IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 3489 OF 2016

KAIL Limited
(Formerly known as Kitchen Appliance
India Ltd.) .. Petitioner.
vs.
The Sahebrao Deshmukh Cooperative
Bank Limited and ors. .. Respondents.

Mr. Vivek Patil i/b Vivek Patil & Associates for the petitioner.
Mr. Vishal C. Ghasal for respondent no.1.

CORAM: D.H. WAGHELA, C.J. AND
M.S.SONAK, J.
DATE : 16 APRIL 2016.

P.C.:

1] Rule. In view of the order proposed to be made, service upon respondent Nos. 5 to 8 is dispensed with. Rule is however, made returnable forthwith.

2] By this petition under Articles 226 and 227 of the Constitution of India, the petitioner, seeks following reliefs:

> *"a] That this Hon'ble Court may please to declare the mandate under section 154(2-A) of the Maharashtra Co-operative Societies Act 1960 is invalid and arbitrary to the extent of the co-parties to the transaction of Loan and recovery thereof as the quantum is not fixed to the proportionate share of such parties and consequence thereof the operation of the order dated 10.09.2015 passed by the Deputy Registrar, Co-operative Societies, Wadala, Mumbai and order dated 11.01.2016 passed by Divisional Joint Registrar, Co-Operative Societies, Mumbai Division, Mumbai for its execution as against the Petitioner*

b] That this Hon'ble Court may please to stay the operation of the order dated 10.09.2015 passed by the Deputy Registrar, Co-operative Societies, Wadala, Mumbai and order dated 11.01.2016 passed by Divisional Joint Registrar, Co-Operative Societies, Mumbai Division, Mumbai for its execution as against the Petitioner solely till the out come of this present petition.

c] Ad-Interim relief in terms of prayer clause (b)

d] Any other order may be passed in favour of Petitioner in any facts and circumstances of the present case."

3] In our judgment, the relief to declare the mandate under Section 154 (2A) of the Maharashtra Cooperative Societies Act, 1960 (MCS Act) as invalid or arbitrary to the extent indicated in the aforesaid prayer clauses or even otherwise, it is quite misconceived. The Division Bench of this Court in ***Kausalya Sampat vs. Vasant Sahakari Bank Ltd and ors.***[1] ***,*** upon taking into consideration several decisions of the Hon'ble Supreme Court has specifically upheld constitutional validity of Section 154 (2A) of the MCS Act. In paragraphs 14 and 15, the Division Bench of this Court has observed thus:

> *"14. In the light of the consistent view of the Honourable Supreme Court of India interpreting a similar provision in large number of statutes which are in pari materia to the provisions of sub-section (2A) of section 154 of the Maharashtra Co-operative Societies Act, 1960, we are of the view that the provisions of sub-section (2A) of Section 154 are constitutionally valid and are not violative of the petitioner's fundamental rights under Articles 14 and 19 of the Constitution of India. We are also of the opinion that the*

1 2004(4) Mh.L.J. 795

> *case of Mardia Chemicals Ltd., and others (supra) has no application to the facts of the present case. The said case was not an appellate or revisional proceedings but were original proceedings and, therefore, imposition of a condition of deposit of dues was held to be impermissible in law. The present case is not of a original proceeding and, therefore, we are of the view that the judgment in the case of Mardia Chemicals Ltd., and others, do not apply herein. We therefore uphold the validity of the said sub-section (2A) of section 154 of the Maharashtra Co-operative Societies Act, 1960.*
>
> *15. We are further of an opinion that by providing for deposit only of 50% of the total dues under a recovery certificate the legislature has itself whittle down the rigour of the said provisions. Thus absence of power to dispense with deposit by revisionary authority does not make the provision arbitrary or discriminatory. The section itself provides for uniform dispensing of the 50% of the amount already adjudicated as dues by the lower authority."*

