

IN THE HIGH COURT OF JUDICATURE AT BOMBAY***ORDINARY ORIGINAL CIVIL JURISDICTION*****ARBITRATION PETITION NO. 396 OF 2013****ALONGWITH****ARBITRATION PETITION NO. 397 OF 2013****ALONGWITH****ARBITRATION PETITION NO. 401 OF 2013**

**1. M/s.Saba Chemicals,)
a registered partnership firm registered under)
the provisions of the Indian Partnership Act,)
1932, and having their registered address at)
3rd Floor, Rangoonwala Building,)
91, Mohammedali Road, Mumbai 400 003)
And also at Plot No.C1-B, 3415, GIDC,)
Ankleshwar - 393 002, Dist. Bharuch, Gujarat)**

**2. Mr.Merchant Mohammed Hanif Jusab,)
Partner of M/s.Saba Chemicals,)
3rd Floor, Rangoonwala Building,)
91, Mohammedali Road, Mumbai 400 003)
And also at 95, Memonwada Road,)
Abdullah Mansion, Mumbai 400 003)
And also at Shop No.121, Ground Floor,)
Heena Panna Shipping Centre, situated at)
Junction of Bhulabhai Desai Road, Tardeo,)
Mumbai 400 034)**

**3. Mr.Ibrahim Dawood Sopariwala,)
Partner of M/s.Saba Chemicals,)
3rd Floor, Rangoonwala Building,)
91, Mohammedali Road, Mumbai 400 003)
And also at Flat No.802, 8th Floor, 6, Motibai)
Street, Agdas Mahal, Agripada,)
Mumbai 400 011)**

**4. Mr.Satish Champaklal Dhanesha,)
Partner of M/s.Saba Chemicals,)**

3rd Floor, Rangoonwala Building,)
91, Mohammedali Road, Mumbai 400 003)
And also at Plot No. C1-B, 3415, GIDC,)
Ankleshwar – 393 002, Dist. Bharuch, Gujrat)

5. Mrs.Bilkis Mohd. Hanif Haji Jusab,)
7, Mohammed Manzil, Gr.Floor, Opp.Y.M.C.A.)
Playground, Mumbai 400 008)

6. Mr.Abdul Gaffar Haji Jusab,)
Flat No.706, 7th Floor, K.D.Building,)
Nagpada Junction, Mumbai 400 008)

..... Petitioners

VERSUS

1. Siddhartha Bhattacharya,)
Liquidator of The Memon Co-operative Bank)
Ltd., (in Liquidation),)
an erstwhile Co-operative Bank, registered under)
The Multi-State Co-operative Societies Act, 2002)
having their registered office and Central)
Administrative Office at Patel & Soni Arcade,)
1st Floor, 234, Belasis Road, Nagpada Junction,)
Mumbai 400 008 represented by Liquidator)

2. Mr.Sawant Navnath Devrao,)
B-7, Shree Ram Society, Near GER Office,)
Ankleshwar, District Bharuch)

..... Respondents

ALONGWITH **ARBITRATION PETITION NO. 395 OF 2013**

1. Mr.Merchant Mohammed)

2. Mrs.BilkisMohd.Hanif Haji Jusab,)
7, Mohammed Manzil, Gr.Floor, Opp.Y.M.C.A.)
Playground, Mumbai 400 008)

3. Mr.Satish Champaklal Dhanesha,)
partner of M/s.Saba Chemicals, 3rd Floor,)

Rangoonwala Building, 91, Mohammedali Road,)
Mumbai 400 003 And also at)
Plot No.C1-B, 3415, GIDC, Ankleshwar)
393 002, Dist. Bharuch, Gujarat) Petitioners

Versus

Shri Siddhartha Bhattacharya,)
Liquidator of The Memon Co-operative Bank)
Ltd., (in Liquidation), an erstwhile Co-operative)
Bank, registered under The Multi-State)
Co-operative Societies Act, 2002 having their)
registered office and Central Administrative)
Office at Patel & Soni Arcade, 1st Floor, 234,)
Belasis Road, Nagpada Junction, Mumbai)
400 008 represented by Liquidator) Respondents

ALONGWITH
ARBITRATION PETITION NO. 400 OF 2013

- 1. Mr.Imran Mohammed Hanif Merchant)**
7, Mohammedi Manzil, Ground Floor,)
Club Back Road, YMCA Road, Agripada,)
Mumbai – 400 008)
- 2. Mr.Merchand Mohammed Hanif Jusab,)**
7, Mohammedi Manzil, Ground Floor,)
Club Back Road, YMCA Road, Agripada,)
Mumbai – 400 008)
And also at 91, Mohammedali Road, 3rd Floor,)
Mumbai – 400 003)
And also at 95, Memonwada Road, Abdullah)
Mansion, Mumbai – 400 003. And also at)
Shop No.121, Ground Floor, Heera Panna)
Shopping Centre, Situated at Junction of)
Bhulabhai Desai Road, Tardeo, Mumbai)
400 034)
- 3. Mr.Satish Champaklal Dhanesha,)**
2/27, Bhari Building, J.B.Road, Sewree,)
Mumbai 400 015)

**And also at Plot No. C1-B, 3415, GIDC,)
Ankleshwar – 393 002, Dist. Bharuch, Gujrat)**

VERSUS

**1. Siddhartha Bhattacharya,)
Liquidator of The Memon Co-operative Bank)
Ltd., (in Liquidation),)
an erstwhile Co-operative Bank, registered under)
The Multi-State Co-operative Societies Act, 2002)
having their registered office and Central)
Administrative Office at Patel & Soni Arcade,)
1st Floor, 234, Belasis Road, Nagpada Junction,)
Mumbai 400 008 represented by Liquidator) Respondents**

Mr.H.Pandya, i/b. Mr.Shashank Fadia for the Petitioners.

Mr.N.N.BHadrashete for Respondent no.1.

CORAM : R.D. DHANUKA, J.

RESERVED ON : 01st APRIL, 2015

PRONOUNCED ON : 8th MAY, 2015

JUDGMENT :-

1. By these five petitions, the petitioners have impugned the arbitral award in Arbitration Petition No.396 of 2013 dated 8th December, 2012, in Arbitration Petition Nos.395 of 2013, 400 of 2013 and 401 of 2013, all dated 15th December, 2012 and in Arbitration Petition No.397 of 2013 dated 8th December, 2012, passed by the learned arbitrator respectively under section 34 of the Arbitration and Conciliation Act, 1996 (for short the said 'Arbitration Act'). Some of the relevant facts for the purpose of deciding these petitions are as under :-

2. Since the facts and issues involved in all the aforesaid petitions are identical,

the learned counsel appearing for the parties have addressed this court in Arbitration Petition No.396 of 2013 and have agreed that the reasons to be recorded by this court in the said arbitration petition would also apply to the other four petitions and separate reasons in those four petitions need not be recorded. All the five petitions are thus disposed of by a common judgment. The petitioners herein were the original respondents in the arbitral proceedings whereas the respondent no.1 who is liquidator of the Memon Co-operative Bank Ltd. was the original claimant.

3. The Memon Co-operative Bank Ltd. is registered under the provisions of the Multi State Co-operative Societies Act, 2002 (hereinafter referred to as the said Act of 2002). Sometimes in the year 1999, the petitioner no.1 firm had made an application for loan facility of Rs.15,00,000/-. The other petitioners and respondent no.2 stood as guarantors for the petitioner no.1. In the year 1999, the said bank advanced loan facility to the extent of Rs.15 lacs to the petitioner no.1 against equitable mortgage of property i.e. Plot No.C1-B, admeasuring 704 square meters togetherwith building/structure thereon situated at 3415 GIDC Estate, Ankleshwar, District Bharuch and against hypothecation of machineries. The petitioners and respondent no.2 signed various documents in favour of the said bank.

4. It is the case of the respondent no.1 that as on 28th February, 2009, the petitioner no.1 firm and the guarantors were liable to pay to the said bank in respect of the said loan amount of Rs.68,20,328/-inclusive of interest as on that date. The petitioners had committed default in making repayment of the said loan. On 14th April, 2009 the said bank issued a notice through their advocates and called upon the petitioners to make the said payment with interest.

