

(2013) 04 BOM CK 0073

In the Bombay High Court

Case No : Arbitration Petition No"s. 85, 23, 119 of 2010 and 1160 of 2009

M/s. Technica International Engineering Pvt. Ltd. and Others APPELLANT
Vs

Kokan Mercantile Co-op. Bank Ltd., Mr. Masood Mahmood RESPONDENT
Rakhe and Mrs. Sofiya Masood Rakhe etc. etc.

Date of Decision : 02-04-2013

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 12, 13, 16, 17, 34
Civil Procedure Code, 1908 (CPC) — Order 7 Rule 7, 2, 52, 52(1)
Contract Act, 1872 — Section 131, 171
Evidence Act, 1872 — Section 3
Industrial Disputes Act, 1947 — Section 2
Limitation Act, 1963 — Section 10, 11, 12, 13, 13
Multi-State Cooperative Societies Act, 2002 — Section 12, 126, 126(6), 13, 2

Citation : (2013) 4 BC 349 : (2013) 5 BomCR 274

Hon'ble Judges : R.D. Dhanuka, J

Bench : Single Bench

Advocate : G.S. Gidwani, instructed by Petitioners in Arbitration Petition No. 1160 of 2009, Mr. A.H. Fernandes, instructed by Petitioners in Arbitration Petition No. 85 of 2010, Mr. Navin Tiwari, instructed by Petitioners in Arbitration Petition No. 119 of 2010 and Arbitration Petition No. 23 of 2010 and Mr. Vasant Dhawan for the Petitioners in Arbitration Petition Nos. 1160 of 2009 and 85 and 23 of 2010, for the Appellant; Nikhil Sakhardande, instructed by . Arbitration Petition Nos. 1160 of 2009, 85 and 23 of 2010, Mr. Sandeep Waghmare for the Respondents in Arbitration Petition No. 1160 of 2009 and 85, 23 and 119 of 2010 and Ms. Sowmya Srikrishna, instructed by . for the Respondents in Arbitration Petition Nos. 85, 23 and 119 of 2010, for the Respondent

Judgement

R.D. Dhanuka, J.—By these petitions filed u/s 34 of the Arbitration and Conciliation Act, 1996, the petitioners seeks to challenge the awards made by the learned arbitrator u/s 84 of the Multi State Cooperative Societies Act, 2002 (hereinafter referred to as "Multi-State Act, 2002") allowing the claims made by the first respondent. As the learned counsel appearing for parties have made common arguments in all the four petitions, the same were heard together by

consent of the parties finally at the admission stage and are being disposed of by this common order. The facts in Arbitration Petition No. 85 of 2010 and Arbitration Petition No. 23 of 2010 are as under:-

(a) The first petitioner in Arbitration Petition No. 85 of 2010 is a private limited company. One of the Director of first petitioner Mr. Abdul Latif Mahmood Dadan expired leaving petitioner no. 3 to 6 as his legal heirs. Petitioner no. 3 is one of the Directors of the first petitioner. Petitioner no. 3 is also one of the legal heirs of Mr. Abdul Latif Mahmood Dadan. Petitioner no. 4 to 7 are legal heirs of the said Abdul Latif Dadan. Petitioner No. 8 was a guarantor who had executed guarantee to secure the facilities granted by the first respondent to the first petitioner. Respondent nos. 2 and 3 are also guarantors. On 14th June, 1981 the first respondent granted a term loan, cash credit over draft and over drawn facility of Rs. 15 lacs in favour of the petitioner no. 1. The first respondent disbursed a sum of Rs. 1 lacs as term loan on 10th October, 1981 and Rs. 7 lacs as cash credit on 7th September, 1981 to the first petitioner against the hypothecation of machinery, equipments, accessories, land, building and plant, book debt, stock in trade, raw material etc. The Petitioner no. 8 and respondent nos. 2 and 3 stood as securities for repayment of the said loan. The first petitioner also executed hypothecation deeds in favour of the first respondent. It was the case of the first respondent that the first petitioner committed default in making payment of the various amounts towards the term loan, cash credit, over draft and over drawn/adjustment accounts and sum of Rs. 12,52,858.86 was due and payable by the first petitioner to the first respondent. According to the first respondent, guarantors were also jointly and severally liable to the first respondent in respect of the said facilities.

(b) On 20th May, 1983, the first respondent filed dispute being Cooperative Case No. CC-II/372 of 1983 u/s 91 of the Maharashtra Cooperative Societies Act, 1960. The said summary case was subsequently renumbered as CC/V/685 of 1987. The first respondent had claimed Rs. 12,52,858.86 in the said proceedings. Parties in the said proceedings had commenced oral evidence. The first respondent thereafter was converted into Multi-State cooperative Bank under the provisions of the said Multi-State Act, 2002. The Cooperative Court passed an order on 18th June, 2002 holding that the said court had no jurisdiction to try and entertain the dispute and returned the plaint to the disputant to file before appropriate authority.

(c) On 28th June, 2006, the first respondent filed arbitration proceedings (RC/204/06) before the learned arbitrator appointed u/s 84 of the Multi-State Act, 2002 inter alia praying for an award in the sum of Rs. 4,92,34,124.40 with further interest thereon and cost. In the said proceedings, the petitioner nos. 3 to 6 have also been joined as legal heirs of the said Mr. Abdul Latif Dadan. The Petitioners filed common written statement and also counter claim before the learned arbitrator disputing the claims made by the first respondent on various grounds and also praying for an award against the first respondent in the sum of

Rs. 77.69 lacs with interest thereon. Petitioner no. 3 also filed affidavit of evidence in support of counter claim before the learned arbitrator.

(d) On 9th October, 2007 the first respondent made an application u/s 17 of the Arbitration & Conciliation Act, 1996 before the learned arbitrator inter alia praying for an order of attachment before the award and for restraining the petitioners herein from selling and/or disposing of and/or creating any third party rights in respect of various properties. In the said application, it was the case of the first respondent that the petitioners herein were in the process of disposing of and/or creating third party rights in respect of their property. The learned arbitrator passed an exparte order and issued ad interim warrant of attachment in respect of various properties and directed to issue show cause notice to the petitioner no. 5 herein as to why the attachment should not be confirmed. 5th respondent filed an application in the month of October, 2007 inter alia praying for vacating the said ad interim order. The 5th petitioner also filed detailed affidavit. In the said affidavit, it was submitted by the 5th petitioner that various properties attached by way of ad interim order, were his properties and were not received from the borrowers or acquired by him from the loan alleged to be made available to the borrowers by the first respondent bank. The 5th petitioner also annexed copies of 7/12 extract claiming ownership and also Form No. 6 extract along with the deed of transfer confirming the transmission of each of the properties in his name by sale or by gift. It was contended by the petitioner no. 5 that the liability of the legal representatives is limited to the extent of the properties of the deceased which has come to his hand. It was contended that he was not member of the first respondent bank and had not taken any facilities from the Bank. It was also contended that the properties were not in any way related to or connected with the loan transactions of the borrowers. It was pleaded that the other parties to the proceedings had no right, title or interest in the said properties and the same solely belonged to the petitioner no. 5. Petitioner no. 5 also pointed out the properties of the guarantors in respect of which no action was taken by the first respondent. There was no affidavit in reply filed by the first respondent bank to the application made by the 5th petitioner for raising the warrant of attachment and vacating the ad interim order nor any rejoinder was filed by the bank to the affidavit in reply filed by the petitioner no. 5 claiming to be the absolute owner of the property under attachment.

(e) On 29th October, 2007, the learned arbitrator passed ad interim warrant of attachment of the flats being Flat No. 4 on the first floor, A Wing in the building known as New Sai Niketan, 345, Mount Road, Mazgaon, Mumbai 400 010 and also flat No. 5 on 11th Floor, A Wing in the same building. On 22nd April, 2009, the learned arbitrator refused to vacate the ad interim order of attachment passed by him and confirmed the ad interim attachment order against the property of the petitioner no. 5.

(f) By award dated 10th June, 2009, made by the learned arbitrator, it is declared that the first respondent Bank was entitled to recover from the party

respondents to the said proceedings who are petitioners herein and respondent no. 2 and 3 jointly and or severally, sum of Rs. 12,52,858.86 with interest at the rate of 16.5% per annum with effect from 24th August, 1983 till 18th June, 2002 with further interest at the rate of 14% per annum from 19th June, 2002 till realization and cost of Rs. 20,000/-. The learned arbitrator also declared that the attachment of the properties i.e. flat no. 4 and flat no. 5 in New Sai Niketan as well as various lands situated at Taluka Pen, District Raigad shall remain in force till the realization of the amount awarded. The learned arbitrator rejected the counter claim made by the petitioners with cost quantifying at Rs. 20,000/-.

(g) Being aggrieved by the said award dated 10th June, 2009 the principal borrower, petitioner no. 3 the legal heir of the original petitioner no. 2 who was also one of the director, petitioner no. 8 who was guarantor and the legal heirs of original petitioner no. 2 have impugned the award by filing Arbitration Petition No. 85 of 2010. The Petitioner No. 4 Ridhwan Abdul Latif Dadan has also filed a separate petition (23 of 2010) who is one of the legal heir of the original petitioner no. 2 for setting aside the impugned award.

