

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment pronounced on: 30th April, 2015

+ **CS(OS) No. 2710/2011**

MAHAMEDHA URBAN COOPERATIVE BANK LTD.

..... Plaintiff

Through Mr. Rakesh Khanna, Sr. Adv.
with Mr. Shiv K. Tyagi, Mr.
Virender Singh and Mr.
Mohit Nagar, Advs.

versus

DELHI STATE COOPERATIVE BANK LTDDefendant

Through Mr. V.P. Singh, Sr. Adv.
with Mr. M. I. Choudhary
and Mr. R. C. Khatri,
Advs.

CORAM:

HON'BLE MR. JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. The plaintiff bank Ltd. is a Co-operative Society registered under the provisions of the Uttar Pradesh Co-operative Societies Act, 1965. The defendant bank is a Co-operative Society registered under the Delhi Co-operative Societies Act, 2003 (hereinafter referred to as the "Act").
2. By letter dated 13th August, 2001 issued by Reserve Bank of India the plaintiff bank was admitted as a sub-member of the New Delhi Banker's Clearing House through the defendant bank, which acted as its Sponsor Bank since 2001 to 4th May, 2009.

3. It is stated that for sponsoring the sub-membership of the plaintiff bank, it levied clearing charges at the rate of Rs.2.00 per instrument of the plaintiff bank processed through the clearing house. The plaintiff bank was also maintaining fixed deposits with the defendant bank to the extent of Rs.3.00 crores, which in turn had sanctioned an Over Draft (OD) limit of Rs.1.80 crore, against the fixed deposits to the plaintiff bank.
4. The plaintiff and the defendant had banking dealings and the defendant bank debited the account of the plaintiff for the amounts which the defendant claimed were due to it.
5. The plaintiff has filed a suit for recovery for a sum of Rs.3,58,38,073.18/- along with pendente lite and future interest against the defendant.
6. The claim of the plaintiff in the present suit is in respect of the arbitrary and unauthorized debit entries by the defendant in the current account No. 814 of the plaintiff.
7. Prior to the present suit, the plaintiff filed a writ petition being Writ Petition (C) No. 11427/2009 asking for a mandamus that the amounts claimed by the plaintiff in the writ petition be paid to the plaintiff. This writ petition was dismissed as withdrawn vide order dated 20th July, 2011. Thereafter the plaintiff has filed the present suit for recovery of the said amount.
8. The defendant bank in its written statement has raised a preliminary objection that the suit is not maintainable as the plaintiff society did not serve a notice under Section 129 of the Act before filing the suit.

9. This Court had framed preliminary issue vide order dated 5th September, 2012 which reads as follows:

"Whether the suit instituted by the Plaintiff is liable to be rejected in view of the provisions of Section 129 of the Delhi Cooperative Societies Act, 2003? OPD"

10. Both parties have made their submissions on this issue.

11. The contention of the plaintiff is that as per the provisions of Section 129 of the Act, the notice in writing is required to be issued to the Registrar, in case the suit is instituted against a co-operative society or any of its officer, in respect of any act touching the business of co-operative society. The aforesaid act of the defendant cannot be termed as touching the business of the defendant co-operative society.

12. There is no such terms and conditions in respect of the relationship of the plaintiff and defendant, which authorizes the defendant to manipulate the statement of account and to treat outward clearing as unclear balance and to charge interest thereon. In the present case, the defendant society is the member of Clearing House at Delhi, which is regulated by Reserve Bank of India and the plaintiff joined the said clearing house as sub member to the defendant. The said relationship as well as consequent illegal debit entries by the defendant society, does not touch the business of the co-operative society.

13. However, the plaintiff without prejudice has submitted that the defendant as well as Registrar of Co-operative Society was already put to notice/ aware of the present claim as the plaintiff earlier filed WP(C) No. 11427 of 2009 against the defendant as well as Registrar

Co-operative Societies and Reserve Bank of India, with the prayer to issue writ by quashing the arbitrary action of erroneous debit entry of Rs. 2.64 Crore and to reverse the same along with interest, hence the notice in the said writ petition amounts to notice under Section 129 of the Act. The defendant and the Registrar Co-operative Societies were duly served and appeared in the said petition. The Writ Petition was dismissed as withdrawn vide order dated 20th July, 2011 with the liberty to seek other remedies that may be available to the plaintiff in accordance to law.

