

(2009) 12 GUJ CK 0023

In the Gujarat High Court

Case No : Special Civil Application No's. 12093, 12094, 12095 and 12096 of 1994 and 12092 of 2004

Mukeshbabu Securities Ltd. and Others

APPELLANT

Vs

Praful Harsh and Another

RESPONDENT

Date of Decision : 17-12-2009

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 16, 16(2), 16(3), 25, 25(4)
Industrial Disputes Act, 1947 — Section 2

Citation : (2011) 1 ARBLR 147 : (2010) 51 GLR 1053

Hon'ble Judges : K.S. Jhaveri, J

Bench : Single Bench

Advocate : P.M. Thakkar and Navin K. Pahwa, for Thakkar Assoc, for the Appellant; K.G. Vakharia and Avani S. Mehta, for the Respondent

Judgement

K. S. Jhaveri, J.—By way of these petitions, the petitioners have prayed to quash and set aside the orders dated 2-6-2004 passed by the respondent No. 1 whereby the applications raising preliminary contention regarding jurisdiction of respondent No. 1 in Arbitration Suit Nos. H/98, H/99, H/101, H/104 and H/108 of 2003 were rejected.

2. The facts in brief leading to the filing of the present petition could be set out as under:

2.1. The respondent No. 2 filed a suit before the Arbitrator for recovery of certain amounts from the petitioners. The petitioner No. 1-companies along with petitioner Nos. 2 to 5 as directors filed applications before the Arbitrator u/s 16 of the Arbitration Act (hereinafter referred to as "the Act" for the sake of convenience) raising objection with respect to the jurisdiction of the Arbitrator in entertaining the arbitration suit filed by the respondent No. 2 on the ground that the petitioner-Company and other petitioners are neither the members of the respondent No. 2 nor its officers or servant and that therefore, the arbitration suit cannot be tried by the Arbitrator.

2.2. During the course of hearing, the petitioners produced documentary evidence in support of the claim that the petitioners never became members of the respondent No. 2-Society. The respondent No. 1 rejected the applications of the petitioners vide orders dated 2-6-2004. Being aggrieved by the same, the petitioners have preferred these petitions.

3. Mr. P.M. Thakkar, learned Senior Counsel appearing for M/s. Thakkar Associates has submitted that the petitioners No. 1 companies had made an application on 25-5-1998 for becoming shareholder of the respondent No. 2 and also deposited an amount of Rs. 5,00,001/- with the society. However, the respondent No. 2 did not decide upon the said application within the period prescribed u/s 25(4) of the Act which is four months. The petitioners also did not receive any communication from the office of the respondent No. 2 within a period of fifteen days from the expiry of the period of four months, and accordingly, the application is deemed to have been rejected in view of the proviso to Section 25(4) of the Act. Therefore, it is clear that the petitioners companies never became a member of the respondent society though a formal application was made for being admitted as member.

3.1. Mr. Thakkar has drawn the attention of this Court to Section 84, more particularly Sub-sections (1) and (2) of the Act and submitted that a dispute with respect to claim by a Multi-State Co-operative Society for any debt or demand due to it from a member or a Director etc. can alone be referred to the Arbitral Tribunal whereas a claim made by a Multi-State Co-operative Society such as the respondent in the present case cannot be made against a non-member of the Society. In the present case, none of the petitioners are the members of the respondent No. 2 as stated hereinabove, and therefore, the present suit against the petitioners is not maintainable.

3.2. Mr. Thakkar has further contended that in view of the fact that the dispute is not covered by the provisions of Section 84 of the Act, the Arbitration suits could not have been referred to the Arbitral Tribunal under the provisions of Section 84 of the Act.

4. Mr. K.G. Vakharia, learned Senior Counsel for the respondents has submitted that the petitioner had filed an application seeking the membership of the respondent co-operative society and the same came to be taken in the Board meeting on 19-6-1998 pursuant to which the petitioner came to be admitted as member as per the rules and regulations and allotted the shares. Accordingly, the names of the petitioner came to be entered in the share register.

4.1. Mr. Vakharia has also submitted that some of the petitioners were also paid dividend to the tune of Rs. 71,250/- on 8-10-1999 for the year 1998-1999 and dividend of Rs. 1,00,000/- on 8-8-2000 for the year 1999-2000. The petitioners had accepted the said amount of dividend which was payable to them on their shares in capacity as members of the respondent-Co-operative Bank. The petitioners were aware of the membership status with the Bank since the

petitioners reflected the shares of Madhavpura Mercantile Co-operative Bank in their balance-sheet as on 31st March, 2001 under the heading investments.