2. The facts in Arbitration Petition No. 1160 of 2009 and Arbitration Petition No. 119 of 2010 are as under:

(a) M/s. Thakur Electrical Engineering Works is registered Partnership firm. Petitioner no. 2 and Mrs. Sharifa A. Thakur were partners of petitioner no. 1. Mrs. Sharifa Thakur expired on 31.12.2000 leaving behind petitioner no. 5 to 8 and respondent no. 2 as her heirs or legal representatives who were brought on record after demise of Mrs. Sharifa Thakur some time in the year 1988. The partners of the petitioner no. 1 applied for cash credit facility for the amount of Rs. 28 lacs against the security of stock in trade hypothecated by the petitioner no. 2 and the another partner. The first respondent granted such facility to petitioner no. 1. It was the case of the first respondent that the borrower committed default in making payment. Respondent nos. 3 and 4 had signed the said application as surety. The first respondent filed recovery case being Case No. CC/1/1198/1991 in the Cooperative Court. During the pendency of the said dispute filed u/s 91 of the Cooperative Societies Act, the first respondent was converted from cooperative society under the Provisions of Maharashtra Cooperative Societies Act, 1960 into Multi-State Cooperative Bank under the provisions of Multi-State Cooperative Societies Act, 2002.

(b) By an order dated 13th December, 2002, the Cooperative Court held that it ceases to have jurisdiction over the matter and returned the plaint for presentation in the appropriate court.

(c) In the month of April, 2006, the first respondent filed statement of claim before the learned arbitrator appointed under the provisions of the said Multi-State Act, 2002 inter alia praying for an award in the sum of Rs. 1,82,97,651.68 with further interest thereon and for cost. From the cause title of the statement of claim, it is clear that petitioner no. 5 to 8 were impleaded as legal heirs of Mrs.

Sharifa Thakur, one of the partner of the petitioner no. 1. Written statement was filed by some of the petitioners before the learned arbitrator opposing claims made by the first respondent.

(d) On 18th October, 2007, the first respondent filed an application for interim relief u/s 96 of the Said Multi-State Act, 2002. In the said application, it was pleaded by the bank that the respondent no. 3(a) to 3(f) who are petitioners in the present petition were liable to the amount of claim made by the bank as legal heirs of the guarantors late Mrs. Sharifa Thakur and with a view to defeat the claim of the bank, the said respondents were in the process of disposing of and/or creating third party rights in respect of their property mentioned in the said application. The properties situate at village Rajapur bearing Gat No. 68A/1A, 1A/17 having area 28 acre and holding account no. 72. The learned arbitrator passed ad interim warrant of attachment in respect of the said property situated at village Rajapur and issued show cause notice. On 12th December, 2007 the petitioner no. 4 herein made an application before the learned arbitrator for raising the warrant of attachment and for vacating ad interim order. It was pleaded by the petitioner no. 4 that the property in question is his independent property and had not been inherited from the original respondent no. 3 i.e. his wife Mrs. Sharifa Thakur. It was pleaded that the legal heirs were liable only to the extent of the shares of the estate of the deceased coming to their hands and the individual property of the legal heirs of the deceased cannot be attached and or legal heirs cannot be held liable for the debts of the deceased. It was also pleaded that the deceased wife of petitioner no. 4 did not leave behind her any estate at the time of her death. The Petitioner no. 4 also enclosed copies of the documents pertaining to the property in question to show that the said property never belong to the deceased and the same stood in the name of the petitioner in the records of the concerned authorities. Petitioner no. 4 applied for dismissal of the interim application filed by the first respondent u/s 96 of the Multi-State Act, 2002 and for vacating ad interim order dated 18th October, 2007 passed by the learned arbitrator. There was no reply filed by the respondent bank to the said application controverting the averments made therein.

(e) Being aggrieved by the said order, petitioner on. 4 filed Writ Petition No. 2306 of 2009 in this court. By an order dated 24th February, 2009 passed by Anoop V. Mohta, J. the said petition was disposed of as the application for raising warrant of attachment filed by the petitioner no. 4 was pending before the learned arbitrator. This court directed the learned arbitrator to dispose of the said application as early as possible.

(f) By an award dated 30th May, 2009, the learned arbitrator declared that respondent no. 1 is entitled to recover from all the respondents i.e. petitioners herein and respondent nos. 2 to 4 jointly or severally an amount of Rs. 44,88,798.68 with interest at the rate of 17% per annum from the date of filing of the dispute before the Cooperative Court till the date of return of the plaint by the Cooperative Court and at the rate of 14% per annum from that date till

recovery of the amount and cost quantified at Rs. 5,000/- as administrative charges. It is also declared that the properties attached being property situated at village Rajapur, shall continue to stand attached till full satisfaction of the claim. Being aggrieved by the said award dated 30th May, 2009, the principal borrower i.e. M/s. Thakur Electrical Engineering Works as well as partners of the said firm and the legal heir of the deceased partner have impugned the award by filing Arbitration Petition No. 1160 of 2009. Petitioner no. 4 herein who is one of the legal heirs of Mrs. Sharifa Thakur and whose property is attached by an order passed by the learned arbitrator has filed separate petition being Arbitration Petition No. 119 of 2010 impugning the said award. In none of these petitions the Bank has filed any affidavit in reply.

3. The learned counsel appearing for the petitioners, submits as under:

(a) The learned arbitrator did not have jurisdiction to entertain the dispute as the dispute could be adjudicated only by the cooperative court.

(b) The claims made by the Bank were barred by law of limitation.

(c) The award is in violation of principles of natural justice and is passed without verifying the alleged claim of the first respondent and without recording evidence or allowing the petitioner to cross examine the first respondent and its witnesses.

(d) The learned arbitrator was biased in favour of the bank by dispensing with due procedure of law. The learned arbitrator was professionally associated with the first respondent and has been on their panel and the award is thus vitiated by fraud or misconduct on the part of the learned arbitrator.

(e) The award against petitioner 4, 5 and 6 is without jurisdiction as none of them were borrowers or guarantor or surety or executor of alleged security documents and could not have been impleaded as party respondent to the arbitration proceedings. There exists no arbitration agreement between the bank and the petitioner no. 4 to 6 who were impleaded as legal heirs of one of the party who was director of petitioner no. 1.

(f) The property of the legal heir i.e. petitioner no. 4 was his self acquired property and not inherited by him from Mr. Abdul Latif Mahmood Dadan and thus no award directing him to pay could be made against any of the legal heirs or in any event no attachment can be levied on the personal property of the legal heirs who had not inherited the said property from the deceased director of petitioner no. 1.

(g) It is submitted that the counter claim has been rejected without any reasons though counter claim was established and proved in the cross examination of the witnesses examined by the Bank.

(h) The evidence in the Cooperative Court led by the parties has not been considered as evidence in arbitration by the learned arbitrator.

(i) It is submitted that no credit of fixed deposit receipts of the petitioner has

been given by the learned arbitrator in the impugned award.

(j) The bank did not challenge the order passed by the Cooperative Court holding that it had no jurisdiction to entertain the dispute in view of the bank converting into Multi-State cooperative society and returning the dispute. It is submitted that the arbitration proceedings were thus barred by *res judicata*.

(k) The learned counsel appearing in Arbitration Petition No. 119 of 2010 submits that the learned arbitrator even did not consider the application made by the petitioner for raising the warrant of attachment. It is submitted that though the Cooperative Court had returned the plaint on 13th December 2002, no steps were taken by the bank for filing statement of claim before the learned arbitrator for more than four years. It is submitted that in view of section 126 of the Multi State Act, though the first respondent became Multi-State Cooperative bank, the dispute which was already pending in the cooperative court was bound to be decided by that court alone and no arbitration proceedings could have been filed in view of section 126(6) of the Multi-State Act, 2002. The learned counsel placed reliance upon the judgment of this court in *The Abhyudaya Cooperative Bank Ltd. Vs. State of Maharashtra and Others*, .

(l) In support of the plea that the award was in violation of principles of natural justice, the petitioners placed reliance upon the judgment of this court delivered on 16th March, 2012 in the case of *Prakash Kumar Sinha Vs. Konkan Mercantile Cooperative Bank Ltd. And Ors.* in Arbitration Petition No. 767 of 2009.

(m) In support of the plea that even if the plea of jurisdiction is not raised by the party, the said plea is legal plea and can be accepted although no such plea had taken or precise issue is framed. Petitioner placed reliance upon the judgment of the Supreme Court in the case of *State of Rajasthan Vs. Rao Raja Kalyan Singh, (Dead by his Lrs.)*, .

4. The learned counsel Mr. Sakhardande and Ms. S. Shrikrishna appearing for the bank submits as under:

(a) With effect from 29th June, 1999 the first respondent bank was converted as Multi State Cooperative Bank within the provisions of Said Multi-State Cooperative Act, 2002 and therefore, the Cooperative Court by order dated 18th June, 2002 held that it ceases to have jurisdiction u/s 91 of the Maharashtra Cooperative Societies Act and returned the plaint filed by the bank. After conversion of the Bank as Multi-State cooperative Bank, the bank ceases to be cooperative society and could not have continued its proceedings before the cooperative court. The order passed by the Cooperative Court was not challenged by the petitioners. The Petitioners also filed counter claim before the learned arbitrator and submitted to the jurisdiction of the learned arbitrator. In fact no application u/s 16 was filed raising the issue of jurisdiction before the learned arbitrator. The learned counsel placed reliance upon the judgment of this court (*R.D. Dhanuka, J.*) delivered on 23rd January, 2013 in Arbitration Petition No. 935 of 2012 and other companion petitions in the case of *Abhudaya Cooperative*

Bank Vs. Rainproof Exports Pvt. Ltd. The learned counsel distinguished the judgment of this court relied upon by the petitioners in the case of Abhudaya Bank Vs. State of Maharashtra (supra). The learned counsel submits that the petitioners thus have waived their right to challenge the jurisdiction of the learned arbitrator in view of section 4 of the Arbitration & Conciliation Act, 1996.

