

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
SPECIAL CIVIL APPLICATION No. 10556 of 1994
With
SPECIAL CIVIL APPLICATION No. 10557 of 1994
To
SPECIAL CIVIL APPLICATION No. 10559 of 1994

For Approval and Signature:

HONOURABLE MR.JUSTICE JAYANT PATEL

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- 1 Whether Reporters of Local Papers may be allowed to see the judgment ?
 - 2 To be referred to the Reporter or not ?
 - 3 Whether their Lordships wish to see the fair copy of the judgment ?
 - 4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
 - 5 Whether it is to be circulated to the civil judge ?

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ARVINDBHAI RAMJIBHAI SHAH & 5 - Petitioner(s)
Versus
SAHYOG CO-OPERATIVE BANK LTD & 5 - Respondent(s)

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Appearance :

MR RN SHAH for Petitioner(s) : 1, 1.2.1, 1.2.2, 1.2.3, 1.2.4, 1.2.5 - 6.
MR GIRISH D BHATT for Respondent(s) : 1,
None for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE JAYANT PATEL

Date : 31/03/2008

ORAL JUDGMENT

1. As common questions arise for consideration in all the petitions, they are being considered by this common judgement.
2. The short facts of the case appears to be that the respondent Bank filed four Lavad Suits being Lavad Suit No.1294/90 for recovery of Rs.2,61,191.62; Lavad Suit No.1295/90 for recovery of the amount of Rs.1,31,860.71; Lavad Suit No.1296/90 for recovery of Rs.2,67,955.73; and being Lavad Suit No.1297/90 for recovery of Rs.30,41,308.46. All the Suits were filed on 28.05.1990. The summons were served. The defendants had appeared through their advocate. However, it appears that as per the petitioner, because of disturbed situation in the city on account of riots and curfew, the advocate of the petitioner could not remain present in the proceedings of the suit and the learned Nominee closed the right to file written statement. It appears that thereafter, the learned Nominee proceeded further. The officers of the Bank were examined, the depositions were recorded, the documents were taken in evidence and thereafter, the learned Nominee accepted the claim of the respondent-plaintiff Bank in the suit and passed the award in the respective suits. The matters were carried in Appeal being Appeal Nos. 239/92, 240/92, 241/92 and 242/92 before the Tribunal. The Tribunal in the said

appeal ultimately after hearing both the sides, found that the learned Nominee was justified in proceeding further with the suit and the award does not call for interference and therefore, dismissed all the appeals. Under these circumstances, the present petitions before this Court.

3. Heard Mr. Shah, learned counsel appearing for the petitioners and Mr. Bhatt, appearing for the respondent Bank.

4. Mr. Bhatt for the respondent Bank at the outset raised the preliminary contention to the effect that the matters are covered by the decision of this Court (Coram: R.M. Doshit, J.) dated 20.01.2003 in Special Civil Application No. 2857/94 and allied matters, which were preferred by Kumudchandra Ramjibhai Shah in the capacity as the guarantor and who is also one of the legal heir of the original loanee. He submitted that in the said decision, the very judgement and award of the Nominee as well as the very Judgment of the Tribunal were under challenge and this Court has not interfered with the Judgement and Award of the Nominee or its confirmation thereof by the Tribunal and therefore, the present petition under Article 227 of the Constitution deserves to be dismissed.

5. In order to examine the contention, it deserves

to be recorded that the capacity of Kumudchandra Ramjibhai Shah was that of a guarantor in the proceedings of the suits before the Nominee. It is also true that the very judgement and awards of the Nominee in the suit proceedings as well as the orders of the Tribunal in the appeal proceedings were subject matter of challenge. It is also true that in the said Special Civil Application No. 2857 of 1994 and allied matters, the present petitioners who were surviving at that time were also party respondents Nos. 3 to 6. But, it appears that when the matters were heard on 20.01.2003 before this Court, it was not brought to the notice of this Court that the present group of petitions preferred by the principal borrower are pending and the matters are admitted and the interim relief has been granted against the execution of the award and they are awaiting final hearing.

6. It appears that in the said decision, this Court passed the following order:

"Neither of the learned advocates is present on call.

