

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

WRIT PETITION NO. 6907 OF 2017

Narayan Rajaram Raut ..Vs.. The Mumbai Dock Labour Board & Ors.

Office Notes, Office Memorandum of appearances, Court's orders or directions & Registrar's orders.	Court's or Judge's orders
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Mr. Satyaprakash Sharma a/w Shakuntala
Sharma for Petitioner.

Mr. L. S. Deshmukh for Respondent No.1.

CORAM : K. K. TATED, J.

DATE : JUNE 28, 2017.

P.C. :

. Heard learned Counsel for parties.

2. By this petition under Articles 226 and 227 of the Constitution of India, Petitioner is challenging the order dated 23rd March, 2016 passed by the Deputy Registrar, Co-operative Societies, A Ward, Mumbai under Section 101 of the Maharashtra Co-operative Societies Act, 1960 (hereinafter be referred as 'said Act'), holding that the Petitioner is liable to pay sum of Rs. 4,55,900/- and interest on principal amount of Rs. 2,70,000/- at the rate of 12.5% p.a. to the Respondent No.1.

3. In the present proceedings, Respondent No. 3 – Prakash Ganpat Zagade obtained a loan of Rs. 2,10,000/- from Respondent No.1. For that loan, Petitioner stood as a guarantor. As the Respondent No.3 failed and neglected to repay the loan along with interest, after following due process of law, Respondent No.1 filed Application under Section 101 of the said Act for recovery of the entire amount.

4. Notice to the said proceedings were duly served on principal borrower as well as guarantor i.e. the Petitioner. The Petitioner vide letter dated 29th May, 2015 admitted the receipt of notice of proceedings under Section 101 of the said Act and requested to grant some time and allow him to take assistance of Union Representative. After hearing both the sides, the Authority i.e. Deputy Registrar, Co-operative Societies, Mumbai has passed impugned order dated 23rd March, 2016 under Section 101 of the said Act, recording that borrower as well as guarantor remained present before him and accepted their liabilities.

5. Being aggrieved by the said order dated 23rd March, 2016, Petitioner instead of preferring Revision Application under Section

154 of the said Act, filed present Writ Petition under Articles 226 and 227 of the Constitution of India.

6. The learned Counsel Mr. Sharma appearing on behalf of Petitioner submit that though an alternate remedy is available to him under Section 154 of the said Act, present Writ Petition is maintained under Articles 226 and 227 of the Constitution of India, because the Respondent No. 1 and 2 failed and neglected to comply the procedure as required under law to decide the application under Section 101 of the said Act. He submit that the Respondent No.2 failed to issue the proper notice on the Petitioner, for the proceedings under Section 101 of the said Act. He submit that Respondent No.1 failed to provide him copy of the complaint filed by them under Section 101 of the said Act. He further submit that even the Respondent No.2 failed to give proper opportunity to the Petitioner to put up his case before him. In support of his contention, he relied on the Affidavit dated 26th September, 2016 duly affirmed by Mr. Prabhakar Uparkar, the General Secretary of Mumbai Port Trust Mazdoor Sangh, MbPT Unit, Mumbai.

7. The learned Counsel for Petitioner submit that bare reading of the impugned order dated 23rd March, 2016 shows that the Authority failed and neglected to comply the natural justice before passing the order. He submit that Authority has not considered their submissions and points at the time of passing the impugned order.

8. The learned Counsel for Petitioner submit that if the proper notice is not issued, then the entire proceeding is required to be set-aside. In support of his contention, he relied on the Judgment of Calcutta High Court in the matter of *B. K. Gooyee ..Vs.. Commissioner of Income Tax West Bengal, reported in 1965 DGLS (Calcutta) 29*. He submit that in this authority the Calcutta High Court held that if notice is issued by the Income Tax Authority without any signature then the entire proceeding is required to be set-aside.

9. The learned Counsel for Petitioner also relied on the Judgment in the matter of *Khushal Narayanrao Mundhe ..Vs.. State of Maharashtra and others, reported in 2007(4) Mh.L.J. 333*. He submit that in this authority, the High Court has held that in absence of any notice, grant of such certificate

under sub-section (1) of Section 101 of the Maharashtra Co-operative Societies Act, be declared as illegal. He further submit that in this authority, High Court also held that despite the fact that remedy by way of Revision is made available under section 154 of the said Act, in the facts and circumstances of that case, power under Article 227 of the Constitution of India requires to be exercised. He relied on paragraph 5 and 6 of the said authority which read thus :

