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

CIVIL APPLICATION (CAW) NO.1282/2023
IN
WRIT PETITION NO.557/2023

PETITIONER	Shri Mungsaji Maharaj Sahakari Soot Girni Limited a Co-operative Society registered under the Maharashtra Co-operative Societies Act, 1960 bearing Registration No.BULD/PRG/A/DH-6 having its Office at Anuradha Nagar, Sakegaon Road, Chikhali, District Buldhana – 443201 through its Authorised Signatory Shri Vishal S/o Gulabrao Mawal, aged about 45 Years, Resident of Santoshimata Mandir, Gandhi Nagar Ward No.18, Chikhali, Buldhana – 443201.
...VERSUS...	
RESPONDENT APPLICANT	The Buldhana District Central Co-Operative Bank Limited District Buldhana through its Managing Director.

Mr. C.S. Kaptan, Sr. Advocate a/b Mr. R.S. Kalangiwale, Advocate for petitioner
Mr. H.D. Dangre, Advocate for respondent/applicant

CORAM : BHARAT P. DESHPANDE, J.

Date of reserving the order : 12/03/2024
Date of pronouncing the order : 14/03/2024

O R D E R

1. Heard learned counsel for the parties. This is an application filed by the respondent for modification and clarification of the ad interim order passed by this Court dated 23/01/2023.

2. The petitioner while arguing the matter for *ad interim* relief, submitted that a judgment of the Cooperative Court, Akola dated 05/12/2019 was overturned by the Cooperative Appellate Court vide judgment dated 21/02/2022 without considering the important facts and aspects and more particularly the dispute regarding disbursement of the loan in question. The order dated 23/01/2023 was passed by this Court (Coram : Avinash G. Gharote, J.) after satisfying that the petitioner has made out a *prima facie* case for grant of *ad interim* protection with certain conditions and issuing notice for final disposal of the matter. The request for stay of the impugned award dated 21/02/2022 was granted subject to the petitioner depositing additional amount of Rs.1,00,00,000/- in this Court on or before 06/02/2023.

3. A farad-note dated 04/02/2023 shows that vide pursis dated 03/02/2023, the petitioner deposited a demand draft of Rs.1,00,00,000/- in this Court in compliance of the order dated 23/01/2023. Notices were issued to the respondent, who appeared and filed present application for modification-clarification of the *ad interim* order dated 23/01/2023.

4. Record shows that thereafter the matter was adjourned on the premise ground that the entire petition could be disposed of on merit at the admission stage itself. However, the application for modification was also kept along with it. Since the matter could not be taken up for final disposal though listed from time to time, the learned counsel for the respondent insisted that the application be taken up and accordingly this Couirt vide order dated 08/03/2024 directed that the application for modification will be taken up for adjudication.

5. Accordingly, the application was argued at length.

6. Mr. Dangre, learned counsel for the respondent would submit that the order dated 23/01/2023 was passed on the basis of incorrect statements and facts disclosed by the petitioner. He would submit that the award passed by the Appellate Court is well reasoned order wherein the said authority has considered that though a statement of accounts filed by the respondent cannot be taken into account as evidence, there are specific admissions on part of the petitioner which would prove that the loan amount was sanctioned and disbursed and thereafter the petitioner failed to repay such loan.

He would submit that this fact has been suppressed by the petitioner while arguing the matter at the time of *ad interim* relief.

7. Mr. Dangre would further submit that the first Appellate Court clearly observed that most of the documents are admitted by the petitioner and the balance-sheets and accounts of the petitioner also show the dues which are to be paid to the respondent-bank, which itself is an admission considered by the first Appellate Authority. He would submit that this aspect is also not disclosed while arguing the matter for *ad interim* relief.

8. Mr. Dangre would then submit that the contents of the petition are in fact incorrect as the first Appellate Authority after excluding the statement of accounts more particularly Exh.87 to 90 considered the other documents including the admission of the petitioner and accordingly passed the award in favour of the respondent.

