IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.1970 OF 2012

Janakalyan Sahakari Bank Ltd. & Anr. .Petitioners

V/s.

The Divisional Joint Registrar,
Co-operative Societies, Mumbai & Ors. .Respondents

Mr. Bhupesh V. Samant a/w Mr. Ganesh Kale for the Petitioners.
Mr. M.A. Sayed, AGP for Respondent Nos.1, 2 and 9.
Mr. Onkar Gupte i/b Mr. Kalpesh Joshi for the Respondent Nos.6(a) to 6(c) and 6(e), 7 and 8.

CORAM : A.A. SAYED, J.
DATED : 23 DECEMBER, 2015

(PRONOUNCED IN CHAMBER AT 2.40 PM)

JUDGMENT:

1. This Petition is filed by the Petitioner-Bank invoking Article 226 of the Constitution challenging the common order dated 25 October 2010 passed by the Respondent No.1-Divisional Joint Registrar, Co-operative Societies, Mumbai Division, dismissing the Revision Applications Nos.618 and 619 of 2006 of the Petitioner-Bank. By the impugned common order the Divisional Joint Registrar has confirmed the two orders both dated 10 August 2006 in the two Recovery Certificate Application Nos.7968 and 7069 of 2005, passed by the Respondent No.2-Assistant Registrar, Co-operative Societies, under section 101 of the MCS Act whereby the Assistant Registrar had held that the

Respondent Nos.1 and 2 therein i.e. M/s. Aluman Metals Ltd. and Shri Mukesh Harikrishna Gupta, (Respondent Nos.3 and 4 respectively in the present Petition) only were jointly and/or severally liable to pay to the Petitioner-Bank a sum of Rs.57,72,109/- and Rs.29,37,070/- (respectively in the two Applications) with interest on the principal amounts from 1 October 2005 at the rate of 13.50% p.a. and/or subject to such rate as may determined by the Reserve Bank of India from time to time till payment or realization and directed the issuance of Recovery Certificates accordingly. The Assistant Registrar, however, rejected the claim of the Petitioner-Bank in both the Recovery Certificate Applications as against Respondent Nos.3 to 6 therein (Respondent Nos.5 to 8 in the present Petition) and thereby discharged the Respondent Nos.5 to 8 herein from their personal liability of payment in their capacity as guarantors. In the orders dated 10 August 2006, the Assistant Registrar held as follows:

> *" Taking into consideration the points as raised in clause 3 to 7 and in view of principles of natural justice it is not proper to hold Respondent Nos.3 to 6 responsible for the loan transaction and therefore I have decided to issue Recovery Certificate after deleting the names of Respondent Nos.3 to 6 from the aforesaid Recovery Application."*

2. Thus, by the impugned common order dated 25 October 2010, the Divisional Joint Registrar while confirming the two orders dated

10 August 2006 of the Assistant Registrar held that only Respondent Nos.3 (borrower) and 4 (Director and guarantor) are liable for payment of the amount under the two Recovery Certificates. Respondents Nos.5 to 8 (guarantors) were accordingly relieved from their liability to make payment. The Petitioner- Bank is, therefore, aggrieved by the denial of its claim as against the Respondent Nos.5 to 8 (guarantors). It may be stated here that so far as Respondent No.3 (borrower) and 4 (Director and guarantor) are concerned, the two orders dated 10 August 2006 of the Assistant Registrar holding them liable and the issuance of Recovery Certificates against them has attained finality. It may also be noted that during the pendency of this Petition, Respondent No.6 expired and his heirs have been brought on record and any reference to Respondent No.6 in this order shall mean the original Respondent No.6 (since deceased).

3. Petitioner No.1 is a Co-operative Bank registered under the provisions of Maharashtra Co-operative Societies Act, 1960 (hereinafter referred to as 'MCS Act'). Petitioner No.2 is an officer of the Petitioner No.1-Bank. Respondent No.1 is the Divisional Joint Registrar of Co-operative Societies. Respondent No.2 is Assistant Registrar of the Co-operative Societies and is empowered to hear Recovery Applications filed by the Co-operative Banks under section 101 of the MCS Act and to

issue Recovery Certificates. Respondent No.3 is a Company incorporated under the Companies Act and is the constituent of the Petitioner No.1-Bank which was extended various credit facilities including Cash Credit and Term Loan facilities. Respondent No.4 is its Director and guarantor in respect of the facilities granted by the Petitioner No.1-Bank. The Respondent Nos.5 to 8 are guarantors in respect of the facilities granted by the Petitioner No.1-Bank to the Respondent No.3-Company. Respondent No.9 is the State of Maharashtra.

