

(2019) 07 BOM CK 0003

In the Bombay High Court

Case No : Civil Application No. 1450, 1451 Of 2013, 2544, 2723, 2724 Of 2014, Writ Petition No. 435, 438, 440, 2406, 2407, 2436, 2442 Of 2013, 1548, 3024, 4722, 4965 Of 2017

Datta Nagari Sahakari Patsanstha

APPELLANT

Vs

Tanwani Hotels Pvt. Ltd

RESPONDENT

Date of Decision : 02-07-2019

Acts Referred:

Maharashtra Co operative Societies Act, 1960 — Section 91, 98A, 98(a)(ii), 101, 156, 154(2A)
Code Of Civil Procedure, 1908 — Section 2(3)
Bombay Tenancy And Agricultural Lands Act, 1948 — Section 74
Maharashtra Co operative Societies Rules, 1961 — Rule 107, 107(3), 107(1)(e), 107(11)

Citation : (2019) 07 BOM CK 0003

Hon'ble Judges : R.D. Dhanuka, J

Bench : Single Bench

Advocate : Rajendra V. Pai, P.D. Dalvi, A.R. Pai, Neuty N. Thakkar, Apurva Bhat, A. S. Khandeparkar, Datta H. Pawar, Sonali Pawar, Apoorva Khandeparkar, R.P. Kadam

Final Decision : Dismissed

Judgement

1. By Writ Petition Nos. 435 of 2013, 438 of 2013, 440 of 2013, 2406 of 2013, 2407 of 2013, 2436 of 2013 and 2442 of 2013, Shri Datta Nagari

Sahakari Patsanstha Maryadit (Chinchwad) has challenged various orders. By Writ Petition Nos. 4722 of 2017, 4965 of 2017, 1548 of 2017 and 3024

of 2017, M/s.Tanwani Hotels and other two borrowers have challenged various orders passed by the authority under the provisions of the

Maharashtra Co-operative Societies Act, 1960 (for short the said MCS Act) read with Maharashtra Co-operative Societies Rules, 1961 (for short the

said MCS Rules). By consent of parties, all the aforesaid writ petitions were heard

together and are being disposed of by a common order. Some of the relevant facts for the purpose of deciding these petitions are as under :-

2. Shri Datta Nagari Sahakari Patsanstha Maryadeet (Chinchwad) is hereinafter referred to as the lender whereas the Tanwani Hotels Pvt. Ltd. and

others are referred to as the borrowers in the later part of this judgment.

3. On or about 30th June, 1999, one of the borrower i.e. Tanwani Hotels Pvt. Ltd. who was a member of the lender applied for loan for a sum of Rs.

70 lacs and Rs.80 lacs respectively. On 30th June, 1999, the lender sanctioned the said loan on the condition that the borrower would pay compound

interest at the rate of 19% per annum with six monthly rest insofar as loan amount of Rs.70 lacs is concerned and compound interest at the rate of

20% per annum with six monthly rest insofar as loan amount of Rs.80 lacs is concerned. The borrower agreed to repay the entire loan with interest as

per the terms of the agreement on or before 29th June, 2002.

4. On 5th January, 1999 and 9th May, 2000 Mr.Anil Tanwani and Mr.Amar Tanwani applied for loan of Rs.30 lacs each respectively to the lender

which amount was sanctioned by the lender. It is the case of the lender that all the aforesaid borrowers failed to repay the amount under those three

loans to the lender as per the terms of the contract and committed default.

5. On 18th November, 2004, the lender applied for issuance of the recovery certificate under section 101 of the MCS Act against Tanwani Hotels

Pvt. Ltd.. On 22nd December, 2003, the lender applied for issuance of the recovery certificate against Mr.Amar Tanwani. A separate application was

made on 22nd December, 2003 by the lender for issuance of the recovery certificate against Mr.Anil Tanwani.

6. On 20th December, 2004, the Assistant Registrar of Co-operative Societies, Shirol issued notices to the borrowers in those application filed under

section 101 of the MCS Act and posted the matter for hearing on 31st January, 2005. It is the case of the lenders that the borrowers appeared before

the Assistant Registrar and sought adjournments on not less than 10 occasions. The borrowers also failed to submit its say before the Assistant

Registrar.

7. On 25th January 2005, 16th June 2005 and 16th June, 2005 Tanwani Hotels Pvt. Ltd., Mr.Amar Tanwani and Mr.Anil Tanwani filed a dispute

under section 91 of the MCS Act against the lenders before the Co-operative Court, Kolhapur for settlement of the accounts between the lender and

the borrowers and for other reliefs. On 20th August, 2005, the borrowers made oral submission before the Assistant Registrar. On 14th October,

2005, the learned Assistant Registrar issued certificate under section 101 of the MCS Act against all the borrowers.

8. On 14th November, 2005, the borrowers applied for review of the order dated 14th October, 2005 passed by the learned Assistant Registrar. On

25th November, 2005, the learned Assistant Registrar allowed the said review application and re-heard the application filed by the lender for issuance

of the recovery certificate. On 29th April, 2006, the learned Assistant Registrar passed an order issuing recovery certificate under section 101 of the

MCS Act for the sum of Rs.1,17,32,497/- in respect of the first loan of Rs.70 lacs with interest at the rate of 19% per annum and for the expenses.

9. On 29th April, 2006, the learned Assistant Registrar issued a recovery certificate for Rs.1,24,60,423/- with interest at the rate of 20% per annum

and the expenses thereto insofar as loan amount of Rs.80 lacs is concerned. On 29th April, 2006, the learned Assistant Registrar issued a recovery

certificate for a sum of Rs.48,12,228/- with interest at the rate of 20% per annum from 1st October, 2003. On 29th April, 2006, the learned Assistant

Registrar issued a recovery certificate for Rs.37,67,772/- with interest at the rate of 19% per annum w.e.f. 1st October, 2003.

10. On 16th November, 2006, the lenders and the borrowers filed consent terms before the co-operative court in the said dispute filed by the

borrowers. On 16th November, 2006, the co-operative court passed a consent award. Under the said consent award, the borrowers agreed and

confirmed that they had received the loan amount of Rs.30 lacs each and agreed to pay the said amount at the rate of 17% per annum within 8

months from the date of the said consent terms failing which the lender was allowed to recover the same as per the certificate issued under section

101 of the MCS Act with cost.

11. Similar consent terms were filed in the other disputes in respect of the other loans. It was provided in the consent terms that the lender has to

furnish account statement of total dues and then the borrowers shall pay the said dues to the lender. It is the case of the lender that the borrowers

failed to repay the amount in terms of the consent award. It is the case of the borrowers that the lender failed to furnish the statement of account as

per the consent award within the stipulated period of four months in case of Tanwani Hotels Pvt.Ltd. and within eight months in case of Mr.Amar

Tanwani and Mr.Anil Tanwani.

12. On 13th May, 2008, the special recovery officer initiated proceedings under section 107 of the MCS Rules, 1961 and attached the property of the

borrowers. Being aggrieved by the said attachment order passed by the special recovery officer, the borrowers filed recovery application before the

Divisional Joint Registrar, Co-operative Societies, Kolhapur i.e. Revision Application Nos.261 of 2008 to 265 of 2008.

13. It is the case of the lender that during the pendency of the said revision application filed by the borrowers and the guarantors, the borrowers also

made a grievance that since there was compromise between the parties, the accounts were to be furnished by the lender as per the consent award.

The special recovery officer heard the parties. It is the case of the lender that the lender submitted the accounts as per the said consent terms to the

borrowers through its manager Shri Raul Japtanmulukh and the borrowers through Mr.Amar Tanwani received the entire accounts. It is the case of

the lender that the special recovery officer took acknowledgment of the borrowers on the Roznama acknowledging the receipt of the accounts as per

the compromise. It is the case of the lender that on 19th April, 2010, the special recovery officer accepted the accounts submitted by the lender after

overruling the objections of the borrowers.

14. On 19th April, 2010, the lender initiated recovery proceedings. The special recovery officer issued a demand notice upon the borrowers on 19th

April, 2010. On 19th April, 2010, the borrowers challenged the said notice dated 19th April, 2010 before the learned Joint Divisional Registrar, Co-

operative Societies. By an order dated 14th October,2010, the Divisional Joint Registrar, Co-operative Societies was pleased to set aside the demand

notice dated 19th April,2010. The Divisional Joint Registrar, Co-operative Societies was pleased to set aside the demand notice dated 7th September,

2007 in Revision Application Nos. 182 of 2010 to 184 of 2010. It is the case of the borrowers that the Divisional Joint Registrar in the said order

observed that the lender had not given proper accounts to the borrowers. The

lender did not challenge the said order dated 14th October,2010 passed by the Divisional Joint Registrar.

15. On 18th August,2011, the borrowers filed execution application before the learned Civil Judge, Senior Division for seeking execution of the consent award dated 16th November, 2006. By order dated 12th December, 2011, the learned Civil Judge, Senior Division recorded that the decree holder was ready to deposit the amount and allowed the decree holder (borrower) to deposit the amount of Rs.1,58,20,268/- (on account) within 30 days from the date of the said order and also granted liberty to the lender to withdraw the said amount. The borrowers deposited the amount of Rs.1,28,20,268/- and Rs.30,00,000/- in savings account totalling to Rs.1,58,20,268/- which amounts were adjusted by the lender.