9. Mr. Dangre would then submit that even the bailiff report and the contents therein are not properly addressed and only few facts which were in favour of the petitioner were disclosed by suppressing the facts in favour of the respondent-bank. He would submit that the petitioner gave undertaking to the bailiff, who is the

officer of the Court, that the entire decreetal amount would be paid in a short period. However, in the petition, the petitioner has distorted the version by claiming that part payment was made with the understanding that the petitioner would be able to file the petition challenging the order of the first Appellate Authority, which is not found in the undertaking. The petitioner has suppressed this aspect and therefore, the *ad interim* order needs modification.

10. Mr. Dangre would further submit that the order of the first Appellate Authority is in fact a money decree and the same cannot be stayed unless the judgment debtor – petitioner furnishes bank guarantee- security or deposit the entire decreetal amount in this Court. He finally submits that the cheque of Rs.12,00,00,000/- which was handed over to the bailiff is still with the respondent-bank but in view of the stay granted by this Court, the respondent-bank is unable to encash it. In the alternative, he would submit that the respondent – bank would be allowed to encash the cheque of Rs.12,00,00,000/-.

11. Per contra, Mr. Kaptan, learned senior counsel for the petitioner, while elaborating the main dispute would submit that the petitioner initially applied for grant of loan to Maharashtra State

Cooperative Bank, Mumbai in the year 1992 and at that time a loan of Rs.7,56,00,000/- was sanctioned. The State Government stood as guarantor to the said sanctioned loan only to the extent of Rs.4,40,00,000/- and accordingly, the Maharashtra State Cooperative Bank revised the loan and sanctioned it to Rs.4,40,00,000/- as midterm loan. The Apex Bank initially released first installment of Rs.1,55,00,000/- from the entire loan of Rs.4,40,00,000/-. However, thereafter the said loan was transferred to the respondent – bank by way of tri-party agreement.

12. Mr. Kaptan, learned senior counsel would then submit that though necessary documents were executed by the petitioner with the respondent-bank for sanctioning loan of Rs.2,30,00,000/- under four different heads, there was no actual disbursement of such loan. He claimed that the dispute filed by the respondent – bank before the Cooperative Court shows that the loan was sanctioned and disbursed. However, the petitioner challenged such contention by filing written statement and more specifically about disbursement of the loan amount.

13. Mr. Kaptan, learned senior counsel would then submit that the amount of loan sanctioned and disbursed by the Apex Bank

was paid directly to the said Apex Bank and accordingly, the dispute filed by the respondent was amended, thereby reducing the amount claimed from the petitioner. He would submit that on the date of dispute, no material was shown that the loan though sanctioned was disbursed or utilized by the petitioner at any point of time. He would submit that the sanctioning of the loan is quite separate and distinct from the disbursement of loan. For the purpose of disbursement, the bank is required to maintain the statement of account for each type of loan, which is clearly absent in the present matter.

14. Mr. Kaptan, learned senior counsel would then submit that though one-time settlement proposal was given by the petitioner, it was always subject to and without prejudice to the rights of the contentions of the petitioner. He would submit that in the written statement the petitioner categorically denied about disbursement of loan.

15. Mr. Kaptan, learned senior counsel would then submit that the learned Cooperative Court, after framing of the points and issues, recorded categorical findings on the basis of the evidence of the parties and more specifically admissions on the part of the Branch Manager of the respondent, who, in clear terms admitted

that there was no disbursement though sanctioned in favour of the petitioner.

16. Mr. Kaptan, learned senior counsel would then submit that such findings are based on the documents and admissions of the Manager of the respondent-bank and by discarding the statements of accounts which were produced at Exhs.87 to 90. He would submit that such documents are not admissible in evidence and this finding is also accepted by the first Appellate Authority. However, the first Appellate Authority failed to consider the difference between sanction and disbursement and by misconstruing the documents including the balance-sheets, came to a finding that there are admissions about the loan utilized by the petitioner.

17. Mr. Kaptan, learned senior counsel would further submit that the documents of sanction of loan are not at all disputed. However, the respondent-bank failed to prove the statements of accounts and any other material to show that in fact loan was disbursed and utilized by the petitioner at any point of time. He would submit that the old balance-sheets up to the year 1999 cannot be considered as admission for the loan which was sanctioned by the respondent-bank subsequently.

