

(2016) 07 GUJ CK 0006

In the Gujarat High Court

Case No : Special Civil Application No. 2628 of 2012 with Special Civil Application No. 2629 of 2012

Ambica Nager Co-Operative

APPELLANT

Vs

Gujarat State Co-Operative

RESPONDENT

Date of Decision : 01-07-2016

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Gujarat Co-operative Societies Act, 1961 — Section 99 (4)
Gujarat Co-operative Societies Rules, 1965 — Rule 41 A

Citation : (2016) AIRCC 2945 : (2016) 3 GCD 2142 : (2016) 3 GujLH 43

Hon'ble Judges : Smt. Abhilasha Kumari, J.

Bench : Single Bench

Advocate : Mr. Sunit Shah for Mr. NV Gandhi, Advocate, for the Petitioners No. 1 - 2; Mr. Pushpadatta Vyas, Advocate, for the Respondents No. 1; Rule Served, for the Respondents No. 1 - 3

Final Decision : Disposed Off

Judgement

Smt. Abhilasha Kumari, J.—Both these writ petitions filed under Articles 226 and 227 of the Constitution of India raise identical issues. As they were heard together, they are being decided by a common judgement.

2. The petitioners are aggrieved by the impugned common judgement passed by the Board of Nominees, the third respondent herein, as upheld by the Gujarat State Co-operative Tribunal, the second respondent, whereby conditional leave to defend the respective Summary Lavad Suits filed by the first respondent, the Gujarat State Co-operative Housing Finance Corporation Limited, has been granted on the payment of 20% of the amount claimed.

3. For the sake of convenience, the facts as obtain in Special Civil Application No. 2628 of 2012, may be noticed first. Petitioner No. 1, Ambika Nagar Cooperative Housing Society, is a Co-operative Society registered under the provisions of the Gujarat Cooperative Societies Act, 1961 ("the Act" for short) and the Rules

framed thereunder. Petitioner No. 2 is the President of petitioner No. 1. The first respondent filed Summary Lavad Suit No. 531 of 2005 under Section 99(4) of the Act before the third respondent against the petitioners, for the recovery of an amount of Rs. 2,51,18,831.54 paisa. Respondent No. 1 had advanced finance to the petitioners for the construction of tenements which were allotted to sixty-three members of petitioner No. 1 Society. The loan advanced was to the tune of Rs. 59,82,000/-. The construction of residential units was to be undertaken under the HUDCO Project, on the terms and conditions stated therein. The loan amount was required to be repaid upon completion of the construction of the residential units. To secure the loan amount, the petitioners had mortgaged land bearing Survey Nos. 441 TO 444, ad-measuring 11904 sq. meters upon which 90 residential units were constructed, vide registered Mortgage Deed dated 05.09.1988, in favour of the first respondent. Upon service of summons in the Summary Lavad Suit, the petitioners/defendants appeared before the third respondent and filed an application seeking unconditional leave to defend the suit. The defence put up by the petitioners was that the mortgaged property was sub-mortgaged to HUDCO by the first respondent/plaintiff, therefore, HUDCO is a necessary party to the proceedings. In the absence of HUDCO, the suit is not maintainable. It was also stated by the petitioners that HUDCO had approached the Debt Recovery Tribunal, Ahmedabad (DRT) by filing Original Application No. 248 of 2005 against the petitioners and the first respondent, to recover the outstanding amount arising from the same loan transactions. It was alleged by the petitioners that the first respondent had suppressed this fact in the suit. The first respondent filed a counter affidavit to the application for leave to defend preferred by the petitioners. After considering the rival stands of parties, the third respondent passed the impugned order dated 05.03.2008, below Exh.23, granting conditional leave to defend the Summary Lavad Suit upon the deposit of 20% of the amount. Aggrieved by the said order, the petitioners filed Revision Application No. 41 of 2008 under Section 150(9) of the Act, before the second respondent Tribunal, which has been rejected by the impugned order dated 05.01.2012.

4. The factual matrix of Special Civil Application No. 2629 of 2012 is almost similar. The petitioner No. 1 Virat Nagar Co-operative Housing Society, had taken a loan of Rs. 17,22,000/- from the first respondent by mortgaging land bearing Survey Nos. 442 and 475/A paiki, ad-measuring 6065 sq. meters, upon which sixty-three residential units were constructed by way of a registered Mortgage Deed dated 05.09.1988. In the Summary Lavad Suit No. 532 of 2005 filed by the first respondent, the petitioners filed an application for leave to defend. The third respondent, vide the order dated 05.03.2008, granted conditional leave to defend upon the payment of 20% of the amount. The petitioners filed Revision Application No. 42 of 2008 before the second respondent. By its order dated 05.01.2012, the second respondent rejected the same. The above orders passed by the third and second respondents are impugned in the present petition.

