

(2014) 03 GUJ CK 0063
In the Gujarat High Court

Case No : Special Civil Application Nos. 10481 and 10482 to 10485 of 2013

Modi Harishkumar Hasmukhlal

APPELLANT

Vs

People's Co-operative Credit Society Ltd.

RESPONDENT

Date of Decision : 04-03-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 37 Rule 1, Order 37 Rule 4, Order 43 Rule 1A

Constitution of India, 1950 — Article 227

Gujarat Co-operative Societies Act, 1961 — Section 102, 99, 99(4), 99(4)(5)

Citation : (2014) 3 GLH 778 : (2014) 3 GLR 1996

Hon'ble Judges : C.L. Soni, J

Bench : Single Bench

Advocate : H.M. Parikh and Hemang H. Parikh, Advocate for the Appellant;
Chirag B. Patel, Advocate for the Respondent

Judgement

C.L. Soni, J.—In all these petitions filed under Art. 227 of the Constitution of India, the petitioners have challenged the judgment and order passed by the Gujarat State Co-operative Tribunal ("the Tribunal") in the appeals filed by them against the judgment and award passed by the learned Board of Nominees, Mehsana in Lavad Suits filed against them by the respondent-People's Co-operative Credit Society Limited. The petitioners of Special Civil Application No. 10481 of 2013 had preferred Appeal No. 6 of 2013 before the Tribunal against the award made in Lavad Suit No. 245 of 2007. The petitioners of Special Civil Application No. 10482 of 2013 had preferred Appeal No. 10 of 2013 against the award made in Lavad Suit No. 425 of 2007. The petitioners of Special Civil Application No. 10483 of 2013 had preferred Appeal No. 9 of 2013 against the award made in Lavad Suit No. 835 of 2007. The petitioners of Special Civil Application No. 10484 of 2013 had filed Appeal No. 7 of 2013 against the award made in Lavad Suit No. 246 of 2007 and the petitioners of Special Civil Application No. 10485 of 2013 had preferred Appeal No. 8 of 2013 against the award made in Lavad Suit No. 833 of 2007.

2. Since common questions of law arise in all these petitions, the petitions are heard and decided by this common order.

3. In the suits filed by respondent No. 1, the learned Board of Nominees granted conditional leave to the petitioners to defend the suits. However, the petitioners did not comply with the condition of deposit of amount for leave to defend. The order imposing condition for leave to defend was also not challenged in higher forum. The Board of Nominees, therefore, proceeded to decide the suits on the basis of the evidence led by respondent No. 1 and passed awards for recovery of the suit amounts against the petitioners. The petitioners challenged the judgment and award before the Tribunal by filing appeals.

4. Before the Tribunal, it was urged that the petitioners were ready to deposit the amounts as per the condition for leave to defend and request was made to remand the matter to the Board of Nominees. However, the Tribunal came to the conclusion that the petitioners lost opportunity to defend the suit by not complying with the condition imposed by the Board of Nominees and the Board of Nominees was justified in passing the awards against the petitioners on the basis of the evidence available with it. The Tribunal thus dismissed the appeals. The petitioners are thus before this Court.

5. I have heard the learned Advocates for the parties. Learned Advocate Mr. H.M. Parikh appearing for the petitioners submitted that in regular appeals preferred before the Tribunal against the awards made by the Board of Nominees, it was open to the petitioners to call in question the conditional order made by the Board of Nominees for leave to defend. Mr. Parikh submitted that the Gujarat Co-operative Tribunal Regulations permits taking of all the grounds available under law in the appeals filed under Sec. 102 of the Gujarat Co-operative Societies Act, 1961 ("the Act" for short) against the final award made by the Board of Nominees in lavad suits, and therefore, the Tribunal has seriously erred in holding that the petitioners were not entitled to challenge the conditional order of leave to defend.

6. Mr. Parikh submitted that before the Tribunal, the petitioners had shown their willingness to deposit the amount as per condition for leave to defend and requested to remand the matter to the Board of Nominees to give opportunity to the petitioners to defend the suits. However, the Tribunal turned down such request without any justifiable reasons. Mr. Parikh submitted that when the Board of Nominees granted leave to defend though on condition of depositing the amount, it was on finding that the petitioners were raising triable issues, and therefore, when the petitioners were ready to deposit the amount as per the condition for leave to defend, the Tribunal ought to have remanded the matter to the Board of Nominees by directing the petitioners to deposit the amount to give opportunity to the petitioners to defend the suits. Mr. Parikh submitted that considering the defence raised by the petitioners before the Board of Nominees, the petitioners were entitled to unconditional leave to defend, and therefore, the Tribunal ought to have permitted the petitioners to satisfy the Tribunal that the

learned Board of Nominees was not justified in imposing condition to deposit the amounts for leave to defend. Mr. Parikh submitted that there are good triable issues raised by the petitioners, and since the petitioners are ready to comply with the condition imposed by the Board of Nominees for leave to defend, the petitioners be granted one opportunity to defend the suit. Mr. Parikh, thus, urged to entertain the petitions.

