(2011) 03 BOM CK 0228

In the Bombay High Court

Case No : Arbitration Petition No. 282 of 2006 in Arbitration Case No. ARB/SCB/226 of 2004

Jayant Industrial Packaging Ltd., Hargovinddas Ramjibhai Mehta, Since deceased through his Legal Representatives Mr. Vijay Mehta, Yogesh H. Mehta and Mukesh H. Mehta — APPELLANT

Vs

The Saraswat Cooperative Bank Ltd. and R.A. Dalvi, Arbitrator — RESPONDENT

Date of Decision : 17-03-2011

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 12, 13, 16, 17, 19
Limitation Act, 1963 — Article 136
Maharashtra Co-operative Societies Act, 1960 — Section 101
Multi-State Cooperative Societies Act, 2002 — Section 84, 96, 97

Citation : (2011) 7 ALLMR 247 : (2013) 1 ARBLR 115 : (2012) 4 BomCR 222 : (2011) 4 MhLj 128

Hon'ble Judges : Anoop V. Mohta, J

Bench : Single Bench

Advocate : Kamal R. Katha and Manish Bohra, instructed by JPS Legal, for the Appellant; Y.R. Naik, for Respondent No. 1, G.B. Kedia and M. Agre, instructed by and Divya Sanghvi, for the Respondent

Final Decision : Allowed

Judgement

Anoop V. Mohta, J.—The present Petition is filed u/s 34 of the Arbitration and Conciliation Act, 1996 (for short the Arbitration Act), challenging the impugned award dated 31st March, 2006, passed by the Arbitrator, appointed by the Central Registrar of Cooperative Societies, vide order dated 23rd January, 2003, u/s 84 of the Multi State Cooperative Societies Act, 2002 (the MSCS Act).

2. The basic events are as under:

On 11/04/2004, a claim petition was filed by the Respondent Bank before the learned Arbitrator, Mr. R.A. Dalvi, against the Petitioners. On 11/11/2004, an order of attachment before judgment was passed. The execution Application No.

405 of 2004 filed by the Respondent Bank. On 23/11/2004, Chamber Summons No. 1727 of 2004 filed in above Execution Application.

3. On 25/08/2005, this Court in Chamber Summons No. 1727 of 2004 vacated the order of attachment.

4. On 14/09/2005, Appeal No. 791 of 2005, preferred by the Respondents from order dated 24/08/2005 was withdrawn.

5. On 16/09/2005, a statement of defence filed by Petitioner No. 2.

6. On 08/10/2005, an application by the Petitioners u/s 13/16 of the Arbitration Act, before the Arbitrator. On 24/10/2005, an affidavit of evidence and an affidavit in rejoinder of Respondents filed. In December, 2005, an affidavit of claims filed along with documents before the Arbitrator including written arguments.

7. On 31/03/2006, the impugned award passed.

8. Petitioner No. 1 is, original Opponent No. 1 Company. Petitioner No. 2 [since deceased, 2(a) to 2(c)], 3 and 4 were the Directors of the Company. They were the members of the Cooperative Bank registered under the Maharashtra Cooperative Societies Act, 1960 (for short, MCS Act). The banking financial facilities had been provided to the Company, after due execution of various requisite documents signed by the Directors, some time in the year 1997. On company''s immovable properties-

(i) land admeasuring 1226.78 sq. mtrs. And bearing Plot Nos. 130 and 138, 177 and 178 under City Survey No. 80A and 81/1, Block No. 93 and situated at Charma Market, Char Rasta under Village Kim Palod, Taluka Mangrol, District Surat in the state of Gujarat, and;

(ii) Office premises located at 104, Janaki Centre, Off.

Vira Desai Road, Andheri (West), Mumbai400 053 in the State of Maharashtra created banks first charge.

9. Some time in 1999, the Company approached the Bank and after due discussion, rescheduled/restructured the existing credit limits after execution of fresh documents.

10. As there were consistent defaults, the Respondent bank initiated recovery proceedings on 19th September, 2002 by filing the application before the learned Assistant Registrar, Cooperative Societies, Mumbai u/s 101 of the MCS Act. As objection was raised with regard to the jurisdiction, by an order dated 28th March, 2004, the learned Additional Registrar directed the Respondent bank to file the application before an appropriate forum.

11. An Application, u/s 84 of the MSCS Act read with the Arbitration Act, was filed against the Petitioners for the due aggregating Rs. 336.61 lacs, as on 31st August, 2004, with interest at contractual rate at 17.75%.