“5. The learned counsel for the respondent No.2 Mr. Jain submit that revision is not maintainable in view of the remedy provided under section 154 of the Act, 1960. The learned counsel for the petitioner, submits that issuance of certificate, is without notice. It is significant to note that the certificate is issued by the respondent No.4 Assistant Registrar, Co-operative Societies. The allegation is made in the petition that no hearing was given to the petitioner before issuing certificate under section 101 of the Act, 1960, by the respondent No.4. There is no counter filed on behalf of the respondent No.4 regarding issuance of the notice, mode of service to the petitioner, date of hearing, if any, scheduled by the respondent No.4. all these details are lacking in the order passed under section 101 of the Act, 1960. Such details are also not provided in the affidavit filed on behalf of the respondent Nos. 2 and 3. Only reference of demand notice dated 31-1-2005 issued by the respondent NO.2, is made. Demand made by the respondent No.2 stands on different footing. On receipt of the

application and/or while resorting to power under sub-section (2) of section 101 of the Act, 1960, it is expected that the authority concerned, shall issue notice to the respondent/alleged defaulter and shall offer an opportunity of being heard.

6. It is true that issuance of notice, to a member or defaulter, in a proceeding under sub-section (1) of section 101 for grant of certificate is not expressly provided under sub-section (1) of section 101 of the Act, 1960. However, powers have been conferred upon the Registrar, after making such enquiries as he deems fit, to grant of certificate for recovery of the amount stated therein, to be due as arrears. Not only notice, under sub-section (1) or section 101 is contemplated but such enquiries as Registrar deems fit, are also contemplated. In a given case, after the death of debtor, the liability of repayment of the loan falls upon the legal representative of the debtor. In such case, it is the duty of Recovery Officer to ascertain such liability and to enquire about undisposed property left by the deceased member/defaulters coming into hands of his legal representatives. Expression of legal representative, is defined under section 2(11) of the Code of Civil Procedure. Even principles of natural justice requires issuance of such notice by the Registrar to member/defaulters before issuance of certificate under sub-section (1) of section 101 of the Act, 1960. One more aspect, is important that sub-section (2) of section 101 empowers the Registrar if he is satisfied that the Society concerned has failed to take action under sub-section (1) of section 101 in respect of any amount due as arrears, he may on his own motion, after making such enquire is as he deems fit, grant certificate for recovery of the amount stated in the said certificate, to be due as arrears. Such certificate, is also aided with

deeming provision by sub-section (2) as if, which have been issued on the application made by the Society concern. Sub-section (3) of section 101 gives finality to a certificate granted by the Registrar under sub-section (1) or sub-section (2). Sub-section (3) also makes such recovery certificate, a conclusive proof of the arrears stated to be due therein. It further provides that such arrears shall be recoverable according to the law for the time being in force, for recovery of the land revenue. Sub-section (4) of section 101 obligates the Collector and the Registrar to take precautionary measures authorized by section 140 to 144 or any law or provision corresponding thereto for the time being in force, until the arrears due to, together with interest and incidental charges incurred in the recovery of such arrears, are paid. It is also apropos to refer to section 98(a) and (b) of the Act, 1960 which read thus :

98. Money how recovered – Every order passed [by the Official Assignee or a de-registered society under sub-section (3) of section 21A or every order passed] by the Registrar or a person authorized by him under section 88 or by the Registrar [or the Co-operative Court] under section 95 (for by the Cooperative Court under section 96), every order passed in appeal under the last preceding section, every order passed by a Liquidator under section 105, every order passed by the State Government in appeal against orders passed under section 105 and every order passed in revision under section 154 shall, if not carried out, -

(a) on a certificate signed by [the Official Assignee or] the Registrar [for the Co-operative Court] or a Liquidator, be deemed to be a decree or a Civil Court, and shall be executed in the same manner as a decree of such Court, or

(b) be executed according to the law and

under the rules for the time being in force for the recovery of arrears of land revenue :

Provided that, any application for the recovery in such manner of any such sum shall be made by the Collector, and shall be accompanied by a certificate signed by the Registrar. Such application shall be made within certificate signed by the Registrar. Such application shall be made within twelve years from the date fixed in the order and if no such date is fixed, from the date of the order.

