**(2016) 01 PAT CK 0068**

**In the Patna High Court**

**Case No :** Civil Writ Jurisdiction Case No. 12487 of 1996

Narendra Kumar and Others — APPELLANT

Vs

The State of Bihar and Others — RESPONDENT

**Date of Decision :** 15-01-2016

**Acts Referred:**

Bihar Co-operative Societies Act, 1935 — Section 16, Section 33, Section 34, Section 35, Section 36, Section 37, Section 40, Section 40(1)

**Citation :** (2016) 01 PAT CK 0068

**Hon'ble Judges :** Jyoti Saran, J.

**Bench :** Single Bench

**Advocate :** Ram Suresh Rai, Sr. Adv., Arbind Kumar and Arbind Kumar Singh, Advocates, for the Appellant; S.Raza Ahmad, AAG 9, for the Respondent

**Final Decision :** Allowed

## Judgement

Jyoti Saran, J.—1. Heard learned counsel for the parties.

2. Of the 11 petitioners herein petitioner Nos. 2, 3, 6, 7 and 8 have deceased. A direction was issued for substitution but Mr. Arbind Kumar Singh learned counsel for the petitioner submits that although intimation was given to the parties but they have not responded. In the circumstances, the present writ petition on account of death and non substitution of the petitioner Nos. 2, 3, 6, 7 and 8 would proceed only in respect of petitioner Nos. 1, 4, 5 and 9 to 11.

3. The petitioners have prayed for quashing the entire proceedings arising from Surcharge Proceeding Case No. 145 of 1988 including the orders passed on 8.7.1988 and 12.6.1989 as well as the appellate order dated 24.8.1996 passed in Surcharge Appeal No. 7 of 1993 by the Cabinet Minister, Cooperative Department whereby and whereunder a sum of Rs. 38,79,973.93 paisa is sought to be recovered from the petitioners upon fixation of an individual liability at Rs. 3,52,721.63 paisa stated to be the loss sustained by the Bihar State Cooperative Bank Ltd. on account of the loan sanctioned by the Board of Directors of the Bank i.e. the present petitioners.

4. Facts of the case briefly stated is that the respondent No. 11 Housing Cooperative Society through the Bihar State Cooperative Federation, respondent No. 9 applied for a grant of loan before the respondent No. 10, the Housing and Urban Development Corporation Ltd. (''HUDCO'' for the sake of brevity) for providing financial support to the tune of Rs. 253.00 lacs stated to be the cost of acquisition of land for the Housing Cooperative Society Ltd. A meeting was held which was attended by the authorities of the HUDCO, the Bihar State Housing Cooperative Federation, the Secretary (Development) Bihar State Cooperative Bank as well as the office bearers of the Cooperative Society. In the meeting, it was decided that since the loan was for the purpose of purchase of land for the Housing Cooperative Society hence a bank guarantee to such effect be furnished by the Cooperative Bank. Accordingly, the Bihar State Housing Cooperative Federation submitted a certificate whereupon the HUDCO sanctioned the loan with the condition that the Housing Cooperative society should provide/arrange funds for meeting the cost of acquisition. A meeting was held presided by the Registrar, Cooperative Society in the presence of the authorities of the Cooperative Bank as well as the Federation and a sanction for interim loan was accorded by the Registrar to the tune of Rs. 2.53 crores to be provided by the Bank for purchase of land. A letter to such effect was issued to the Bank placed at Annexures-9 and 10. An agreement for the interim loan was executed between the Cooperative Society and the Bihar State Cooperative Bank Ltd., a copy of which is placed at Annexure-12 and pursuant whereto a sum of Rs. 2.63 crores was released by the Bank and deposited in the current account of the Collector, Patna for meeting the cost of land acquisition for the purpose of the society. The land acquisition exercise however failed and the proceedings initiated for acquisition of the land was withdrawn by the State Government. As a result, the entire project came to stand still. Obviously, since the loan to be sanctioned by the HUDCO was conditional upon the arrangement of land by the Society hence it did not proceed either and even the money released by the Bank lying in the account of the Collector became purposeless. In the circumstances, the Registrar vide letter dated 7.7.1989 placed at Annexure-13 directed the Managing Committee of the Bank to take steps for recovery of the money lying in the current account of the Collector, Patna and ultimately on 30.3.1988 the amount was returned to the bank account.