16. Sometime in the month of December 2011, the lender filed a writ petition bearing no. 374 of 2011 before this court impugning the order dated 12th December,2011 and also challenged the maintainability of the execution application filed by the borrowers. By an order dated 14th February, 2012, this court recorded that the demand notice dated 2nd June, 2011 was issued for a sum of Rs.5.82 crores. However, the borrowers had deposited Rs.1.58 crores in the trial court and that the demand notice remained to be executed. This court recorded that the only clarification required was that the demand notices may be prosecuted further upon giving credit of Rs.1.58 crores to the borrowers. By the said order, this court disposed of the said Writ Petition No.374 of 2012. The borrowers did not challenge the said order dated 14th February, 2012.

17. On 7th April, 2012, the borrowers filed an application before the learned Civil Judge, Senior Division inter-alia praying for stay of the recovery proceedings till the lender furnishes the accounts as per the consent award. Learned Civil Judge Senior Division passed an order restraining the lender from prosecuting the demand notices till the accounts were submitted as per the consent award. On 7th April, 2014, learned Civil Judge, Senior Division (Executing Court) recorded that the Court had perused the order of this Court and directed the lender to submit the accounts as per the consent award on or before the next date. The advocate for the lender made a statement before the Executing Court that the lender will not prosecute that demand notice till the decision on the issue of jurisdiction was rendered by

the Executing Court.

18. On 15th June, 2012, learned Civil Judge, Senior Division held that the said Court had jurisdiction to decide the execution application and passed an order accordingly. It was held that the execution application filed by the borrowers was maintainable. The said order dated 15th June, 2012 passed by the learned Civil Judge, Senior Division came to be challenged by the lender by filing three writ petitions in this Court bearing Nos.435 of 2013, 438 of 2013 and 440 of 2013. During the pendency of the Writ Petitions Nos.435 of 2013, 438 of 2013 and 440 of 2013, the lender also challenged the order dated 7th April, 2012 passed by the learned Civil Judge, Senior Division by seeking amendment to these petitions. This Court permitted the lender to carry out amendment in the aforesaid three writ petitions.

19. Insofar as the demand notice dated 2nd June, 2011 issued by the Special Recovery Officer under rules 107(3) and 107 (11) read with section 156 of the said MCS Act is concerned, the borrowers filed four revision applications bearing Nos.370 of 2012, 373 of 2012, 374 of 2012 and 369 of 2012 before the Divisional Joint Register. There was delay of about six years and two months in filing those revision applications filed by the borrowers.

The borrowers did not make any deposit along with the said revision applications or before hearing of the application for condonation of delay before the Divisional Joint Registrar. The said application for condonation of delay was opposed by the lender before the Divisional Joint Register.

20. On 17th January, 2013, the Divisional Joint Register passed an order on those four applications for condonation of delay and recorded that prima-facie he found difficulties in the recovery certificate. There was a compromise decree passed by the Co-operative Court and had admitted that the parties were working on the terms of compromise decree during which time was lost. The Divisional Joint Register observed that if the delay was condoned and the revision applications were decided on merits, there would be no harm caused to the parties. The said order dated 17th January, 2013 came to be challenged by the lender by filing four separate writ petitions bearing Nos.2406 of 2013, 2407 of 2013, 2436 of 2013 and 2442 of 2013. Thus four writ petitions were also heard along with the earlier three writ petitions filed by the lender.

21. On 26th June, 2015, this Court in the writ petitions filed by the lender

recorded the statement made by the learned counsel for the borrowers that they would represent against the demand notices within three weeks before the Special Recovery Officer. This Court directed that if any representation would be made within three weeks, the Special Recovery Officer to consider the same, if the same was in respect of the amount which was mentioned in the said demand notice and to communicate his decision to the borrowers within two weeks from the date of receipt of the representation of the borrowers. This Court also recorded that it was expected that the lender would not prosecute the demand of the recovery certificate under section 101 of the MCS Act in accordance with the said order passed by this Court would not preclude the borrowers from challenging the attachment or sale of the property in question, if any such avenue is open to them under the Act or Rules. This Court had disposed of those four writ petitions filed by the lender accordingly.

22. Pursuant to the said order dated 26th June, 2015 passed by this Court, the borrowers appeared before the Special Recovery Officer. By a letter dated 17th November, 2015, the borrowers through their advocate disputed the demand notice issued by the Special Recovery Officer. By an order dated 27th July, 2015, the Special Recovery Officer considered the objections raised by the borrowers and rejected those objections and upheld the demand notices issued by the Special Recovery Officer. On 27th July, 2015, the Special Recovery Officer also issued fresh demand notice upon the borrowers. On 18th August, 2015, the borrowers replied to the said demand notice and disputed the amount.

23. The borrowers thereafter filed the Revision Application Nos.309 of 2015, 310 of 2015, 311 of 2015 and 312 of 2015 challenging the demand notices before the Divisional Joint Registrar under section 154 of the said MCS Act. The Revisional Authority passed an order on 20th May, 2016 on those revision applications and rejected those revision applications. Being aggrieved by the said order dated 20th May, 2016, the borrowers filed four Writ Petitions bearing Nos. 4722 of 2017, 4965 of 2017, 1548 of 2017 and 3024 of 2017 in this Court which are also heard along with the earlier writ petitions referred to aforesaid and are being disposed of by this order and judgment.

24. Mr.R.V. Pai, learned counsel appearing for the lender submits that there were

no executable terms in the consent terms which the trial Court could execute in the execution proceedings. The execution application was filed by the borrowers, who was liable to make payment to the lender and thus they could not have filed the execution application as decree-holders. He submits that the finding of the Executing Court that the lender had not fixed the due amount admittedly is totally perverse and without any basis. The lender had calculated the entire amount as per the terms of the consent award and had communicated to the borrowers.

25. It is submitted by the learned counsel that the learned Civil Judge had no jurisdiction to try the execution application filed by the borrowers. He submits that in the execution application filed by the borrowers, nothing was left to be executable insofar as the lender is concerned. The statement of accounts in terms of the consent award was already forwarded by the lender to the borrowers. It is submitted by the learned counsel that it was specifically provided in the consent terms that if the borrowers failed to satisfy the amount mentioned in the consent terms within the time prescribed, the lender was free to recover its dues as per the recovery certificate issued under section 101 of the said MCS Act. He submits that the lender was in fact a decree-holder and had right to recover its dues from the borrowers in accordance with law.

26. It is submitted by the learned counsel that the proceedings filed by the borrowers before the Co-operative Court under section 91 of the MCS Act itself were nullity and without jurisdiction. He submits that the said so called consent award itself was without jurisdiction. The parties even by consent could not have conferred jurisdiction on the Co-operative Court under section 91 of the MCS Act in the proceedings challenging the recovery certificate issued under section 101 of the MCS Act.

27. It is submitted by the learned counsel that by an order dated 14th February, 2012 passed by this Court in Writ Petition No.374 of 2012 filed by the lender while disposing of the said writ petition, it was clearly held by this Court that on the strength of Special Darkhast Application taken out by the borrowers, who was indebted to the lender described as the decree-holder an order came to be passed considering him as a decree-holder under which Rs.1.58 crores has been deposited in the trial Court. The demand notices remained to be executed. The only clarification which was required

was that the demand notices may be prosecuted further upon giving a credit of Rs.1.58 crores to the borrowers.

28. It is submitted that by virtue of the said order dated 14th February, 2012 passed by this Court, the so called consent award was virtually set aside

by this Court. The only issue was about the execution of the demand notices after giving credit of Rs.1.58 crores to the borrowers. Learned counsel

also strongly placed reliance on the order passed by this Court on 26th June, 2015 in Writ Petition No.7884 of 2014 along with three other connected

matters filed by the Special Recovery Officer impugning the orders dated 24th March, 2014 passed by the Divisional Joint Registrar, Co-operative

Societies, by which the revision applications filed by the borrowers were allowed and the demand notice dated 2nd June, 2011 issued by the Special

Recovery Officer came to be set aside.

29. It is submitted that the borrowers made a statement before this Court in the said writ petitions that four revision applications filed by them would

be withdrawn and they would reply to the demand notice dated 2nd June, 2011. This Court also recorded the statement made by the learned counsel

for the borrowers that the borrowers would repay against the said demand notice within three months from the date of the said order before the

Special Recovery Officer. This Court accordingly directed the Special Recovery Officer to consider the objections of the borrowers and to pass an

appropriate order. He submits that by the said order, this court had already observed that the lender would proceed with the recovery of dues covered

by the certificate under section 101 of MCS Act in accordance with law. Learned counsel submits that there was no question of enforcement of the

so called consent award by the borrowers in view of the said order dated 26th June, 2015 holding that the lender would proceed with the recovery of

dues covered by the certificate under section 101 of MCS Act in accordance with law.