14. It is argued by the learned Senior counsel for the plaintiff that in suit for possession and mesne profits, when mandatory notice for termination of tenancy is not issued, the suit plaint itself can be taken as notice terminating tenancy and once service of plaint in suit is taken as notice terminating the tenancy, the provisions of Order VII Rule 7 CPC can be applied to take notice of subsequent facts. Reliance is placed on ***Jeevan Diesels and Electricals Ltd. vs. Jasbir Singh Chadha (HUF) and Anr.*** 182 (2011) DLT 402.

Similarly, it is submitted by the counsel that in ***Textile Committee through its Director & Anr. Vs. Mrs. Anita Suri*** in FAO (OS) No. 185/2009 decided on 12th May, 2009 (para 21), the Division Bench of this Court dealt with the issue that no notice under Section 80 CPC was given though the appellant No. 2 was the Secretary, Ministry of Textiles. It was held that the suit should be permitted to proceed in the absence of notice against such of the parties to whom there is no requirement of serving a notice under Section 80 of the said Code.

15. Yet another case of Supreme Court was referred by the learned counsel for the plaintiff in ***Raghunath Dass vs. Union of India*** AIR 1969 SC 674, while dealing with issue in respect of requirement of Notice under Section 80 CPC, held that the object of the notice under this provision is to give to the concerned Government and public officers opportunity to reconsider the legal position and to make amends or settle the claim, if so advised without litigation. The legislative intention behind that section is that public money and time should not be wasted on unnecessary litigation and the Government and the public officers should be given a reasonable opportunity to examine the claim made against them lest they should be drawn into avoidable litigations. The purpose of law is advancement of justice. The provisions in Section 80 CPC are not intended to be used as boobytraps against ignorant and illiterate persons.

16. In view of the above, it is submitted by the counsel that the requirement of issuance of notice under Section 129 of the Act is fulfilled by filing of suit itself and alternatively the same be condoned and the suit be proceeded on merits.

17. Per contra, Mr. V.P. Singh, learned Senior counsel appearing on behalf of the defendant submits that the requirement of prior notice under Section 129 of the Act is mandatory. There cannot be any escape or concession to condone the party for not complying the statutory provision. He submits that it is totally immaterial if earlier the writ petition was filed which was not maintainable and it amounts to notice. He submits that the plaintiff cannot take the shelter of the decisions relied by the counsel under Section 80 CPC or under Section 106 of the Transfer of Property Act as the present Act is a

special Act, there is a statutory remedy and notice is mandatory under Section 129 of the Act. He submits that the argument of the plaintiff has no force as in para 3 of the plaint, it is admitted by the plaintiff that the defendant Bank is a co-operative society registered under the Act. In case even if the grievance of the plaintiff is taken on face value that the defendant has illegally credited the amount in question, no doubt, the plaintiff was entitled to file the suit but at the same time, if there is mandatory requirement of notice, it must be followed, otherwise suit is not maintainable.

18. For the purpose of convenience, Section 129 of the Act is reproduced hereunder :

“129. Notice necessary in suits.

No suit shall be instituted against a co-operative society or any of its officer in respect of any act touching the business of the co-operative society until the expiration of ninety days 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. (Emphasis Supplied)”

19. It is pertinent to mention that admittedly the defendant debited the suit amount from the current account from the period January to April, 2009. Against the said action, the plaintiff filed the writ petition (Civil) 11427/2009 in September, 2009. The same was dismissed and withdrawn on 20th July, 2011 with liberty to take other remedies. The present suit was filed by the plaintiff in September, 2011. The written statement was filed by the defendant on 6th January, 2012. In para 1 of the preliminary objection, the objection was raised that the suit was

not maintainable in terms of Section 129 of the Act. Replication was filed by the plaintiff on 9th January, 2012 where the reply to the preliminary objection was given. It is the admitted position that despite of having the knowledge about the objection, no steps were taken by the plaintiff to either to amend the plaint or to seek any liberty to serve the notice as prescribed under Section 129 of the Act and to file fresh suit after service of notice. Issues were framed on 5th September, 2012 when it was also ordered that the issue No.3 be treated as preliminary issue and still the plaintiff just kept quite by alleging that the notice is not required to be served.

