

(1946) 02 BOM CK 0013
In the Bombay High Court
Case No : Second Appeal No. 801 of 1943

Digambar Narayan Modak

APPELLANT

Vs

Malegaon Co-operative Credit Society

RESPONDENT

Date of Decision : 11-02-1946

Acts Referred:

Bombay Co-operative Societies Act, 1925 — Section 51

Citation : (1947) 49 BOMLR 746

Hon'ble Judges : Lokur, J;Bavdekar, J

Bench : Division Bench

Judgement

Lokur, J.—This is an appeal arising out of execution proceedings. The Malegaon Co-operative Credit Society went into liquidation and its liquidator filed a suit on its behalf against the appellant and others to recover possession of certain property. The suit was decided in its favour and the appellant who was defendant No. 4 was ordered to deliver possession of the property to the society. The appellant appealed against the decree and the appellate Court reversed the decree of the trial Court and dismissed the society's suit with costs throughout. The decree of the first appellate Court was confirmed in second appeal by this Court and the appeal was dismissed with costs. Thus the appellant became entitled to recover Rs. 226-9-10 for his costs in the three Courts, and he presented this darkhast to recover that amount by attachment and sale of the moveable properties of the society found in its office. The executing Court called upon the appellant to show how the darkhast was maintainable without the leave of the Registrar as required by Section 51 of the Bombay Co-operative Societies Act, 1925. After hearing the appellant, the executing Court dismissed the darkhast on the ground that it had no jurisdiction to proceed with it in the absence of the leave of the Registrar of Co-operative Societies. That order was confirmed in appeal by the learned Assistant Judge at Poona.

2. Section 51 of the Bombay Co-operative Societies Act, 1925, runs as follows:-

Save in so far as is expressly provided in this Act no civil Court shall take

cognizance of any matter connected with the winding up or dissolution of a society under this Act, and when a winding up order has been made no suit or other legal proceeding shall lie or be proceeded with against the society except by leave of the Registrar and subject to such terms as he may impose.

3. It is admitted that a winding up order has been made and, therefore, the second part of this section would be applicable. MM. Kane argues that the second part does not apply to a darkhast proceeding since it is not a "legal proceeding", which expression must be deemed to have been used ejusdem generis with the preceding word "suit". But a darkhast is undoubtedly a legal proceeding and under the section any legal proceeding, as much as a suit, requires the leave of the Registrar before it is started or before it is proceeded with.

4. The circumstances of this case are, however, peculiar. In this case the position of the parties has been fluctuating. The leave of the Registrar is required only when a suit or a legal proceeding is instituted against a society in liquidation. Here the suit was started by the Society against the appellant and, therefore, no leave of the Registrar u/s 51 was then required. When the suit was decided in favour of the society, the appellant preferred an appeal to the District Court against the society and then the proceeding became one against the society and, therefore, it could not be proceeded with without the leave of the Registrar. There was then no question of starting a legal proceeding, since, as held in *Kristnama Chariar v. Mangammal* ILR (1902) Mad. 91 the appeal was merely a continuation of the suit which had already been filed. Therefore, it was not a case of starting a suit or a legal proceeding, but it was a case of continuation of a legal proceeding already started, and as it was against a society in liquidation, the appellate Court could not proceed with it in the absence of the leave of the Registrar. But apparently no such objection was raised when the appeal was heard. The appeal was decided in favour of the appellant and in the second appeal the society became the appellant, and as that proceeding was not against the society, there was no question of any leave being obtained from the Registrar. After that appeal was dismissed, the present darkhast was started against the society and it could not be proceeded with without the leave of the Registrar. Both the Courts below have held that the darkhast itself did not lie without the leave of the Registrar and on that ground dismissed the darkhast. But as in the case of the appeal, the darkhast also is a continuation of the suit, as held in *Sadashiv Ganpatrao v. Vithaldas Nanchand* I.L.R(1895) . 20 Bom. 198 and therefore, the filing of the darkhast was not the starting of a new legal proceeding, but only a continuation of the suit already filed by the society against the appellant. But as the proceeding in the darkhast was against the society in liquidation, it could not be proceeded with in the absence of the Registrar's leave. In such circumstances, the proper course was to allow time to the appellant to obtain the Registrar's leave and produce it. But MM. Kane contends that this contention should have been raised in the appeal when he had filed it against the society in liquidation, and as it was not urged and the appeal was decided in the appellant's favour, it must be taken either that the objection

was waived or that the society was now precluded from raising the objection on the ground of res judicata. But as the Court had no jurisdiction to proceed with any legal proceeding against the society in liquidation without the leave of the Registrar, there could be no waiver, and as the question was not raised and the appeal was decided in favour of the appellant, there can be no bar of res judicata. The same proceeding having continued even in the darkhast, it is open to the society to raise the objection of the want of the Registrar's leave at any stage of the proceeding.

5 On the other hand the learned Government Pleader contends on behalf of the society that the appellant should not be given any more opportunity to produce the Registrar's leave, since till now he has never made any attempt to apply for such leave. There are several cases under the Pensions Act where in a second appeal permission was given to produce a certificate under that Act, and the suit was remanded to the trial Court to enable the party to obtain and produce such certificate. We think that this is a proper case in which the appellant should be given an opportunity of approaching the Registrar and seeking his leave to continue the darkhast. If he succeeds in obtaining the leave and producing it, then the darkhast will have to be proceeded with. If he fails to obtain the leave, then the darkhast will have to be dismissed.

6 But as the appellant did not ask for an opportunity to obtain and produce the Registrar's leave in the lower Courts or even in this Court in the memorandum of appeal, we think that he should bear the costs of both the appellate Courts.

7 We set aside the order appealed against and remand the darkhast with a direction that the appellant should be given a reasonable opportunity to obtain and produce the Registrar's leave u/s 51 of the Bombay Co-operative Societies Act, 1925. If he fails to do so, then the darkhast shall be dismissed. The appellant shall pay the respondent's costs in this Court and in the lower appellate Court. The costs of the executing Court will be costs in the darkhast.