5. During course of the audit the audit team was of the opinion that the money released for meeting the cost of acquisition of land remained with the Collector, Patna with effect from 22.4.1987 until 30.3.1988 and thus had incurred loss of interest which required to be recompensed. The audit objection raised by the auditors was acted upon and got translated in the surcharge proceedings in question bearing Surcharge Case No. 145 of 1988. The Joint Registrar, Cooperative Society, Bihar, Patna vide order bearing Memo No. 1817 dated 12.3.1993 held the Director, the Chairman and the 12 Directors of the Cooperative Bank responsible for the loss of interest calculated at Rs. 38,79,937.93 and upon equal distribution of the said amount amongst these 13

 

persons, they were directed to individually pay a sum of Rs. 2,98,456.77. The petitioners being aggrieved preferred a statutory appeal and giving rise to Surcharge Appeal No. 7 of 1993 and vide order bearing No. 26 dated 29.8.1996 impugned at Annexure-30 the appeal was dismissed and the order passed in surcharge proceedings was affirmed. 11 of the 13 Chairman/Directors of the Bank being aggrieved have preferred the writ petition of whom 5 have deceased and the remaining are pursuing the matter. Of the 11 petitioners, the petitioner No. 1 has even deposited the amount but has also claimed a refund by filing an application to that effect.

6. I have heard Mr. Ram Suresh Rai, learned Sr. Counsel for the petitioner, Mr. S. Raza Ahmad, learned AAG 9 for the State and Mr. S.N. Pathak for the Bank.

7. It is the stand of the petitioner that there was nothing in the action of the Board of Directors which warranted a proceeding under Section 40 of the Bihar Cooperative Societies Act, 1935 (hereinafter referred to as ''the Act''). The argument has been contested by the counsel for the State as well as the Bank on grounds that since the Board of Directors have flouted the norms and procedure required to be followed for grant of any loan and as a consequence whereof the money advanced though has returned to the Bank but during the interregnum period the amount released has suffered loss of interest, this loss of interest which has been calculated at Rs. 38,79,973.93 requires to be collected from the persons responsible for such release. It is the argument of learned counsel for the respondents that since these petitioners are admittedly a party to the decision regarding grant of loan in favour of the society and since the prescribed procedure in the present case has not been followed hence the petitioners cannot escape the responsibility. It is further the argument of Mr. Ahmed learned A.A.G. 9 that even if the money so released by the Bank remained in the custody of the Collector, Patna but since it was lying in the current account and upon request made by the Bank, it has been returned back to the Bank, there has been no gain of interest on the said amount accruing to the State and thus the State cannot be held in any manner responsible for loss of interest.

8. On the other hand it is the argument of Mr. Pathak appearing for the Bank that since it is under a collective decision taken in a meeting presided by the Registrar, Cooperative Society regarding the advancement of land in favour of the society and since the money was lying in the account of the District Magistrate hence any loss of interest suffered by the Bank has to be recompensed either by the Board of Directors who were responsible for such release or by the District Magistrate in whose account the money was lying and that the Bank cannot suffer on this account.

9. In the entire gamut of argument advanced on behalf of the petitioner, State and the Bank the foundation lies on the basic question whether the loss of interest if any suffered by the money lying in the account of the District Magistrate, Patna with effect from 22.4.1987 until 30.3.1988 i.e. when the money returned back to the Bank, could be a subject matter of a surcharge

 

proceedings and even if the answer to the issue is in the affirmative, whether in the circumstances existing, the petitioners at all were liable to be proceeded with in a surcharge proceedings for recovery of the loss and/or whether the pre requisites for such initiation stands satisfied in the present case.