30. It is submitted by the learned counsel that even under the said so called consent award rendered by the Co-operative Court, the borrowers had not

deposited the amount agreed to be deposited. Some of the properties of the borrowers are already secured in favour of the lender. Some of the

personal properties of the Directors of Tanwani Hotels Private Limited, one of the borrowers are also secured in favour of the lender. It is submitted

by the learned counsel that since the borrowers in any event failed to pay in accordance with the provisions of the said so called consent award, the lender became entitled to execute the recovery certificate in accordance with the recovery certificate issued by the Assistant Registrar under section 101 of the MCS Act and was not bound to accept the amount agreed to be paid by the borrowers under the said so called consent award on the basis of the agreement arrived at between the parties. Learned counsel tendered a statement showing the amount payable in accordance with the recovery certificate, payable as per the consent award. He submits that the members of the lender who are from the middle class family as a result of the default committed by the borrowers have suffered greater hardship.

31. In support of the submission that the Co-operative Court has no jurisdiction to entertain the dispute under section 91 of the MCS Act thereby directly or indirectly impugning the recovery certificate issued under section 101 of the MCS Act, learned counsel placed reliance on the following

judgments :-

- a) The judgment of the Supreme Court in case of Harshad Chimanlal Modi vs. Dlf Universal Limited, AIR 2005 SC 4446 (paragraph 28),
- b) . The judgment of the Supreme Court in case of Official Trustee Wes Bengal vs. Sachindra Nath Chatterjee, AIR 1969 SC 823 (paragraphs 15 to 18),
- c) . The judgment of the Supreme Court in case of Rafique BB vs. Sayyad Walyuddin, AIR 2003 SC 3789 (paragraphs 6 to 9),
- d) . The judgment of the Supreme Court in case of Sarwan Kumar vs. Madan Lal Aggarwal, AIR 2003 SC 1475 (paragraphs 20 to 24),
- e) .The judgment of the Supreme Court in case of Sant Lal Gupta vs. Modern Co-operative Housing Society Limited & Ors., 2010 (13) SCC 336 (paragraph 23),
- f). The judgment of the Supreme Court in case of Roger Shashoua & Ors. vs. Mukesh Sharma & Ors., (2017) 14 SCC 722 (paragraphs 62 and 64),
- g). The judgment of the Supreme Court in case of Kanwar Singh Saini vs. High Court of Delhi, 2012(4) SCC 307 (paragraph 13).

32. Learned counsel for the lender placed reliance on the judgment of this Court in case of Vasundhara Ashokrao Patil vs. Rajaram Bapu Sahakari Bank Limited, 2003 (4) Mh.L.J. 315 (paragraphs 5 to 8) and would submit that a

certificate issued under section 101 of the MCS Act cannot be construed as a dispute falling under any part of section 91 of the MCS Act and cannot be adjudicated upon in the said proceedings. In support of the submission that the recovery certificate under section 101 of the MCS Act is final and conclusive and thus there is no remedy under section 91 of the MCS Act to challenge such recovery certificate and the recovery certificate could be challenged, if any, under section 154 of the MCS Act. Learned counsel placed reliance on the judgment of this Court in case of Kedarling Vikas Seva Society vs. Dinkar D. Raut, 2003(1) Mh.L.J. 152.

33. Learned counsel for the lender invited my attention to prayer clause (a) of the dispute filed by the borrowers under section 91 of the MCS Act. He submits that in the said dispute, the borrowers had prayed for declaration that the notice dated 23rd May, 2003 issued by the Special Recovery Officer was bad and illegal and no recovery could be made by the Special Recovery Officer in the said notice. The borrowers had also prayed for statement of accounts in the said dispute and for installment of the amount payable upon statement of account with simple interest at the rate of 16% p.a. On 23rd May, 2003, the Special Recovery Officer of the lender had demanded an amount payable under the recovery certificate. He submits that though there was no reference to section 101 of the MCS Act in the said recovery notice, the said notice was for recovery of the amount payable under the recovery certificate issued by the Assistant Registrar under section 101 of the MCS Act.

34. Learned counsel tendered a copy of the said application under section 101 of the MCS Act with Rule 107(1)(e) filed by the lender before the Assistant Registrar. He submits that the demand notice dated 23rd May, 2003 issued by the lender had merged with the application under section 101 of the MCS Act filed on 18th November, 2004. It is submitted that by clever drafting, the borrowers could not take out pleadings out of the clutches of bar under section 91 of the MCS Act by only challenging the notice of demand dated 23rd May, 2003 in the dispute filed under section 91 of the MCS Act. He submits that the proceedings under section 101 of the MCS Act could not be challenged in the dispute under section 91 of the MCS Act. It is submitted that the Co-operative Court had thus no jurisdiction to try and entertain the alleged dispute on the date of filing such dispute and to pass an

award by consent or otherwise.

35. It is submitted by the learned counsel that the recovery certificate even otherwise could not have been modified by consent of parties before the

Co-operative Court under section 91 of the MCS Act. The only remedy of the borrowers to challenge the recovery certificate was by way of revision

application under section 154 of the MCS Act read with MCS Rules. The proceedings under section 101 and 91 of the MCS Act are in different

spheres. Mr.Pai, learned counsel fairly accepted that the issue of jurisdiction of the Co-operative Court under section 91 was not raised by the lender

before the Co-operative Court or even in the execution application filed by the borrowers.

36. In his alternate submission, learned counsel for the lender submits that the statement of account was already furnished by the lender to the

borrowers in compliance with the terms recorded in the consent award. In support of this submission, he invited my attention to the Roznama of the

execution proceedings dated 24th February, 2010 recording that the borrowers had received the calculation. He submits that there was no time

specified in the consent terms for furnishing the calculation by the lender to the borrowers. He invited my attention to the observations made by the

Divisional Joint Registrar in the order dated 20th November, 2009 observing that both the parties had failed to comply with the consent terms. The

Divisional Joint Registrar had directed the Special Recovery Officer to decide the objections raised by the borrowers on 25th June, 2008 on merits and

as per law. The Divisional Joint Registrar also made an erroneous observation that there was not a single document on record to show that the lender

had communicated the calculation as per the terms and conditions nos.1 to 3 of the consent award and there was no proof of compliance regarding

term no.4.

37. Learned counsel for the lender invited my attention to the Roznama of the Special Recovery Officer page 65 (i) of Writ Petition No.435 of 2013

and would submit that a specific endorsement was made in the said Roznama that the lender had furnished the statement of account to the borrowers.

In the margin of Roznama, there was an endorsement acknowledging the receipt of the bank statement and signed by Amar Tanwani, one of the

borrower. The borrowers had asked for time to consider the said statement of

account furnished by the lender. The matter was thereafter adjourned to 11th March, 2010. It is submitted that since the borrowers did not pay in accordance with the said account furnished by the lender, the Special Recovery Officer was justified in issuing notice of demand dated 2nd June, 2011 and to seek recovery in accordance with the recover certificate issued by the Assistant Registrar under section 101 of the MCS Act against the borrowers.

38. Learned counsel invited my attention to the averments made in paragraph 12 (c) of the Writ Petition No.435 of 2013 and would submit that the lender has challenged the jurisdiction of the Co-operative Court by seeking amendment to the said writ petition which amendment was permitted by this Court. He submits that no defence based on the consent terms is thus available to the borrowers in view of the order dated 26th June, 2015 passed by this Court in the earlier writ petitions filed by the lender.

39. Insofar as the delay in filing the revision applications by the borrowers is concerned, learned counsel for the lender invited my attention to the applications filed by the borrowers for condonation of delay of six years and two months in filing the revision applications and reply of the lender to the said applications before the Divisional Joint Registrar and would submit that there was no explanation for delay caused by the borrowers in the said application for seeking condonation of delay. He submits that the learned Divisional Joint Registrar has taken very casual approach in the matter and has without recording any reasons, or in any event satisfactory reasons, has condoned gross delay of six years and two months in filing the revision application. In view of the gross unexplained delay on the part of the borrowers in filing the revision application, right had accrued in favour of the lender.

40. In support of this submission, learned counsel for the lender placed reliance on the judgment of the Supreme Court in case of Balwant Singh (Dead) vs. Jagdish Singh & Ors. (2010) 8 SCC 685 and in particular paragraphs 25, 26, 29 to 31 and would submit that since the borrowers did not explain gross delay of six years and two months in filing the revision application before the Divisional Joint Registrar, the Divisional Joint Registrar could not have passed an order condoning the said gross delay in filing the revision application in favour of the borrowers. He submits that the

Supreme Court in the said judgment has clearly held that once a valuable right has accrued in favour of one of the party as a result of failure of the other party to explain the delay by showing sufficient cause and its own conduct, it will be unreasonable to take away that right on mere asking of the applicant particularly when the delay is directly as a result of negligence, default or inaction on that party.

41. In his alternate submission, it is submitted that the Divisional Joint Registrar could not have even otherwise considered the application for condonation of delay filed by the borrowers in filing the revision application under section 154 of the MCS Act unless a mandatory condition of deposit of 50% of the due amount was complied with by the borrowers under section 154 (2A) of the MCS Act. He submits that admittedly the borrowers did not deposit any such amount and thus learned Divisional Joint Registrar even could not have entertained the said application for condonation of delay in filing such revision application. The entire order thus passed by the Divisional Joint Registrar is contrary to section 154 (2A) of the MCS Act. In support of this submission, learned counsel for the lender strongly placed reliance on the judgment of this Court in case of Barindra Overseas Private Limited & Anr. vs. Shilpa Shares & Securities & Ors., 2018(6) All MR 1 and in particular paragraphs 78 and 79 thereon.

