

(2012) 06 BOM CK 0116

In the Bombay High Court

Case No : Arbitration Petition No. 461 of 2010

The Saraswat Co-operative Bank Ltd.

APPELLANT

Vs

M/s. Jaynit Agencies and Others

RESPONDENT

Date of Decision : 11-06-2012

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 13, 34, 4, 5
Limitation Act, 1963 — Section 3, 3(1)
Maharashtra Co-operative Societies Act, 1960 — Section 91
Multi-State Cooperative Societies Act, 2002 — Section 84

Citation : (2012) 5 ALLMR 245 : (2012) 4 ARBLR 371 : (2012) 4 BomCR 400

Hon'ble Judges : Anoop V. Mohta, J

Bench : Single Bench

Advocate : Bhupesh V. Samant, for the Appellant; Javed Khan Akhtar the Respondents 1 to 4 and 6, for the Respondent

Judgement

Anoop V. Mohta, J.—On 11 May 2012, the learned counsel for Respondents 1 to 4 and 6 appeared and made his submissions. I have already heard the counsel for the Petitioner on 27 April 2012. The counsel for Respondents was absent on that day and on earlier occasion also as recorded in Order dated 27 April 2012. To give one more opportunity the matter was kept for final disposal on 4 May 2012 in chamber. The matter was further kept on 7 May 2012 for arguments on behalf of Respondents. The matter thereafter was listed on 10 May 2012 in chamber, but on request of the counsel for Respondents, the same was listed by consent on 11 May 2012. On 11 May 2012, heard both the parties and the matter was closed for judgment. After hearing both the parties and considering the rival submissions so raised, I am inclined to interfere with the Award based upon the reasons already recorded in the Order dated 27 April 2012.

2. The Petitioner has invoked Section 34 of the Arbitration and Conciliation Act, 1996 (for short, the Arbitration Act) and thereby challenged award dated 24 September 2009 passed by the Arbitrator Mr. R.A. Dalvi who was appointed u/s 84 of the Multi-State Co-operative Societies Act, 2002 (for short, "MSCS Act").

The basic ground is raised on the foundation of Arbitration Case No. ARB/SCB/001/2009, wherein an application u/s 13 of the Arbitration Act, the contesting party raised specific objection based upon the averments, that the same Arbitrator, in other, as many as more than 40-50 matters disqualified and withdrew from the Arbitration proceedings. The Petitioner-Disputant bank is the same. Those averments against the Arbitrator, therefore, applies squarely in the facts and circumstances of this case also. Admittedly, the Petitioner never raised such objection in the present case but specific grounds are raised in the Petition u/s 34 of the Arbitration Act. The Arbitrator is not made party by contending that no relief whatsoever, is sought against him. The allegations, even if so raised based upon the record of the bank, though in other matters, but directly concerned with the Arbitrator, as well as, the disputants. Therefore, those grounds and objections so raised with regard to the disqualification of the Arbitrator, in my view, and as contended, goes to the root of the matter.

3. The basic agreement with the Respondent firms and its partners are of the year 1984. The first demand notice was issued in the year 1996. The Petitioner filed dispute, governed by Section 91 of the Maharashtra Co-operative Societies Act (for short, the MCS Act), in the Co-operative Court, Mumbai and not before the Registrar under the then existing MSCS Act. In the year 2002, all those matters were returned, for want of jurisdiction. The Petitioner's Appeal was pending up to 2008 when ultimately they withdrew the Appeal for filing dispute before the Arbitrator as per Section 84 of the MSCS Act. The Petitioner, accordingly invoked those provisions and the Arbitrator was appointed in January 2009. The parties proceeded accordingly, before the Arbitrator. Though, issues were framed, there was no discussion and/or point raised, as well as, decided about the limitation.

4. The learned counsel appearing for the Petitioner has relied on the judgment of Venture Global Engineering Vs. Satyam Computer Services Ltd., the conduct of the Arbitrator as referred in the above case, goes to the root of the matter and certainly affect such Arbitration proceedings, basically when the Arbitrator in question was never appointed by consent of the parties. The Arbitrator was appointed in view of the provisions of Section 84 of the MSCS Act. Therefore, on the similar ground and the foundation, if the Arbitrator himself got disqualified and withdrew from the proceedings, there is no reason and as contended, by raising specific ground to the Petition, the Arbitrator should have returned the matter back as done in the other cases without passing the order against the Petitioner and/or rejecting the claim on merits.

5. The learned Arbitrator while deciding/rejecting the claim of the Petitioner nowhere dealt with the aspect of limitation. Though not raised, but as such claim in the present facts and circumstances, if are beyond the period of 3 years, the benefit if any, being the important provisions, need to be referred and decided by the Arbitrator, while granting and/or rejecting the claim. Whether it is within limitation, is a crucial factor to adjudicate the monetary claim in any of the

proceedings. I have in Sealand Shipping & Export Pvt.Ltd. vs. Kinship Services (India) Pvt. Ltd.², observed as under:

"25 The Apex Court, while dealing with section 3 of the Limitation Act, in Kamlesh Babu and Others Vs. Lajpat Rai Sharma and Others, observed as under:

17 It is well settled that section 3(1) of the Limitation Act casts a duty upon the Court to dismiss a suit or an appeal application, if made after the prescribed period, although, limitation is not set up a defence.

27 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, specially 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 frame work of substantive as well as procedural laws."

6. In totality, as submitted and I am also convinced that the matter needs to be remanded back for re-hearing on all the issues. The learned counsel appearing for the Respondents unable to justify the submissions made by the learned counsel appearing for the Petitioner on the grounds as recorded above.

7. In the result, the impugned Award dated 24 September 2009 needs to be quashed and set aside. However, considering the facts and circumstances, the Arbitration Petition be disposed of expeditiously preferably within four months from the date of receipt of copy of this order and the record. Both the parties to cooperate accordingly.

Therefore the following order:

(i) The impugned award dated 24 September 2009 passed by the Arbitrator is quashed and set aside.

(ii) The Arbitration Petition is remanded back for re-hearing before the Arbitral Tribunal other than the present Arbitrator.

(iii) The Arbitral Tribunal to decide all the issues including the issue of jurisdiction and limitation. The Arbitration Petition be disposed of preferably within four months from the receipt of the date of the judgment/order.

(iv) Both the parties to cooperate accordingly.

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