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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.7080 OF 2017

WITH

WRIT PETITION NO.9714 OF 2016

Shankar Mahadev Surve

..Petitioner.

V/s.

The State of Maharashtra & Ors.

..Respondents.

Mr.Sanjeev P.Kadam with Prashant Raut, Ramdas Hake Patil & Vilasini Balasubraminam for the petitioner.

Mr.A.R.Metkari, AGP for the respondent-State.

Mr.V.D.Patil with Kalpesh U.Patil for respondent No.2 in WP/7080/17 & for respondent No.5 in WP/9714/16.

CORAM : M.S.SONAK, J.

DATE : MARCH 26, 2019

ORAL JUDGMENT

Heard Mr.Kadam, learned counsel for the petitioner, Mr.Patil, learned counsel for the respondent and Mr.Metkari, learned AGP for the State.

2. With the consent of the parties, both these petitions are taken up for disposal and are being disposed of by common judgment and order.

3. Rule in both these petitions. Rule made returnable

forthwith, with consent and at the request of learned counsel for the parties.

4. Challenge in Writ Petition No.7080 of 2017 is to the judgment and order made by the Maharashtra State Co-operative Appellate Court dismissing the petitioner's appeal No.52/2016 and allowing the appeal No.76/2016 instituted by respondent No.2 society. These appeals had been instituted before the Appeal Court against the judgment and award dated May 9, 2016 made by the Co-operative Court at Satara in dispute bearing No.844/2009.

5. Challenge in Writ Petition No.9714/2016 is to the order made by the authority under the Maharashtra Cooperative Societies Act with regard to the enforcement of recovery certificate issued under section 101 of the Maharashtra Cooperative Societies Act, 1960 ('the said Act' for short).

6. The facts in this case disclose that even before the recovery certificate was issued under section 101 of the said Act, the petitioner had already raised and instituted a dispute under section 91 of the said Act in the matter of his alleged liabilities under loans availed of by him from respondent No.2 society. The question arose, therefore, as whether such a dispute under section 91 of the said Act was at all maintainable.

7. The Co-operative Court had taken the view that such

disputes were maintainable, since, there was a direction from this Court to decide the dispute on merits. The Appeal Court, by the impugned judgment and order has reversed the orders of the Co-operative Court and held that the dispute under section 91 of the said Act was not maintainable. Mr.Patil, learned counsel for respondent No.2 Society points out that the Appeal Court had only held that once recovery certificate is issued under section 101 of the said Act, the dispute under section 91 of the said Act can no longer be said to be maintainable and is liable to be rejected on the said ground.

8. According to me, the aforesaid reasoning of the Appeal Court runs contrary to the reasoning of this Court in the case of *Uttam Pandurang Sabde & Ors. V/s. Osmanabad Janta Sahakari Bank Ltd. & Anr.*¹. In the said case, the question was whether a dispute under section 91 of the said Act is maintainable or could be proceeded with, once recovery certificate is issued under section 101 of the said Act.

9. The learned Single Judge of this Court upon, examining the provisions of the said Act has held that where the dispute under section 91 of the said Act was raised prior to the issuance of the recovery certificate under section 101 of the said Act, such a dispute was maintainable and such dispute could not have been rejected on the ground that subsequently, the recovery certificate was issued under

¹ 2009 (6) All M.R. 769

section 101 of the said Act.

10. The reasoning in *Uttam Pandurang Sabde (supra)* in paragraphs 6 and 7 reads as follows :-

“6. After hearing the learned Counsel for the petitioner as well as respondent, it is necessary to note some undisputed facts. It is not in dispute that the dispute filed by the present petitioners before the Cooperative Court was filed on 18/10/1996. The recovery certificate under Section 101 of the Act was issued on 28/10/1996. The appellate Cooperative Court has allowed the Appeal merely on the point that, the Cooperative Court had no jurisdiction to entertain the dispute filed by the petitioners herein.

Once it is not in dispute that the dispute was filed on 18/10/1996 i.e. prior to issuance of the recovery certificate, in that case, the ratio laid down in reported Judgment of this Court in case of Vasundhara v. Rajaram (cited supra) and in case of Shri. Kedarling Vikas Seva Scy. Ltd. v. Dinkar (cited supra) is not applicable. In those cases, the certificate under Section 101 of the Act was issued and dispute was filed subsequent to the issuance of the certificate. In the instant case, the dispute is filed on 18/10/1996 at the stage of pending proceedings under Section 101 of the Act. The certificate came to be issued on 28/10/1996. Therefore, so far stage of filing of the dispute is concerned, the facts of the present case are more akin to the facts in case of Basaveshwar Cooperative Credit Society Ltd. v. Jayant (cited supra). In said matter, the dispute was filed at the stage when the parties failed to settle the exact amount and the appellant society threatened to proceed to recover the amount as arrears of rent and issued notice, upon receipt of which, the

respondent therein filed dispute under Section 91 of the Act being Dispute No. 857 of 2006 and took up the plea that the recovery proceedings initiated were without authority and were not sustainable.

In the instant case also, the dispute was filed before the recovery certificate was issued and at the stage when recovery proceedings were initiated and same were in progress. In case of Basaveshwar Cooperative Credit Society Ltd. v. Jayant (cited supra), the Hon'ble Division Bench of this Court in paragraph 4 held, ' The Cooperative Court is exercising its statutory powers conferred on it under Section 91, while the Registrar is exercising powers under Section 101 of the Act. They fall in distinct and different jurisdictions. Thus they are distinct and different jurisdictions operating in different fields.

This Court further in paragraph 5 held, The proceedings before the Cooperative Court are proceedings before a statutory Court.

Therefore, what follows from the aforesaid observations by this Court is that, the exercise of the power by the Cooperative Court under Section 91 is distinct and different from the exercise of jurisdiction by the Registrar under Section 101 of the Act.

