

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

Writ Petition No.3433 of 2012
(Ravi Commercial Urban Co-operative Bank Ltd., Nagpur v. Gaurishankar
s/o Buddhulal Gupta and others)

Office Notes, Memoranda of Coram,
appearances, Court's orders or directions Court's or Judge's orders
and Registrar's order

Shri A.H. Lohiya, Advocate for Petitioner.

Coram : R.K. Deshpande, J.

Dated : 5th January, 2015

1. Heard Shri Lohiya, the learned counsel appearing for the petitioner. None appears for the respondents, though served.

2. The challenge in this petition is to the order dated 19-3-2012 passed below Exhibit 10 by the Trial Court rejecting the application under Order VII, Rule 11(d) of the Civil Procedure Code for rejection of plaint on the grounds that there is non-compliance of mandatory requirement of issuance of notice before institution of suit, as contemplated by Section 164 of the Maharashtra Co-operative Societies Act, 1960, and that there is no averment made in the plaint that any such notice was served upon the Registrar. The Trial Court has taken a view that the notice under Section 164 of the said Act would be necessary if the pleadings in the plaint disclose that the dispute touches the business of the Society and further that the dispute does not touch

the business of the Society.

3. Shri Lohiya, the learned counsel for the petitioner, has placed reliance upon the provision of Section 164 of the Maharashtra Co-operative Societies Act, which is reproduced below :

“164. Notice necessary in suits.- No suit shall be instituted against a society, or any of its officers, in respect of any act touching the business of uthe soceti, until the expiration of two months next after notice in writing has been delivered to the Registrar or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims, and the plaint shall contain a statement that such notice has been so delivered or left.”

He has relied upon the decisions of this Court in the cases of *Gurudev Developers v. Kurla Konkan Niwas Co-op. Hsg. Society*, reported in 2000(3) *Mh.L.J.* 131; *Homi Nariman Bhiwandiwalla v. The Zoroastrian Co-operative Credit Bank Ltd. and another*, reported in AIR 2001 Bombay 267; and *Suprabhat Co-operative Housing Society Ltd. and another v. Span Builders and another*, reported in 2002(3) *Mh.L.J.* 837. The propositions of law laid down in these decisions, viz. that the requirement of issuance of notice under Section 164 of the Maharashtra Co-operative Societies Act is mandatory, and that the plaint must contain the averment to that effect, and that failure to comply with both these requirements should entail the consequences of dismissal of the

suit under Order VII, Rule 11(d) of the Civil Procedure Code, are not disputed.

4. Shri Lohiya has invited my attention to Explanation 2 below Section 91 of the Maharashtra Co-operative Societies Act explaining the term “dispute” as under :

“Explanation 2.-For the purposes of this sub-section a dispute shall include-

(i) a claim by or against a society for any debt or demand due to it from a member or due from it to a member, past member or the nominee, heir or legal representative of a deceased member, or servant for employee whether such a debt or demand be admitted or not;

(ii) a claim by a surety for any sum or demand due to him from the principal borrower in respect of a loan by a society and recovered from the surety owing to the default of the principal borrower, whether such a sum or demand be admitted or not;

(iii) a claim by a society for any loss caused to it by a member, past member or deceased member, by any officer, past officer, or deceased officer, by any agent, past agent or deceased agent, or by any servant, past servant or deceased servant, or by its committee, past or present, whether such loss be admitted or not;

(iv) a refused or failure by a member, past member or a nominee, heir or legal representative of a deceased member, to deliver possession to a society of land or any other asset resumed by it for breach of condition as the assignment.”

Perusal of Explanation 2 read with Section 164 of the Maharashtra Co-operative Societies Act makes it clear that the question as to whether the dispute touches the business of the Society or not, is a question of fact to be determined after the parties are permitted to lead evidence. Unless such adjudication is done, no finding can be recorded that the notice under Section 164 of the said Act is necessary, and for want of such notice, the suit is not maintainable and is liable to be dismissed. The suit cannot, therefore, be dismissed in exercise of the power conferred by Order VII, Rule 11(d) of the Civil Procedure Code. Though the Trial Court has recorded the finding that the dispute in the suit does not touch the business of the Society, it is merely on prima facie assessment of the case and the same shall not come in the way of the parties while finally adjudicating the matter after the parties are permitted to lead evidence.

5. Shri Lohiya has further invited my attention to sub-section (3) of Section 163 of the Maharashtra Co-operative Societies Act and has urged that undisputedly a certificate under Section 101 of the said Act has already been obtained by the petitioner-defendant No.1 Bank against the borrowers and the guarantors. Pursuant to the said certificate, the property mortgaged is put to auction and, therefore, the suit claiming permanent injunction restraining the Bank from auctioning the

property is barred by sub-section (3) of Section 163 of the said Act. He concedes that this point was not raised before the Trial Court. In view of this, though it is purely a question of law, the same cannot be entertained at this stage, as the respondents are remained absent in spite of service of notice for final disposal of the matter. The petitioner shall be at liberty to file such application for dismissal of the suit before the Trial Court, which shall be considered and decided in accordance with law.

6. With these observations, the petition is dismissed. No costs. All questions are kept open.

Judge.

Lanjewar