

(2009) 03 GUJ CK 0006

In the Gujarat High Court

Case No : Special Civil Application No. 18061 of 2003

Rahul Dinubhai Parikh and Another

APPELLANT

Vs

General Cooperative Bank Ltd.

RESPONDENT

Date of Decision : 09-03-2009

Acts Referred:

Citation : (2009) 2 GLH 701

Hon'ble Judges : R.R. Tripathi, J

Bench : Single Bench

**Advocate : Megha Jani and M.S. Anushree Kapadia, for the Appellant;
Gajendrasinh Baghel, for H.S. Munshaw, for the Respondent**

Judgement

Ravi R. Tripathi, J.—The present petition is filed challenging order dated 09.10.2003 passed by the Gujarat State Cooperative Tribunal in Review Application No. 1 of 2000 and the judgment and order dated 17.11.1999 passed by the Gujarat State Cooperative Tribunal in Appeal No. 302 of 1998.

2. Heard Ms. Megha Jani, learned advocate for the petitioners.

3. The learned advocate for the petitioners invited attention of the Court to the judgment and order dated 17.11.1999, which is at Annexure-J. The learned advocate for the petitioners submitted that the Gujarat State Cooperative Tribunal (hereinafter referred to as, "the Tribunal") has erred in allowing Appeal No. 302 of 1998, arising from Lavad Case No. 3076 of 1985. The Tribunal has quashed and set aside the judgment and order passed by the Board of Nominees in Lavad Case No. 3076 of 1998 dated 12.05.1998.

4. The learned advocate for the petitioners vehemently submitted that the Tribunal has erred in passing the order to the effect that an amount of Rs. 2,56,887-24 ps. is recoverable with effect from 07.10.1985 till the recovery of the amount with interest at the rate of 17% from person and properties of respondent Nos. 1, 2, 5 and 7. The Tribunal was pleased to order that the order passed by the Board of Nominees below Exh.6 will continue till the recovery of

the decretal amount. Respondent No. 1 is M/s. Machine Tools Corporation - a partnership firm, respondent No. 2 is deceased Dinubhai Maneklal Parikh, through his heirs - (A) Smt. Sushilaben Dinubhai Parikh (Wd/o the deceased) and (B) Dr. Rahul Dinubhai Parikh (son of the deceased), respondent No. 5 is Dr. Rahul Dinubhai Parikh, respondent No. 7 is Smt. Padmaben Mansukhlal Modi and respondent No. 6 is Mansukhlal Amratlal Modi.

5. The learned advocate for the petitioners invited attention of the Court to the facts of the case which are as under:

5.1 That earlier there was a partnership firm in the name and style of present respondent No. 1 - M/s. Machine Tools Corporation, but then, the partners were different, viz. (1) Dinubhai Maneklal Parikh, (2) Yusufbhai Fidahussain Lokhandwala, (3) Ketkiben Manharlal Modi, (4) Mansukhlal Amratlal Modi and (5) Padmaben Mansukhlal Modi. The said partnership firm was dissolved on 28.07.1983. The dissolution deed of the said partnership firm is at Annexure-B to the petition.

5.2 At the time of dissolution, it was decided that Mr. Dinubhai Maneklal Parikh will be referred as "continuing partner", but as all other partners had retired, the partnership firm had come to an end. In the dissolution deed, Shri Dinubhai Maneklal Parikh was referred as "continuing partner". The learned advocate for the petitioners submitted that nomenclature cannot be said to be accurate and in accordance with law because once all other partners had retired and partnership has come to end, a single person could not have been referred to as a "continuing partner". On dissolution of the partnership firm, one of the partners choses to take over the business of the partnership firm, but then that person could not have been referred to as a "continuing partner". This could have been done only if two or more persons had decided to take over the business then they could have been referred to as "continuing partners".

6. The learned advocate for the petitioners submitted that the dissolution deed is not in question inasmuch as, the factum of the dissolution is not challenged by the Bank.

7. The learned advocate for the petitioners submitted that thereafter, said Shri Dinubhai Maneklal Parikh formed another partnership with petitioner No. 1 herein - Rahul Dinubhai Parikh - his son. Not only that, this fresh partnership firm opened a Current Account with "Naranpura Branch" of the same Bank, whereas the erstwhile partnership firm had "Hypothecation Account" with "Sarangpur Branch" of this very Bank.

