

**FARAD CONTINUATION SHEET
IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.7613 OF 2016

Office Notes, Office Memoranda of Coram, Appearances, court's orders or directions and Registrar's orders	Court's or Judge's orders
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None for the Petitioner

Capt.Mr.M.F.G.Fernandes, respondent no.3 present in court

Mr.S.H.Kenkal, A.G.P. for the respondent no.1

**CORAM : K. K. TATED, J.
DATE : JULY 17, 2017**

P.C.:

1 Not on board. At the request of respondent no.3 Capt.Mr.M.F.G.Fernandes party in person, matter is taken on board for speaking to minutes of order dated 06.07.2017 as under:

- a) In the appearance the name of the respondent no.3 should be **Capt.M.F.G.Fernandes**.
- b) In paragraph 3 line 7 "**He**" be substituted by "**She**".
- c) In paragraph 3 line 8 the date "**04.03.2015**" be substituted by "**04.09.2015**".
- d) In paragraph 3 line 9 the date "**15.10.2015**" be substituted by "**19.10.2015**".

e) In paragraph 4 line 3 the date “**20.10.2015**” be substituted by “**28.10.2015**”.

f) In paragraph 9 on page 5 line 2 after “**72**” “**(3) and 72(4)**” be added.

(g) In paragraph 9 on page 7 “**Rule 72. Production and inspection of election papers:** be deleted and “**Rule 72(3) and 72(4). Procedure for assessing damages against delinquent promoters, etc., under section 88**” be reproduced as under:

“(3) On receipt of the statements referred to in sub-rule (2), the Registrar or the person authorized by him, if he is satisfied that there are reasonable grounds for holding the person or persons liable, shall frame charges.

(4) The person or persons concerned shall, after the charges are framed be asked to put in his statement in defence and to indicate the documentary or oral evidence which he would like to produce. The Registrar or the person authorised by him may permit production of other documentary or oral evidence, if considered necessary, subsequently.”

g) In paragraph 11 on page 8 line 3 after the word “**72(3)**” the words “**and 72(4)**” be added.

3 Rest of the order remains as it is.

4 The original order dated 11.07.2017 shall stand corrected accordingly.

(K.K.TATED, J.)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.7613/2016

Florence Cooperative Housing Society ... Petitioner

Vs.

Dy. Registrar,
R, North Ward & Ors. ... Respondents

Ms. Sumedha Rao for the petitioner
Mr. S. H. Kankal, AGP for respondent No.1.
Capt. M. F. G. Fernandes respondent No.3 in person.

CORAM : K. K. TATED, J.
DATE : JULY 6, 2017

P.C.:

1. Heard. By this petition under Article 227 of the Constitution of India the Petitioner challenges the order dated 08.08.2015 issued by respondent No.2 Dy. Registrar, H/East Ward, Dadar (W), Mumbai – 400 028.

2. It is the case of the petitioner that respondent No.2 issued notice/order dated 08.08.2015 under section 88 of Maharashtra Cooperative Societies Act, 1960 (said Act) and Rule 72(3) and 72(4) of the Maharashtra Cooperative Societies Rules, 1961 (said Rules) without following due process of law. She submits that even respondent No.2, at the time of submitting final order, failed to consider the recommendation dated 04.09.2015 of the Mumbai District Cooperative Housing Federation Ltd. (the Federation.) She submits

that after filing final report dated 15.10.2015, the Authority, without passing any final order issued recovery certificate dated 03.12.2015 u/s.98 of the Maharashtra Cooperative Societies Act, 1960. She submits that as the Authority issued recovery certificate dated 03.12.2015 without final order, same is required to be set aside. To that effect, the petitioner raised the following grounds in the Writ Petition.

“(a) The repeated appointment of enquiry officer at the behest of one Complainant is contrary to the provisions of Section 83(1) of M.C.S. Act, 1960 which stipulates complaint by 1/5 th number of members. The Petitioner Society has 84 members and only member is complaining and rest 83 members are supporting the Petitioner.

(b) The confirmation of charges under point Nos.2,4, 6 and 10 do not take into consideration the findings given by the Federation which clearly records that there is no mismanagement, misappropriate or wastage of Society funds by the Managing Committee.

(c) The findings that Rs.2000/- towards telephone bill and expenses for attending sec. 101 proceedings filed against the Complainant/Respondent No. 3 is neither excessive nor unnecessary as it is not disputed that Mr.Rebello attended all the hearings in person.

(d) The finding that amount of Rs.78289/- spent on beautification of the garden and subsequent sanction of total amount of Rs.1,50,000/- shows lack of proper planning, is vexatious as no one denies the fact that the garden is actually beautified.