18. So far as bailiff report is concerned, Mr. Kaptan, learned senior counsel would submit that the petitioner handed over a postdated cheque of Rs.12,00,00,000/- and transferred an amount of Rs.1,00,00,000/- by Real Time Gross Settlement (RTGS) in favour of the respondent-bank. Though the petitioner gave assurance about the payment of the remaining balance, the officer of the respondent-bank noted and instructed the bailiff not to go ahead with the attachment of the property. Thus, the respondent-bank itself was satisfied with the amount of Rs.12,00,00,000/- by way of cheque and assurance given for payment of remaining amount on behalf of the petitioner. He, therefore, would submit that such bailiff report cannot be taken adversely as on concession given by the respondent-bank the attachment was halted.

19. Finally, Mr. Kaptan, learned senior counsel would submit that the decree passed by the first Appellate Court is itself required to be interfered with as there is absolutely no material to show that the loan was actually disbursed and utilized. However, as on date, the petitioner has handed over a cheque of Rs.12,00,00,000/- in favour of the respondent-bank, which itself amounts to giving of

security under Order 41 Rule 5 of the Civil Procedure Code for grant of stay to the impugned order.

20. A perusal of dispute application filed under Section 91 of the Maharashtra Cooperative Societies Act, 1960 would go to show that the respondent-bank claimed of granting loan to the petitioner in the year 1994 itself. The loan was thereafter renewed in the year 2000 and since there were outstanding amount, the dispute was raised for recovery of Rs.8,27,90,000/- as found in paragraph no.5 of the dispute application. It is also an admitted fact that in this paragraph no.5, a loan of Rs.2,42,44,000/- is shown as loan sanctioned by Maharashtra State Cooperative Bank, Mumbai. By way of amendment to the dispute application, this amount of Rs.2,42,44,000/- sanctioned by Maharashtra State Cooperative Bank, Mumbai was deleted from paragraph no.8 and outstanding amount is shown as Rs.5,19,92,149/-.

21. The petitioner contested such matter by filing written statement and raising preliminary objections. The main contention of the petitioner is that the loan though sanctioned, was never disbursed and utilized by the petitioner. After recording evidence of the Branch Manager, who admitted in clear terms that there was no

disbursement of the said loan in favour of the petitioner, learned Cooperative Court vide its judgment dated 05/12/2019 clearly observed that the respondent failed to prove that they are liable to recover Rs.5,19,92,149/- together with interest from the petitioner. The findings of the Cooperative Court would clearly go to show that along with documents the evidence of the officer of the bank was also considered.

22. The Appellate Court, on the other hand, vide its judgment dated 21/02/2022 recorded a finding that the petitioner has admitted about sanction and disbursement of four types of loans. This finding is found at various places in the impugned order.

23. Mr. Kaptan, learned senior counsel was right in pointing out that the petitioner never admitted about the disbursement of the loan though they admitted about sanctioning of the loan. Similarly, the first Appellate Court by considering the balance-sheets of the year 1995-96 and up to 1999 observed that there is admission on part of the petitioner by showing dues to be paid to the respondent – bank and also considered Exhs.87 to 90, which were inadmissible in evidence.

24. Perusal of the first Appellate Court's order would go to show that in the chart, the statements of accounts, which were considered as inadmissible in evidence are also mentioned which undisputedly show that not only on the admission but on the statements of accounts some reliance has been placed.

25. As far as the OTS application is concerned, it is clear that such proposal was forwarded without prejudice to the rights and contentions raised by the petitioner and thus only because the petitioner applied for one-time settlement, it would not amount to admitting of the fact. Even otherwise, one-time settlement proposal was in respect of the year 2008.

26. The grounds raised in the present petition *qua* the documents and the observations made by the first Appellate Court require serious consideration for the simple reason that the respondent-bank failed to produce the statements of accounts, which are very material to establish that the loan though sanctioned was utilized. It is also necessary to prove a part payment made and the actual amount outstanding as on the date of filing of the dispute.