12. Before that, notice dated 25th February, 2003 was issued by the Respondent bank under the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short, the Securitisation Act). The Petitioners'' challenge was rejected. Therefore, on 26th August, 2004, the Respondent bank took possession of both the properties. Moti Naroli factory of the Petitioners was sold on 29th December, 2004 for Rs. 1,15,11,111/. As alleged, other factory was in possession of the bank on the date of the award. In the meantime, inspite of the orders, the bank sold the hypothecated properties of the Petitioners. Therefore, a contempt Petition was filed.

13. Petitioner Nos. 2 to 4 who owned the immovable property, (not mortgaged with the Bank),"Kanchan" situated at Plot No. 7, Road No. 5, Vallabh Nagar Cooperative Housing Society Ltd., Near Cooper Hospital, JVPD Scheme, Vile Parle, (W) Mumbai), were trying to dispose of the same. The Respondent bank therefore, filed an application for interim/protective relief by way of "attachment before Judgment", and by order dated 11th October, 2004, the properties were attached.

14. The issue with regard to the jurisdiction of such Multi State Cooperative Bank to invoke Securitisation Act for the recovery of dues was also in the field since December, 2002. In view of the order passed by a Division Bench of this Court, thereby all proceedings initiated by the bank before the learned Assistant Registrar were stayed.

15 The Arbitrator framed 18 issues. The Arbitrator passed the impugned award by holding that:(

i) Opponent No. 2 was the member of the bank till his death and Opponent Nos. 3 and 4 are also members of the bank;

(ii) The Registrar was competent to pass order dated 28th March, 2004 and the Bank was competent to initiate the proceedings;

(iii) Claims are within limitation''

(iv) The Bank has proved the transactions and execution of the documents, whereas, the Petitioners failed to do the same;

(v) The Respondent Bank has supportive statement of accounts and thereby granted the award of Rs. 2,20,64,525/with future interest. The Arbitrator has also affirmed that the Bank has secured by first charge over the movable and immovable properties of the Company and further secured by the joint and several guarantees of his Directors and therefore, entitled to recover dues from the Directors and their legal heirs;

(vi) The Arbitrator also held that the Legal Representatives of Opponent No. 2i. e. 2(a), 2(b) and 2(c) are liable for the payment.

16. The operative part of the order is as under:

1. It is hereby declared that the Saraswat Cooperative Bank (the Bank) is entitled to recover from Opponent Nos. 2(c), 3 and 4 a sum of Rs. 2,20,64,525/ as on 31st August, 2004 together with future interest at 15% for the period from 1st September, 2004 till realisation as also a sum of Rs. 26,780/being Arbitration and Administrative cost of the present proceedings.

2. It is further declared that the repayment of said dues, amounting to Rs. 2,20,64,525/is secured by a first charge over immovable properties of Opponent No. 1 being the factory located at village Kim Palod, Taluka Mangrol, Dist. Surat, in the state of Gujarat and more particularly described in Schedule II to the Original Application.

3. It is also declared that the payment of all said dues to the Bank by Opponent No. 1 is duly guaranteed by Opponent Nos. 2 (since deceased) 3 and 4 and as such Opponent Nos. 2 (c), 3 and 4 are jointly and severally liable to pay said dues to the Bank, the liability of Opponent No. 2 (c) to be restricted only to the extend of the value of estate inheritated by him from the estate of deceased Opponent No. 2.

4. The Opponent Nos. 1, 2(c), 3 and 4 are accordingly directed to pay the Bank jointly and severally said sum of Rs. 2,20,64,525/together with interest thereon at the rate of 15% p.a. from 31st August, 2004 till payment on or before 15th May, 2006 failing which, the Bank shall be entitled to sell the above mentioned mortgaged immovable properties of Opponent No. 1 at the exclusive cost of the Opponent Nos. 1 to 4.

5. It is further declared that interim order of "attachment before judgment" dated 11th November, 2004 as modified by order dated 3rd December, 2004 in respect of all rights, title and interest of Opponent Nos. 2,3 and 4 should continue till full payment of all the aforesaid dues of the Bank and for recovery of said dues in full, the Bank is entitled to sell any portion or entire portion of 3rd, 4th, 5th, 6th,7th, and 8th floors of the structure constructed/ to be constructed in terms of the Development Agreement dated 30th August, 2003 entered into between Opponent Nos. 2(c), 3 and 4 and said Developer on Plot No. 7, Road No. 5, J.V.P.D., Vile Parle (West), Mumbai.

17. By order dated 16th April, 2009, this Court has permitted to join the Arbitrator as Respondent No. 2, as various allegations were made against him. The Arbitrator has filed affidavit dated 24th June, 2009.