(e) The findings that there is loss of Rs.21,000/- because structural audit was done twice in one year is not only false and frivolous but, vexatious and given without considering the reply of the committee.

(f) The findings that proceedings under Section 78 and 101 are filed in personal capacity is completely erroneous. The Managing Committee members are not at all liable to pay the legal expenses from their personal account.”

3. The learned counsel for the petitioner submits that as per section 88 of the Maharashtra Cooperative Societies Act, 1960 (said Act) only Registrar can pass a final report and order. Whereas, in the present proceedings, same was passed by the Assistant Registrar. Hence, the same is required to be set aside. She submits that the Federation, in its report dated 04.09.2015 given opinion that there is no irregularity committed by the Petitioner/Directors. She submits that in spite of the recommendation dated 04.09.2015 from the Federation, the Authority prepared the final inquiry report dated 19.10.2015 and issued recovery certificate dated 03.12.2015 u/s.98 of the said Act. Hence, same is required to be set aside.

4. On the other hand, the learned AGP for respondent Authority filed Affidavit-in-Reply dated 04.07.2017. In paragraph 3 of the said reply, they specifically stated that the inquiry report dated 28.10.2015 is an order of Authorised Officer u/s.88 of the said Act. Paragraph 3 of the said Affidavit-in-Reply filed by AGP reads thus:

“(3) I state and submit that the Authorized Enquiry Officer was appointed by an order dated 09.04.2014 by the Deputy Registrar, Cooperative Societies, R-North Ward, Mumbai. I say that the Authorized Officer made an enquiry and accordingly submitted the report to the Dy. Registrar wherein the said report the authorised officer made an order and imposed the liability upon the concerned office bearers. The Enquiry Report dated 28.10.2015 is an order of Authorised Officer passed u/s.88 of the MCS Act, 1960. The said order is annexed at page No.172/204 to the present Writ Petition. “

5. The learned AGP submits that the contention made by the learned counsel for the petitioner that the Authority has not passed

final order is contrary to the records in the present proceedings. Same was passed by the authority. He submits that if the final order is passed u/s.88 of the said Act, an appeal is provided u/s.152 of the said Act. He submits that when an alternate efficacious remedy is available, the petitioner has to adopt the same first and therefore, on this ground also the petition is not maintainable.

6. Respondent No.3 party in person submits that respondent No.2, on the basis of final report dated 19.10.2015 passed final order on the same date. He placed on record the said order. He further submits that the Authority followed the procedure u/s.88 of the said Act and Rule 72 of the Maharashtra Cooperative Societies Rules, 1961 (said Rules). He further submits that once the final order is passed u/s.88 of the said Act, an appeal is provided u/s.152 of the said Act. Hence the present Writ Petition is not maintainable when alternate remedy is available. He also argued the matter on merits, pointing out, the way in which the petitioner has misappropriated the amount as well as mismanaged the society. He submits that as the petition is not maintainable in view of an alternate efficacious remedy u/s.152 of the said Act, same is liable to be rejected with costs.

7. The party in person also relied on the judgment in the matter of ***Jalgaon Jamod Taluka Kharedi Vs. Shivhari Pandurang Wagh and Ors. 2006(1) BCR 696***. Paragraph 4 of the said authority reads thus:

“4. A perusal of Section 88 of the Act reveals that the said section contemplates enquiry by Registrar or a person authorised by him and the enquiry begins with framing of charges against the person or persons who were Directors of Co-operative Society and

therefore were responsible for its management and administration. The Registrar or person authorised by him has to give reasonable opportunity to the person concerned and the person concerned, after such enquiry, has to make an order requiring such direction to repay or restore the money or property or any part thereof with interest. Thus, it is the authorised person who himself has to pass an order for repayment of money or for restoration of property. It is thus more than clear that there is no question of authorised officer, in this case respondent No. 3, submitting his report to any officer of Co-operative department and after receipt of said report, such officer of Co-operative department passing any independent order of recovery against respondents No. 1 and 2. The arguments of petitioner in this respect are misconceived. It is not the situation like one in Departmental Enquiry in which the Enquiry Officer is appointed by Disciplinary Authority and the Enquiry Officer only submits his report/findings to Disciplinary Authority and final order of punishment is passed by the Disciplinary Authority. The scheme of Section 88 of the Act is very clear and no two orders are required to be passed as contended by the petitioner in this case.”

