

(2013) 07 GUJ CK 0039
In the Gujarat High Court

Case No : Special Civil Application No. 3754 and 3756 of 2013

Chandrakant Shankerlal Shah

APPELLANT

Vs

Liquidator Anand Peoples Cooperative Bank Ltd. and Others

RESPONDENT

Date of Decision : 03-07-2013

Acts Referred:

Advocates Act, 1961 — Section 35, 37, 38, 48AA
Civil Procedure Code, 1908 (CPC) — Order 9 Rule 1, Order 9 Rule 13, Order 9 Rule 9,
Order 9 Rule 9
Constitution of India, 1950 — Article 14, 226, 246(1), 254, 254(2)
Forest Act, 1927 — Section 11, 11(1), 17, 6
Gujarat Co-operative Societies Act, 1961 — Section 100, 101, 102, 103, 106
Land Acquisition Act, 1894 — Section 11, 12, 18, 41(4)(b)

Citation : (2013) 07 GUJ CK 0039

Hon'ble Judges : Bhaskar Bhattacharya, C.J.; J.B. Pardiwala, J

Bench : Division Bench

Advocate : Masoom K. Shah and MS. Mohini K. Shah, for the Petitioners No. 1,
for the Appellant;

Judgement

J.B. Pardiwala, J.—As common questions of fact and law are involved in both the above captioned petitions, those were heard analogously and are being decided by this common judgment and order. By way of this petition under Article 226 of the Constitution of India, the petitioner, a guarantor of the respondent no. 1 Bank, seeks to challenge the order dated 18th January 2013 passed by the Gujarat State Cooperative Tribunal, Ahmedabad, in Misc. Application No. 82 of 2012 for condonation of delay in filing an appeal against the judgment and award passed by the Board of Nominees in Arbitration Case No. 2393 of 2002, by which the Tribunal refused to condone the delay and thereby rejected the application.

2. The petitioner has also challenged the constitutional validity of Sections 96, 102, 110 and 166 of the Gujarat Cooperative Societies Act, 1961.

3. The case made out by the petitioner in this petition may be summarised as under:-

The petitioner stood as a guarantor on behalf of the respondent nos. 2 to 6 who availed of some financial facilities from the respondent no. 1 Bank. The respondent no. 2 is a partnership firm being the principal borrower and the respondent nos. 3 to 6 are the partners of the said firm. The respondent no. 7 is also one of the guarantors along with the petitioner.

3. As the original debtors failed to repay the amount of loan, the Bank filed a Lavad Case No. 2393 of 2002 for recovery of Rs. 1,21,39,529=00 against the debtors as well as the guarantors which include the petitioner.

4. The petitioner appeared before the Board of Nominees through a Power of Attorney as he is residing in the United States of America. It appears that the Board of Nominees allowed the suit filed by the Bank and passed an award for recovery of Rs. 1,21,39,529=00 vide judgment and decree dated 31st August 2010.

5. Feeling dissatisfied with the judgment and award passed by the Board of Nominees, the petitioner herein, through his Power of Attorney, preferred an appeal u/s 102 of the Act of 1961 before the Gujarat State Cooperative Tribunal, Ahmedabad. As there was a delay in filing the appeal, an application for condonation of delay being Misc. Application No. 82 of 2012 was also filed.

6. It appears that the Tribunal rejected the application for condonation of delay on the premise that the petitioner was not able to assign any sufficient cause as to why he was not able to file the appeal in time. The Tribunal also noted that before the Board of Nominees, the Power of Attorney of the petitioner had appeared and his advocate had also cross-examined one of the witnesses of the plaintiff Bank. Thereafter, none remained present before the Board of Nominees and the Court proceeded to pass the money decree. It also appears that the Tribunal rejected the argument of the petitioner that since he was residing in the United States of America, he was not aware about the decree which was passed by the Board of Nominees. The Tribunal took the view, relying on a Division Bench decision of this High Court in the case of Suryakant Bhikhabhai Hakani Vs. Bombay Mercantile Co-Op. Bank Ltd. and Ors, , that in view of the provisions of Rule 41(4)(b) of the Gujarat Cooperative Societies Rules, 1965, one of the modes of communication of the award is the pronouncement of the award by the Board of Nominees. The Tribunal took the view that since the petitioner was being represented by an advocate, the date on which the award was pronounced should be construed as the date of knowledge to the petitioner about the passing of the award by the Board of Nominees. Accordingly, the application for condonation of delay was rejected.

7. Feeling dissatisfied with the order passed by the Tribunal, the petitioner has come up with this petition.

Submissions on behalf of the Petitioner:

8. Mr. Vishwas Shah, the learned counsel appearing for the petitioner vehemently

submitted that the Tribunal committed a serious error in rejecting the application for condonation of delay by relying on the Division Bench decision of this High Court rendered in the case of Suryakant Bhikhabhai Hakani (supra). According to Mr. Shah, the ratio as propounded by the Division Bench of this Court in Suryakant Bhikhabhai Hakani (supra) runs contrary to the decision of the Supreme Court rendered in the case of D. Saibaba Vs. Bar Council of India and Another, . According to Mr. Shah, the attention of the Division Bench of this Court was not drawn towards the decision of the Supreme Court in the case of D. Saibaba (supra) and, therefore, the Division Bench decision of this Court in Suryakant Bhikhabhai Hakani (supra) should be declared as per incurium.

9. Mr. Shah further submitted that his client is residing in the United States of America, and for the purpose of defending the suit, he had executed a Power of Attorney in favour of one Kantilal Thakkar. Mr. Shah also submitted that it is no doubt true that an advocate was appearing before the Board of Nominees but, by such reason alone, it could not be said that the date on which the award was pronounced should be considered as the date on which the petitioner had the knowledge of such money decree being passed against him. By mere pronouncement of the award even in a case where an advocate is appearing by itself is not sufficient to impute knowledge to the party or the litigant about such adverse order being passed against him. Mr. Shah placed reliance on the provisions of Rule 41(4) of the Rules 1965.

10. According to Mr. Shah, an appeal has to be preferred within two months from the date of the decision or order to the Tribunal. According to Mr. Shah, "the date of the decision or order" means, "the date of communication or knowledge of the order". Such knowledge could not be imputed to the petitioner only by reason of the fact that he was being represented by an advocate and, therefore, although the pronouncement of the award is one of the modes of communicating such decision to the parties, such communication in that form alone should not be construed as such party being put to knowledge for the purpose of the period of limitation in filing the appeal.

11. According to Mr. Shah, such a construction of the provision of law becomes unworkable, and in such circumstances, Mr. Shah has also challenged the constitutional validity of Sections 96, 102, 110 and 166 of the Act of 1961.