27. In ***Bank of Baroda, Bombay Vs. Shree Moti Industries, Bombay and others 2009 (1) Mh.L.J. 282*** the learned Single Judge of this Court in paragraph nos.41 and 42 observed thus :-

> *"41. Having said so, now the question is - as to whether the plaintiff-bank has established its outstanding dues. No doubt, the bank has produced original documents, but could not establish proof thereof as per the Evidence Act. The documents are executed on 31st March, 1987 are nothing but typed copies of some unproved correspondence. There is no evidence on record to answer following questions : -*
> *(1) How much amount was borrowed by the borrowers based on the loan documents?*
> *(2) How much amount has been paid to them?*
> *(3) At what rate and to what extent interest is charged in the loan account of defendant No.1 by the bank?*
> *(4) How much amount has been repaid by the borrower from time to time?*
> *(5) What are the outstanding dues, due and recoverable from the defendants?*
> *42. One has to take judicial note of the fact that once the loan documents are obtained, the bank is required to open a loan account in its books of accounts. Borrower is permitted to operate that loan account. Borrower is permitted to withdraw and deposit amounts in his loan account. That is how, the borrower operates his loan account. The bank is entitled to debit its charges. Normally, the monthly or six monthly or yearly interest depending upon the contract between the parties is charged in the account. The balance is struck. Some times, it may be credit or some times it may be debit balance in the account. Reciprocal entries are to be found in bank account. From operation of bank account one has to find out as to how much amount is due and recoverable from the borrower. That is how, the liability is required to be determined. On date of the suit, the amount due and recoverable from the defendant-borrower is required to be established or proved by the plaintiff by producing extracts of loan account certified under the Bankers Books Evidence Act. "*

28. Apart from this, the powers of this Court under Order 41 Rule 5 of the Civil Procedure Code is in respect of an appeal and grant of stay to money decree on condition as provided under Sub Rule 2, which reads thus :-

> *"(2) **Stay by Court which passed the decree.** - Where an application is made for stay of execution of an appealable decree before the expiration of the time allowed for appealing therefrom, the Court which passed the decree may on sufficient cause being shown order the execution to be stayed."*

29. Thus, though the present matter is a writ petition wherein the petitioner is asking for stay of the execution of the warrant, which was issued for attachment of the property, this Court is empowered to exercise such discretion on satisfaction that substantial loss my result to the party applying for stay of execution unless such order is made and the application has been made without unreasonable delay and the security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.

30. Though the petitioner has made out a *prima facie* case and accordingly an order was passed at the time of issuing notice to the respondent, it is clear from the record that serious consideration is required for the issues raised in the present petition and if the

execution or the proceedings are not stayed, it would affect the petitioner substantially. The application is filed within time and there is no delay on the part of the petitioner.

31. As far as security is concerned, it is admitted that when the bailiff went for attachment of the properties of the petitioner, an amount of Rs.1,00,00,000/- was transferred by way of RTGS in the account of the respondent – bank and a cheque of Rs.12,00,00,000/- was handed over to the officer of the bank in presence of the bailiff as security, which is still available to the respondent and could be considered as a security furnished by the petitioner. Apart from this, an amount of Rs.1,00,00,000/- is further deposited by the petitioner in this Court. Thus, the record clearly goes to show that *prima facie* case is made out by the petitioner for grant of interim relief or confirmation of *ad interim* relief granted vide order dated 23/01/2023, till disposal of the present petition. The aspect of security is also necessary to be taken into account as a cheque of Rs.12,00,00,000/- is still in possession of the respondent-bank, which was handed over to them in presence of the bailiff. Such cheque could be kept alive as a security for the enforcement of the

decree or order passed by the first Appellate Court in case the petition is decided against the petitioner.

32. The contention raised by Mr. Dangre, learned counsel for the respondent that *ad interim* order was passed on incorrect facts, therefore, cannot be accepted. *Ad interim* order was passed not only on the basis of submissions advanced by the petitioner but also on perusal and on satisfaction of the *prima facie* case by the Court itself. Thus, on the above facts and circumstances, no case is made out for modification-alteration of the *ad interim* order.

33. Since the matter is now kept for final disposal at the admission stage itself, no interference is warranted with the *ad interim* order and accordingly, the civil application stands rejected. No order as to costs.

(BHARAT P. DESHPANDE, J.)

Wadkar