4] Mr. Vivek Patil, learned counsel for the petitioner, has however, submitted that the petitioner's challenge to the provisions contained in Section 154 (2A) of the MCS Act is based upon a ground different and distinct from the one raised in ***Kausalya Sampat (supra).*** There is really no basis for this contention particularly, if the ground adjudged by the Division Bench in paragraph 16 is adverted to. However, even assuming this is so, once the constitutional validity of the provisions contained in Section 154 (2A) of the MCS Act, is upheld by the Division Bench of this Court, it would not be permissible to raise the very same question once again by submitting that the challenge on this occasion is upon some different ground. Similar attempt was repelled by the Hon'ble Supreme Court in ***Delhi Cloth and General Mills Ltd. Vs. Shambhu Nath Mukherji and ors.***[2]***,*** by observations in paragraph 11, which reads thus:

2 (1977) 4 SCC 415

> *"11. It is submitted by Mr. Dial that in that decision this Court was only required to consider the objection raised on the score of Article 14 on a ground which is different from the one he would like to take before us. We are, however, unable to accept this submission. <u>If this Court held Section 10 as intra vires and repelled the objection under Article 14 of the Constitution it would not be permissible to raise the question again by submitting that a new ground could be raised to sustain the objection. It is certainly easy to discover fresh grounds of attack to sustain the same objection, but that cannot be permitted once the law has been laid down by this Court holding that Section 10 of the Act does not violate Article 14 of the Constitution.</u> The ratio decideni of Niemla Textile Finishing Mills (supra) will apply while dealing with the objection under Article 14 of the Constitution in respect of the present reference under Section 10(1)(c) of the Act. The submission of the learned Counsel is, therefore, devoid of substance."*
>
> (*emphasis supplied*)

5] The decision in ***DCM vs. Shambhu Nath Mukherji (supra),*** has been followed by the Hon'ble Supreme Court in ***Tika Ram and ors. Vs. State of Uttar Pradesh and ors.***[3]***,*** whilst resisting the attempt on the part of the petitioners therein to challenge the constitutional validity of certain provisions of Land Acquisition (U.P. Amendment and Validation) Act, 1991, even though, the constitutional validity of such provisions had already been upheld by the Hon'ble Supreme Court in ***Meerut Development Authority vs. Satbir Singh***[4] and ***GDA Vs. Jan Kalyan Samiti***[5]***.*** That the challenge in ***Tika Ram (supra),*** was premised upon different grounds, was not accepted as sufficient, to permit the petitioners in the said petition to affect the precedential value of the earlier decisions.

3 (2009) 10 SCC 689
4 (1996) 11 SCC 462
5 (1996) 2 SCC 365

6] In view of the aforesaid decisions of the Hon'ble Supreme court, there is no scope to entertain the challenge now raised by the petitioner in the present petition. That apart, the only grounds upon which constitutional validity of the provisions contained in Section 154(2A) of the MCS Act has now been assailed are contained in paragraphs (xx) and (xxi) of the petition, which read thus:

> *"That the constitutional validity of the provisions of section 154(2A) needs to be decided as it is arbitrary upon the guarantors, surety challenging the legality, correctness and propriety of the order passed in the proceeding under provisions of Section 101 of the Maharashtra Co-operative societies Act 1960 and not challenged by the Borrower.*
>
> xx. *That the mandate of the provision of Section 154 (2-A) must be offered with the proportionate share of the parties to the transaction i.e. co-borrower, guarantor and or sureties as per the transactions to ascertain the quantum of the deposit of the award amount in equal proportion and the such quantum to be applied for the mandate under section 154 (2-A) of the said Act for entertaining the revision."*