42. Insofar as the Writ Petition Nos.4722 of 2017, 4965 of 2017, 1548 of 2017 and 3024 of 2017 filed by the borrowers are concerned, it is submitted by the learned counsel for the lender that the Divisional Joint Registrar has rightly rejected the revision applications filed by the borrowers and the impugned orders passed by the Divisional Joint Registrar do not warrant any interference of this Court.

43. Mr.Dalvi, learned counsel for the lender who also appeared in Writ Petition No.2407 of 2013 filed by the lender adopted the submissions made by Mr.Pai in Writ Petition No.2406 of 2013 and would submit that the delay of six years and two months was not sufficiently explained by the borrowers.

The Divisional Joint Registrar could not have entertained even the application of condonation of delay without the borrowers depositing 50% amount

due under section 154 (2A) of the MCS Act. He also strongly placed reliance on the judgment of this Court in case of Barindra Overseas Private

Limited & Anr. (supra) and reiterated his submissions in Writ Petition No.2436 of 2013 and 2442 of 2013 and would submit that the impugned order

passed by the Divisional Joint Registrar condoning the delay of six years and two months deserves to be set aside.

44. Mr.Khandeparkar, learned counsel for the borrowers on the other hand submits that as against the total loan of Rs.1.80 crores taken by the

borrowers from the lender, the borrowers have already paid much more than the principal amount. The lender has charged exorbitant amount of

interest to the borrowers and did not submit any statement of account to the borrowers though the parties had agreed before the Co-operative Court in

the dispute filed by the borrowers that such statement of account would be furnished by the lender to the borrowers. The borrowers were required to

pay the amount that was to be calculated in the said statement of account. He submits that the two authorities below have rendered the findings of

fact that the lender had not furnished any such statement of account to the borrowers in compliance with the consent award rendered by the Co-

operative Court based on the consent terms filed by the parties.

45. It is submitted that the borrowers had thus not committed any breach of the consent award rendered by the Co-operative Court. The obligation of

the borrowers to pay the amount in terms of the consent award did not commence till such time the statement of account was furnished by the lender

to the borrowers. He submits that the findings rendered by the Executing Court that the lender had not furnished the statement of account to the

borrowers has not been impugned by the lender by filing any appropriate proceedings and the said finding has attained finality.

46. Insofar as the issue of jurisdiction raised by the lender during the course of argument by the learned counsel for the lender is concerned, it is

submitted by the learned counsel for the borrowers that no such issue of jurisdiction was ever raised by the lender before the Co-operative Court in

the dispute filed by the followers. It is submitted that on the other hand, the lender and the borrowers filed the consent terms before the Co-operative

Court. The lender had acted upon the consent award and thus cannot be allowed to raise issue of jurisdiction of the Co-operative Court in the said

dispute filed by the borrowers under section 91 of the MCS Act at this stage.

47. Without prejudice to the aforesaid submissions, it is submitted by the learned counsel that the borrowers had not challenged the recovery

certificate issued by the learned Assistant Registrar in the said dispute filed

under section 91 of the MCS Act. He submits that it is an admitted position that the recovery certificate was issued by the Assistant Registrar only after filing of the dispute by the borrowers under section 91 of the MCS Act and thus there was no question of the borrowers challenging the validity of the recovery certificate in the said dispute. He submits that by an order dated 30th December, 2005, the recovery certificates earlier issued by the Assistant Registrar came to be recalled. The fresh recovery certificates were issued thereafter on 29th April, 2006. The consent terms were filed by the parties in the said dispute filed by the borrowers under section 91 of the MCS Act on 16th July, 2006.

48. It is submitted by the learned counsel that under the consent terms arrived at between the parties before the Co-operative Court, it was the obligation of the lender to work out the amount payable by the borrowers with simple rate of interest at 17% p.a. The borrowers deposited a sum of Rs.15.00 lacs with the lender during the pendency of the proceedings. He submits that since the lender did not furnish any statement of account, the question of the borrowers committing any default in making payment in compliance with the consent award did not arise. The lender thus could not have issued any fresh demand notice based on the recovery certificate issued by the Assistant Registrar which recovery certificate had merged with the consent award rendered by the Co-operative Court under section 91 of the MCS Act.

49. It is submitted that the borrowers were and are entitled to get the amount worked out from the lender under the said consent award rendered by the Co-operative Court and was liable to make payment based on such statement of account to be calculated in terms of the consent terms within four months from the date of furnishing such statement of account by the lender to the borrowers. It is submitted that the order passed by the Special Recovery Officer on 19th April, 2010 holding that the borrowers had accepted the correctness of the statement of account furnished by the lender was set aside by the Divisional Joint Registrar in the Revision Application No.184 of 2010 filed by the borrowers by an order dated 14th October, 2010.

50. It is submitted that in the order dated 14th October, 2010, the Divisional Joint Registrar had rendered a finding that in the present case, it was clear

that the decretal amount has not been fixed by the Divisional Joint Registrar even on the date of order dated 14th October, 2010. It was also observed

that the decretal amount should be fixed at the out set and then all other terms and conditions would come in the picture as per the terms of the

consent award rendered by the Co- operative Court. By the said order, the learned Divisional Joint Registrar has set aside the order dated 19th April,

2010 passed by the Special Recovery Officer. He submits that this order passed by the Divisional Joint Registrar on 14th October, 2010 setting aside

the order passed by the Special Recovery Officer has not been impugned by the lender and thus the said order has attained finality.

51. Insofar as the issue raised by the learned counsel for the lender that the borrowers could not have filed any execution application as the decree-

holder for enforcement of the consent award rendered by the Co-operative Court is concerned, learned counsel for the borrowers placed reliance on

the definition of "decree-holder" under section 2(3) of the Code of Civil Procedure, 1908. He submits that under the said consent award, which was

based on the consent terms filed by the parties, right was created in the borrowers to receive proper statement of account and thereafter had four

months time to clear the liability as per the consent award. Since the lender had failed to supply the statement of account in compliance with the order

passed by the Co-operative Court, the borrowers were entitled to seek execution of the consent terms rendered by the Co-operative Court.

52. Learned counsel for the borrowers placed reliance on the certificate issued by the Co-operative Court at II, Kolhapur and Sindhudurg District

dated 16th August, 2006 stating that the consent award shall be executed in the same manner as the decree of the civil Court as set out in section

98(a)(ii) of the MCS Act. He also invited my attention to the order dated 7th April, 2012 passed by the Executing Court below Exhibit "1" filed by

the borrowers directing the lender to submit the account as per the consent decree on or before the next date. He submits that the learned counsel for

the lender made a statement before the Executing Court on 7th April, 2012 that the lender will not prosecute that demand notice.

53. Learned counsel for the borrowers invited my attention to the order dated 12th December, 2011, recording the statement of the borrowers that

they were ready to deposit an amount of Rs.1,58,20,268/- and allowed the borrowers to deposit the said amount within 30 days. By the said order, the

lender was granted liberty to withdraw the said amount. He submits that in compliance with the said order dated 12th December, 2011, the borrowers have already deposited the said amount of Rs.1,58,20,268/- which amount has been already withdrawn by the lender. He submits that the said amount was quantified by the borrowers in the application dated 18th August, 2011 filed by the borrowers before the Executing Court. The borrowers had also prayed in the said application that the lender be directed to furnish the statement of account in compliance with the consent award rendered by the Co-operative Court.

54. Insofar as the issue of jurisdiction of the Executing Court raised by the lender is concerned, learned counsel for the borrowers strongly placed reliance on the order dated 15th June, 2012 passed by the Executing Court below Exhibit â?" 1, in Special Darkhast No.20 of 2011 holding that the Executing Court had jurisdiction to try and entertain the said execution application filed by the borrowers. It is submitted that the Executing Court also referred to the order passed by the Divisional Joint Registrar setting aside the order of the Special Recovery Officer dated 19th April, 2010 and held that the decretal amount had not been fixed by the lender and shall be fixed at the out set and then all other terms and conditions would come in picture.

55. It is submitted that by the said order the Executing Court also rendered a finding that the lender had first to fix the due amount which was admittedly not done by the lender and thus in such circumstances the borrowers have every right to be the decree-holder for compliance of the consent decree. The Executing Court also rendered a finding that the plain reading of the consent decree would show that the lender has to comply with their liability first and after compliance of their liability, the borrowers' liability would come in force. Unless and until, the lender would have complied with the terms and conditions of the consent decree, the borrowers were not liable to comply with the consent decree.

56. It is submitted by the learned counsel for the borrowers that the borrowers had not challenged the validity of the recovery certificate. The dispute was already filed before issuance of the recovery certificate by the Assistant Registrar. Learned counsel for the borrowers placed reliance on the judgment of the Supreme Court in case R. Rajanna vs. S.R. Venkataswamy &

Ors. and in particular paragraphs 10 and 11 and would submit that since the Co-operative Court had passed a consent decree based on the consent terms filed by the parties, only that Court alone who examined and determined the question raised by the lender. The remedy of the lender was thus to approach the Co-operative Court itself for a declaration that the said consent award rendered by the Co-operative Court was null and void and not binding upon the lender.