(b) On the issue of limitation raised by the petitioner, the learned counsel submits that the Cooperative Court had returned the plaint on 18th June, 2002 whereas the claim was filed before the learned arbitrator on 28th June, 2006. It is submitted that u/s 85 of the said Multi-State Cooperative Act, 2002, the dispute relating to the recovery of any sum including interest thereon due to a Multi state cooperative Bank by a member thereof, be computed from the date on which such member dies or ceases to be a member of the society. Petitioner no. 1 continued to be member of the first respondent bank and thus the claim was not barred by law of limitation. It is submitted that in view of section 29(2) of the Limitation Act, the provisions of Multi-State Act 2002 being special statute providing special period of limitation. The learned counsel placed reliance upon the judgment of the Supreme Court in the case of L.S. Synthetics Ltd. Vs. Fairgrowth Financial Services Ltd. and Another, and particularly paragraph Nos. 38 and 39 in support of the plea that in case of inconsistencies between the special statute and Limitation Act, the special statute or local law would apply.

(c) On the ground of bias raised by the petitioner in the petition, it is submitted by the learned counsel appearing for the respondent that no such issue was raised before the learned arbitrator. No application was made u/s 12 read with section 13 of the Arbitration and Conciliation Act, 1996. The petitioner all through out participated before the learned arbitrator without raising any such dispute. The learned arbitrator was not appointed by the bank but was appointed by the Central Registrar u/s 84(4) of the said Multi-State Act, 2002. The petitioner in any event has not furnished any particulars of alleged bias against the learned arbitrator.

(d) On the issue of natural justice raised by the petitioner, it is submitted that after return of the plaint by the Cooperative Court, the Bank filed fresh statement of claim before the learned arbitrator and placed reliance upon the evidence filed in the said proceedings. The petitioner never made any application before the learned arbitrator to consider the evidence led before the cooperative court as part of the record before the learned arbitrator and thus the same never formed part of the record before the arbitrator and thus was rightly not considered.

(e) On the issue of affidavit in lieu of examination in chief in support of the counter claim filed by the petitioners and on the issue of opportunity not having been given to cross examine the witnesses of the respondent, it is submitted that the petitioners never applied for any opportunity to cross examine the witness of the bank. The right to cross examine the witnesses of the Bank was never refused by the learned arbitrator as the same was never claimed and thus right,

if any was deemed to have been waived or abandoned. The learned counsel submits that though both the parties had filed affidavits to prove their claims, the learned arbitrator has not dealt with any of the affidavits while allowing the claims made by the bank though there was reference to such affidavit in the impugned award. The learned arbitrator has decided the matter based on pleadings and documents on record but did not consider the affidavits while allowing the claims. No prejudice was thus caused to the petitioner. Reliance is placed on para 8 of the judgment of the Supreme Court in the case of Union of India (UOI) Vs. T.R. Varma, in support of the plea that if the party has contradicted the statement before the court or tribunal as to what happened transpired before the court, the statement of the presiding officer is generally taken to be correct. The learned counsel submits that no opportunity to cross examine was refused and only if it would have been applied for and would have been refused, it would amount to denial of natural justice. Paragraph 8 of the judgment of Supreme Court in the case of Union of India Vs. T.R. Varma reads thus:

8. We have thus before us two statements, one by Mr. Byrne and the other by the respondent, and they are in flat contradiction of each other. The question is which of them is to be accepted. When there is a dispute as to what happened before a court or tribunal, the statement of the Presiding Officer in regard to it is generally taken to be correct, and there is no reason why the statement of Mr. Byrne should not be accepted as true. He was admittedly an officer holding a high position, and it is not suggested that there was any motive for him to give false evidence. There are moreover, features in the record, which clearly show that the statement of Mr. Byrne must be correct. The examination of witnesses began on April 20, 1953, and four witnesses were examined on that date, among them being Sri G.B. Tawakley. If, as stated by the respondent, he asked for permission to cross-examine witnesses, and that was refused, it is surprising that he should not have put the complaint in writing on the subsequent dates on which the enquiry was continued. To one of the witnesses Sri P. Govindan Nair, he did actually put a question in cross-examination, and it is difficult to reconcile this with his statement that permission had been refused to cross-examine the previous witnesses. A reading of the deposition of the witnesses shows that the Enquiring Officer himself had put searching questions, and elicited all relevant facts. It is not suggested that there was any specific matter in respect of which cross-examination could have been but was not directed. We think it likely that the respondent did not cross-examine the witnesses because there was nothing left for him to cross-examine. The learned Judges gave two reasons for accepting the statement of the respondent in preference to that of Mr. Byrne. One is that there was no record made in the depositions of the witnesses that there was no cross-examination. But what follows from this ? That, in fact, there was no cross-examination, which is a fact; not that the request of the respondent to cross-examine was disallowed. Then again, the learned Judges say that the respondent was present at the hearing of the writ petition before them, that they put

questions to him, and formed the opinion that he was sufficiently intelligent, and that it was difficult to believe that he would not have cross-examined the witnesses. We are of opinion that this was a consideration which ought not to have been taken into account in a judicial determination of the question, and that it should have been wholly excluded. On a consideration of that record and of the probabilities, we accept the statement of Mr. Byrne as true, and hold that the respondent was not refused permission to cross-examine the witnesses, and that the charge that the enquiry was defective for this reason cannot be sustained.

(f) On the issue of *res judicata* raised by one of the petitioners, it is submitted that the return of the plaint by the cooperative court on the ground of jurisdiction was not an adjudication on merits and thus the claim filed in the arbitration proceedings for the same relief could not be barred by *res judicata*.

(g) On the issue of jurisdiction raised by the legal heirs, it is submitted that in view of section 84(2), even the heirs or legal representatives of the deceased member are governed by the provisions for reference of dispute to arbitration. The legal heirs were claiming through a member and thus their impleadment to the arbitration proceedings and the award thereof is not without jurisdiction. It is submitted that u/s 131 of the Contract Act, the liability of the guarantor is not extinguished on his death but is inherited by the legal heirs. Reliance is placed on para 8 of the judgment of the Madras High Court in the case of *State Bank of India Vs. Jayanthi, Aarthi Lakshmi and Sanjai Balaji rep. by Mother and Natural Guardian M. Jayanthi*, which reads thus:

8. From the aforesaid conclusion, it is clear that the learned Single Judge, without disputing the stand of the Appellant-Bank that it can retain the documents as a lien on the basis of the power conferred by Section 171 of the Indian Contract Act, took a view that having regard to the fact that the Respondent's husband Mahendran, who was the guarantor in respect of the loan advanced to one M/s. Somerset Tea Plantation, died and therefore, on his death, the liability as against the guarantor stands extinguished. With due respect, the learned Single Judge is not correct in law in holding that the liability under the guarantee: stands revoked or extinguished on the death of the Guarantor. Section 131 of the Contract Act clearly provides that in case of death of Guarantor, the date of guarantee/continuing of the guarantee executed in favour of the Bank stands revoked in respect of future transactions. Hence, we have no hesitation in holding that the liability of the guarantor cannot be extinguished on his death so far the liability which existed on the date of the death of the Guarantor. It is well settled that on the death of the Guarantor, the liability exists and such liability can be fastened on the estate of the deceased, being inherited by his legal heirs, and the creditor can recover the dues out of the estate of the deceased.

(h) On the issue whether the properties in respect of the legal heirs of the borrower and or guarantor can be attached or not and whether any award can be

made in that regard by the learned arbitrator or not is concerned, it is submitted that where such legal heirs are legal representatives of the guarantor and or partner and as to whether the property in the hands of such legal heirs and representatives are their personal property or not or are inherited from such borrowers and or guarantors is the issue which has to be decided in the execution proceedings by appropriate court and could not have been decided by the learned arbitrator. It is submitted that as and when the decree is executed by the Executing Court on application to the bank, this issue can be decided u/s 52 of the Code of Civil Procedure. The learned counsel placed reliance upon the judgment of the then Nagpur High Court in the case of AIR 1931 173 (Nagpur) and particularly at page 174.

(i) On the issue of credit not having given in respect of the fixed deposit as alleged by the petitioner is concerned, the learned counsel for the bank submits that no such ground has been raised in the petition. On the merits of the claim, it is submitted that the scope of enquiry u/s 34 is very limited. The arbitral tribunal has rendered finding of fact and no interference is permissible to interfere with the said finding of fact by this court u/s 34 of the Act.

