(2000) 03 GUJ CK 0069

In the Gujarat High Court

Case No : Special Civil Application No. 6499 of 1987

Thakorbhai L. Patel and Others — APPELLANT

Vs

Assistant District Registrar, Co-op. Societies, Valsad and Others — RESPONDENT

Date of Decision : 10-03-2000

Acts Referred:
Gujarat Co-operative Societies Act, 1961 — Section 110, 93

Citation : AIR 2001 Guj 66 : (2001) 3 GLR 1921

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

Bench : Single Bench

Advocate : B.B. Naik, for the Appellant; Digant P. Joshi, Asstt, Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

R.R. Tripathi, J.—The petitioners are the sons of one Shri Laxmanbhai Dahyabhai Patel, who was the Chairman of Min Kuchcha Seva Sahakari Mandali Limited. Said Shri L. D. Patel died on 2-11-1984 and as the petitioners have inherited the ancestral properties of H.U.F., they have filed the present petition challenging the orders passed by the Liquidator produced at Annexure ''B'' and also the order of dismissal of Appeal No. 47 of 1987, at Annexure ''C'' and also the judgment dated 4-7-1987 passed in Revision filed u/s 155 of the Gujarat Co-operative Societies Act, 1961 (hereinafter referred to as "the Act").

2. It is the case of the petitioners that the District Registrar on perusing the audit report for the period from 1-4-1976 to 3-6-1977 and the Special Report of the Auditor, appointed one Shri M. S. Mangela to hold inquiry u/s 86 of the Act. Said Shri Mangela submitted his report to the concerned authority. In the said report it was found by Shri Mangela that the Secretary of the Society Shri Rambhai Ukabhai was in-charge of the stock of the society and the keys of the shop of the society were remaining with him, and therefore, he was liable for the loss of stock amounting to Rs. 70,501-24 paise. It was also stated in the said report

that the Secretary is only liable for Rs. 50-00 and Rs. 256-00 respectively for the stock of baskets and empty oil tins. It was also stated in the report that for not counting the interest amount of Rs. 2888-57 paise, the Secretary and the members of the Executive Committee are liable and that the society should take necessary steps for recovering the amount due from the members of the society and in the end it was held by the inquiry officer that for amount of Rs. 350/- as the inquiry fees the Secretary of the Society, Shri Rambhai Ukabhai is liable for half amount, i.e., Rs. 175/- and all the members of the Executive Committee for the year 1976-77 are liable for the remaining amount of Rs. 175/- severally and jointly. It was urged by Shri Naik, learned Advocate for the petitioners that it is clear from the report of the Inquiry Officer that the deceased L. D. Patel was not responsible for loss of any amount to the society. A copy of the report is annexed at Annexure ''A'' to the petition.

3. The District Registrar, Co-operative Societies, having felt that the society is not economically viable, had passed an order dated 19-10-1981 for taking the society into liquidation and appointed a Co-operation Officer (Liquidation) as Liquidator of the society u/s 107 of the Act. After the Liquidator was appointed, the Liquidator issued notice dated 3-5-1982 to deceased L. D. Patel u/s 110 of the Act to deposit an amount of Rs. 8039-78 paise with interest and to deposit Rs. 803-97 paise as liquidation charges and Rs. 0-40 paise as notice charges within 15 days u/s 110 of the Act. It is contended by Shri Naik, the learned Advocate for the petitioners that the Liquidator had not issued any notice before directly issuing the notice to deposit the amount. Nor did he held any inquiry in the matter. Hence, the action of the Liquidator is vitiated on account of violation of principles of natural justice and the same is required to be quashed and set aside by this Court. It is also stated by Shri Naik that the Liquidator once again issued notice dated 16-2-1983 informing the father of the petitioners that the Secretary and the members of the Managing Committee of the year 1976-77 are liable for the amount of Rs. 80,397-93 paise being an amount of misappropriation including misappropriation of the stock and loss to the society. It is also mentioned in the said notice that the Secretary and the members of the Managing Committee are liable for the said amount personally and jointly. The Liquidator also recommended to the District Registrar, Co-operative Societies, Valsad to issue necessary certificate to recover the said amounts as arrears of the land revenue and to that effect an order came to be passed which is the impugned order at Annexure ''B'' to this petition. It is also submitted that thereafter the District Registrar issued a certificate to recover the said amount as arrears of land revenue and the same is forwarded to respondent No. 3-Special Recovery Officer to the District Collector, Valsad. The respondent No. 3 then started proceedings to recover the said amount as arrears of the land revenue and issued notices to the deceased Laxmanbhai Dahyabhai Patel and after his death notices were issued to the petitioners. The petitioners challenged the notices issued by the Special Recovery Officer before the District Collector, Valsad, who by an order dated 24-2-1986 held that the order of the Liquidator is

illegal and the said order cannot be passed without following the procedure prescribed u/s 93 of the Act. It is important to note that the Collector further held that, "the Collector has no jurisdiction to hear the appeal" and directed the petitioners to file an appeal before the Registrar, Co-operative Societies, Gujarat State and granted relief of restraining the Special Recovery Officer from recovering the amount in question by way of arrears of land revenue.