5. Before this Court, elaborate submissions have been advanced by learned

counsel for the respective parties, as summarised below.

6. Mr. Sunit Shah, learned counsel appearing for Mr. N.V. Gandhi, on behalf of the petitioners, has submitted that in paragraph two of the order passed by the third respondent, a clear finding has been recorded that the petitioners have raised triable issues. As per the settled position of law once such a conclusion is reached, the third respondent ought to have granted unconditional leave to defend the suit instead of imposing a condition to pay 20% of the amount in both the cases. It is submitted that the provisions of the Code of Civil Procedure, 1908 (CPC) are applicable to proceedings under the Act, therefore, the law governing the procedure to be adopted under Order-37 of the CPC ought to have been followed by the Board of Nominees and no condition ought to have been imposed.

6.1 To buttress the above submission, learned counsel for the petitioners has placed reliance upon the following judgements :

(1) M/s. Mechalec Engineers and Manufacturers v. M/s. Basic Equipment Corporation reported in AIR 1977 SC 577.

(2) Mrs. Raj Duggal v. Ramesh Kumar Bansal reported in AIR 1990 SC 2218.

(3) Uma Shankar Kamal Narain and another v. M.D. Overseas reported in (2007) 4 SCC 133.

(4) M/s. Fixity Packaging Industries Pvt. Ltd. and Ors. v. Udyen Jain (HUF) reported in AIR 2010 SC (Supp.) 411.

(5) M/s. Sunil Enterprises and another v. SBI Commercial and International Bank Ltd. reported in AIR 1998 SC 2317.

(6) State Bank of Hyderabad v. Rabo Bank reported in AIR 2015 SC 3820.

6.2 It is submitted that once the Board of Nominees concludes that triable issues have been raised, the principles of law laid down in paragraph-8(b) of M/s. Mechalec Engineers and Manufacturers v. M/s. Basic Equipment Corporation (supra) would be applicable and the defendants/petitioners are entitled to unconditional leave to defend the Summary Lavad Suit. It is contended that the Tribunal has also lost sight of this position of law and has erred in upholding the judgement of the Board of Nominees.

7. Mr. Pushpadatta Vyas, learned advocate appearing for the first respondent, has submitted that the procedure dealing with a Summary Suit under Section 99(4) of the Act has been specifically laid down in Rule 41A of the Gujarat Co-operative Societies Rules, 1965 ("the Rules" for short). Sub-clause (ii) of Clause (2) of Rule 41A of the Rules clearly stipulates that after reading the pleadings of parties, the documents produced by them and upon hearing them, the award may be passed or leave to defend granted to the opponent, subject to the condition that the opponent shall deposit thirty-three and half percent amount of the claim of the dispute or such less amount as may be fixed by the Board of Nominees after taking into consideration the facts and circumstances of the

dispute.

7.1 It is contended that a specific procedure has been laid down under the Rules as to how the dispute referred to in sub-section (4) of Section 99 is to be dealt with. Under Rule 41A (2)(ii), the Board of Nominees has no power to grant unconditional leave to defend but has been vested with discretion whether to impose a condition for the payment of thirty-three and half percent of the amount, or a lesser amount. Under the circumstances, the Board of Nominees has not committed any error of law in imposing a condition for the payment of 20% of the amount and the Tribunal has correctly confirmed the said order.

7.2 Learned counsel for the first respondent further contended that it is not the case of the petitioners that they have not borrowed the amount from respondent No. 1, or that no amount is outstanding. Almost thirty years have passed since the loan was taken in the year 1988 and no amount, whatsoever, has been paid by the petitioners. By litigating, the petitioners are only trying to delay the payment.

7.3 In support of the above submissions, learned counsel for the first respondent has placed reliance on the following judgements :

(1) Modi Harishkumar Hasmukhlal v. Peoples Cooperative Credit Society Ltd. reported in (2014) 3 GLH 778.

(2) Dipakbhai Prahladbhai Patel & Anr v. Rameshbhai Tribhovanbhai Patel & Anr. reported in 2016 (2) GLR 976.

8. This Court has heard learned counsel for the respective parties at length, considered the rival submissions and perused the documents on record.

9. The only issue arising for determination before the Court is whether, after recording in its judgement that triable issues have been raised by the petitioners (original defendants), the third respondent Board of Nominees was justified in granting conditional leave to defend the summary proceedings under the Act and whether the second respondent Tribunal has rightly confirmed the judgement of the third respondent, or not ?