5. In rejoinder the learned counsel appearing for the petitioner submits that the judgment delivered by this court (R.D. Dhanuka, J.) in the case of Abhudaya Cooperative Bank Vs. Rainproof (supra), is distinguishable in the facts of this case. It is submitted that no appeal was filed by the Bank against the order of the Cooperative Court returning the plaint. It is submitted that in view of section 149(9)(10) and (11) of the Maharashtra Cooperative Societies Act read with section 126(6) of the Said Multi State Cooperative Societies Act, 2002, the proceedings once initiated in the cooperative court ought to have been continued before the same court or before the cooperative appellate court by filing an appeal u/s 149 against the order of the return of plaint by the cooperative Court and thus filing of fresh proceedings before the learned arbitrator in respect of the same cause of action was not maintainable. It is submitted that if the right and remedy has been provided in the same statute, one cannot be disassociated from the other. It is then submitted that the only right of the bank was to file appeal u/s 149 of the MCS Act against the order dated 18th June, 2002 returning the plaint and not by adopting the proceedings under the provisions of the Said Multi-State Cooperative Societies Act, 2002. The learned counsel also placed reliance upon the judgment of the Supreme Court in L.S. Synthetics Ltd. Vs. Fairgrowth Financial Services Ltd. and Another, in support of the plea that the Maharashtra Cooperative Societies Act is self contained code and thus the bank could not have adopted the proceedings under the Multi-State Cooperative Act, 2002. It is submitted that the change of status does not permit the bank to invoke provisions of the Multi-State Cooperative Societies Act. It is submitted that the learned arbitrator could not have passed any order against the legal heirs or in respect of their personal properties. It is submitted that if such award delivered by the learned arbitrator is upheld by rejecting this petition, it can be executed as if the decree of the court and in such event the Executing court would not be

able to go behind the decree and therefore, the issue whether such properties were inherited by the said petitioners from the borrowers and/or guarantors or were self acquired properties would not be permitted to be gone into before the Executing Court. It is submitted that since it was admitted position before the learned arbitrator that these properties were personal properties of the legal heirs as would be reflected from the application made by the bank itself and is also clear from the order passed by the arbitrator, there was no such issue required to be left open for adjudication by the Executing Court as sought to be canvassed by the Bank.

6. I shall first deal with the issue raised by the petitioner as to whether the learned arbitrator did not have jurisdiction to entertain the dispute in view of the position that section 91 of the Maharashtra Cooperative Societies Act was applicable to respondent no. 1 bank when the dispute was filed by the first respondent before the cooperative court and also whether in view of the cooperative court returning the plaint for want of jurisdiction, the statement of claim filed before the learned arbitrator by the first respondent would be barred by res judicata.

7. It is not in dispute that when dispute filed u/s 91 before the Cooperative Court against the petitioners, the first respondent bank was cooperative society under the provisions of Maharashtra Cooperative Societies Act. It is, however, also not in dispute that with effect from 29th June, 1999, the first respondent bank was converted into Multi-state Cooperative Bank within the provisions of the Multi-State Cooperative Societies Act, 2002. There is no dispute that the Cooperative Court by order dated 18th June, 2002 held that it ceases to have jurisdiction u/s 91 of the M.C.S. Act and returned the plaint filed by the bank. Respondent no. 1 bank thereafter applied for adjudication of its claim before the learned arbitrator appointed u/s 84 of the said Multi-State Cooperative Societies Act, 2002. The said order dated 18th June, 2002 passed by the Cooperative Court returning the plaint has been accepted by both the parties. Respondent No. 1 Bank filed statement of claim before the learned arbitrator. The Petitioner filed counter claim before the learned arbitrator without raising any plea of jurisdiction and unconditionally. In my view, the petitioners have thus waived the right to challenge the jurisdiction of the learned arbitrator in view of section 4 of the Arbitration & Conciliation Act, 1996. The order passed by the Cooperative Court returning the plaint became final and binding on both the parties. No application u/s 16 was filed by the petitioners before the learned arbitrator raising the issue of jurisdiction.

8. As far as the judgment of this court in the case of The Abhyudaya Cooperative Bank Ltd. Vs. State of Maharashtra and Others, relied upon by the petitioner is concerned, this court has distinguished the said judgment in the case of Abhyudaya Bank Vs. Rainproof Export Pvt. Ltd. in the judgment delivered on 23rd January, 2013 in Arbitration Petition No. 935 of 2012 holding that u/s 126(6) of the Multi-State Cooperative Act, 2002, after conversion of the

Cooperative Bank into Multi-State Cooperative Bank, provisions of the said Multi-State Cooperative Societies Act, 2002 would apply to such multi-state cooperative bank and not Maharashtra Cooperative Societies Act. Paragraphs 24, 25, 27, 31, 32 of the judgment of this court in the case of Abhyudaya Cooperative Bank Ltd. vs. Rainproof Exports Pvt. Ltd., delivered on 23rd January, 2013 read thus:

24. It is not in dispute that w.e.f. 11th January, 2007, the petitioner was converted into a multi state bank and has been governed under the provisions of Multi State Act. It is not in dispute that certificate to that effect has been issued by the Central Registrar u/s 22 of the Multi State Act, 2002 in favour of the petitioner. In view of section 22(5) (a), from the date of amendment, the petitioner has become a multi state co-operative society. u/s 2 of the Act, it is provided that the said Act shall apply to all multi state co-operative societies. It is not in dispute that the registration of the petitioner society as co-operative society came to be cancelled on the petitioner becoming a multi state cooperative society w.e.f. 11th January, 2007.

25. It is clear that by the order passed by the Assistant Registrar, the petitioner bank has been already permitted to withdraw the said application filed u/s 101 of the Maharashtra Co-operative Societies Act in view of the petitioner having been converted as multi state co-operative society. In my view, merely because the order records of liberty granted by the learned Assistant Registrar to file arbitration proceedings, such liberty in my view is of no significance. The petitioner had already filed arbitration proceedings u/s 84 before the said order came to be passed by the Assistant Registrar. In any event the petitioner being a multi state society was not required to obtain any leave from the Assistant Registrar to file arbitration proceedings u/s 84, thus merely because such liberty is granted, no part of the order can be considered as without jurisdiction. The petitioner being a multi state society is governed by the provisions of the Multi State Act. The remedy of arbitration provided u/s 84 is a statutory and is binding on all parties mentioned therein. In my view, there is no substance in the argument of the respondents that there is no arbitration agreement between the parties or that the proceedings are without jurisdiction.

27. In case of Abhyudaya Co-op. Bank Ltd. vs. State of Maharashtra(supra) this court was considering the situation where the proceedings filed u/s 101 of the Maharashtra Co-operative Societies Act against the borrowers was rejected by the Assistant Registrar. Revision application u/s 154 of that Act was pending before the Divisional Authority. In the meanwhile the petitioner bank stood registered under the Multi State Act on 11th January, 2007. The Revisional Authority in view of such registration of the petitioner under the Multi State Co-operative Societies Act rejected the revision application on the ground that the authority under the Maharashtra Co-operative Societies Act did not have jurisdiction to decide the proceedings in respect of the society registered under the Multi State Act. The petitioner bank impugned the order of Revisional

Authority by filing a writ petition. In the facts of that case, this court took a view that the proceedings under Maharashtra Co-operative Societies Act remaining unaffected could not fall within the ambit of Section 126 of the Multi State Co-operative Act. This court considering those facts quashed the order passed by the Revisional Authority and remanded the matter back to the revisional authority for disposal of the application. In my view, the view taken by this court that section 84 of the Multi State Act would apply to the case which are to be instituted under the said Act and would not apply to the case which had already instituted under another Act including Maharashtra Cooperative Societies Act is in that context and considering the peculiar facts of that case. In the facts of this case, the petitioner has already withdrawn application filed u/s 101 of the Act in view of the petitioner having become Multi State Co-operative Society. The proceedings filed by the respondents impugning the order of the Assistant Registrar are already dismissed. The arbitration proceedings have already commenced. The respondents have already filed their written statement before the learned arbitrator. The petitioner bank had filed second application for withdrawal of proceedings before the Assistant Registrar after initiating proceedings u/s 84 of the Multi State Act. The petitioner would not have proceeded with two parallel proceedings in respect of the same cause of action, one before the Assistant Registrar and another before the arbitrator. The petitioner being a Multi State Co-operative Society w.e.f. 11th January, 2007 have been governed by the provisions of the Multi State Co-operative Act. In view of the remedy provided u/s 84 of the Multi State Act for resolution of dispute by the arbitration is provided under the statute and once such proceedings having been already filed u/s 84, the petitioner could not have proceeded with application filed u/s 101 of the Maharashtra Co-operative Societies Act. In my view, the learned Assistant Registrar was thus right in allowing the petitioner to withdraw the said application filed u/s 101 of the Maharashtra Co-operative Societies Act in view of the subsequent development. In my view, the judgment of this court in case of *Abhyudaya Co-op. Bank Ltd. vs. State of Maharashtra*(supra) thus is of no assistance to the respondents.

31. In my view, once application u/s 101 of the Maharashtra Co-operative Societies Act filed by the petitioner was allowed to be withdrawn, the effect of the withdrawal was as if such application was never filed. I am not inclined to accept the submission made by Mr. Jain, the learned counsel appearing for the respondents that there is no arbitration agreement between the parties or that the respondents not having given consent to appoint any arbitrator, the matter could not be referred to the arbitration u/s 84 of the Multi State Act. In my view, remedy of the arbitration provided for u/s 84 is statutory and no consent of the parties is required for referring the dispute to arbitration once condition u/s 84 are satisfied.

32. From the perusal of the record, it is clear that the petitioners had filed application for withdrawal of the application u/s 101 of the Co-operative Societies Act in view of the subsequent development. The application dated 25th

November, 2008 was the first application filed by the petitioner for seeking liberty to withdraw the application filed u/s 101 of the Maharashtra Co-operative Societies Act. During the pendency of the said application, the petitioner filed application u/s 84 of the Multi State Act before the learned arbitrator for seeking resolution of dispute. By an order dated 12th January, 2009 the Assistant Registrar rejected the first application for seeking withdrawal. In these circumstances, the petitioner bank filed another application on 25th March, 2009 for seeking withdrawal of application filed u/s 101 in favour of the petitioner already having filed dispute u/s 84 of the Multi State Act. In my view, application dated 25th March, 2009 filed by the petitioner was in order and was not barred by res judicata.