8. The learned advocate for the petitioners invited attention of the Court to the fresh deed of partnership which is produced at Annexure-C to the petition. The learned advocate for the petitioners vehemently submitted that the Lavad Suit filed by the Bank was defective to that extent it impleaded petitioner No. 1, describing him as one of the partners of the erstwhile partnership firm.

09.03.2009

9. The Bank had filed the suit on 17.10.1985 being Lavad Suit No. 3076 of 1985 against in all 7 persons, viz. (1), M/s. Machine Tools Corporation - Partnership Firm, (2) Shri Dinubhai Maneklal Parikh, (3) Shri Yusufbhai Fidahussain Lokhandwala, (4) Smt. Ketkiben Manharlal Parikh, (5) Shri Raul Dinubhai Parikh, (6) Shri Mansukhlal Amratlal Modi and (7) Smt. Padmaben Mansukhlal Modi. The relief sought for in the suit is, an amount of Rs. 2,56,887-24 ps. (Rupees Two Lacs Fifty Six Thousand Eight Hundred Eighty Seven & 24 paisley), with notice charge of Rs. 101/-, with 18% interest from 07.10.1985 till the date of realization of the same from defendant Nos. 2, 3,, 5 and 6, Shri Dinubhai Maneklal Parikh, Shri Yusufbhai Fidahussain Lokhandwala, Shri Rajul Dinubhai Parikh and Shri Mansukhlal Amratlal Modi. The learned advocate for the petitioners submitted that there is no reason set out as to why the Bank had chosen not to include defendant Nos. 1, 4 and 7 in the prayer.

10. The learned advocate for the petitioners invited attention of the Court to a pursis Exh.52 dated 12.08.1991 filed by the plaintiff Bank, a copy of which is produced at Annexure-F, page No. 77, whereby the plaintiff Bank sought deletion of defendant Nos. 3, 4 and 6, stating that these defendants had already retired from the partnership and the entire liability of the partnership firm is taken over by defendant Nos. 2 and 5, i.e. Shri Dinubhai Maneklal Parikh and Shri Rajulbhai Dinubhai Parikh. The application was allowed on the same day, i.e. 12.08.1991 and the aforesaid defendant Nos. 3, 4 and 6 were permitted to be deleted. There is a handwritten order to that effect on the said pursis Exh.52.

11. The learned advocate for the petitioners submitted that defendant Nos. 1, 2 and 5 had filed a written statement in Lavad Case No. 3076 of 1985, a copy of which is produced at Annexure-E, page No. 69, wherein in para-3, a contention was raised that the suit filed by the plaintiff suffers from the mis-joinder of parties, as defendant No. 5 - Shri Rajulbhai Dinubhai Parikh is wrongly impleaded as party; that defendant No. 5 is no way liable for the dues of the plaintiff Bank; that he was not the partner of the erstwhile partnership firm; that he had never signed any document; that he had not executed any document and the plaintiff Bank has erred in debiting interest on interest, which is not legal.

11.1. Pursuant to the aforesaid pleadings, Board of Nominees had framed an issue at Sr. No. 4 to the effect that, "Whether defendant No. 5 proves that he was not a partner of defendant No. 1 partnership firm?"

11.2 The aforesaid issue is replied by the Board of Nominees in negative. For recording that finding, the Board of Nominees has recorded that, "defendant No. 5 in his reply and his advocate in arguments have submitted that defendant No. 5 was never a partner of defendant No. 1 partnership firm, but in documents produced at Sr. Nos. 10 and 12 with Mark No. 149, which are exhibited as Exh.144 and Exh.145, defendant No. 5 has admitted that he has signed as partner of defendant No. 1 firm. In Exh.168, which is a partnership deed of

defendant No. 1 firm, defendant No. 5 has admitted his signature. Thus, defendant No. 5 is not able to prove that he was not a partner of defendant No. 1. Hence, Issue No. 5 is answered in negative".

11.3 At this juncture, the learned advocate for the petitioners, made available a copy of Exhs.144 and 145, which are taken on record. It is the say of the learned advocate for the petitioners that these two documents are the documents, whereby petitioner No. 1 herein applied for opening a Bank account for the new partnership firm. It is the case of petitioner No. 1 herein right from the beginning that after the earlier partnership firm was dissolved, a partnership firm was formed by his deceased father with him in the same name and style and for that subsequent partnership fir, a bank account was being opened. The learned advocate for the petitioners submitted that it is at the cost of repetition she will reiterate that petitioner No. 1 herein - original defendant No. 5 was never a partner in erstwhile partnership firm. She submitted that the Board of Nominees committed an error in answering Issue No. 4 in negative.