10. At the outset, it would be pertinent to notice a few relevant provisions of the Act.

11. Section 168 of the Act provides the express power for the enactment of rules for carrying out the purposes of the Act, by notification in the Official Gazette. Clause (b) of Sub-section (2) of Section 168 stipulates that such rules can be made "to provide for all matters expressly required or allowed by this Act to be prescribed by rules." The rule making power to provide for all matters permissible under the Act flows from this provision. The Rules framed under the Act have been amended from time to time. By way of the Gujarat Co-operative Societies (First Amendment) Rules, 1997 (the Amendment of 1997), Rule 41A and Form K have been inserted in the principle Rules framed in 1965.

12. Section 99 of the Act provides the procedure for the settlement of disputes and the power of the Registrar, his Nominee or Board of Nominees. This provision is relevant for the case in hand and is being reproduced as below :

"99. Procedure for settlement of disputes and power of Registrar, his nominee or board of nominees :

(1) The Registrar, or his nominee or board of nominees, hearing a dispute under section 98 shall hear the dispute in the manner prescribed, and shall have power to summon and enforce attendance of witnesses including the parties interested or any of them by the same means and as far as possible in the same manner as provided in the case of a Civil Court by the Code of Civil Procedure, 1908 (V of 1908).

(2) Except where a dispute involves complicated question of law or fact, no legal practitioner in his capacity as a legal practitioner or as person holding a power of attorney shall be permitted to appear on behalf of any party at the hearing of a dispute.

(3)(a) If the Registrar or his nominee or board of nominees is satisfied that a person, whether he be a member of the society or not, has acquired any interest in the property of a person who is a party to a dispute, he may order that the person who has acquired the interest in the property may join as a party to the dispute ; and any decision that may be passed on the reference by the Registrar or his nominee or board of nominees shall be binding on the party so joined, in the same manner as if he were an original party to the dispute.

(b) Where a dispute has been instituted, in the name of the wrong person or where all the defendants have been not included, the Registrar or his nominee or board of nominees may, at any stage of the hearing of the dispute if satisfied that the mistake was bona fide, order any other person to be substituted or added as a plaintiff or a defendant, upon such terms as he thinks just.

(c) The Registrar, his nominee or board of nominees may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Registrar, his nominee or board of nominees, as the case may be, to be just, order that the name of any party improperly joined whether as plaintiff or defendant be struck out, and that the name of any person who ought to have been joined whether as plaintiff or defendant or whose presence before the Registrar, his nominee or board of nominees as the case may, may be necessary in order to enable the Registrar, his nominee or board of nominees effectually and completely to adjudicate upon and settle all the questions involved in the dispute, be added.

(d) Any person who is a party to the dispute and entitled to more than one relief in respect of the same cause of action may claim all or any of such reliefs; but if he omits to claim all such reliefs, he shall not forward claim for any relief so omitted, except with the leave of the Registrar, his nominee or board of

nominees.

(4) Notwithstanding anything contained in sub-section (1), (2) and (3), the following disputes or class of disputes, if the plaintiff so desires, shall be decided summarily by the Registrar, or his nominee or board of nominees, in such manner as may be prescribed, namely :

(a) any dispute for recovery of debt upon promissory note, hundi, bill of exchange or bond, with or without interest, whether agreed upon under such instrument or under the bye-laws ;

(b) any dispute for recovery of a fixed sum of money or in the nature of debt, with or without interest, arising on a written contract ;

(c) any dispute for recovery of price of goods sold and delivered, where the rate, quality and quantity are admitted in writing.

(d) any dispute for recovery of dues payable by a member of a housing society towards contribution for construction of the house, or any dispute in respect of repayment of any loan, interest on loan, ground rent, local authority taxes, sinking fund, water charges, electrical charges, maintenance and upkeep charges or charges for other services rendered by the society and the interest on such arrears, payable under the written agreement or under the bye-laws.

(5)(a) The defendant shall not be entitled to defend the dispute unless he obtains leave from the Registrar, his nominee or, as the case may be, the board of nominees, in such manner as may be prescribed.

(b) The Registrar, his nominee or board of nominees may grant the leave under clause (a) on such conditions, as he thinks fit.

(c) The Registrar, his nominee or board of nominees shall not refuse the leave to defend the dispute unless he is satisfied that the facts disclosed by the defendant do not indicate that he has substantial defence to raise or that the defence intended to be put by him is frivolous or vexatious.

(d) Whether the defendant fails to obtain such leave or fails to appear or defend the dispute in pursuance of such leave, the averments made in the plaint and documents produced therewith shall be deemed to have been admitted by the defendant :

Provided that the Registrar, his nominee or board of nominees in his discretion requires any fact so admitted to be proved otherwise than by such admission.

(e) Where the conditions on which leave to defend is granted are not complied with by the defendant, the Registrar, his nominee or, as the case may be, board of nominees may pass an award against him, as if he has not been granted such leave.