4 Pursuant to a sanction letter dated 30 July 2002, the Petitioner-Bank had disbursed the following credit facilities to Respondent No.3 -M/s. Aluman Metals Ltd. (borrower),:

i) Cash Credit Facility of Rs.50.00 Lacs,
ii) Working Capital of Rs.30.00 Lacs,
iii) Term Loan (LNBLD) of Rs.41.00 Lacs,
iv) Term Loan (PLMLN) of Rs.6.00 Lacs at the rate of interest and upon certain terms and conditions.

5 The repayment of the aforesaid credit facilities were secured by Respondent Nos.4 to 8 (guarantors) by execution of Demand Promissory Note and also all other security documents in favour of the Petitioner-Bank. A Guarantee Agreement dated 16 September 2002 was executed by Respondent Nos.4 to 7 and a separate Guarantee Agreement of

even date i.e. 16 September 2002 was executed by Respondent No.8-Company. The repayment of the aforesaid credit facilities were interalia secured by the equitable mortgage by deposit of title deeds of certain properties.

6 As there was default in repayment of the installments and interest by the Respondent No.3-Company (borrower), some properties were sold with consent and the sale proceeds realized therefrom and given due credit against outstandings of the related credit facilities maintained by the Petitioner-Bank. Even after giving due credit of the sale proceeds, certain sums remained due and payable by the Respondent No.3-Company to the Petitioner-Bank. Since the Respondent No.3-Company failed to regularize the accounts, the Petitioner-Bank initiated recovery proceedings by filing two separate Recovery Applications before the Assistant Registrar. As stated earlier, by orders dated 10 August 2006 the Assistant Registrar allowed the Recovery Applications against the Respondent Nos.3 and 4 alone. Pursuant to the said orders dated 10 August 2006 of the Assistant Registrar, there were a couple of rounds of litigation and orders of remand passed by the Divisional Joint Registrar as well as by this Court, which orders need not really be gone into for the purposes of the present Petition. Suffice it to say that ultimately by the impugned common order dated 25 October 2010 in the two Revision

Applications filed by the Petitioner-Bank, the orders dated 10 August 2006 of the Assistant Registrar discharging Respondent Nos.5 to 8 from the liability of making payment was confirmed by the Divisional Joint Registrar. According to the Petitioner-Bank the rejection of the claim against the Respondent Nos.5 to 8 (guarantors) by the Assistant Registrar was arbitrary and they have been wrongly discharged from their personal liability for making payment as guarantors.

7. At the outset it is required to be noted that in the present Petition, we are not concerned with the Recovery Certificates issued in favour of the Respondent Nos.3-Company (borrower) and 4 (Director and guarantor) and the Recovery Certificates issued against them has attained finality in terms of the orders dated 10 August 2006 of the Assistant Registrar. The controversy in the present Petition is essentially as regards the liability of the guarantors-Respondent Nos. 5 to 8.

8. In the order dated 10 August 2006 in Recovery Certificate Application No.7069 of 2005, it has been observed by the Assistant Registrar as follows:

> *"(12) …. The Applicant Bank has renewed the said accounts from the loan sanction letter dated 19.3.2004, 10.10.2003, 5.11.2003 without taking permission of the Respondent No.3 to 6. The copy of the application of the renewal of loan from the Respondent*

No.1 is not attached with the Application.

Even though the Respondent No.3 to 6 has not permitted for renewal of loan account after expiry of the period of the loan on 31.5.2003, the Respondent No.1 has been advanced of Rs.57,16,598.65 (when there was Debit Balance of Rs.18,26,499.09 on 31.5.2003) in the said account. Also Respondents has transacted in the said account for lacs of rupees.

After observing the above mentioned fact it seems that the <u>Applicant Bank has not fulfilled the conditions under Indian Contract Act</u> and therefore, Respondent Nos.3 to 6 should not be held responsible for the said loan as guarantors.

...

(14) (c). If Respondent No.3 to 6 are to be held responsible for the said loan, it is necessary to take permission from them also but the Bank has not taken the same and I am not satisfied with the explanation given by the Applicant Bank.

