

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 1187 OF 2006
WITH
INTERIM APPLICATION NO. 11869 OF 2024

Jana Seva Sahakari Bank Ltd.

....*Petitioner*

: *Versus* :

1. M/s. Oskar Infosys India Pvt. Ltd.

2. Shri. Mandar M. Tendulkar,
Managing Director of Respondent No.1

3. Smt. Shubhangi Tendulkar
Director of Respondent No.1

4. Shri. Rajendra Badodekar
Director of Respondent No.1

5. Smt. Ratnaprabhu Gangan
Director of Respondent No.1

6. Shri. Hemant Hari Raut

7. Shri. Rajesh Balwant Shinde

8. Shri. Shirishchandra J. Patil

9. Smt. Subhangi B Sinkar

....*Respondents*

Mr. Sanjay Anabhawane, with Ms. Tejaswi Nandre, for the Petitioner.

Mr. Mohan V. Kanade, for Respondent No.5.

Mr. Sachin Mhatre with Ms. Rochelle Fiona Fernandes (through VC) i/by.
Mhatre law Associates, for Respondent No.9 .

CORAM : SANDEEP V. MARNE, J.

Reserved on : 20 January 2025.

Pronounced on : 28 January 2025.

JUDGMENT :

1) The Petitioner-Bank has filed the present petition challenging the judgment and order dated 6 December 2005 passed by the Cooperative Appellate Court dismissing Appeal No.718/2004 filed by it and confirming the order dated 16 June 2004 passed by the Co-operative Court in Misc. Application No.18/2004 taken out by the Petitioner in Dispute Case No. CC/IV/546 of 2000. Misc. Application No.18/2004 was filed by the Petitioner under the provisions of Section 152 of the Code of Civil Procedure, 1908 (**the Code**) seeking corrections in the order dated 20 March 2001 to the extent of non-passing of any direction against Opponent Nos.1 and 3 to 9 in the Dispute. By order dated 20 March 2001, the Co-operative Court awarded sum of Rs. 12,76,014/- with interest only against Opponent No.2-Mandar M. Tendulkar by recording the admission given by Opponent No.2. Petitioner noticed non-passing of Award against the rest of Opponents, and accordingly applied for correction in the order dated 20 March 2001. Petitioner's application is rejected by the Cooperative Court by order dated 16 June 2004, which is upheld by the Cooperative Appellate Court by order dated 6 December 2005.

2) Briefly stated, facts of the case are that Petitioner is a cooperative society registered under the provisions of Maharashtra Cooperative Societies Act, 1960 and also a Bank. Respondent No.1 is a limited company registered under the provisions of the Companies Act, 1956 and engaged in the business of telecom consultancy. Respondent No.2 is the Managing Director, whereas Respondent Nos.3 to 5 are

Directors of Respondent No.1-Company. Respondent No.1 applied to the Petitioner-Bank for disbursal of credit facility of Rs.17,25,000/- on 15 September 1998 and the Bank sanctioned loan of Rs.10,00,000/-. It is Bank's contention that Directors of the Company (Respondent Nos. 2 to 5) stood as guarantors and as well as Respondent Nos. 6 to 9 as sureties for repayment of the loan. Respondent Nos. 5 and 9 created equitable mortgage of their respective flats to secure repayment of loan. Respondent No. 5 mortgaged Flat No. A-102, Municipal Employees Arunachal Co-op. Hsg. Soc. Ltd. admeasuring about 630 sq.ft. at Pahadi, Aarey Road, Goregaon (E), Mumbai-400 063 (**Flat No. A-102**). Respondent No. 9 mortgaged residential Flat bearing No.1, Dyandhara Municipal Co-op. Hsg.Soc. Ltd. Tank Lane, Daftary Lane, Malad (E), Mumbai-400 097 (**Flat No. 1**).

