

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

WRIT PETITION NO.11477 OF 2016

Shri Nandkumar Maruti Patil

...Petitioner

vs.

Shri Kalleshwar Nagari Sahakari

Pathsanstha Ltd. & Ors.

...Respondents

Mr. U. R. Mankapure for the Petitioner.

Mr. P. M. Arjunwadkar for the Respondents.

CORAM : M. S. KARNIK, J.

DATE : 25/01/2017.

P.C.:

. The challenge in this Petition is to the judgment and order dated 1/7/2016 passed by the Maharashtra State Co-op Appellate Court, Mumbai (hereinafter 'the Appellate Court', for short) whereby the Appellate Court has modified the order passed by the learned Trial Judge, Cooperative Court-2, Kolhapur and that the Miscellaneous Application No.49/2012 filed by the Petitioner is allowed subject to payment of Rs.5 Lakhs by the Petitioner.

2. The Respondent No.1 had filed a dispute bearing No.28/2010 before the Maharashtra State Co-operative Appellate Court at Mumbai for recovery of an amount of Rs.10,17,787 with interest @ 11% p.a. till realization of claim on the alleged ground of misappropriation committed by the Petitioner. In the dispute it is the contention of the Respondent No.1 that the Petitioner had admitted the claim of the Respondent No.1 and, accordingly, he had given two cheques towards repayment of the misappropriated amount. However, the said cheques were dishonoured and thus, the Respondent No.1 filed

a criminal complaint under section 138 of the Negotiable Instruments Act against the Petitioners. In the said matter summons was only served upon the Petitioner and upon appearance he was convicted by the Criminal Court. Having regard to all this, dispute was filed for recovery before the Co-operative Court. Despite proper service the Petitioner did not appear. The matter proceeded ex-parte and the learned Trial Judge allowed the dispute filed by the Respondent No.1. The Petitioner was directed to pay to the Respondent the decretal amount with interest by judgment and award dated 14/10/2010.

3. Thereafter, the Petitioner filed Miscellaneous Application No.49/2012 for setting aside the ex-parte award contending that he was not aware of the pendency of the dispute. According to him he was residing at Atpadi and though the office bearers of the Respondent No.1 were aware of this, the summons was willfully not served at the current address and an order of substituted service by paper publication was taken. The Petitioner prayed that delay of 336 days in filing the application due to lack of knowledge of the filing of the dispute may be condoned and the ex-parte judgment and award may be set aside and the dispute may be restored to its original state.

3. The Respondent No.1 strongly resisted the application for setting aside the ex-parte award and opposed the application for condonation of delay.

4. The learned Trial Judge was pleased to allow the application subject to the Petitioner depositing Rs.75,000/- with the Respondent No.1/Society as part amount of award dated 14/10/2010

within one month from the date of Trial Court's order.

5. The Respondent No.1 being aggrieved by the order passed by the learned Judge, Co-operative Court, No.-II, Kolhapur directing only Rs.75,000/- as against the decretal amount of Rs.10.17,787/- along with interest filed an Appeal before the Appellate Court. By the impugned order, the learned Appellate Court was pleased to partly allow the Appeal and modify the order of the Trial Court by directing the Petitioner to deposit a sum of Rs.5 Lakhs with the Respondent No.1.

6. The Petitioner being aggrieved by the order passed by the Appellate Court has approached this Court by way of filing the present petition. The learned counsel for the Petitioner submits that once the Trial Court was satisfied with the reasons assigned in the application for setting aside ex-parte award, upon condonation of delay, the condition imposed by the Trial Court calling upon the Petitioner to deposit a sum of Rs.75,000/- is not justifiable. According to the learned counsel for the Petitioner once the matter is restored to its original position, the Trial Court is not justified in imposing any conditions while setting aside the ex-parte order. The learned counsel would contend that the Appellate Court also should not have entertained the Respondent No.1's Appeal and in any case has completely erred in directing the Petitioner to deposit Rs.5 Lakhs. The learned counsel for the Petitioner submitted that he is not in a position to deposit the amount of Rs.5 Lakhs and due to his inability he would lose his valuable right to contest the suit on merits. According to him though the Respondent No.1 was aware of his current address, purposely substituted service by way of paper publication was issued of the last known address.

7. Learned counsel for the Respondent No.1 on the other hand supported the impugned order. According to him in the facts of this case where two cheques issued by the Petitioner are dishonoured and he has been convicted by the Criminal Court, the Appellate Court was justified in imposing the condition of 50% of the decretal amount while setting aside the ex-parte award. According to the learned counsel for the Respondent No.1, the Petitioner is trying to delay the payment on one pretext or the other. He has invited my attention to the findings of the Appellate Court. According to the learned counsel, the Appellate Court has given good reasons while directing the Petitioner to deposit the amount of Rs.5 Lakhs as a condition precedent to setting aside the ex-parte award and the same does not call for any interference.

8. Taking an overall view of the matter, I do not find any perversity in the view that has been taken by the Appellate Court, more so when the Petitioner has been convicted u/s.138 of the NI Act. The view taken by the Appellate Court consequent upon the dishonour of two cheques amounting to Rs.10,17,787/- towards recovery of the misappropriate amount is in the interest of justice. However, with a view to give fair opportunity to the Petitioner to contest the dispute as he has expressed his inability to pay the amount of Rs.5 Lakhs, I am inclined to modify clause 02(1) of the order dated 1/7/2016 of the Appellate Court. Accordingly, the Petitioner to make a part payment of Rs.3 Lakhs instead of Rs.5 Lakhs as directed by the Appellate Court in clause 02(1) of the operative part of the order dated 1/7/2016. Rest of the order of the learned Appellate Court is maintained. The said amount to be deposited within 6 weeks from today.

9. The learned Trial Judge may decide the matter on its own merits and need not be influenced by what is stated by me in this order or that of Appellate Court's order. All contentions on merits are kept open.

10. The learned Trial Judge is requested to dispose of the dispute as early as possible and preferably within a period of 8 months from today. Writ Petition disposed of.

(M. S. KARNIK, J.)