Company : CourtKutchehry
Website : www.courtkutchehry.com
Printed For :
Date : 12/09/2026

(2012) 03 BOM CK 0161

In the Bombay High Court

Case No : Arbitration Petition No. 767 of 2009

Prakash Kumar Sinha APPELLANT

Vs

Konkan Mercantile Cooperative Bank Ltd. and Others RESPONDENT

Date of Decision : 16-03-2012

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 17, 19, 27, 31, 33
Limitation Act, 1963 — Section 3
Maharashtra Co-operative Societies Act, 1960 — Section 126, 84, 85

Citation : (2012) 4 BomCR 688

Hon'ble Judges : Anoop V. Mohta, J

Bench : Single Bench

Advocate : Devendra Sharma assisted with Mr. Ashwin R. Singh in Arbitration Petition No. 767 and Mr. H.R. Sharma for Respondent No. 8 in Arbitration Petition No. 767 of 2009, for the appearing parties; Devendra Sharma a/w Mr. Ashwin R. Singh Respondent No. 8 in Arbitration Petition No. 677 of 2009, Mr. H.R. Sharma in Arbitration Petition No. 677 of 2009 and None for the others, for the Respondent

Judgement

Anoop V. Mohta, J.—Both the Petitioners have invoked Section 34 of the Arbitration and Conciliation Act, 1996 (for short, the Arbitration Act) and thereby challenged the undated common award. The operative part of the same is as under: AWARD The claim is allowed as follows: The claimants are entitled to recover Rs. 20,74,359.19 from the Respondent Nos. 1 and 3 to 11 jointly and/or severally together with interest on the above said amount at the rate of 17.5% p.a. from the date of recovery Suit i.e. 20.06.1992 till 18.2.2003 and also further interest at the rate of 14% p.a. (simple mode) from 19.02.2003 till full recovery of the claim is allowed and also Rs. 15,000/towards cost of administrative charges.

The Claim Petitions were filed by Respondent No. 1 (Original Claimant) against the borrower alleged guarantors, Respondent No. 12 Official Assignee, also made party, as Original Respondent No. 1 was declared insolvent. The proprietor

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/prakash-kumar-sinha-appellant-hash...

expired long back. Respondent Nos. 3 to 7 are his Legal Heirs. The Petitioner in Arbitration Petition 767 of 2009 is original Respondent No. 8 and Arbitration Petition No. 677 of 2009 is by original Respondent No. 9. The other Respondents though served not present.

2. The Principal borrower submitted an application on 19 June 1989, for enhancement of Cash Credit Facility from Rs. 10 lacs to Rs. 15 lacs. The same was against the Security of Stock and Trade with 25% margin subject to hypothecation. The Application for Cash Credit Facility of Rs. 15 lacs was filed on 21 January 1991. The same was kept pending. Because of a considerable loss of more than Rs. 13 lacs, an application to the bank for a settlement on 27 May 1991, and requested for adjustment. On 8 June 1991, the sanction was granted for Rs. 15 lacs. As there was default, the bank issued demand notices some time in January 1992. But as alleged, it were not addressed to the Petitioners.

3. The demand notices were addressed to all other guarantors as they alleged to have been signed the documents in the year 1989. A request was made again in 1992 to settle the matter. The claimant bank ultimately on 20 June 1992 filed a dispute Application No. 721 of 1992 before the Cooperative Court at Mumbai, as at the relevant time, they were governed by the provisions of Maharashtra Cooperative Societies Act, 1960 (for short, the "MCS Act 1960").

4. The same was opposed basically by Respondent Nos. 8 and 9 and also by the Principal borrower in the year 1994. The Petitioners have also filed written statement on 20 April 1995. The issues were framed some time in the year 2000. An additional written statement was also filed. The issues were recasted on 12 June 2002. By an order dated 18 February, 2003, the Cooperative Court returned the plaint to the bank by holding that the Court has no jurisdiction, in view of the specific provisions of the MultiState Cooperative Societies Act, 2002 (for short, "MSCS Act2002"), which came into force w.e.f. 3 July 2002.

5. On 28 June 2006, in view of specific provisions as available under the MSCS Act, 2002 (Chapter IX) for the settlement of dispute, an application was filed for reference of disputes. An Arbitrator was appointed accordingly. The Petitioners filed written statement some time in October 2007 before the Arbitrator. The claimant filed claim affidavit on 21 February 2008. An application was filed by the Petitioners to produce and furnish copy of the documents referred. The claim was opposed by the Petitioners also. Notice for production of documents was also issued in 13 May 2008. The same was replied by the bank. The Petitioners moved an application directing the bank to produce the records and proceedings of the Cooperative Court. The same was opposed. An application was filed by the Petitioners for framing issues on 28 August 2008. However, the learned Arbitrator by an order dated 28 August 2008 rejected the application by holding that the Arbitrator is not bound by the CPC (for short, "the CPC"). No issues were framed. Reply was also filed by the bank to the Petitioners application for amendment. The Arbitrator, has passed the undated award some time in the year 2009. The Petitioners, after receipt of the awards, filed Arbitration Petitions within time.