12. Coming to the challenge to the constitutional validity of the provisions of the Act of 1961, Mr. Shah submitted that the Act suffers from the lack of legislative competence to the extent it deals with the enforcement of mortgage by empowering the cooperative bank to recover money using its machinery could be said to be encroaching upon the Union's occupied field through Entry Nos. 6, 7 and 13 (Concurrent List) read together. According to Mr. Shah, any enforcement of a mortgage could be through a Civil Court under the provisions of the Code of Civil Procedure. The very fact that Section 106 has been enacted bears eloquent testimony to the fact that otherwise or in absence of Section 166, it is the Civil Court who has the jurisdiction.

13. Mr. Shah also submitted that Section 96 and Section 102 read with Section 166 of the Act of 1961 bars the jurisdiction of the Civil Court in respect of any dispute required to be referred to the Registrar, or his nominee, or Board of Nominees, for decision.

14. The Civil Court is an entity created by the Parliament under the Code of Civil Procedure. According to Article 254 of the Constitution of India, whenever there is a conflict between the Union and the State law, it is the Union law that shall prevail unless the President of India, by virtue of power under Article 254(2) of the Constitution of India, has given its assent to such a Law.

15. According to Mr. Shah, the assent of the President envisaged under Article 254(2) is neither an idle or an empty formality nor an automatic event necessitated or to be given on mere asking. According to Mr. Shah, we should call upon the State Government to produce such evidence to show that the assent of the President was sought for and such assent was granted after due application of mind.

16. Mr. Shah, in such circumstances, prays that the order passed by the Tribunal be set-aside and the provisions which have been referred to above be declared as ultra vires the Constitution of India.

17. Having heard the learned counsel for the petitioner and having gone through the materials on record, the only question that falls for our consideration is, whether the Division Bench decision of this Court rendered in the case of Suryakant Bhikhabhai Hakani (supra) is in any manner in conflict with the Supreme Court decision in the case of D. Saibaba (supra) so as to declare the Division Bench decision of this Court in Suryakant Bhikhabhai Hakani (supra) as per incurium.

18. Taking into consideration the main controversy involved in the petition, it appears that the matter would have gone before the learned Single Judge taking up the determination with respect to the Cooperative Societies Act. However, with a view to overcome the difficulty to meet with the Division Bench judgment of this Court in Suryakant Bhikhabhai Hakani (supra) which has been relied upon by the Tribunal in rejecting the delay condonation application and which is binding to the learned Single Judge, the petitioner has thought fit to challenge some of the provisions of the Act of 1961 as unconstitutional. That is how the matters have come up before us for consideration.

19. We are of the opinion that before dealing with the submissions of Mr. Shah as regards the constitutional validity of some of the provisions of the Act of 1961, we should look into the two decisions which, according to Mr. Shah, are in conflict with each other, along with the relevant provisions of the Act and the Rules.

20. Section 96 of the Act of 1961 falls in Chapter IX of the Act, which prescribes the procedure for deciding disputes. Section 96 reads as under:

96. Disputes: (1) Notwithstanding anything contained in any other law for the

time being in force, any dispute touching the constitution, management or business of a society shall be referred in the prescribed form either by any of the parties to the dispute, or by a federal society to which the society is affiliated, or by a creditor of the society, to the Registrar, if the parties thereto are from amongst the following:-

(a) a society, its committee, any past committee, any past or present officer, any past or present agent, any past or present servant or nominee, heir or legal representative of any deceased officer, deceased agent or deceased servant of the society, or the Liquidator of the society;

(b) a member, past member or a person claiming through a member, past member or a deceased member of a society, or a society which is a member of the society;

(c) a person, other than a member of the society, who has been granted a loan by the society, or with whom the society has or had transactions under the provisions of section 46, and any person claiming through such a person;

(d) a surety of a member, past member or a deceased member, or a person other than a member who has been granted a loan by the society u/s 46, whether such a surety is or is not a member of the society;

(e) any other society, or the Liquidator of such a society.

(2) When any question arises whether for the purposes of sub-section(1) a matter referred to for decision is a dispute or not, the question shall be considered by the Registrar, whose decision shall be final.

21. Section 102 of the Act of 1961 provides for an appeal against the decision of the Registrar or his nominee or Board of Nominees. Section 102 reads as under:

102. Appeal against decision of Registrar or his nominee or board of nominees:

Any party aggrieved by any decision of the Registrar or his nominee or board of nominees u/s 101 or in an order passed u/s 100 may, within two months from the date of the decision or order, appeal to the Tribunal.

22. Section 110 of the Act of 1961 prescribes the powers of the Liquidator. Section 110 reads as under:

110. Powers of Liquidator: The Liquidator appointed u/s 108 shall have power, subject to the rules and the general supervision, control and direction of the Registrar, -

(a) to institute and defend suits and other legal proceedings, civil or criminal, on behalf of the society in the name of this office;

(b) to carry on the business of the society, so far as may be necessary for the beneficial winding up of the same;

(c) to sell the immovable and movable property and actionable claims of the society by public auction or private contract, with power to transfer the whole or part thereof to any person or body corporate, or sell the same in parcels;

(d) to raise, on the security of the assets of the society, any money required;

(e) to investigate all claims against the society and, subject to the provisions of the Act, to decide questions of priority arising out of such claims and to pay any class or classes of creditors in full or ratably according to the amount of such debts, the surplus being applied in payment of interest from the date of liquidation at a rate approved by the Registrar, but not exceeding the contract rates;

(f) to make any compromise or arrangement with creditors or persons claiming to be creditors, or having or alleging themselves to have any claim, present or future, whereby the society may be rendered liable;

(g) to compromise all calls or liabilities to calls and debts and liabilities capable of resulting in debts, and all claims present or future, certain or contingent, subsisting or supposed to subsist between the society and a contributory or alleged contributory or other debtor or person apprehending liability to the society, and all questions in any way relating to or affecting the assets or the winding up of the society, on such terms as may be agreed, and take any security for the discharge of any such call, liability, debt, or claim, and give a complete discharge in respect thereof;

(h) to determine, from time to time, after giving an opportunity to answer the claim, the contribution to be made or remaining to be made by the members or past members or by the estate, nominees, heirs or legal representatives of deceased members, or by any officer, past officer or the estate or nominees, heirs, or legal representatives of a deceased officer to the assets of the society, such contribution being inclusive of debts due from such members or officers;

(i) to make applications u/s 103;

(j) to get disputes referred to the Registrar for decision by himself or his nominee or board of nominees;

(k) to determine by what persons and in what proportion the costs of the liquidation shall be borne;

(l) to fix the time or times within which the creditors shall prove their debts and claims or be included for the benefits of any distribution made before those debts or claims are proved;

(m) to summon and enforce the attendance of witnesses and to compel the production of any books, accounts, documents, securities, cash or other properties belonging to or in the custody of the society by the same means and in the same manner as provided in the case of a Civil Court under Code of Civil Procedure, 1908;

(n) to do all acts, and to execute in the name and on behalf of the society, all deeds, receipts and other documents, as may be necessary to such winding up;

(o) to take such action as may be necessary u/s 19, with the prior approval of the Registrar, if there is reason to believe that the society can be reconstructed.

