

**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Gaurang Kanth

FMA 2402 of 2016

Sisir Kumar Biswas

Vs.

The State of West Bengal & Ors.

For the Appellants : Mr. Milan Ch. Bhattacharjee, Sr. Adv.,
Mr. Prasenjit Mukherjee, Adv.,
Ms. Sulagna Bhattacharjee, Adv.

For the State : Mr. Pradip Roy. Adv.

For the Respondent Bank : Mr. Partha Sarathi Bhattacharjee, Adv.,
Mr. Saikat Chatterjee, Adv.,
Mr. Puranjan Pal, Adv.

Heard on : 24.07.2024

Judgment on : 24.07.2024

Joymalya Bagchi, J.:-

1. In the appeal, appellant has assailed the order passed on consent which reads as follows :

“Under such circumstances and for the foregoing reasons, this Writ Petition is disposed of on agreement of parties and the following agreed Order is passed:-

(A) *The Petitioner will deposit a sum of rupees two crores within a period of one month from today with the Bank and upon such deposit, the Bank shall hand over a copy of the Statement of Claims referred to in the Order Sheet dated 10.2.09 and shall obtain a receipt from the Petitioner there for.*

(B) *The Petitioner shall cooperate and shall put his signature acknowledging receipt on the said Statement of Claims.*

(C) *As soon as the Statement of Claims is received by the Petitioner, the fact of such receipt shall immediately be notified to the Assistant Registrar, Co-operative Societies, Birbhum and such intimation shall be given by the Petitioner himself.*

(D) *The Assistant Registrar, Co-operative Societies, Birbhum, shall then fix another date and thereafter, on a day-to-day basis, shall proceed to conclude the enquiry contemplated under Section 128 of the West Bengal Co-operative Societies Act, 1983 within a period of fifteen days where-after, he will pass necessary Orders.*

(E) *The Petitioner must cooperate and must be present on each and every date and shall not be permitted any adjournments.*

Mr. Asish Sanyal learned Advocate for the Petitioner states that he has instruction to agree that upon conclusion of such enquiry, the Order shall be binding not only on the Petitioner but also on the Respondents and both shall act accordingly.

The aforementioned deposit of rupees two crores shall be without prejudice to the rights and contentions of the parties and also without prejudice to the rights of the Bank to proceed in accordance with law in the event it is found that their calculations are correct.

In the event, the Petitioner fails to deposit the aforementioned amount within the period indicated above, this Order will be deemed to lose its force.

The Writ Petition is accordingly disposed of with a further observation that till the Assistant Registrar, Co-operative Society passes a fresh Order in the manner indicated above, the impugned Order dated 10.2.2009 shall be kept in abeyance.”

2. Factual matrix giving rise to the impugned order is as follows:
Respondent no. 6-bank had sanctioned a cash credit loan with a limit up to Rs. 45 lakhs to the appellant. The appellant did not service the loan and by a memo dated 26th February, 2008 the bank demanded a sum of Rs. 4,18,16,835.50P along with interest calculated up to 31st January, 2008 from him. As the amount remained unpaid, proceeding under section 128 of the West Bengal Co-operative Societies Act, 1983 (hereinafter referred to as ‘the Act of 1983’) was initiated before the Assistant Registrar, Cooperative Societies and order dated 10th February, 2009 directing payment of amount of Rs. 5,66,15,111.50 was passed. The aforesaid order came to be challenged by the appellant in the present writ petition.
3. During the hearing of the writ petition the appellant contended no enquiry had been undertaken by the Assistant Registrar in terms of section 128 of the Act of 1983. In view of such submission, certified copy of the proceeding was placed before the Hon’ble

Single judge. Upon perusal of the records the Hon'ble Single judge noted upon the requisition made by the bank the Assistant Registrar had given an opportunity of hearing to the parties and passed the impugned order.

4. It was also contended on behalf of the appellant that a copy of the statement of claim with regard to the cash credit account had not been handed over to the appellant. Appellant further submitted before the Hon'ble Single Judge that he was ready and willing to face the enquiry after supply of the statement of claim. In this backdrop the appellant and the bank agreed that upon deposit a sum of Rs. 2 crores within a month and handing over of the statement of claims, the order impugned shall be set aside. The enquiry shall stand revived if the amount was not deposited within the aforesaid time frame, the order shall remain unaltered. Subsequent to the passing of the order, on 6.4.2009 the matter was mentioned before the Hon'ble Single Judge by the appellant and on his prayer a typographical error with regard to time frame within which the aforesaid deposit is to be made was altered from 30 to 45 days.
5. Appellant failed to act in terms of the aforesaid consent order and did not deposit the sum of Rs. 2 crores. This prompted the respondent bank to initiate a contempt proceeding being WPCRC 423(W) of 2013. In the contempt proceeding, it was not the case of

the appellant that the aforesaid order was not passed on consent but that a sum over Rs. 2 crores had already been adjusted in the books of accounts. This prompted the Hon'ble Single Judge to obtain a report from appropriate authorities with regard to the correctness of such submission. The report shows the submission made on behalf of the appellant was incorrect and the Hon'ble Single Judge was constrained to issue a rule of contempt. Subsequently, the rule was discharged *inter alia* holding the submission of adjustment of over Rs. 2 crores in the books of accounts being made by the counsel without instruction from the appellant should not visit the latter with penalty.