The petitioner in all these four petitions is one Kumudchandra Ramjibhai Shah. The petitioner challenges the decree passed by the Board of Nominees and confirmed by the Gujarat State Cooperative Tribunal (hereinafter referred to as 'the Tribunal'). The petitioner also challenges the notices issued by the Special Recovery Officer. All these petitions involve identical question of law and, hence, are disposed of by this common judgment and order.

It appears that the Sahyog Cooperative Bank, the respondent no.1 herein (hereinafter referred to as 'the Bank'), had instituted Arbitration Suit Nos.1294/1990 to 1297/1990 against the petitioner and some others for

recovery of moneys due from the said defendants. A decree was passed in the respective suit by the Board of Nominees on 16th December, 1990. Feeling aggrieved, some of the defendants preferred Appeals Nos.239/1992 to 242/1992 before the Tribunal. All the four appeals were dismissed by a common judgment and order dated 15th September, 1993. Feeling aggrieved, the petitioner has preferred the present petitions.

Pursuant to the decree passed by the Tribunal, the Special Recovery Officer had sought to execute the decrees by issuing notice on 5th February, 1994. The petitioner has also challenged the said notice dated 5th February, 1994.

It is the claim of the petitioner that the petitioner was not a party to either of the transactions of overdraft in respect of which the respective decree has been passed against the petitioner and the concerned respondents. The petitioner has submitted that he has been impleaded as the party respondent merely on the ground that he is one of the heirs of late Mr.R.N.Shah, who was the debtor of the Bank. Further, the petitioner had not stood surety for the said amount borrowed by his late father Mr.R.N.Shah. However, illegally and without the authority of law the respondent authority has attached the salary of the petitioner, who happens to be the servant of the Ahmedabad Municipal Corporation. It is also contended that Section 96 of the Act does not empower the Board of Nominees to entertain the disputes in the present nature (i.e. between the Society and the heirs and legal representatives of the deceased member).

I have perused the records. The Tribunal has categorically recorded that the late Ramjibhai Nagindas Shah, the father of the petitioner and his five sons (including the present petitioner) had money transaction with the Bank; that the said Ramjibhai Shah had borrowed a loan from the Bank and, his sons stood sureties for the said transaction. A further loan was borrowed by the said Ramjibhai Shah and one of his sons Arvindbhai. All other sons of the said Ramjibhai Shah had stood sureties for the said transaction; that Arvindbhai and his brothers i.e. the sons of the said Ramjibhai Shah carried on business in partnership in the name of M/s. Relief Medical and Optical Store. The loan was borrowed by them in respect of the said partnership business. None of the said amounts was repaid by the concerned borrowers. In view of the above facts recorded by the Tribunal, I see no substance in the contention raised by the petitioner that he was not a party to any of the disputed transactions, nor did he stand surety in any of the said transactions.

As to Section 96 of the Act, be it noted that the said section empowers the Registrar or its nominee to entertain and resolve a dispute relating, inter alia, to the business of the Society where the parties to the dispute are, inter alia, a member, a past member or a person claiming through a member, a past member or a

deceased member of the Society. Hence, in my view, the Board of Nominees had a jurisdiction to entertain the present disputes and to resolve the same.

In above view of the matter, no interference with the impugned judgment and order of the Tribunal or the action of the Special Recovery Officer is warranted. Hence, all these petitions are dismissed with costs. Rule nisi issued in each of these petitions is discharged. Interim relief stands vacated. The Registry shall maintain copy of this judgment and order in each of these petitions"

7. The aforesaid shows that this Court has examined the legality and validity of the awards passed by the Nominee and its confirmation thereof by the Tribunal qua the rights of the petitioners therein who stood as the surety/guarantor to the loan transaction. Therefore, if the very person in the very capacity is to assert right for challenging the very judgement and the awards of the Nominee or its confirmation thereof by the Tribunal, such a challenge is not permissible or in any case, cannot be entertained by the coordinate bench of this Court. However, such situation would operate qua the rights of the guarantor/surety and it may not fully apply qua the rights of the principal borrower.

