(2013) 01 BOM CK 0097

In the Bombay High Court

Case No : Arbitration Petition No. 1334 of 2010

Saraswat Cooperative Bank Ltd. APPELLANT

Vs

Konkan Mercantile Cooperative Bank Ltd. Harbour Crest, Mazagaon T.T. Mira Road Branch, Mumbai and Others RESPONDENT

Date of Decision : 29-01-2013

Acts Referred:
Arbitration and Conciliation Act, 1996 — Section 34

Citation : (2013) 7 BomCR 828

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

Bench : Single Bench

Advocate : Harshad Bbadbhade along with Mr. Harshad Sathe instructed by Ms. Swati Sawant, for the Appellant; Jamshed Lentin with Mr. A.A. Bhore, for the Respondent

Judgement

R.D. Dhanuka, J.—By this petition filed u/s 34 of the Arbitration & Conciliation Act, 1996, petitioner seeks to challenge the award dated 23rd June, 2010 made by the learned arbitrator allowing the claims made by the respondent against the petitioner in the sum of Rs. 5 lacs with further interest at the rate of 10% p.a. Some of the relevant facts for the purpose of deciding this petition are as under:

(a) Respondent nos. 2 to 5 are members of the respondent no. 1 bank. The respondent nos. 2 to 5 obtained housing loan of Rs. 5 Lacs from the first respondent. The first respondent issued Pay Order in favour of P & K Estate towards purchase of flat by respondent no. 2. It is the case of the first respondent that the said pay order was collected by the second respondent to hand it over to P & K Estate. Respondent nos. 2 to 5 executed various documents in favour of the first respondent for availing the said loan. The second respondent failed to make repayment of the loan to the first respondent. According to first respondent sum of Rs. 6,29,471/- was due and payable from respondent nos. 2 to 5 to the first respondent.

(b) The Petitioner is a collecting banker. On 28th September, 2004 M/s. Satkar

Cooperative Credit Coop. Society made an application to the petitioner for opening current account for clearing cheques/drafts etc. drawn in favour of their constituents. The Petitioner opened an account in its Masjid Bandar Branch bearing Account No. APOB 3321.

(c) On 4th January, 2005, said M/s. Satkar Credit Cooperative Society sent Pay Order bearing No. 8764 amounting to Rs. 5 lacs drawn on Konkan Mercantile Bank for the purpose of clearing. The said Pay Order was drawn in favour of P & K Estate. On the backside of the said Pay Order, an endorsement was made by M/s. P & K Estate instructing to pay the said amount to Satkar Cooperative Credit society. It is the case of the petitioner that after verifying the said endorsement made by M/s. P & K Estate and said endorsement having been confirmed by Satkar Credit Cooperative Society, the petitioner sent the said Pay Order for clearance to Konkan Mercantile Bank, the first respondent herein. The respondent no. 1 bank released the payment on the said Pay Order which was issued by the first respondent itself.

(d) The first respondent filed dispute u/s 84 of the Multi State Cooperative Societies Act, 2002 and initially joined respondent nos. 2 to 5 only as respondents. The first respondent thereafter made an application for adding petitioner herein as necessary party in the said proceedings without giving any notice to the petitioner and without effecting the service of the said application on the petitioner. The learned arbitrator allowed the said application and impleaded the petitioner as respondent no. 5 to the said proceedings. The Petitioner thereafter filed written statement and resisted the claim of the first respondent. It was the case of the petitioner that Satkar Credit Coop. Society had opened current account with the petitioner with sole intention for clearing the cheques of the said credit society as the said society did not have clearing facility with Reserve Bank of India. While availing the said facility, the said credit society had executed indemnity bond in petitioner''s favour promising to indemnify the petitioner if any loss was occurred to the petitioner due to clearing facility availed of by the said society. The first respondent filed claim affidavit before the learned arbitrator. The Petitioner filed an application to cross examine the witnesses of the first respondent. The learned arbitrator rejected the said application, but allowed the petitioner to file written arguments. The petitioner accordingly filed written arguments on 21st April, 2010. By an award dated 23rd June, 2010, the learned arbitrator observed that in view of the indemnity bond executed by said Satkar Credit Coop. Society, in favour of the petitioner, it was presumed that if any cheque or pay order was deposited by the respondent nos. 2 to 5 for clearance, the whole responsibility would be upon the petitioner for clearance of such cheque or pay order. The learned arbitrator rendered a finding that in this case, Satkar Credit Coop. Society had deposited a Pay order amounting to Rs. 5 Lacs dated 4th January, 2005 which was drawn on first respondent Bank for the sole purpose of clearance of the said pay order, which was drawn in favour of P & K Estate and thus it was sole responsibility of the petitioner to confirm genuineness of the Pay order deposited by the said society by following KYC norms. It is held that the petitioner bank also should have followed KYC norms while opening of the account of said Satkar Credit Coop. Society. The learned arbitrator held that the petitioner was equally responsible for repayment of the loan along with respondent nos. 2 to 5 to the extent of Rs. 5 lacs and declared that the first respondent was entitled to recover the amount of Rs. 6,29,471.80 with future interest at the rate of 10% p.a. with effect from 5th January, 2005 till realization from the respondent nos. 2 to 5 and a sum of Rs. 5,00,000/- with interest from the petitioner.

(e) The petitioner has challenged the said award in so far as it directs payment of Rs. 5 lacs with interest against petitioner is concerned.

2. The learned counsel for the petitioner submits that there was no arbitration agreement between the petitioner and first respondent and thus the entire proceedings were without jurisdiction.

