IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

ARBITRATION APPEAL NO. 15 OF 2014

ALONGWITH

CIVIL APPLICATION NO. 17 OF 2014
IN
ARBITRATION APPEAL NO. 15 OF 2014

Bank of India
Having its office at Asset Recovery
Branch, Zonal office – 1162/6, University
Road, Shivaji Nagar, Pune 411 005
Through its constituted Attorney,
Mrs. Sulabha Rathod ...Appellant

: V/S :

1. Yadav Consultancy Services Pvt. Ltd.
8, Satyam Apartment, Mukund Nagar,
Pune 411 037, through Shri. Prakash
Yadav (Original Applicant) address as above
2. The Ld. Recovery Officer
Debt Recovery Tribunal PMT,
Commercial Building No.1,
Shankarsheth Road, Pune.
3. Micro Small and Medium Enterprises
Facilitation Council, Pune,
Agriculture College Compound,
Shivajinagar, Pune 411 005
Through the Chairman ...Respondents

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Mr. S.U. Kamdar, Senior Counsel i/by. Mr. O.A. Das, Advocate for the appellant.
Mr. Prakash Yadav representative of respondent No.1, in person.

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Coram :- Smt. R.P. SondurBaldota, J.

19th November, 2015.

JUDGMENT :-

1). This Appeal preferred under Section 37 of the Arbitration and Conciliation Act, 1996 (for short "the Arbitration Act") is to challenge the order dated 16th June, 2014 passed by the District Court, Pune rejecting the application of the appellant under Section 34 of the Arbitration Act challenging the Arbitral Award. The impugned Award was an ex-parte Award passed by Micro, Small and Medium Enterprises Facilitation Council, Pune in favour of respondent no.1.

2). The petitioner, the bank had initiated recovery proceedings against one M/s. Sona Aluminium Finishers Private Limited vide R.P No. 06/2002 before the Recovery Officer, Debt Recovery Tribunal (DRT), Pune. The Recovery Officer, by his order dated 26th July, 2006 appointed respondent no.1 as the Court Commissioner for the purpose of taking possession of the property to be auctioned for recovery of the amount of claim of the bank. Under the order, respondent no.1 was to hold possession of the property with him until further instructions from the Recovery Officer. Respondent no.1 was authorized to represent the Tribunal before all Government, judicial and police authorities, if required, for taking over the possession. The fees of respondent no.1 were to be paid by the bank directly to respondent no.1.

3). Accordingly, respondent No.1 acted as the Court Commissioner. The property attached was auctioned and sale certificate was issued to the auction purchaser. Respondent No.1 took possession of the property on 9th November, 2006 as a custodian on behalf of the Debt Recovery Tribunal (DRT). On 13th November, 2006 the auction purchaser applied for delivery possession and undertook to pay the security personnel from the date of the possession. However, M/s. Sona Aluminium Finishers Private Limited filed appeal before Debt Recovery Appellate Tribunal (DRAT) and obtained stay of delivery of possession. In that circumstance, the bank applied for direction to the auction purchaser to pay the charges of the Court Commissioner i.e. respondent No.1. On 6th February, 2007 respondent No.1 filed a reply to the application and sought it's discharge. However, the Recovery Officer by his order dated 29th March, 2007 continued respondent no.1 as the Court Commissioner.