3) Respondent No.1 committed default in repayment of the loan amount and accordingly Petitioners filed Dispute Case No. CC/IV/546 of 2000 against the Respondents for recovery of amount of Rs.12,76,014/- on 16 November 2000. On 20 March 2001, Respondent No.2-Shri. Mandar M. Tendulkar filed affidavit contending that he was likely to receive payment from his client-Tata Telecom by the end of May 2001 and expressed readiness and willingness to deposit the amount of Rs.12,76,014/- towards full and final settlement of Bank's claim by 30 May 2001. He accordingly sought permission to deposit the said amount by 30 May 2001. On the basis of the said Affidavit, the learned Judge of the Co-operative Court proceeded to deliver judgment and order dated 20 March 2001 on admission given by Respondent No.2 directing him to pay future interest on principal amount of Rs.12,76,014/- till the date of repayment. It appears that Respondent No.2 failed to pay the agreed amount of Rs.12,76,014/- to the Petitioner-Bank, who preferred Application dated 13 February 2002 for

correction of mistake occurring due to accidental slip or omission in not granting prayers prayed for in the Dispute Application. The said application of the Petitioner-Bank came to be rejected by the Co-operative Court by order dated 5 December 2002 holding that there was no clerical or arithmetical mistake in the order. The Cooperative Court however granted liberty to Petitioner to file a fresh application under Section 152 of the Code by specifying the rectification needed in the judgment. It appears that Respondent Nos. 5 and 9 preferred Appeal before the Co-operative Appellate Court challenging the original order dated 5 December 2002 to the extent of granting liberty to file a fresh application to the Petitioner-Bank under Section 152 of the Code. Appeal No.71/2003 preferred by Respondent Nos.5 and 9 came to be allowed by the Cooperative Appellate Court by judgment and order dated 26 March 2004 setting aside the order dated 5 December 2002 to the extent of observations made therein. The Cooperative Appellate Court held that no case was made out for exercising jurisdiction under Section 152 of the Code and that the liberty granted in favour of the Petitioner to file a fresh application under Section 152 was erroneous.

4) It appears that despite the Cooperative Appellate Court withdrawing the liberty granted in favour of the Petitioner to file a fresh application under Section 152 of the Code, Petitioner filed Misc. Application No.18/2004 in the Cooperative Court for correction of errors due to accidental slip or omission in the judgment and order dated 20 March 2001. The Cooperative Court rejected the Misc. Application No.18/2004 by its order dated 16 June 2004. Petitioner unsuccessfully challenged the order dated 16 June 2004 before the Cooperative Appellate Court, by filing Appeal, which has been dismissed by Cooperative Appellate Court by order dated 6 December 2005.

5) This is how Petitioners have challenged order dated 6 December 2005 passed by the Cooperative Appellate Court, as well as order dated 16 June 2004 passed by the Cooperative Court in Misc. Application No.18/2004 in the present Petition.

6) By order dated 2 March 2006, the petition has been admitted. Petitioner has filed Interim Application No. 11869/2024 for restraining Respondent Nos.5 and 9 from creating third party rights in respect of Flat No. A-102 of Respondent No. 5 and Flat No. 1 of Respondent No. 9. When the Interim Application came up for hearing, both the learned counsel agreed that the petition itself could be taken up for final disposal. As per the request made by the learned counsel appearing for the rival parties, the petition is taken up for final hearing.

7) Mr. Anabhawane, the learned counsel appearing for the Petitioner-Bank would submit that the Co-operative Court and Co-operative Appellate Court have erred in not entertaining the application preferred by the Petitioner for correction of accidental errors in the order dated 20 March 2001. That there is obvious error in the order dated 20 March 2001 as the Award is made only against Respondent No.2, ignoring the position that the Petitioner-Bank sought recovery of outstanding loan amount against Respondent Nos.1 to 9. That Respondent No.1 is the main borrower who has escaped any liability on account of passing of erroneous direction in the order dated 20 March 2001. That Respondent Nos.5 and 9 have mortgaged their immovable properties in favour of the Petitioner-Bank and on account of their non-inclusion in the operative direction of order dated 20 March 2001, the Bank is unable to recover the decretal amount from them. He would submit that the Bank is unable to recover the outstanding loan amount and interest from Opponent No.2, who filed

misleading Affidavit before the Co-operative Court and thereafter failed to pay the agreed amount of Rs.12,76,014/-. That non-issuance of direction for payment of outstanding amount against Respondent Nos.1, 3 to 9 is an obvious error as the Bank did not withdraw the Dispute *qua* the said Respondents and even if an admission is made by Respondent No.2, the Cooperative Court ought to have continued the dispute *qua* rest of the Respondents by passing a decree not only against Respondent No.2. That the Petitioner-Bank is suffering grave prejudice on account of accidental error committed by the Co-operative Court. That Section 152 of the Code empowers the Court to correct the obvious error in the judgment and the Co-operative Court has erroneously refused to exercise jurisdiction vested in it to correct the error, which is more than obvious. He would therefore pray that the final judgment and Award dated 20 March 2001 be suitably amended under the provisions of Section 152 of the Code by passing order for recovery against Respondent No.1, 3 to 9 as well.