8. Heard the learned counsel for the parties at length.
9. For the sake of brevity section 88 and 152 of the said Act and Rule 72(3) and 72(4) of the said Rules are reproduced as under:

“88. Power of Registrar to assess damages against delinquent promoters, etc.- (1) Where, in the course of or as a result of an audit under section 81 or an inquiry under section 83 or an inspection under section 84 or the winding up of a society, the Registrar is satisfied on the basis of the report made by the auditor or the person authorised to make inquiry under section 83 or the person authorised to inspect the books under section 84 or the Liquidator under section 105 or other wise that any person who has taken any part in the organisation or management of the society or any deceased, or past or present officer of the society has, within a period of five years prior to 1[the date of commencement of such audit or date of order for inquiry, inspection or] winding up, misapplied or retained, or become liable or accountable for, any money or property of the society, or has been guilty of misfeasance or breach of trust in relation to the society, the Registrar or a person authorised by him in that behalf may frame charges against

such person or persons, and after giving a reasonable opportunity to the person concerned and in the case of a deceased person to his representative who inherits his estate, to answer the charge, make an order requiring him to repay or restore the money or property or any part thereof, with interest at such rate as the Registrar or the person authorised under this section may determine, or to contribute such sum to the assets of the society by way of compensation in regard to the misapplication, retention, misfeasance or breach of trust, as he may determine.

Provided that, proceedings under this sub-section, shall be completed by the authorised person within a period of two years from the date of issue of order by the Registrar.

Provided further that, the Registrar may, after recording the reasons therefor, extend the said period for a maximum period of six months.

(2) The Registrar or the person authorised under sub-section (1) in making any order under this section, may provide therein for the payment of the cost or any part thereof, as he thinks just, and he may direct that such costs or any part thereof shall be recovered from the person against whom the order has been issued.

(3) This section shall apply, notwithstanding that the act is one for which the person concerned may be criminally responsible.”

“152. **Appeals.** -(1) An appeal against an order or decision under sections 4, 9, 11, 12, 13, 14, 17, 18, 19, 21, 21 A, 29, 35, 77 A, 78, 79, 88, and 105 including an order for paying compensation to a society shall lie,--

(a) if made or sanctioned or approved by the Registrar, or the Additional or Joint Registrar on whom the powers of the Registrar are conferred, to the State Government,

(b) if made or sanctioned by any person other than the Registrar, or the Additional or Joint Registrar on whom the powers of the Registrar are conferred, to the Registrar.

(2) Where an appeal against an order or decision to the Co-operative Appellate Court has been provided under this Act, it shall

lie to the Co-operative Appellate Court.

(3) An appeal under sub -section (1) or (2) shall be filed within two months of the date of the communication of the order or decision.

(3A) The Appellate Authority, in order to prevent the ends of justice being defeated, may pass such interim orders including order of stay against the impugned order, pending the decision and final hearing of the Appeal.

Provided that, if any interim order has been passed by the Appellate Authority without hearing the other side, the Appellate Authority shall decide such application within a period of three months and pass the necessary orders on merits after giving an opportunity of being heard and for the reasons to be recorded in writing.

(4) Save as expressly provided, no appeal shall lie against any order, decision or award passed in accordance with the provisions of this Act; and every such order, decision or award shall, whether expressly provided or not, be final, but shall always be subject to the provisions for revision in this Act; and where an appeal has been provided for, any order passed on appeal shall likewise be final, but be subject to such revision provisions.”

“Rule 72. Procedure for assessing damages against delinquent promoters, etc., under section 88” be added as under:

(3) On receipt of the statements referred to in sub-rule (2), the Registrar or the person authorized by him, if he is satisfied that there are reasonable grounds for holding the person or persons liable, shall frame charges.

(4) The person or persons concerned shall, after the charges are framed be asked to put in his statement in defence and to indicate the documentary or oral evidence which he would like to produce. The Registrar or the person authorised by him may permit production of other documentary or oral evidence, if considered necessary, subsequently.”

10. Admittedly, in the present petition, the petitioner filed this petition challenging the order dated 08.08.2015. Prayer clause (a) of

this petition reads thus:

“(a) The Hon'ble Court be pleased to call for records and proceedings in the matter of order dated 08.08.2015 issued by respondent No.2 and after perusing the same, quash and set aside the order dated 05.08.2015.”

11. In fact, the order dated 08.08.2015 is not an order, this is just a notice issued by the Authority u/s.88 of the said Act read with Rule 72(3) & 72(4) of the said Rules. Pursuant to the said notice, the Authority held inquiry and submitted final report along with order dated 19.10.2015. As the petitioner has failed to challenge the final order passed by the Authority dated 19.10.2015, the present Writ Petition is not maintainable.

12. In any case, if any final order is passed u/s.88 of the said Act, there is alternate efficacious remedy available to the petitioner u/s.152 of the said Act. On this count also, the petition is required to be dismissed.

13. Considering these facts, I do not find any substance in the Writ Petition. Same stands rejected.

(K.K.TATED,J.)