

(2007) 03 BOM CK 0091

In the Bombay High Court

Case No : Writ Petition No. 1969 of 2006

Khushal Mundhe

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 14-03-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 2(11)
Constitution of India, 1950 — Article 227

Citation : (2008) 1 ALLMR 111 : (2007) 4 BomCR 350 : (2007) 4 BOMLR 350 :
(2007) 4 MhLj 333

Hon'ble Judges : S.B. Deshmukh, J

Bench : Single Bench

Advocate : R.T. Nagargoje, for the Appellant; K.S. Patil, A.G.P. for Respondent Nos. 1 and 4, S.J. Jain, for Respondent Nos. 2 and 3 and M.R. Andhale, for the Respondent

Judgement

S.B. Deshmukh, J.—Heard learned Counsel for the respective parties.

2. Rule. Rule made returnable forthwith and by consent of the parties, petition is taken up for final hearing immediately.

3. The petitioner challenges the recovery certificate issued by the respondent No. 4, on 5-3-2005. The copy of the recovery certificate is annexed with the petition. It seems that the recovery certificate is issued by the respondent No. 4, for recovery of amount of Rs. 2,00,969.11. From para No. 3 of the recovery certificate, it appears that oral instructions were given to the President/Secretary/Office bearers of respondent No. 2 for initiation of the proceedings, for obtaining recovery certificate u/s 101 of the Maharashtra Co-operative Societies Act, 1960 (hereinafter referred to as the "Act 1960" for short). Despite the insistence by the respondent No. 4, no such application was filed by the respondent No. 2. The respondent No. 4, therefore, initiated the proceeding under Sub-section (2) of Section 101 of the Act, 1960. It has also mentioned in para 5 of the order that the respondent No. 2, ultimately, moved an application on 3-2-2005 to

respondent No. 4 for recovery certificate. After the reference of this application, the respondent No. 4, has issued certificate with observations that demand notice were served to the respondent/defaulters, and ultimately certificate u/s 101(1) of the Act, 1960 came to be issued.

4. The grievance raised on behalf of the petitioner is that no notice was issued by the respondent No. 4 to him. In consequence of the issuance of certificate, the respondent No. 3 has initiated proceeding for execution of the said certificate. Exhibit D, is the copy of attachment order passed by the respondent No. 3. Counter affidavit is filed on behalf of the respondent No. 2 and 3. It is sworn in by one Ramdas Kashinath Chawan, Special Recovery Officer, Maharashtra State Co-operative Housing Finance Corporation Ltd. District Office, Beed. In this counter affidavit, it is narrated that the amount of Rs. 75,000/- was disbursed to the petitioner by way of loan in the year 1987. The said amount of loan was to be repaid within a period of 20 years in equal quarterly installment and original membership was in the name of one Mahadev Laxman Bangar. The details could not be obtained from the respondent No. 5 society. The respondent No. 2 had issued notice on 12-10-2001. The respondent No. 5 society is a member of respondent No. 2 Corporation. The respondent No. 2 is entitled to recover the amount from respondent No. 5 society and/or from its members, the arrears of loan amount. The demand notice was issued by the respondent No. 2 on 31-1-2005 to the petitioner by hand and same is received by him. The respondent No. 4 has given opportunity of hearing to the petitioner and thereafter, only the recovery certificate is issued u/s 101(1) of the Act 1960, which according to him is legal and proper. It has also contended in para 10 of the counter affidavit that remedy available to the petitioner is u/s 154 of the Act, 1960. Section 154 has suffered amendment and the person aggrieved by the recovery certificate, at the time of filing of such revision application, is under obligation to deposit 50% of the amount under certificate. To avoid this deposit and to skip over the remedy of revision, the present petition is filed in this Court.

5. The learned Counsel for the respondent No. 2 Mr. Jain submits that revision is not maintainable in view of the remedy provided u/s 154 of the Act, 1960. The learned Counsel for the petitioner, submits that issuance of certificate, is without notice. It is significant to note that the certificate is issued by the respondent No. 4 Assistant Registrar, Co-operative Societies. The allegation is made in the petition that no hearing was given to the petitioner before issuing certificate u/s 101 of the Act, 1960, by the respondent No. 4. There is no counter filed on behalf of the respondent No. 4 regarding issuance of the notice, mode of service to the petitioner, date of hearing, if any, scheduled by the respondent No. 4. All these details are lacking in the order passed u/s 101 of the Act, 1960. Such details are also not provided in the affidavit filed on behalf of the respondent Nos. 2 and 3. Only reference of demand notice dated 31-1-2005 issued by the respondent No. 2, is made. Demand made by the respondent No. 2 stands on different footing. On receipt of the application and/or while resorting to power under Sub-section (2) of Section 101 of the Act, 1960, it is expected that the

authority concerned, shall issue notice to the respondent/alleged defaulter and shall offer an opportunity of being heard.

