IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO.683 OF 2013

1] Bhairavnath Sahakari Vikas, Seva Sanatha Limited, at Post Mahe Tal. Karveer, District : Kolhapur]

2] Kumbhikasari Sahakari Bank Ltd. at Post Kuditri, Tal. Karveer District : Kolhapur]..... Applicants.

Versus

1] Shamrao Anandrao Patil
Age : 66 years, Occ : Agriculture.
R/o. Mahe, Tal. Karveer
District Kolhapur]

2] Sou. Jayshree Shamrao Patil
Age : 56 years, Occ : Household
R/o. As above
Through Power of Attorney
Respondent No.1.]

3] Kolhapur Zilla Madhyavarti Sah. Bank Ltd.
Kolhapur, Shahupuri, 3rd Lane, Kolhapur]

4] Special Recovery Officer,
Shri Shivaji Dinkar Aadnaik
Kolhapur zilla Madhyavarti Sah.Bank Ltd.]

5] Shri Shankarrao Dhondiram Patil
Age – 65 years, Occ – Retired,
R/o. Koge, Taluka – Karveer Dist Kolhapur]

6] Sou. Sakharubai Shankarrao Patil
Age – 60, Occu – household
R/o. As above]

7] Shri Sandeep Shankarrao Patil
Age 35 years, Occu – Agriculturist
R/o. As above]

8] Shri Santosh Shankarrao Patil]
Age 33 years, Occu – Agriculturist]
R/o. As above.]..... Respondents.

Mr. Amit B. Borkar for the Applicants.
Mr. Sagar Ghogare i/b. S. J. Ghogare for the Respondent No.1.
None for Respondent No.2.

CORAM : R. M. SAVANT, J.

DATE : 23RD FEBRUARY, 2015.

J U D G M E N T

At the outset, the learned counsel appearing for the Applicants seek deletion of the Respondent Nos.3 to 8 to the above Civil Revision Application. The said Respondents are accordingly deleted at the risk of the Applicants.

2] Admit.

3] Considering the challenge raised in the above Civil Revision Application, heard forthwith.

4] The revisionary jurisdiction of this Court is invoked against the order dated 17th July, 2013 passed by the learned 11th Joint Civil Judge, Junior Division, Kolhapur, by which order the applicartion Exhibit 130 filed by the Defendant Nos.1 and 2 under Order 7 Rule 11(d) of the Code of Civil Procedure came to be rejected.

5] Shorn of unnecessary details, a few facts can be thus:-

The Suit in question being Regular Civil Suit No.343/2013 is filed

by the Respondent Nos.1 and 2 herein. The said Suit has been filed for a declaration that the sale deed executed by the Defendant Nos.1 to 4 amongst whom are the present Applicants in favour of the Defendant Nos.5 to 8 be declared as null and void and for a further declaration that Defendant Nos.5 to 8 have no right over the suit property. The Plaintiffs have sought an injunction restraining the Defendants from disturbing the possession of the Plaintiffs. In the said suit, the Applicants herein filed the Application under Order 7 Rule 11(d) for dismissal of the Suit on the ground of one notice under section 164 of the Maharashtra Co-operative Societies Act (hereinafter referred to as the said Act) and for want of jurisdiction in view of section 163 of the said Act. It appears that the Original Plaintiffs are the borrowers from the Petitioners herein i.e. original Defendant Nos.1 and 2. On default committed by the original Plaintiffs, the defendant Nos.1 and 2 i.e. the two Co-operative Societies initiated proceedings under section 101 of the Maharashtra Co-operative Societies Act for recovery of the loan amounts. The Assistant Registrar considered the applications filed by the Defendant Nos.1 and 2 and issued the certificates under section 101 of the said Act for recovery of the amounts which have been mentioned in the said certificates. It is required to be noted that the original Plaintiffs did not adopt further proceedings in so far as the said certificates are concerned. However, after the said property was

attached in furtherance of the recovery proceedings which were initiated by the Defendant Nos.1 and 2 that they have approached the Special Recovery Officer under Rule 107 of the Maharashtra Co-operative Rules. It is pursuant to the said recovery proceedings that the auction took place of the suit property pursuant to which the defendant Nos.5 to 8 were declared as the highest bidders and accordingly sale deed came to be executed in favour of the Defendant Nos.5 to 8. It is, thereafter, that the instant Suit has been filed for the reliefs which have been claimed therein. The principal relief claimed is a declaration that the sale deed dated 31st January, 2008 executed by the Defendant Nos.1 to 4 in favour of the Defendant Nos.5 to 8 is illegal and is not binding on the Plaintiffs. The further declaration sought is that the Defendant Nos.5 to 8 have no connection with the suit property. The averments relating to the proceedings initiated under section 101 the auction held on 10th November, 2006 and thereafter the application filed by the Plaintiffs find a place in the plaint. In the said Regular Civil Suit No.343/2013 as indicated above, the Defendant Nos.1 to 4 is the two Co-operative Societies from whom the Plaintiffs had taken a loan raised an objection under Order 7 Rule 11(d) of the Code of Civil Procedure and the objection regarding the maintainability of the Suit was revolving around the non-issuance of notice under section 164 and for want of jurisdiction in the Civil Court in view of section 163 of the said