6. Strongly relying on this observation made in the contempt proceeding Mr. Bhattacharya argues the consent recorded in the impugned order was without instruction from his client. The order passed by the Assistant Registrar is an unreasoned one and opportunity ought to be given to his client to present his case before the registrar afresh.
7. On the other hand, Mr. Chatterjee for the respondent bank submits the order impugned was indeed passed on consent and no appeal lies from a consent order. Moreover, appellant's wife who stood as surety had unsuccessfully challenged the proceeding initiated against her for recovery of the arbitral award wherein the award had been confirmed. Hence, it does not stand in the mouth

of the appellant to state that the award is illegal and the matter be reheard.

8. The primary issue which falls for decision is whether the order impugned was passed on consent of the parties. Bare perusal of the order shows the same was passed on agreement of the parties. However, learned senior counsel strenuously argues the recording was erroneous as no instruction had been obtained by his client to record consent.
9. It is trite no lawyer is entitled to make concession on behalf of his client save and except on the basis of instruction of the latter. To test whether the consent recorded in the order impugned was with the consent/knowledge of the appellant we have looked into the grounds of appeal as well as other attending circumstances including conduct of the parties. In the memo of appeal no ground has been taken that the consent recorded in the order impugned was without the knowledge/consent of the appellant. There is a presumption of correctness with regard to findings recorded in a judicial order. In the event the recording in the order that it was passed on agreement of parties was incorrect it was incumbent on behalf of the appellant to take out a petition before the Hon'ble Single Bench and correct the error. He singularly failed to do so. On the other hand on 6.4.2009 the matter was mentioned at his behest and it was brought to the notice of the Hon'ble Single Judge

that the time frame for deposit of a sum of Rs. 2 crores was incorrectly recorded. The aforesaid conduct of the appellant and absence of any ground in the memo of appeal that the consent recorded was without his knowledge leaves no doubt in our mind that the order impugned was indeed passed on consent and this desperate plea is being belatedly raised to justify the maintainability of the appeal.

10. Be that as it may, even on merits appellant has failed to make out a reopening case for the following reasons. Before the Hon'ble Single Judge it was his grievance that the statement of claim/accounts had not been supplied to him. During the appeal hearing, by order dated 31.3.2014 an earlier Bench recorded that the statements of accounts had been supplied to the appellant and the appellant agreed that he would take steps for payment of the amount determined by the treasury officer.
11. We are informed though the treasury officer intimated the appellant with regard to the pending dues, he failed and/or neglected to pay the amount as per his assurances and the interim stay granted earlier came to be vacated. The order vacating the injunction was affirmed by the Hon'ble Apex Court.
12. In such view of the matter we are of the opinion the grievance of the appellant that he had not been furnished with statements of accounts had been addressed and after going through the said

statement he had assured the earlier Bench that he would pay the dues as notified by the treasury officer. Subsequently, for reasons best known to him, appellant withdrew from such assurance.

13. It is also relevant to note that in the writ petition challenging proceedings initiated against the surety i.e his wife for recovery of the arbitral award, the amount was not set aside and the writ petition was dismissed.
14. In the light of these developments, we are of the view appellant has repeatedly reneged from his earlier undertakings/assurances and by resorting to such subterfuge is seeking to reopen the proceeding.
15. Authorities relied on behalf of the appellant are clearly distinguishable. In *Jamnabai vs. Fazalbhoy Heptoola & Ors.*¹ the lawyer was persuaded to record a concession to the prejudice of his client on the basis of notings made by the trial judge. The Privy Council held it is not clear whether the notings were correct which had prompted the unilateral concession.
16. In the present case, before the Hon'ble Single Judge learned counsel upon instruction had agreed to deposit a portion of the outstanding dues as a condition for remand of the matter before the Assistant Registrar. Subsequently, the matter was mentioned at the behest of the appellant to correct a typographical error with

¹ AIR 1923 PC 184

regard to time frame within which the deposit was to be made. Even no ground is taken in the memo of appeal that consent was recorded without knowledge of the appellant. Last but not the least, during the appeal hearing the appellant prompted the earlier Bench to stay the consent order on assurance that he will pay the amount notified by the treasury officer which he failed to do. These facts glaringly demonstrate the consent recorded by the Hon'ble Single judge was clearly within the knowledge of the appellant.

17. In *Deorao vs. Devkinandan Bhojraj Chandak & Anr.*² it has been held if the appellant disputes the consent order, bar under section 96(3) Civil Procedure Code does not apply. As noted earlier in the memo of appeal the appellant has not challenged the consent recorded in the order impugned.
18. For the aforesaid reasons we are of the opinion the order impugned was passed on consent and the appeal is liable to be dismissed as not maintainable.

(Gaurang Kanth, J.)

(Joymalya Bagchi, J.)

² AIR 1984 Bom 474