5. On 6th July, 2009, the said bank filed a statement of claim before the learned arbitrator under section 84(2) (a) of the said Act of 2002 inter alia praying for a declaration that the petitioners and respondent no.2 were jointly and severally indebted to the said bank to the extent of Rs.72,34,164/- with further interest thereon and for a declaration that the petitioners and respondent no.2 had duly mortgaged the said mortgaged property standing in the name of the petitioner no.1 to the said bank. The said bank also applied for redemption of the mortgage and for sale thereof.

6. On 16th October, 2009, the petitioners except one of the petitioner filed joint written statement in the said proceedings and denied the said claim filed by the bank and raised several issues. Before the learned arbitrator, the bank filed compilation of the documents which was relied upon by the said bank before the learned arbitrator. On 7th October, 2009, the petitioners filed an application before the learned arbitrator for setting aside two interim orders and sought removal of the then arbitrator on the ground of bias and misconduct. The said application dated 7th October, 2009 filed by the petitioners was not pressed.

7. On 16th January, 2010, the said bank was directed to file its affidavit of evidence by way of examination in chief on or before 9th January, 2010 and the matter was posted for cross examination on 16th January, 2010. The petitioner was served with a copy of the affidavit of evidence in support of the claim filed by the said bank on 2nd February, 2010. It is the case of the petitioners that the learned arbitrator thereafter objected about the appearance of the counsel of the petitioners on the ground that he had not filed vakalatnama. It is the case of the petitioners that though the then learned arbitrator ultimately allowed the learned counsel to

appear by recalling his earlier order dated 10th May, 2010, in the meanwhile the said bank filed another affidavit in lieu of examination in chief of evidence alongwith various documents on 25th May, 2010. The petitioners objected to the said bank filing the said new affidavit of evidence on various grounds. The learned arbitrator allowed the bank to file affidavit of evidence alongwith documents on record and directed the petitioners to file their objections to the said affidavit of evidence. The petitioners made various allegations against the then learned arbitrator.

8. On 26th July, 2010, the learned arbitrator recused himself as an arbitrator and directed the administrator of the bank to take appropriate decision. The petitioners were thereafter informed by the bank that the new arbitrator Mr.P.L.Joshi would be hearing the five arbitration claims filed by the bank against the petitioners.

9. On 21st October, 2010, the petitioners filed interim application inter alia challenging the jurisdiction of Mr.P.L.Joshi as an arbitrator and applied for his removal on the ground that he was not validly appointed and that the arbitrator had no power to appoint arbitrator. The said application was opposed by the bank by filing a reply on 8th December, 2010. In the said reply, the bank relied upon orders dated 30th July, 2003 and 28th May, 2010 passed by the Commissioner for Co-operation and Registrar of Co-operative Societies, Maharashtra State inter alia appointing the persons named therein as an arbitrators of the said Memon Co-operative Bank, Mumbai. The petitioners thereafter raised an issue challenging the validity of the order dated 2nd August, 2010 passed by the administrator on the ground that the said administrator had no power whatsoever to appoint and/or transfer and/or assign the five matters to a new arbitrator Mr.P.L.Joshi under the provisions of the said Act of 2002. It is the case of the petitioners that on 2nd

August, 2010 the administrator passed an order appointing Mr.P.L.Joshi as an arbitrator instead and in place of the erstwhile arbitrator who had recused himself to act as an arbitrator.

10. The petitioners thereafter filed various applications raising various issues before the learned arbitrator including application challenging the jurisdiction and appointment of Mr.P.L.Joshi as an arbitrator. On 26th August, 2011 the liquidator of the said bank informed the petitioners that Mr.P.L.Joshi had withdrawn himself as an arbitrator in the said five claims filed by the bank against the petitioners and it was decided to transfer the cases pending before Mr.P.L.Joshi to the new arbitrator Dr.Justice P.D.Upasani, former judge of this court. It is the case of the petitioners that in the hearing held on 20th September, 2011, the petitioners were furnished with the copy of the order dated 23rd May, 2011 passed by Mr.Rajendra Kumar Tiwari, Joint Secretary to the Government of India and Central Registrar, Co-operative Societies, inter alia appointing Mr.Siddharth Bhattacharya, as an liquidator of the said bank.

11. The petitioners were furnished with the copy of the order dated 30th June, 2011 passed by the Commissioner for Co-operation and Registrar of Co-operative Societies, Maharashtra State, Pune by appointing Dr.Justice P.D.Upasani, former judge of this court as a sole arbitrator. The petitioners objected to the appointment of new arbitrator on 22nd September, 2011. The learned arbitrator allowed the application made by the said bank to carry out amendment to the statement of claim. It is the case of the petitioners that the parties were thereafter negotiating for settlement of the dispute.

12. On 23rd November, 2011, Bank of Baroda, Morland Road Branch, Gulmohar

Apartment, Mumbai 400 008 issued a demand notice under the provisions of Securitization and Reconstructions of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) to the petitioners relying upon the facilities granted by the Memon Co-operative Bank Ltd. to the petitioners. The petitioners replied to the said notice issued by Bank of Baroda.

13. It is the case of the petitioners that those five arbitration claims were listed on the board of the learned arbitrator on 20th November, 2012. The advocate of the petitioners was not available and thus the application for adjournment was sought by the petitioners. The learned arbitrator however decided the application of the petitioners raising objection of the petitioners about the maintainability of the second affidavit of evidence and closed the proceedings for declaring award. On 8th December, 2012, the learned arbitrator made an award thereby declaring that the petitioners and respondent no.2 herein had jointly and severally indebted to the said bank to the extent of Rs.71,36,868/- as on 15th June, 2009 with further interest at the rate of 12% per annum thereon from the date of filing of claim petition till realization. The learned arbitrator also declared that the petitioners and respondent no.2 had duly mortgaged the property at Bharuch, Gujarat standing in the name of the petitioner no.1 to secure the repayment of the loan granted by the said bank. The learned arbitrator fixed the period of three months for redemption and after expiry of three months directed that the said mortgaged property be sold and the proceeds thereof be appropriated towards the satisfaction of the claim made by the bank. The said impugned award alongwith other four awards have been impugned by the petitioners in these five arbitration petitions.

14. Mr.Pandya, learned counsel for the petitioners submits that the petitioner no.1 firm could not have become member of the bank at all being not an

individual. He submits that the membership number of the proposers mentioned on the application forms did not tally with the numbers mentioned in the other documents. The petitioner no.1 also denied the signature on the membership application. He submits that in any event, since the bank did not communicate their decision on the applications for membership filed by the petitioners within the time prescribed under section 25(4) of the said Act, 2002, the application made by the petitioners were deemed to have been rejected. He submits that the proceedings thus initiated by the bank under the provisions of Act, 2002 which could be initiated only against the members of the bank were totally without jurisdiction. He submits that the provisions of the said Act, 2002 were thus not applicable at all.

15. Learned counsel submits that though one of the petitioners i.e. petitioner no.2 was director of the said bank till 2001, he was subsequently disqualified. He submits that the claims made against the petitioners were even otherwise barred by law of limitation. He submits that since the petitioners were not the members of the bank, the provisions of Limitation Act, 1963 would apply. He submits that the statement of claim was filed by the said bank against the petitioners much after expiry of the three years from the date of the alleged default and thus claims were barred by law of limitation. Learned arbitrator had allowed time barred claims against the petitioners and on this ground also the award deserves to be set aside.

16. Learned counsel for the petitioners submits that the Commissioner for Co-operation and Registrar of Co-operative Societies, Maharashtra State had appointed two arbitrators. The learned Commissioner for Co-operation and Registrar of Co-operative Societies, Maharashtra State ought to have referred the particular dispute only to one arbitrator and could not have appointed two

arbitrators. He submits that the former judge of this court who was appointed as an arbitrator, his term had expired within one year from the date of his appointment and he could not have appointed any other arbitrator.