...

(16) After considering the pleadings placed before me I found much substance in the contention raised by the Respondent Nos.3, 4 and 6 that with a view to protect Respondent Nos.1 and 2 the Applicant Bank had done the transaction with a view to harass Respondent Nos.3, 4 and 6. Taking into consideration the points as raised in clause 3 to 7 in view of the principles of natural justice it is not proper to hold Respondent Nos.3 to 4 responsible for the loan transaction and therefore I have decided to issue Recovery Certificate after deleting the

name of Respondent Nos.3 to 6 from the aforesaid Recovery Application."

(emphasis applied)

The order in Recovery Certificate Application No.7068 of 2005 is identical (except for the figures).

9. The Divisional Joint Registrar while dismissing the two Revision Applications by the impugned common order dated 25 October 2010 and upholding the orders dated 10 August 2006 of the Assistant Registrar in paragraphs 4, 5 and 6 observed as follows:

" 4. It is contention of Respondent No. 4, 5 and 7 that they did not consent to renewal of cash credit account beyond 30.07.2002. The Applicant Bank renewed cash credit loan when account become "out of order". <u>They did not declare this account as NPA so there aforesaid act is in violation of the norms framed by Reserve Bank of India.</u> Secondly if one account becomes NPA all other accounts become NPA and thus could have taken benefit when there properties were sold by Bank. If CC is renewed behind the back of Guarantors then it is not proper. There no Loan Agreement between borrower and Applicant Bank. Thus observations of Respondent No.1 are proper in this regard.

5. The Applicant Bank stated guarantee of 16/09/2002 was "continuous" but they do not explain why there is 'renewal' of Cash Credit account without consent of the Respondent No.4 to 7. So 'Renewal' of Cash Credit *account was not proper.*

6. Actions of Applicant Bank regarding 'Renewal' of Cash Credit Loan and not declaring that account as NPA are improper. If one account is "out of order" then other account also becomes NPA. The act of Bank is improper by not holding these loan account as NPA."

(emphasis supplied)

10 The learned Counsel have filed Compilation of documents and written submissions. Both the learned Counsel have taken me through the various documents including the RBI Circulars in respect of the declaration of NPA etc. The learned Counsel for the Petitioner-Bank invited my attention to the Guarantee Agreements dated 16 September 2002. He has taken me through several clauses of the Guarantee Agreements executed by Respondents Nos.4 to 8. It is contended on behalf of the Petitioner- Bank that the guarantee was a continuing guarantee and was to remain in force and effect till such time as the borrower repays the full loan together with interest. Learned Counsel for Respondent Nos.6(a) to (c), (e), 7 and 8, on the other hand alluded to the provisions of Indian Contract Act and RBI Circulars to contend that the Respondent guarantors would not be liable and the Respondent No.3-Company was declared as NPA only on 30 September 2005 instead of 1 March 2004 and no consent of renewal was obtained from the Respondent guarantors when the cash credit facility was to expire on

31 May 2003.

11. Having heard the learned Counsel, I find that in the impugned common order of the Divisional Joint Registrar and the orders dated 10 August 2006 of the Assistant Registrar, there is no consideration of the specific terms of the Guarantee Agreements which are signed by the Respondent guarantors, wherein they have agreed to the guarantee being a continued guarantee and also agreed that no consent is required from them for renewal of guarantee. Clauses 6 to 11, 15, 16 and 18 of the Guarantee Agreements read thus:

> *6. The Bank shall have full liberty, without notice to the Guarantor/s and without in any way affecting this guarantee, to exercise at any time and in any manner any power or powers available and/or reserved to the Bank under the terms of sanction and under various loan and other documents executed by the Borrower and/or guarantor/s, to enforce or forbear to enforce payment of the Credit Limits or any part thereof or interest or other moneys due to the Bank from the Borrower or any of the remedies or securities available to the Bank, to enter into any compromise or compound with or to grant time or any other indulgence or facility to the Borrower and the Guarantor/s shall not be released by the exercise by the Bank of their liberty in regard to the matters referred to above or by any act or omission on the part of the Bank or by any other matter or thing whatsoever which under the law relating to sureties would but for this provision have the effect of so releasing the sureties would but for this Guarantor/s hereby waive in favour of the Bank so far as may be necessary to give effect to any of the provisions of this Guarantor/s or any of the Suretyship and other rights which the Guarantor/s might otherwise be entitled to enforce.*
>
> *7. This Guarantee shall be enforceable against the Guarantor/s notwithstanding that any security or securities*

comprised in any instrument(s) executed or to be executed by the Borrower in favour of the Bank shall, at the time when the proceedings are taken against the Guarantor/s on this Guarantee be outstanding or unrealized or lost.