9. Though the learned counsel appearing for the petitioner sought to distinguish the judgment of this court in the case of *Abhyudaya Cooperative Bank Vs. Rainproof* on the ground that the M.C.S. Act, is self-contained code and the bank could not have adopted the proceedings under the Multi-State Cooperative Societies Act, 2002 and that the change of status does not permit the bank to invoke provisions of the Multi-State Cooperative Societies Act is concerned, in my view once the status of respondent no. 1 bank was changed from Cooperative Society to Multi-State Cooperative Society, it ceased to be governed by the provisions of the said Maharashtra Cooperative Societies Act. Both the parties have accepted the order passed by the Cooperative court returning the plaint and has filed their respective claims before the learned arbitrator without raising any dispute about the jurisdiction of the learned arbitrator. In my view the plea of the petitioner thus that the first respondent bank can not adopt the proceedings under Multi-State Cooperative Act 2002 cannot be accepted as the same is without merits. Reliance placed by the petitioner on the judgment of the Supreme Court reported in *L.S. Synthetics Ltd. Vs. Fairgrowth Financial Services Ltd. and Another*, is thus of no assistance to the petitioner in the facts of this case. In my view as the order passed by the Cooperative court returning the plaint is based on the finding that the Cooperative Court ceases to have jurisdiction in view of the conversion of the first respondent bank as Multi-State Cooperative Bank and the suit is not dismissed on merits, claims filed by the respondent bank before the learned arbitrator would not be barred by res judicata. There is no substance in this plea raised by the petitioner that the claims were barred by res judicata.

10. As far as plea of limitation raised by the petitioner is concerned, it is not in dispute that the plaint was rejected by the Cooperative Court on 18th June, 2002. The claim was filed before the learned arbitrator by the first respondent on 28th June, 2006. Reference to clause 29(2) of the Limitation Act on this issue would be relevant which reads thus:

29. Savings: (1)...

(2) Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the

provisions of section 3 shall apply as if such period were the period prescribed by the Schedule and for the purposes of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in sections 4 to 24 (inclusive) shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law.

11. In view of the fact that Multi-State Cooperative Societies Act, 2002 is a special or local law prescribing period of limitation different from the period prescribed by the schedule to the Limitation Act, the limitation prescribed by the Multi State Cooperative Societies Act, 2002 shall apply. Paragraphs 38 and 39 of the judgment of the Supreme Court in the case of L.S. Synthetics Vs. Fairgrowth Financial Services (supra) read thus:

38. A Special Court, having regard to its nature and functions may be a court within the meaning of Section 3 of the Indian Evidence Act 1872 or Section 3 of the Limitation Act, 1963 but having regard to its scope and object and in particular the fact that it is a complete code in itself in our opinion, the period of limitation provided in the schedule appended to the Limitation Act, 1963, will have no application. For the applicability of Section 29(2) of the Limitation Act, the following requirements must be satisfied by the Court invoicing the said provision:

(1) There must be a provision for period of limitation under any special or local law in connection with any suit, appeal or application.

(2) Such prescription of the period of limitation under such special or local law should be different from the period of limitation prescribed by the Schedule to the Limitation Act 1963.

39. In terms of the provisions of the said Act no period of limitation is prescribed, evidently because the Parliament thought it to be wholly unnecessary. Once the statutory operation relating to the attachment of the property belonging to a notified person comes into being, the duties and functions of the Special Court start. In relation to the duties and functions required to be performed by a court of law, no period of limitation need be prescribed. Furthermore. Section 13 of the said Act provides for a non-obstante clause which has been used as a devise to modify the ambit of provisions of law mentioned therein or to override the same in the specified circumstances. [See T.R. Thandur Vs. Union of India (UOI) and Others,]. The said Act does not provide for any period of limitation, the reasons wherefore have been noticed hereinbefore and in that view of the matter, in our considered opinion, Articles 19, 28 and 55 providing for period of limitation prescribed would have no application. Section 13 of the said Act provides for a non obstante clause which is of wide amplitude. In a case of conflict between the said Act and any other Act, the provisions of the former shall prevail.

12. In the events of inconsistencies between the special statute and limitation Act, the special statute or local law would apply. Section 85(1)(a) of the Multi-

State Cooperative Societies Act, 2002 reads thus:

When the dispute relates to the recovery of any sum including interest thereon due to a multi-State Co-operative society by a member thereof, be computed from the date on which such member dies or ceases to be a member of the society.

13. It is not in dispute that the petitioner no. 1 continues to be member of the first respondent bank, period of limitation would thus commence from the date on which the member ceased to be member of the society.

14. In my view thus there is no substance in the plea raised by the petitioners that the claims filed by the first respondent before the arbitral tribunal on 28th June, 2006 were barred by law of limitation.

15. As far as issue of violation of principles of natural justice raised by the petitioner is concerned, though oral evidence was led by the parties before the Cooperative Court, it is not in dispute that before the learned arbitrator, both the parties filed their respective claims and pleadings. It is not in dispute that neither the petitioners nor first respondent applied for taking the evidence led by the parties before the Cooperative Court on record of the arbitral proceedings. It is also not in dispute that that the petitioner did not make any application for cross examining the witnesses of the first respondent. Both the parties made their respective submissions before the learned arbitrator on the basis of the pleadings and documents filed before the arbitrator. Though there is reference to the affidavit filed by the parties in the award, perusal of the award indicates that no reliance is placed by the learned arbitrator on the affidavit filed by the petitioner or the respondent bank while allowing the claims made by the first respondent and rejecting the counter claim made by the petitioner. In my view thus there was no prejudice caused to the petitioner even if the respondent No. 1 Bank did not make their witnesses present for cross examination by the petitioner. Record does not indicate that witness of petitioner was also available for cross-examination by the Bank. As no request was made before the learned arbitrator for examining the petitioner's witnesses or for cross examining the respondent's witnesses, the petitioner is deemed to waive their rights to cross examine the witnesses of the first respondent, if any. There is thus no violation of principles of natural justice committed by the learned arbitrator.

16. As far as plea of bias raised by the petitioner in the present proceedings against the learned arbitrator by alleging that the learned arbitrator has dispensed with the due procedure of law and was professionally associated with the first respondent and has been on their panel and therefore, award is vitiated by fraud and misconduct is concerned, perusal of the record indicates that no such plea was raised by the petitioner before the learned arbitrator either by filing any application u/s 12 read with section 13 or in the written statement. The learned arbitrator was not appointed by the first respondent No. 1 Bank but was appointed by the Central Registrar under the provisions of the Multi-State

Cooperative Societies Act, 2002. Perusal of the record indicates that the learned arbitrator has given equal opportunities to both the parties to prove their claims and has not dispensed with the due procedure of law as sought to be canvassed by the petitioner. In my view there is no substance in this plea raised by the petitioner that the learned arbitrator was biased in favour of the bank and against the petitioner. The learned arbitrator has verified claims of both the parties including the documentary evidence on record and has rightly made the award allowing claims made by the Bank and rejecting the counter claim made by the petitioner.

17. As far as the plea of the petitioner that petitioner Nos. 4 to 6 were not parties to the arbitration agreement and could not have been impleaded as party respondents to the arbitration proceedings and the entire proceedings were thus without jurisdiction is concerned, it is not in dispute that the petitioner nos. 4 to 6 were impleaded as legal heirs of one of the party who was director of Petitioner No. 1 against whom the Bank had made money claim. Reference to section 84(1) (2) and (3) would be relevant which read thus:

84. Reference of disputes.-

(1) Notwithstanding anything contained in any other law for the time being in force, if any dispute [other than a dispute regarding disciplinary action taken by a multi-State co-operative society against its paid employee or an industrial dispute as defined in clause (k) of section 2 of the Industrial Disputes Act, 1947 (14 of 1947)] touching the constitution, management or business of a multi-State co-operative society arises-

(a) among members, past members and persons claiming through members, past members and deceased members, or

(b) between a member, past members and persons claiming through a member, past member or deceased member and the multi-State co-operative society, its board or any officer, agent or employee of the multi-State co-operative society or liquidator, past or present, or

(c) between the multi-State co-operative society or its board and any past board, any officer, agent or employee, or any past officer, past agent or past employee, heirs or legal representatives of any deceased officer, deceased agent or deceased employee of the multi-State co-operative society, or

(d) between the multi-State co-operative society and any other multi-State co-operative society, between a multi-State cooperative society and liquidator of another multi-State cooperative society or between the liquidator of one multi-State cooperative society and the liquidator of another multi-State cooperative society, such dispute shall be referred to arbitration.

(2) For the purposes of sub-section (1), the following shall be deemed to be disputes touching the constitution, management or business of a multi-State co-operative society, namely:-

(a) a claim by the multi-State co-operative society for any debt or demand due to it from a member or the nominee, heirs or legal representatives of a deceased member, whether such debt or demand be admitted or not;

(b) a claim by a surety against the principal debtor where the multi-State co-operative society has recovered from the surety any amount in respect of any debt or demand due to it from the principal debtor as a result of the default of the principal debtor, whether such debt or demand is admitted or not;

(c) any dispute arising in connection with the election of any officer of a multi-State co-operative society.