23. Section 166 of the Act of 1961 imposes a bar of jurisdiction of Courts. Section 166 reads as under:

166. Bar of jurisdiction of courts: (1) Save as expressly provided in this Act, no Civil or Revenue Court shall have any jurisdiction in respect of -

(a) the registration of a society or its bye-laws, or the amendment of its bye-laws or the dissolution of the committee of a society, or the management of the society on dissolution thereof; or

(b) any dispute required or be referred to the Registrar, or his nominee, or board of nominees, for decision;

(c) any matter concerned with the winding up and dissolution of a society.

(2) While a society is being wound up, no suit or other legal proceeding relating to the business of such society shall be proceeded with or instituted against the society or any member thereof, or any matter touching the affairs of the society, except by leave of the Registrar, and subject to such terms as he may impose.

(3) All orders, decisions or awards passed in accordance with this Act or the rules, shall, subject to the provisions for appeal or revision in this Act be final; and no such order, decision or award shall be liable to be challenged, set aside, modified, revised or declared void in any Court upon the merits, or upon any other ground whatsoever except for want of jurisdiction.

24. On plain reading of Section 102 of the Act referred to above, it is very clear that a party aggrieved by any decision of the Registrar or his nominee or Board of Nominees can file an appeal within two months from the date of the decision or order. For our purpose, the phrase "from the date of decision or order" is important. The expression "the date of that order" fell for consideration at the hands of the Supreme Court in the case of D. Saibaba (supra). In that case, Section 48AA of the Advocates Act, 1961 was under consideration. Section 48AA of the Advocates Act reads as under:

48AA. Review.-- The Bar Council of India or any of its committees, other than its disciplinary committee, may of its own motion or otherwise review any order, within sixty days of the date of that order, passed by it under this Act.

25. It was argued on behalf of the Bar Council of India that the limitation for filing a review application would commence from "the date of that order" which was sought to be reviewed in the following factual background:

The respondent no. 1 before the Supreme Court was the wife of the appellant. The marriage had broken down and the spouses had fallen apart. The wife filed a

complaint u/s 35 of the Advocates Act against her husband, alleging professional misconduct on the ground that he was running a telephone booth allotted in his favour in the handicapped person quota. It appears that the State Bar Council directed the complaint to be dropped, forming an opinion that no case for proceeding against the appellant was made out. The wife lodged a second complaint, making almost identical allegations. The Bar Council directed the appellant to surrender the STD booth. The appellant sought some time for surrendering the licence of telephone booth. As the appellant failed to surrender the STD booth, the Bar Council of India passed an order dated 31st March 2001 advising the State Bar Council to delete the name of the appellant from the rolls of advocates. Thereafter, the appellant surrendered the booth. The appellant sought for a review of the order of the Bar Council of India based on the subsequent event of the telephone booth having been surrendered. The Bar Council of India rejected the petition for review on the ground that the same was barred by time. As against the order passed by the Bar Council of India, the appellant filed an SLP before the Supreme Court.

26. The submission of the appellant before the Supreme Court was that he could not have sought for review of the order unless the order was communicated to him and, therefore, the expression "the date of that order" should be construed as meaning, "the date of communication of the order". The Bar Council of India formed an opinion that there was a lacuna in the provision which it could not have removed it. The Bar Council of India, in its impugned order, compared the provisions of Section 48AA with the provisions contained in Sections 37 and 38 of the Act. The opinion formed by the Bar Council of India was that the employment by Parliament of different phraseology in Sections 37 & 38 and Section 48AA was suggestive of the legislative intent that while the limitation for an appeal under Sections 37 and 38 was to be calculated from "the date of the communication of the order", the limitation for review u/s 48AA commenced from "the date of the order" sought to be reviewed and not from "the date of communication of the order".

27. The Supreme Court took the view that so far as the commencement of period of limitation for filing the review petition was concerned, the expression "the date of that order" as occurring in Section 48AA had to be construed as meaning the date of communication or knowledge of the order to the party. The Court also took the view that where the law provided a remedy to a person, the provision had to be so construed in case of ambiguity so as to make the availing of the remedy practical and the exercise of power conferred on the authority meaningful and effective. The Supreme Court held that a construction which would render the provision nugatory should be avoided. It held that the process of interpretation could not be utilized for implanting a heart into a dead provision; however, the power to construe a provision of law could always be so exercised as to give a throb to a sinking heart. The Supreme Court considered its earlier decisions and discussed them in paragraphs 10 to 20 as under:

10. An identical point came up for the consideration of this Court in *Raja Harish Chandra Raj Singh Vs. The Deputy Land Acquisition Officer and Another*, . Section 18 of the Land Acquisition Act, 1894, contemplates an application seeking reference to the Court being filed within six months from the date of the Collector's award. It was held that "the date of the award" cannot be determined solely by reference to the time when the award is signed by the Collector or delivered by him in his office. It must involve the consideration of the question as to when it was known to the party concerned either actually or constructively. If that be the true position, then placing a literal and mechanical construction on the words "the date of the award" occurring in the relevant section would not be appropriate. It is fair and just that a decision is communicated to the party whose rights will ultimately be affected or who will be affected by the decision. The knowledge, either actual or constructive, of the party affected by such a decision, is an essential element which must be satisfied before the decision can be brought into force. Thus construed, the making of the award cannot consist merely of the physical act of writing an award or signing it or even filing it in the office of the Collector; it must involve the communication of the said award to the party concerned either actually or constructively. A literal or mechanical way of construing the words "from the date of the Collector's award" was held to be unreasonable. The Court assigned a practical meaning to the expression by holding it as meaning the date when the award is either communicated to the party or is known by him either actually or constructively.

11. The view taken in *Raja Harish Chandra Raj Singh's* case (supra) by two-Judges Bench of this Court was affirmed by a three Judge Bench of this Court in *State of Punjab Vs. Mst. Qaisar Jehan Begum and Another*, . This Court added that the knowledge of the award does not mean a mere knowledge of the fact that an award has been made; the knowledge must relate to the essential contents of the award.