4). In the meantime, the dispute between the bank and M/s. Sona Aluminium Finishers Private Limited came to be compromised. The bank by it’s letter dated 4th May, 2007 informed respondent no.1 that, it did not desire to incur any further expenses by way of security charges in respect of the attached property and that had decided to discharge the Court Commissioner w.e.f. 8th May, 2007. It claimed that, it had already filed praecipe for the purpose before the Recovery Officer and called upon respondent no.1 to get it's bill until 8th May, 2007 endorsed by the Recovery Officer for payment with intimation that no further payment will be made to it by the bank. The bank has, thereafter, paid charges of respondent no.1 as the Court Commissioner upto 8th May, 2007. Thereafter, by his order dated 12th June, 2007 the Recovery Officer directed the bank to continue to pay the charges of respondent no.1. The bank challenged the order in DRT, Pune by preferring Appeal No. 25 of 2007 to which, the respondents were M/s. Sona Aluminium Finishers Private Limited, the auction purchaser and respondent no.1. By the order dated 24th July, 2008 the DRT set aside the order of the Recovery Officer and directed him to take steps for recovery of charges of respondent no.1 from the auction purchaser for the period of 8th May, 2007 onwards. The auction purchaser challenged the order vide Appeal No.589 of 2008 before the Debt Recovery Appellate Tribunal, which appeal came to be dismissed for default on 30th May, 2012. In the meanwhile, respondent no.1 approached this Court on the issue by filing Writ Petition No. 10259 of 2011. But in view of pendency of the appeal by auction purchaser the writ petition was disposed off without orders.

5). Respondent no.1, then approached respondent no.3, Micro, Small and Medium Enterprises Facilitation Council, Pune for arbitration, under Micro, Small and Medium Enterprises Development Act, 2006 ("MSMED Act" for short) by filing Petition No. 28 of 2012 for recovery of balance outstanding payment. The Council had issued in all four notices to the bank on 5th July, 2012, 9th July, 2012 and 26th July, 2012 and 5th September, 2012. By the last notice dated 5th September, 2012 the bank was called upon finally, to file it's reply on or before 10th September, 2012 with a caution that otherwise ex-parte decision will be taken. The bank, however, failed to file it's say to the petition before the Council. The petition was then decided ex-parte against the bank by the award dated 12th September, 2012 directing the bank to pay a sum of Rs.1,62,82,079/- with interest at the rate of 24%p.a. within a period of one month from 12th September, 2012. Thereafter, respondent no.1 filed darkhast proceedings before the District Court for execution of the Award. By the order dated 18th March, 2013 the property of the bank was directed to be attached. Then the bank preferred Writ Petition No. 2877 of 2013 in this Court wherein interim relief was granted to the bank by the order dated 19th March, 2013 on condition that the bank deposits amount of Rs.1,93,22,590/- in this Court. Accordingly, the bank deposited the amount on 25th March, 2013.

6). On 14th February, 2013 the bank had filed application before the Council for setting aside the award. That was withdrawn as not pressed on 27th September, 2013. It then filed Miscellaneous Civil Application No. 352 of 2013 under Section 34 of the Arbitration Act read with Section 19 of MSMED Act in the District Court, Pune to challenge the award. By the order dated 16th June, 2014 the District Court dismissed the application. Being aggrieved by the order, the bank filed the present appeal which was admitted on 11th July, 2014, and it's hearing expedited.

7). The bank had contended that, the Council could not have arbitrated the dispute between it and respondent no.1 because the bank is not a service purchaser and as such not amenable to the jurisdiction of the Council. In any case, according to it, the dispute if any was between respondent no.1 and the auction purchaser or the recovery officer. The next contention of the bank was that, the award had been passed without giving any opportunity of hearing to it and therefore it was against the principles of natural justice. The next contention of the bank was that, in view of settlement of the dispute between it and M/s. Sona Aluminium Finishers Private Limited, the recovery proceedings came to an end and the bank could not have been held liable to pay the charges of respondent no.1 as per the order of the Presiding Officer, DRT in Appeal No. 25 of 2007. The bank had also alleged that, the claim of respondent no.1 for payment of charges from 8th May, 2007 onwards was barred by the law of limitation since the proceedings for recovery had been filed by respondent no.1 in the month of June, 2012.