Act. The Trial Court considered the application Exhibit 30 and as indicated above by the impugned order dated 17th July, 2013 has rejected the same. The gist of the reasoning of the Trial Court is that for consideration of the application under Order 7 Rule 11(d) of the Code of Civil Procedure, the averments in the plaint are material and since the Plaintiffs have sought a declaration in respect of the sale deed dated 31st January, 2013 executed by the Defendant Nos.1 to 4 in favour of the Defendant Nos.5 to 8, prima facie, it could not be said that the suit is not maintainable. The Trial Court held that the issue regarding the non-issuance of notice under section 164 and whether the suit filed is maintainable can only be considered after an inquiry is conducted which inquiry would encompass within itself as to whether it is the business of the Defendant Nos.1 and 2 to advance loans. The Trial Court as indicated above has accordingly by the impugned order dated 17th July, 2013 rejected the said application.

6] Heard the learned counsel for the parties. The learned counsel for the applicants Shri Borkar would contend that in view of the antecedent facts that is the Plaintiffs being borrowers and that the Proceedings under section 101 being initiated against the Plaintiffs for recovery of the loan amounts as also the auction being held in furtherance of the said recovery the Suit filed seeking a declaration in respect of the sale deed dated 31st January, 2008 which is the outcome

of the said recovery proceedings is not maintainable. The learned counsel would contend that the Trial Court has erred in observing that an issue as to whether the notice was required to be issued and the suit as filed is maintainable would require an inquiry. The learned counsel sought to place reliance on the judgment of the learned Single Judge of this Court reported in ***2012(6) Mh. L. J. 457 in the matter of Devgiri Nagari Sahakari Bank Ltd., Aurangabad and another V/s. Zubidabegum w/o Asadulla Khan and others.*** The learned counsel would contend that the facts in the said case and the facts in the instant case being identical, the said judgment would apply on all fours in the instant case.

7] Per contra, the learned counsel appearing for the Respondent Nos.1 and 2, original Plaintiffs would support the impugned order . The learned counsel would contend that it is only in a Civil Suit that the Plaintiffs can seek a declaration that they have sought in the instant suit, namely, the sale deed executed by the defendant Nos.1 to 4 in favour of the Defendant Nos.5 to 8 is illegal and not binding on the Plaintiffs. The learned counsel for the Respondent Nos.1 and 2 sought to place reliance on the judgment of the Hon'ble Apex Court reported in ***(2012) 5 Supreme Court Cases 642 in the matter of Margret Almeida and others v/s. Bombay Catholic Cooperative Housing Society Limited and Others*** wherein the Apex Court has held that if the

party disputes validity of the title conveyed under a sale deed, then, such dispute would have to be adjudicated by a Competent Court. The learned counsel would contend that it is during the pendency of the proceedings before the recovery officer under Rule 107 that the sale deed have been illegally executed and, therefore, the suit filed by the Plaintiffs is maintainable. The learned counsel would contend that the declaration in respect of the sale deed of the nature sought can only be granted by a Civil Court and, therefore, the Suit is maintainable. The learned counsel would contend that in so far as the applicability of section 164 in the present case is concerned, the same would have to be adjudicated upon having regard to the business of the society and, therefore, the same would require an inquiry to be conducted by the Trial Court and, therefore, the Trial Court has rightly observed that the plaint could not be rejected under Order 7 Rule 11(d) and a inquiry is required to be conducted.