10. For arriving at a conclusion on the issue so framed, I would refer to some of the dates which would be relevant for the issue at hand. There is absolutely no dispute on the issue that the surcharge proceedings has been initiated to recompense the loss of interest suffered by the Bank by the advancement/ release of the loan on 22.4.1987 and its transfer in the current account of the District Magistrate, Patna, until it was returned back by the District Magistrate, Patna to the Bank on 30.3.1988. The surcharge proceedings were initiated in the light of the audit objection giving rise to Surcharge Case No. 145 of 1988 and the Registrar, Cooperative Society proceeding on the audit objection vide order passed on 8.7.1988 present at Annexure-25 while discussing the matter in detail has directed the office bearers of the Bank to show cause against initiation of the proceedings and the matter was posted on 25.7.1988. Surprisingly, even when the proceedings was initiated by the Registrar himself who went on to issue a show cause to the office bearers some where in between, the matter got transferred to the Joint Registrar and the final orders was passed by the Joint Registrar on 4.3.1993 present at Annexure-28. This transfer of surcharge proceedings midway and after issuance of a show cause by the Registrar to be finally disposed of by the Joint Registrar again puts a question mark on its validity especially since it relies upon an order dated 12.6.1989 for directing these petitioners to recompense the amount even when the order dated 12.6.1989 present at Annexure-27 nowhere issue such direction rather is a mere show cause to these petitioners and some others as to why the money be not recovered from them as is manifest from paragraph 15.6 of the order. There was thus no adjudication on the issue of recovery rather on a mere show cause issued by the Registrar on 12.6.1993 to these petitioners to respond against a proposed recovery that has been treated as an adjudication by the Joint Registrar in the final order passed on 4.3.1993 present at Annexure-28 for issuing such directions. Apparently the directions are mechanical and without verification of the earlier orders. It is manifest that even before the issue of recovery was adjudicated by the Registrar that the Joint Register by the impugned order passed on 4.3.1993 has issued directions to these petitioners to recompense the amount of Rs. 38,79,937.93 by individual contribution of Rs. 2,98,456.77. The appellate authority as well has proceeded mechanically and without verifying as to whether at all there has been an adjudication in the proceedings, has proceeded to dismiss the appeal and uphold the order of recovery.

11. I could have ended my order here by simply quashing the orders impugned on this limited ground and remitted the matter for fresh disposal but in the accompanying circumstances where there is a cloud whether at all any proceedings can be initiated under Section 40 of ''the Act'' in the backdrop of the

 

accompanying circumstances, I would reserve my such opinion at the present stage and would proceed to consider the matter on merits and whether the circumstances, existing in the present case warrants a proceeding under Section 40 of ''the Act''.

12. The proceedings under Section 40 of ''the Act'' is not a mechanical exercise rather is a stigmatic proceedings drawn against the office bearers of a society or a financing Bank for indulging in acts of omissions and commissions which has either led to misappropriation of the funds of the society or the Bank or has led to a financial loss to either of them.

13. The stipulations present in Section 40(1) of ''the Act'' would be a relevant factor for consideration of this issue and for the sake of convenience I shall reproduce the same which reads thus:

"40. Surcharge.- (1) Where as the result of an audit under section 33 and Special Audit under Section 33A or an inquiry under section 35, or an inspection under section 34, section 36, or section 37, or the winding up of a society, it appears to the Registrar that any person who has taken part in the organisation or management of the society or any past or present officer of the society has-

(a) made any payment which is contrary to law or to the rules or byelaws of the society, [or against the directions or instructions of the financing bank for which the society is acting as agent under sub-section (3) of Section 16], or

(b) by reason of his culpable negligence or misconduct, involved the society, [or the financing bank for which it is acting as agent under sub-section (3) of Section 16] in any loss or deficiency, or

(c) failed to bring into account any sum which ought to have been brought into account, or

(d) misappropriate or fraudulently retained any property of the society [or of the financing bank which it is acting as agent under sub-section (3) of Section 16.]

the Registrar may inquire into the conduct of such person, or officer and after giving such person or officer an opportunity of being heard make an order requiring him to contribute such sum to the assets of the society [or of the financing bank, as the case may be], by way of compensation in respect or such payment or loss of sum, or to restore such property as the Registrar thinks fit, together with such sum as the Registrar may fix to meet the cost of the proceedings under this section:

Provided that, before any order requiring such person or officer to contribute is passed in respect of a payment referred to in clause (a) reasonable time shall be given to such person or officer to recover the amount of such payment from the payee and credit it to the funds of the society, [or, as the case may be, of the financing bank]

Provided further that any order under this sub-section shall be passed for any commission or omission specified in (a), (b), (c) and (d) within six years from the date of occurrence or within three years from the date of submission of surcharge proposal whichever is earlier .......................................................... .......... ..................................................................."

