending society shall maintain such margin as the Registrar may, with the approval of the Apex Bank, by general or special order, direct from time to time with reference to different commodities, securities or classes of societies.

(2) In case of cash credit, the amount of loan shall not exceed such multiple of owned funds of the borrowing society as may be laid down by the Registrar with the approval of concerned financing agency from time to time.

(3) It shall be lawful for a society to grant loans without taking security of moveable or immovable property if the purpose for which the loan given is considered production-worthy or credit worthy and it is reasonably expected that the loans will be repaid by the loanee. The Registrar may, with the approval of

the Apex Bank, issue directions to societies to ensure that credit worthy purposes indicated above receive finance from the societies without any difficulties on the one hand and without being detrimental to the financial interest of the societies on the other.

(4) The Registrar may recognise a Central Bank as the Central Financing Agency which shall be primarily responsible for financing credit requirements of all credit worthy purposes through the concerned societies in its jurisdiction. On such recognition, such Bank shall be responsible for making all possible efforts to mobilise local resources for making loans available to the societies in its area. Such loans may be granted for credit worthy purposes, giving due importance to the ... and requirements of various status of the producers and co-operative societies with reference to linking up of credit with cooperative processing or co-operative marketing.

(5) Except with the general or special permission of the Registrar, the loan advanced to a member by a society, or to a society by a bank, shall be subject to such conditions as may be laid down by the Registrar, with the approval of the Apex Bank, including the maximum amount to be advanced and the period of repayment, both in regard to total advances to members and societies as also against different types of securities.

(6) No society shall carry on transactions on credit or sanction trade credit to its members or to non-members except in accordance with the general directions that may be issued by the Registrar in that behalf.

(7) In the matter of grant of loans to societies by Central Banks or to members by Primary Societies, the Registrar may lay down with the approval of the

Central Banks, the procedure regarding receiving applications, assessing credit needs, making inquiries in respect of the production programme for which such loan is required and the procedure for finally sanctioning the loan as also the rates of finance to be followed from year to year and the nature of inquiries to be made for the purpose of financing of different crops and imposition of certain conditions regarding proper utilisation of loan and sale of agricultural produce through specified co-operative organisation, before such finance is granted.

(8) The Registrar may with the approval of the Apex Bank, by general or special order, prohibit or regulate grant of loans by a Central Bank or a society where such grant is considered neither in the interest of the society nor in the interest of the development of co-operative movement on sound lines.”

[Provided that, nothing in this rule shall apply to the Co-operative Credit Structure entity, and such entity shall adopt its own loan making policy in conformity with the Reserve Bank of India guidelines.]

31 In the present case, specific averments are made that before grant of loan, they have obtained necessary security from the respective societies, individual guarantee of members of Board of Directors of the borrower society. This is besides the security of properties from the borrower-societies. At the time of grant of such loan and if they have taken necessary steps and precaution, the

amount, if still not paid and/or not recovered and/or not recoverable, though proceedings were initiated at the relevant time, whether can be overlooked and/or still can be treated as loss caused to the society at the instance of the Petitioners/Board of Directors, again is a matter, in my view, which requires consideration from the Appellate Authority and/or from the Department while arriving at the conclusion of loss suffered to the society.

32 The distribution of dividend in the year 2006-2007 i.e. to the extent of Rs. 4.1 crores, is based upon, according to the Petitioners, then existing annual report of the Respondent-society which, according to the Respondents, is fabricated and false. However, the fact of ultimate endorsement by the General Body which is the basic requirement of law before distributing the dividend also just cannot be overlooked at this stage. The issue of fraud and/or fabrication of documents even the balance-sheet, if any, again required to be dealt with in detail subject to detail and specific particulars.

33 It is settled that evidence and supporting material are necessary to prove the allegations of misfeasance and/or fraud or

breach of trust. Specific allegations and materials are necessary. The complainant need to prove his case by leading oral evidence after giving requisite documents and material used and/or to be used against the delinquent. [AIR 1973 BOM 186-Gangadhar Dattatraya Sule vs. The C.K.P. Co-operative Credit Bank Ltd., 1998 (2) Mh LJ 483-Gajanan Pandurang Shet Parkar vs. Authorised Person of the Registrar of co-op. Societies, Mapusa and ors., and (1974) 2 SCC 741-The Official Liquidator v. Raghawa Desikachar and ors.]

34 There is no case, even of the Respondents, that the auditors at the relevant time, certified the said amount as bad debts and/or irrecoverable debts as contemplated in Rule 49 of the MCS Rules and/or any liability was fixed against the individual person in the context of the alleged loss. Rule 49 is reproduced as under :

“49 Writing off of bad debts and losses

All loans including interest thereon and recovery charges in respect thereof which are found irrecoverable and are certified as bad debts by the auditor appointed under Section 81 shall first be written off against the Bad Debt Fund and the balance,

if any, may be written off against the Reserve Fund and the share capital of the society.