17. Learned counsel for the petitioners submits that the liquidator could not have appointed Dr. Justice P.D. Upasani (retired) as an arbitrator as he had no power to appoint any arbitrator. He submits that in any event, in view of the liquidation of the bank, the said bank ceased to be multi-state bank and could not have invoked arbitration under section 84 of the said Act of 2002. Learned counsel submits that the learned Commissioner had appointed the learned arbitrator much after the winding up order of the said Memon Co-operative Bank Ltd. which appointment was thus illegal. He submits that section 90 of the said Act, 2002 does not give any authority to the liquidator to transfer any arbitration matter from one arbitrator to another arbitrator. He submits that since the Bank of Baroda had taken over the assets of the Memon Co-operative Bank Ltd. and since the said Bank of Baroda had issued a notice under the provisions of Securitization Act, the liquidator of the bank could not have continued the arbitration proceedings simultaneously. He submits that though this issue was not raised in the arbitral proceedings before the learned arbitrator, this issue can be raised even in this petition filed under section 34 since it came to the notice of the petitioners after declaration of the award.

18. Learned counsel for the petitioners submits that the learned arbitrator rejected the objection raised by the petitioners in taking affidavit of evidence on record and closed the proceedings for making an award instead of fixing the date for cross-examination of the said witness and thereafter for oral arguments.

19. It is submitted by the learned counsel for the petitioners that two different

entities i.e. Bank of Baroda which initiated the proceedings under the SARFAESI Act, 2002 and the liquidator who filed a suit under Section 84 of the said Act, 2002 could not have initiated two separate proceedings against the petitioners arising out of the same claim. The arbitral proceedings were thus without jurisdiction and, therefore, the impugned award is nullity.

20. The next submission of the learned counsel for the petitioners is that the learned arbitrator could not have granted any relief in favour of the respondents inter alia praying for enforcement of mortgage, redemption of mortgage and for sale of mortgaged properties of the petitioner no.1 and the said reliefs claimed by the respondents were without jurisdiction. He submits that the relief in respect of the enforcement of the mortgage cannot be adjudicated upon by an arbitrator and in view of Order XXXIV of the Code of Civil Procedure, 1908, the proceedings in rem can be tried only by a Civil Court. In support of this submission, the learned counsel placed reliance on the judgment of the Supreme Court in the case of **Booz Allen and Hamilton Inc. Vs. SBI Home Finance Ltd. & Ors.**, reported in **2011 (5) SCC 532** and in particular paragraphs 21, 22, 23 and 27 which read thus :-

“21. The term ‘arbitrability’ has different meanings in different contexts. The three facets of arbitrability, relating to the jurisdiction of the arbitral tribunal, are as under : (i) whether the disputes are capable of adjudication and settlement by arbitration? That is, whether the disputes, having regard to their nature, could be resolved by a private forum chosen by the parties (the arbitral tribunal) or whether they would exclusively fall within the domain of public for a (courts). (ii) Whether the disputes are covered by the arbitration agreement? That is, whether the disputes are enumerated or described in the arbitration agreement as matters to be decided by arbitration or whether the disputes fall under the ‘excepted matters’ excluded from the purview of the arbitration agreement. (iii) Whether the parties have referred the disputes to arbitration? That is, whether the disputes fall under the scope of the submission to the arbitral

tribunal, or whether they do not arise out of the statement of claim and the counter claim filed before the arbitral tribunal. A dispute, even if it is capable of being decided by arbitration and falling within the scope of arbitration agreement, will not be 'arbitrable' if it is not enumerated in the joint list of disputes referred to arbitration, or in the absence of such joint list of disputes, does not form part of the disputes raised in the pleadings before the arbitral tribunal.

22. Arbitral tribunals are private for a chosen voluntarily by the parties to the dispute, to adjudicate their disputes in place of courts and tribunals which are public for a constituted under the laws of the country. Every civil or commercial dispute, either contractual or non-contractual, which can be decided by a court, is in principle capable of being adjudicated and resolved by arbitration unless the jurisdiction of arbitral tribunals is excluded either expressly or by necessary implication. Adjudication of certain categories of proceedings are reserved by the Legislature exclusively for public fora as a matter of public policy. Certain other categories of cases, though not expressly reserved for adjudication by a public fora (courts and Tribunals), may by necessary implication stand excluded from the purview of private fora. Consequently, where the cause/dispute is inarbitrable, the court where a suit is pending, will refuse to refer the parties to arbitration, under section 8 of the Act, even if the parties might have agreed upon arbitration as the forum for settlement of such disputes. The well recognized examples of non-arbitrable disputes are : (i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody; (iii) guardianship matters; (iv) insolvency and winding up matters;

(v) testamentary matters (grant of probate, letters of administration and succession certificate); and (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.

23. It may be noticed that the cases referred to above relate to actions in rem. A right in rem is a right exercisable against the world at large, as contrasted from a right in personam which is an interest protected solely against specific individuals. Actions in personam refer to actions determining the rights and interests of the parties themselves in the subject matter of the case, whereas actions in rem refer to actions determining the title to property and the rights of the parties, not merely among themselves

but also against all persons at any time claiming an interest in that property.

Correspondingly, judgment in personam refers to a judgment against a person as distinguished from a judgment against a thing, right or status and Judgment in rem refers to a judgment that determines the status or condition of property which operates directly on the property itself. (Vide : Black's Law Dictionary). Generally and traditionally all disputes relating to rights in personam are considered to be amenable to arbitration; and all disputes relating to rights in rem are required to be adjudicated by courts and public tribunals, being unsuited for private arbitration. This is not however a rigid or inflexible rule. Disputes relating to sub-ordinate rights in personam arising from rights in rem have always been considered to be arbitrable.

27. An agreement to sell or an agreement to mortgage does not involve any transfer of right in rem but create only a personal obligation. Therefore if specific performance is sought either in regard to an agreement to sell or an agreement to mortgage, the claim for specific performance will be arbitrable. On the other hand, a mortgage is a transfer of a right in rem. A mortgage suit for sale of the mortgaged property is an action in rem, for enforcement of a right in rem. A suit on mortgage is not a mere suit for money. A suit for enforcement of a mortgage being the enforcement of a right in rem, will have to be decided by courts of law and not by arbitral tribunals. The scheme relating to adjudication of mortgage suits contained in Order 34 of the Code of Civil Procedure, replaces some of the repealed provisions of Transfer of Property Act, 1882 relating to suits on mortgages (section 85 to 90, 97 and 99) and also provides for implementation of some of the other provisions of that Act (section 92 to 94 and 96). Order 34 of the Code does not relate to execution of decrees, but provides for preliminary and final decrees to satisfy the substantive rights of mortgagees with reference to their mortgage security. The provisions of Transfer of Property Act read with Order 34 of the Code, relating to the procedure prescribed for adjudication of the mortgage suits, the rights of mortgagees and mortgagors, the parties to a mortgage suit, and the powers of a court adjudicating a mortgage suit, make it clear that such suits are intended to be decided by public for a (Courts) and therefore, impliedly barred from being referred to or decided by private for a (Arbitral Tribunals). We may briefly refer to some of the provisions which lead us to such a conclusion.

(i) Rule (1) of Order 34 provides that subject to the provisions of the Code,

all persons having an interest either in the mortgage security or in the right of redemption shall have to be joined as parties to any suit relating to mortgage, whether they are parties to the mortgage or not. The object of this rule is to avoid multiplicity of suits and enable all interested persons, to raise their defences or claims, so that they could also be taken note of, while dealing with the claim in the mortgage suit and passing a preliminary decree.

A person who has an interest in the mortgage security or right or redemption can therefore make an application for being impleaded in a mortgage suit, and is entitled to be made a party. But if a mortgage suit is referred to arbitration, a person who is not a party to the arbitration agreement, but having an interest in the mortgaged property or right of redemption, can not get himself impleaded as a party to the arbitration proceedings, nor get his claim dealt with in the arbitration proceedings relating to a dispute between the parties to the arbitration, thereby defeating the scheme relating to mortgages in the Transfer of Property Act and the Code. It will also lead to multiplicity of proceedings with likelihood of divergent results.