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/prakash-kumar-sinha-appellant-hash…

6. Undisputed question in the present matters is that though the application/ claim was filed under the MCS Act, 1992, and by order dated 18 February 2003, in view of the provisions of MSCS Act, 2002, the Cooperative Court had returned the Plaint/claim for want of jurisdiction in the year 2000. The Arbitrator, in view of the MSCS Act, 2002, was appointed on the application filed by the bank on 28 June 2006, much after three years from the date of return of the claim Petitions. The learned Arbitrator, failed to deal with the aspect of limitation, specifically when there was a monetary claim raised by the bank. The specific reasons are necessary before awarding any monetary claim in this background. It goes to the root of the matter. The issues were specifically raised. The Arbitrator ought not to have overlooked it.

7. I have already observed in Sealand Shipping and Export Pvt. Ltd. Vs. Kinship Services (India) Pvt. Ltd., that the point of limitation in a given facts and circumstances, and specifically referring to Section 3 of the Limitation Act though not raised by the parties, the Arbitral Tribunal needs to consider the same before awarding any monetary claim. The relevant para 27 reads as under:

It is settled that the plea of limitation, prevent claiming the party from recovering the amount/claim though he has a right to claim the same. It debars the remedy and not the claim. Therefore, the Arbitrator under the Arbitration Act also bound to consider this aspect of limitation at least at the time of awarding the claim so raised by either of the parties, but within the limit of Limitation Act. In my view, there is no question of invoking doctrine of "waiver" and/or "no interference by the Court" as contemplated under Sections 4 and/or 5 of the Arbitration Act, specifically at the time of awarding/granting/passing the final Award. The arbitration proceedings and the power of Arbitrator with this regard, are not exceptional to that. The Arbitrator is bound to pass award within the framework of substantive as well as procedural laws.

8. The justification, even if any, given by the bank while filing the reference u/s 84 of the MSCS Act, 2002, but when the question comes to award the monetary claim, where admittedly cause of action arose in the year 1989, it was necessary for the learned Arbitrator to decide the issue before granting any claim in the year 2009. The reasons are missing. It goes to the root of the matter and the submissions made by the learned counsel appearing for the Petitioners, though they are not the main borrower, being liable jointly and severally, though there is no challenge made by the borrower and/or his legal heirs.

9. Even assuming for a moment that in the present fact, the bank had filed their claim Petition before the Cooperative Court on 20 June 1992, the Cooperative Court returned the same for want of jurisdiction, the bank after more than three years, filed the reference application. There was no challenge raised to the order passed by the Cooperative Court at the relevant time. Therefore, on that date the claim Petition filed by the bank was pending. The provisions of Section 126 of MSCS Act2002 ought to have been taken note of before referring the matter. The specific objection was raised by the Petitioners even for this issue. The learned

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/prakash-kumar-sinha-appellant-hash…

Arbitrator, again failed to provide the detailed reasoning in support and/or to oppose the same objection so raised.

10. The Single Judge of this Court in The Abhyudaya Cooperative Bank Ltd. Vs. State of Maharashtra and Others, had dealt with the similar situation by referring to the Division Bench/decision of this Court apart from other judgments. The Arbitrator in the given situation, though wanted to rely upon the Judgment of the Division Bench to continue with the existing Arbitration proceedings, in that case also the reasons should have been provided.

11. Another aspect in the matter was that, though various applications were moved by the Respondent parties, the same were not considered at the appropriate time in accordance with law. The proper decision is required to be taken at the relevant time, specifically when the Respondent parties have raised various objections including of fraud, representations. No opportunities were given as such related aspect also goes to the root of the merit of the matter. The learned Arbitrator though dealt with those aspects on merit against the Petitioners, yet the issue of jurisdiction and limitation just cannot be overlooked, as basically when the award u/s 84 of the MSCS Act2002, if attained finality, as contemplated u/s 34 and 36 of the Arbitration Act, became executable/ enforceable decree, but if such award and/or decree in view of the above jurisdictional aspect is without jurisdiction, the Court has no option but to accept the same as nullity and illegal and all the proceedings arising out of the same should follow the same consequences.