7. Learned Advocate Mr. Chirag B. Patel appearing for the respondent-Bank submitted that the petitioners having not complied with the condition of deposit of amounts as directed by the learned Board of Nominees for leave to defend the suits, the petitioners are not entitled to ask for remand of the matter to the learned Board of Nominees by now agreeing to deposit such amounts. Mr. Patel submitted that the petitioners having not complied with the condition imposed by the learned Board of Nominees, lost their right to defend the suit and under such circumstances, the learned Board of Nominees was justified in deciding the suits on the basis of the evidence available on record. Mr. Patel submitted that the provisions of Secs. 99(4) and (5) of the Gujarat Co-operative Societies Act, 1961 ("the Act" for short) read with Rule 41A of the Gujarat Co-operative Societies Rules, 1965 ("the Rules" for short) provides for imposition of condition for grant of leave to defend and also the consequences of non-compliance of such condition. Mr. Patel submitted that when the petitioners had not challenged the order imposing condition for leave to defend and still not complied with such condition, the order passed by the learned Board of Nominees could not be challenged in appeal before the Tribunal. Mr. Patel relied on the oral order of this Court dated 19-6-2012 passed in Special Civil Application No. 4596 of 2012 with allied matters so as to make good his point that the order granting conditional leave cannot be challenged in appeal before the Tribunal against the final award. Mr. Patel submitted that since the award made by the learned Board of Nominees is based on the evidence on record and since the petitioners have lost their right to defend the suit, the impugned order made by the Tribunal confirming the awards do not call for interference by this Court while exercising the extra ordinary powers under Art. 227 of the Constitution of India. Mr. Patel thus urged to dismiss the petitions.

8. Having heard the learned Advocates for the parties and having perused the record of the petitions, it appears that the order imposing condition for leave to defend was not challenged by filing revision application before the Tribunal. The petitioners, however, did not comply with the condition. On account of such non-compliance of the condition imposed by the learned Board of Nominees while granting leave to defend, the petitioners lost their right to defend the suits. In such undefended suits, the learned Board of Nominees then on the basis of the evidence on record passed the awards against the petitioners for recovery of the suit amount with interest and costs.

9. Before the Tribunal, the contention was raised that the order imposing condition by the learned Board of Nominees was illegal. It was also contended

before the Tribunal that there was wrong calculation of interest amount. The Tribunal, however, came to the conclusion that the petitioners did not avail of opportunity to defend the suits by complying with the condition and it was not open to the petitioners to challenge the conditional order in appeal. The Tribunal also did not accept the contention about the wrong calculation of interest.

10. At this stage, Rules 1 to 4 of Order 37 of the Code of Civil Procedure and Sec. 99(4)(5) of the Act and Rule 41A of the Rules need to be referred as under:

"ORDER 37

1. Courts and classes of suits to which the Order is to apply:- (1) This Order shall apply to the following Courts, namely--

(a) High Courts, City Civil Courts and Courts of Small Causes; and

(b) Other Courts:

Provided that in respect of the Courts referred to in clause (b), the High Court may, by notification in the Official Gazette, restrict the operation of this Order only to such categories of suits as it deems proper, and may also, from time to time, as the circumstances of the case may require, by subsequent notification in the Official Gazette, further restrict, enlarge or vary, the categories of suits to be brought under the operation of this Order as it deems proper.

(2) Subject to the provisions of sub-rule (1), the Order applies to the following classes of suits, namely:-

(a) suits upon bills of exchange, hundies and promissory notes;

(b) suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising,-

(i) on a written contract; or

(ii) on an enactment, where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty; or

(iii) on a guarantee, where the claim against the principal is in respect of a debt or liquidated demand only.

(iv) suit for recovery of receivables instituted by any assignee or a receivable.