57. It is submitted by the learned counsel for the borrowers that the borrowers had already paid more than Rs.4.00 crores as on date to lender as against the principal amount of Rs.2.10 crores. He submits that the Executing Court has till date not disposed the execution application and also the stay application filed by the borrowers.

58. Insofar as the Writ Petition No.374 of 2011 filed by the lender against the borrowers in this Court is concerned, the said writ petition was filed impugning the order dated 12th December, 2011 passed by the Executing Court in Special Darkhast No.20 of 2011 on the ground that the consent terms between the parties was not executable as the same was entered into on 16th November, 2006 and was conditional. It is submitted that the order dated 14th February 2012 passed by this Court in Writ Petition No.374 of 2012 filed by the lender would not assist the case of the lender. The borrowers have already filed the Civil Application bearing No.2544 of 2014 in Writ Petition No.435 of 2013 inter-alia praying for appointment of the Court Receiver and/or any independent expert to verify the amount of the lender.

59. It is submitted by the learned counsel for the borrowers that even at this stage, this Court may appoint any Court Commissioner or any Chartered Accountant for the purpose of verifying the accounts of the lender and to ascertain the amount due and payable, if any by the borrowers in terms of the consent award rendered by the Co-operative Court based on the consent terms filed by the parties. He submits that admittedly the order dated 19th April, 2010 passed by the Special Recovery Officer holding that the correctness of the statement of account submitted by the lender has not been disputed by the borrowers has been already set aside by the Divisional Joint Registrar which order not having been challenged has attained finality.

The lender thus could not have issued fresh notice of demand based on the original recovery certificate which recovery certificate had already merged

with the consent award rendered by the Co-operative Court.

60. Insofar as Writ Petition Nos.2406 of 2013, 2407 of 2013, 2436 of 2013 and 2442 of 2013 filed by the lender challenging the order passed by the

Divisional Joint Registrar condoning the delay of six years and two months in favour of the borrowers is concerned, it is submitted by the learned

counsel for the borrowers that the borrowers had sufficiently explained the delay in filing the revision application. Various proceedings filed by the

parties were pending either before the Co-operative Court or before the Executing Court in respect of the recovery certificate or the effect thereof.

Learned Divisional Joint Registrar rightly considered this aspect and have rightly condoned the delay in favour of the borrowers. The discretionary

powers exercised by the Divisional Joint Registrar having being properly and judicially exercised, this Court shall not entertain those four writ petitions

filed by the lender challenging the order of the Divisional Joint Registrar condoning the delay in filing the revision applications.

61. Insofar as the submission made by the learned counsel for the lender alleging non-compliance of section 154(2A) of the MCS Act by the

borrowers is concerned, it is submitted by the learned counsel for the borrowers that the powers of the Divisional Joint Registrar to hear the revision

application under section 154 of the MCS Act would be exercised only after the delay, if any, in filing the revision application is first condoned. The

question of any deposit under section 154(2A) of the MCS Act would arise only after such delay, if any, is first condoned. The borrowers were thus

not required to deposit any such amount under section 154(2A) of the MCS Act at the stage of argument of the said application for condonation of

delay or along with the said application for condonation of delay as a condition precedent. In support of the submission that unless the delay is

condoned, the Appellate Authority had no jurisdiction to entertain the appeal or revision in law, learned counsel for the borrowers placed reliance on

the judgment of this Court in case of Pandharinath Rambhau Kavitke vs. Shaikh Hamaja Shaikh Husen 2000 Vol. 102(3) Bom. L.R. 563 and in

particular paragraphs 10 and 11.

62. Learned counsel for the borrowers made an attempt to distinguish the judgment of this Court in case of Barindra Overseas Private Limited & Anr.

(supra) on the ground that the judgment of this Court in case of Pandharinath

Rambhau Kavitke (supra) delivered by this Court at an earlier point of time was not cited by the petitioner before this Court in the said judgment in case of Barindra Overseas Private Limited & Anr. (supra). It is submitted that the revision application thus filed by the borrowers were not in existence or could not be considered to be on record. The delay in filing such revision application was to be first considered. The borrowers were thus not required to deposit any amount till such time the delay in filing the revision application was condoned. He submits that in any event the borrowers had already deposited a sum of Rs.3,49,26,900/- on the date of the Divisional Joint Registrar entertaining the said application without rendering the application for condonation of delay. The borrowers thus had even otherwise complied with the said provisions of section 154(2A) of the MCS Act.

63. Learned counsel for the borrowers placed reliance on the judgment of the Supreme Court in case of Esha Bhattacharjee vs. Managing Committee of Raghunathpur Nafar Academy & Ors. 2013(12) SCC 649 in support of the submission that while considering an application for condonation of delay, the Court has to take liberal approach and to weigh the scale of balance of justice in respect of both the parties. He submits that learned Divisional Joint Registrar has rightly held that no prejudice would be caused to the lender, if the delay in filing the revision application filed by the borrowers was condoned.

64. Learned counsel for the borrowers also placed reliance on the judgment of the Supreme Court in case of Collector Land Acquisition, Anantnag & Anr. vs. Mst. Katiji & Ors., AIR 1987 SC 1353 in support of the submission that the Court has to take liberal approach while considering an application for condonation of delay and has to decide the matter on merits with a view to substantiate the justice to the parties on merits. Learned counsel also placed reliance on an unreported judgment of this Court delivered on 2nd April, 2013 in case of Dnyandev Asaram Palve vs. Sunita Dnyandev Palve in Writ Petition No.6228 of 2012 (Aurangabad Bench).

65. Insofar as Writ Petition Nos. 4722 of 2017, 4965 of 2017, 1548 of 2017 and 3024 of 2017 filed by the borrowers impugning the order passed by the Divisional Joint Registrar rejecting the revision application filed by the borrowers is concerned, learned counsel for the borrowers invited my attention to the impugned orders challenged in those writ petitions and would submit that

the impugned orders passed by the Divisional Joint Registrar are without rendering any reasons. The Divisional Joint Registrar has not considered any submissions made by the borrowers while impugning the order passed by the Special Recovery Officer and has passed a very cryptic order in breach of the principles of natural justice and also the directions issued by this Court in the order dated 26th June, 2015 in Writ Petition No.7884 of 2014 and other connected matters.

66. It is submitted that since there are no reasons recorded by the Divisional Joint Registrar while rejecting the revision application, the impugned orders deserves to be set aside on this ground alone. In support of this submission, learned counsel for the borrowers strongly placed reliance on an unreported judgment of the Supreme Court delivered on 26th July, 2018 in case of Central Board of Trustees vs. M/s.Indore Composite Pvt. Ltd. In Civil Appeal No.7240 of 2018 and in particular paragraphs 15 to 17. He also strongly placed reliance on another unreported judgment of the Supreme Court in case of M/s.Kranti Associates Pvt. Ltd. & Anr. vs. Sh.Masood Ahmed Khan & Ors., (2010) 9 SCC 496 and in particular paragraph 51.

67. Mr.R.V. Pai, learned counsel for the lender in rejoinder submits that in the Roznama dated 24th February, 2010 of the Special Recovery Officer, it was already recorded that the statement of account was handed over to Mr.Amar Tanwani, one of the borrower and he had acknowledged the receipt of the statement of account. The matter was adjourned to 11th March, 2010. He submits that the Special Recovery Officer has rendered a finding that the statement of account was furnished by the lender in accordance with the consent award.

68. Learned counsel for the lender placed reliance on the order dated 14th October, 2010 passed by the Divisional Joint Registrar impugning the order setting aside the order dated 19th April, 2010 and submits that even by the said order, it was made clear that the lender society can strictly observe the terms and conditions set out by the Co-operative Court as per the consent award or may go ahead with appropriate legal recourse. The said order would also apply to the borrowers. He submits that even according to the said order, the recovery notice issued by the lender for enforcement of the recovery certificate was valid and thus the Divisional Joint Registrar rightly rejected the revision application filed by the borrowers against the order of

the Special Recovery Officer holding that the demand notice was proper. The Divisional Joint Registrar did not interfere with the order of the Special

Recovery Officer holding that the notice of demand as valid.

69. Learned counsel for the lender once again strongly placed reliance on the order passed by this Court on 14th February, 2012 holding that the only

clarification required was that the demand notices may be prosecuted further upon giving credit of Rs.1.58 crores to the borrowers. The said demand

notice had remained to be executed. He submits that by the said order, this Court had observed that the Special Darkhast application filed by the

borrowers was strangely filed describing the borrowers as the decree-holders. Learned counsel submits that the grievance of the borrowers that the

lender had not furnished the statement of account is totally falsified by record produced by the lender and also by Roznama of the Special Recovery

Officer specifically recording that the statement of account was furnished and such statement of account was duly acknowledged by one of the

borrower.

70. Learned counsel for the lender placed reliance on section 98A of the MCS Act and would submit that the Executing Court was required to apply

its own mind to the execution of its decree. The application filed for execution of consent award by the borrowers itself was not maintainable. This

Court has already rendered a finding that the demand notice issued by the lender has remained to be executed. As against a certified amount of

Rs.5.82 crores as per recovery certificate at the relevant time the borrowers had only paid Rs.1.58 crores.