In the present case, the appellate Cooperative Court in paragraph 12 of the Judgment has observed that, Lower Court ought to have framed preliminary issue of jurisdiction and then should have proceeded further with the dispute. It is further observed that, When the Court have jurisdiction then only it can take cognizance of subject matter of dispute and can hear and decide it.

Basically, lower court had no jurisdiction to take cognizance of the subject put before it in dispute for adjudication. The view taken

by lower court about jurisdiction is not correct, legal. In light of these findings, other Issues framed and decided by lower Court are without jurisdiction and need not be discussed.

On perusal of paragraph 12 of the Judgment of appellate Cooperative Court, the findings recorded by said Court are not sustainable. As rightly held by this Court in case of Basaveshwar Cooperative Credit Society Ltd. v. Jayant (cited supra), the Cooperative Court is exercising its statutory power conferred on it under Section 91 of the Act, while the Registrar is exercising powers under Section 101 of the Act and they fall in distinct and different jurisdiction. Apart from this, as per Order XIV Rule 2 of Code of Civil Procedure,

Notwithstanding that a case may be disposed of on a preliminary issue, the Court shall, subject to the provisions of Sub-rule (2), pronounce judgment on all issues.

7. Therefore, the observation of the appellate Court that the point of jurisdiction should have been considered as a preliminary issue and cooperative court should have decided the same before taking other issues for adjudication, is not in consonance with the provisions of Order XIV Rule 2 of the Code of Civil Procedure. Once it is not under dispute that, the dispute was filed before issuance of certificate under Section 101 of the Act, it has to be held that the dispute was maintainable. This view is supported by the Judgment of this Court in case of Basaveshwar Cooperative Credit Society Ltd. v. Jayant (cited supra). Therefore, the impugned Judgment and Order passed by the appellate Cooperative Court is quashed and set aside. The matter is remanded back to the appellate Cooperative

Court for fresh hearing. The appellate Cooperative Court, Aurangabad to decide the Appeal on merits. It will be open for the parties to agitate all issues before the appellate Cooperative Court, Aurangabad. The Writ Petition is partly allowed to the extent above. Since this Writ Petition is pending from 2002, the Maharashtra State Appellate Court, Bombay Bench at Aurangabad is directed to hear and decide the Appeal preferably within six months from today. It is made clear that this Court has not adjudicated the matter on merits and it will be open for both the parties to argue the matter on merits. The Rule is made absolute to the above extent. The Writ Petition is partly allowed and disposed of. Civil Application, if any, stands disposed of in view of disposal of main Writ Petition.”

11. Since, according to me, the issue raised in this petition is covered by the decision of *Uttam Pandurang Sabde (supra)*, the impugned judgment and order made by the Appeal Court will have to be set aside and the matter will have to be remanded back to the Appeal Court to decide both the appeals on their own merits and in accordance with law.

12. Accordingly, the impugned judgment and order dated January 18, 2017 made in the Co-operative Appellate Court is hereby set aside and the Co-operative Appellate Court to decide Appeal Nos.52/2016 and 76/20126 on their own merits and in accordance with law as expeditiously as possible and in any case within a period of

six months from today.

13. The record indicates that the petitioner has already deposited an amount of Rs.7.5 lakhs with the Registrar of the Co-operative Court at Satara. This amount was deposited as a pre-condition for stay of execution of the recovery certificate.

14. Today, the petitioner has filed an affidavit / undertaking dated March 26, 2019 in which the petitioner, without prejudice to his rights and contentions, has undertaken to pay to respondent No.2 society an amount of Rs.7.50 lakhs as per the schedule indicated in the said affidavit. The schedule provides that an amount of Rs.2.50 lakhs will be paid on or before April 10, 2019, further amount of Rs.2.50 lakhs will be paid on or before April 30, 2019 and the last and the balance amount of Rs.2.50 lakhs will be paid on or before May 30, 2019. The affidavit / undertaking is taken on record and marked 'X' for identification. The affidavit / undertaking is accepted an undertaking to this Court.

15. In addition to the aforesaid amount, respondent No.2 Society can be granted and is hereby granted leave to withdraw an amount of Rs.7.5 lakhs already disputed by the petitioner together with accrued interest, if any, from the Registrar of the Co-operative Court. The aforesaid means that respondent No.2 society will have received an amount of over Rs.15 lakhs by May 30, 2019. Since respondent No.2

society will have received this amount, the execution of the recovery certificate to remain stayed pending the disposal of the two appeals by the Co-operative Appellate court.

16. It is made clear that the amount received by respondent No.2 society shall have to abide by the final orders that shall be made in the two appeals by the Co-operative Appellate Court, including the order for refund with interest as may be determined by the Co-operative Appellate Court. If such orders are made, respondent No.2 society, subject to their right of taking out further proceedings, will have to refund such amounts to the petitioners within a period of eight weeks from the date the said order is made.

17. Further, it is made clear that in case the petitioner fails to adhere to the time schedule set out in the affidavit / undertaking dated March 26, 2019, the petitioner shall not be entitled to the benefit of interim order restraining the execution of the recovery certificate pending before the Co-operative Appellate Court.

18. Mr.Kadam, learned counsel for the petitioner requests that the order to record that the authorised representative of respondent No.2 society is present in the Court, which is recorded accordingly.

19. Accordingly, rule is made absolute in the aforesaid terms in both these petitions. There shall be no order as to costs.

20. The petitioner and the authorised representative of

respondent No.2 to remain present before the Co-operative Appellate Court on April 15, 2019 at 11.00 a.m. and file an authenticated copy of this order.

21. All concerned to act on the basis of an authenticated copy of this order.

(M.S.SONAK, J.)