8). Respondent no.1, contested the application alleging that the application was barred by limitation provided under Section 34(3) of the Arbitration Act and there was no application for condonation of delay. He also alleged another bar against the application i.e. bar under Section 19 of the MSMED Act, the bank had not deposited 75% of the amount of the Award while filing application before the Court. According to it, the amount deposited by the bank in this Court pursuant to the order passed in Writ Petition No. 2877 of 2013 cannot fulfill the condition of pre-deposit of 75% as per Section 19 of MSMED Act. It was next contended by it that, the application of the petitioner was barred by *res-judicata* since the bank had earlier filed application before the Council on 14th February 2013 for setting aside the *ex-parte* order and, thereafter, also approached this Court.

9). On merit, the case of respondent no.1 was that, since it had provided services to the bank by functioning as the Court Commissioner, it could take recourse to arbitration under MSMED Act. It's appointment as the Court Commissioner had been made at the instance of the bank. By the order dated 29th March, 2007 Recovery Officer had asked the bank to continue to pay the charges of respondent no.1. The bank did not challenge that order. Therefore, the same has attained finality. It is also pointed out that the auction purchaser denied his liability to pay charges of respondent no.1 as he was never put in possession of the secured assets. As regards the allegation that the impugned award was against the principles of natural justice, respondent no.1 points out that the notice dated 5th September, 2012 was not the only notice sent by the Council to the bank. The Council had sent notices dated 5th July, 2012, 9th July 2012, 27th July, 2012 and lastly 5th September, 2012. Despite receipt of the earlier notices, the bank had failed to appear before the Council and file it's say.

10). The District Court by the order impugned in the present appeal has held that, the application of the bank was not filed within the prescribed period of limitation under Section 34(3) of the Arbitration Act, and the application was not tenable in view of the application filed by the bank on 14th February, 2013.

11). The Award challenged by the bank is dated 12th September, 2012. The application under Section 34 of the Arbitration Act to challenge it was filed on 1st April, 2013. As such, the same was barred by limitation provided under Section 34(3) of the Arbitration Act. The bank had sought to contend that, though the Award had been passed on 12th September, 2012, it had received it's certified copy only on 12th February, 2013. The application for the certified copy was made on 11th October, 2012. Respondent no.1, however, had pointed out that certified copy of the Award had been served upon the bank by it, as far back as on 4th October, 2012, and submitted that, with that certified copy, it was possible for the bank to file application under Section 34 of the Act within the prescribed period of limitation. Respondent no.1 had produced acknowledgement of service of certified copy upon the appellant. The bank had not disclosed this fact before the District Court at the time of filing of the application. The District Court also noted that, the application for certified copy itself had been delayed by 29 days. Since the appellant had received certified copy of the impugned Award on 4th October, 2012, it ought to have filed the application for setting the Award on/or before 4th January, 2013. Thus, the application was barred by the law of limitation.

12). In my opinion, the view taken by the District Court on the question of limitation is correct. In addition, it is to be seen that, after applying for certified copy of the award on 11th October, 2012 the bank simply waited until 12th February, 2013 despite receiving certified copy from respondent no.1 when it could have and ought to have filed the application immediately. Further, it is obvious from the record that, the Bank must have become aware of the award on 13th September, 2012 because, according to it, that is the date on which the Council had fixed the hearing. In that case, it must be presumed that the representative of the bank had visited the office of Council on 13th September, 2012. If that is so, there is no propriety in applying for certified copy, as late as on 11th October, 2012. This delay is unexplained.

13). Mr. Kamdar, the learned Senior Counsel appearing for the Bank submits that, the period of limitation to challenge the award would start running from the date on which certified copy of the award is served upon the party by the Arbitrator/Council and not from the date of the order. Since the bank received the certified copy on 12th February, 2013 the period of limitation started running from that date and the application filed on 1st April, 2013 was within the period of limitation of 3 months. Mr. Yadav, for respondent no.1 points out on the other hand that, the award in question would be governed by Micro, Small and Medium Enterprises Facilitation Council Rules, 2007 framed by the State Government vide Section 21(3) and 30 of MSMED Act under which the parties are to file application within seven days for copy of the award.