71. It is submitted by the learned counsel for the lender that at the first instance, the revision application filed by the borrowers against the notice of

demand itself was not maintainable and thus ought to have been rejected on that ground itself. In support of this submission, learned counsel for the

borrowers placed reliance on the judgment delivered by this Court in case of Sunil Sitaram Mahajan vs. Suryakant Pandurang Badave & Ors., 2016(3)

Mh.L.J. 373 and in particular paragraphs 8 and 9. He also placed reliance on the judgment of this Court in case of Manager, Adarsh Mahila Nagri

Sahakari Bank Ltd. & Anr. vs. State of Maharashtra & Ors., 2012(2) Bom.C.R. 163 in support of this submission.

72. Insofar as the judgment of the Supreme Court in case of R. Rajanna (supra)

relied upon by Mr.Khandeparkar, learned counsel for the borrowers

is concerned, the said judgment is distinguished by Mr.Pai on the ground that the said judgment was based on the interpretation of the Court decree.

There was no issue of jurisdiction of the Court who passed the decree raised in the matter.

73. Insofar as the submission of learned counsel for the borrowers that the lender had not raised an issue of jurisdiction of the Co-operative Court in

entertaining the dispute under section 91 of the MCS Act is concerned, it is submitted by the learned counsel for the lender that the issue of jurisdiction

can be raised by a party at any stage. In support of this submission, learned counsel placed reliance on the judgment of the Supreme Court in case of

Kanwar Singh Saini v. High Court of Delhi, (2012) 4 SCC 307 and in particular paragraph 13 and also in case of Roger Shashoua & Ors. Mukesh

Sharma & Ors., (2017) 14 SCC 722 and in particular paragraphs 62 to 64. He submits that the consent award rendered by the Co-operative Court

itself was nullity.

74. Learned counsel for the lender placed reliance on the order dated 12th August, 2015 passed by R.G. Ketkar, J. in Writ Petition No.435 of 2013

and other connected matters recording that the calculation was given by the lender to the borrowers on the basis of clause 2 of the agreement dated

28th June, 1999 as also the deposits made by the borrowers either in Court or with the lender as admitted by the lender in this Court on 12th August,

2015 and 19th August, 2015.

75. Mr.Khandeparkar, learned counsel for the borrowers submits that the so called order passed by the Special Recovery Officer was not an order

but was only a letter. The Divisional Joint Registrar has not rejected the revision application on the ground of maintainability of the revision application

but on merits without assigning any reasons and thus deserves to be set aside on this ground alone.

76. It is submitted by the learned counsel that in the said dispute filed by the borrowers before the Co-operative Court under section 91 of the MCS

Act, the borrowers had not challenged the recovery certificate issued by the Assistant Registrar under section 101 of the MCS Act. The liability of the

borrowers was compromised in the consent terms. The recovery certificate would have been operative only in the event of the borrowers committing

any default of the provisions of the consent award, which was based on the consent terms filed by the parties and not otherwise. Since no default have been committed by the borrowers, there was no question of the lender enforcing the recovery certificate by issuing a fresh demand notice.

REASONS AND CONCLUSION

77. Writ Petition No.435 of 2013 is filed by the lender impugning the order dated 15th June, 2012 passed by the learned Civil Judge, Senior Division,

Jaisinghpur holding that the executing court had jurisdiction to entertain and try the execution petition filed by the borrowers. By amending the petition,

the lender has also impugned the order dated 7th April,2012 directing the lender to submit the accounts as per the consent award on or before the next

date. It is vehemently urged by Mr.R.V.Pai, learned counsel for the lender that the dispute filed by the borrower under section 91 of the MCS Act

thereby impugning the notice of demand as well as the recovery certificate itself was not maintainable and thus the executing court did not have

jurisdiction to pass any order on the execution application filed by the borrowers for seeking execution of such consent award passed by the Co-

operative Court.

78. It is not in dispute that the lender had applied for issuance of recovery certificate under section 101 of the MCS Act against the borrowers on 18th

November,2014 against Tanwani Hotels Pvt. Ltd., and on 22nd December, 2003, against Mr.Amar Tanwani and Mr.Anil Tanwani respectively.

Assistant Registrar of Co-operative Societies had issued notices to the borrowers on 20th December,2004 in those proceedings filed under section 101

of the MCS Act. It is also not in dispute that on 25th January,2005, the said Tanwani Hotels Pvt. Ltd. and on 16th June 2005 Mr.Amar Tanwani and

Mr.Anil Tanwani filed three separate disputes under section 91 of the MCS Act against the lenders before the Co-operative Court, Kolhapur for

settlement of the accounts between the lender and the borrowers and for other reliefs.

79. The recovery certificate however came to be issued by the Assistant Register on 14th October,2005 against all the borrowers under section 101 of

the MCS Act. After an order of recall by the learned Assistant Registrar on 25th November, 2005, the learned Assistant Registrar passed another

order issuing recovery certificate on 29th April,2006 against all the borrowers

separately. It is not in dispute that the consent terms came to be filed between the parties in the said three disputes filed by the borrowers before the Co-operative Court on 16th November, 2006.

80. The submission that is urged before this court by the learned counsel for the lender is whether such dispute could have been at all filed by the borrowers against the lender under section 91 of the MCS Act directly or indirectly praying for setting aside the recovery certificate issued by the Assistant Registrar under section 101 of the MCS Act or not. It is not in dispute that when the disputes were filed by the borrowers on 25th January, 2005, the recovery certificates were not even issued by the Assistant Registrar. The question of the borrowers thus impugning the recovery certificate at that point of time did not arise. A perusal of the prayer, in the dispute filed by the borrowers indicates that the borrowers had applied for settlement of the accounts between the lender and the borrowers and for other reliefs.

81. In consent terms filed by the parties before the Co-operative Court, it was provided that the borrowers had agreed and confirmed that they had received various loan amount from the lender and agreed to pay the said amount at the rate of 17% per annum within four/eight months from the date of the said consent terms failing which the lender was allowed to recover the same as per the certificate issued by the learned Assistant Registrar under section 101 of the MCS Act with cost. In the said consent terms, it was also provided that the lender shall furnish account statement of total dues and then the borrowers shall pay the said dues to the lender. It was the case of the borrowers that the lender failed to furnish the statement of account as per the consent award within the stipulated period of four months in case of Tanwani Hotels Pvt. Ltd. and within eight months in case of Mr. Amar Tanwani and Mr. Anil Tanwani. On the other hand, it was the case of the lender that such statement of account was already furnished by the petitioner before special recovery officer which statement was acknowledged by the authorized representative of the borrowers. Since the borrowers failed to pay the amount in terms of the said accounts statement within the time prescribed under the consent terms, according to the lender, it became entitled to recover the entire amount payable as per the recovery certificate issued by the Assistant Registrar under section 101 of

the MCS Act.

82. It is not in dispute that the lender did not raise any objection before the Co-operative Court about maintainability of the said dispute under section

91 of the MCS Act. The lender has not disputed that it was a party to the consent terms filed before the Co-operative Court in those three disputes

filed by the borrowers. It is the case of the lender itself that pursuant to the said consent terms, the lender had alleged to have complied with its

obligation under the said consent terms to submit statement of account showing the amount due from the borrowers to the lender in compliance with

the said consent terms. The issue of jurisdiction is belatedly raised by the petitioner before this court by seeking amendment to the petition. In my

view, since the borrowers had not applied for setting aside the recovery certificate issued by the Assistant Registrar under section 101 of the MCS

Act, the dispute for settlement of the account between the lender and the borrowers based on the notice of demand issued by the lender was

maintainable. There is thus no substance in the submission of Mr.Pai, learned counsel for the lender that the Co-operative Court did not have

jurisdiction at the first instance to entertain the dispute filed by the borrowers under section 91 of the MCS Act.

83. Insofar as the judgment of Supreme Court in case of Harshad Chimanlal Modi (supra) relied upon by Mr.R.V.Pai, learned counsel for the lender is

concerned, since this court is of the view that the Co-operative Court had jurisdiction to adjudicate upon the dispute relating to the settlement of

account, the judgment of Supreme Court in case of Harshad Chimanlal Modi (supra) holding that even by consent of parties, the jurisdiction cannot be

conferred upon the court, which court does not have jurisdiction would not assist the lender.

84. Insofar as the judgment of the Supreme Court in case of Official Trustee West Bengal (supra) relied upon by Mr.Pai, learned counsel for the

lender is concerned, it is held by the Supreme Court that the court must not only have jurisdiction to try the suit brought but must also have the

authority to pass the orders sought for. The jurisdiction of the court must include the power to hear and decide the questions at issue, the authority to

hear and decide the particular controversy that has arisen between the parties. In my view, since the Co-operative Court has not decided the validity

of the recovery certificate while rendering a consent award, question of the Co-operative Court exceeding its jurisdiction as sought to be canvassed by

the learned counsel for the lender did not arise. There cannot be any dispute about the principles of law laid down by the Supreme Court in case of

Official Trustee West Bengal (supra). However, the said principles of law would not apply to the facts of this case since this court is of the view that

the co-operative court had jurisdiction to decide the issue of settlement of account between the parties.