12. In *Assistant Transport Commissioner, Lucknow and Others Vs. Nand Singh*, , the question of limitation for filing an appeal u/s 15 of the U.P. Motor Vehicles Taxation Act, 1935, came up for the consideration of this Court. It provides for an appeal being preferred "within thirty days from the date of such order". The taxation officer passed an order on October 20/24, 1964 which was received by the person aggrieved on October 29, 1964. The appeal filed by him was within thirty days-the prescribed period of limitation, calculated from October 29, 1964, but beyond thirty days of October 24, 1964. It was held that the effective date for calculating the period of limitation was October 29, 1964 and not October 24, 1964.

13. In *Raj Kumar Dey and Others Vs. Tarapada Dey and Others*, , this Court pressed into service two legal maxims guiding and assisting the Court while resolving an issue as to calculation of the period of limitation prescribed, namely, (i) the law does not compel a man to do that which he could not possibly perform, and (ii) an act of the Court shall prejudice no man. These principles

support the view taken by us hereinabove. Any view to the contrary would lead to an absurdity and anomaly. An order may be passed without the knowledge of anyone except its author, may be kept in the file and consigned to record room or the file may lie unattended, unwittingly or by carelessness. In either case, the remedy against the order would be lost by limitation though the person aggrieved or affected does not even know what order has been passed. Such an interpretation cannot be countenanced.

14. How can a person concerned or a person aggrieved be expected to exercise the right of review conferred by the provision unless the order is communicated to or is known to him either actually or constructively? The words "the date of that order", therefore, mean and must be construed as meaning the date of communication or knowledge, actual or constructive, of the order sought to be reviewed.

15. In *O.N. Mohindroo Vs. The District Judge, Delhi and Another*, , interpreting the *pari materia* provision contained in Section 44A of the Act, this Court held that the word "otherwise" used in the context of the power of review exercisable "of its own motion or otherwise" must be assigned a wide meaning and it will cover a case where the review jurisdiction is sought to be exercised by a reference made to the Bar Council. The provision entitled a person aggrieved to invoke review jurisdiction of the Bar Council by moving an appropriate petition for the purpose. It was also held that the review jurisdiction conferred on the Bar Council is wide and reference cannot be made to the provisions of the CPC so as to limit the width of review jurisdiction by drawing an analogy from the provisions of the CPC or the Criminal Procedure Code.

16. Placing such a construction, as we propose to, on the provision of Section 48AA is permitted by well settled principles of interpretation. Justice G.P. Singh states in *Principles of Statutory Interpretation* (Eighth Edition, 2001), "It may look somewhat paradoxical that plain meaning rule is not plain and requires some explanation. The rule, that plain words require no construction, starts with the premise that the words are plain, which is itself a conclusion reached after construing the words. It is not possible to decide whether certain words are plain or ambiguous unless they are studied in their context and construed." (p. 45) The rule of literal interpretation is also not to be read literally. Such flexibility to the rule has to be attributed as is attributable to the English language itself.

17. The learned author states again, "In selecting out of different interpretations "the Court will adopt that which is just, reasonable and sensible rather than that which is none of those things" as it may be presumed "that the Legislature should have used the word in that interpretation which least offends our sense of justice". (p. 113, *ibid*) "The Courts strongly lean against a construction which reduces the statute to a futility. A statute or any enacting provision therein must be so construed as to make it effective and operative "on the principle expressed in the maxim: *ut res magis valeat quam pereat*"." (p. 36, *ibid*) "If the language used is capable of bearing more than one construction, in selecting the true

meaning regard must be had to the consequences resulting from adopting the alternative constructions. A construction that results in hardship, serious inconvenience, injustice, absurdity or anomaly or which leads to inconsistency or uncertainty and friction in the system which the statute purports to regulate has to be rejected and preference should be given to that construction which avoids such results." (pp. 112-113, *ibid*).

18. Reading word for word and assigning a literal meaning to Section 48AA would lead to absurdity, futility and to such consequences as the Parliament could have never intended. The provision has an ambiguity and is capable of being read in more ways than one. We must, therefore, assign the provision a meaning-and so read it-as would give life to an otherwise lifeless letter and enable the power of review conferred thereby being meaningfully availed and effectively exercised.

19. On the same principle the provision has to be interpreted from the point of view of exercise of the power by the Bar Council. The interpretation ought to be directed towards giving the expression a meaning which will carry out the purpose of the provision and make the remedy of review conferred by the provision meaningful, practical and effective. How can the Bar Council of India or any of its Committees exercise their power to review unless the matter is before them? The jurisdiction to exercise power of review does not come to an end merely by lapse of sixty days from the date of the order sought to be reviewed. In view of the construction which we have placed hereinabove, in our opinion, the expression "sixty days from the date of that order" prescribes the period of limitation for invoking the power of review. It has nothing to do with the actual exercise of power by the Bar Council. In other words, merely by lapse of sixty days from the date of the order sought to be reviewed, the Bar Council of India or any of its Committees is not divested of its power to exercise review jurisdiction. That is the only reasonable construction which can be placed on the provision as framed, though we cannot resist observing that the provision is not happily drafted.

20. In ordinary course, having held that the application filed by the petitioner for invoking review jurisdiction was well within limitation and that the jurisdiction to review was not lost by the Bar Council of India merely by lapse of sixty days from the date of the order sought to be reviewed, we would have left this matter to be heard and decided on merits by the Bar Council of India. However, in the peculiar facts and circumstances of the case, we are not inclined to remand the matter and we feel that the ends of justice would be better satisfied if the controversy is set at rest here itself, fully and finally. During the course of hearing, the learned counsel for the parties too agreed to such a course being appropriate to follow. We, therefore, take up the merits of the controversy as well.

28. One another important aspect which deserves to be noted in the judgment of the Supreme Court is that in that case also the constitutional validity of Section 48AA was challenged on the ground that the provision was unworkable and

unreasonable and, therefore, suffered from inherent infirmity.

29. This is precisely the argument of Mr. Shah in the present case also that the manner in which the provisions of the Act of 1961 are being construed they are rendered unworkable and unreasonable. However, the Supreme Court declined to go into the question of constitutional validity of Section 48AA of the Act on the premise that the challenge would not survive in view of the construction which the Supreme Court explained on the language of Section 48AA.

30. Thus, what is discernible from the decision in the case of D. Saibaba (supra) is that how could a person concerned or a person aggrieved be expected to exercise the right of appeal conferred by the provision unless the order is communicated to or is known to him, either actually or constructively. The words "the date of that order", therefore, should be construed as meaning, "the date of communication or knowledge, actual or constructive, of the order sought to be appealed".