8) The petition is opposed by Mr. Kanade, the learned counsel appearing for Respondent No.5. He would submit that the Bank expressly consented for passing of the Award dated 20 March 2001 only against Respondent No.2 and now it cannot turn around and seek to rope in the other Respondents in the Award. That the Bank has made no efforts for recovering the decretal amount of Rs.12,76,014/- from Respondent No.2 and is unnecessarily litigating against Respondent No.5, who is not even party to the compromise. That on account of passing of Award only against Respondent No.2, Respondent No.5 is discharged *qua* all his obligations arising out of contracts executed with the Bank. He would submit that the Bank cannot blow hot and cold by first making an attempt to recover the loan amount from Respondent No.2 and after failing to do so, file an

application for roping in rest of the Respondents. He would pray for dismissal of the petition.

9) Mr. Mhatre, the learned counsel appearing for Respondent No.9 would also oppose the petition and adopt the submissions made on behalf of Respondent No.5.

10) Rival contentions of the parties now fall for my consideration.

11) Petitioner sanctioned and disbursed credit facilities of Rs.10,00,000/- in favour of Respondent No.1-Company of which Respondent Nos.2 to 5 were Directors, whereas Respondent Nos.6 to 9 stood as sureties for repayment of the loan. Dispute No.CC/IV/546 of 2000 was filed for recovery of amount of Rs.12,76,014/-. In the Dispute Application, apart from Respondent Nos. 1 to 9, Petitioner also impleaded the two Societies wherein the 2 flats of Opponent Nos.5 and 9 are situated claiming that they had created equitable mortgage in respect of the said Flat Nos.A-102 and Flat No.1. In his Dispute Application, Petitioner made following prayers:

THE DISPUTANTS, THEREFORE, PRAY

a) that this Hon'ble Court be pleased to declare that the Opponents are Jointly and severally liable to pay to the disputants a sum of Rs.12,76,014/- as on 14th November, 2000 and further interest on Re.12.76,014/- at the rate of 16% per annum from 15th November, 2000 till the full and final payment and/or realisation of the same.

b) that this Hon'ble Court be pleased to order and decree that the Opponents pay to the Disputants a sum of Rs.12,76.014/- as on 14th November, 2000 and further interest at the rate of 16% per annum from 15th November. 2000 till the full and final payment and/or realisation of the same:

c) that this Hon'ble Court be pleased to declare that the Opponents have created an equitable mortgage in favour of the Disputants by delivering

the title documents with the Disputants of the properties viz. Residential Flat bearing No.A-102, Municipal Employees Arunachal Co-operative Housing Society Ltd, admeasuring about 630 sq.ft. at Pahadi, Aarey Road, Goregaon (East), Mumbai 400 063 belongs to opponent No.5 and Residential Flat bearing No.1, Dyandhara Municipal Co-operative Housing Society Ltd., Tank Lane, Daftary Lane, Malad (East), Mumbai 400 097 belongs to Opponent No.9 alongwith Fixture, Furniture and stocks.

d) that this Hon'ble court be plesed to pass an order of attachment before judgment of the property tendered by the Opponents as security to the Disputants, viz. Residential Flat bearing No.A-102, Municipal Employees Arunachal Co-operative Housng Society Ltd. admeasuring about 630 sq.ft. at Pahadi, Aarey Road, Goregaon (East), Mumbai-400 063 belong to opponent No.5 and Residential Flat bearing No.1 Dyandhara Municipal Co-operative Housing Society Ltd., Tank Lane, Daftary Lane, Malad (East), Mumbai-400 097 belongs to Opponent No.9 alongwith Fixture, Furniture and stocks.