The Arbitrator in his affidavit has stated in para 7 as under:

7. I say that from Roznama, it is noticed that on 09/03/2006, Mr. Ghag an Officer of the Respondent Bank filed before the Arbitrator Exhibit A26, which is a Statement of Account of Opponent No. 1 along with written clarification about Rs. 1,15,11,111/and Mr. Ghag also filed the records regarding membership of Opponent Nos. 1, 2, 3 and 4 which were marked as Exhibit A27. From the roznama it is however seen that the same was not filed in the presence of

Petitioners or their representative. There is no Exhibit after Exhibit A27.

18. The Petitioners filed additional affidavit on 7th October, 2009.

The allegations against the Arbitrator are as under:

6. I say that accordingly the Ld. Arbitrator was called upon to decide the application being an alleged challenge to his appointment and continuation as Arbitrator. I say that the said application preferred by the Respondent No. 1 Bank was rejected immediately, without even obtaining the say of the Opponents thereto in that proceeding. Hereto annexed and marked as Exhibit "A" is a copy of the application filed by the Respondent No. 1 Bank in that proceeding. I crave leave to refer to and rely upon the Order passed therein when produced.

7. I say that it is apparent that the Ld. Arbitrator has misconducted himself therein. I say that the Petitioners are apprehensive that the Ld. Arbitrator may have had an interest in the said Bank even prior to the disclosed date being 2007, i.e. During our proceedings which have not been disclosed by the Respondent No. 1. I say that in view of disclosed misconduct of the Ld. Arbitrator in another proceeding pending before him, the Ld. Arbitrator having interest in the Respondent No. 1 Bank before passing the impugned award in our proceedings cannot be ruled out. I say that since the Ld. Arbitrator had a current account in the joint names of himself and his wife in addition to that he was receiving interest at the rate of about 3.5% on the credit in his saving accounts goes on to show that these accounts were prior to 2007 and could be in operation while deciding the award in the present matter. I say that although the non disclosure of the Ld. Arbitrators interest in the Bank was in the other proceeding, it is submitted that this Hon''ble Court be pleased to take cognizance of the said misconduct of the Ld. Arbitrator, whilst considering the grounds of misconduct taken by us in this petition.

19. The Arbitrator had been deciding the innumerable disputes between the Bank and its members since 2003.

20. The Petitioners'' Application u/s 13 of the Arbitration Act was rejected in the year 2008, whereby a challenge was raised to his appointment and the continuation of the Arbitration, without obtaining the say of the other side. Therefore, the objections/ grounds as contemplated u/s 24(3), Section 34(2)(a)(iv) and (2) (b) (ii) of the Arbitration Act have been raised in the petition, basically by relying on the Supreme Court judgment in Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd.,

21. The Respondent contesting Bank supported the impugned award on all counts; including the allegations of misconduct against the Arbitrator stating it to be without substance; non supply of Exhibit Nos. 25, 26 and 27 though produced behind their back, caused no prejudice and; the Arbitrator has considered the sale proceeds of the property already sold. Therefore, prayed to dismiss the Petition.

22. The order dated 24th August, 2005 passed by this Court (Mr. A.M. Khanwilkar, J.) which, as informed, has attained finality. The relevant paras and operative part of the order is as under:

9. As mentioned earlier, there is nothing in the Act of 2002 to suggest that the Arbitrator can exercise similar powers as can be exercised by the Civil Court to pass order of attachment before passing of the decree even in relation to property outside the scope of reference pending before it. To get over this position, Counsel for the Petitioners relied on Section 97 of the Act of 2002. Section 97 of the Act, however, is a provision which creates legal fiction by providing that the Central Registrar or Arbitrator or any person authorised by him in writing in this behalf be deemed to be a Civil Court for the purposes of Article 136 of the Schedule to the Limitation Act, 1963. The legal fiction is for this limited purpose. No more, and no less. In other words, Section 97 of the Act of 2002 cannot be construed to mean vesting of the powers similar to that of the Civil Court in the Arbitrator, who is to exercise powers under the Act of 2002 albeit for the recovery of any amount by attachment or by sale without attachment of any property, etc. Similarly, the provision such as Section 96 of the Act also does not empower the Arbitrator to exercise similar powers as that of the Civil Court. Subsection (2) only provides that the attachment order passed under Sub-section (1) by the Arbitrator shall be executed by a Civil Court having jurisdiction in the same way as an attachment order passed by itself and shall have the same effect as such order. That does not mean that the Arbitrator can exercise similar powers of the Civil Court of attachment before decree so as to cover property beyond the scope of reference before it.