8] Having heard the learned counsel for the parties, I have considered the rival contentions. The two issues which arise in the present Civil Revision Application is as regard whether the Plaintiffs were required to issue notice under section 164 of the Maharashtra Co-operative Societies Act prior to the initiation of proceedings by way of Suit against the Defendant Nos.1 and 2 as also whether there is lack of jurisdiction in the Civil Court to adjudicate upon the Suit in view of

section 163 of the Maharashtra Co-operative Societies Act. In so far present case is concerned, it is an undisputed position that the Plaintiffs were the borrowers from the defendant Nos.1 and 2 and have defaulted in the payment of the loan amount. It is also an undisputed position that the proceedings under section 101 of the said Act came to be initiated against the Plaintiff for recovery of the said loan amount. The said proceedings culminated in the concerned Assistant Registrar Co-operative Societies issuing the certificates under the said provision. It is required to be noted that the Plaintiffs did not challenge the said certificates though a remedy by way of a revision under section 154 of the said Act was available to the Plaintiffs. In view of the fact that the Plaintiffs inspite of certificates issued had not repaid the amount, it is for recovery of the amount that the auction of the suit property came to be held. It seems that the said auction took place in the year 2006 and the defendant Nos.5 to 8 were the successful bidders in the said auction and accordingly the defendant Nos.1 and 2 executed the sale deed in favour of the defendant Nos.5 to 8. It is required to be noted that the Plaintiffs have questioned the attachment of the suit property as also the auction held by way of an application filed before the Special Recovery Officer under Rule 107 of the Maharashtra Co-operative Societies Rules. The Plaintiffs accept the fact that the sale deed have been executed whilst their application before the Special Recovery

Officer was pending. Hence, what crystallise from the aforesaid facts is the fact that the Plaintiffs are borrowers and that the defendant Nos.1 and 2 i.e. the Applicants herein have lent the amounts to the Plaintiffs. Hence, in so far as the business of the Plaintiffs is concerned, it is expressly clear that the Plaintiffs were in the business of advancing loans to its members. It is in the said context that the Trial Court ought to have adjudicated upon the Suit. The aforesaid facts are clear from the plaint. However, the Trial Court has curiously observed that the same would require an inquiry. In so far as compliance of section 164 of the said Act is concerned, that is the issuance of a notice to the Co-operative Society is concerned, at times the said notice can be waived and hence the Suit cannot be said to be barred at all times. However, the question that is posed in the instant matter is whether the Civil Court has jurisdiction in the light of the challenge which is raised in the Suit. By way of seeking a declaration in respect of the sale deed dated 31st January, 2008 the Plaintiffs are in fact seeking to challenge sale deed dated 31st January, 2008. The sale deed as indicated above is the culmination of the proceedings under section 101, as ultimately defendant Nos.1 and 2 have to recover the amount which are covered by the certificates issued under section 101 which they have done by putting the suit property to auction and, thereafter, the sale deeds have been executed in favour of the defendant Nos.5 to 8 who are the

auction purchasers being the highest bidders. The Trial Court as can be seen has glossed over all aforesaid facts and has held that the Suit as filed for the declaration sought is maintainable.

9] In so far as the judgment of the learned Single Judge of this Court in Devgiri Nagari Sahakari Bank Ltd. (supra) is concerned, the facts in the said case can be said to be identical to the facts in the present case . In the facts of the case the learned Single Judge held that the subject matter of the Suit touches the business of the society that is the Petitioner Bank and as such the notice under section 164 is mandatory and in the absence of the said notice the suit was not maintainable. In my view, and as rightly contended by the learned counsel for the Petitioner, the said judgment supports the case of the Applicants on all fours as regards the maintainability of the suit.

10] In so far as the judgment of the Hon'ble Apex Court in Margret Almeida and Others (supra) is concerned, the Apex Court in the said case was concerned with suits filed for declaration that the Resolution passed by the Co-operative Society proposing to sell its property to the Respondent Nos. 22 and 23 and Conveyance Deed dated 7/12/2009 executed pursuant thereto were invalid, illegal and void ab-initio. The maintainability of the suits were questioned. It is in the context of the reliefs sought in the Suit that the Apex Court held that the bar under

section 163 would not apply and the dispute is not covered by section 91 of the Co-operative Societies Act and that it is before the Civil Court that the relief sought in respect of a declaration in respect of the sale deed and dispute in respect of title would have to be adjudicated. Such is not the case in the instant matter as in the instant matter, the facts which have been adverted to hereinabove ex-facie disclose that it is the business of the defendant Nos.1 and 2 society to advance loans and, therefore, the dispute in the Suit touches the business of the society and in the absence of notice under section 164 of the said Act, the Suit as filed was not maintainable. The Trial Court has, therefore, fallen into an error of jurisdiction by entertaining the suit. The exercise of revisionary jurisdiction of this Court is, therefore, warranted. The impugned order dated 17th July, 2013 is, accordingly, quashed and set aside. The application Exhibit 30 would stand allowed. The suit in question would, accordingly, stand dismissed. The Civil Revision Application is allowed to the aforesaid extent and disposed of.

(R. M. SAVANT, J.)

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