e) that pending the hearing and final disposal of the dispute this Hon'ble court be pleased to pass an order of permanent injunction to restrain the Opponents, their servant, agents and persons claiming through or under them from disposing off, dealing with or parting with the possession of the property, creating third party interest in respect of the securities tendered to the Disputants, viz. Residential flat bearing No.A-102, Municipal Employees Arunachal Co-operative Housing Society Ltd., admeasuring abut 630 sq.ft. at Pahadi, Aarey Road, Goregaon (East), Mumbai-40 063 belongs to opponent no.5 and Residential Flat bearing No.1, Dyandhara Municipal Co-operative Housing Society Ltd., Tank Lane,. Daftary Lane, Malad (East) alongwith fixture, Furniture and stocks.

f) that pending the hearing and final disposal of the dispute this Hon'ble Court be pleased to pass an order of permanent injunction to restraining the opponent no.10 and 11 and their office bearers be restrained from transferring and/or dealing in any manner whatsoever with records of Residential Flat bearing No.A-102, Municipal Employees Arunachal Co-operative Housing Society Ltd., admeasuring 630 sq.ft at Pahadi, Aarey Road, Goregaon (East), Mumbai-400 063 belongs to opponent no.5 and Residential Flat bearing No.1, Dyandhara Municipal Co-operative Housing Society Ltd., Tank Lane,. Daftary Lane, Malad (East), Mumbai-400 097 belongs to Opponent No.9.

g) that a fit and proper person be appointed as Receiver for the mortgaged properties viz. Residential Flat bearing No.A-102, Municipal Employees Arunachal Co-operative Housing Society Ltd., admeasuring about 630 sq.ft. at Pahadi, Aarey Road, Goregaon (East), Mumbai-400 063 belongs to Opponent no.5 and Residential Flat bearing No.1., Dyandhara Municipal Co-operative Housing Society Ltd, Tank Lane, Daftary Lane, Malad (East), Mumbai-400 097 belongs to Opponent No.9 alongwith fixture, Furniture and stocks.

h)that interim and ad-interim orders in terms of prayers (c), (d), (e), (f) and (g) above be granted.

- i) for costs of this dispute be provided to the Disputants.
- j) for further and other reliefs as the nature and circumstances of the case may require as this Hon'ble Court may deem fit be granted to the disputants.

12) Petitioner also filed application seeking attachment before judgment in respect of the two Flats. The Dispute Application was filed on/or about 16 November 2000. It is not clear at this juncture as to whether all the Respondents (Opponents in the Dispute) had opportunity of filing their Written Statements opposing the Dispute or not. Within 4 months of filing of the Dispute Application, an Affidavit was filed by Mr. Mandar M. Tendulkar on behalf of Respondent Nos. 1, 2 and 3 on 20 March 2001 as under:

I, Shri. Mandar M. Tendulkar, Opponent NO.2, Managing Director of Opponent No.1, for myself and on behalf of Opponent No.3, state on solemn affirmation as under :

1. I say that the Disputant Bank has filed the above Dispute for the relief claimed therein. I say that I, the Opponent No.2, for myself and on behalf of Opponent Nos.1 and 3 say that I am likely to get a payment from my client-Tata Telecom by the end of May, 2011. Hereto annexed and marked Exhibit-'A' is the xerox copy of letter addressed by my client to me.
2. I say that in the Dispute Application, the Disputant Bank has claimed a sum of Rs.12,76,014/- as on 14/11/2000. I say that I am ready and willing to deposit the said amount in full and final settlement of Disputant Bank's claim by 30th May, 2001.
3. In the abovesaid premises, I say that I may be permitted to deposit the abovesaid claim of the Disputant Bank by 30th May, 2011 in full and final settlement of the claims raised by the Disputant Bank in the abovesaid Dispute.

13) Based on the Affidavit dated 20 March 2001 signed by Opponent No.2 and filed on behalf of Opponent Nos. 1, 2 and 3, the learned Judge of the Cooperative Court proceeded to pass judgment and order dated 20 March 2011 which reads thus:

1) The present dispute is filed by the disputants against the Opponents for the recovery of sum of Rs.12,75,014-00 as and 14-11-2000 and further interest at the rate of 16% p.a. from 15-11-2000, till the full and final payment realisation of the same.