10. Viewed in this perspective, I find substance in the stand taken on behalf of the Applicant that the order of attachment passed in respect of subject property being Kanchan Bungalow of the ownership of the Applicant which is admittedly not the mortgage property and not referable to the scope of proceedings pending before the Arbitrator u/s 84 of the Act, was not amenable to order of attachment before passing of the Award. Accordingly, this Chamber Summons ought to succeed in terms of prayer Clauses (a) and (b).

23. The Arbitrator inspite of above, ordered/directed to sell the property and/or any portion of the property to recover the dues of the bank. This part of the award is totally without jurisdiction and it is null and void. The Arbitrator is bound to follow the order passed by the High Court. The Arbitrator just cannot sit over like an Appellate Court over such High Court order. Mere denial of the Arbitrator and even by the bank in this regard, no way sufficient to defend such action of passing of award/order, inspite of clear directions given by the High Court. It is a clear breach of the order passed by the High Court.

24. The Arbitrator in view of Section 97, if case is made out, may pass an appropriate order pending the Arbitration proceedings, but once the Arbitration proceeding is concluded, Section 97 of the MSCS Act, nowhere empowered the Arbitrator to put the order of attachment before judgment, for execution in such

fashion. There is no specific provisions in the MSCS Act to enforce and/or to set executed the award passed by the Arbitrator appointed u/s 84 of the MSCS Act. Therefore, pending such procedure or enforcement, the Arbitrator has no power and jurisdiction to attach the property and/or appoint receiver and/or direct/ permit the bank to sell the property without waiting for the award to be final and binding and/or enforceable. The whole action/award, therefore, in this regard is apparently without jurisdiction and contrary to the law.

25. It is relevant to note that once the award is passed by the Arbitrator, appointed under the MSCS Act, for the enforcement of the said award, the provisions of Arbitration Act are applicable. There is no provision under the Arbitration Act like Sections 96 and 97 of the MSCS Act except Section 17 which empowers the Arbitrator to pass appropriate order of protection of the subject matter and/or properties involved in the disputes pending arbitration. Section 9 empowers the Court to pass appropriate order, prior, during and even after the conclusion of the Arbitration proceedings, till the award get executed. Therefore, even pending the enforcement proceedings and/or Section 34 and/or Section 37 Appeal and/or pending enforcement, only the Court has power to pass protective and injunctive orders.

26. Admittedly, the bank has invoked Securitization Act for recovery of the unpaid amount. One property, at Surat, had already been auctioned. Therefore, having invoked Securitization Act, the invocation and appointment of the Arbitrator u/s 84 of the MSCS Act, that resulted into the impugned award, is also a matter of debate. Two proceedings for recovery of bank dues in such fashion, definitely caused injustice and harassment to the borrower parties like the Petitioners. Whether the provisions of Securitization Act can be invoked by the Multi State Cooperative Bank like the Respondent, is also a matter of debate. Though settled by this Court, but the Special Leave Petitions are pending in the Supreme Court.

27. Under the Arbitration Act, the parties, by consent, appoints the Arbitrator of their choice. They can select their own procedure to conduct the Arbitration Proceedings. They are free to accept and provide their own rules and regulations for Arbitration Proceedings before the Arbitrator appointed/selected by them. But under the MSCS Act, the Registrar appoints the Arbitrator. There is no question of any choice or consent. The Arbitrator, who is appointed by the Registrar unilaterally, needs to follow the procedures so described and prescribed under the Arbitration Act. That covers Sections 12 - 16 of the Arbitration Act also. In the present case, Respondent No. 2 Arbitrator was appointed in the year 2003, as informed, had decided as many as, 1300 Arbitration Petitions filed by the Bank. The Petitioners, as recorded, even raised objection u/s 13 of the Arbitration Act. The Arbitrator and his wife at the relevant time were share holders/ members of the bank since 2007. The Arbitral Tribunal never disclosed his interest in the bank affair and/or of their membership. The Petitioners'' application was also rejected without hearing. Therefore also, the Petitioners

have raised additional ground as the application u/s 12/13 was rejected and has passed the impugned award. The submission therefore so raised by the learned Counsel appearing for the Petitioners on grounds of misconduct and bias of the Arbitrator, just cannot be overlooked.

28. There is nothing on record to show that the Arbitrator directed and/or permitted the parties to lead their respective evidence. There is nothing on record to show that the parties have agreed and/or decided not to lead or file affidavit of evidence and/or accepted to proceed with the Arbitration on the basis of documents placed/filed on record.

29. The Arbitrator, in my view, is bound to follow the principles of natural justice and fairplay. The practice and principles of the CPC (for short, the CPC) and the Evidence Act are also relevant, for taking any decision by any judicial body/ authority. The Arbitrator who decides the rights and disputes between the parties is also bound to follow these principles, unless agreed by the parties otherwise.