(6) The Registrar, his nominee or, as the case may be, board of nominees shall under special circumstances set aside the award passed by him and if necessary

stay or set aside execution, and may grant leave to the defendant to appear and defend the disputes, if it seems reasonable so to do, and on such terms as he thinks fit."

(emphasis supplied)

13. As can be seen from a perusal of the above provision of law, sub-sections 99(4) and (5) deal with the procedure to be adopted by the Board of Nominees while dealing with summary proceedings. By way of the amendment of 1997, Rule 41A has been inserted, which reads as below :

"Rule 41-A. Summary procedure for deciding disputes :

(1) In dispute referred to in sub-section (4) of Section 99, the disputant shall in addition to the normal averment in Form K make the following averment namely :-

(a) that the claim of the disputant is for recovery of liquidated sum of money only and no other relief beyond the scope of this rule is claimed in the dispute ;

(b) that the disputant believes that there is no valid or bona fide defence to his claim.

(2) (i) Within ten days from the service of a notice calling upon the opponent to obtain leave from the Registrar to appear and defend the claim, the opponent or such of the opponents as are interested in defending the claim shall apply to the Registrar by an affidavit or a declaration for the leave setting out the facts on which he relies, and what triable issues are likely to arise. The opponent shall in such application disclose all the documents which he considers important from his point of view. A copy of such application shall be served on the disputant and he shall have a right to file a rejoinder in the form of an affidavit or declaration and place before the deciding authority. Such material as in his opinion supports his contentions.

(ii) The Registrar, on reading the affidavits and declarations and on hearing the parties and their pleadings and considering the documents relied on and produced by them, may pass an award or grants leave to defend to such of the opponents, subject to the condition that the opponent shall deposit thirty three and half percent amount of the claim of the dispute or such less amount as may be fixed by the Registrar after taking into consideration the circumstances and facts of the case."

(emphasis supplied)

14. As is clear from a reading of Rule 41A (2)(ii), the procedure prescribed under sub-section (4) of Section-99 of the Act for dealing with summary proceedings, has been further elaborated upon and every stage that is required to be followed has been expressly provided for in detail, in order to carry out the purposes of the principal section. Rule 41A (2)(ii) clearly stipulates that after perusal of the affidavits, documents, declarations and pleadings of parties and considering the

said documents, the Registrar may pass an award or grant leave to defend to the opponents subject to the conditions that the opponent shall deposit thirty three and half percent of the claim of the dispute or such lesser amount as may be deemed fit on the facts and in the circumstances of the case. A plain reading of this provision, which is a clear and unambiguous one, leaves no manner of doubt that the Registrar, his Nominee or Board of Nominees is empowered to grant only conditional leave to defend. The only discretion vested in him by the rule is whether the opponent should be directed to pay thirty three and half percent or a lesser amount, looking to the facts and circumstances of the case.

15. Mr. Sunit Shah, learned counsel for the petitioners has submitted that the principles of law enunciated by the Supreme Court in the judgements cited by him with respect to Order 37 of the CPC dealing with the procedure for summary suits, would prevail.

16. Order 37 Rule (3) of the CPC reads thus :-

"3. Procedure for the appearance of defendant.

(1) In a suit to which this Order applies, the plaintiff shall, together with the summons under rule 2, serve on the defendant a copy of the plaint and annexures thereto and the defendant may, at any time within ten days of such service, enter an appearance either in person or by pleader and, in either case, he shall file in Court an address for service of notices on him.

(2) Unless otherwise ordered, all summonses, notices and other judicial processes, required to be served on the defendant, shall be deemed to have been duly served on him if they are left at the address given by him for such service.

(3) On the day of entering the appearance, notice of such appearance shall be given by the defendant to the plaintiffs pleader, or, if the plaintiff sues in person, to the plaintiff himself, either by notice delivered at or sent by a pre-paid letter directed to the address of the plaintiff's pleader or of the plaintiff, as the case may be.

(4) If the defendant enters an appearance, the plaintiff shall thereafter serve on the defendant a summons for judgement in Form No. 4A in Appendix B or such other Form as may be prescribed from time to time, returnable not less than ten days from the date of service supported by an affidavit verifying the cause of action and the amount claimed and stating that in his belief there is no defence to the suit.

(5) The defendant may, at any time within ten days from the service of such summons for judgement, by affidavit or otherwise disclosing such facts as may be deemed sufficient to entitle him to defend, apply on such summons for leave to defend such suit, and leave to defend may be granted to him unconditionally or upon such terms as may appear to the Court or Judge to be just :

Provided that leave to defend shall not be refused unless the Court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defence to raise or that the defence intended to be put up by the defendant is frivolous or vexatious :

Provided further that, where a part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit shall not be granted unless the amount so admitted to be due is deposited by the defendant in Court.