(ii) In passing a preliminary decree and final decree, the court adjudicates, adjusts and safeguards the interests not only of the mortgagor and mortgagee but also puisne/mesne mortgagees, persons entitled to equity of redemption, persons having an interest in the mortgaged property, auction purchasers, persons in possession. An arbitral tribunal will not be able to do so.

(iii) The court can direct that an account be taken of what is due to the mortgagee and declare the amounts due and direct that if the mortgagor pays into court, the amount so found due, on or before such date as the court may fix (within six months from the date on which the court confirms the account taken or from the date on which the court declares the amount due), the petitioner shall deliver the documents and if necessary re-transfer the property to the defendant; and further direct that if the mortgagor defaults in payment of such dues, then the mortgagee will be entitled to final decree for sale of the property or part thereof and pay into court the sale proceeds, and to adjudge the subsequent costs, charges, expenses and interest and direct that the balance be paid to mortgagor/defendant or other persons entitled to receive the same. An arbitral tribunal will not be able to do so.

iv) Where in a suit for sale (or in a suit for foreclosure in which sale is ordered), subsequent mortgagees or persons deriving title from, or

subrogated to the rights of any such mortgagees are joined as parties, the court while making the preliminary decree for sale under Rule 4(1), could provide for adjudication of the respective rights and liabilities of the parties to the suit in a manner and form set forth in Form Nos. 9, 10, and 11 of appendix 'D' to the Code with such variations as the circumstances of the case may require. In a suit for foreclosure in the case of an anomalous mortgage, if the plaintiff succeeds, the court may, at the instance of any party to the suit or any other party interested in the mortgage security or the right of redemption, pass a like decree in lieu of a decree for foreclosure, on such terms as it thinks fit. But an arbitral tribunal will not be able to do.

(v) The court has the power under Rule 4(2), on good cause being shown and upon terms to be fixed by it, from time to time, at any time before a final decree is passed, extend the time fixed for payment of the amount found or declared due or the amount adjudged due in respect of subsequent costs, changes, expenses and interest, upon such terms as it deems fit. The Arbitral Tribunal will have no such power.”

21. Learned counsel for the petitioners also placed reliance on the judgment of this Court in the case of **Vedansh Hospitality and Resorts Limited & Ors. Vs. New India Co-operative Bank Ltd. & Ors.**, reported in 2013 (4) Bom.C.R. 292 and in particular paragraphs 12, 13 and 15 in support of his submission that under Section 84 of the said Act, 2002, the learned arbitrator could not decide the issue of sale or redemption of the mortgaged properties. Paragraphs 12, 13 and 15 of the said judgment read thus :-

“12. Admittedly, the Arbitrator was appointed under Section [84](#) of the MSCS Act. The Arbitrator was not appointed by consent of the parties. The learned Arbitrator therefore, even otherwise considering Section [19](#) read with Section [34](#) of the Arbitration Act bound to take note of basic principles of CPC and Evidence Act before assessing and/or giving findings relying upon the documents and material on record as there was other agreed procedure. This Court in Prakash Kumar (Supra), referring to Sahyadri Earth Movers Vs. L & T Finance Limited 2011 (4) Mh. L. J. 200, has already observed as under:-

“14. 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 Act-2002, 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 Act-2002 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.”

13. So far as Clause 2 of the Award whereby, the learned Arbitrator has directed/permitted the Respondent Bank to dispose of the mortgaged, as well as, the hypothecated securities of all Opponents to recover the dues, need to be interfered with. The learned Arbitrator, as recorded above, is 2011 (4) Mh. L.J. 200 even otherwise bound by the provisions of the Arbitration Act. Therefore, there is no question of issuing such direction to dispose of the mortgaged, as well as, the hypothecated securities while passing the final award against the borrower/guarantor. The Arbitration Act provides the remedy, once the award attains finality to execute the same and/or to take appropriated steps to dispose of the mortgaged, as well as, the hypothecated securities. Such composite order of granting decree, as well as, passing final award on execution of the same, is impermissible. This Court in Jayant Industrial Packaging Limited, Mangrol Vs Saraswat Co-operative Bank Limited 2011(4) Mh. L.J. 128 has observed as under:-

“25 It is relevant to note that once the award is passed by the Arbitrator, appointed under the MSCS Act, for the enforcement of the said award, the provisions of Arbitration Act are applicable. There is no provision under the Arbitration Act like Sections [96](#) and [97](#) of the MSCS Act except Section [17](#) which empowers the Arbitrator to pass appropriate order of protection of the subject matter and/or properties involved in the disputes pending arbitration. Section [9](#) empowers the Court to pass appropriate order, prior, during and even after the conclusion of the Arbitration proceedings, till the award get executed. Therefore, even pending

the enforcement proceedings and/or Section [34](#) and/or Section [37](#) Appeal and/or pending enforcement, only the Court has power to pass protective and injunctive orders.”

15. The Apex Court recently in Booz Allen and Hamilton INC. (Supra) observed that the complicated issues with regard to the sale or redemption of mortgaged property needs to be adjudicated in Civil Court and not before or by the Arbitral Tribunal. We are concerned with the statutory Arbitration under Section [84](#) of the MSCS Act. However, considering the scheme and purpose of Section [84](#) of the MSCS Act, in the present case no further discussion is required in view of the other reasonings given in the matter.”

22. Learned counsel for the petitioners placed reliance on the judgment of the *Vedansh Hospitality and Resorts Limited & Ors. (supra)* and in particular paragraphs 17 to 20 on the ground that the learned arbitrator violated the principles of natural justice by not giving an opportunity to the petitioners to cross-examine the witness examined by the respondents.

23. Learned counsel for the petitioners placed reliance on the judgment of this Court in the case of *Jayant Industrial Packaging Ltd & Ors. Vs. Saraswat Co-operative Bank Ltd. & Anr.*, reported in 2012 (4) Bom. C.R. 222 and more particularly paragraphs 30 to 32 and would submit that the learned arbitrator could not have taken the documents filed by the respondents on record without consent and/or knowledge of the petitioners.

24. Learned counsel for the petitioners submits that the learned arbitrator took an affidavit of evidence of the respondents on record without hearing the petitioners. Learned arbitrator could have issued a direction permitting the petitioners to cross-examine the witness on the earlier occasion. Learned arbitrator thus could have atmost closed the cross-examination and could have

placed the matter on board for arguments. Since the learned arbitrator did not fix further hearing, the petitioners could not make any oral arguments before the learned arbitrator.

25. Learned counsel for the petitioners placed reliance on the judgment of the Supreme Court in the case of ***Pasupuleti Venkateswarlu Vs. Motor and General Traders***, reported in ***1975 (1) SCC 770*** and in particular paragraphs 2 to 5 thereof and would submit that since several facts came to the notice of the petitioners after declaration of the award which are crucial, the petitioners are entitled to rely upon those facts which came to the notice of the petitioners subsequently in this petition under Section 34 of the Arbitration Act.

26. Mr. Bhadrashete, learned counsel for the respondents, on the other hand, submits that under Section 86 of the said Act of 2002, the Central Registrar is empowered to make an order of winding up of Multi-State Co-operative Societies. Under Section 87 of the said Act, the Central Registrar is empowered to make an order of winding up of co-operative banks on the direction of Reserve Bank. Under Section 89 of the said Act, the Central Registrar is empowered to appoint a liquidator, if the order is passed for winding up of Multi-State Co-operative Societies by the Central Registrar under Section 86 of the said Act. Section 90 of the said Act provides for powers of liquidator.