2) It is the case of the disputant that, the Disputants are Cooperative Bank, registered under the M.C.S. Act, 1960. All the Opponents are members and share holders of the disputant bank. The Opp. No.10 and 11 are joined as parties under the relevant provisions of M.C.S. Act, 1960. The Disputant submitted that Opp.No.1 is a company incorporated under the company's Act. And the Opp. No.2 to 5 are the Directors of Opp.No.1 and also stood as guarantors of Opp.No.1, in their personal capacity. The Opponent applied for credit facility of Rs.17,25,000/- vide their application dt.15/9/1998. And disputant sanctioned term loan facility to the tune of Rs.10 lakhs to the Opponent, subject to mortgage of residential premises of Opp.No.5 to 9 and hypothecation of stocks, furniture fixtures and machinaries. The term loan was to be repaid in 60 equal monthly instalment. The Disputant submitted that, the Opponent become irregular in repaying the instalment granted to them in a loan account. The disputant sent them several demand notice and requested them to clear up the arrears of dues. But to no avail. Hence, they are in arrears of some aggregating of Rs.12,76,014/- The Disputant submitted that as Opponents avoiding payment of dues and trying to dispose of the property, therefore the disputant has no other alternative to file the present dispute. And prayed for the reliefs mentioned earlier.

3) All the Opponents are duly and properly served, and they appeared before the Court on 20/3/2001, the Opp.No.1, 2 and 3 filed an affidavit and admitted the claim. This affidavit is filed by the Opp.No.2 on behalf of Opp.No.1 and 3 and submitted that he is likely to get a payment from his client Tata Telecom by the end of May 2001. He further submitted that he is ready and willing to deposit the amount of Rs.112,76,014/- in full and final settlement by 30-5-2001.

4) I perused the application filed by the Opp.No.2, heard Ld. Adv. For Opp.No.2 as well as Ld. Adv. for the disputants. As the Opp.No.2 admitted the claim, and ready and willing to pay the bank by 30/5.2001 and **the disputant bank have no objection for the same.**

(emphasis added)

14) Thus, the learned Judge has recorded consent of the Petitioner-Bank for passing of judgment and order dated 20 March 2001 only against Opponent No.2.

15) After securing judgment and order dated 20 March 2001 against Respondent No.2, the Bank did not immediately realise that there was any mistake or error therein and maintained silence for a

period of almost one year. On 13 February 2002, Petitioner-Bank was advised to file application under Section 152 of the Code seeking following prayers:

7. In these circumstances the Disputants pray that this Hon'ble Court be pleased to correct the mistake occurred due to accidental slip or omission by granting the prayers which are prayed in the Dispute Application.

16) The prayer was premised on following averments:

4. On 20th March, 2001 the Opponent No.2 by his affidavit preferred for and on behalf of Opponent Nos.1 to 3 submitted to this Hon'ble Court that Opponent No.1 is likely get a payment from Tata Telecom by the end of May 2001 and are ready and willing to deposit the amount claimed by the Disputant Bank in full and final settlement by 30th May, 2001. The other opponents have not opposed the said proposal.

5. The said proposal was also not objected by the Disputants and this Hon'ble Court was pleased to pass an order on the basis of the admission made by the Opponent Nos.1 to 3 on 20th March, 2001.

6. The Disputants state that due to oversight this Hon'ble court accidentally slip or omitted to deal with the prayers prayed by the disputants in the above matter.

17) Petitioner's application came to be rejected by the learned Judge of the Co-operative Court by order dated 5 December 2002 holding that on 16 June 2001, Petitioner had applied for speaking to the minutes of the main judgment which application was opposed by the contesting Respondents and the application remained pending. During pendency of the said application, Petitioner-Bank filed application under Section 152 of the Code for correction of mistake occurring due to accidental slip or omission. The Court observed that the application was moved without issuing notice to the other side and the judgment could not be rectified without giving notice to Respondent No.2 who would be affected by the rectification. The Court held in paras-6 and 8 as under:

6. In the present application, disputant has nowhere mentioned that which mistakes have been occurred due to accidental slip or omission. The disputant is only seeking to correct the mistakes occurred due to accidental slip or omissions. After perusal of the judgment and admission of Opp. No.2, it is clear that only interest is not mentioned in the judgment. Award is not prepared. Though in the affidavit filed by Opp.No.2 on behalf of Opp.No.1 and 3, it is mentioned that, Opp.No.2 has tendered this affidavit on their behalf. But no Power of Attorney or any authority is annexed with this affidavit. My predecessor, herself has verified and recorded the statement of Opp.No.2, from this statement it is evidence that Opp.No.2 had no intention to admit claim on behalf of Opp.No.1 and 3. In the judgment, though it is mentioned that Opp.No.1, 2 and 3 filed affidavit, which is filed by Opponent No.2, on behalf of Opp.No.1 and 3. It is observed by the Court that, Opp.No.2 has submitted that he is ready and willing to deposit amount. The court has observed that Opp.No.2 admitted the claim and bank has no objection for the same. **There is no ambiguity in this judgment (except the mention of rate of interest).** The dispute is still pending against remaining opponents.

8. As far as rectification of Judgement is concerned, interest is required to be mentioned. However, this application is moved by the disputant, without issuing notice to the other side. In the present case, Judgment cannot be rectified without giving notice to the Opp.No.2 who is going to be affected by this rectification in respect of interest. Discussing as above, I am rejecting this application **with liberty to the disputant to file fresh application u/s. 152 of C.P.C. and directing to give specifications for the rectification of Judgment.**

(emphasis added)

18) Since, liberty was granted by the Co-operative Court to the Petitioner-Bank to file a fresh application under Section 152 of the Code, Respondent Nos. 5 and 9 preferred Appeal No.71/2003 before the Appellate Court challenging the order dated 5 December 2002. The Appeal came to be allowed by the Co-operative Appellate Court on 26 March 2004 holding that carrying out any rectification or clarification of the judgment would require substitution of the same by different judgment and Award and that therefore the clarification/rectification sought for by the Petitioner-Bank was beyond the purview of Section 152 of the Code. The relevant findings recorded by the Co-operative Appellate Court are as under:

Point No.2

After reading Sec.152 of C.P.C. one can realize that u/Sec.152 Clerical, arithmetical mistakes only can be corrected. After reading Judgment and Order of the Trial Court dated 20.3.2001 and **after seeing clarification sought by the Respondent bank one can not come to the conclusion that, said clarification is of clerical mistake or arithmetical mistake. However, said clarification is granted judgment and Award passed by the Trial Court requires to be substituted by different judgment and award, and as such no conclusion can be drawn that, clarification and rectification sought by Respondent bank is of nature and can be given by exercising powers u/sec.152 of C.P.C. My finding to this point for determination is- No.**

Point No.3

I find, if clarification and rectification are given as described by Respondent bank, total Judgment and Award is required to be substituted. **Only remedy for the Respondent bank is to file appeal against said Judgment and Award as Trial court also cannot review its own order. Respondent Bank had made mistake by giving no objection for passing Award, as passed by the Trial Court. Hence, it is for Respondent bank to consider, whether to file appeal after getting delay condoned, or to seek any other remedy but clarification and rectification asked can not be given by the Trial Court, as discussed earlier. Hence, appeal require to be allowed. Considering peculiar circumstances, no order as to costs be passed.**

(emphasis and underlining added)

19) Thus the Cooperative Appellate Court specifically recorded that the Petitioner-Bank had committed a mistake in giving no-objection for passing of the Award. It held that the only possible remedy for it was to file an appeal against the Award. The Appellate Court held that the Trial Court cannot review its Award. It accordingly set aside the order dated 5 December 2002 passed by the Trial Court, which had granted liberty to the Petitioner-Bank to file a fresh application under Section 152 of the Code.

20) Once the liberty granted in favour of the Petitioner-Bank to file a fresh application under Section 152 of the Code was withdrawn by the Appellate Court, the Petitioner-Bank could not have filed Misc.