14. A plain reading of the provisions would manifest that where, as a result of an audit under Section 33, a special audit under Section 33A, an enquiry under Section 35 and inspection under Section 34, 36 or 37 or upon the winding up of a society that the Registrar is of the opinion that any person who has taken part in the organization or management of the society has made any payment which is contrary to law and/or by reason of culpable negligence or misconduct caused loss to the society or the financing Bank or has failed to bring into account any sum which should have been brought into account or has misappropriated or fraudulently retained any property, that the Registrar is vested with jurisdiction to enquire into the conduct of such person and after giving opportunity of being heard, pass appropriate orders for recompensing the loss suffered as well as to meet the cost of the proceedings.

15. Plainly speaking the provisions of Section 40 is a safeguard against an act of misappropriation and misutilisation of the funds of the society at the hands of the office bearers and the members and a supervisory jurisdiction is vested in the Registrar to regulate the same and take appropriate action in case of any deliberate act by the organizational or managerial staff of the society or the Bank in indulging in such pursuits. It is a proceeding attached with stigma.

16. Considering the legislative intent of the provisions of Section 40 of ''the Act'' it is to be seen.

(a) whether the circumstances accompanying the present case did warrant any such initiation; and

(b) whether the Cooperative Bank has unilaterally proceeded to advance the loan by flouting all norms, in contravention of its bye laws and de hors the statutory prescriptions.

17. If the two conditions are satisfied then no infirmity can be attached to the proceedings so initiated but the records in the present case depict completely converse situation. In a transaction involving the State, the Society, the Bihar State Cooperative Federation and the HUDCO, in my considered opinion the Board of Directors of the Bank have been made an escape goat. The pleadings reflect that the Bank was nowhere in the picture rather has been forced to become a participant in the matter of advancement of loan to the society by the HUDCO through the federation and since the HUDCO wanted to secure its interest by taking a guarantee from the Cooperative Bank that on the directives of the Registrar, Cooperative Society an exercise was undertaken in which the Bank advanced loan to meet the project value of the land to be acquired for the society so that the HUDCO could advance the loan so applied for. My observations stands fortified by the sequence of events as listed hereinafter.

 

18. Annexure-1 is a loan application by the Bihar State Housing Cooperative Federation before the HUDCO for advancement of loan of Rs. 2.53 crores to meet the payment for land acquisition for the Housing Cooperative Society which is dated 16.12.1986. The minutes of discussion present at Annexure-2 reflects that the HUDCO was prepared to disburse the loan only upon getting the approval of the Registrar to the Scheme and upon securing a bank guarantee from the Cooperative Bank as is manifest from the noting present at paragraph 3. Annexure-7 is the copy of the proceedings of a meeting held on 3.4.1987 in the office of the Administrator, Bihar State Housing Cooperative Federation which was attended by the Registrar, Cooperative Societies, the Administrator of the Housing Cooperative Federation, the Development Officer HUDCO and the President of the Housing Cooperative Society. In the said meeting which was presided by the Registrar Cooperative Society himself, the Office Bearers of the Housing Cooperative Society were directed to submit certain documents before the Housing Cooperative Federation for obtaining the approval of the Registrar, Cooperative Society on the claim. The most relevant document is Annexure 9 which is letter dated 16.4.1987 of the Registrar, Cooperative Society and which is addressed to the Managing Committee of the Bihar State Cooperative Bank Ltd. communicating sanction for interim credit cash limit to the Housing Cooperative Credit Society. By the said letter the Registrar, Cooperative Society has intimated its approval for sanctioning the interim cash credit loan to the society. The said letter is followed by another letter of the Registrar, Cooperative Society which again is dated 16.4.1987 and is addressed to the Managing Director, Bihar State Housing Cooperative Federation informing him about the approval granted to the loan advancement in favour of the society as well as to the bank guarantee to be obtained from the Bihar State Cooperative Bank in favour of the HUDCO. It is in view of these developments that the Secretary, Finance, Bihar State Cooperative Bank Ltd. informed the Secretary of the Housing Credit Society on 21.4.1987 (Annexure-11) regarding the interim cash credit limit sanctioned to the society to the tune of Rs. 2.63 crores subject to the terms and conditions which inter alia provided that the crash credit limit was operative for 90 days and was subject to interest payable at the rate of 16% per annum and a penal interest @ 2% on the over dues. A resolution to such effect was also passed on 21.4.1987 present at Annexure-11/1. The letter of the Secretary, Finance of the Bank addressed to the Secretary of the Housing Cooperative Society would manifest that the loan released was conditional upon performance of certain duties by the Housing Cooperative Society. It is manifest from the records that although the Housing Cooperative Society had applied for loan of Rs. 2.53 crores before the HUDCO but in so far as the interim cash credit is concerned they have made a request for a limit of 2.63 crores and the Cooperative Bank considering the circumstances existing granted acceptance thereto. An agreement was entered into in between the Housing Cooperative Society and the Bihar State Cooperative Bank accepting the terms and conditions for the cash credit limit of 2.63 crores which is present at Annexure-12. On completion of the formalities by the society, the money was released by the Bank on 22.4.1987 and was transferred in the current account of