4. The petitioners then preferred an appeal before the Registrar, Co-operative Societies, Gujarat State, Gandhinagar being Appeal No. 47 of 1987, which came to be dismissed on 16-4-1987. The petitioners preferred a Revision Application, which also came to be dismissed on 4-7-1987.

5. In the present petition, Mr. Naik, the learned Advocate appearing for the petitioners had invited the attention of the Court to the provisions of Section 86 of the Act, which read as under :

"86. Inquiry by Registrar :- (1) The Registrar may of his own motion himself, or by a person duly authorised by him in writing in this behalf, hold an inquiry into the Constitution, working and financial conditions of a society.

(2) The Registrar shall hold such an inquiry --

(a) on the requisition of a society duly authorised by rules made in this behalf to make such representation, in respect of any of its members, such member being itself a society, or

(b) on the application of a majority of the committee of a society, or

(c) on the application of one-third of the members of a society.

(3) to (5) ... ..."

Mr. Naik, learned Advocate has also invited the attention of the Court to the provisions of Section 93 of the Act, which read as under :

"93. Power of Registrar to assess damages against delinquent, promoters, etc.:--

(1) Where in the course of or as a result of an audit u/s 84, or an inquiry u/s 86 or an inspection u/s 87, or the winding-up of a society, the Registrar is satisfied on the basis of the report made by the auditor or the person authorised to make inquiry u/s 86, or the person authorised to inspect the books u/s 87, or the Liquidator u/s 110, that any person who has taken any part in the organisation or management of the society or any deceased, or past or present officer of the society had within a period of five years prior to the date of such audit, inquiry, inspection or order for winding up, misapplied or retained, or become liable or accountable for, any money or property of the society, or has been guilty of misfeasance or breach of trust in relation to the society, the Registrar or a person authorised by him in that behalf may investigate the conduct of such person or persons and after framing charges against such person or persons, and after giving a reasonable opportunity to the person concerned and in the case of a

deceased person to his representative who inherits his estate, to answer the charges, make an order requiring him to repay or restore the money or property or any part thereof, with interest at such rate as the Registrar or the person authorised under this Section may determine, or to contribute such sum to the assets of the society by way of compensation in regard to the misapplication, retention, misfeasance or breach of trust, as he may determine.

(2)... ... ..."

Mr. Naik, learned Advocate has also invited attention of the Court to the provisions of Section 110 of the Act, which read as under :

"110. Powers of Liquidator :- The Liquidator appointed u/s 108 shall have power, subject to the rules and the general supervision, control and direction of the Registrar, --

(a) to institute and defend suits and other legal proceedings, civil or criminal, on behalf of the society, in the name of his office;

(b) to carry on the business of the society, so far as may be necessary for the beneficial winding-up of the same;

(c) to sell the immovable and movable property and actionable claims of the society by public auction or private contract, with power to transfer the whole or part thereof any person or body corporate, or sell the same in parcels;

(d) to raise, on the security of the assets of the society, any money required;

(e) to investigate all claims against the society, and subject to the provisions of the Act, to decide questions of priority arising out of such claims and to pay any class or classes of creditors in full or rateably according to the amount of such debts, the surplus being applied in payment of interest from the date of liquidation at a rate approved by the Registrar, but not exceeding the contract rates;

(f) to make any compromise or arrangement with creditors or persons claiming to be creditors, or having or alleging themselves to have any claim, present or future, whereby the society may be rendered liable;

(g) to compromise, all calls or liabilities to calls debts and liabilities capable of resulting in debts, and all claims present or future, certain or contingent, subsisting or supposed to subsist between the society and a contributory or alleged contributory or other debtor or person apprehending liability to the society, and ali questions in any way relating to or affecting the assets or the winding up of the society, on such terms as may be agreed, and take any security for the discharge of any such call, liability, debt, or claim, and give a complete discharge in respect thereof;

(h) to determine from time to time, after giving an opportunity to answer the claim, the contribution to be made or remaining to be made by the members or past members or by the estate, nominees, heirs or legal representatives of deceased members, or by the officer, past officer or the estate or nominees, heirs or legal representatives of a deceased officer to the assets of the society, such contribution being inclusive of debts due from such members or officers;

(i) to (o) ... ..."

