

(2011) 02 GUJ CK 0042

In the Gujarat High Court

Case No : Letters Patent Appeal No. 1065 of 2010 in Special Civil Application No. 623 of 2006

Narmada Cotton Cooperative Spinning Mill Ltd. (in Liquidation)

APPELLANT

Vs

Mahendra Kumar Indrajeetsinhji Cotton Pvt. Ltd. and Others

RESPONDENT

Date of Decision : 24-02-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 80

Gujarat Co-operative Societies Act, 1961 — Section 107, 108, 112, 166, 167

Citation : (2011) 3 GLR 2247

Hon'ble Judges : S.J. Mukhopadhaya, C.J.; J.B. Pardiwala, J

Bench : Division Bench

Advocate : Varun K. Patel, for the Appellant; Krina Calla, AGP for Respondents 2 to 4 and P.S. Champaneri, for the Respondent

Final Decision : Allowed

Judgement

J.B. Pardiwala, J.—A neat question of law falls for our consideration in the present appeal, which is as under:

Whether the Registrar appointed under the Gujarat Cooperative Societies Act, 1961, while adjudicating the application u/s 112 of the Gujarat Cooperative Societies Act, 1961 for leave to continue legal proceedings of civil suit, is justified in refusing to grant leave to continue the suit or other legal proceedings after winding up order of the society is passed on the premise that before institution of the suit the Plaintiff has failed to issue notice u/s 167 of the Gujarat Cooperative Societies Act, 1961?

2 The above referred question of law arises in the backdrop of the following factual background.

3 The Appellant before us is a cooperative society (now in liquidation) registered under the provisions of the Gujarat Cooperative Societies Act, 1961 (hereinafter

referred to as "the Societies Act"). The original Petitioner entered into agreement of lease dated 1.10.1998 with the Appellant-society for conversion contract for a period of five years. The agreement was signed on behalf of the Chairman of the Appellant Society and Director of the original Petitioner - company i.e. Respondent No. 1 in the present appeal. On 26th April 2000 a suit being Civil Suit No. 2467 of 2000 was filed by the Respondent No. 1 against the Appellant society in the City Civil Court, Ahmedabad for breach of agreement of lease deed dated 1st October 1998 for non-fulfilment of the agreement by the Society. In the civil suit Respondent No. 1 has mainly pleaded that they have suffered huge losses on account of breach of the terms of the agreement by the Appellant society and accordingly prayed for damages and loss sustained by Respondent No. 1.

4 It deserves to be noted that during the pendency of Civil Suit No. 2467 of 2000 an order of winding up of the Appellant society came to be passed in exercise of powers u/s 107 of the Societies Act and Liquidator also came to be appointed u/s 108 of the Societies Act on 19th April 2001. After winding up order came to be passed Liquidator filed Special Civil Suit No. 208 of 2001 in the court of the learned Senior Civil Judge, Bharuch against Respondent No. 1 for recovery of outstanding dues and liquidated damages for breach of the contract.

5 It is important to mention that for the breach of the terms and conditions as enumerated in various clauses of the agreement the parties have filed suits against each other and they are pending before different courts.

6. As required u/s 112 of the Societies Act, Respondent No. 1 preferred an application for permission to grant leave to proceed further with the suit i.e. Suit No. 2467 of 2000.

7. The application preferred by Respondent No. 1 u/s 112 of the Societies Act came to be rejected by the Joint Director (Administration), Cottage and Village Industries on the ground that the notice as provided under the provisions of Section 167 of the Societies Act was not addressed to the Registrar before filing of the suit and therefore the very institution of the suit was not in accordance with law. Accordingly, the prayer for leave was rejected. The said order dated 28.11.2005 passed by Respondent No. 3 herein in this appeal was subject matter of challenge before the learned Single Judge in Special Civil Application No. 623 of 2006.

8. The learned Single Judge came to the conclusion that Respondent No. 3 ought not to have rejected the application preferred by Respondent No. 1 for leave as contemplated u/s 112 of the Societies Act on the premise that Section 167 of the Societies Act had no application at all in the facts and circumstances of the case. The learned Single Judge is of the opinion that Section 167 would apply only if there is any dispute touching the business of the Society. The learned Single Judge is of the view that having regard to the nature of dispute between the Appellant society and Respondent No. 1 it cannot be said that it is a matter

touching the business of the Society. The learned Single Judge further came to the conclusion that if, upon analysing and scrutinising the evidence on the record the Civil Court finds that the subject matter of the suit is not touching to the business of the Society and in such a case the Court may come to the conclusion that the notice u/s 167 of the Act would be necessary and all these aspects can be considered before the competent civil court where the suit proceedings are pending and the Registrar, exercising powers u/s 112 of the Act is only performing his duty to the limited extent of protecting the interest of the Society under Chapter-X of the Societies Act. Accordingly, the learned Single Judge allowed the Special Civil Application and the impugned order, which was passed by the Registrar dated 28th November 2005 came to be quashed and set aside.