31. Besides the same, the knowledge of the award does not mean a mere knowledge of the fact that an award has been made; the knowledge must relate to the essential contents of the award and that is possible only if the copy of such award is made available to the concerned party.

32. At this stage, it will be apposite to now consider Rule 41 of the Rules 1965. Rule 41 was amended on 7th May 1988. The pre-amended Rule 41 reads as under:

41. Procedure of hearing and decision:-

(1) The adjudicating authority shall record a brief note in English or in Gujarati language of the evidence of the parties and witnesses who attend and upon the evidence so recorded and upon consideration of any documentary evidence produced by either side, a decision shall be given in accordance with justice, equity and good conscience and it shall be reduced to writing. Such a decision shall be given in open Court either at once or on some future date of which due notice shall be given to the parties.

(2) If any party duly summoned to attend fails to appear, the dispute may be decided ex-parte.

(3) Where the adjudicating authority is a board of nominees consisting of the board of nominees of two nominees and if their opinions differ regarding the decision, the adjudicating authority shall return the case to the Registrar with its notes of dissent and thereupon the dispute may be decided by the Registrar himself or the case may be forwarded to a fresh board of three nominee for decision.

(4) The decision shall be communicated to the parties by -

(a) pronouncement of the award; or

(b) registered post to any party which may be absent on such date.

(5) After the decision of the case, of the adjudicating authority is a nominee or the board of nominees it shall return all the case papers to the Registrar.

33. By way of amendment in 1988, clause (b) in sub-clause (4) to Rule 41 came to be amended. It reads thus:

(b) registered post to any party which may be absent on [the date if due notice of the decision is not given to such party.]

(c) Ordinary post with UPC to any party which may be absent on the date if due notice of the date of decision is given to such party.

34. The plain reading of Rule 41 referred to above implies that one of the modes of communicating the decision to the party is the pronouncement of the award. The other two modes as could be read in Rule 41 are, intimation by registered post to the party who may be absent on the date if due notice of the decision was not given to such a party, or ordinary post with U.P.C. to any party who may be absent on the date despite due notice of the date of decision was given to such a party.

35. Rule 41(4) fell for consideration at the hands of the Division Bench of this Court in the case of Suryakant Bhikhabhai Hakani (*supra*). The Division Bench in the facts of that case took the view that the appellant had appeared before the Board of Nominees through his lawyer. Since the lawyer was representing the appellant, it could be presumed that he was aware about the day-to-day proceeding and the date of pronouncement of the judgment and award and, therefore, the party, who was not personally present, could not be said to have no knowledge about the date of pronouncement of the decision. The Division Bench took the view that in such circumstances, the Registrar of the Board of Nominees was not bound to communicate the decision by registered post to the person who was not physically present on the date of pronouncement. The Court took the view that it was the duty of the lawyer to inform the decision of the Board of Nominees which had gone against his client. We quote the following paragraphs of the judgment, which are as under:

7. It is clear from the unamended provision of Rule 41(4) (b) of the Rules that earlier the decision was required to be communicated by Registered Post to any party which may be absent on such date when the decision was pronounced. But, in the amended provisions of Rule 41(4)(b) of the Rules it is made clear that the decision shall be communicated by Registered Post to any party which may be absent on the date if due notice of the date of decision is not given to such party.

8. In the case of Kalyanbaugh Co-op. Housing Society Limited (*supra*), the learned Single Judge has, after reproducing the amended provisions of Rule 41(4) (b) of the Rules and totally relying on the decision of this Court in the case of Amrutlal Mangalji Joshi (*supra*), quashed and set aside the decision of the Tribunal only on the ground that the decision of the Board of Nominees was not

communicated by Registered Post to the party which was absent on the date of the pronouncement of the judgment and award passed by the Board of Nominees.

9. It is pertinent to note that the proceedings in the nature of civil suit, which is nomenclatured as "arbitration suit", is governed by Chapter-IX of The Code of Civil Procedure, 1908, as per provisions of Rule 41(2) of the Rules. As far as appearance of parties and consequence of non-appearance of a party is concerned, under Order-IX Rule- 1 of the Code of Civil Procedure, it is made clear that on the day fixed in the summons for the defendant to appear and answer, the parties shall be in attendance at the Court-house in person or by their respective pleaders, and the suit shall then be heard unless the hearing is adjourned to a future day fixed by the Court. The said Rule also provides consequences of non-appearance of either the plaintiff/s or by the defendant/s.

10. In the case of Amrutlal Mangalji Joshi (supra), the learned Single Judge has relied upon a decision of the Apex Court in the matter of Raja Harish Chandra Raj Singh Vs. The Deputy Land Acquisition Officer and Another, and after comparing the provisions of Section-12 and Section 18 of the Land Acquisition Act, 1894, came to the conclusion that same principle of law would be applicable in the case of Rule-41 of the Rules. It also appears that the learned Single Judge has not dealt with Rule 41(2) of the Rules which was amended on 2.6.1976 which lays down the procedure to be adopted under Order IX of Code of Civil Procedure.

11. In the present case, as stated here-in-above, the present appellant appeared through his Lawyer, who was bound to attend the proceedings which were pending before the Board of Nominees. It was also the case of the appellant in the delay condonation application before the Tribunal that, though, he had engaged the Lawyer, the Lawyer did not remain present and plead his case in defence before the Board of Nominees.

12. Since the Lawyer was representing the case of the appellant, it is presumed that, he was aware about the day-to-day proceedings and the date of pronouncement of the judgment and award and, therefore, the party, who was not personally present, cannot be said to have no knowledge about the date of pronouncement of the decision. The party, who has engaged a Lawyer, may not attend the proceedings on every occasion but it is the duty of the Lawyer to attend the case on his client's behalf. It is presumed that the Lawyer had knowledge of date of notice of pronouncement of judgment and award and therefor in our view the Registrar of Board of Nominees is not bound to communicate his decision by Registered Post to the person who was not physically present on the date of pronouncement. It was the duty of the Lawyer to inform the decision of the Board of Nominees which had gone against the appellant.