27. Learned counsel submits that under Section 90(2) of the said Act, the liquidator has power to institute and defend suits and other legal proceedings on behalf of the Multi-State Co-operative Societies. Under Section 93 of the said Act, the Central Registrar has power to cancel registration of the Multi-State Co-operative Societies. The registration of the respondent no.1-bank has not been

cancelled by the Central Registrar. The appointment of liquidator is continued. Learned counsel submits that on 2nd May 2011, the Reserve Bank of India has cancelled the banking license of the respondent no.1-bank under Section 22 of the Banking Regulations Act, 1949. On 29th December 2010, Government of India has addressed a letter to the Bank of Baroda approving the scheme of arrangement for transfer of specific assets and liabilities of the respondent no.1 to the Bank of Baroda. He submits that the respondent no.1-bank is still functioning as Multi-State Co-operative Bank and not ceased to be Multi-State Co-operative Bank as canvassed by the learned counsel for the petitioners. Only certain specific assets and liabilities of the respondent no.1-bank are transferred to the Bank of Baroda. The liquidator has thus powers to recover the pending dues of the respondent no.1 from its debtor. He submits that on the date of approval of scheme by the Reserve Bank of India, recovery proceedings filed against the petitioners were pending. He submits that in view of approval of the scheme by the Reserve Bank of India, the submission of the learned counsel that the Bank of Baroda could not have filed any proceedings under the SARFAESI Act, 2002 is of no significance.

28. In so far as the issue raised by the petitioners that the petitioners were not given an opportunity to cross-examine the witness examined by the respondents is concerned, it is submitted that the first affidavit filed by the respondents was not an affidavit of evidence but was an affidavit in support of the claim. The respondent no.1-bank was thereafter advised to file an affidavit in lieu of the examination-in-chief. Learned arbitrator had rightly permitted the respondent no.1-bank to file such affidavit of evidence. He submits that objection raised by the petitioners opposing the said affidavit being taken on record was found frivolous by the learned arbitrator and is rightly rejected.

29. Learned counsel for the respondents invited my attention to various roznamas of the arbitral proceedings and would submit that the petitioners had taken number of adjournments and had filed several applications raising frivolous issues. The learned arbitrator had rightly rejected all such applications filed by the petitioners. He submits that on 19th March 2012 also, the petitioners had applied for adjournment. By consent of the parties, the matter was adjourned to 16th April 2012. The petitioner no.5 had appeared in-person before the learned arbitrator for himself on few occasions. The settlement talks between the parites failed. The learned arbitrator, accordingly, on 30th October 2012 gave a warning to both the parties and fixed the hearing on 20th November 2012. He submits that during the period between March 2012 and November 2012, the matter was adjourned on 11 dates. Since the petitioners were absent all throughout except that one of the partners remained present on few occasions, none of the petitioners were present for cross-examination of the witness examined by the respondents. He submits that the matter was referred to the arbitration in August 2009 which could not be concluded for more than three years because of repeated adjournments and non-cooperative attitude of the petitioners. The petitioners were not willing to cross-examine the witness as was apparent from their conduct.

30. Learned counsel for the respondents submits that the learned arbitrator has decided the applications filed by the petitioners raising various frivolous objections. It is not the case of the petitioners that no notice of hearing was given by the learned arbitrator to the petitioners. He submits that the petitioners having remained absent on most of the dates of hearing cannot make such grievance of lack of opportunity.

31. In so far as the issue of membership raised by the petitioners is concerned, learned counsel for the respondents submits that the learned arbitrator had framed specific issue on this allegation made by the petitioners and after considering the pleadings and documents filed by the respondents has rendered finding of fact that the petitioners were the members of the respondent-bank which finding is not perverse and thus no interference with such finding of fact is permissible under Section 34 of the Arbitration Act.

32. In so far as the issue raised by the learned counsel for the petitioners that the petitioner no.1 being a firm could not have been otherwise made a member of the bank is concerned, he submits that no such objection was raised by the petitioners before the learned arbitrator and thus, this question cannot be raised for the first time before this Court. He submits that the petitioner no.2 was a Director of the respondent no.1-bank at the relevant time and was fully aware as to whether the petitioner no.1 could be made a member of the bank or not. The petitioner no.1 had applied for loan as a member. He cannot be allowed to blow hot and cold at the same time.

33. Learned counsel for the respondents invited my attention to the loan application form signed by the petitioners and also Deed of Guarantee and would submit that even on such documents, membership and member of the petitioners were mentioned. Number of shares held by the petitioners was also mentioned in the said application. The petitioners had signed several documents in favour of the respondents. Even the register of mortgage maintained by the respondents would indicate that the petitioners had created equitable mortgage in favour of the respondents and had also paid stamp duty payable for creation

of equitable mortgage. Originals of all such documents deposited with the respondent no.1-bank by the petitioners were with narcotic department in view of on going proceedings against some of the petitioners. The documents were notarised and signatures of the petitioners were identified by their advocate.

34. In so far as the submission of the learned counsel for the petitioners that the relief in respect of mortgage and sale of mortgaged properties cannot be granted by the learned arbitrator is concerned, he submits that the right of Multi-State Co-operative Societies under Section 84 of the said Act to recover the debts includes the right to enforce the mortgage. He submits that there was no other remedy available to the Multi-State Co-operative Society other than to invoke arbitration proceedings under Section 84(1) of the said Act, 2002. The respondent no.1-bank cannot approach a Civil Court for enforcement of mortgage in view of non-obstante provision of Section 84(1) of the said Act, 2002.

35. In so far as the judgment of this Court in the case of *Vedansh Hospitality and Resorts Limited & Ors. (supra)* relied upon by the petitioners is concerned, learned counsel for the respondents submits that this Court has not decided the issue whether relief in respect of mortgage can be decided by an arbitrator under Section 84 of the said Act, 2002 or not. In support of this submission, learned counsel for the respondents placed reliance on paragraphs 13 & 15 of the said judgment in the case of *Vedansh Hospitality & Resorts Limited & Ors. (supra)*.

36. In so far as the allegation of bias made by the petitioners against the learned arbitrator are concerned, the learned counsel for the respondents submits that the learned arbitrator had given several opportunities to the petitioners to remain

present and cross-examine the witness. The allegations made by the petitioners against the first arbitrator were totally frivolous. He submits that in any event, the learned arbitrator against whom the said allegations were made had resigned. Learned counsel submits that the findings rendered by the learned arbitrator in the impugned award allowing the claim of the respondents are based on the pleadings, documents and the affidavit of evidence filed by the respondents and such findings are not perverse and thus, this Court cannot interfere with such findings of facts.

37. In rejoinder, learned counsel for the petitioners submits that the partner of the petitioner no.1 who was a Director of the respondent no.1-bank upto to 2001 did not continue as Director. He submits that the judgment of the Supreme Court in the case *Booz Allen and Hamilton Inc.(supra)* squarely applies to the facts of this case. He submits that various disputed documents have been considered by the learned arbitrator in the impugned award and thus, the award is in violation of principles of natural justice. He submits that the petitioners had raised an issue of membership before the learned arbitrator which issue was required to be decided by the learned arbitrator.

38. In so far as the copy of the roznama relied upon by the learned counsel for the respondents is concerned, learned counsel for the petitioners submits that the advocate of the petitioners was present on many occasions. Since the settlement talks were going on, the petitioners did not pursue the matter. He submits that even the liquidator appointed by the Central Registrar could have filed a suit against the petitioners in view of Section 9 of the Code of Civil Procedure, 1908 for the purpose of redemption of mortgage and for sale of mortgaged properties.

REASONS AND CONCLUSIONS :-

39. In so far as the submission of the learned counsel for the petitioners that the learned arbitrator did not have jurisdiction to decide the prayers for redemption of mortgage and sale of mortgaged properties is concerned, to decide this issue raised by the learned counsel for the petitioners, it would be appropriate to refer to the some of the provisions of the Multi-State Co-operative Societies Act, 2002.

40. The said Act of 2002 applies to all co-operative societies with objects “not confined to one state’ which were incorporated before commencement of the said Act applied to all Multi-State Co-operative Societies. The said Act was enacted with a view to consolidate and amend the law relating to the Co-operative Societies, with objects “not confined to one State” and “serving the interests of members in more than one State.” All such co-operative societies with objects having their operations over more than one states are called Multi-State Co-operative Societies and are governed by the said Act, 2002 which a Central Act.