Bare perusal of section 98 shows that certificate signed by Registrar shall be executed in the same manner as a decree of a Civil Court to be executed according to the law and under the rules for the time being in force for recovery of arrears of land revenue. Proviso to sub-clause (b) of section 98, however, contemplates obligation for recovery and also puts limitation of 12 years from the date fixed in the order and if no such date is fixed, from the date of the order. Thus, issuance of certificate under sub-section (1) of section 101, of the Act, 1960, is important for recovery of the dues of the society from member concerned and such a certificate, in fact is having force of decree passed by the Civil Court. Such certificate is also made conclusive proof of the arrears contained in the said certificate and further is made final under sub-section (3) of section 101. The Registrar, therefore, for this reason also, has to issue notice before granting any certificate under sub-section (1) of section 101 and should give an opportunity of being heard to the member/defaulters concerned. In absence of any notice, grant of such certificate under sub-section (1) of section 101, appears to be illegal.

In this premise, despite the fact that remedy by way of revision is made available under section 154 of the Act, 1960, in the facts and circumstances of this petition, in my view,

power under Article 227 of the Constitution of India requires to be exercised.”

10. The learned Counsel for Petitioner relied on the authority in the matter of ***Balasaheb Dhondiram Nikam ..Vs.. Joint Registrar, Co-operative Societies, Kolhapur and others, reported in 2015(3) Mh.L.J. 482.*** He submit that in this authority it is held by the High Court that it is necessary for Assistant Registrar and/or Officers under Section 101 of the said Act, to give reasons, after giving opportunity to borrowers and/or guarantors, before passing order of recovery. If reasoned order is missing and if there is a breach of principal of natural justice at the time of issuing of certificate, same is required to be set aside. He relied on para 3 of the Judgment which read thus :

“3. The learned counsel appearing for the Petitioner has pointed out the provisions specifically Rule 86-F (Chapter VIII-A) of the Maharashtra Co-operative Societies Rules, 1961 (for short, the MCS Rules), which is reproduced

“86-F. Judgments, order and Certificate :- *After hearing the arguments of the parties, the Registrar shall issue a reasoned judgment and pass an order for the grant or the rejection of the application. The Registrar, thereafter, shall issue a Certificate in Form “V”. The judgment and the certificate shall bear his seal, signature and date.”*

and further submission is placed by referring to the basic notice issued under section 101 of the Maharashtra Co-operative Societies Act, 1960 (for short, “the MCS Act”) for recovery of the amount due dated 25 July, 2011, in which there are no reasons whatsoever mentioned which is required in view of the Rules so referred. I am inclined to accept the submission, as in pursuance to the Rules, it is necessary for the Assistant Registrar and/or other Officers to give reasons after giving opportunity to the borrowers and/or guarantors, before passing such order of recovery, as done in the present case. All these basic elements are missing in the basic notice. The Revisional Authority therefore, ought to have considered the submissions so made, but without assigning any reasons and by overlooking the written arguments filed by the Petitioner in Revision Application under section 154 of the MCS Act, dismissed rejected the same, solely on the ground that “the applicant has admitted the loan” and further that technical grounds were raised. I am inclined to observe that the authorities concerned, are under obligation to deal and decide the issues by reasoned order, that is the requirement of law, in view of clear provisions, so recorded before issuing any recovery certificate.”

11. The learned Counsel for Petitioner relied on the authority in the matter of ***Sandeep Polymers Pvt.Ltd. And others ..Vs.. State of Maharashtra and others, reported in 2010(7) Mh.L.J. 538***. He submit that in this authority, the High Court held that certificate issued under section 101 of the said

Act without following due procedure and without proper service of notice is required to be set aside.

12. The learned Counsel for Petitioner also relied on the Judgment of ***Geneshkumar Makhanlal Chandak and another ..Vs.. Nagpur Urban Co-operative Bank Ltd. and another, reported in 2005(3) Bom.C.R.925.*** He submit that in this Authority High Court has held that if recovery certificate under section 101 of the said Act and demand notice are issued without holding proper inquiry and without giving proper opportunity of hearing to the party, same is required to be quashed and set aside.

13. On the basis of these submissions and the authority, the learned Counsel for Petitioner submit that the impugned order passed by the authority is required to be set aside with costs.

14. On the other hand, learned Counsel Mr. Deshmukh appearing on behalf of Respondent No.1 vehemently opposed the present Writ Petition. He submit that the Authority after following due process of law, passed the impugned order dated 23rd March, 2016. He submit that when the Respondent No.2 – Authority issued a notice dated 11th

December, 2015 to the Petitioner, Petitioner immediately approached the Authority by the letter dated 22nd December, 2015 and requested for some time and permission to allow the Union Officer to appear on behalf of him. Not only that, Petitioner appeared before the Authority on 11th January, 2016 and requested for some time. In support of his contention, the learned Counsel for Respondent No.1 placed on record the photocopy of roznama dated 11th January, 2016 recorded by Respondent No.2. He also relied on the Roznama dated 28th January, 2016 recorded by Respondent No.2 in the present proceedings stating that the Petitioner and Respondent Nos. 3 and 4 were present and admitted their liabilities. Copy of the said roznama is taken on record and marked "X" for identification.