20. It is well settled law that when the plain reading of section itself is clear, then no departure is permissible from the rule of construction. It has been followed in ***Association for Development vs. Union of India & Others***, 2010 (115) DRJ 277 wherein this court approved the literal rule and observed that it is not the duty of the court to enlarge the scope of the legislation when the language of the provision is plain and unambiguous. It cannot be assumed that there is any such exception. In view of the well settled principles of law that the courts are not to add words or delete words from the statute so as to enlarge or limit the scope of the sections. The courts are rather to interpret the law as it exists in the statute book on the plain reading and not to put to qualifications which are not legislatively engrafted. It is well settled canon of interpretation that the courts must do their endeavors to read the provisions plainly.

21. Similar situation arose in a Suit No. 641/1979 titled "***M/s.Hedge and Golay Limited vs. National Cooperative Consumer Federation Limited***" decided on 11th August, 1981 by this Court

speaking through Hon'ble Shri J.D. Jain, J. In this case, a preliminary issue was framed which reads as follows:

"Whether the present suit is barred under provision of Section 90 of the Delhi Cooperative Societies Act, 1972 having not been complied with."

The said preliminary issue was decided in favour of the defendant and the suit was dismissed holding "as a result the suit is dismissed for want of requisite notice under Section 90 of the Act". The Court while discussing the submissions of the parties held on 11th August, 1981 that "on its plain language, it is crystal clear that prohibition contained herein (meaning Section 90 of the Act) is absolute and categorical in that service of a prior notice on the Co-operative Society or its officer is a must before any suit in respect of any Act touching the business of the Society is instituted and the notice has to be served in the manner laid therein".

It was further observed that "this provision of law is apparently analogous to Section 80 of the Code of Civil Procedure". The Court relied upon two judgments of the Supreme Court of India i.e. **Amar Nath vs. Union of India**, AIR 1963 SC 424 and **Nirmal Chand vs. Union of India**, AIR 1966 SC 1068.

22. Under the same circumstances, in the judgment **Krishak Bharti Cooperative Limited. Vs. IFFCO Tokyo General Insurance Co. Ltd.**, 125 [2005] DLT 45 decided on 28th October, 2005 a similar provision i.e. Section 115 of the Multi State Co-operative Societies Act, 2002 regarding service of notice on the Registrar, Co-operative Societies was interpreted by the Court and after taking note of various judgments of the Supreme Court, the Court held that suit was

not maintainable because before filling the suit the plaintiff did not serve a notice on the central Registrar of the Multi State Co-operative Societies as envisaged by Section 115 of the Multi State Co-operative Societies Act, 2002.

23. The Bombay High Court has also given a similar finding in ***Jijamata Sahakari Sakhar Karkahana Ltd. Vs. Sukhdeo Ramhau Fulzade*** (2010) 112 BomLR 3329 while interpreting Section 164 of the Maharashtra Co-operative Societies Act. In conclusion the Court held "the substantial question of law arising in this case must therefore be answered to the effect that a civil court had no jurisdiction to entertain the suit in this case as it was instituted against a Co-operative Housing Society without compliance of requirements contained in Section 164 of the Act of 1960. Section 164 is paramateria to Section 90 of the Act of 1972 and Section 129 of the Act. The business of the defendant Society is banking and the transaction as even claimed by the plaintiff with the defendant Society was in the nature of business which is the prime object of the defendant Society.