41. Section 3(n) of the said Act provides for definition of a member which reads thus :

“3. Definitions :

(n) “member” means a person joining in the application for the registration of a multi-state cooperative society and includes a person admitted to membership after such registration in accordance with the provisions of this Act, the rules and the byelaws.”

Section 3(p) of the said Act provides for definition of Multi-State Co-operative Society which reads thus :

“3. Definitions :

(p) “multi-state cooperative society” means a society registered or deemed to be registered under this Act and includes a national cooperative society and a Federal cooperative.

42. Under Section 4 of the said Act, the Central Government is empowered to appoint a person to be the Central Registrar of the Co-operative Societies and may appoint such other persons as it may think fit to assist the Central Registrar. Section 10 of the said Act provides that every multi-state co-operative society may make its bye-laws consistent with the provisions of the said Act and the rules made thereunder. Section 25 of the said Act provides as to who may become members of the said multi-state co-operative societies and also provides for their duties, rights and liabilities.

43. Section 84 of the said Act of 2002 provides for reference of disputes touching the constitution, management or business of Multi-State Co-operative Society. It provides that a dispute shall be referred to arbitration and settled by an arbitrator to be appointed by the Central Registrar. Section 85 of the said Act provides for limitation in filing dispute. Section 84 of the said Act reads thus :-

“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 cooperative 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 cooperative 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 cooperative society or liquidator, past or present, or

(c) between the multi-state cooperative 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 cooperative society, or

(d) between the multi-state cooperative society and any other multistate

cooperative society, between a multi-state cooperative society and liquidator of another multi-state cooperative society or between the liquidator of one multi-state cooperative society and the liquidator of another multi-state cooperative society, such dispute shall be referred to arbitration.

(2) For the purposes of sub-section (1), the following shall be deemed to be disputes touching the constitution, management or business of a multi-state cooperative society, namely:-

- (a) a claim by the multi-state cooperative 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 multistate cooperative 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 debtor, 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 cooperative society.*

(3) If any question arises whether a dispute referred to arbitration under this section is or is not a dispute touching the constitution, management or business of a multi-state cooperative society, the decision thereon of the arbitrator shall be final and shall not be called in question in any court.

(4) Where a dispute has been referred to arbitration under sub-section (1), the same shall be settled or decided by the arbitrator to be appointed by the Central Registrar.

(5) Save as otherwise provided under this Act, the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply to all arbitration under this Act as if the proceedings for arbitration were referred for settlement or decision under the provisions of the Arbitration and Conciliation Act, 1996.”

44. Section 86 and 87 provides for winding up of Multi-State Co-operative Societies. Section 90 provides for powers of liquidator. Section 93 provides for power of Central Registrar to cancel registration of the Multi-State Co-operative Society. Section 96 provides for powers of the arbitrator to direct conditional attachment of the property or a part thereof of a party to the reference to arbitration as he deems necessary. Section 96(2) provides that attachment under sub-section (1) shall be executed by a Civil Court having jurisdiction in the same way as an attachment order passed by itself and shall

have the same effect as such order. Section 96(2) of the said Act reads thus :-

“96. Attachment before award :

(1)

(2) *The attachment under sub-section (1) shall be executed by a civil court having jurisdiction in the same way as an attachment order passed by itself and shall have the same effect as such order.”*

45. Section 97 of the said Act provides that Central Registrar or arbitrator or person authorised by him in writing shall be a Civil Court for certain purposes.

Section 97 of the said Act reads thus :-

“97. Central Registrar or arbitrator or person authorised to be civil court for certain purposes. The Central Registrar or the arbitrator or any person authorised by him in writing in this behalf shall be deemed, when exercising any powers under this Act for the recovery of any amount by the attachment and sale or by sale without attachment of any property, or when passing any orders or any application made to him for such recovery, or for taking a step-in-aid of such recovery, to be a civil court for the purposes of article 136 of the Schedule to the Limitation Act, 1963 (36 of 1963).”

Section 117 of the said Act provides for bar of jurisdiction of Courts in respect of certain matters. Section 117 of the said Act reads thus :-

“117. Bar of jurisdiction of courts :- (1) *Save as otherwise provided in this Act, no court shall have jurisdiction in respect of-*

(a) *the registration of a multi-state cooperative society or its byelaws or of an amendment of the bye-laws;*

(b) *any matter concerning the winding up and the dissolution of a multi-state cooperative society.*

(2) *While a multi-state cooperative society is being wound up, no suit or legal proceedings relating to the business of such society shall be proceeded with or instituted against the liquidator or against the society or any member thereof, except by leave of the Central Registrar and subject to such terms and conditions as he may impose.*

(3) *Save as otherwise provided in this Act, no decision or order made under this Act shall be questioned in any court.”*

46. Rule 30 of the Multi-State Co-operative Societies Rules, 2002 provides that the Central Registrar may appoint and fix the fee of the arbitrators subject

to the provisions of Arbitration and Conciliation Act, 1996. Save as otherwise provided under the said Act, the provisions of the Arbitration and Conciliation Act, 1996 shall apply to all arbitration under the said Act as if the proceedings for arbitration were referred for settlement or decision under the provisions of the Arbitration and Conciliation Act, 1996.

47. A perusal of the objects and reasons of enactment of the said Multi-State Co-operative Societies Act, 2002 indicates that the said Act has been enacted so as to consolidate and amend the law relating to co-operative societies, with objects not confined to one State and serving the interests of members in more than one State, to facilitate the voluntary formation and democratic functioning of co-operative as people's institutions based on self-help and mutual aid and to enable them to promote their economic and social betterment and for matters connected therewith or incidental thereto. In my view, the purpose of filing arbitration under Section 84 for all the disputes falling under Section 84 mandatorily is also with a view to avoid any multiplication of the proceedings.

48. A perusal of Section 84 of the said Act clearly indicates that the said provision is non-obstante provision and will apply notwithstanding anything contained in any other law for time being in force, if any dispute touching the constitution, management or business of Multi-State Co-operative Society arises among members, past members and persons claiming through members, past members and deceased members, or between a member, past member and persons claiming through a member, past member or deceased member and the multi-State co-operative society, such dispute shall be referred to arbitration. The said provision is mandatory and not discretionary. Under Section 84(2)(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 shall be deemed to be a dispute touching the constitution, management or business of a multi-State co-operative society.

49. It is thus clear that the recovery of any debt by multi-state co-operative society from person mentioned therein would be a dispute touching the constitution, management or business of a multi-State co-operative society. A perusal of Section 84 provided under Chapter IX of the said Act clearly contemplates that the learned arbitrator has power and jurisdiction to entertain the prayers for recovery of all debts whether it is secured or unsecured within the provision of Section 84(2)(a) of the said Act. In my view, since the provisions of the said Act are self contained and a special mechanism is created under the Statute by making procedure of the reference of disputes to the arbitration mandatory, no Civil Court will have jurisdiction to entertain such proceedings which has to be referred to arbitration under the said provisions. In my view, the learned arbitrator has thus jurisdiction to entertain even the prayer for recovery under the mortgage by multi-state co-operative society and such dispute is deemed to be a dispute touching the constitution, management or business of a multi-State co-operative society.

50. A conjoint reading of Sections 96 and 97 also makes it clear that the arbitrator is empowered to pass an order of attachment before declaring an award which order of attachment shall be executed by a Civil Court having jurisdiction in the same way as an attachment order passed by Civil Court itself. The arbitrator is also authorised to be a Civil Court for certain purposes

when exercising powers under the said Act for recovery of any amount by the attachment and sale or by sale without attachment of any property or when passing any orders on any application made to him for such recovery or for taking a step-in-aid of such recovery. It is thus clear that powers of an arbitrator who can be appointed by the Central Registrar under powers conferred upon the Central Registrar under the provisions of the said Act has wide power prescribed under the said Act of 2002 which is a self-contained Code. Under Section 117 of the said Act, 2002, there is bar of jurisdiction of Courts except the dispute referred in the said provision.