9. The Appellant being aggrieved by the order passed by the learned Single Judge has challenged the same by way of the present Appeal.

10. The learned Counsel for the Appellant-society has put forward the following contentions:

10.1 The learned Single Judge has erred in holding that while passing the impugned order in exercise of the powers u/s 112 of the Societies Act, the Registrar has unnecessarily taken into consideration the requirement of notice before institution of the suit u/s 167 of the Societies Act, which is exclusively within the domain of the civil court to decide.

10.2 The second contention is to the effect that the learned Single Judge ought to have compared the provisions of Sections 166 and 167 of the Act and ought not to have held that Sub-section (2) of Section 166 of the Act is wider in terms when it refers to "any matter touching affairs of the society" than a reference to a phrase "any act touching the business of the society" as referred to in Section 167 of the Act requiring the notice to be issued before institution of the suit.

10.3 The third contention is to the effect that the learned Single Judge has failed to consider the object before enactment of Section 112 of the Act and also Section 167 of the Act.

11 Per contra, learned Counsel for Respondent No. 3 has put forward the following contentions before us:

11.1 The order passed by the learned Single Judge warrants no interference as the same is absolutely in accordance with law.

11.2 Secondly, it has been contended that Section 167 of the Act would apply only if the subject matter of the civil suit is in respect of any act touching the business of the Society and having regard to the nature of the dispute and the subject matter of the suit it cannot be said that the suit is in respect of an act touching the business of the Society.

12. Having heard the respective counsel for the parties and having considered various provisions of law, we are of the opinion that the judgment and order

passed by the learned Single Judge warrants interference in the present appeal. It would be expedient for better adjudication of the entire controversy to quote the two relevant provisions i.e. Section 112 and Section 167 of the Societies Act. Sections 112 and 167 of the Societies Act read as under:

112 . Bar of suit in winding up and dissolution matters Save as 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 proceedings shall lie or be proceeded with against the society or the liquidator, except by leave of the Registrar, and subject to such terms as he may impose:

Provided that where the winding up order is cancelled, the provisions of this section shall cease to operate so far as the liability of the society and of the members thereof to be sued is concerned, but they shall continue to apply to the person who acted as liquidator.

167: Notice necessary In suits Save as otherwise provided In this Act, no suit shall be instituted against a society, or any of its officers in respect of any act touching the business of the society, until the expiration of two months next after notice In writing has been delivered to the Registrar or left at his office, stating the cause of action, the name, description and place of residence of the Plaintiff and the relief which he claims, and the plaint shall contain a statement that such notice has been so delivered or left.

13. On plain reading of Section 112 of the Societies Act it is evident that there is bar operating for the Civil Court in the proceedings of the suit against the Society in case the Society is ordered to be liquidated. The wordings of Section 112 are plain and unambiguous. It says that no Civil Court shall take cognizance of any matter connected with the winding up or dissolution of a society and when a winding up order has been made no suit or other legal proceedings shall lie or be proceeded with against the society or the liquidator, except by leave of the Registrar, and subject to such terms as he may impose. As it is an admitted position that suit was filed by Respondent No. 1 prior to order of liquidation, Respondent No. 1 was required to obtain the leave of the Registrar for proceeding with the suit. The powers of the Registrar u/s 112 of the Act while considering the matter to grant leave to proceed with the suit or instituting the suit are that of quasi judicial authority because, granting of leave or refusal of leave is to result into adverse consequence to either side, maybe the Plaintiff or the Defendant, as the case may be. While exercising the power u/s 112 of the Act the Registrar has to largely consider the issue as to whether the suit is filed prior to liquidation and the proceedings of the suit is not going to result into serious prejudice to the proceedings of liquidation or that the liquidator can properly represent the society in the said proceedings. The other relevant circumstances as may be known to law may also be required to be considered by the Registrar, but the powers of the Registrar are more or less at par with the Company Court granting leave to institute or to proceed with the proceedings