Application No.18/2004 once again seeking correction of alleged mistake in the original Award. However, after passing of the order dated 26 March 2004 by the Appellate Court, Petitioner was advised to once again move the Trial Court and file Misc. Application No.18/2004 on 29 April 2004, in which following pleadings and prayers were made:

I, Milind Moreshwar Deo, the Officer of the Disputant Bank do hereby on solemn affirmation state as under :

1. I say and submit that the Disputants herein filed a suit against the Opponents for recovery of their dues on or about 15 November, 2000 and also filed an interim application for issuing attachment before judgment against the properties mortgaged by the Opponent No.5 and Opponent No.9 by way of security for the repayment of loan facility granted to Opponent No.1. I crave leave to refer to and rely upon the said dispute application alongwith the interim application.
2. I say and submit that this Hon'ble Court on 20th March, 2001 was pleased to pass an Order in the above matter.
3. I say and submit that the Disputants preferred an application under section 152 of C.P.C. 1908 as there was errors due to accidental slip or omission of the Order and Judgement dated 20th March, 2001, on 13th February 2002.
4. I say and submit that on 5th December, 2002 this Hon'ble Court was pleased to pass an order of the aforesaid application dated 13th February 2002 whereby the said application was rejected. I crave leave to refer to and rely upon the said Order and judgment as and when produced.
5. I say and submit that the Opponent Nos.5 and 9 had preferred an appeal before Appeal No.71 of 2003 in the Appellate Court against the said order dated 5th December, 2002. I crave leave to refer to and rely upon the said Appeal as and when produced.
6. I say and submit that the appellate Court vide its order dated 26th March, 2004 set aside the Order of the 5th December , 2002. Hereto annexed and marked Exhibit-"1" is the copy of the Appellate Court's Order dated 26th March, 2004 in Appeal No.71 of 2003.

In these circumstances, the Disputants prays that this Hon'ble Court be pleased to correct the errors due to accidental slip or omission of the Order and Judgment passed in the above matter by this Hon'ble Court on 20th March, 2001 by granting all the prayers prayed by the Disputants in their dispute application.

21) Thus, after narrating the history of filing of appeal by Respondent Nos. 5 and 9 and passing of order dated 5 December 2002 by the Appellate Court, Petitioner-Bank straightaway made a prayer for correction of error due to accidental slip or omission by granting all the prayers prayed for by it in the Dispute Application. This prayer was repetition of the prayer earlier made in the previous application, which is clear from the following:

Prayer in Application dated 13-02-2002	Prayer in Application dated 29-04-2004
In these circumstances the Disputants pray that this Hon'ble Court be pleased to correct the mistake occurred due to accidental slip or omission by granting the prayers which are prayed in the Dispute Application.	In these circumstances, the Disputants prays that this Hon'ble Court be pleased to correct the errors due to accidental slip or omission of the Order and Judgment passed in the above matter by this Hon'ble Court on 20 th March, 2001 by granting all the prayers prayed by the Disputants in their dispute application.

22) In my view, once the liberty granted in favour of the Petitioner to file a fresh application under Section 152 of the Code was withdrawn by the Co-operative Appellate Court, it was improper for the Petitioner to file Misc. Application No.18/2004 under Section 152 of the Code. In the petition, there is absolutely no justification pleaded by the Petitioner as to why and how Misc. Application No.18/2004 was filed. The relevant averments relating to passing of order dated 26 March 2004 by the Appellate Court and filing of Misc. Application No.18/2004 are to be found in paras-6 and 7 of the petition which read thus:

6) Being aggrieved by the first impugned order, Respondent Nos.5 and 9 herein preferred an Appeal before the Maharashtra Co-operative Appellate Court (hereinafter for brevity's sake referred to as the Appellate Court") on the ground that Org. Respondent No.5 were never the directors of Respondent No.1-Company and that wrong order was passed against the said Respondents inspite of the fact that Respondent No.2 for self and on behalf of Respondent Nos.1 and 3 admitted the claim of Petitioners. Hereto

annexed and marked is a copy of the said Appeal of Respondent No.5 and 9. The Hon'ble Appellate Court by its order dated 26th March 2004 allowed the said Appeal and set aside the order of the IVth Co-operative Court dated 5th December 2002 (hereinafter for sake of convenience referred to as "the second impugned order"). Hereto annexed and marked as Exhibit "G" is a copy of the said order dated 26th March 2004. The Appellate Court allowed the said Appeal and observed that the clarification rectification sought for by the Petitioners herein in the Application under Section 152 of Civil Procedure Code was not maintainable and that the remedy of the Petitioners bank was to prefer an appeal against the Judgment/Decree.