12. Though the evidence of CPC and the Evidence Act are not applicable in view of Section 19 of the Arbitration Act, still the basic principle of natural justice, fairplay and the principle of law just cannot be overlooked by the Arbitrator, appointed under the MSCS ACT2002. I have already observed in Sahyadri Earthmovers Vs. L and T Finance Limited and Another, the role of Arbitrator dealing with the Arbitration proceedings, is crystallized as under:

Pleading - Claim defense - counter claim - inspection documents

(i) The Petitioner/claimant to file claim petition with details particulars and supporting documents, if any. The Respondents be permitted to file reply/ defense/rejoinder/counter claim/ set off and supporting documents, if any. The Arbitrator may direct the parties to file a list/ compilation of documents and call for more information''s or details. The parties may admit or deny the documents, after due inspection of the documents.

Interim order or protective order

(vii) The Arbitration Act (S/17) empowers the Arbitrator to pass just and equitable, appropriate interim or protective order, pending the arbitration proceedings before him, relates to the "subject matter of the dispute for and against the parties unless agreed otherwise. This power operates during the existence of the tribunal.

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/prakash-kumar-sinha-appellant-hash…

Binding Procedural Rules to conduct Arbitration-

viii) Once all the parties appear, the Arbitrator must decide and/or discuss the procedure to be followed in conducting the proceedings, if not already decided or agreed, including the governing law.

Binding terms and the reference-

ix) The Arbitral Tribunal needs to proceed in accordance with the terms of the agreement and or the reference, taking into consideration the choice of law or governing law.

The issues for proper trial

(x) The Arbitrator may direct the parties to file their respective issues though it is not mandatory. The issues are helpful for the proper and effective trial.

(xi) The Arbitrator, after hearing the parties, may finalize the issues.

List of the witnesses Call for the witness

(xii) The parties, if they want to examine witness, may file a list of witnesses. If necessary, seek order from the Court u/s 27 of the Arbitration Act, to call necessary witness with or without documents.

The evidence in chief through affidavits inspection cross examination reexamination, if necessary, including Video conference/process.

(xiii) The Arbitrator, if decided by the parties, direct the claimant to file affidavit in support of the claims and permit the Respondents to cross examine and also permit the Respondent to file affidavit in chief in support of their defense; and permit cross examination to the other side and/or follow such other procedure. This can be done, if agreed, through video conferences.

Expert report/witness

(xiv) The Arbitrator may permit the parties to call an expert witness and/or report or by consent call for expert evidence/report.

Mediation and conciliation

(xv) The Arbitrator by consent of the parties, may refer the matter for mediation/ conciliation.

Arbitrator''s power to dismiss for default or pass exporter award.

(xvi) The Arbitrator is entitled to dismiss the Arbitration Petition in default if the Petitioner/claimant is absent. The Arbitrator is also empowered to pass an exporter award, if the Respondent or his Advocate is absent. But still must act fairly and honestly.

Equal and fair treatment

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/prakash-kumar-sinha-appellant-hash…

(xvii) The Arbitrator must give equal opportunity to both the parties and, therefore, bound to follow the principles of natural justice, fair play and equity.

CPC & Evidence Act

(xviii) Though CPC and the Evidence Act are not applicable strictly, (Section 19), but the settled principles do apply. The power of Arbitral Tribunal to determine the admissibility, relevance, materiality and weight of any evidence just cannot be overlooked.

To decide jurisdiction :

(xix)The Arbitrator is empowered to decide his own jurisdiction if objected and even the issue of existence of arbitration agreement (S/16). It should be decided as early as possible by passing reasoned order, as this could be additional ground of challenge u/Section 34 of the Arbitration Act.

Substantial laws customs commercial usages and practice

(xx) The Arbitrator is bound by the substantive laws of the land as well as procedural laws and practice and principle apart from the custom and usage of the trade referring the business and commerce between the parties, in all respects.

To Analyse the evidence and the record

(xxi) The Arbitrator is required to consider all the material and evidence/ documents placed by the parties on record read with the evidence led by the parties. The Arbitrator is, therefore, bound to analyse and appreciate the same by giving proper and correct interpretation of terms of the contract subject to provisions of law, before passing reasoned interim or final award. The Arbitrator to pass reasoned interim and/or final award, unless agreed otherwise.

To award interest prepost future interest as agreed if not as per the law

(xxii) The Arbitrator is required to consider/grant pre/post, pending and future interest as contemplated u/s 31 of the Arbitration Act.

The Doctrines to be followed

(xxiii)The Arbitrator cannot disregard the substantive and procedural law. The Arbitrator is therefore bound to take note of law; of interpretation, precedent, obiter dicta, ratio decidendi, Estoppel, acquiescence, waiver and res judicata, public policy, natural justice, fairplay and equity.

The communication/service of the award/interim or final.

(xxiv)The Arbitrator, if other side is absent, needs to send/serve a copy of the signed arbitral award as per the law so that the aggrieved party may take appropriate steps to challenge the same within limitation and as it is also enforceable, executable like decree.

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/prakash-kumar-sinha-appellant-hash…

(xxv) The Arbitrator, if application is moved, may correct an error or clarify the award, as contemplated u/s 33 of the Arbitration Act.