24. The understanding between the parties and nature of the business carried out shows the act of the parties touching the business of the co-operative society within the meaning of Section 2(f) and (h) of the Act. The reliance is placed on the said provision which reads as under :

Section 2(f) of the Act, defines "co-operative bank" as under:

“co-operative bank” means a bank as defined under Section 5 as amended by section 56 of the Banking Regulations Act, 1949 (10 of 1949);”

Section 2(h) of the Act defines “Co-operative society” as under :

“co-operative society” means a society registered or deemed to be registered under this Act.”

There is an admission by the plaintiff in para 3 of the plaint that the defendant is a co-operative society registered under the Act.

25. With regard to the submission of learned Senior counsel appearing on behalf of plaintiff that the defendant’s case is not covered under the scheme of Section 129 of the Act as the said business between the parties is not in respect of touching the business of co-operative society. The said argument has no force in view of similar issue discussed in the case of ***Agro Mechanical Services and Repairs Co-Op. Society Ltd. vs. State Bank of India***, 1989 (91) BomLR 111 decided on 18th January, 1989 by Bombay High Court (Nagpur Bench), the Court in paras 15 and 16 held as under :

“15. Admittedly the business of the petitioner is to render service to their members and to the society at large with the help of the mechanical devices. The service to be rendered is in agriculture. An infra-structure was necessary for carrying out these businesses of the society. This infra-structure, in view of what the Supreme Court has held above, need not necessarily be the part of the business, nor it would touch the business of the Society. It is for this infrastructure that the Bank has advanced the loan and the loan was agreed to be utilised by the Society for the purpose of getting its infra-structure. The bald question that arises for decision of this controversy is, whether this infra structure in itself would be

touching the business of the Society. In view of the construction put by the Supreme Court in para 20 of the judgment, it would be very difficult to accept the arguments of Mr. Chandurkar that this infra structure itself touches the business of the Society. In fact the business of the society starts or commences after the infra structure is in existence. Pre-infra structure act would not, therefore, become the part of the business of the Society which is to commence only after the infra structure is complete. That is why the Supreme Court found itself unable to agree with the view expressed by the Full Bench of this Court that any act which affects the business of the Society would be included in the act "touching the business of the society".

16. Looked from this angle, everything becomes crystalised. The amount has been advanced by the State Bank of India to the Society for the purpose of purchasing the tractors and some machinery which was required by the Society petitioner for carrying out its business. The liability which was created before the infra structure could be erected. This was a simple liability which the Society took upon itself in view of a contract of loan. There is no direct relationship of taking the debt with the business of the society in the real sense of the term. Therefore this act of borrowing the money from the Bank does not become an act touching the business of the society. Mr. Chandurkar, the learned advocate for the respondent invited my attention to the ratio laid down in *Mohan Meakin Ltd. v. The Pravara Sahakari Sakhar Karkhana Ltd.* The ratio laid down in that case was that, when the act on which the suit is based touches the business of the Society, then the notice under s. 164 of the Co-operative Societies Act is a must and no suit can proceed in the absence of the notice. In fact nobody disputes that proposition, because that is the requirement of the Statute itself and no interpretation is required of that. The real question is, whether the act which becomes a basis of the litigation touches the business of the society. In the reported ruling a Sugar factory started a distillery. The distillation was taken to be the bye-product of the molasses and it was held as an allied business. There was no dispute as far as the

factual position was concerned. It is on this background that the Court held that the “act touches the business of the Society”. I have doubts regarding the applicability of this ratio in the present case. Similarly, the ratio laid down *C.F. Marconi v. Madhav Co-operative Housing Society Ltd.* does not render any help as far as the present litigation is concerned.

26. The next submission of the plaintiff has also no force that the writ petition filed prior to the suit be treated as notice, as it is settled law when notice is pre-condition under the Act, it has to be served strictly on the basis of suit filed and the notice must give clearly the relief and the cause of action when the same is mandatory, if there is any defect in the notice, the same cannot be said to be valid. Thus, admittedly in the present case, no notice is served within the meaning of Section 129 of the Act.

27. As a result, the plaint is liable to be rejected for want of requisite notice under Section 129 of the Act as the same was necessary under the said provision. The plea of waiver cannot be allowed. No costs.

(MANMOHAN SINGH)
JUDGE

APRIL 30, 2015