2. Institution of summary suits:- (1) A suit, to which this Order applies, may if the plaintiff desires to proceed hereunder, be instituted by presenting a plaint which shall contain,-

(a) a specific averment to the effect that the suit is filed under this Order;

(b) that no relief, which does not fall within the ambit of this rule, has been claimed in the plaint; and

(c) the following inscription, immediately below the number of the suit in the title

of the suit, namely;

(2) The summons of the suit shall be in Form No. 4 in Appendix B or in such other Form as may, from time to time, be prescribed.

(3) The defendant shall not defend the suit referred to in sub-rule (1) unless he enters an appearance and in default of his entering an appearance the allegations in the plaint shall be deemed to be admitted and the plaintiff shall be entitled to a decree for any sum, not exceeding the sum mentioned in the summons, together with interest at the rate specified, if any, up to the date of the decree and such sum for costs as may be determined by the High Court from time to time by rules made in that behalf and such decree may be executed forthwith.

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

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

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

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

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

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

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

(6) At the hearing of such summons for judgment,-

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

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

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

4. Power to set aside decree:- After decree the Court may, under special circumstances, set aside the decree, and if necessary stay or set aside execution, and may give leave to the defendant to appear to the summons and to defend the suit, if it seems reasonable to the Court so to do, and on such terms as the Court thinks fit.

Save as provided by this Order, the procedure in suits hereunder shall be the same as the procedure in suits instituted in the ordinary manner."

Sections 99(4) and (5) of the Act:

"99(4) Notwithstanding anything contained in sub-secs. (1), (2) and (3), the following disputes or class of disputes, if the plaintiff so desires, shall be decided summarily by the Registrar, or his nominee or Board of Nominees, in such manner as may be prescribed, namely:

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

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

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

(d) any dispute for recovery of dues payable by a member of a housing society towards contribution for construction of the house, or any dispute in respect of repayment of any loan, interest on the loan, ground rent, local authority taxes, sinking fund, water charges, electrical charges, maintenance and upkeep charges

or charges for other services rendered by the society and the interest on such arrears, payable under the written agreement or under the bye-laws;

99(5)(a) the defendant shall not be entitled to defend the dispute unless he obtains leave from the Registrar, his nominee or, as the case may be, Board of Nominees, in such manner as may be prescribed.

(b) The Registrar, his nominee or Board of Nominees may grant the leave under clause (a) on such condition, as he or it thinks fit.

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

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

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

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

Rule 41A of the Rules:

"Rule 41 A. Summary procedure for deciding disputes:

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

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

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

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

his contentions.

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

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

12. From the above provisions of the Act and Rules, what appears is that the defendant would lose his right to defend the suit if he does not comply with the condition of deposit of the amount for leave to defend. Such right would not be revived if the order imposing condition for leave to defend is allowed to attain finality by not challenging the same by-way of revision application during the pendency of the suit. There is no provision in the Act or the Rules like Order 43, Rule 1A of the Code which gives right to a party to challenge non-appealable orders while challenging the final decree entitling the party to lavad suit to challenge any order made in the suit when appeal is filed before the Tribunal against the final award passed in the suit. Mr. Parikh, however, relied on Regulation No. 6(4)(f) of the Gujarat State Co-operative Tribunal Regulations, 1964 to contend that such order imposing condition can be challenged in appeal against the final award. Such contention cannot be accepted. In the appeal under Sec. 102 of the Act, the grounds available are to challenge the final award. In such appeal, the petitioners are not entitled to challenge the order imposing condition of deposit of amount for leave to defend the suit. The Tribunal has, therefore, rightly held that the petitioners cannot challenge the condition for leave to defend. The Tribunal has also not committed any error in refusing to remand the matters to Board of Nominees. Simply because the petitioners were desirous to deposit the amount as per the condition for leave to defend is no ground to remand the matter to Board of Nominees. For remand of the matter, the Tribunal is to be satisfied that re-hearing is necessary to meet with the ends of justice. No such case was made out by the petitioners. The petitions are, therefore, required to be dismissed. However, the amount deposited by the petitioners pursuant to the order dated 4-10-2013 passed in the present

petitions shall be required to be adjusted towards the dues outstanding against the petitioners.

In the result, the petitions are dismissed. The impugned orders made by the Tribunal in the appeals and that made by the learned Board of Nominees in the suits are confirmed. The amount deposited by the petitioners pursuant to the order made by this Court dated 4-10-2013 shall be adjusted towards the outstanding amounts to be recovered from the petitioners. Notice in each petition stands discharged. Ad-interim relief granted therein stands vacated.