7) The Petitioners also preferred Misc. Application being Application No.18 of 2004 before IVth Co-operative Court on the basis that the order dated 5th December 2002 was already set aside and therefore, there was caused incidental slip and/or omission to be corrected by grant of the prayer made by the Petitioners in the Dispute Application. Hereto annexed and marked as Exhibit "H" is a copy of the Petitioners' said application. By order dated 16th June 2004, the IVth Co-operative Court dismissed the said application holding that there is no clerical or arithmetical error arising out of incidental slip or omission on the part of Court while passing the order. Hence the Application was not maintainable and was liable to be dismissed. Hereto annexed and marked as Exhibit "I" is a copy of the said order dated 16th June 2004 (hereinafter referred to as "the third impugned order").

23) In my view, the Petitioner-Bank could not have filed Misc. Application No.18/2004 once the liberty granted to it by the Co-operative Court vide order dated 5 December 2002 was withdrawn by the Appellate Court on 26 March 2004. The filing of Misc. Application No.18/2004 itself was improper. The Co-operative Court has rightly rejected the said application by order dated 16 June 2004.

24) Even if the issue of maintainability of Misc. Application No.18/2004 is to be momentarily ignored, I do not find patent error in the order dated 16 June 2004 passed by the Co-operative Court. Once the Petitioner consented to passing of judgment and order dated 20 March 2001 only *qua* Respondent No.2, the Bank cannot then turn around and say that passing of order only *qua* Respondent No.2 was a mistake on the part of the Court. It is a deliberate act on the part of the Petitioner-Bank to secure order for recovery of amount only against

Respondent No.2. The Court has not committed any mistake and the Court has acted on conscious call made by the Petitioner to secure order of recovery only against Respondent No.2. By doing so, the Bank consciously gave up its claims against the remaining Respondents. Here, the provisions of Explanation-V to Section 11 of the Code of Civil Procedure, 1908 would apply with full force. Under Explanation-V to Section 11, any relief claimed in the plaint, which is not expressly granted by the decree is deemed to have been refused. Thus, the Court has consciously refused the decree in favour of rest of the Respondents on the basis of choice made by the Petitioner-Bank itself. The Petitioner-Bank had a choice of seeking a partial decree only against Respondent No.2 based on his Affidavit and could have continued the Dispute Application *qua* the other Respondents. This is true, more so because the Dispute Application contained specific prayer seeking a declaration of existence of equitable mortgage *qua* the two flats. The Bank was well aware that in the Affidavit dated 20 March 2001 filed by Respondent No. 2 on behalf of only Respondent Nos. 1 to 3, no arrangement was made *qua* the said equitable mortgages. The Affidavit was not signed on/or on behalf of Respondent Nos. 5 and 9, who are owners of the said flat. The Bank still made a conscious choice to give up the prayers relating to mortgage *qua* Respondent Nos.5 and 9 and decided to get the loan amount recovered only against Respondent No.2. This is thus not a case involving any clerical or arithmetical mistake in the judgment and order arising out any accidental slip or omission which can be corrected in exercise of jurisdiction under Section 152 of the Code.

25) In the applications dated 13 February 2002 or 29 April 2004, there is no averment that the bank's consent was erroneously recorded. Even before me, Petitioner has not come up with a case that it never

gave consent for passing of the order *qua* Respondent No.2 or that it prayed for continuation of the Dispute Application *qua* rest of the Respondents.

26) In my view, therefore there is no patent error in the order dated 16 June 2004 passed by the Co-operative Court dismissing Misc. Application No.18/2004. The Co-operative Appellate Court has correctly appreciated this position and has dismissed Petitioner's Appeal No.718/2004 by order dated 6 December 2005. In absence of any perversity in the findings recorded by the Co-operative Court and the Co-operative Appellate Courts or any error in exercise of jurisdiction, there is no warrant for interference in the impugned orders in exercise of extraordinary jurisdiction of this Court under Article 227 of the Constitution of India. The Petition is devoid of merits. It is accordingly **dismissed** with no order as to costs. Rule is discharged.

27) With dismissal of the petition, nothing would survive in Interim Application No.11869/2024 filed for the purpose of seeking restraint order against Respondent Nos.5 and 9 from creating third party rights or dispose of Flat No. A-102 and Flat No.1. Interim Application also stands disposed of.

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[SANDEEP V. MARNE, J.]