13. While comparing the provisions of Sections 12 and 18 of the Land Acquisition Act, 1894 and Rule-41 of the Gujarat Cooperative Societies Act, 1961, we are of the opinion that, the decision taken by the Collector under the provisions of the

Land Acquisition Act, 1894 is not comparable with the proceedings undertaken by the Board of Nominees which has to follow the procedure prescribed under Order- 9 of the Civil Procedure Code. Under Sections 12 and 18 of the Land Acquisition Act, the Collector declares an Award under Section- 11 of the Land Acquisition Act after considering the objections raised by the affected persons whose lands are under acquisition which is totally not in a judicial manner. The Collector after following the provisions of the Land Acquisition Act, arrived at a particular price and declares the award and, therefore, the same is required to be served to the affected person whose land has been acquired by the authority if he does not remain present on the date of pronouncement of the award. In the case on hand, the Board of Nominees, after following the procedure prescribed under Order- IX of the CPC and recording the evidence of the witnesses, pronounced the judgment and award, it is not mandatory to serve the decision by Registered Post to any party, who had engaged a Lawyer, was absent on the date of pronouncement, since it is presumed that the Lawyer was aware about the day-to-day proceedings before the Registrar or his Nominee. It is pertinent to note that under Order-IX R. 13 of the Code of Civil Procedure, the defendant against whom an ex parte decree is passed, can apply for setting aside the same on the grounds mentioned in it. In the present case also the appellant could have approached the Board of Nominees under the said provision.

14. In the case of Kalyanbaugh Co-op Housing Society Limited (supra), it appears that, both the defendants chose not to remain present before the learned Board of Nominees as they were under the impression that it was a dispute between the society and the bank and in their absence, the learned Board of Nominees proceeded ex parte and delivered the judgment against the petitioners. In the present case, the appellant was duly represented by his Advocate and, therefore, the Board of Nominees did not commit any error by not sending the decision by Registered Post to the defendant since he was represented by an Advocate who was aware about the day-to-day proceedings and about the decision which was pronounced by the Board of Nominees.

15. It is pertinent to note that in the case of Amrutlal Mangalji Joshi (supra), the learned Single Judge has, by placing reliance upon Section 41(4)(b) of the Rules, which has been subsequently amended, held that the decision was required to be sent to the party which was absent on the date of the pronouncement of the judgment and decree by Registered Post and remitted the matter to the Tribunal to decide the delay condonation application after giving opportunity to the parties. After amendment in the said Rule in 1988, it is made clear that the decision is required to be communicated by Registered Post to the party which may be absent on the date if due notice of the date of the decision is not given to such party. That means, if the party had knowledge of the date of decision through any source including his Lawyer, it is not mandatory for the Registrar or his nominee to send his decision by Registered Post.

16. Apart from this aspect it appears that the appellant was aware about the

decision way back in 2004 when the Notice of attachment under Section- 200 of the Bombay Land Revenue Code was served to the appellant. The appellant preferred an Appeal after two years i.e. in the year 2006 and, therefore, in absence of sufficient ground for delay, the Tribunal had rightly dismissed the application for condonation of delay. In view of the aforesaid factual as well as legal aspect of the matter, we are in agreement with the observations made by the learned Single Judge in the impugned judgment and order. No interference is called for in the impugned judgment and order of the learned Single Judge. The appeal is devoid of any merit and deserves to be dismissed. Hence, the appeal is dismissed accordingly. There shall be no order as to costs.

36. It also appears that in taking the view that if a lawyer was representing his client, it could be presumed that he would be aware about the day-to-day proceedings and the date of the pronouncement of the judgment and award and, therefore, even though his client was not personally present, the client could not be said to have no knowledge about the date of pronouncement of the decision, the Division Bench of this Court relied on clause (2) of Rule 41, which provides that if any of the parties duly summoned or informed to attend, fails to appear, the dispute may be decided in accordance with the relevant provisions of Order IX of the Code of Civil Procedure, 1908.

37. We fail to understand as to how the provisions of Order IX of the CPC would substantiate the view taken by the Division Bench as referred to above. The provisions of the CPC are based on a general principle that, as far as possible, no proceeding in a court of law should be conducted to the detriment of any party in his absence. Order IX of the CPC enacts the law with regard to the appearance of the parties to the suit and the consequences of their non-appearance. It also provides a remedy for setting aside an order of dismissal of the suit and for setting aside an ex-parte decree passed against the defendant. The scheme of Order IX shows that there is a separate procedure for setting aside dismissal of a suit for the plaintiff's default and for rehearing of the suit on merits, in juxtaposition to the procedure for setting aside an ex-parte decree against the defendant where the later has defaulted for any sufficient reason. The provisions of the order do not ordinarily apply to cases where there is a defect in favour of or against the defendant on the merits of the case and after hearing the parties. It has to be remembered that the terms of Order IX are all parts of the procedural enactment and while construing them, an attempt should be to further the remedy and suppress the mischief.

38. In our view, after having gone through and discussed both the decisions, one of the Supreme Court and the other, of the Division Bench of this Court, we are at one with Mr. Shah that the Division Bench decision of this Court is definitely in conflict with the decision of the Supreme Court in the case of D. Saibaba (supra).

39. It is altogether a different thing to say that a litigant must be vigilant of the proceedings pending in a Court or any other forum and should not be completely dependent on his advocate, and should also not disown his advocate completely

to throw the entire blame on the advocate when a stage comes for condonation of delay in filing an appeal before the higher forum. However, to say that if a litigant is represented by an advocate, then the advocate is presumed to know each and every date of the proceedings and the litigant is also presumed to have knowledge of such award passed, will be a proposition which cannot be sustained at all.

40. It is a cardinal principle of law that every party to the litigation before an appropriate forum is entitled to an adequate notice about the pronouncement and passing of a judgment or order against him or in his favour, particularly so, against him because only after he comes to know of the passing of the adverse order that he sets in motion the process to file an appeal against such an order. It is essentially fair and just that the said decision should be communicated to such a party because the knowledge of the party affected by such a decision, either actual or constructive, is an essential element which must be satisfied before the decision can be brought into force. Thus considered, the passing of an order by a forum or a court, particularly so by a tribunal having judicial trapping cannot consist merely in the physical act of writing the judgment or order or signing it or even consigning to record in his office; it must hand over the appropriate and actual communication of such an order or judgment to the party concerned, especially when the judgment is against such a party. The communication may be either actual or constructive. If the order is pronounced in the presence of the parties, whose rights are affected by it, it can be said to be made when pronouncing it. If the date of the pronouncement of the order is communicated to the party and it is pronounced accordingly, on the date previously communicated, the order is said to be communicated to the said party even if the party is not actually present on the date of its pronouncement. Similarly, if without notice of the date of pronouncement, an order is pronounced and the party concerned, especially the party against whom the order is pronounced, is not present when the pronouncement is made, the order can be said to be made only when it is actually communicated to the parties later. The knowledge of such a party adversely affected by order, either actual or constructive, being an essential requirement of fair play and natural justice, the expression "date of the order" used in Section 102 of the Act 1961 must mean the date when the order was either actually communicated to the party or was known by it either actually or constructively.