3. Section 84 of the Multi State Cooperative Societies Act provides that the dispute between one Multi State Cooperative Society and any other Multi State Cooperative Society has to be referred to arbitration in accordance with section 84. In my view there is no substance in this submission made by the petitioner that there was no arbitration agreement between the parties or that the proceedings were without jurisdiction.

4. The next submission of the petitioner is that no notice of hearing or copy of the application was served upon the petitioner by the first respondent for impleading the petitioner as party to the arbitration proceedings and the said order impleading the petitioner as party respondent by the learned arbitrator was an ex parte order. In my view the learned arbitrator ought to have given opportunity to the petitioner before impleading the petitioner as party respondent to the proceedings. Impleading the petitioner as party respondent without notice and hearing the petitioner, is in violation of principles of natural justice.

5. The learned counsel for the petitioner then submits that there was no locus or privity between the petitioner and the first respondent. Said Satkar Credit Coop. Society did not have facility of clearing and had opened an account with the petitioner for clearing of the cheques and or pay orders received by the said society. The said Satkar Credit Coop. Society had deposited the pay order with the petitioner for clearance. The said Pay Order was issued by the first respondent bank itself and endorsed by M/s. P & K Estate and thereafter by Satkar Credit Coop. Society. The petitioner was thus not required to go into the validity of the said Pay Order once the same was issued by the first respondent Bank and was endorsed by the party in whose favour the said pay order was issued. The said pay order was ultimately cleared by the first respondent bank. It was first respondent bank who was required to take action, if any, in case of any fraud or breach committed by its own customers and not the petitioner. The learned counsel invited my attention to the affidavit filed by the first respondent

bank before the learned arbitrator in which it was admitted that the petitioner was clearing agent. The learned counsel submits that Satkar Credit Coop Society was not party before the learned arbitrator. There was no cause of action against the petitioner. If there was any negligence, the same was on the part of the first respondent in verifying the credentials of its own account holders/borrowers. The learned counsel submits that the learned arbitrator has erroneously awarded sum of Rs. 5 lacs merely on the basis of indemnity bond executed by Satkar Credit Coop. Society and did not consider the other relevant documents and submissions advanced by the petitioner. The petitioner was not responsible for any breach committed by the respondent nos. 2 to 5 or by M/s. Satkar Credit Coop. Society. The learned counsel submits that though by the impugned award the learned arbitrator has directed respondent nos. 2 to 5 to pay to the first respondent, though the impugned award has not been challenged by the respondent nos. 2 to 5, no steps are taken by the first respondent against respondent nos. 2 to 5 to execute the said award.

6. Mr. Lentin, the learned counsel appearing for the first respondent submits that it was due to negligence of the petitioner Bank in verifying the credentials of account holder, the first respondent was required to clear payment under the said pay order of Rs. 5 lacs. It is submitted that the pay order was issued in favour of P & K Estate by the first respondent to entrust the said Pay order in favour of Satkar Credit Coop. Society and in turn the said society which had account with the petitioner had sent the said pay order for clearing. It is submitted that thus it was petitioner''s duty to follow KYC norms and to verify the credentials of the clients before sending the said pay order for clearance to first respondent bank. It is submitted that on the account opening form there was instruction that the said account shall be operated jointly and though the endorsement was made only by one account holder, without following the instructions of operation, the petitioner sent the said instrument for clearance to the first respondent which amounted to gross negligence on the part of the petitioner. It is submitted that the petitioner ought to have sent the said instrument back to the society for rectification and not to the first respondent. It is submitted that due to negligence on the part of the petitioner, there was loss caused to the first respondent bank which could be recovered by the first respondent from the petitioner. It is submitted that in view of the indemnity bond submitted by the said society, the petitioner could recover the said loss if any suffered by the petitioner from the said society. The documents produced on record and the pleadings indicate that the petitioner was only clearing agent. M/s. Satkar Credit Coop Society did not have facility for clearing of cheques and or pay orders of its customers. It is not in dispute that respondent nos. 2 to 5 were customers of the first respondent who had borrowed amount from the first respondent. The first respondent had issued pay order in favour of the party from whom respondent nos. 2 to 5 had agreed to purchase the property. The said pay order was issued by the first respondent and was entrusted to M/s. P & K Estate which was deposited by P & K Estate with Satkar Credit Coop. Society

and in view of said Satkar Credit Coop. Society not having the facility of clearance had deposited the said pay order for clearance with the petitioner. The Petitioner had no locus and or connection with the said P & K Estate or with respondent nos. 2 to 5 who were customers of the first respondent. It is also not in dispute that he said pay order was issued by the first respondent itself in favour of M/s. P & K Estate. In my view, in view of the pay order having been issued and signed by the first respondent there was no question of petitioner verifying the instructions of operation whether it was signed by one account holder and or signed jointly. In my view, cause of action of the respondent may be against respondent nos. 2 to 5 and not against the petitioner. In my view, impleadment of the petitioner as party respondent to dispute itself was without jurisdiction. There was no cause of action for the first respondent to seek any recovery from the petitioner. Perusal of the award indicates that the learned arbitrator has misdirected in impleading the petitioner as 5th respondent to the dispute in respect of which petitioner had no connection of whatsoever nature. The Petitioner could not be fastened with the liability merely on the basis of indemnity bond given by the said Satkar Credit Coop. Society in favour of the petitioner. In my view the entire award is vitiated on this ground and deserves to be set aside. The award shows total non application of mind on the part of the learned arbitrator. I, therefore, pass the following order:

The impugned award dated 23rd June, 2010 is set aside qua the petitioner. The petition is disposed of in the aforesaid terms. There shall be no order as to costs.