against the company in liquidation. The important question with which we are confronted with is as to whether the Registrar can take notice of the fact that there is non compliance of Section 167 of the Act. Section 167 has also been inserted with some definite object. For the exercise of various powers under the Gujarat Cooperative Societies Act, 1961 over all the cooperative societies in the State it is necessary that the Registrar should know all the affairs of the society. With this object in view Section 167 of the Societies Act must have been enacted looking to the scheme of the whole Act. It is the Registrar of the Cooperative Societies who is expected to know all litigations which any party intends to file against any cooperative society. On receipt of such a notice he would immediately come to know about the financial condition of the society. He would also be able to know the transactions involved and he can effectively supervise and control a society. If necessary, a compromise could be effected. If necessary, the Committee could be changed. If necessary, an enquiry could be ordered and if necessary, even a winding up order could be passed. It could be that the Plaintiff and the office-bearers of the Society might unite, there may be fraud, the Plaintiff may not give any notice to the Defendant society, a false suit could be filed in which the Defendant society might waive the notice and might not even appear. The Plaintiff may obtain an ex parte decree. Such a situation can only be averted if before the institution of the suit the Registrar knows the fact that a suit is to be filed against a particular society or for a particular amount or for a particular relief. In order that the Registrar may have control, in order that a cooperative society may not commit any fraud in the large interest of the cooperative movement itself which could be considered a public policy, this mandatory provision has been enacted and, therefore, this mandatory provision cannot even be waived by the Society unlike notice u/s 80 of the CPC Code.

14. Though Section 80 of the CPC is not relevant for the purpose of deciding the present appeal, but, we deem it fit to make a reference of it from a different perspective. The provisions of Section 80 of the CPC are meant for the benefit of the Defendant and therefore Defendant could waive them. A notice u/s 167 of the Gujarat Cooperative Societies Act, 1961 has to be served not on the Defendant society, but on the third party, that is, Registrar, Cooperative Societies. It is manifest that the mandatory provision of Section 167 is for the protection of the public interest and not just for the protection of an individual society.

15. It is difficult for us to accept the line of reasoning adopted by the learned Single Judge because, the learned Single Judge appears to be of the opinion that the issue as to whether the notice u/s 167 of the Act is necessary can be raised and decided by the Civil Court at an appropriate stage of the suit proceedings. We are afraid that the same is not permissible on the plain language of Section 112 itself. If the Civil Court is left to adjudicate the issue as regards compliance or non-compliance of Section 167 at an appropriate stage of the civil suit, that means, the Civil Court should first take cognizance of the matter and then decide as to whether notice u/s 167 of the Act was required or not required. The words

used in Section 112 are "no court shall take cognizance". The expression "cognizance" has not been defined in the Act. But the word "cognizance" is of indefinite import. The Hon'ble Apex Court in the matter of S.K. Sinha, Chief Enforcement Officer v. Videocon International Limited, reported in 2008 (1) GLH 479 while deciding a matter arising under the Code of Criminal Procedure has explained as to what is the true meaning of the word "cognizance". We can take some clue from the observations made by the Honourable Apex Court in the said judgment. In paragraph 12 of the said judgment it is observed as under:

The expression "cognizance" has not been defined in the Code. But the word (cognizance) is of indefinite import. It has no esoteric or mystic significance in criminal law. It merely means "become aware of" and when used with reference to a Court or a Judge, it connotes "to take notice of judicially". It indicates the point when a Court or a Magistrate takes judicial notice of an offence with a view to initiating proceedings in respect of such offence said to have been committed by someone. "Taking cognizance" does not involve any formal action of any kind.

If the Civil Court is left to decide this issue, then, the Civil Court will have to go into the facts and the merits of the suit and that will amount to taking cognizance. Without taking cognizance, the Civil Court will not be able to decide the issue about compliance or non-compliance of Section 167 and Section 112 specifically prohibits the Court concerned from taking cognizance of any matter except by leave of the Registrar. "What law prohibits something to be done directly the same cannot be done indirectly."

16. We are of the view that Respondent No. 3 is justified in refusing to grant leave as prayed for by Respondent No. 1 under the provisions of Section 112 of the Societies Act permitting Respondent No. 1 to continue with the civil suit instituted against the Appellant society in the absence of a valid statutory notice u/s 167 of the Societies Act.

17. For the reasons recorded above, we are left with no option option but to quash and set aside the judgment and order passed by the learned Single Judge dated 9th October 2010 in Special Civil Application No. 623 of 2006. Letters Patent Appeal succeeds and deserves to be allowed and the same is hereby allowed with no order as to costs.