

(2012) 12 BOM CK 0022

Bombay High Court

Case No: Writ Petition No. 2166 of 1998

Yashomandir Sahakari Patpedhi
Maryadit, Mumbai

APPELLANT

Vs

Ashok Raj Enterprises and
Others

RESPONDENT

Date of Decision: Dec. 6, 2012

Acts Referred:

- Constitution of India, 1950 - Article 226, 227
- Maharashtra Co-operative Societies Act, 1960 - Section 91, 97

Citation: (2013) 3 MhLj 39

Hon'ble Judges: B.P. Dharmadhikari, J

Bench: Single Bench

Advocate: Rahul Rao instructed by Ms. U.M. Jhaveri, for the Appellant;

Final Decision: Dismissed

Judgement

B.P. Dharmadhikari, J.

Matter was called out in first half and as nobody appeared for respondents, it was passed over. It is called out again. Challenge in this petition filed under Articles 226 and 227 of Constitution of India is to the judgment and order dated 20th February, 1998 passed by Co-operative Appellate Court Bombay in Appeal No. 466/1997 remanding matter back to Co-operative Court to work out the exact liability of respondent No. 1 borrower. Respondents 2 and 3 are his Guarantors.

2. Learned Counsel for petitioner has invited attention to the dispute u/s 91 of Maharashtra Co-operative Societies Act as filed by the petitioner Credit Co-operative Society for recovery of amount of Rs. 1,30,212.85 due on 31st December, 1990. Attention is also invited to the judgment of Co-operative Court dated 11th November, 1993 wherein it is recorded that respondent No. 1 remained present, accepted liability, did not dispute quantum and sought instalment. Accordingly,

Co-operative Court permitted petitioner Bank to recover abovementioned amount with future interest upon it calculated at 18% from 1st January, 1991 and granted instalment of Rs. 4000/- per month + additional monthly component towards interest amount. The payment of instalment was to commence from 10th December, 1993.

3. It is further pointed out that this judgment and order of Co-operative Court passed upon admission was then questioned almost after four years in Appeal No. 466/1997 before Co-operative Appellate Court at Bombay u/s 97 and in that appeal on 16th October, 1997 ex parte stay was granted. The petitioner was advised to move an application before President of State Cooperative Appellate Court seeking transfer of matter. Accordingly, Transfer Application No. 71/1997 was filed and during its hearing the respondent No. 1 agreed to repay entire amount if petitioner gave true and correct statement of accounts. In view of this as he gave away right to repay the amounts in instalments and entire amount was agreed to be repaid, the petitioners agreed and President accordingly appointed one Advocate for looking into the accounts of petitioner-society and to work out the liability of respondent No. 1. Court Commissioner then determined that liability at Rs. 2,58,011/- as on 20th November, 1997 and submitted his report on 18th December, 1997.

4. The matter, thereafter, was placed before very same Member of Cooperative Appellate Court. Before that Court respondent No. 1 produced a statement of accounts prepared by a C.A. and the Appellate Court then noted that certain payments made by respondent No. 1 were not accounted for by Court Commissioner. The Co-operative Appellate Court found it difficult to reconcile the position and, therefore, remanded matter back to Co-operative Court for taking decision within period of three months by setting aside the judgment and order dated 11th November, 1993.

5. The petitioners also state that as a part of very same judgment, the Cooperative Appellate Court in absence of proper justification and without recording proper reasons has condoned huge delay of four years in entertaining the appeal. Learned Counsel submits that delay needed to be condoned by passing the separate order first and thereafter only the Co-operative Appellate Court could have entertained appeal on merits. The exercise as undertaken is, therefore, unsustainable.

6. It is urged that as delay has not been properly explained and this Court has already made some observations in that respect after hearing both sides on 4th May, 1998, the order of remand should be quashed and set aside. Appeal filed after four years should be dismissed and petitioner should be permitted to proceed further with recovery as per judgment of Co-operative Court dated 11th November, 1993.

7. Perusal of order dated 4th May, 1998 passed by this Court shows that after hearing both sides this Court has recorded a prima facie finding that order dated

20th February, 1998 passed by Member, Maharashtra State Co-operative Appellate Court, Mumbai is wrong. It has noted that judgment and order dated 11th November, 1993 was questioned after four years and there was no cogent and convincing reason for condoning that delay. It has also noted that at the instance of respondents Court Commissioner was appointed to take accounts and hence it was not necessary for the learned Member of Co-operative Appellate Court to attempt to reconcile the accounts again. In view of these findings the said judgment dated 20th February, 1998 impugned in present petition came to be stayed.

8. Learned Counsel for petitioner upon instructions has stated that as on date the amount in excess of Rs. 4,88,592/- is recoverable from respondent No. 1 and though proceedings are going on, he is avoiding the same by putting in some hurdle.

9. The perusal of impugned judgment dated 20th February, 1998 clearly shows that after recording findings on merits, the Co-operative Appellate Court has approached the question of condonation of delay. The delay has been condoned without recording relevant events to gather why period of four years was required by respondent No. 1. His mere contention that he approached Society on many times for getting correct figure of outstanding amount and alleged non-co-operation by Society has been accepted. His statement that he did not repay the balance amount has also been accepted. The Co-operative Appellate Court has overlooked the fact that the judgment of Co-operative Court dated 11th November, 1993 impugned in appeal before it was practically on admission of liability and as such the Co-operative Court had asked him to pay the amount in monthly instalments. In view of this judgment and direction there was no question of the said liability being questioned thereafter by him. The story that he approached Co-operative Society, sought details etc., therefore, could not have been accepted lightly. The law on the point of condonation of delay is well settled. Unless and until delay is first condoned, the Court does not get jurisdiction to embark upon enquiry on merits of the matter. Here it appears that the Co-operative Appellate Court has first considered the merits of the controversy and then proceeded to condone the delay. This exercise could not have been undertaken simultaneously. Reference can be made to judgment of this Court in case of [Mathuradas Mohota College of Science Vs. R.T. Borkar and Others](#), and in the case of [National Buildings Construction Corporation Ltd. and Another Vs. Regional Labour Commissioner \(Central\)](#), .

10. Moreover, the Co-operative Appellate Court was supposed to examine the challenge to the judgment and order dated 11th November, 1993 delivered by Co-operative Court. The appointment of Court Commissioner and accounts settled by him was in pursuance to orders passed in an application moved for transfer of present petitioners. The validity or correctness thereof was not the issue involved in Co-operative Appeal. Judgment of Co-operative Court delivered on admission could not have been displaced due to developments in transfer application.

11. Thus, the Co-operative Appellate Court could not have given any importance to the report of Court Commissioner or to then objection raised by respondent No. 1 to the same. It ought to have restricted its consideration to the challenge to validity of judgment and award dated 11th November, 1993. The Co-operative Appellate Court has not even touched that aspect. In this situation, I find the impugned judgment dated 20th February, 1998 unsustainable. Same is accordingly quashed and set aside. Appeal No. 466/1997 is dismissed. Judgment and award dated 11th November, 1993 passed by Co-operative Court, Bombay in Dispute No. CC-1/71/91 is hereby restored. Rule made absolute accordingly. No costs.