4.2. Mr. Vakharia has also submitted that Section 16 of the Arbitration Act permits Arbitral Tribunal to rule on its own jurisdiction on any of the objection which may be raised by the party before filing written statement, and therefore, no interference is called for in the present petitions.

4.3. Mr. Vakharia has submitted that furthermore the arbitrator has not rejected the application in toto, but has kept open the question of membership to be decided at the stage of hearing. It will always be open to the parties to adduce evidence at the time of final hearing and not at preliminary stage.

4.3A. Mr. Vakharia has relied upon a ratio compounded by the Apex Court in the case of Maharshi Dayanand University and Another Vs. Anand Coop. L/C Society Ltd. and Another, more particularly Paras 12 and 13 and submitted that thus this Court may not exercise jurisdiction in the present case at this stage.

4.4. Mr. Vakharia has also made an endeavour to submit that the amount of Rs. 5,00,001/- given by the petitioners is deposited by the Bank on 26-5-1998 and the application was considered in the Board meeting on 19-6-1998, and therefore, the action is within the statutory period of four months as contemplated u/s 25(4) of the Societies Act. He has submitted that the petitioners were also orally communicated about the same by the Bank and the petitioner also received dividend which means that they have accepted the fact of being members and the present stand is just an afterthought by the petitioners.

5. Controverting the submission made by Mr. Vakharia, Mr. Thakkar has submitted that no share certificates were received by the petitioners and neither are they produced on record by the Bank though referred in the affidavit-in-reply. In that view of the matter, in view of the statutory provisions, since the communication is not received within a period of fifteen days from the date of alleged resolution, the respondent cannot claim benefit under the pretext of any communication made to the petitioner if so.

6. This Court has heard learned Counsel appearing for both the sides and also perused the papers on record including the impugned order. At the outset, it would be relevant to peruse Sections 84(1) and (2) and 25(4) of the Arbitration Act (sic. Multi-State Co-operative Societies Act, 2002) which read as under:

Section 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 Cooperative 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 Co-operative Society and liquidator of another Multi-State Co-operative Society or between the liquidator of one Multi-State Society and the liquidator of another Multi-State Society,

such dispute shall be referred to arbitration.

(2) For the purposes of Sub-section (1), the following shall be deemed to be disputed 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, 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.

Section 25. Persons who may become members-

....

(4) Every application for admission as a member of a Multi-State Co-operative Society shall be disposed of by such society within a period of four months from the date of receipt of the application, and the decision of such society on the application shall be communicated to the applicant within fifteen days from the date of such decision.

Provided that if the application is not disposed of within the period of aforesaid, or the decision is not communicated within a period of fifteen days of the expiry of the aforesaid period of four months, the Multi-State Co-operative Society shall be deemed to have made a decision, on the date of expiry of such period, refusing admission to the applicant.

(Emphasis supplied)

6.1. Section 16 of the Arbitration Act reads as under:

16. Competence of Arbitral Tribunal to rule on its own jurisdiction: (1) The Arbitral Tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,-

(a) an arbitration Clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the Arbitral Tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the Arbitral Tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

(3) A plea that the Arbitral Tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) xxx xxx xxx (5) The Arbitral Tribunal shall decide on a plea referred to in Sub-section (2) or Sub-section (3), and where the Arbitral Tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(6) xxx xxx xxx

6.2. As a result of the perusal of the aforesaid Sections, this Court is of the opinion that the contention of the society regarding applicability of Section 16 of the Arbitration Act is prima facie misconceived inasmuch as the petitioners have never challenged the jurisdiction of the Tribunal. The contention of the petitioners is that they are not subject to proceedings before arbitration in view of the fact that in view of the statutory provisions read with Sections 84 and 25(4) of the Act. The further proceedings before the arbitration shall agonize the petitioner, and therefore, the contention of the society that Arbitral Tribunal has jurisdiction to decide at final hearing stage and not at this stage deserves to be rejected.

7. It is also required to be considered that in view of the settled legal position the point regarding applicability of the Act or the jurisdiction qua the petitioner/ plaintiff/defendant covered under any Act is to be decided at the preliminary stage. Whenever any objection is raised which relates to the very initiation of the arbitral proceedings on the ground that either the reference made to the arbitrator is not competent or otherwise the arbitrator is not competent or has no jurisdiction to entertain the arbitral proceedings on any ground, the arbitrator is under a statutory obligation to decide such plea before proceeding further with the arbitral proceedings. In my view, the arbitrator ought to have considered the

application of the petitioner. Prima facie, it appears that the petitioners have not challenged the fact regarding jurisdiction of the Arbitral Tribunal, but the subject-matter of challenge whether the petitioners are covered under the provisions of the Act or not. The arbitrator has not given any finding on the plea as to the membership raised by the petitioners.