(3) If any question arises whether a dispute referred to arbitration under this section is or is not a dispute touching the constitution, management or business of a multi-State co-operative society, the decision thereon of the arbitrator shall be final and shall not be called in question in any court.

18. On conjoint reading of the aforesaid provisions, it is clear that reference of disputes touching the constitution or management or business of the Multi-State Cooperative Society, has to be referred to arbitration even if the said dispute arises between Multi-State Cooperative Society and persons claiming through members, if the claim by the Multi-State Cooperative Society for any debt or demand is due from members or their legal representatives whether such debt or demand is admitted or not. In my view the petitioner no. 4 to 6 who are claiming to be legal heirs of one of the party to the proceedings who was impleaded as Creditor by the Bank were claiming through him and were therefore, necessary parties to the said proceedings and would be also governed by section 84 of the Multi-State Cooperative Societies Act, 2002 including the arbitration agreement and were bound by the statutory arbitration u/s 84. In my view, there is no substance in the plea raised by the petitioner that their impleadment as party respondent to the arbitration proceedings was without jurisdiction or was bad in view of their being no alleged agreement between the Bank and Petitioner Nos. 4 to 6. u/s 131 of the Contract Act, on the death of the guarantor, liability exists and such liability can be fastened on the estate of the deceased guarantor, being inherited by the legal heirs and the creditor can recover the dues out of the estate of the deceased.

19. As far as reliance on the judgment of the Supreme Court in the in the case of State of Rajasthan Vs. Rao Raja Kalyansingh (supra) by the petitioner is concerned, Paragraph 6 of the said judgment is relied upon by the petitioner which reads thus:

6. Though this issue is not very specific but undoubtedly it covers the plea taken by the respondent in paragraph 1 of his written statement. That apart the plea of maintainability of the suit is essentially a legal plea. If the suit on the face of it is not maintainable, the fact that no specific pleas were taken or no precise issues were framed is of little consequence.

20. In my view on conjoint reading of section 4 and section 16 of the Arbitration & Conciliation Act, 1996, the petitioner not having raised the plea of jurisdiction before the learned arbitrator can not be allowed to raise such plea in this application filed u/s 34 for the first time. Reliance placed by the petitioner thus on the judgment of the Supreme Court in the case of State of Rajasthan Vs. Rao Raja Kalyan Singh (supra) is of no assistance to the petitioner.

21. In my view there is no substance in the plea of the petitioner that the learned arbitrator did not give credit of the fixed deposit receipts in the impugned award. The record indicates that no such plea was raised by the petitioner before the learned arbitrator. The learned arbitrator has considered all the documents and plea raised by both the parties and have rendered finding of fact which are not perverse and no interference is warranted.

22. In my view, there is no substance in the plea raised by the petitioner that the counter claim has been rejected by the learned Arbitrator without assigning any reasons though the counter claim was alleged to have been established or proved in the cross examination and the witnesses examined by the Bank before the Cooperative Court. The evidence led by the parties before the Cooperative Court were not forming part of the record before the learned arbitrator and thus no reliance thereof can be placed by the petitioner. If the petitioner wanted to rely upon the evidence already led before the Cooperative Court, the petitioner ought to have made proper application before the learned arbitrator which admittedly had not been made. There is thus no substance in the submission that the counter claim was established by the petitioner or that the same has been rejected without any reasons.

23. The next question which arise for consideration of this court is whether properties of the legal heirs who were brought on record in the proceedings before the learned arbitrator could be attached without deciding the issue whether any of the legal heirs have inherited any properties from the deceased borrowers and/or guarantors considering the effect of section 52 of the Code of Civil Procedure, 1908.

24. Perusal of the records in Arbitration Petition No. 85 of 2010 and Arbitration Petition No. 23 of 2010 indicates that the 1st respondent bank had filed an application u/s 17 of the Arbitration Act, 1996 before the learned arbitrator seeking an order of attachment in respect of the properties of the legal heirs. In the application dated 9th October, 2007 made by the bank, it was alleged that with a view to defeat the claims/rights of the bank, the said respondent were in process of disposing of and/or creating third party rights in respect of their property. The petitioner no. 4 filed an affidavit opposing the said relief and contended that the properties mentioned in the application for which attachment was sought by the bank were personal properties of petitioner no. 4 which properties were not received from the borrowers or acquired by him from the loan alleged to have been made available to the borrowers by the bank. Petitioner no. 4 also annexed documents in support of the plea of ownership and

form no. 6 extract alongwith the deed of transfer confirming the transmission of each of the properties by sale or by gift. The petitioner no. 4 also placed reliance upon the judgment of this court in Writ Petition No. 1056 of 1982 in support of his plea that the liability of the legal representatives is limited to the extent of the properties of the deceased which has come to his hands. It was also pleaded that his properties were not in any way related to or connected with the loan transaction between the bank and their borrowers. It was pleaded that the borrowers or other parties to the proceedings had no right, title or interest in the said properties which were properties of petitioner no. 4 exclusively.

25. There was no reply filed by the bank controverting the averments made by petitioner no. 4. The application filed by the bank u/s 96 of the said Multi-State Act, 2002 indicates that it was the case of the bank that the respondents may create third party rights in their property situate at Flat Nos. 4 and 5, in the building known as New Sai Niketan, 345, Mount Road, Mazagaon, Mumbai-400 010. Order of attachment of those properties was sought against Mrs. Rehana Abdul Latif Dadan (petitioner no. 3) and also Mr. Ridhwan Abdul Latif Dadan (petitioner no. 4 herein). Even in the affidavit in support of the application filed u/s 96 of the Multi-State Act, 2002, it was pleaded that the said interim order was sought against them in respect of their properties. Warrant of attachment with show cause notice was issued in the month of October, 2007 in respect of the said two flats. Order dated 22nd April, 2009 passed by the learned arbitrator on the said application made by the 1st respondent bank u/s 17 on the Arbitration and Conciliation Act, 1996 and 96 of the said Multi-State Act indicates that the learned arbitrator proceeded on erroneous premise that if the arbitrator is satisfied that a party to any reference made to him u/s 84 with intent to defeat or delay the execution of any decision that may be passed thereon is about to dispose of the whole or any part of the property, that requirement is the only requirement for passing order of attachment u/s 96 of the said Multi-State Act, 2002. It is held that there is no discretion made in empowering the arbitrator u/s 96 to decide as to whether the property held by the legal heirs were self acquired, inherited or received as gift and confirmed the attachment order against the property of petitioner no. 4. The learned arbitrator did not address himself on the issue as to whether the said properties in respect of which warrant of attachment was sought by the bank were personal properties of petitioner no. 4 or not and were not inherited from the deceased borrowers and/or guarantors of the bank.

26. In the operative part of the award, the learned arbitrator has directed that the attachment of the said properties shall remain in force till the realization of the amount awarded. The arbitrator also held that the principle debtors as well as all the legal heirs were jointly and/or severally liable to pay the amount awarded by the arbitrator in favour of the bank with interest. Schedule of the properties to the said award discloses the properties which were claimed by the one of the legal heir as his individual properties.

27. Perusal of the records in Arbitration Petition No. 1160 of 2009 and 119 of 2010 indicates that the bank had applied for an order of warrant of attachment in respect of the properties standing in the name of the original respondent 3(f) [petitioner no. 4 herein]. In the application filed by the bank u/s 96 of the said Multi-State Act, the bank had prayed for warrant of attachment against the legal heirs of Mrs. Sharifa A. Thakur who was one of the partner of M/s. Thakur Electrical Engineering Works. In the said application filed by the bank, it was pleaded that the properties at Village Rajapur bearing Gat No. 68A/1A 1A/17 having area 28 acre and holding account no. 72 were properties of the said legal heirs. In application for award before the judgment it was pleaded by bank that the respondent no. 3(f) to the said application (petitioner no. 4 herein) was likely to dispose of the land standing in his name and if he succeeds, the bank would not be able to recover the amount claimed in the claim petition. The petitioner no. 4 herein made an application before the learned arbitrator inter alia praying for raising of attachment and vacating interim orders and pointed out that the properties in question was his independent property and was not inherited from the original respondent no. 3. The petitioner no. 4 also annexed documents pertaining to the property in question to show that the said property never belong to the deceased and the same stood in his name in the records of the concerned authorities. It was also pleaded that the legal heir was liable only to the extent of the share of the estate of the deceased coming to his hands and individual property of the legal heirs of the deceased could not be attached and/or the legal heirs could not be held liable for the debts of the deceased. It was pleaded by petitioner no. 4 that his deceased wife Mrs. Sharifa A. Thakur did not leave behind her any estate at the time of her death. The petitioner had also challenged the ad-interim order passed by the arbitrator by filing the Writ Petition (2306 of 2009). By an order dated 24th February, 2009, Anoop. V. Mohta, J. disposed of the said writ petition on the ground that application for raising of warrant of attachment and vacating the interim order is already filed by the petitioner and is pending before the Arbitral Tribunal since December 2007 and therefore at that stage, no interference could be made with the impugned order. The arbitrator was directed to dispose of the said application as early as possible. Perusal of the record indicates that the said application filed by petitioner no. 4 for vacating the ad-interim order passed by the learned arbitrator has not been disposed of.