85. Insofar as judgment of Supreme Court in case of Rafique BB (supra) relied upon by Mr.R.V.Pai, learned counsel for the lender is concerned, it is

held by the Supreme Court that the decree without jurisdiction is nullity and objection may be raised in the executing proceedings if it appears on the

face of the record. There cannot be any dispute about this proposition of law laid down by the Supreme Court. Since this court is of the view that the

consent award rendered by the co-operative court was within the jurisdiction of the co-operative court, the said award was not nullity. The said

judgment of the Supreme Court thus would not assist the case of the lender.

86. Insofar as the judgment of Supreme Court in case of Sarwan Kumar (supra) relied upon by Mr.R.V.Pai, learned counsel for the lender is

concerned, said judgment is clearly distinguishable in the facts of this case. The lender did not raise any issue of jurisdiction at any earlier stage.

87. Insofar as judgment of the Supreme Court in case of Sant Lal Gupta (supra) relied upon by Mr.R.V.Pai, learned counsel for the lender is

concerned, it is held by the Supreme Court that whatever is prohibited by law cannot be permitted and what cannot be done directly is not permissible

to be done indirectly. In this case as already held, the co-operative court has not decided the question of validity of the recovery certificate issued

under section 101 of the MCS Act. Both the parties however had agreed to arrive at an agreed amount for payment by way of settlement of the

entire dispute. In that context, the petitioner had agreed to furnish statement of account to the borrowers. The borrowers agreed to pay the amount

according to such statement of account within the time prescribed.

88. It was further agreed by and between the parties that if such amount was not paid by the borrowers within the time specified in the consent terms,

the lenders in that event would be entitled to recover in accordance with the

recovery certificate issued by the Assistant Registrar against the borrowers under section 101 of the MCS Act. The question of challenging the validity of the said recovery certificate in the said dispute filed by the borrowers against the lender or the co-operative court deciding the validity of recovery certificate did not arise. The judgment of the Supreme Court in case of Sant Lal Gupta (supra) also thus would not assist the case of the petitioner.

89. Insofar as judgment of the Supreme Court in case of Roger Shashoua & Ors. (supra) relied upon by Mr.R.V.Pai, learned counsel for the lender is concerned, the Supreme Court in the said judgment had considered the provisions of the Arbitration and Conciliation Act, 1996. The facts before the Supreme Court in the said judgment were totally different and thus are clearly distinguishable with the facts of this case. The said judgment would not assist the case of the lender.

90. Insofar as judgment of Supreme Court in case of Kanwar Singh Saini (supra) relied upon by Mr.R.V.Pai, learned counsel for the lender is concerned, it is held by the Supreme Court that the conferment of jurisdiction is a legislative function and it can neither be conferred with the consent of the parties nor by a superior court, and if the court passes order/decreed having no jurisdiction over the matter, it would amount to a nullity as the matter goes to the root of the cause. Such an issue can be raised at any belated stage of the proceedings including in appeal or execution. There cannot be any dispute about such proposition of law laid down by the Supreme Court. However, since this court is of the view that the co-operative court has jurisdiction to adjudicate upon the reliefs sought in the said dispute and in any event has not decided the validity of the recovery certificate issued under section 101 of the MCS Act, the question of party conferring the jurisdiction on the court which does not have jurisdiction did not arise.

The judgment of the Supreme Court in case of Kanwar Singh Saini(supra) thus would not assist the case of the lender.

91. Insofar as judgment of this court in case of Vasundhara Ashokrao Patil (supra) relied upon by the learned counsel for the lender is concerned, it is held by this court in the said judgment that the certificate issued under section 101 of the MCS Act cannot be challenged by filing a dispute under any part of section 91 of the MCS Act. There is no dispute about this proposition of

law. However, in the facts of this case, the recovery certificate was not even issued when the disputes were filed by the borrowers under section 91 of the MCS Act nor such recovery certificates were challenged in such dispute nor the co-operative court had decided the validity of any such recovery certificate in the consent award rendered by the co-operative court. The judgment of this court in case of Vasundhara Ashokrao Patil (supra) is thus clearly distinguishable in the facts of this case and would not assist the case of the petitioner.

92. There is also no dispute about the proposition of law laid down by this court in case of Kedarling Vikas Seva Society (supra) holding that the recovery certificate could be challenged only under section 154 of the MCS Act. In my view since the borrowers had not impugned the recovery certificate in the said disputes filed under section 91 of the MCS Act, the judgment of this court in case of Kedarling Vikas Seva Society (supra) would not assist the case of the lender.

93. The next question that arises for consideration of this Court is whether the lender had submitted the statement of account to the borrowers in terms of the consent award rendered by the Co-operative Court or not.

94. A perusal of the record indicates that before the Special Recovery Officer the lender had submitted the accounts as per the consent terms to the borrowers through its Manager "Mr. Raul Japtanmulukh" which was received by the borrowers through Mr. Amar Tanwani. The Special Recovery Officer had taken an acknowledgement of the borrowers on the Roznama acknowledging the receipt of the accounts in compliance with the terms of the consent award. The borrowers however, have strongly placed reliance on the order dated 14th October, 2010 passed by the Divisional Joint Registrar observing that the lender had not given proper accounts to the borrowers.

95. Learned Civil Judge, Senior Division also recorded the statement made by the borrowers on 12th December, 2011 that the borrowers were ready and willing to deposit the amount and accordingly allowed the borrowers to deposit a sum of Rs.1,58,20,268/- on account within 30 days from the date of the said order and granted liberty to the lender to withdraw the said amount. The borrowers accordingly deposited the said amount of Rs.1,58,20,268/- which amounts were adjusted by the lender.

96. A perusal of the said order dated 14th February, 2012 passed by this Court indicates that this Court had observed that on the strength of special

darkhast application taken out by the borrowers but was indebted to the lender described as the decree-holder, an order came to be passed

considering him as a decree-holder under which Rs.1.58 crores had been deposited in the trial Court. The demand notices remained to be executed.

The only clarification which was required was that the demand notices may be prosecuted further upon giving a credit of Rs.1.58 crores to the

borrowers. In my view, Mr.Pai, learned counsel for the lender is right in his submission that the only issue was about the execution of the demand

notices after giving credit of Rs.1.58 crores to the borrowers. The question whether the execution application filed by the borrowers was maintainable

or not is academic.

97. A perusal of the order dated 26th June, 2015 passed by this Court in Writ Petition No.7884 of 2014 along with other connected matters indicates

that the borrowers had made a statement before this Court in the said writ petition that four revision applications filed by them would be withdrawn

and they will reply to the demand notice dated 2nd June, 2011 and would repay against the said demand notice within three months from the date of

the said order before the Special Recovery Officer. This Court had accordingly directed the Special Recovery Officer to consider the objections of

the borrowers and to pass appropriate order. This Court observed that the lender would proceed with the recovery of dues covered by the certificate

under section 101 of the MCS Act in accordance with law.

98. In my view, Mr.Pai, learned counsel for the lender is right in his submission that there was thus no question of enforcement of the consent award

by the borrowers in view of the order dated 26th June, 2015. The borrowers not having paid to the lender in accordance with the accounts submitted

by the lender in terms of the consent award rendered by the Co-operative Court within the time prescribed in the consent award, the lender became

entitled to execute the recovery certificates issued under section 101 of the MCS Act. The borrowers are however entitled to the credit of the

amounts already paid to the lender after passing of the consent award by the Co-operative Court.

99. In my view, the observations of the Divisional Joint Registrar that there was

not a single document on record to show that the lender had communicated the calculation as per the terms and conditions of the consent award is contrary to the Roznama on record. In any event, the said order passed by the Divisional Joint Registrar is of no significance in view of the subsequent orders passed by this Court in various writ petitions filed by the parties against each other referred to aforesaid. It was not the case of the borrowers that the Roznama of the Special Recovery Officer annexed at page 65(I) of Writ Petition No.435 of 2013 was wrongly recorded or that there was no acknowledgement of one of the borrowers on the said Roznama acknowledging the statement of account.

100. Insofar as the Writ Petition Nos.2406 of 2013, 2407 of 2013, 2436 of 2013 and 2442 of 2013 filed by the lender before this Court impugning the order passed by the Divisional Joint Registrar on 17th January, 2013 thereby condoning delay of six years and two months in filing the revision applications by the borrowers under section 154 of the MCS Act is concerned, It is not in dispute that the borrowers had not deposited 50% of the certified amount after giving credit of the amounts already paid as a condition precedent under section 154(2A) of the MCS Act before the Divisional Joint Registrar. The question that arises for consideration of this Court is whether such application for condonation of delay filed by the borrowers itself could have been heard by the Divisional Joint Registrar before compliance of the mandatory condition under section 154 (2A) of the MCS Act by the borrowers or not.

101. This Court in case of Barindra Overseas Private Limited & Anr. (supra) relied upon by Mr.Pai, learned counsel for the lender has held that at the first instance the Divisional Joint Registrar could not have even entertained an application for condonation of delay before the borrowers depositing 50% of the certified amount. In my view, this judgment would squarely apply to the facts of this case. The Divisional Joint Registrar thus could not have entertained the application for condonation of delay in filing the revision application against the recovery certificate issued by the Assistant Registrar before compliance of the mandatory deposit of 50% of the certified amount by the borrowers under section 154(2A) of the MCS Act.