13. The relevant factor here again is that the aggrieved parties normally select their own procedure and Arbitrator/Judge to settle their disputes through the Arbitration proceedings. But, in view of specific provisions of MSCS Act2002, the parties have no choice to select their own Arbitrator to decide the dispute between the parties. Therefore, such Arbitrator appointed under any act just cannot claim that the provisions of CPC and/or Evidence Act are not applicable. The initiation of Arbitration proceedings referring to the Arbitration Act in my view, is nothing but the statutory Arbitral Tribunal created under the provisions of MSCS Act2002 and the Arbitration Act. Therefore, it is also necessary for such Arbitrator while deciding any issue for and/or against the parties, he must take note of the basic principle of CPC and/or the Evidence Act before assessing and/ or giving finding based upon the documents and material placed on record.

14. It is not the case that the Petitioners have admitted all the documents, on the contrary the reply and/or submission so raised shows that they raised various grounds including allegations of fraud and misrepresentation. They have made specific case subject to the validity of those basic documents. Therefore, in such situation the Bank ought to have led proper evidence to defend and to support the contents of these documents. It means, again an opportunity to the other side, if occasions come, even to cross examine the witnesses. In the present case, there is no evidence laid by the bank. The aspect of banking documents treating it to be governed by the provisions of the Banking Laws, cannot be accepted in favor of the bank, in a situation like this, when the claim was based upon the cause of action, and where the borrower failed to appear before the Tribunal, of the year 1989. There is no serious dispute on the basic cash credit facility was of Rs. 10 lacs. The case that it was subsequently enhanced to Rs. 15 lacs without due notice and/or knowledge of the guarantor and/or sureties is also another facet which the Arbitrator must have taken care note of, while deciding the award, when the basic claim was filed in the year 1992 when the governing law was MCS Act 1960.

15. The Petitioners were alleged to be the members of the society. The aspect of filing of claim against the principal borrower and the guarantors, even if any, on the basis of provisions of Section 85, under the MSCS Act2002 was not available under the MCS Act 1960, at the relevant time. The general principle of the Limitation Act was in force. The claim Petition was returned for want of jurisdiction. A fresh claim Petition was filed before the Arbitrator on 28 June 2006. The membership, even if any, was no way sufficient to say that the claim Petition so filed is within the limitation of three years. Section 85 of the MSCS Act2002 just cannot be invoked retrospectively, in such fashion, to protect their claims Petitions against the borrower and/or the guarantors.

16. As noted, the learned Arbitrator has dealt with the only contention raised by the Petitioners borrower on merits of the date but failed to take note of the fact

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/prakash-kumar-sinha-appellant-hash…

that though borrower served, as recorded, but not represented, the documents so referred and rely, certainly revolved around the case/claim of the main borrower. Therefore, while deciding the total claim and granting the award against all the parties, the bank''s documents ought to have been referred for the case and/or the documents of the borrowers also.

17. The aspect of removal of financial assistance and/or fresh application is also relevant factor, which ought to have been dealt with from the point of view of the Petitioners borrowers. Any change in banking documents, just cannot be made without consent of all the parties. The borrower''s changed application, cannot be taken as a foundation to impose liability on the guarantors, as their consent, as well as, signatures were also necessary. It is not the case of the claimant bank that they have signed theses documents twice.

18. The contention of the learned counsel appearing for the bank is that the learned Arbitrator has dealt with this facet taking note of the admitted signatures on these documents. The point is not the admitted signatures. The point is the facts and circumstances and alleged misrepresentation and the changes without the consent of the guarantors. The Claimant Bank, cannot unilaterally, without consent of all the borrowers change any terms and conditions of such bank documents. The Arbitrator has not dealt with this facet also.

19. The last and important facet is that the Arbitrator has passed the award and granted interest @ 17.5% from the date of recovery Suit i.e. from 20 June 1992 till 18 February 2003 and @ 14% p. a. from 19 February 2003 till the recovery of the same. Therefore, the findings should be given again that the Petitioners'' guarantors were the guarantors since the inception. The issue of jurisdiction and of limitation, therefore if goes to the root of the matter, then it follows the grant of interest on such awarded amount. The award is illegal and perverse and unsustainable.

20. The facts of insolvency proceedings and its effects on the parties and the litigation ought to have been discussed.

21. Therefore, taking overall view of the matter and considering the scope and purpose of Arbitration Act and proceedings, and as observed above, the award so passed is without jurisdiction and illegal. The Court u/s 34 of the Arbitration Act is entitled to interfere with the same.

22. Resultantly, the common award passed by the sole Arbitrator, in Arbitration Proceeding No. 206 of 2006, (Exhibit A), is quashed and set aside. Both these petitions are accordingly allowed. There shall be no order as to costs.

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/prakash-kumar-sinha-appellant-hash…