IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.10523 OF 2013

Shri Girish Manohar Mokashi .. Petitioner.
V/s
The Dombivli Nagari Sahakari Bank Ltd .. Respondent.
.....
Ms. Smita G. Mane for petitioner.
Mr. Ashutosh R. Gole for respondent.
.....
CORAM : ANOOP V. MOHTA, J.
DATE : FEBRUARY 11, 2015

ORAL JUDGMENT :

Rule returnable forthwith. Heard finally.

1) The petitioner-original respondent No.2 has challenged the order dated 05 September, 2013 passed by the learned President, Maharashtra State Co-operative Appellate Court, thereby allowing the appeal filed by the respondent-bank. The order passed by the Trial Judge is set aside and the application Exhibit 36 i.e. for the amendment to bring the counter claim is rejected.

2) A Suit was filed by the bank in the year 1995. The petitioner filed reply/written statement on 18 December, 2009. On 24 March, 2011, a pursis filed by the bank for withdrawal of the

claims. The petitioner, therefore, in the background taking note of sudden stand taken by the bank to withdraw the suit, beside justifying the amendment application covering the counter claim based on the events and the pleadings placed on record referring to the claims as well as defences so raised, filed the amendment application on 25 August, 2011.

3) After hearing both parties, the amendment application was allowed on 20 December, 2012. The petitioner carried out the amendment on 03 January, 2014 itself. The appeal was filed on 18 February, 2013. By impugned order dated 05 September, 2013, the appeal was allowed and thereby rejected the amendment/counter claim application filed by the petitioner. There is no issue that pending the writ petition, on 06 December, 2013, the respondent's claim/dispute was dismissed for non-prosecution with reasoned order. This background supports the case of the petitioner with regard to the grant of amendment as done by the court below for the reasons so stated apart from the undisputed position on record, so referred above.

4) The claim was raised and the defence so filed at an appropriate time could have been decided in accordance with law,

which was also in the background of payment of Rs.1,01,300/- on 11 June, 1982. There is no denial to the fact that the averments are raised in the written statement in this regard. The already filed written statement, in no way debars the petitioner to continue with the defences and the counter claims so raised, in the situation that the bank itself decided to withdraw the suit. Admittedly, the pursis of withdrawal of the suit was also dismissed and lateron, the dismissal of suit for non-prosecution itself is an additional factor which goes in support of the petitioner, the intention of the bank was clear not to defend the case of earlier payment by the petitioner, apart from, not supplying the documents asked for the relevant time, not to prosecute and proceed further, in view of the specific plea/defence so raised in the written statement. The pursis was filed after the filing of the written statement by the petitioner.

5) The contentions of the learned counsel appearing for the respondents based on the Supreme Court judgments and the judgments of this Court with regard to the grant or refusal of amendment, at such stage of proceeding, and the counter claim is beyond the limitation; there is no question of entertaining such amendment application, are not acceptable for the reasons referred

above. However, this in no way read to mean that the counter claim so raised is decided finally in favour of the petitioner. The trial Judge is required to deal with the same in accordance with law. Therefore, merely because suit/claim raised by the bank was dismissed/disposed of for want of prosecution, that itself cannot be the reason to deny the counter claim raised by the petitioner at this stage. Therefore, in the present facts, I am not inclined by accept the submission that the suit claims/counter claims ought not to have been allowed.

6) The power of Appellate Authority, though not limited or restricted, the grant of amendment order passed by the Trial Court in the background, cannot be stated to be perverse and illegal. Therefore, in the interest of justice, by keeping all the defences/points open for the respondent-bank to including the issue of limitation, I am inclined to interfere with order dated 05 September, 2013 and order accordingly.

7) For the reasons so stated above and for the reasons so mentioned by the Trial Judge, order below Exhibit 36 dated 20 December, 2012 is restored by granting the amendment application. Thus, the following order.

: <u>ORDER</u> :

1. Quash and set aside order dated 05 September, 2013, order below Exhibit 36 dated 20 December, 2012 granting the amendment application is maintained.

2. All points are kept open including of limitation.

3. Petition is accordingly allowed.

4. No costs.

(ANOOP V. MOHTA, J.)