(6) At the hearing of such summons for judgement.

(a) if the defendant has not applied for leave to defend, or if such application has been made and is refused, the plaintiff shall be entitled to judgement forthwith ;
or

(b) if the defendant is permitted to defend as to the whole or any part of the claim, the Court or Judge may direct him to give such security and within such time as may be fixed by the Court or Judge and that, on failure to give such security within the time specified by the Court or Judge or to carry out such other directions as may have been given by the Court or Judge, the plaintiff shall be entitled to judgement forthwith.

(7) The Court or Judge may, for sufficient cause shown by the defendant, excuse the delay of the defendant in entering an appearance or in applying for leave to defend the suit.]"

17. Sub-rule (5) and the first proviso thereto vest discretion in the Court to grant unconditional leave to defend. With regard to the provisions of Order 37 CPC the law is, by now, well-developed and has been highlighted by learned counsel for the petitioners in the judgements relied upon by him.

18. In the judgement in the case of M/s. Mechalec Engineers and Manufacturers v. M/s. Basic Equipment Corporation (supra), the Supreme Court has held as below :

"8. In *Sm. Kiranmoyee Dassi v. Dr. J. Chatterjee* (1945) 49 Cal WN 246 at p. 253, Das. J., after a comprehensive review of authorities on the subject, stated the principles applicable to cases covered by order 37 C.P.C. in the form of the following propositions (at p. 253) :

"(a) If the Defendant satisfies the Court that he has a good defence to the claim on its merits the plaintiff is not entitled to leave to sign judgement and the defendant is entitled to unconditional leave to defend.

(b) If the Defendant raises a triable issue indicating that he has a fair or bona fide or reasonable defence although not a positively good defence the plaintiff is not entitled to sign judgement and the defendant is entitled to unconditional leave to defend.

(c) If the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is to say, although the affidavit does not positively and immediately make it clear that he has a defence, yet, shews such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiff's claim the Plaintiff is not entitled to judgement and the Defendant is entitled to leave to defend but in such a case the Court may in its discretion impose conditions as to the time or mode of trial but not as to payment into Court or furnishing security.

(d) If the defendant has no defence or the defence set up is illusory or sham or practically moonshine then ordinarily the Plaintiff is entitled to leave to sign judgement and the Defendant is not entitled to leave to defend.

(e) If the defendant has no defence or the defence is illusory or sham or practically moonshine then although ordinarily the Plaintiff is entitled to leave to sign judgement, the Court may protect the Plaintiff by only allowing the defence to proceed if the amount claimed is paid into Court or otherwise secured and give leave to the Defendant on such condition, and thereby show mercy to the Defendant by enabling him to try to prove a defence".

19. In *Mrs. Raj Duggal v. Ramesh Kumar Bansal* (supra), the Supreme Court has held that :

"3. Leave is declined where the Court is of the opinion that the grant of leave would merely enable the defendant to prolong the litigation by raising untenable and frivolous defences. The test is to see whether the defence raises a real issue and not a sham one, in the sense that if the facts alleged by the defendant are established there would be a good or even a plausible defence on these facts, if the Court is satisfied about that leave must be given. If there is a triable issue in the sense that there is a fair dispute to be tried as to the meaning of a document on which the claim is based or uncertainly as to the amount actually due or where the alleged facts are of such a nature as to entitle the defendant to interrogate the plaintiff or to cross-examine his witnesses leave should not be denied. Where also, the defendant shows that even on a fair probability he has a bona fide defence ; he ought to have leave. Summary judgements under Order 37 should not be granted where serious conflict as to matter of fact where any difficulty on issues as to law arises. The Court should not reject the defence of the defendant merely because of its inherent implausibility or its inconsistency."

20. In *Uma Shankar Kamal Narain and Another v. M.D. Overseas* (supra), similar principles were reiterated by the Supreme Court in the following terms :-

"8. The position in law has been explained by this Court in *Milkhiram (India) (P) Ltd. v. Chamanlal Bros. and Mechalec Engineers & Manufacturers v. Basic Equipment Corpn.* In *Sunil Enterprises and Anr. v. SBI Commercial & International Bank Ltd.* the position was again highlighted and with reference to the aforesaid decisions it was noted as follows : (SCC pp. 35657, para -4)

"(a) If the defendant satisfied the Court that he has a good defence to the claim on merits, the defendant is entitled to unconditional leave to defend.

(b) If the defendant raises a triable issue indicating that he has a fair or bona fide or reasonable defence, although not a possibly good defence, the defendant is entitled to unconditional leave to defend.