41. In the case of Madan Lal Vs. State of U.P. and Others, , the matter regarding the extension of time for filing an appeal as in the present case came up for consideration before the Supreme Court. In that case, the appellant in the Supreme Court had preferred a claim u/s 6 of the Indian Forest Act in respect of certain plots of land. On 9th May 1955, the Forest Settlement Officer before whom the claim was preferred by the appellant recorded an order u/s 11(1) of the Indian Forest Act that the appellant had proved his claim and directed the Divisional Forest Officer to do the needful. According to the respondents in the Supreme Court, the aforesaid order dated 9th May 1955 made by the Forest

Settlement Officer admitting the claim of the appellant was passed without any notice to them and in their absence and that they came to know about such order only on 24th April 1956. Section 17 of the Indian Forest Act, relating to the filing of an appeal from an order of Forest Settlement Officer u/s 11 of the Act lays down a time limit of three months from the date of the order for presenting such an appeal. The order under appeal was undoubtedly passed on 9th May 1955 and the appeal was preferred on 20th July 1956. The respondents in the Supreme Court, the State of U.P. wanted three months' period for filing the appeal to be commenced from 24th April 1956 when it acquired the knowledge about the passing of the impugned order. While dealing with the question of extension of time, and after relying upon the previous judgment, in para 9 of the judgment, Their Lordships observed as under:-

The Act we are concerned with does not state what would happen if the Forest Settlement Officer made an order u/s 11 without notice to the parties and in their absence. In such a case, if the aggrieved party came to know of the order after the expiry of the time prescribed for presenting an appeal from the order, would the remedy be lost for no fault of his? It would be absurd to think so. It is a fundamental principle of justice that a party whose rights are affected by an order must have notice of it. This principle is embodied in O.XX, R.1 of the Code of Civil Procedure, though the Forest Settlement Officer adjudicating on the claims under the Act is not a court, yet the Principle which is really a principle of fair play and is applicable to all tribunals performing judicial or quasi judicial functions must also apply to him. The point has been considered and decided by this Court in *Raja Harish Chandra Raj Singh Vs. The Deputy Land Acquisition Officer and Another*, . This was a case under the Land Acquisition Act, 1894 and the court was considering the question of limitation under the proviso to Section 18 of that Act. u/s 18 of the Land Acquisition Act a person who has not accepted the Collector's award can apply to the Collector requiring him to refer the matter for the determination of the Court. This application has to be made within six months from the date of the Collector's award in the case where the person interested was not present or represented before the Collector at the time when he made his award or had received no notice from the Collector of the award. Construing the expression "the date of the award" this Court observed:

The knowledge of the party affected by the award, either actual or constructive, being an essential requirement of fair play and natural justice the expression "the date of the award" used in the proviso must mean the date when the award is either communicated to the party or known by him either actually or constructively. In our opinion, therefore, it would be unreasonable to construe the words "from the date of the Collector's award" used in the proviso to Section 18 in a literal or mechanical way... where the rights of a person are affected by any order and limitation is prescribed for the enforcement of the remedy by the person aggrieved against the said order by reference to the making of the order must mean either actual or constructive communication of the said order to the party concerned.

42. In our opinion, to make Section 102 workable, it will have to be read harmoniously with Rule 41. After the evidence is over, the nominee is to give the decision and he may pronounce the same in open court either at once or on some future date of which due notice would be given to the parties. If the nominee does not pronounce the decision at once in the court and a future date is fixed for pronouncing the decision, the decision is deemed, to be communicated to the parties either by pronouncement of the award or by registered post to any party who may be absent on the date if due notice of the decision is not given to such a party or by ordinary post with U.P.C. to a party who may be absent on the date if due notice of the date of decision is given to such a party. The communication can be made by pronouncing the award if both the parties are present. In such circumstances, perhaps there may not be any further necessity of complying with clause (b) and clause (c) of sub-rule (4) of Rule 41.

43. The intention of the statute appears to be to communicate the decision to a party who may be absent despite due notice of the date of decision and also to a party to whom due notice of such decision is not given to such a party.

44. The view which we have taken is in conformity with the decision in the case of D. Saibaba (*supra*) to which it appears that the attention was not drawn of Their Lordships while deciding the case of Suryakant Bhikhabhai Hakani (*supra*) and deserves to be considered in light of Rule 41(4)(b) and Rule 41(4)(c). If an advocate is presumed to have knowledge of the pronouncement of the award and thereby a client is also presumed to have knowledge about the same, then in such circumstances, clauses (b) and (c) will have to be construed as if they are applicable only in cases where the party is not being represented by any advocate. It is difficult for us to place such a construction on plain reading of clauses (b) and (c).

45. We also lay emphasis on the phrase "such a decision shall be given to the parties" as it appears in Rule 41(1).

46. To the aforesaid extent, we hold that the Division Bench decision of this High Court in the case of Suryakant Bhikhabhai Hakani (*supra*) is per incurium as the Supreme Court decision in the case of D. Saibaba (*supra*) has not been taken into consideration.

47. In view of the construction which we have placed on the language of Section 102 of the Act read with Rule 41(4)(a), (b) and (c), the challenge to the constitutional validity of the provisions would not survive. However, we may only say that the Courts must presume that the Legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and that its discriminations, if any, are based on adequate grounds. The Courts must not invalidate a statute lightly, only on the ground that the provision is unworkable or is causing hardship.

48. In our opinion, in considering whether a particular legislation is invalid, the

writ-court should follow the principles as laid down by the Supreme Court in the case of *State of M.P. Vs. Rakesh Kohli and Another*, wherein the Apex Court considered various earlier decisions of the said court laying down the circumstances in which a writ-court can declare a statutory provision as ultra vires in the following manner:

24. While dealing with the aspect as to how and when the power of the court to declare the statute unconstitutional can be exercised, this Court referred to the earlier decision of this Court in *Rt. Rev. Msgr. Mark Netto Vs. State of Kerala and Others*, and held in para 46 of the Report as under: *Government of Andhra Pradesh and Others Vs. Smt. P. Laxmi Devi*, p. 740)

46. In our opinion, there is one and only one ground for declaring an Act of the legislature (or a provision in the Act) to be invalid, and that is if it clearly violates some provision of the Constitution in so evident a manner as to leave no manner of doubt. This violation can, of course, be in different ways e.g. if a State Legislature makes a law which only Parliament can make under Schedule VII List I, in which case it will violate Article 246(1) of the Constitution, or the law violates some specific provision of the Constitution (other than the directive principles). But before declaring the statute to be unconstitutional, the court must be absolutely sure that there can be no manner of doubt that it violates a provision of the Constitution. If two views are possible, one making the statute constitutional and the other making it unconstitutional, the former view must always be preferred. Also, the court must make every effort to uphold the constitutional validity of a statute, even if that requires giving a strained construction or narrowing down its scope vide *Rt. Rev. Msgr. Mark Netto Vs. State of Kerala and Others*, SCC para 6: AIR para 6. Also, it is none of the concern of the court whether the legislation in its opinion is wise or unwise.