8. Mr. Shah, learned counsel appearing for the petitioners in all the petitions, has strenuously argued that the Board of Nominee even in absence of the defendant concerned ought to have examined the case of the plaintiff before passing the awards. He submitted that merely because the defendant did not appear or did not file written statement, was not

sufficient ground on the part of the Nominee to proceed for passing ex parte award. He relied upon the decisions of the Apex Court reported at AIR 1999 SC 3381 in the case of Balraj Taneja & Anr. Vs. Sunil Madan & Anr. and AIR 2008 SCW 340 in the case of Bogidhola Te & Trading Co. Ltd. & Anr. Vs. Hiralal Somani for supporting his submissions. In furtherance to his submission, he also relied upon the decision of this Court in the case of H.V.Panchal Vs. A.M.Co. Bank Ltd. reported in 2002 (4) GLR 3539 and in the case of Kanaiyalal Babulal Thakkar Vs. Utpal Co-op Housing Society Ltd. reported in 2004(4) GLR 3188, wherein this Court in a matter of ex parte Judgement and Award, once having found that the discretion is not properly exercised by the Nominee or the Trial Court, as the case may be, has remanded the matter on condition to deposit a particular amount, by the concerned defendants.

9. Mr. Shah, learned counsel for the petitioner also contended that in view of the provisions of Section 167 of the Gujarat Cooperative Societies Act (hereinafter referred to as 'the Act'), it was required for the Bank to give the notice before institution of the Suit before the Nominee and no such notice has been issued and therefore, the suits were not maintainable. In support of his contentions, he relied upon the decision of this Court in the case of Bai

Chanchalben W/o Rambhai Mathurbhai & Ors. Ramanlal Keshavlal Shah & Ors. reported in 1981 GLR 101 and 1981(1)GLR 722. Therefore, he submitted that there was a good defence to be raised by the defendants who are petitioners herein and therefore, this Court may also remand the matter to the learned Nominee for retrial of the suit.

10.If one bench of this Court has taken the view upholding the legality and validity of the judgement and award of the Nominee and its confirmation thereof by the Tribunal, the very view taken would be binding to the other coordinate bench of this Court. It is true that the capacity of petitioner therein was as a guarantor, whereas, in the present petitions, the capacity is that of the principal borrower. Therefore, technically speaking, the rights of the principal borrower and the rights of the guarantor so far as it relates to defending the suits are concerned, it may stand independently and separately, but once the award has been passed, the liability of the principal borrower of the guarantor would be joint and several. Same situation would continue in a case where the Tribunal has confirmed the judgement and award of the Nominee and so will be the situation if such is confirmed by this Court in a petition under Article 226/227 of the Constitution.

11. Therefore, it appears that it is not possible for this Court to take a different view than the view taken by the other coordinate bench of this Court, which is binding to this Court.

12. There are additional circumstances for not taking a different view in the present cases at the instances of the principal borrower who are petitioners herein and the same are that:

A) If this Court examines the contention in the present petition and ultimately accepts and sets aside the award passed by the Nominee and remands the matter, may be on appropriate condition to deposit the amount like 50% or so, of the awarded amount, the consequence would arise that the surety or the guarantor would face the whole decree or the award for discharging of the liability, whereas, the principal borrower will face the liability lesser than that.

B) Such situation cannot be permitted to operate because in no circumstances, the liability of the surety/guarantor would be exceeding the liability of the principal borrower.

C) The Judgement and the Award so far as it relates to the rights of the surety, cannot be upset by this Court in view of the

earlier decision dated 20.01.2003. Hence, the power if exercised at the instance of the principal borrower in a case where the Judgement and the Award of the Nominee and its confirmation thereof by the Tribunal is further confirmed by this Court at the instance of the guarantor/surety, anomalous and conflicting situation would prevail. Such exercise of the power would be against the sound discipline for exercise of judicial discretion by this Court.

13.Hence, I find that in view of the earlier decision of this Court dated 20.01.2003 in Special Civil Application No. 2857/94, the contention as sought to be canvassed on behalf of the petitioners by Mr. Shah cannot be entertained.

14.In the result, the petitions deserve to be dismissed. Hence, dismissed. Rule discharged. I.R. vacated. R & P to be returned to the Tribunal and to the Nominee.

(JAYANT PATEL, J.)

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