8. On a conjoint reading of Sections 84 and 25(4) of the Act it is clear that a person can be admitted as a member of a society by making an application. The application for admission as a member is required to be disposed of within a period of four months from the date of receipt of the application. The decision on such application is required to be communicated to the applicant within 15 days from the date of such decision. It is also clear that if the application is not disposed within a period of four months, it is deemed that the society has refused admission to the applicant.

8.1. In the present case, it is an admitted fact that the petitioners made an application for membership on 25-5-1998 and considering the period of four months the application ought to have been disposed of by 25-9-1998 and communication thereof ought to have been made to the petitioners on or before 10-10-1998. Accordingly, in view of the deeming provision of proviso to Sub-section (4) of Section 25 of the Act, the application is deemed to have been rejected. In the event of failure on the part of the respondent No. 2, it cannot be said that the petitioners were members of the respondent No. 2.

9. The respondent No. 2 has submitted that the petitioners have reaped the fruits of dividends paid to them, however, this Court is of the view that the omission on the part of the respondents will not prejudice the rights of the petitioners inasmuch as it is a payment by the respondent No. 2 itself and not demanded by the respondent No. 2. The petitioner cannot be said to have derived any benefits from the said payment as the payment was not made at the instance of the petitioners. It will always be open to the Bank to recover the payment from the person who has wrongly made payment to a non-member. A mistake of the Bank official cannot confer any jurisdiction under the Act.

10. It will not be out of place at this juncture to refer to an order passed by this Court on 21-9-2004 in this group of petitions which reads as under:

Draft amendment granted in all the petitions.

Notice for final disposal returnable on 1-10-2004. Ad-interim relief in terms of Para 9(B) till then.

In the meantime, the respondents are directed to file their reply and to produce on record any material in order to establish that the petitioner is a member of the Society. Direct Service is permitted.

10.1. Pursuant to the order dated 21-9-2004, the matter was adjourned to 1-10-2004 and further adjourned to 8-10-2004 as a result of failure on the part of the respondents to file reply. On 8-10-2004, as the reply was not filed, this

Court admitted the matter and granted ad-interim relief. Thus, it is clear that even before admitting the matter, no evidence was produced by the Bank.

10.2. The Arbitral Tribunal has referred to 2-3-2003 as the date of admitting the petitioners. However, before the arbitrator the respondent No. 2 relied on the list of members and contended that the petitioners were admitted as members of the respondent-Society, and therefore, the petitioners' plea of not being admitted as members is not sustainable. However, the membership list produced by the respondent society shows the date of membership of petitioner No. 1 as 2-3-2000. The share application for becoming member by the petitioners is dated 26-5-1998 almost two years prior to the date of membership shown by the respondent-Society in the membership list. There even if it is believed that the petitioners-Companies were admitted as members of the respondent-Society on 2-3-2000, there is no compliance of the provisions of Section 25(4) of the Act.

10.3. Even today, the respondent society is not in a position to produce any documents on record to show that the decision was communicated to the petitioners. The respondent-Bank has not produced any material before the Arbitrator as well to suggest that the respondent Bank has either taken a decision or that the decision was communicated to the petitioners if any. In that view of the matter, this Court is of the opinion that since communication is not made on or before 10-10-1998, the contention raised by the petitioners that the petitioners are not members of the respondent-Society deserves to be accepted.

10.4. An endeavour is made by the respondents that no documentary evidence is available with the Bank with regard to membership of the petitioners. This Court is of the view that if no documentary evidence was available, the Bank ought not to have hurried to file arbitration proceedings. It would not be out of place to mention that the resolution of 1998 is produced for the first time before this Court.

11. It is also contended by the petitioners that the petitioner No. 1 in each petition companies cannot be treated as members of the Bank. In my view, the petitioners themselves have applied for the membership of the Bank. A company can be treated as a member of a Co-operative Bank in view of Section 25(h) of the Societies Act wherein it is contemplated that such class or classes or persons or association of persons as may be permitted by the Central Registrar having regard to the nature and activities of a Multi-State Co-operative Society shall be admitted as a member of co-operative society. In that view of the matter, I am of the opinion that the contention of the petitioners that the petitioner No. 1 cannot be a member is not acceptable. Hence, this contention is rejected.

12. In the premises aforesaid, these petitions are partly allowed. The orders dated 2-6-2004 passed by the respondent No. 1 in Arbitration Suit Nos. H/98, H/99, H/101, H/104 and H/108 of 2003 are hereby quashed and set aside. The proceedings against the petitioners are not maintainable under the Multi-State Co-operative Societies Act, 2002. Rule is made absolute to the aforesaid extent.