28. On perusal of the impugned award it reveals that the learned arbitrator did not decide the issue whether properties attached by interim order were whether inherited by the legal heirs from the deceased borrowers and/or guarantors. In the operative part of the award, the arbitrator has directed that the principle borrowers/guarantors as well as all the legal heirs of the original respondent no. 3 were jointly and severally liable to pay amount of Rs. 44,88,798.68 with interest thereon. The learned arbitrator also directed that the properties situate at Village Rajapur shall continue to stand attached till further satisfaction of the claim.

29. Section 96 of the said Multi State Act, 2002 reads thus:-

96. Attachment before award.-

(1) Where the arbitrator is satisfied that a party to any reference made to him u/s 84 with intent to defeat or delay the execution of any decision that may be passed thereon is about to-

(a) dispose of the whole or any part of the property; or

(b) remove the whole or any part of the property from its existing precincts, the arbitrator may, unless adequate security is furnished, direct conditional attachment of the said property or such part thereof as he deems necessary.

(2) The attachment under sub-section (1) 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.

30. Section 52 of the Code of Civil Procedure, 1908 reads thus:-

52. Enforcement of decree against legal representative

(1) Where a decree is passed against a party as the legal representative of a deceased person, and the decree is for the payment of money out of the property of the deceased, it may be executed by the attachment and sale of any such property.

(2) Where no such property remains in the possession of the judgment-debtor and he fails to satisfy the Court that he has duly applied such property of the deceased as is proved to have come into his possession, the decree may be executed against the judgment-debtor to the extent of the property in respect of which he has failed so to satisfy the Court in the same manner as if the decree had been against him personally.

31. It is not in dispute that the legal heirs of the borrowers and/or guarantors who were impleaded as party respondent before the learned arbitrator by the bank were not impleaded as the principle borrowers and/or guarantors but were impleaded as heirs and legal representatives of the one of the deceased partner. The learned counsel appearing for the bank did not dispute that the liability if any of the legal heirs of the deceased borrowers and/or guarantors would be only restricted to the extent of the estate of the deceased borrowers and/or guarantors inherited by such legal heirs against whom decree was sought by the bank. It is not in dispute that the personal properties or other properties which has not been inherited by the legal heirs could not have been sold in execution of the decree against such deceased principle borrowers and/or guarantors. The only arguments advanced by the learned counsel appearing for the bank is that question as to whether the properties claimed to be self acquired properties by the legal heirs of the deceased borrowers and/or guarantors were self acquired properties or were inherited by them from the borrowers and/or guarantors or not could be decided only by executing court at the stage of execution of the

decree and thus the said properties could be attached u/s 96 of the said Multi State Act, 2002 which attachment would continue till such issue is decided by the executing court under the provisions of Code of Civil Procedure, 1908. The learned counsel appearing for the bank in support of this plea had relied upon the judgment in case of AIR 1931 173 (Nagpur) . Relevant portion of the said judgment reads as under:-

As to the next question, viz., whether the plaintiff-appellant is entitled to a decree against the assets of Mt. Rukmabai in possession of the respondent, I am inclined to think that the appellant is entitled to this relief. In the plaint, para. 2, he alleged that Mt. Rukmabai was dead and that the respondent was her heir, being her daughter. The plaintiff claimed a personal decree against the respondent. In the pleadings the defendant contended that she was not in possession of her mother's property. The plaintiff's pleader stated in reply that the question of assets should be left to be determined in execution and he joined issue on other points. An issue was framed in these terms:

Can plaintiff claim decree against the estate of her father inherited by her after her mother's death?

The respondent's learned Counsel contends that this issue arose out of the contentions of the parties regarding the liability of the respondent as legal representative of Mt. Rukmabai. This argument is, in my opinion, unsustainable. The aforesaid issue contemplated liability of respondent as a reversioner to her father and the object thereof was to determine whether the debt contracted by Mt. Rukmabai was binding on the assets of her husband. That is the plain meaning of that issue. My attention has been drawn to the decision passed in *Rambhau v. Ramkrishnapuri* Civil Revn. No. 353 in which it was held that:

an issue having been raised as to the existence of assets belonging to the deceased in the hands of his son, the Judge was bound to decide it.

The rule laid down above does not apply in this case, inasmuch as there was no issue framed. The plaintiff's pleader desired the Court to reserve this contention to be determined in execution.

It does not appear that the CPC contemplates determination of the question as to whether the legal representative has or has not the assets in his possession in the course of the suit. Section 2, Sub-section (11), Civil P.C., defines legal representative as:

a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued.

Under this definition a person who is entitled to the possession of the assets of the deceased becomes legal representative irrespective of whether he is actually in possession or not. If he is not the heir then it is necessary to prove that he is

actually in possession. It was held in *Lallu Bhagvan v. Tribhuvan Motiram*, that a decree could be passed against the legal representative although the deceased debtor may have left no assets. All that the Court has to see is whether the right to sue survives and is enforceable against one who in law represents the assets of the deceased. All that is necessary is that the legal representative must be a person on whom the estate would devolve. Section 52(1), Civil P.C., also shows that a decree may be passed against the legal representative of a deceased person without proof that the deceased left any property. The decree passed against the legal representative only declares his liability to account for the assets of the deceased debtor in his hands. Consequently it is not necessary to inquire in this suit as to whether the respondent has any assets in possession of Mt. Rukmabai or even that Mt. Rukmabai had left any assets. On this point there was disagreement between the Judges of the Allahabad High Court. In *Tamiz Bano Vs. Nand Kishore and Another*, , Mukerji, J., was of opinion that the question has to be determined in execution and Ashworth, J., was of opinion that it must be determined in the suit itself. It would appear however that Ashworth, J., was influenced by the rule of English law in this respect. In view of Section 52, Civil P.C., it appears to me clear, as observed by Mr. Mulla, p. 181, Edn. 9 of 1930, that the plea is confined to execution only: see also *Shankarlal v. Ganesh Singh* and *Rajaram v. Nathu*.

It is contended for the respondent that the plaintiff is not entitled to the relief asked for in second appeal. I do not see any reason why he should not be entitled to this relief. Order 7, Rule 7, Civil P.C., states:

Every plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the Court may think just to the same extent as if it had been asked for.

The plaintiff has pleaded that the respondent being the daughter of Rukmabai is her heir and representative and has also asked for a decree, against her. He in reality asked for more than he was entitled to. There is nothing to prevent the Court from giving him as much relief as he is entitled to. The appellant has now claimed for what was already covered by the relief which he asked for in the plaint. The prayer made by him now is based upon admitted facts and all I have to see is whether he is under law entitled to it. I am of opinion that, to meet the ends of justice, the plaintiff must be given a decree against the assets, if any, of Mt. Rukmabai in the hands of the respondent. I therefore pass a decree accordingly.

As the plaintiff was fighting on a false ground in the two Courts below, he is not entitled to any costs incurred by him in the two Courts below. In this Court also a prayer was made at the hearing and I therefore would allow him half the costs of this appeal.

32. Perusal of the application as well as the warrant of attachment issued by the

learned arbitrator clearly indicates that it was not the plea of the bank that the properties sought to be attached by the bank were properties of the deceased borrowers and/or guarantors. The application made before the learned arbitrator by the bank indicates that it was their own case that such properties were properties of the legal heirs who had filed detailed affidavit enclosing supporting documents in their plea that said properties were self acquired properties and inherited estates of the deceased borrowers and/or guarantors. It was also pleaded that the deceased borrowers and/or guarantors had not left any estate which could be inherited by the legal heirs. There was no affidavit in reply filed by the bank controverting those averments made by the legal heirs before the learned arbitrator. Even the documents referred to and relied upon by the legal heirs before the learned arbitrator were not disputed by the bank. The learned arbitrator has erroneously proceeded on the premise that once the bank shows that they have apprehension that the properties might be disposed of so as to deprive the bank to recover its dues in case of any award is made in their favour by the arbitrator, order of warrant of attachment was a matter of fact u/s 96 of the Multi-State Act, 2002. The learned arbitrator did not address himself on the issue that when it is the case of the bank itself that such properties were of the legal heirs and in any event not having controverted those averments by filing any affidavit, whether final order of warrant of attachment could be passed by the learned arbitrator in respect of such properties which were claimed to be self acquired properties of the legal heirs.

33. In my view, on conjoint reading of Sections 35 and 36 of the Arbitration and Conciliation Act, 1996, it is clear that subject to Part I, an award shall be final and binding on the parties and persons claiming under them respectively. It is also clear that if an application filed u/s 34 is refused, the award shall be enforced under the Code of Civil Procedure, 1908 in the same manner as if it were a decree of the court. Considering these two provisions, I am of the view that in a situation where the legal heirs pleaded before the Arbitral Tribunal that they have not inherited any properties from the deceased borrowers and/or guarantors and have produced the documents in support of such plea which was not controverted by the applicant seeking attachment, the Arbitral Tribunal was bound to decide such claim made by the legal heirs while deciding the claim of the applicant in the same award.

34. In view of Section 36 of the Arbitration and Conciliation Act, 1996, if the petition filed by the legal heirs is rejected, in my view executing court will not be able to go into the issue while executing such award as to whether the legal heirs had inherited any property from the borrowers and/or guarantors and/or whether any such property remained in possession of the judgment debtors. The executing court would not be able to go behind the award made by the learned arbitrator which on refusal of application u/s 34 by the court has to be enforced as if it was a decree of the court.