 

the Collector, Patna for being disbursed for payment of the cost of acquisition of land. Barely 2 months having passed since the money was released by the Bank in the current account of the Collector that the Registrar Cooperative Society vide his letter dated 7.7.1987 informed the Managing Director of the Cooperative Bank that the State Government had decided to cancel the land acquisition initiated for acquisition of land for the Housing Cooperative Society and that he should get in touch with the Collector, Patna to obtain the cancellation order. The Bank was further directed to freeze the account of the Housing Cooperative society. A similar letter was also addressed to the Collector, Patna by the Registrar, Cooperative Society with a direction to refund the money of the Cooperative Bank. These letters are dated 7.7.1987 and would be very relevant to the issue involved. Immediately on receiving the directives from the Registrar, Cooperative Society that the Managing Director of the Bihar State Cooperative Bank vide letter dated 11.7.1987 directed the Housing Cooperative Society to refund the entire outstanding amount inclusive of the principle and interest within 3 days time. The request was reiterated by the Bank with the Housing Cooperative Society by another letter dated 13.8.1987 present at Annexure-17 requiring the refund of the amount deposited or to face legal actions. Since the money was not refunded to the Bank by the Collector, Patna that a letter was addressed to the Commissioner, Land Reforms by the Managing Director of the Bank on 30.8.1987 present at Annexure-18. The request of the Bank met with a refusal as is reflected from the letter of the Deputy Secretary, Department of Revenue and Land Reforms as dated 6.9.1987 whereby the Managing Director of the Bank was informed that in view of the pendency of the matter before the High court, they would take no steps for refund of the money. This letter of the Deputy Secretary refusing to refund the amount to the Bank is present at Annexure-19 to the writ petition. Ultimately it is after a series of correspondences that on 30.3.1988 the money returned to the Bank by the Collector as would be manifest from the letter of the Collector, Patna dated 30.3.1988 present at Annexure-28.

19. An audit took place thereafter and it is at this stage that the audit team was of the view that the loss suffered by the Bank by virtue of the money moving out of the account of the Bank on 22.4.1987 and remaining with the Collector only to be returned on 30.3.1988, led to loss of interest to the Bank which required to be recompensed and which has led to the proceedings in question and the orders impugned.

20. The order of the appellate authority manifests that the proceeding in so far as the Chairman and some others was dropped by reason of their death but proceeded against the Directors who were alive. The stand taken by the State and the Bank in their counter affidavit for upholding the validity of the proceedings is that the loan was advanced in excess of the amount approved by the Registrar by Rs. 10 lacs and secondly that the loan was advanced in contravention of the bye laws of the society. I am rather surprised that in a case where the entire exercise which led to the advancement of loan was chaired by

 

the Registrar himself and it is only after the approval granted by the Registrar that the Board of Directors of the Bank decided to release the amount which again merely stood transferred in the account of the Collector, Patna and not to the account of the Society, how the Directors could be charged with misconduct and where was the misappropriation. It is not a case where a suo motu decision was taken by the Bank for advancement of loan to the society rather is a case where it is only after a series of deliberations which was chaired by the Registrar himself and bears his approval which finally resulted in the advancement of the loan. The sequence of events which have been discussed by me hereinabove is a confirmation of my impression that in the whole exercise, the Board of Directors have been made a escape goat when it is the Registrar, Cooperative Society himself who decided on the mode and manner in which the loan is to be advanced by the HUDCO in favour of the Housing Cooperative Society and also approved the interim Cash Credit limit by the bank to meet the purpose. Having done so the Registrar, Co-operative Societies now reverts back to draw a proceeding against the Board of Directors of the Bank by invoking the provisions of Section 40 of ''the Act''. There cannot be a better example of misuse and abuse of statutory powers by the Registrar, Cooperative Society. Being himself the architect in the advancement of loan, he cannot take recourse to Section 40 of ''the Act'' to initiate such proceedings.