8. The Guarantor/s hereby agree and give consent to the sale, mortgage on prior, pari-passu or second basis, release etc. of any of the assets by the Borrower from time to time as may be approved by the Bank of the transfer of any of the asses of the Borrower from one unit to the other or to the release or leasing out by the bank any or whole of the asses charged to the bank on such terms and conditions as the bank may deed fit and this may be treated as a standing and continuing consent for each and every individual ct of transfer, mortgage, release or lease of any of such assets of the Borrower. The Guarantor/s hereby declare and agree that no separate consent for each such transfer, mortgage, release of lease of any of such assets would be necessary in future.

9. The Guarantor/s hereby agree and declare that the Borrower will be free to avail of further Credit Limits or other facilities from the Bank or any other financial institution or Bank in addition to the Credit Limits and/or to secure the same during the subsistence of this guarantee and in that event the guarantee herein contained will not be affected or vitiated in any way whatsoever but will remain in full force and effect and binding on the guarantor/s.

10. The rights of the Bank against the Guarantor/s shall remain in full force and effect notwithstanding any arrangement which may be reached between the Bank and the other Guarantor's, if any, or notwithstanding the release of that other or others from liability and notwithstanding that any time hereafter the other Guarantor/s may cease for any reason whatsoever to be liable to the Bank, the Bank shall be at liberty to require the performance by the Guarantor/s of his / her obligations hereunder to the same extent in all respects as if the Guarantor/s had at all times been solely liable to perform the said obligations.

11. To give effect to this Guarantee, the Bank may act as if the Guarantor/s were the principal debtor to the Bank.

15. This Guarantee shall not be wholly or partially satisfied *or exhausted by any payment made to or settled with the Bank by the Borrower and shall be valid and binding on the Guarantor/s and operative until repayment in full of all moneys due to the Bank under the terms of sanction and loan documents.*

16. This Guarantee shall be irrevocable and the obligations of the Guarantor/s hereunder shall not be conditional on the receipt of any prior notice by the Guarantor or by the Borrower and the demand or notice by the Bank, as provided in Clause 20 hereof shall be sufficient notice to or demand on the guarantor/s.

18. This Guarantee shall be a continuing one and shall remain in full force and effect till such time the Borrower repay in full the Loans together will all interest, liquidated damages, costs, charges, commissions and all other moneys that may from time to time become due and payable and remain unpaid to the Bank under the terms of sanction.

12. Moreover, there is also no discussion as regards the provisions of Indian Contract Act or the provisions of RBI Circulars in the impugned orders, though the same have been relied upon in concluding that the Petitioner-Bank has not fulfilled the conditions under the Indian Contract Act and that the acts of Petitioner-Bank is in violation of RBI norms (see paras 8 & 9 above). In the aforesaid circumstances, in my view, the findings in the impugned orders dated 10 August, 2016 of the Assistant Registrar and the impugned common order dated 25 October, 2010 of the Divisional Joint Registrar that the Respondent Nos.5 to 8 are not liable and would stand discharged from their liability of payment, are perverse and cannot be sustained.

13. Taking an overall view of the matter, in my opinion, the following order would meet the ends of justice:

O R D E R

i) The impugned common order dated 25 October 2010 of the Divisional Joint Registrar and the orders dated 10 August 2006 of the Assistant Registrar are set aside as against Respondent Nos. 5 to 8 and the matter is remitted back to the Assistant Registrar, Co-operative Societies, to consider the two Recovery Applications afresh. It is clarified that the Recovery Certificates issued as against Respondent Nos. 3 and 4 shall remain in force.

ii) The parties are at liberty to file further Affidavits and documents before the Assistant Registrar. The heirs of Respondent No.6 shall be brought on record in the two Recovery Applications before the Assistant Registrar.

iii) The Assistant Registrar to decide the matters expeditiously without being influenced by the earlier orders or this order.

iv) The Petition is disposed of in the above terms with no orders as to costs.

v) All contentions are kept open.

(A.A. SAYED, J.)

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