30. In the present case, the Arbitrator received Exhibits A25, A26 and A27 and exhibited without knowledge and intimation to the Petitioners. The copies were also not supplied to the Petitioners. However, the Arbitrator relied upon those documents while passing the final impugned award. The Arbitrator himself in his affidavit dated 24th June, 2009, as quoted above, admitted that those documents were not filed in the presence of the Petitioners and/or their representatives. From the affidavit of the Arbitrator, it is not clear to whom the copy of Exhibit A25 was supplied.

31. The Arbitrator ought not to have taken the fresh and new documents on record, without the consent of the Petitioners. The copies of those documents ought to have been furnished to the Petitioners. The Arbitrator has strongly relied upon these documents. There is nothing to show that the Petitioners were heard on these documents.

32. Even though the statement of account as produced by the bank as per the bankers book of evidence and certified by its authorized officer and Exhibit A27, yet it is necessary for the Arbitrator to provide the copy of the documents and opportunity to the Petitioners and ought not to have taken on record without their consent and/or knowledge. The parties have always right to explain and provide detail comments and/or place on record with other supporting documents and/or deny the statement, so that the Arbitrator can pass and/or arrive at a proper conclusion, specially when it is monetary claim of the bank based upon the respective accounts and adjustments including of the interest, penal interest and charges claimed by the Bank.

33. In the present case, the property was also sold by the bank in the year 2004. The requisite adjustment at the relevant time certainly could have affected finally the bank statement. Exhibit A26 was a Certified Statement of Account with Balance.

34. The submission/reasoning given by the Arbitrator that the copies of the documents and/or the contents of the documents are well within the knowledge of the Petitioners therefore, though taken behind their back, it causes no prejudice, in my view, in the present facts and circumstances, is unacceptable. It is relevant to note that even the Respondent Bank Officer Mr. Ghag''s arguments was entertained in absence of the Petitioners, on 9th March, 2006 though the Petitioners had filed their written submission on 4th March, 2006. Therefore, taking over all view of the matter, the Arbitration proceedings in the present case as conducted is contrary to the provisions of Section 19, 24(3), 34 of the Arbitration Act, apart from principles of natural justice and fairplay.

35. Though asked, neither the bank nor the Arbitrator explained the rate and date of penal interest which they have charged. The same is also not permissible to be charged by the bank in such fashion. It is obligatory on the part of the bank to provide the update accounts, so that the appropriate defence can be raised by the borrower including the case of adjustment.

36. The learned Counsel appearing for the Respondent Bank makes statement that after the impugned award was passed, the remaining property (office property) which was attached in the Securitization Proceedings, has also been disposed of. The amount so received now, shall be adjusted.

37. The Contempt proceedings as initiated, recorded above, is also dismissed.

38. The aspect of two parallel proceedings, one under the Securitization Act and second before the Arbitrator for the recovery of the amount dues and payable to the bank is also relevant. Apart from causing a great injustice and hardship to the parties, there is always a possibility of conflict of views and/or the decisions.

39. The principle of resjudicata cannot be overlooked as contemplated under the CPC, as in such cases where the parties, the cause of action, the documents, the evidence and the authority and jurisdiction of respective authorities, under the Securitization Act, the Debt Recovery Tribunal and/or the Appellate Tribunal and under the MSCS Act, are similar in all respect, as both authorities are empowered to take final decisions.

40. Normally, there is no question of taking fresh affidavit of the Arbitrator in Section 34 Application. For the first time in the Court, but in the present facts and circumstances, and as already directed by this Court after recording the reason and as there are allegations made against the Arbitrator, the affidavit of the Arbitrator become part of the present proceedings. Even the Court has permitted the Petitioners to file additional affidavit to bring on record the subsequent events basically revolving around the allegations against the Arbitrator and to expose his conduct. After going through all these additional affidavits on record, show that the Arbitration proceedings commenced and concluded just by overlooking the basic object and purpose of the Arbitration Act. The whole Arbitration proceedings have been conducted and concluded contrary to the provisions of the Arbitration Act.

41. Taking over all view of the matter, the present award need to be quashed and set aside.

42. Accordingly, the following order.

i) The impugned award dated 31st March, 2006, is quashed and set aside and the matter is remanded back for fresh hearing.

ii) The Arbitrator to give full opportunities to all the parties in all respect and pass award/order after hearing both the parties.

iii) The liberty is granted to the parties to apply and/or submit proposal for settlement, if any.

iv) A fresh Arbitration Proceedings be initiated after giving notice to the parties.

v) The Petition is accordingly allowed. No order as to costs.