7] The ground as contained in paragraph (xx), besides being covered in the decision of Division Bench of this Court in ***Kausalya Sampat (supra),*** is even otherwise untenable. It is settled position in law that the liability of the guarantor or surety is co-extensive with that of principal borrower. Similarly, it is also settled position in law that liability of a guarantor or a surety is joint and several alongwith the principal borrower. There may be cases where the principal borrower may, for reasons best known, be not interested in challenging the recovery certificate issued against the principal borrower and guarantors. In such a situation, the guarantor, being jointly and severally liable, will obviously have the right to institute a revision under Section 154 of the MCS Act to question the recovery certificate issued by the Registrar under Section 101 of MCS Act. In order to maintain such a revision, however, there is nothing unreasonable or arbitrary in requiring such guarantors to comply with the mandate of Section 154 (2A) of the MCS Act. There is accordingly, no merit in the challenge to the constitutional validity of Section 154 (2A) of the MCS Act, to the extent, it applies to guarantors or sureties, when they challenge the recovery certificate issued against them by the Registrar under Section 101 of the MCS Act.

8] The ground in paragraph (xxi) of the petitioner, can hardly be styled as any ground to challenge the validity of the provisions contained in Section 154 (2A) of MCS Act. In the said paragraph, the petitioner offers suggestion as to the manner in which, the provisions contained in Section 154 (2A) should have been drafted. Obviously, on such basis, there is no question of declaring the provisions contained in Section 154 (2A) as unconstitutional. Besides, even the fundamental basis, upon which, the petitioner's suggestion is premised, appears to be flawed. The liability between the principal borrower and the guarantor is not proportionate, but rather the same is coextensive. Similarly, liability, as between the principal borrower and a guarantor is joint and several. This means that the bank or lender is entitled to proceed against either of such parties or both, without any legal restrictions. Considered from such perspective, there is no merit in the challenge to the constitutional validity of the provisions contained in Section 154 (2A) of the MCS Act.

9] Mr. Patil, learned counsel for the petitioner, however, submitted that if the petitioner is granted four weeks time to comply with the mandate contained in Section 154(2A) of the MCS Act, the petitioner, will comply with the same, since, it is the case of the petitioner that the petitioner is neither a guarantor nor a surety to the loan. Mr. Patil attempted to contend before us that we should go into the issue as to whether or not the petitioner is indeed liable under the recovery certificate. There is no question of entertaining the challenge to the recovery certificate issued by the Registrar on merits by us. The provisions contained in Section 154 (2A) afford an alternate and efficacious remedy to the petitioner to raise precisely such issue. The petitioner cannot avoid compliance with the provisions contained in Section 154 (2A) of the MCS Act and urge the consideration of challenge on merits, directly by this Court. However, now that the petitioner has expressed desire to comply with the mandate under Section 154 (2A) of the MCS Act, no serious prejudice will be occasioned to respondent Nos.1 to 4, if such opportunity is granted to the petitioner, subject of course, to the compliance by the petitioner with the mandate of Section 154 (2A) of the MCS Act within a period of four weeks from today.

10] Accordingly, whilst rejecting the challenge to the constitutional validity of Section 154 (2A) of the MCS Act, we permit the petitioner to comply with the mandate under Section 154 (2A) of the MCS Act within a period of four weeks from today. In case, there is compliance within a period of four weeks from today, then the order dated 11 January 2016 made by the Divisional Joint Registrar of Cooperative Societies, Mumbai Division, Mumbai shall stand set aside and the Revision Application No. 510 of 2015 shall stand restored to its file. Such revision application should then be entertained and decided on its own merits and in accordance with law. It is made clear that this Court has not adverted to the merits of the matter and therefore, all contentions of the all the parties are kept open for decision by the

Revisional Authority, in case, the petitioner reports compliance of the mandate contained in Section 154 (2A) of the MCS Act, within a period of four weeks from today.

11] We, however, clarify that as of now, there is no interim order in operation. We record the statement made by learned counsel for respondent no.1 that it shall take appropriate proceedings in the matter of recovery of its dues.

12] Rule is accordingly made partly absolute to the aforesaid extent. There shall however, be no order as to costs.

(CHIEF JUSTICE)

(M.S.SONAK, J.)