51. Under Section 9 of the Code of Civil Procedure, 1908, Courts shall have jurisdiction to try all suits of civil nature excepting the suits of which their cognizance is either expressly or impliedly barred. In my view, since all the disputes between the persons referred under Section 84(1)(a) to Section 84(1)(d) relating to touching the constitution, management or business of Multi-State Co-operative Society has to be referred to arbitration which would include the dispute for debt or demand recoverable from principal debtor or surety, whether secured or unsecured, such dispute is expressly or in any case impliedly barred from adjudication by a civil court.

52. Be that as it may, since the reference of such dispute to arbitration is mandatory, the jurisdiction of the Civil Court to try such dispute or any part thereof is even otherwise impliedly barred. In my view, the legislative intent is clear that the Civil Court thus will have no jurisdiction to entertain the reliefs in respect of enforcement of mortgage and sale of mortgaged properties which reliefs are incidental to and part of the dispute arising under Section 84(1), Section 84(2)(a) and Section 84(2)(b). In my view, thus there is no substance in the

submission of the learned counsel for the petitioner that the arbitrator did not have jurisdiction to grant any relief in respect of redemption of any mortgage or for sale of mortgaged properties and the same could be entertained only by a Civil Court.

53. Be that as it may, under Section 84(3) of the said Act, it is clear that if any question arises whether a dispute referred to arbitration under the said section was or not a dispute touching the constitution, management or business of Multi-State Co-operative Society, the decision thereon of the arbitrator shall be final and shall not be called in question in any Court. In my view, once the learned arbitrator has decided that she had jurisdiction to entertain such claim, the said decision of the learned arbitrator on that issue is final and even otherwise could not be called in question in these proceedings under Section 34 of the Arbitration and Conciliation Act, 1996.

54. The provisions of Section 84(5) and Rule 30 of the Multi-State Co-operative Societies Act, 2002 make it clear that save as otherwise provided under the said Act, the provisions of the Arbitration and Conciliation Act, 1996 shall apply to all arbitration under the said Multi-State Co-operative Societies Act, 2002. In view of non-obstante provision under Section 84 of the said Act, 2002, even if any other remedy provided under any other law is provided, remedy under the provision of Section 84 which provides for arbitration would prevail.

55. A perusal of the judgment of Supreme Court in case of **Booz Allen and Hamilton Inc. (supra)** indicates that the Supreme Court in the said judgment was considering the application under section 8 of the Arbitration and Conciliation Act,

1996 in a civil suit. The parties to the said proceedings had entered into an arbitration agreement voluntarily. In that context, Supreme Court held that the arbitral tribunals are private fora chosen voluntarily by the parties to the dispute, to adjudicate their disputes in place of courts and tribunals which are public fora constituted under the laws of the country. It is held that every civil or commercial dispute, either contractual or non-contractual, which can be decided by a court, is in principle capable of being adjudicated and resolved by arbitration unless the jurisdiction of arbitral tribunals is excluded either expressly or by necessary implication. It is held that adjudication of certain categories of proceedings are reserved by the Legislature exclusively for public fora as a matter of public policy. In the said proceedings, the parties were not governed by any provisions regarding statutory arbitration.

56. In my view, in case of statutory arbitration, whether parties have independently entered into any arbitration agreement or not is not relevant. In view of section 84 of the said Act of 2002, once the parties to a dispute would fall under the category provided under section 84(1) (a) and (b) and if the dispute relates to the category of disputes prescribed therein, parties have no option but to refer their dispute to arbitration of the arbitrator to be appointed by the Central Registrar or other person under the provisions of the said Act. The parties even do not have any option to choose or nominate a particular arbitrator under the provisions of the said Act. In my view the reliefs sought by the Multi-state Co-operative Bank for enforcement of the securities for the purpose of recovering the debts would exclusively fall within the jurisdiction of the learned arbitrator under section 84 and thus expressly or impliedly barred from the purview of the jurisdiction of the civil court.

57. I am not inclined to accept the submissions of the learned counsel for the petitioners that though the reliefs for recovery of the money claimed could be adjudicated upon by an arbitrator under section 84 whereas for the purpose of enforcement of the mortgage and for sale of the mortgaged property, the proceedings can be entertained by the civil court only though the dispute was between the parties described under section 84 of the said Act of 2002 and the dispute was relating to recovery of the debt.

58. Insofar as judgment of this court in case of ***Vedansh Hospitality and Resorts Limited (supra)*** relied upon by the petitioners is concerned, a perusal of the said judgment clearly indicates that though this court has referred to the judgment of Supreme Court in case of ***Booz Allen and Hamilton Inc. (supra)*** in the said judgment of the learned Single Judge of this court, this court has held that the court was concerned with the statutory arbitration under section 84 of the Multi State Co-operative Societies Act and considering the scheme and purpose of the section 84 of the said Act, in that case, no further discussion was required in view of the other reasoning given in the said judgment. In my view in the said judgment, this court has not decided whether reliefs for enforcement of the mortgage and for sale of the mortgaged properties cannot be granted by an arbitrator appointed under section 84 of the said Act of 2002. The said judgment relied upon by the petitioners is thus of no assistance to the petitioners.

59. Insofar as submission of the learned counsel for the petitioners that the petitioner no.1 being a partnership firm could not have become member of the respondent bank is concerned, it is clear that petitioner no.1 firm had submitted the membership application form duly signed by its partners. The membership application forms were also filed simultaneously by the partners of the petitioner

no.1 independently. The respondent bank had in the board meeting held on 30th June, 1990 had granted membership to all the petitioners of the respondent bank. Based on such membership granted in favour of the petitioners, the respondents had sanctioned overdraft facility in favour of the petitioner no.1 which facility was admittedly availed of by the petitioners.

60. A perusal of the statement of claim as well as affidavit of evidence filed by the respondent bank before the learned arbitrator clearly indicates that the witness examined by the respondents had annexed several documents which were executed by the petitioners including the copies of membership application forms. There was no cross examination of the witness examined by the respondents by the petitioners. The membership of the petitioners was thus proved.

61. Insofar as submission of the learned counsel for the petitioners that the membership numbers of the proposers mentioned on the application forms filed by the petitioners did not tally with the other documents and that the petitioner no.1 had not signed the membership application form is concerned, there is no substance in this submission made by the learned counsel for the petitioners. Even if, there was any discrepancy in the membership numbers of the proposers mentioned in the application form, the said application having been filed by the petitioners themselves, the petitioners cannot take any advantage of any discrepancy in the details furnished in the application form of the membership. The respondent has not rejected the application of membership filed by the petitioners on that ground or otherwise. No such objection was even otherwise raised by the petitioners before the learned arbitrator.

62. Insofar as submission of the learned counsel for the petitioners that since there was no communication by the respondents to the petitioners about acceptance of membership of the petitioners within the time prescribed under section 25(4) of the said Act of 2002, the application made by the petitioners were deemed to have been rejected is concerned, the petitioners never raised this issue before the learned arbitrator. The petitioners acted as members of the respondent bank all throughout and exercised their rights as members. Petitioner no.2, who is the partner of the petitioner no.1 was also a director of the respondent bank for quiet sometime. Unless he would have become member of the bank, he could not have been appointed as a director of the bank. The issue of the petitioners not being a member of the respondent bank after several years of availing facilities as a member was thus totally frivolous and rightly rejected by the learned arbitrator.

63. In my view even if there was any discrepancy in the forms or that the same were not filled in in accordance with the bye-laws of the bank by the petitioners, since such provisions in the bye-laws were for the benefit of the bank, the bank could have waived their rights of not insisting to file an application for membership in a particular format and duly filled in alongwith details and signature of the proposers. In my view, the bank could have rejected the said application form on those grounds and no benefit thereof could be taken by the petitioners.

64. A perusal of the arbitral award indicates that the learned arbitrator has discussed the issue of membership in details in the impugned award. The learned arbitrator has dealt with all the documents relating to membership and has rendered a finding of fact that those documents would speak for themselves. It is held that

the petitioners had made a feeble attempt to assail those membership application forms on frivolous grounds. In my view, the findings of fact rendered by the learned arbitrator on this issue is based on the pleadings, documents and oral evidence laid by the respondents and is not perverse and thus cannot be interfered with under section 34 of the Arbitration Act by this court.