35. On perusal of the award as well as interim order passed by the learned

arbitrator it is clear that though the plea of the legal heirs claiming the property in question to be self acquired property and not having been inherited the same from the borrowers and/or guarantors and though such plea not having been controverted by the applicant, the learned arbitrator could not have overlooked these facts and could not have confirmed the order of warrant of attachment on the properties of the legal heirs. The award shows patent illegality committed by the learned arbitrator in the impugned award on this issue.

36. The learned arbitrator ought to have clarified in the impugned award that the legal heirs were liable only to the extent they had inherited any property from the estate of the deceased borrowers and/or guarantors. I am not inclined to accept the submission made by the learned counsel appearing for the bank that the issue as to whether the properties in question which were attached by an order passed by the learned arbitrator were inherited by the legal heirs or not from the borrowers and/or guarantors has to be decided only in the execution proceedings and were not to be decided by the learned arbitrator.

37. The High Court in case of *Ranjitsingh (supra)* relied upon by the bank has held that u/s 52(1) of the Code of Civil Procedure, the decree may be passed against the legal representatives of the deceased persons without proof that the deceased left any property. It is held that the decree passed against the legal representative only declares his liability to account for the assets of the deceased debtor in his hands and it is thus not necessary to enquire in that suit as to whether respondent has any assets in possession of the party against whom a decree is prayed and as to whether that party had left any assets. The High Court in the said judgment has noticed that some of other High Courts had disagreed with such view. In the facts of that case, the High Court held that the said issue could be decided by executing court. In my view, in view of the finality rendered to an award subject the provisions in Part I and such award being enforceable as a decree of court in view of section 36 of the Arbitration and Conciliation Act, 1996 on a refusal of application u/s 34 by the Court, such issue which was raised before the learned arbitrator by the legal heirs can not be overlooked by the learned arbitrator and cannot be left to be determined by the executing court to adjudicate. In my view impugned award is incomplete in this respect.

38. In case of *Oriental Bank of Commerce Vs. Mrs. Rajrani*, , the issue arose for the consideration of the Madhya Pradesh High Court as to whether in case the legal heir raises the plea that he has not inherited any property from the party defendant to the suit in a suit for recovery of a debt and was not in possession of any property left by the deceased, such plea was available to the legal heirs in the suit itself and cannot be agitated in the execution proceedings. The Division Bench of the Madhya Pradesh High Court dismissed the appeal filed by the appellant bank. The Division Bench of the Madhya Pradesh High Court followed the judgment of the High Court reported in AIR 1948 Nagpur, 168. The relevant paragraphs of the judgment in case of *Oriental Bank of Commerce (supra)* reads

as under:-

Facts giving rise to this appeal in brief are that one Shyam Behal had taken a loan of Rs. 20,000/- from the appellant/Bank. He had agreed to pay interest on it at the rate of 12% per annum with quarterly rest. He also agreed to refund the amount in sixty installments. Various documents were executed by that debtor Shyam Behal in favour of the appellant/Bank. The said Shyam Behal did make certain payments last of which was of Rs. 500/-, made on 10-12-1986. Thereafter, no payments were made by him till his death on 26-3-1988. The respondent being mother of the said Shyam Behal was his only heir as that Shyam Behal died unmarried. She also did not pay anything, therefore, a suit was filed by the appellant on 25-8-1990 for recovery of Rs. 25,234.92 paise from her as the amount due on date. This suit was contested by the respondent. Besides other grounds she contested it also on the ground that she has no assets left by her son Shyam Behal to her and, therefore, was not liable for the said debt of Shyam Behal.

The learned Trial Court after taking evidence of both the parties as adduced by them and after hearing them pronounced the impugned judgment on 8-8-97 holding that the said amount was due from Shyam Behal but the respondent was not liable for its payment because the deceased Shyam Behal had not left any movable or immovable property to the respondent. Therefore, the learned Trial Court dismissed the suit of appellant/Bank.

The main grievance of the appellant against the impugned judgment and decree is that in view of Section 52 of the CPC the legal representative of the debtor could have only raised the objection regarding the deceased having left no property in her hand in the execution proceedings and the learned Trial Court should not have considered the same in the suit. According to him the learned Trial Court and have decreed the suit after finding that the said amount was due from the said Shyam Behal and the respondent was his legal representative.

Therefore, the only question that arises for determination is whether the plea that the defendant was not in possession of the assets of the deceased was available to the defendant in ARBP-85-23-1160-119 the suit or not ? On a similar question in the case of AIR 1948 168 (Nagpur) , following observations were made by Justice Bosc J., as he then was:-

...a difference of opinion emerges. Some Judges hold that in such a case the plaintiff is entitled to a decree the moment he proves that the defendant is an heir and that the correct stage at which to ascertain whether there are assets is in execution. Others hold that the existence of assets must be disclosed in the trial itself. I need not decide this matter in revision. All that is necessary to state in this case is that there is a difference of opinion on this point which has not been settled in this Province.

But then it was further observed by him:

...I think the plaintiff ought to have been told that he would be required to establish this in the suit and that it would not be enough to leave the matter to the execution stage. I think this was all the more necessary in a case where the defendant did not appear.

In the present case a plea was taken by the respondent that she was not liable to pay the said debt because the deceased had left no assets to her. The appellant/Bank had full knowledge of this plea and even evidence was adduced in the Trial Court to that extent. The respondent had categorically averred that her son Shyam Behal has not left any movable or immovable property which remained uncontroverted. In such a circumstance agreeing by the opinion expressed by Hon"ble Bose, J., in the above referred case of Sheonarayan Harlal this Court is of the considered opinion that it would not be proper to grant any decree in favour of the appellant/Bank leaving the respondent to reagitate the matter in execution proceedings.

In the case of Tamiz Bano Vs. Nand Kishore and Another, , Justice Ashworth after discussing the English Law on this very question observed:

Is this plea to be denied to a legal representative in India merely on the ground that (while Section 52 of the CPC specifically permits it to a legal representative in execution proceedings there is no section of any Indian Act which either specifically or by implication, provides for the plea being taken in the course of the suit on the debt? To hold this would be straining beyond all measures maxim of "unius inclusio alterius exclusio est." The fact that the plea of "plene administravit" can be taken in execution proceedings when events justifying such a plea may have occurred subsequent to the decree is no reason why it can not be taken in the suit as a reason for no decree being passed....

Indeed it would appear that a person sued for a debt as legal representative can resist the suit either on the plea that as the deceased left no assets, he can have no legal representative (since the expression has reference to some estate and does not mean merely a relation who would have been the heir if any property had been left) or again on the plea that he has duly applied all the assets available or proved to be available.

Agreeing with the above referred opinions for the reasons mentioned therein, it is held that the respondent was well within her rights to raise the plea that she has not inherited any property from her son, by way of defence in a suit for recovery of a debt of her deceased-son. The plea that the respondent was not in possession of any property left by the deceased was available to the respondent in the suit itself. The impugned judgment, therefore, suffers with no legal infirmity.

39. In my view, the learned arbitrator ought to have considered section 96 of the Multi State Act, 2002 with sections 35 and 36 of the Arbitration and Conciliation Act, 1996 and section 52 of the Code of Civil Procedure, 1908 in the impugned award while attaching the properties. Section 96 of the Multi State Cooperative

Societies Act, 2002 cannot be read in isolation.

40. In my view, a legal heirs and representatives are entitled to raise an issue that the deceased has left no assets, or that they were not in a possession of any property left by the deceased or the same was not available to them in the arbitration proceedings itself. In my view, the learned arbitrator is bound to decide the said issue in the impugned award itself after considering the material facts and documents into consideration.

41. Perusal of the impugned award indicates that the learned arbitrator has considered all other aspects in the matter on merits and have rendered a finding of fact against the borrowers and the guarantors which findings are not perverse and thus no interference is warranted with such finding of facts. The learned arbitrator in my view was right in passing a decree against the borrowers and the guarantors and was right in directing the legal heirs to pay the amount directed to be paid by the borrower/guarantor whose legal heirs they were. The learned arbitrator however was bound to decide the issue whether properties sought to be attached were inherited by the legal heirs from the debtors or not. In my view part of the award by which the personal properties of the legal heirs are attached and the attachment order having been allowed to continue till recovery of the entire amount by the bank from the parties is perverse and patently illegal and that part of the award deserves to be set aside. Resultantly I pass the following order:-

(a) Part of the award dated 10th June, 2009 (subject matter of Arbitration Petition Nos. 85 of 2010 and 23 of 2010) and order of warrant of attachment directing that the attachment of the properties described in schedule of the properties is set aside. The order of attachment of the properties passed by the learned arbitrator attaching the properties is set aside and remitted back to the learned arbitrator for disposal in accordance with law.

(b) Direction of the learned arbitrator issued in the award dated 30th May, 2009 (subject matter of Arbitration Petition No. 1160 of 2009 and Arbitration Petition No. 119 of 2010) and order of warrant of attachment in so far as it attaches the properties is set aside and remitted back to the learned arbitrator for disposal in accordance with law.

(c) Arbitrator shall decide whether properties in question were inherited by the legal heirs of the deceased debtors/guarantors and to what extent they are liable expeditiously and not later than six months from today.

(d) During the pendency of the proceedings before the learned arbitrator, petitioners shall not sell, alienate, encumber, part with possession or create any third party rights in respect of the properties which were subject matter of attachment.

(e) Rest of the impugned award is upheld.

(f) Petitions are disposed of in the aforesaid terms.

(g) There shall be no order as to costs.