(c) If the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is, if the affidavit discloses that at the trial he may be able to establish a defence to the plaintiff's claim, the Court may impose conditions at the time of granting leave to defend the conditions being as to time of trial or mode of trial but not as to payment into Court or furnishing security.

(d) If the defendant has no defence, or if the defence is sham or illusory or practically moonshine, the defendant is not entitled to leave defend.

(e) If the defendant has no defence or the defence is illusory or sham or practically moonshine, the Court may show mercy to the defendant by enabling him to try to prove a defence but at the same time protect the plaintiff imposing the condition that the amount claimed should be paid into Court or otherwise secured."

The said principles were recently highlighted in *Defiance Knitting Industries (P) Ltd. v. Jay Arts.*"

21. In *M/s. Fixity Packaging Industries Pvt. Ltd. and Ors. v. Udyen Jain (HUF)* (supra), the Supreme Court has held that :

"10. We, therefore, with respect, are not in a position to agree with the finding of the learned trial judge that leave should be granted by way of mercy, and are, therefore, not in a position to interfere therewith as the plaintiff Page respondent did not challenge that aspect of the matter before the High Court. We are, therefore, of the opinion that clause (c) of paragraph 4 in *Sunil's case* (supra) which reads as under :

"(c) If the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is, if the affidavit discloses that at the trial he may be able to establish a defence to the plaintiff's claim the court may impose conditions at the time of granting leave to defend the conditions being as to time of trial or mode of trial but not as to payment into court of furnishing security." is applicable to the facts and circumstances of this case. We are not oblivious of the fact that ordinarily the conditions imposed for grant of leave to defend in a suit filed under Order 37 of the Code of Civil Procedure should not be unduly onerous when leave to defend is granted. The conditions imposed thereunder unsustainably should not be onerous. As a result whereof, the defendant would not be able to defend the action for all intent and purpose. Each case, however, has to be considered on its own merits. We, therefore, are of the opinion that it is a fit case where while quashing order passed by the learned trial judge as also the High Court, We, in exercise of our jurisdiction under Article 136 of the

Constitution of India, should modify the impugned order in the following terms :-

(i) The appellant shall deposit a sum of Rs. 1,10,00,000/- (Rupees One Crore ten lakhs only before the learned trial judge within a period of two months from today.

(ii) Within the aforementioned period, the appellant should deposit a further sum of Rs. 90,00,000/- (Rupees ninety lacs only) which shall be deposited before the trial judge who shall in turn invest the same in a fixed deposit so as to enable the successful party i.e. the plaintiff-respondents or the complainants in the other two cases referred to us hereinbefore to be compensated from the said option, in the event, either the suit or the said complaint petition are decided in their favour."

22. Similar principles of law have been enunciated by the Supreme Court in M/s. Sunil Enterprises And Another v. SBI Commercial and International Bank Ltd. (supra), which has been referred to in the above-quoted judgement and in State Bank of Hyderabad v. Rabo Bank (supra).

23. There can be no dispute regarding the principles of law laid down in the judgements relied upon on behalf of the petitioners, insofar as the provisions of Order 37 of the CPC is concerned. However, there is a marked difference in the procedure provided for summary suits in the CPC and that provided for under the Act and Rules under consideration, especially after the insertion of Rule 41A (2) (ii), insofar as the discretion to grant leave to defend is concerned. The wider discretion that was envisaged under Section-99 (5)(b) enabling the Registrar, his Nominee or Board of Nominees to grant leave to defend on certain conditions has been considerably narrowed down after the insertion of Rule 41A. Section 5(c), whereby the Registrar, his Nominee or the Board of Nominees is enjoined not to refuse leave to defend unless the defendant fails to raise a substantial defence or such defence is frivolous or vexatious, has now been circumscribed after the Amendment of 1997 and insertion of Rule 41A2(ii), whereby leave to defend can only be granted on the condition of deposit of thirty-three and half percent or a lesser amount, as the facts and circumstances of the case warrant. The Registrar or Board of Nominees can only grant conditional leave to defend. The only discretion that can be exercised is whether the defendant should be asked to deposit thirty-three and half percent or a lesser amount. In the present case, the Board of Nominees has exercised this discretion and granted leave to defend on the condition of deposit of 20% of the amount claimed.