Then in paras 56 and 57, the Court stated as follows: *Government of Andhra Pradesh and Others Vs. Smt. P. Laxmi Devi*, SCC p.744)

56. In our opinion adjudication must be done within the system of historically validated restraints and conscious minimisation of the Judges' personal preferences. The court must not invalidate a statute lightly, for, as observed above, invalidation of a statute made by the legislature elected by the people is a grave step. As observed by this Court in *The State of Bihar Vs. Maharajadhiraja Sir Kameshwar Singh of Darbhanga and Others*, (AIR p. 274, para 52)

52. ... The legislature is the best judge of what is good for the community, by whose suffrage it comes into existence....

57. In our opinion, the court should, therefore, ordinarily defer to the wisdom of the legislature unless it enacts a law about which there can be no manner of doubt about its unconstitutionality.

25. The Constitution Bench of this Court in *Mohd. Hanif Quareshi and Others Vs. The State of Bihar*, while dealing with the meaning, scope and effect of Article 14,

reiterated what was already explained in earlier decisions that to pass the test of permissible classification, two conditions must be fulfilled, namely,

(i) the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group, and

(ii) such differentia must have rational relation to the object sought to be achieved by the statute in question.

The Court further stated that classification might be founded on different basis, namely, geographical, or according to objects or occupations or the like and what is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration.

26. In *Mohd. Hanif Quareshi and Others Vs. The State of Bihar*, , the Constitution Bench further observed that there was always a presumption in favour of constitutionality of an enactment and the burden is upon him, who attacks it, to show that there has been a clear violation of the constitutional principles. It stated in para 15 of the Report as under: (AIR pp. 740-41)

15. ... The courts, it is accepted, must presume that the legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds. It must be borne in mind that the legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest and finally that in order to sustain the presumption of constitutionality the court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation.

27. The above legal position has been reiterated by a Constitution Bench of this Court in *Moti Das Vs. S.P. Sahi, The Special Officer In Charge of Hindu Religious Trusts and Others*, .

28. In *Hamdard Dawakhana and Another, Kalipada Deb and Another, Lakshman Shripati Itpure @ Lakshman Shripati Impore and A.B. Choudhri and Another Vs. The Union of India (UOI) and Others*, , inter alia, while referring to the earlier two decisions, namely, *The Bengal Immunity Company Limited Vs. The State of Bihar and Others*, and *Moti Das Vs. S.P. Sahi, The Special Officer In Charge of Hindu Religious Trusts and Others*, , it was observed in para 8 of the Report as follows: *Hamdard Dawakhana and Another, Kalipada Deb and Another, Lakshman Shripati Itpure @ Lakshman Shripati Impore and A.B. Choudhri and Another Vs. The Union of India (UOI) and Others*, , AIR p. 559)

8. Therefore, when the constitutionality of an enactment is challenged on the ground of violation of any of the articles in Part III of the Constitution, the ascertainment of its true nature and character becomes necessary i.e. its subject-

matter, the area in which it is intended to operate, its purport and intent have to be determined. In order to do so it is legitimate to take into consideration all the factors such as history of the legislation, the purpose thereof, the surrounding circumstances and conditions, the mischief which it intended to suppress, the remedy for the disease which the legislature resolved to cure and the true reason for the remedy....

In *Hamdard Dawakhana*, the Court also followed the statement of law in *Mahant Moti Das* and the two earlier decisions, namely, *Chiranjit Lal Chowdhuri Vs. The Union of India (UOI) and Others*, and *The State of Bombay and Another Vs. F.N. Balsara*, and reiterated the principle that presumption was always in favour of constitutionality of an enactment.

29. In one of the recent cases in *Karnataka Bank Ltd. Vs. State of A.P. and Others*, while referring to some of the above decisions, in para 19 of the Report, this Court held as under: (SCC pp. 262-63)

19. The rules that guide the constitutional courts in discharging their solemn duty to declare laws passed by a legislature unconstitutional are well known. There is always a presumption in favour of constitutionality, and a law will not be declared unconstitutional unless the case is so clear as to be free from doubt; "to doubt the constitutionality of a law is to resolve it in favour of its validity". Where the validity of a statute is questioned and there are two interpretations, one of which would make the law valid and the other void, the former must be preferred and the validity of law upheld. In pronouncing on the constitutional validity of a statute, the court is not concerned with the wisdom or unwisdom, the justice or injustice of the law. If that which is passed into law is within the scope of the power conferred on a legislature and violates no restrictions on that power, the law must be upheld whatever a court may think of it. (See *The State of Bombay and Another Vs. F.N. Balsara*,

49. We are also not impressed by the submission of Mr. Shah that there is no material to show that the assent was given by His Excellency, the President of India, to the Act of 1961 with due application of mind. If it is the assertion on the part of the petitioner that there is no valid assent at the end of His Excellency, the President of India, then the burden is on the petitioner to establish such fact by adducing cogent, clinching & convincing evidence in that regard and the petitioner should not ask the Court to undertake an inquiry, more particularly, after a period of fifty-two years.

50. It is now well-settled that when a point which is ostensibly a point of law is required to be substantiated by facts, the party raising the point, if he is the writ-petitioner, must plead and prove such facts by evidence which must appear from the writ-petition and if he is the respondent, from the counter-affidavit. If the facts are not pleaded or the evidence in support of such facts is not annexed to the writ-petition or to the counter-affidavit, as the case may be, the court will not entertain the point. There is a distinction between a pleading under the CPC and

a writ-petition or a counter-affidavit. While in a pleading, that is, a plaint or a written-statement, the facts and not evidence are required to be pleaded, in a writ-petition or in the counter-affidavit, not only the facts but also the evidence in proof of such facts have to be pleaded and annexed to it.

51. With the above observations, we direct the registry to place both the matters before the learned Single Judge, taking up the determination of matters under the Cooperative Societies Act. The learned Single Judge shall decide on merits the legality, validity and propriety of the order passed by the Tribunal rejecting the application for condonation of delay on its own merits.