A perusal of all these provisions makes it clear that appointment of Mr. M. S. Mangela was under the provisions of Section 86 of the Act and it was on the inquiry report submitted by said Mr. Mangela that the Registrar was expected to take further steps which could have been in accordance with Section 93 of the Act. It seems that the authorities instead of following the procedure prescribed u/s 93 of the Act, had resorted to the provisions of Section HO of the Act and the Liquidator passed an order of recovery and requested the Registrar to issue a certificate of recovery. Said certificate of recovery was sought to be enforced through respondent No. 3-Special Recovery Officer. A combined reading of Section 86 and Section 93 make it clear that once the report u/s 86 was before the Registrar, it was only u/s 93, that the Registrar was expected to take recourse to and should have proceeded in accordance with the provisions of Section 93 only. At this juncture, Mr. Naik, learned Counsel for the petitioners had invited my attention to a decision of Patna High Court in the matter of Kinjer Vyaper Mandal Sahyog Samiti Ltd. Vs. Deputy Registrar, Co-operative Societies, Patna Division and Others, , wherein the Full Bench was considering the question of applicability of the provisions of Section 40 of the Bihar and Orissa Co-operative Societies Act (6 of 1935) to a reference u/s 48 of the said Act by a society against the officer, agent or servant for defalcation of its fund. The facts of the case are set out in Para 2, which are in close similarity to the present case, read as under :

"The facts lie in a narrow compass and are not in serious dispute. The Kinjer Vyapar Mandal Sahyog Samiti Ltd. the petitioner is a registered Co-op. Society under the Bihar and Orissa Co-op. Societies Act, 1935 (hereinafter referred to as ''the Act'') in the district of Gaya. Respondent No. 2 Sri Chandramani Sharma was the Manager of the said society appointed by the Registrar of Co-op. Societies, Bihar in the relevant period. The petitioner society raised a dispute against respondent No. 2 for defalcating a huge amount of its funds u/s 48 of the Act. The matter was thereafter, referred to respondent No. 3, the Asstt. Registrar, Co-op. Societies, Jehanabad. The said respondent in Award Case No. 7 of 1976-77 passed a decree against respondent No. 2 to the tune of Rs. 61,439/ -- as the principal amount and Rs. 12,990/- as interest upto 30th June, 1976 besides costs and future interest thereon vide Annexure 3 to the writ petition. Respondent No. 2 for fixing the financial liability on respondent No. 3 referred to and relied on the audit report of the society for the years 1973-74 and 1974-75. Aggrieved by the award decree, respondent No. 2 filed C.W.J.C. No. 3244 of 1978 primarily on the ground that the said award was made ex parte against him without any notice and was violative of the principle of natural justice. The petitioner appeared as respondent in the said writ petition and hotly contested the alleged ground of lack of notice. However, respondent No. 2 also filed an appeal against the award decree u/s 48(6) of the Act. The deputy Registrar, Co-op. Societies, respondent No. 1 heard the appeal ex parte on the 23rd July, 1979 and reserved order. Later the petitioner received a communication dt. the 11th February, 1980 communicating to them that respondent No. 1 vide annexure 1 had allowed the appeal on the ground that no notice was served on respondent 2 before passing the award decree. The petitioner then filed a review petition in the said appeal which, however, was rejected on the 25th February 1980. The petitioner then preferred the present writ petition to challenge Annex-1, the appellate order of the Deputy Registrar, Co-op. Societies and the subsequent rejection of the review application."

The Full Bench while considering the question raised before it, considered the relevant parts of Sees. 40 and 48 of the Act, which reads as under :

"4.....

"40. Surcharge :- (1) Where as the result of an audit u/s 3 or an inquiry u/s 35 or an inspection under Secs. 34, 36 or 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 laws of the society or is 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) misappropriated or fraudulently retained any property of the society or of the financing bank for 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 into contribute sum to the assets of the society or of the financing bank as the case may be by way of compensation in respect of 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 no order shall be passed under this sub-Sec, in respect of any act or omission mentioned in clause (a), (b), (c) or (d) except within six years of the date on which such attacked or omission occurred.

(2) This Section shall apply notwithstanding that such person or officer may have incurred criminal liability under this Act or under any other law.

(3) An appeal shall lie from an order of the Registrar under sub-section (1) to the State Govt. on application made by the person or officer against whom such order was passed within three months from the date of the communication to him of such order. The order of the State Govt. on appeal, and subject to the result of such appeal, if any, the order of the Registrar, shall be final."

