

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

Writ Petition No. 6471 of 2019

Wasudeo Masane and Others Vs. Sant Savata Maharaj Gramin Bigar Sheti Sah.
Patsanstha Ltd.

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Mr. P.S. Gawai, Advocate for the petitioners
Mr. Abhijeet Deshmukh, Advocate for the respondent

CORAM : MANISH PITALE, J.

DATED : FEBRUARY 21, 2020

By this writ petition, the petitioners have challenged judgment and order dated 07/08/2019, passed by the Maharashtra State Co-operative Appellate Court, Mumbai Bench at Nagpur, whereby an appeal filed by the petitioners was allowed, an Award passed by the Co-operative Court was set aside and the dispute raised by the respondent – Society stood remanded to the Co-operative Court for fresh consideration.

2. According to the petitioners, the order of remand was uncalled for, in the facts and circumstances of the present case and that passing such an order amounted to granting an opportunity to the respondent – Society to fill in serious lacunae in its case before the Co-operative Court.

3. The respondent – Society filed a Dispute before the Co-operative Court, alleging that the petitioner No.1 had defaulted in repayment of loan and that the petitioners No.2 and 3 were guarantors, who were equally responsible for the default on behalf of petitioner No.1. It is an admitted position that although the petitioners were served in the matter, the Co-operative Court proceeded *ex-parte*. Certain documents were placed on record on behalf of the respondent – Society, including an account statement, which allegedly conclusively proved the default committed by the petitioners. Evidence by way of affidavit was tendered by an Officer of the respondent – Society and an endorsement was made by the Court that the said witness was present in the Court and he admitted contents of the said affidavit. Since the petitioners failed to appear before the Co-operative Court despite service, there is no cross-examination of the said witness. On the basis of such evidence on record, the Co-operative Court in its judgment and order dated 10/07/2018, found that the respondent – Society had been able to prove that the petitioner No.1 had defaulted in repayment of loan and accordingly, the dispute was allowed and the petitioners were jointly and severally directed to pay an amount of Rs.2,77,861/- with interest @15% per annum on Rs.2,50,000/- from 31/03/2017, till realization of the amount.

4. Aggrieved by the same, the petitioners filed

an appeal before the Co-operative Appellate Court. By the impugned judgment and order, as noted above, the appeal was allowed and the matter was remanded to the Co-operative Court for fresh consideration.

5. According to the learned counsel appearing for the petitioners, considering the categorical findings given by the Co-operative Appellate Court in the impugned judgment and order from paragraph 10 onwards, it was evident that there were fatal flaws in the material placed on record on behalf of the respondent – Society before the Co-operative Court and that even if the petitioners had been proceeded *ex-parte*, the respondent – Society was not absolved from proving its case before the Co-operative Court. According to the learned counsel appearing for the petitioners, having found serious flaws committed by the respondent – Society before the Co-operative Court in proving its case, the Co-operative Appellate Court could not have observed that such flaws were merely procedural flaws, which could justify the order of remand to the Co-operative Court. On this basis, it was submitted that the impugned judgment and order deserved to be set aside. The learned counsel appearing for the petitioners placed reliance in the case of **Vishnu Dashrath Chavan Vs. Pundlik Dashran Chavan, 2017(5) Mh.L.J. 163.**

6. On the other hand, the learned counsel appearing for the respondent – Society submitted that

the respondent – Society had been able to place on record certain material to demonstrate the default committed by the petitioners, but, there was no material in the form of denial on the part of the petitioners. It was submitted that order of remand was in the interest of the petitioners also because they were proceeded *ex-parte* before the Co-operative Court. It was also submitted that a fair opportunity was available to the rival parties before the Co-operative Court to support their respective stands and that, therefore, no interference was warranted in the impugned order, in the interest of justice.

7. Heard learned counsel for rival parties and perused material on record. The Co-operative Appellate Court in the impugned judgment and order has observed that the manner in which the Co-operative Court proceeded to deal with the material produced on record by the respondent – Society, demonstrated that there were serious flaws in it. It has been observed in the impugned order that although the petitioners were proceeded *ex-parte*, yet, the material placed on record in the form of oral and documentary evidence on behalf of the respondent – Society did not satisfy the requirements of law. In fact, in paragraph 11, the Co-operative Appellate Court observed that the Co-operative Court committed an error in permitting the documents to be exhibited, although necessary procedure contemplated in the Code of Civil Procedure (CPC) was not adhered to by the respondent – Society.

It was specifically recorded that certificate of electronic record as prescribed under Section 65(B) of the Evidence Act was not placed on record, in respect of document at Exh.15 i.e. account extract, on the basis of which it was claimed by the respondent – Society that the petitioners had committed default in repayment of loan. Having noticed such serious flaws, the reason why the Co-operative Appellate Court remanded the matter to the Co-operative Court was that an opportunity was required to be given to the respondent – Society to eliminate the procedural lacunae committed during the proceedings before the Co-operative Court.

8. The question for consideration is, as to whether such serious flaws noticed by the Co-operative Appellate Court could be termed as mere procedural lacunae or they were serious transgressions of law committed on the part of the respondent – Society, which had a direct bearing on the claims made against the petitioners. The manner in which the Co-operative Appellate Court has set aside the order of the Co-operative Court and directed fresh proceedings before the said Court, amounts to giving fresh lease of life to the respondent – Society to get over serious flaws committed during the proceedings before the Co-operative Court. There is substance in the contention raised on behalf of the petitioners that even if the proceedings before the Co-operative Court had proceeded *ex-parte* against them, it was for the

respondent – Society to have proved its case to the hilt to secure order in its favour. The learned counsel appearing for the petitioners has correctly relied upon the judgment of this Court in the case of **Vishnu Dashrath Chavan Vs. Pundlik Dashran Chavan** (supra), wherein this Court has reiterated that orders of remand are not to be passed in a routine manner and that if the parties claimed before the Appellate Court that they were precluded from adducing either oral or documentary evidence and a request is made for an opportunity to adduce additional evidence, then the Appellate Court may be justified in the facts and circumstances of the case to consider remand of proceedings.

9. In the present case, the impression gathered by this Court is that having noticed serious flaws committed by the respondent – Society before the Co-operative Court, the Co-operative Appellate Court proceeded to hold that remand of proceedings was justified to eliminate the procedural lacunae committed in the proceedings before the Co-operative Court. Non-adherence to the procedure contemplated under CPC and Rules of Evidence under the Evidence Act, amounts to serious flaws, which results in certain rights accruing to the opposite party. Such serious flaws cannot be dubbed mere procedural errors, which could be permitted to be corrected by order of remand. Therefore, this Court is of the opinion that the Co-operative Appellate Court committed an error in

remanding the matter to the Co-operative Court. The Co-operative Appellate Court ought to have decided the matter on merits either way, on the basis of the material on record. Hence, the writ petition is partly allowed. The impugned judgment and order passed by the Co-operative Appellate Court is quashed and set aside. The matter is remanded to the Co-operative Appellate Court for fresh consideration on merits on the basis of material already available on record.

10. Needless to say, since the matter has been remanded to the Co-operative Appellate Court for decision on merits, the stay granted by the Co-operative Appellate Court during pendency of the proceedings, shall continue to operate till final decision in the appeal.

11. The parties shall appear before the Co-operative Appellate Court on 2nd March 2020.

12. The writ petition is disposed of in above terms.

JUDGE