12. The learned advocate for the petitioners submitted that Lavad Suit No. 3076 of 1985 was dismissed by the Board of Nominees by order dated 12.05.1998. The Board of Nominees was pleased to vacate the order of attachment before judgment /injunction granted below Exh.6.

13. The respondent Bank, being aggrieved by the aforesaid order, had preferred an appeal before the Gujarat State Cooperative Tribunal being Appeal No. 302 of 1998. The learned advocate for the petitioners submitted that being aggrieved by the answer to Issue No. 4 in negative, petitioner No. 1 herein also had filed "Cross Appeal", which was not separately numbered to Appeal No. 302 of 1998.

14. The Cooperative Tribunal decided the appeal filed by the bank by judgment and order dated 17.11.1999 and quashed and set aside judgment and order dated 12.05.1998 of the Board of Nominees in Lavad Case No. 3076 of 1985 and was pleased to order that an amount of Rs. 2,56,887-24 ps. be paid with 17% interest from 07.10.1985 till the realization from defendant Nos. 1, 2 and 5 from every property of theirs" and the order passed below Exh.6 by the Board of Nominees was ordered to continue till the amount is recovered.

14.1 The learned advocate for the petitioners submitted that the Cooperative Tribunal did not pass any order on the "Cross Appeal" filed by petitioner No. 1 herein, which was not separately numbered.

15. The learned advocate for the petitioners submitted that petitioner No. 1 then filed Review Application No. 1 of 2000 before the Gujarat State Cooperative Tribunal, which too came to be dismissed by judgment and order dated 09.10.2003. It is being aggrieved by the aforesaid orders that the present petition is filed.

16. Having gone through the judgment and order passed by the Board of Nominees and having perused Exhs.144, it is clear that the same is dated

09.08.1983, i.e. subsequent to the dissolution of the partnership on 28.07.1983 and it is after formation of the new partnership firm on 05.08.1983 and therefore, the Board of Nominees has erred in referring to Exh.144 and coming to conclusion that petitioner No. 1 has signed the said document, as a partner of the erstwhile partnership firm.

16.1 So far as Exh.145 is concerned, it is a certificate issued by the deceased father of petitioner No. 1 herein dated 12.08.1983, wherein there is no signature of petitioner No. 1 - original defendant No. 5.

16.2 So far as Exh.168 is concerned, it is a Deed of Partnership, a copy of which is produced at Annexure-C, page No. 51. This document is dated 05.08.1983, wherein it recited that the partnership firm had come into being from 01.07.1983. This document, on the contrary, supports the case of petitioner No. 1 herein - original defendant No. 5. Therefore, it is clear that the Board of Nominees has erred in answering Issue No. 4 in negative.

17. These facts ought to have been appreciated by the Cooperative Tribunal, but it has failed to do so. It has erred in allowing the appeal against petitioner No. 1 herein and also erred in dismissing the Review Application filed by petitioner No. 1 herein.

18. The learned advocate for the petitioners submitted that so far as petitioner No. 1 herein is concerned, he does not dispute the liability which he may be liable to discharge as an heir of Shri Dinubhai Parikh - his father. But he cannot be liable, as a partner of the erstwhile partnership firm. Therefore, that order is required to be quashed and set aside.

19. In view of above, judgment and order passed by the Gujarat State Cooperative Tribunal in Appeal No. 302 of 1998 and in Review Application No. 1 of 2000 are quashed and set aside. The judgment and order of the Board of Nominees in Lavad Case No. 3076 of 1985, to the extent it answers Issue No. 4 in negative, is also quashed and set aside.

20. The petition is allowed to the aforesaid extent. Rule is made absolute. No costs.

At the request of the learned advocate for the respondent Bank, it is clarified that the judgment and orders of the Board of Nominees and Cooperative Tribunal, which are quashed and set aside by this judgment and order, do not absolve petitioner No. 1 of the liability, which he is required to discharge as a son of Shri Dinubhai Maneklal Parikh.