15. The learned Counsel for Respondent No.1 submit that the authority specifically recorded in the impugned order dated 23rd March, 2016 that the Petitioner and principal borrower admitted their liabilities and also the documents executed by them from time to time. He further submit that in any case, an alternate remedy is available to the Petitioner under Section 154

of the said Act, therefore, there is no question of entertaining the present Writ Petition under Article 227 of the Constitution of India. He submit that under Section 154 of the said Act, Petitioner has to deposit 50% of the claim amount at the time of filing Revision Application. To avoid the liability to deposit the amount, Petitioner has preferred to file present Writ Petition under Section 226 and 227 of the Constitution of India and the same is required to be dismissed.

16. I have heard both the parties.

17. In the present Writ Petition question is whether the Writ Petition which has filed by the Petitioner under Article 226 and 227 of the Constitution of India challenging the order dated 23rd March, 2016 passed by the Deputy Registrar, Co-operative Societies, Mumbai is maintainable, when an alternate efficacious remedy under Section 154 of the Maharashtra Co-operative Societies Act, 1960 is available.

18. It is to be noted that in the present proceedings, Respondent No. 2 issued notice dated 11th December, 2015 about filing of proceedings under Section 101 of the said Act by Respondent No.1. That notice was duly served on Petitioner. Petitioner immediately

written letter dated 22nd December, 2015 to Respondent No.2 and requested for some time to engage and take help of Union Officer. Apart from that, the roznama dated 11th January, 2016 and 28th January, 2016 clearly shows that Petitioner along with principal borrower was present before Respondent No. 2 – Authority and admitted their liabilities. No where they raised objection about the defective notice and/or not providing the copy of complaint filed by Respondent No.1 under section 101 of the said Act. Not only that, in impugned order dated 23rd March, 2016 it was specifically recorded by the Authority that Petitioner as well as principal borrower were present before him and accepted their liabilities.

19. The Authority relied by the Petitioner in the matter of **B. K. Gooyee** (*supra*) is not applicable in the facts and circumstances of the present case, because that authority was under the Income Tax Act whereas the present proceedings is under Maharashtra Co-operative Societies Act, 1960. principles are different in both the Act for notice.

20. In the matter of **Khushal Narayanrao Mundhe** (*supra*) the Court held that in the absence of any notice, grant of

such certificate under sub-section (1) of section 101 of the said Act is required to be set aside. That is not the case in hand. In the present case, the notice was duly served on the Petitioner. Apart from that, Petitioner appeared before the Authority on 11th January, 2016 and 28th January, 2016. Hence this citation is not applicable in the present case.

21. In similar way, the authority cited by the Petitioner in the matter of ***Balasaheb Dhondiram Nikam (supra), Sundeep Polymers Pvt. Ltd. And others (supra)*** and ***Ganeshkumar Makhanlal Chandak and another (supra)*** are not applicable in the facts and circumstances of the present case. In all these three authorities, the Court held that if the principle of natural justice are not followed by Assistant Registrar and/or Officers and/or opportunity was not given to borrowers and/or guarantors at the time of passing order of recovery, the same is required to be set aside. That is not the case in the present proceeding. The Petitioner appeared before the Authority on 11th January, 2016 as well as on 28th January, 2016. He admitted his liability. After hearing all the parties, the impugned order was

passed by the Authority. Hence, these authorities are also not applicable in the present proceedings.

22. Apart from that, under Section 154 of the said Act, an alternate efficacious remedy is available to the Petitioner to file Revision. If the Revision is filed, Petitioner has to deposit 50% amount of the disputed claim. To avoid the deposit of the amount as required under Section 154 of the said Act, Petitioner has preferred the present Writ Petition under Articles 226 and 227 of the Constitution of India. Even on this ground also, the Writ Petition is not required to be entertained by this Court.

23. Hence, Writ Petition stand rejected.

24. At this stage, the learned Counsel Mr. Sharma appearing on behalf of Petitioner seeking stay of this order. It is to be noted that impugned order was passed on 23rd March, 2016 and there is a money claim. Considering these facts, I do not find any reason to stay this order. Hence, oral request made by the learned Counsel for Petitioner is rejected.

(K.K.TATED, J.)