24. The difference between the procedure envisaged under Order 37 of CPC and under Section 99 subsections (4) and (5) of the Act read with Rule 41A (2) (ii) has been noticed by this Court in the case of Modi Harishkumar Hasmukhlal v. Peoples Cooperative Credit Society Ltd. (supra) (Coram : C.L. Soni, J.), relied upon by Mr. Pushpadatta Vyas, learned counsel for respondent No. 1. The relevant extract of the judgement reads thus :

"12. There appears a difference between the provisions of Order 37 of the Code

and Section 99(4)(5) of the Act as well as Rule 41A of the Rules as regards condition for leave to defend and the effect of non-compliance of the condition. Under the provisions of Order 37, discretion is available with the Court to grant unconditional leave whereas sub-section (4) and (5) of section 99 of the Act with Rule 41-A mandates to impose condition of deposit of 33.5% amount of the claim of dispute or such less amount as may be fixed by the learned Board of Nominees. Clause (e) of sub section (5) of section 99 of the Act provides that noncompliance of the condition may result in passing of award against the defendant as if the defendant has not been granted leave to defend.

13. From the above provisions of the Act and Rules, what appears is that the defendant would lose his right to defend the suit if he does not comply with the condition of deposit of the amount for leave to defend. Such right would not be revived if the order imposing condition for leave to defend is allowed to attain finality by not challenging the same by way of revision application during the pendency of the suit."

25. Further, in *Dipakbhai Prahladbhai Patel & Anr v. Rameshbhai Tribhovanbhai Patel & Anr.* (supra), also relied upon by learned counsel for respondent No. 2, this Court (Coram : C.L. Soni, J.) has held as below :

"10. All the provisions of the Code do not apply to the lavad suit filed before Board of Nominee for dispute covered under Section 96 of the Act. Wherever the legislature has intended to apply any provision of the Code for the proceedings of the Lavad suit, it is specifically so provided in the provisions of the Act and except where it is so specifically provided, the provisions of the Code shall not apply to the proceeding of the Lavad Suit in general. In any case, even in the Code, there is no provision for rejection of the suit on the ground of either limitation or nondisclosure of the cause of action. What is provided in the Code is for framing of issues under Order-XIV either of fact or law. Sub-Rule (2) of Order 14 of the Code provides that where issues of both of law and fact arise in the same suit and the Court is of the opinion that the case or any part thereof may be disposed of on the issue of law only, it may try that issue first if that issue relates to the jurisdiction of the Court or a bar to the suit created by any law for the time being in force and for that purpose, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined and may deal with the suit in accordance with the decision on that issue. Though the legislature has not made such provision applicable for the lavad suit filed before the Board of Nominee, however even if on issue of limitation or on the issue of bar to the suit, created by any law, if the Board of Nominee wants to decide the suit, it has to try such issue with other issues which may require adducing of evidence by the parties. Thus, there is no provision for outright rejection of the suit on the issue of limitation or non-disclosure of cause of action. In any case, since the provision of Order-XIV has no application to the suit filed before the Board of Nominee under the provisions of the Act, even such opportunity of raising the issue of limitation or issue of bar of suit created by any law is not

available so as to decide such issues first in the Lavad suit filed under the Act."

26. From the above discussion, it emerges that principles of law enunciated in the judgements of the Supreme Court relied upon by the learned counsel for the petitioners, while holding the field in respect of Order 37 of the CPC, would not be applicable to the present proceedings under Section 99(4) and (5) of the Act read with Rule 41A2(ii) of the Rules for the reason that the Act and Rules envisage a particular procedure for granting leave to defend in summary proceedings, the scope of which is considerably narrower than that contemplated under Order 37 of the CPC.

27. The Act under consideration is a specific statute enacted with the object of consolidating and amending the law relating to Co-operative Societies in the State of Gujarat. It addresses the specific issues arising in the Co-operative Sector. The CPC is a general Code of procedure to be followed in civil matters. By Section 99(1) of the Act, the Registrar, his Nominee or the Board of Nominees have been vested with power to summon witnesses and compel them to give evidence or produce documents while hearing a dispute "as far as possible in the same manner provided in the case of a Civil Court by the Code of Civil Procedure, 1908." The words used are "as far as possible" which clearly mean that there can be a general application of the provision of the CPC while following the procedure to settle disputes with all powers prescribed in the CPC. However, where a specific procedure under the Act and Rules has been prescribed, the said procedure is to be scrupulously followed.

28. It is a settled position of law that a procedure enacted by a special law or statute would prevail over the general law. A specific statute is enacted to fulfil the need of laying down the law in a particular field. While doing so, the legislature, in its wisdom, is conscious of the peculiar problems, situations or issues that arise in that sphere and enact the law in order to address them. A special law is enacted at the micro level in comparison with a general law that operates at the macro level. Thus, the provisions of a special enactment that deals with and operates in the particular field for which it has been enacted, would prevail over the general law.

29. This principle of law has been enunciated by the Supreme Court in the case of Jeewan Kumar Raut and Anr. v. Central Bureau of Investigation reported in (2009) 7 SCC 526.