14). The argument to Mr. Kamdar, needs to be tested on the anvil of Section 31 and Section 34 of the Arbitration Act. The heading of Section 31 is “Form and contents of arbitral award”. It’s sub-section (5) provides that, after the arbitral award is made, a signed copy shall be delivered to each party. This according to the bank, was not complied with by the Council and the bank on 12th October, 2013 applied for certified copy of the Award.

15). The heading of Section 34 is, “Application for setting aside arbitral award”. Sub-section 3 thereof, which provides for limitation for filing the application reads thus -

> “34(3). An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal :
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> Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of third days, but not thereafter.”

It is clear from bare perusal of the above provision that, the period of limitation thereunder, starts running from the date of receipt of the arbitral award by a party. There is no qualification added in the provision to the receipt of the arbitral award as receipt of the arbitral award from the arbitrator himself under section 31 of the Arbitration Act. Therefore, receipt of certified copy of the award from respondent no.1 must be held to be the starting point of limitation under Section

34(3) of the Arbitration Act. In the circumstances, the District Court is correct in it's finding that the application of the petitioner was barred by the limitation under Section 34(3) of the Arbitration Act.

16). The next argument of Mr. Kamdar is of violation of principles of natural justice. Mr. Kamdar submits that, the notice dated 5th September, 2012 sent by the Council to the bank was for appearance before the Council for the hearing on 13th September, 2012 but the Council pronounced it's award one day in advance i.e. on 12th September, 2012. Thus, the Award was passed without proper notice and without affording an opportunity of hearing to the Bank. Mr. Yadav, of respondent no.1, points out that, the impugned Award has been passed ex-parte not because of failure on the part of the bank in appearing before the Council on 13th September, 2012. He submits that, prior to 5th September, 2012 there were three more notices sent to the Bank i.e. notices dated 5th July, 2012, 9th July, 2012 and 26th July, 2012. The Bank had not responded to any of the notices. By the last notice dated 5th September, 2012 the Council had called upon the Bank to submit its say before the Council on/or before 10th September, 2012. The bank had failed to submit it's say on/or before that date. The bank, on the other hand, relies upon it's reply dated 8th September, 2012 addressed to the Council in which it had claimed that two of the notices i.e. the notice dated 9^{th} July, 2012 and 26^{th} July, 2012 had not been received by it. Acceptance of this claim, can be of no help to the Bank, since this would mean that, it had undisputedly received the notice dated 5^{th} July, 2012 and despite receipt thereof it had not appeared before the Council to contest the application of respondent no.1. In any case, the letter dated 5^{th} September, 2012 had called upon the Bank to submit its say on/or before 10^{th} September, 2012 and the Bank had failed to comply with the same. Therefore, there is no substance in the complaint of the bank that it was not afforded an opportunity of hearing by the Council. Strangely, in their response dated 8^{th} September, 2012 the Bank had only requested for copies of the notices dated 9^{th} July, 2012 and 26^{th} July, 2012 and did not say anything about submitting its say on/or before 10^{th} September, 2012 not even a request for more time to file reply.

17). The third submission of Mr. Kamdar, is based upon the order of DRT, Pune passed in Appeal No. 25 of 2007 on 24^{th} July, 2008 by which DRT directed the Recovery Officer to take steps for recovery of charges of respondent no.1 for the period subsequent to 8^{th} May, 2007 from the auction purchaser. Mr. Kamdar, submits that since respondent no.1 did not challenge this order, it is binding upon it and as such it is not open to respondent no.1 to claim charges from the bank. Respondent no.1, refuted the argument with a submission that DRT had no jurisdiction to entertain Appeal No. 25 of 2007 against the order of the Recovery Officer, DRT, Pune. Mr. Yadav submits that, the bank could resort to Section 30 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 ("RDDB Act" for short) because RDDB Act gives jurisdiction and power to the Tribunal to entertain and decide the applications from Banks and financial institutions. This would mean that, the jurisdiction to be exercised by the Tribunal is in respect of the debt due to bank and not the liability of the Bank. I find substance in the contention of respondent no.1. Since DRT had no jurisdiction to entertain the appeal, the order dated 24th July, 2008 passed by it on the appeal preferred by the bank would be *non-est* and hence must be ignored.