6. It is true that issuance of notice, to a member or defaulter, in a proceeding under Sub-section (1) of Section 101 for grant of certificate is not expressly provided under Sub-section (1) of Section 101 of the Act, 1960. However, powers have been conferred upon the Registrar, after making such enquiries as he deems fit, to grant of certificate for recovery of the amount stated therein, to be due as arrears. Not only notice, under Sub-section (1) of Section 101 is contemplated but such enquiries as Registrar deems fit, are also contemplated. In a given case, after the death of debtor, the liability of repayment of the loan falls upon the legal representative of the debtor. In such case, it is the duty of Recovery Officer to ascertain such liability and to enquire about undisposed property left by the deceased member/defaulters coming into hands of his legal representatives. Expression of legal representative, is defined u/s 2(11) of the Code of Civil Procedure. Even principles of natural justice requires issuance of such notice by the Registrar to member/defaulters before issuance of certificate under Sub-section (1) of Section 101 of the Act, 1960. One more aspect, is important that Sub-section (2) of Section 101 empowers the Registrar if he is satisfied that the Society concerned has failed to take action under Sub-section (1) of Section 101 in respect of any amount due as arrears, he may on his own motion, after making such enquiries as he deems fit, grant certificate for recovery of the amount stated in the said certificate, to be due as arrears. Such certificate, is also aided with deeming provision by Sub-section (2) as if, which have been issued on the application made by the Society concern, Sub-section (3) of Section 101 gives finality to a certificate granted by the Registrar under Sub-section (1) or Sub-section (2). Sub-section (3) also makes such recovery certificate, a conclusive proof of the arrears stated to be due therein. It further provides that such arrears shall be recoverable according to the law for the time being in force, for recovery of the land revenue. Sub-section (4) of Section 101 obligates the Collector and the Registrar to take precautionary measures authorized by Section 140 to 144 or any law or provision corresponding thereto for the time being in force, until the arrears due to, together with interest and incidental charges incurred in the recovery of such arrears, are paid. It is also apropos to refer to Section 98(a) and (b) of the Act, 1960, which read thus:

98. Money how recovered. -- Every order passed [by the Official Assignee of a de-registered society under Sub-section (3) of Section 21A or every order passed] by the Registrar or a person authorized by him u/s 88 or by the Registrar [or the Co-operative Court] u/s 95 (for by the Cooperative Court u/s 96), every order passed in appeal under the last preceding section, every order passed by a Liquidator u/s 105, every order passed by the State Government in appeal against orders passed u/s 105 and every order passed in revision u/s 154 shall, if not carried out,

(a) on a certificate signed by [the Official Assignee or] the Registrar [for the Co-

operative Court] or a Liquidator, be deemed to be a decree or a Civil Court, and shall be executed in the same manner as a decree of such Court, or

(b) be executed according to the law and under the rules for the time being in force for the recovery of arrears of land revenue:

Provided that, any application for the recovery in such manner of any such sum shall be made by the Collector, and shall be accompanied by a certificate signed by the Registrar. Such application shall be made within twelve years from the date fixed in the order and if no such date is fixed, from the date of the order.

Bare perusal of Section 98 shows that certificate signed by Registrar shall be executed in the same manner as a decree of a Civil Court to be executed according to the law and under the rules for the time being in force for recovery of arrears of land revenue. Proviso to sub-clause (b) of Section 98, however, contemplates obligation for recovery and also puts limitation of 12 years from the date fixed in the order and if no such date is fixed, from the date of the order. Thus, issuance of certificate under Sub-section (1) of Section 101, of the Act, 1960, is important for recovery of the dues of the society from member concerned and such a certificate, in fact is having force of decree passed by the Civil Court. Such certificate is also made conclusive proof of the arrears contained in the said certificate and further is made final under Sub-section (3) of Section 101. The Registrar, therefore, for this reason also, has to issue notice before granting any certificate under Sub-section (1) of Section 101 and should give an opportunity of being heard to the member/defaulters concerned. In absence of any notice, grant of such certificate under Sub-section (1) of Section 101, appears to be illegal.

In this premise, despite the fact that remedy by way of revision is made available u/s 154 of the Act, 1960, in the facts and circumstances of this petition, in my view, power under Article 227 of the Constitution of India requires to be exercised.

7. In this view of the matter, writ petition is partly allowed. Certificate issued by the respondent No. 4 u/s 101(2) of the Act, 1960, dated 5-3-2005, is quashed and set aside.

8. The case is remanded back to the Respondent No. 4, for disposal in accordance with the provisions of the Act, 1960. The learned Counsel for the petitioner and respondent No. 2 undertake to cause appearance of their respective clients before the respondent No. 4 on 16-4-2007 at 11.00 a.m. Rule made absolute in the above terms. No costs.