"26. It is a well-settled principle of law that if a special statute lays down procedures, the ones laid down under the general statutes shall not be followed. In a situation of this nature, the respondent could carry out investigations in exercise of its authorisation under Section 13(3) (iv) of TOHO. While doing so, it could exercise such powers which are otherwise vested in it. But, as it could not file police report but a complaint petition only ; sub-section (2) of Section 167 of the Code may not be applicable.

27. The provisions of the Code, thus, for all intent and purport, would apply only

to an extent till conflict arises between the provisions of the Code and TOHO and as soon as the area of conflict reaches, TOHO shall prevail over the Code. Ordinarily, thus, although in terms of the Code, the respondent upon completion of investigation and upon obtaining remand of the accused from time to time, was required to file a police report, it was precluded from doing so by reason of the provisions contained in Section 22 of TOHO."

30. In *Kirpalsingh Pratapsingh v. Salvinder Kaur Hardipsingh Lobana* reported in 2004 (2) GLR 1211, this Court has held as below :

"24(i). The expression "special law" means a provisions of law which is not applicable generally but which applies to a particular or specific subject or class of subjects. Section 41 of the Indian Penal Code stands on the same footing and defines the phrase "special law". Sometimes, a particular act or part of a procedural law may be considered as general and can be given effect to with reference to some act. But it may be special with reference to other act.

24(ii). In this connection I would like to quote the well accepted proposition of law emerging from various observations made by the Apex Court in different decisions as a gist of the principle and it can be summarised that,

"When a special law or a statute is applicable to a particular subject, then the same would prevail over a general law with regard to the very subject, is the accepted principle in the field of interpretation of statute." The operation or effect of a general Act may be curtailed by special Act even if a general Act contains a non-obstante clause. But here is not a case where the language of Section 320 Cr.P.C. Would come in the way in recording the compromise or in compounding the offence punishable under Section 138 of the N.I. Act. On the contrary provisions of Section 147 of N.I. Act though starts with non-obstante clause, is an affirmative enactment and this is possible to infer from the scheme that has overriding effect on the intention of legislature reflected in Section 320 Cr.P.C."

31. In *Ishwarbhai Girdhardas Pabari v. Chandalben Dhirajlal Variya and Ors.* reported in (2015) 1 GLR 425, this Court has held as below :

"Considering the principles of law enunciated by the Supreme Court as well as this Court, it is clear that as per proviso to sub-section (2) of Section 22 of the Specific Relief Act, the Court shall, at any stage of the proceedings, allow the plaintiff to amend the plaint on such terms as may be claimed for possession. The language of the proviso is mandatory. Moreover, Section 22 itself begins with a non-obstante clause. The Specific Relief Act is a special enactment and Section 22 thereof is enacted for a specific purpose which appears to be to avoid a multiplicity of proceedings. A specific provision in a special enactment would, therefore, override the procedural law, more particularly, Order 6, Rule 17 of the C.P.C. Under the circumstances, the restrictions upon the amendment of pleadings, as placed by the proviso to Order 6, Rule 17 of the C.P.C. Would not be attracted in a case where the amendment of the plaint is sought in a suit for specific performance of an agreement to sell. The provisions of Section 22 of the

Specific Relief Act entitle the plaintiff to claim the relief of possession in a suit for specific performance of an agreement to sell at any stage of the proceedings. The case of the petitioner in the present petition is squarely covered by the provisions of Section 22 of the Specific Relief Act. (Para 17)"

(emphasis supplied)

32. Having arrived at a conclusion that the provisions of a special enactment would prevail over the general law and that under Rule 41A(2)(ii), the Board of Nominees has no discretion to grant unconditional leave to defend, it now remains to be examined whether the discretion vested in the Board of Nominees to impose a condition for the deposit of 20% while granting leave to defend in the present case, has been properly exercised.

33. The above rule enjoins the Registrar to look into the facts and circumstances of the case while granting leave to defend. In the present case, it is not denied by the petitioners that they have taken loans from respondent No. 1 and have mortgaged land in its favour. The loan transactions date back to the year 1988. It is also undisputed that the petitioners have not repaid the outstanding amount till date. The objections regarding non-joinder of a party or a discrepancy in the loan amount as per the contention of the petitioners cannot supercede the power of the Board of Nominees in granting conditional leave to defend and can be considered during the proceedings.

34. Taking into consideration the totality of the above factual and legal aspects, the cumulative effect of the above discussion is that the Board of Nominees has not committed any error of law while imposing a condition of the deposit of 20% of the amount claimed while granting leave to defend to the petitioners. The impugned judgement of the Board Nominees does not require interference from this Court.

35. The petitions are, therefore, rejected. Rule is discharged, in each petition. There shall be no orders as to costs.