18). One more argument advanced by Mr. Kamdar is that, MSMED Act, deals with sale and purchase of commodities. Therefore, the Council had no jurisdiction to arbitrate the dispute between the bank and respondent no.1. Further, respondent no.1 had failed to establish the fact that, the bank is the service buyer as contemplated under MSMED Act or that respondent no.1 is the service provider. I find no substance in the argument. MSMED Act, 2006 has been specially enacted to deal with the dispute of delayed payments to service provider like respondent no.1 and therefore Facilitation Council had jurisdiction to adjudicate the dispute.

19). It is unfortunate that, the entire approach and conduct of the bank in the matter of payment of charges of respondent no.1 leaves much to be desired. The bank is a nationalized bank and as such a public institution. It had filed an application before the Recovery Officer for recovery of its dues from M/s. Sona Aluminium Finishers Private Limited and had applied for sale of the attached properties. The Recovery Officer appointed respondent no.1 as the Court Commissioner for the purpose of taking possession of the property to be auctioned for recovery of the amount of claim of the bank. Under the order, respondent no.1 was to hold possession of the properties with it, until further instructions from the Recovery Officer. Respondent no.1 was authorized to represent the Tribunal before all Government and Judicial Authorities, if required for taking over the possession. After the auction of the property conducted and while challenge to the auction by M/s. Sona Aluminium Finishers Private Limited was pending, settlement had been arrived at between the bank and M/s. Sona Aluminium Finishers Private Limited. Thereafter, instead of simply refusing to pay the charges of respondent no.1 beyond 8th May, 2007 the bank ought to have made an application for discharge of the Commissioner in order to avoid its further liability. It is not even the case of the bank that, it had taken any such step. The record shows that, the bank and M/s. Sona Aluminium Finishers Private Limited had filed application at Exhibit-288 before the Recovery Officer on 30th April, 2007 for recording settlement, cancellation of sale and unconditional withdrawal of the appeal filed in DRAT after withdrawal of the amounts deposited by the debtor. During the hearing of that application, it was contended on behalf of the bank that, the compromise could be recorded by the Recovery Officer under Order 23(3) Civil Procedure Code, the auction of the property cancelled and the Commissioner discharged. The application was opposed by the auction purchaser who had deposited full price of the property of Rs.66,66,000/- in the auction process and who was issued sale confirmation certificate. He had contended that, he was entitled to get possession of the property auctioned. The application was disposed off by the Recovery officer holding that, the request for cancellation/setting aside the sale was beyond his jurisdiction and hence could not be granted. As regards the other prayers which were consequential to setting aside of the sale, the same could also not be granted. About discharge of respondent no.1 as the Court Commissioner, the Recovery Officer granted liberty to the bank to take possession of the property, after paying it's upto-date bills/charges. Further, if desired, the bank could file an application for taking possession from the Court Commissioner. Apparently, the bank had not taken any step. It had simply refused to pay the charges of the Commissioner and dragged respondent no.1 into a prolonged litigation. The bank is therefore liable to compensate respondent no.1 with costs.

20). For the reasons stated above, the appeal is dismissed. The bank is directed to pay costs quantified at Rs.5,00,000/- to respondent no.1. At the request of Mr. Kamdar, learned Senior Counsel appearing for the appellant, the interim order dated 11th July, 2014 is extended by a period of six weeks from today.

21). In view of dismissal of the appeal, Civil Application No. 17 of 2014 does not survive. The same is accordingly disposed off.

(SMT. R. P. SONDURBALDOTA, J)