65. Insofar as issue of limitation raised by the petitioners is concerned, since the petitioners were the members of the respondent bank and continued to be the member on the date of filing of statement of claim before the learned arbitrator by the respondents, the limitation for filing arbitration claim did not commence. The learned arbitrator in my view has rightly rejected the plea of limitation raised by the petitioners having found no substance. In my view there is no merit in this submission of the learned counsel for the petitioners.

66. Insofar as submission of the learned counsel for the petitioners that the Commissioner for Co-operation and Registrar of Co-operative Societies could not have appointed two arbitrators is concerned, under section 84(4) of the said Act of 2002, the dispute has to be referred to the arbitration under section 84(1) and shall settled or decided by the arbitrator to be appointed by the Central Registrar. A perusal of the record indicates that no such issue was raised by the petitioners before the learned arbitrator. However on perusal of the record indicates that by an order dated 24th June, 2009 passed by the learned Commissioner for Co-operation and the Registrar of Co-operative Societies, two arbitrators viz. Shri Justice R.J.Kochar, former judge of this court and Shri Shaikh Ibrahim Amir were appointed to adjudicate the disputes those had arisen between respondent bank and its debtors and their appointment was valid for one year. The disputes filed by the respondent were not referred to two arbitrators who were appointed for

adjudicating upon various disputes of the respondent bank as canvassed by the learned counsel for the petitioners. The disputes filed by the respondents were referred to the former judge of this court as the sole arbitrator. There is thus no substance in this submission of the learned counsel for the petitioners.

67. Insofar as submission of the learned counsel for the petitioners that the liquidator could not have appointed Dr. Justice P.D. Upasani (retired) as an arbitrator is concerned, a perusal of the record indicates that the liquidator had not appointed the learned arbitrator but the Central Commissioner for Co-operation and Registrar of Co-operative Societies had appointed her. There is thus no merit in this submission of the learned counsel for the petitioners.

68. Insofar as submission of the learned counsel for the petitioners that the learned arbitrator could not have been appointed after winding up order of the Memon Co-operative Bank Ltd. is concerned, a perusal of section 90 of the said Act of 2002 clearly indicates that even on issuance of the order for winding up of a co-operative bank and on appointment of liquidator of such bank, the liquidator is empowered under the said provision of the said Act to institute or defend suits and other proceedings on behalf of the multi state co-operative society by the name of his office. In my view merely because the bank was wound up and the liquidator came to be appointed, right of the multi-state co-operative society who invoked the provisions of the Arbitration Act through the liquidator are not taken away. The provisions of the arbitration in that event can be invoked and the proceedings can be instituted and defended by and on behalf of such multi-state co-operative society by the liquidator by the name of his office.

69. Insofar as submission of the learned counsel for the petitioners that since the

Bank of Baroda had taken over the assets of the Memon Co-operative Bank Ltd. and since the said Bank of Baroda had issued a notice under the provisions of Securitization Act, the liquidator of the bank could not have continued the arbitration proceedings is concerned, in my view the arbitration proceedings initiated by the liquidator under section 90 read with section 84 were not barred merely because a separate proceedings and/or steps were taken by the Bank of Baroda under the provisions of Securitization Act independently. In my view both the proceedings are separate and independent and can be initiated and pursued at the same time and are not barred as canvassed by the learned counsel for the petitioners.

70. A perusal of the record indicates that the Reserve Bank of India by an order dated 4th May, 2011 had cancelled the bank licence issued under section 22 of the Banking Regulation Act, 1949 which was granted to the said Memon Co-operative Bank Ltd. and approved the scheme of arrangement for transfer of specific assets and liabilities of the Memon Co-operative Bank Ltd. and Bank of Baroda on 18th April, 2011. A perusal of the scheme of arrangement for transfer of the specific assets and liabilities of the Memon Co-operative Bank Ltd. to Bank of Baroda clearly indicates that the banking business of the said Memon Co-operative Bank Ltd. was ceased to exist except for the purpose of continuing the existing recovery proceedings, enforcement of awards and decrees, recovery certificates against judgment debtors of the said bank and to remit the proceeds of recovery to the Bank of Baroda which shall become owner/beneficiary of the assets. It was further provided that regarding all other pending legal proceedings by and against the said Memon Co-operative Bank Ltd., including those required to be initiated or defended till the execution of the deed of assignment, the same shall be continued by the said Memon Co-operative Bank Ltd. In my view, there is thus no substance

in the submission made by the learned counsel for the petitioners that the liquidator of the bank could not have continued the arbitration proceedings in view of the scheme having been approved by the Reserve Bank of India and the assets of the Memon Co-operative Bank Ltd. having been transferred to the Bank of Baroda.

71. Insofar as submission of the learned counsel for the petitioners that the learned arbitrator could not have taken second affidavit of evidence on record in view of the respondents already having filed earlier affidavit of evidence is concerned, a perusal of the record indicates that the first affidavit filed by the respondents was affidavit in support of the claim and was not affidavit of evidence. Be that as it may, a party may file evidence of more than one person. A party may also file additional affidavit of evidence before commencement of the cross examination. Admittedly the second affidavit which was affidavit of evidence of the witness was tendered by the respondents before the witness of the respondents was cross examined by the petitioners on the first affidavit of the witness. The learned arbitrator in my view has thus rightly taken the said affidavit of evidence on record. There is thus no merit in this submission of the learned counsel for the petitioners.

72. Insofar as submission of the learned counsel for the petitioners that the learned arbitrator even if was right in taking the second affidavit of evidence on record, she ought to have given an opportunity to cross examine the petitioners is concerned, a perusal of the record indicates that though the petitioners were served with the copies of the notices by the learned arbitrator, on most of the dates of hearing before the learned arbitrator, the petitioners and their advocate was absent inspite of repeated warning by the learned arbitrator. Even on the date when the learned arbitrator passed an order taking second affidavit of evidence on record by

passing a detailed order, the petitioners had chosen to remain absent before the learned arbitrator. Neither any of the petitioners nor their advocate was present for the purpose of cross examination of the witness examined by the respondents. The learned arbitrator noticed that the arbitral reference which was filed in the year 2009 was adjourned on one or the other ground because of the non co-operative attitude of the petitioners and could not be disposed off for more than three years solely due to such attitude on the part of the petitioners. Since the petitioners and their advocate were absent on most of the dates, the learned arbitrator was justified in the facts of this case to close the matter for declaration of award. In my view a party who deliberately delays the proceedings and is absent on number of dates inspite of receipt of service cannot make a grievance of violation of principles of natural justice. In my view the learned arbitrator has shown much more indulgence then what was required in this matter to the petitioners.

73. In my view there is no substance in the submission of the petitioners that any of the documents of the respondent are taken on record behind the back of the petitioners or any of the arbitrator had acted biased.

74. A perusal of the record indicates that the learned arbitrator has thus considered the pleadings and documents and also the oral evidence laid by the respondents in the impugned award and has rendered a finding of fact which are not perverse and thus no interference with such finding of fact is permissible under section 34 of the Arbitration Act. In my view judgment of this court in case of **Jayant Industrial Packaging Ltd. & Ors. (supra)** and in case of **Vedansh Hospitality and Resorts Limited (supra)** relied upon by the petitioners on this issue are thus clearly distinguishable with the facts of this case and do not assist the petitioners.

75. Insofar as judgment of Supreme Court in case of ***Pasupuleti Venkateshwarlu (supra)*** relied upon by the learned counsel for the petitioners is concerned, said judgment even does not remotely apply to the facts of this case. Reliance placed by the learned counsel on the said judgment is totally misplaced.

76. In my view all the five petitions are devoid of merits. I, therefore, pass the following order :-

Arbitration Petition nos. 396 of 2013, 395 of 2013, 397 of 2013, 400 of 2013 and 401 of 2013 are dismissed. No order as to costs.

(R.D. DHANUKA, J.)