21. Even on merits the proceedings are de hors the statutory provisions. As I have observed, it is neither a case where there was a unilateral decision by the Bank to advance loan to the society nor is a case where the loan advanced was misappropriated by the loanee. On the contrary, the money lay in safe custody of the Collector, Patna. In so far as the loss of interest is concerned, even on this issue, the Board of Directors could not have been saddled with the liability for no sooner did the Registrar intimate the Managing Director of the Bank regarding the withdrawal of the acquisition proceedings vide Annexure-17 dated 7.7.1987 i.e. within 3 months of the advancement of loan on 22.4.1987 that the Managing Director of the Bank immediately directed the Housing Cooperative Society on 13.8.1987 to refund the loan and also requested the Collector, Patna to refund the amount. Since the money was lying in the current account of the Collector, Patna who had also been requested by the Registrar, Cooperative Societies to refund the same to the bank and had the Collector, Patna refunded the amount immediately perhaps there would not have been much loss of interest. It is only because the State refused to refund the amount and the money lay in the current account of the Collector, Patna without earning interest that the entire issue of loss of interest cropped up. The letter which completely exempts the petitioners of all liabilities is the one written by the Deputy Secretary, Department of Revenue and Land Reforms dated 6.9.1987 whereby the Managing Director of the Cooperative Bank was blatantly informed that they would not refund the amount. Once this declination took place at the level of the State Government, I am surprised as to how the Board of Directors could be proceeded for the loss of interest on account of the State refusing to refund the

 

amount. The money was ultimately refunded by the Collector, Patna on 30.3.1988 and hence the delay whatsoever is entirely attributable to the State and not the petitioners.

22. In my considered opinion, neither the circumstances accompanying the present case possesses the attributes for initiation of a surcharge proceedings and even if there was any irregularity in the disbursement of loan, it was entirely attributable to the directives of the Registrar, Cooperative Society and not the petitioners. That the money so advanced safely returned to the account of the Bank, the loss of interest whatsoever suffered during the period again cannot be attributable to the petitioners for whereas the loan was released by the Bank on 22.4.1987, within 3 months thereafter, the Managing Director of the Bank on being informed that the acquisition proceedings were withdrawn by the State Government that on 13.8.1987 he made a request to the Housing Cooperative Society as well as the Commissioner, Land Reforms vide Annexures-17 and 18 respectively for refund of the amount and apart there from, the Registrar, Cooperative Society had also requested the Collector, Patna for refund of the amount. In the circumstances where expeditious steps were taken by the Registrar, Cooperative Societies as well as the petitioners in requesting the Collector to refund the amount within 3 months of its release, the delay thereafter certainly cannot be attributable to these petitioners nor can they be held responsible for any loss of interest suffered on such release. In my opinion neither on the merits nor in the backdrop of the statutory provisions, the surcharge proceedings so initiated against the Board of Directors was sustainable and as a consequence the entire proceedings arising from Surcharge Case No. 145 of 1988 including the appellate order passed in Surcharge Appeal No. 7 of 1993 cannot be upheld and are accordingly set aside.

23. It is stated by learned counsel for the petitioners that owing to ensuing election and without prejudice to the rights and contentions advanced in the present proceedings that the petitioner No. 1 Narendra Kumar had deposited the amount so directed under the impugned orders vide Annexures-28 and 30 and for which an application for refund remains pending in I.A. No. 1059 of 2015. Since this Court has quashed the proceedings in its entirety hence the money so deposited by the petitioner with the Bihar State Cooperative Bank stated to be to the tune of Rs. 3,52,721.63 deposited by the petitioner No. 1 shall be refunded to him by the Bank within a period of 3 months from the date of receipt/ production of a copy of this order.

24. The writ petition is allowed. The interlocutory application stands disposed of.

 