All other dues and accumulated losses or any other loss sustained by the society which cannot be recovered and have been certified as irrecoverable by the auditor may be written off against the Reserve Fund or share capital of the society.”

35 Therefore, for the reasons so recorded above and by keeping all points open for the Appellate Authority to deal with in accordance with law, but as above basic points in my view, do not find place in the order so passed, though granted conditionally interim relief partly and as all the above basic ingredients are missing in the order and as this goes to the root of the matter as well as the defaults/defects so raised by the Petitioners and as statutory Appeals are not yet finally heard and as the Appellate authority is empowered considering the basic principle of law of Appeal to deal with various aspects including the factual matters/matrix , if necessary, therefore, in the interest of justice and to avoid further complication and as case is made out, in view of the breach of provisions of laws apart from

principle of natural justice, the irreparable injury and injustice, I am inclined to interfere with the impugned order's operative part even by taking note of the principles of the Supreme Court Judgment in *Kokkanda (supra)*.

36 Another reason to interfere with the interim order so passed is that there is nothing on record to show that any protective order and/or interlocutory order was claimed by the society/bank and/or any other Authority, pending the inquiry under Section 88 since 2007, even till the date of impugned order dated 23.01.2015. While admitting the Appeals, the learned Appellate Authority, has put the condition as if Section 88 inquiry has attained finality and there is an apprehension that unless the conditional order is not passed, the Bank and/or the society will suffer further loss and/or it will be difficult for them to recover the said amount. The aspects of pendency of litigation for recovery against the basic borrowers and/or of guarantors and the proceedings initiated to attach their property and which are pending and in some of the matters, the properties have been attached are very important. Recovery of alleged losses by overlooking those proceedings and even the original borrower

societies and/or the guarantors and for the reason so recorded above, the conditions so imposed at this stage of the proceedings, in my view, is also unacceptable. However, to avoid further complications, at this stage, I am inclined to order that all the Petitioners are directed not to create third party right or interest in their respective immovable properties pending the decision of the Appeals which is fixed on 28.03.2015 or such other date. However, it is made clear that the observation so made in the present order is only for passing the present order in support of the operative part of the order. The Appellate Authority has to deal with the merit of Appeals, uninfluenced by this order, in accordance with law.

37 Having noted above, I am inclined to observe that the State of Maharashtra and/or the concerned Ministry of Cooperation required to issue appropriate guidelines and/or circulars – How to deal with such inquiry proceedings right from initiation as contemplated under Section 81 – the auditor's reports and its effectiveness – till the decision under Section 88 MCS Act read with 72 of MCS Rules by taking into consideration the statutory prescribed procedures. “The law of damages/compensation including the

mitigating circumstances” are relevant to be noted by all the concerned. “The principle of Evidence Act” – to prove the documents and/or material and the charges, by giving equal opportunity to all the concerned, at appropriate stages, including by following principle of natural justice, covering the importance of the reasoned order, based upon the proved documents/material. The general principles of law, therefore, need to be kept in mind while dealing with such proceedings till its conclusion and for effective execution of it as the same are necessary to seal the guilty delinquent and/or to discharge the innocent. It is also necessary to prevent and control the situation and/or prevent the further losses and/or deterioration of the Bank business. Early steps and appropriate to proceedings to assess the damages or of recoverable amount and the timely action, by all the concerned, are always necessary to avoid further complications at the final stage and including the execution of it. If such circulars and/or guidelines are already circulated, even after amendment to the MCS Act and the Rules, the timely supervision of such inquiry is also required to be followed by the Department. The delinquent and/or guilty person gets chance/leverage to challenge such action and/or orders, if those are not in accordance with law and the principle of

natural justice.

38 Therefore, the following order :

ORDER

(i) Operative part of impugned order dated 18.02.2015 passed by the Appellate Authority/State Government is substituted for the additional reasons so recorded above as follows :

“The effect & operation of the Order dated 23.01.2015 passed by Respondent No.1-Authorised Officer, is stayed till the decision of the Appeals. However, the impugned order against the Petitioners not to create any third party right or interest in the respective immovable properties is maintained. For the reason so recorded above, this order to continue three weeks further if adverse order is communicated to the Petitioners” .

(ii) All the Appeals to be disposed of early as possible.

(iii) It is made clear that the Appellate Authority to consider the rival contentions and submissions

on its own merits uninfluenced by the observations even if made, in the present order.

(iv) All the writ petitions are disposed of accordingly.

(v) There shall be no order as to costs.

(vi) Rule is made partly absolute accordingly.

(viii) There shall be no order as to costs.

39 The learned Government Pleader appearing for the State seeks stay of this order which is passed in open court today. However, considering reasons so recorded already, the oral request for stay is rejected.

 The parties to act on the basis of an authenticated copy of this order.

(ANOOP V. MOHTA, J.)