102. Be that as it may, in my view the validity of the recovery certificate even otherwise could not have been challenged by the borrowers in view of

the fact that the borrowers had confirmed the validity of the said recovery certificate in the consent terms filed before the Co-operative Court in the disputes filed by the borrowers under section 91 of the MCS Act. The question that remained was whether the lender had submitted the statement of account to the borrowers or not and upon receipt of the said statement of account whether the borrowers had paid the said dues within the time prescribed under the said consent award or not. This Court is of the view that the lender had submitted such statement of account to the borrowers and the borrowers not having paid the amount in accordance with the said statement, the lender was entitled to recover the dues in accordance with the recovery certificate issued by the Assistant Registrar after giving credit of the amount paid. The revision application thus filed by the borrowers was thus even otherwise not maintainable.

103. I am not inclined to accept the submission of Mr.Khandeparkar, learned counsel for the borrowers that the Divisional Joint Registrar could not have exercised jurisdiction unless delay in filing the revision application was first condoned. In my view, even while considering the application for condonation of delay, the Divisional Joint Registrar should have jurisdiction to decide such application. There is thus no merit in the submission made by the learned counsel for the borrowers that the question of mandatory deposit would have arisen only after allowing the application for condonation of delay filed by the borrowers by the Division Joint Registrar.

104. Insofar as the judgment of this Court in case of Pandharinath Rambhau Kavitke (supra) relied upon by Mr.Khandeparkar, learned counsel for the borrowers is concerned, this Court in the said judgment while dealing with section 74 of the Bombay Tenancy And Agricultural Lands Act, 1948 had considered a situation where though there was a delay of 20 years in filing the appeal and though no application for condonation of delay was filed by the appellant, the Appeal Court without considering the issue of delay had entertained the appeal on merits. In these circumstances, this Court held that the Appellate Court had clearly acted without jurisdiction in entertaining the appeal which was already barred by law of limitation. This Court did not consider any provision making deposit of any amount as a condition precedent for entertaining the appeal in the said judgment. The said judgment is thus clearly distinguishable in the facts of this case and would not assist the

case of the borrowers.

105. Learned counsel for the borrowers had strongly urged that the learned Divisional Joint Registrar had rightly taken a liberal view in the matter and

has accordingly condoned the delay of six years and two months in filing the revision application under section 154 of the MCS Act. On the other

hand, it was vehemently urged by the learned counsel for the lender that no such application for condonation of delay could have been at all

entertained by the learned Divisional Joint Registrar without deposit of 50% amount by the borrowers and in any event without the borrowers

explaining gross unexplained delay of six years and two months.

106. This Court is of the view that the said revision application at the first instance was not even maintainable without deposit of the amount as per the

provisions of section 154(2A) of the MCS Act. In any event in view of the gross delay of six years and two months in filing the revision application,

the rights had accrued in favour of the lender. A perusal of the application for condonation of delay filed by the borrowers clearly indicates that the

delay was not at all explained by the borrowers. A perusal of the impugned order also clearly indicates that no reasons are recorded by the learned

Divisional Joint Registrar while condoning the delay of six years and two months in filing the revision application. The judgments relied upon by

Mr.Khandeparkar, learned counsel for the borrowers are thus clearly distinguishable in the facts of this case. The judgments relied upon by Mr.Pai,

learned counsel for the lender would assist the case of his client.

107. Insofar as the order passed by the learned Divisional Joint Registrar rejecting the revision application filed by the borrowers against the notice of

demand issued by the Special Recovery Officer is concerned, it is the case of the borrowers that the learned Divisional Joint Registrar while rejecting

those revision applications did not record any reasons. Learned counsel for the borrowers did not dispute that the revision applications were filed by

his clients impugning the notice of demand issued by the Special Recovery Officer. This Court in case of Sunil Sitaram Mahajan (supra) relied upon by

Mr.Pai, learned counsel for the lender has held that the revision application is not maintainable against a notice after adverting to the earlier judgment

of this Court in case of Manager, Adarsh Mahila Nagri Sahakari Bank Ltd. & Anr. (supra). In my view, the said judgment would apply to the facts of

this case. I am respectfully bound by the said judgment.

108. In my view, at the first instance the said revision application filed by the borrowers itself was thus not maintainable. There is no dispute about the proposition of law that the Divisional Joint Registrar was bound to record the reasons while considering the revision application on merits. Be that as it may, the borrowers had admittedly not complied with the mandatory condition of deposit under section 154(2A) of the MCS Act before the Divisional Joint Registrar. The Divisional Joint Registrar even on that ground could not have entertained the said revision application.

109. In any event, since the notice of demand was issued by the Special Recovery Officer in view of the fact that the borrowers had failed to clear their dues to the lender in compliance with the recovery certificate and in breach of the provisions of the consent terms, the borrowers could not have challenged the said notice of demand even otherwise on merits. The impugned order thus passed by the Divisional Joint Registrar not recording the detailed reasons would not cause any prejudice to the borrowers. The judgment of the Supreme Court in case of Central Board of Trustees (*supra*) and in case of M/s.Kranti Associates Pvt. Ltd. & Anr. (*supra*) relied upon by Mr.Khandeparkar, learned counsel for the borrowers thus would not assist the case of the borrowers.

110. The Supreme Court in case of V. Kala Bharathi & Ors. (*supra*) relied upon by Mr.Pai, learned counsel for the lender has held that if the amount deposited by the judgment-debtor falls short of the decretal amount, the decree-holder is entitled to apply the rule of appropriation by appropriating the amount first towards interest, then towards costs and subsequently towards the principal amount due under the decree. The borrowers have paid various amounts after issuance of the recovery certificates by the Assistant Registrar to the lender during the pendency of various proceedings. In view of the principles of law laid down by the Supreme Court in case of V. Kala Bharathi & Ors. (*supra*), the lender would be entitled to apply the rule of appropriation by appropriating the amount paid first towards interest, then towards costs and subsequently towards the principal amount due under the recovery certificates.

111. The borrowers have filed a Civil Application bearing No.2544 of 2014 in Writ Petition No.435 of 2013 iner-alia praying for the appointment of the

Court Commissioner and/or any independent expert to verify the amount of the lender.

112. In my view, the borrowers have not made out a case for setting aside the order passed by the learned Divisional Joint Registrar rejecting the

revision applications filed by the borrowers which are subject matter of Writ Petition Nos.4722 of 2017, 4965 of 2017, 1548 of 2017 and 3024 of 2017

and thus these writ petitions are liable to be dismissed.

113. I therefore, pass the following order :-

a). The Writ Petition Nos.4722 of 2017, 4965 of 2017, 1548 of 2017 and 3024 of 2017 filed by the borrowers are dismissed.

b). It is declared that the borrowers are liable to pay to the lender in accordance with the recovery certificates dated 29th April, 2006 after giving

credit of the amounts paid. It is made clear that the lender would be entitled to appropriate the amount paid by the borrowers first towards interest,

then towards costs and subsequently towards the principal amount due under the recovery certificates dated 29th April, 2006.

c). Both the parties are directed to suggest a common name of a Chartered Accountant for the purpose of computation of the amounts payable by the

borrowers to the lender under those recovery certificates within two weeks from today to the Registrar (Judicial) of this Court. The Registrar

(Judicial) in that event appoint the said Chartered Accountant for such purpose with a request to compute the amount within four weeks from the date

of communication of this order. Both the parties are directed to pay the fees and expenses payable to the Chartered Accountant equally. Upon

computation of the amounts by the Chartered Accountant, the borrowers shall pay such amounts to lender within four weeks from the date of

communication of the amount. The amount to be computed by the Chartered Accountant shall be inclusive of interest payable upto the date of

payment.

d). In the event of the parties not suggesting the name of any Chartered Accountant to the learned Registrar (Judicial) within the time prescribed, the

learned Registrar (Judicial) may appoint a Chartered Accountant, if any, on the panel of this Court and if not on the panel, may take the assistance of

the Commissioner for Taking Accounts of this Court for such determination of the amount. Both the parties would be at liberty to file their

computation based on the aforesaid conclusion of this Court before the Chartered Accountant or such officer, who may be appointed for the purposes

of such computation with a copy to be served on the other side. If any fees is payable to the Commissioner for Taking Accounts, the same shall be

borne by both the parties equally.

e). The Writ Petition Nos.435 of 2013, 438 of 2013, 440 of 2013, 2406 of 2013, 2407 of 2013, 2436 of 2013 and 2442 of 2013 filed by the lender are

disposed of on aforesaid terms.

f). In view of the disposal of the aforesaid writ petitions, Civil Application Nos. 2544 of 2014, 1450 of 2013, 2723 of 2014, 1451 of 2013, 2724 of 2014,

are also disposed off.

g). There shall be no order as to costs.

h). All the parties, the Chartered Accountant or such other person who is appointed by the Registrar (Judicial) to act on the authenticated copy of this

order.

(R.D.DHANUKA, J.)

Learned counsel appearing for the borrowers prays for stay of the operation of this order. Application for stay is rejected.