"48. Disputes :- (1) If any dispute touching the business of a registered society (other than a dispute regarding disciplinary action taken by the society or its managing committee against a paid servant of society) arises --

(a) amongst members, past members, persons claiming through members, past members or deceased members, and sureties of members, past members or deceased members, whether such sureties are members or non-members; or

(b) between a member, past member, persons claiming through a member, past member or deceased member, or sureties of members, past members or deceased member, whether such sureties are members or non-members, and the society, its managing committee or any officer, agent or servant of the society; or

(c) between the society or its managing committee and any past or present officer, agent or servant of the society; or

xx xx xx

such dispute shall be referred to the Registrar."

The Full Bench after taking into consideration the very important aspect of the matter, it held that in a way Section 40 pertains to the administrative power of the Registrar resulting from an audit, inquiry or inspection, etc. It is a vested power to penalise for misconduct and negligence on one hand, in order to compensate the society by way of surcharge therefore on the other. It has nothing to do with inter se dispute which may arise under the five sub-clauses of sub-section (1) of Section 48. In a limited way the two Sections can be said to be mutually exclusive and operative in altogether different fields. The Full Bench concluded in Para 10 as under : "10. On the large scheme, therefore, it must be held that Secs. 40 and 48 are independent provisions in different chapters, having no direct nexus with each other, and operate in separate fields. As already noticed, one pertains to the administrative power of the Registrar resulting from an audit, inquiry or inspection etc. whilst the other relates to the vested right of parties to raise a dispute for reference and settlement by the registrar."

6. The provisions of Section 93 cannot be confused for the provisions u/s 110 and the action which was required to be taken u/s 93 could have been taken

under the provisions of Section 100. It is important to note that Section 93 itself provides that the Registrar has to take into consideration a report made by the Liquidator u/s 110 and than to follow the procedure further prescribed u/s 93. In the light of that action taken by the Liquidator by issuing order of recovery and subsequent action thereafter, cannot be justified in any manner.

7. Mr. Naik has submitted that whenever in a statute there is special provisions made it is not open to the authorities to resort to the general provisions. His contention is that after an inquiry by the officer appointed u/s 86, the recourse open to the Registrar was only under the provisions of Section 93. In this regard, Mr. Naik relied upon a judgment of the Hon''ble the Supreme Court in the matter of The J.K. Cotton Spinning and Weaving Mills Co. Ltd. Vs. The State of Uttar Pradesh and Others, . Mr. Naik relied on the observations of the Supreme Court in para 9, which reads as under : "... ... ... The learned Attorney General seemed to suggest that while this rule of construction is applicable to resolve the conflict between the general provision in one Act and the special provision in another Act, the rule cannot apply in resolving a conflict between general and special provisions in the same legislative instrument. This suggestion does not find support in either principle or authority. The rule that general provisions should yield to specific provisions is not an arbitrary principle made by lawyers and Judges but springs from the common understanding of men and women that when the same person gives two directions one covering a large number of matters in general and another to only some of them his intention is that these latter directions should prevail as regards these while as regards all the rest the earlier direction should have effect. In Pretty v. Solly, 1859-53 ER 1032 quoted in Caries on Statute Law at page 206. (6th Edition) Roilly. M. R., mentioned the rule thus :-

"The rule is that whenever there is a particular enactment and a general enactment in the same statute and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply."

8. It is clear from the aforesaid observations that once there is a special provision in the statute, it is not open to the authorities to resort to the general provisions and it is clear from the facts of the present case that there is a special provision made in Section 93 of the Act, and therefore, it was not open to the authorities to resort to any other provision under the Act. It may also be noted that the learned A.G.P. is not able to explain as to why the authorities have not resorted to the provisions of Section 93 and why they have insisted for circumventing the provisions of Section 93 by issuing an order of recovery by the Liquidator and subsequent steps thereafter. Mr. B. B. Naik, learned Advocate for the petitioners has also invited my attention to a judgment of this Court in the matter of Sardarkunj Co-operative Housing Society Ltd., Ahmedabad & Ors. v. Ramabhai Jethabhai Patel & Ors., reported in 1984 (2) GLR 1213, wherein also

this Court has considered similar situation where a recourse was required to be taken to special provision and not general provision of the siatute and this Court has held that whenever there a special provision made in the statute, the authorities must resort to that special provision and refrain themselves from resorting to the general provision. In the result, the impugned orders at Annexure at ''B'', ''C'' and ''D'', namely, the order of the Liquidator, judgment dated 16-4-1987 in Appeal No. 47 of 1987 by the Additional Registrar, Cooperative Societies and the judgment dated 4-7-1987 in revision, are quashed and set aside. However, it will be open to the District Registrar to take recourse to the provisions of Section 93 and proceed further with the erring parties on the basis of the inquiry report submitted by Mr. M. S. Mangela. In the result, the petition is allowed. Rule is made absolute accordingly with no order as to costs.

9. Petition allowed.