

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

ARBITRATION PETITION NO.1380 OF 2010

M/s. Maks Glass Corporation)
 Prop. Mr. Mohammed Ayub Khan,)
 Occupation : Business, Age 55 years,)
 having address at – RH-I, M-22, Sector 7,)
 Vashi, Navi Mumbai.) .. Petitioner

Vs.

1. The Bombay Mercantile Co-operative)
 Bank Limited,)
 A Co-operative Bank registered under the)
 Provisions of the Multi- State Co-operative)
 Societies Act, 2002,)
 having its registered office at 78,)
 Mohammedali Road, Mumbai - 400 003.)

2. Mr. Mohammed Naeem Khan)
 Occupation : Business, Age Adult,)
 having address at – M/s.A.K. Glass House,)
 Plot No.467, Ushakal, Turbhe,)
 Navi Mumbai.)

3. Mr. Ruparam L. Parmar (deleted))

4. Mr. Mohammed Tufail Khan)
 Occupation : Business, Age Adult,)
 having address at – SS-2, R-41,)
 Sector 8, Koperkhairane,)
 Navi Mumbai.) .. Respondents

Mr.Bhupesh Samant for the petitioner.

Mr.Mayur Khandeparkar a/w Ms.Sapna Rachure i/by M/s. T.N. Tripathi
 & Co. for respondent no.1.

CORAM : R.D. DHANUKA, J.
DATE : 18th March 2015

JUDGMENT :-

. By this petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 (for short “the said Arbitration Act), the petitioner has impugned the arbitral award dated 24th April 2010 passed by the learned arbitrator under Section 84 of the Multi-State Co-operative Societies Act, 2002 thereby allowing the claims made by the respondent no.1. Some of the relevant facts for the purpose of deciding this petition are as under :

2. The petitioner herein was the respondent no.1 in the arbitral proceedings whereas the respondent no.1 herein was the original claimant. The respondent nos.2 to 4 in the present proceedings were the original respondent nos.2 to 4 in the arbitral proceedings.

3. The petitioner in his capacity as a member made an application to the respondent no.1-Bank for Term Loan facility of Rs.4.80 lacs on 2nd March 1993. The respondent no.1 sanctioned the said application on various terms and conditions. The said loan was repayable with interest @17.5% p.a. The petitioner thereafter made an application for Overdraft facility on 20th March 1995 for an amount of Rs.7 lacs which was sanctioned by the respondent no.1 on 11th September 1995. The said Overdraft facility was repayable with interest @16.5% p.a.

4. It was the case of the respondent no.1-bank that the petitioner and the respondent nos.2 to 4 committed various defaults in making repayment of the amounts of two loan facilities. The respondent

no.1 accordingly issued a demand notice dated 27th November 1997 calling upon the petitioner and the respondent no.3 and 4 to pay a sum of Rs.19,28,911.82/- as on 30th September 1997 in so far as the amount payable under the Overdraft facility is concerned. The respondent no.1 also placed reliance on the statement of account which was furnished to the petitioner. Since the petitioner did not make any payment in response to the demand notice dated 27th November 1997, the respondent no.1 invoked the provisions of the arbitration under the provisions of Multi-State Co-operative Societies Act, 2002 and appointed an arbitrator to adjudicate the dispute.

5. On 16th June 2007, the respondent no.1-bank filed a statement of claim before the learned arbitrator, inter alia, praying for the amounts of Rs.1,08,70,443.82/- as on 31st March 2007 in Overdraft account and Rs.17,13,349/- in Term Loan Account as on 31st March 2007 with further interest thereon and for the arbitration costs. The said statement of claim was resisted by the petitioner by filing a written statement in the month of December 2007.

6. During the pendency of the arbitration proceedings before the learned arbitrator, it was the case of the respondent no.1-bank that the petitioner was given inspection of all the original documents referred to and relied upon by the respondent no.1 in the statement of claim in the presence of the learned arbitrator. It is, however, the case of the petitioner that all the original documents were not shown to the petitioner.

7. Learned arbitrator framed four points for determination. The respondent no.1 examined Mr.Vahidali Kazi, officer of the

respondent no.1 as one of the witnesses in the arbitral proceedings. The said witness was cross-examined by the learned advocate representing the petitioner.

8. On 24th April 2010, the learned arbitrator rendered an award directing the petitioner and the respondent nos.2 to 4 to the said proceedings to pay to the bank an amount of Rs.1,08,70,433.82/- as on 31st March 2007 in overdraft account and Rs.17,13,349/- in term loan account i.e. total Rs.1,25,83,792.82 with interest thereon @17.5% p.a. from 1st April 2007 till payment plus arbitration fess Rs.10,120/- and administrative charges of Rs.7,500/-. The learned arbitrator returned the original documents produced by the concerned officer to him on obtaining his acknowledgment since copies of all those documents were already on record.

9. The petitioner has impugned the said award dated 24th April 2010 in this petition. The respondent nos.2 to 4 have not impugned the said award.

10. Mr.Samant, learned counsel appearing for the petitioner invited my attention to the pleadings, correspondence and the oral evidence led by the respondent no.1-bank. He submits that the award was franked on 5th March 2010. He invited my attention to the roznama of the proceedings and submits that on 6th March 2010, the learned arbitrator had heard the submissions of the petitioner. He submits that since the award was already prepared by the learned arbitrator on 5th March 2010 itself, the so called hearing rendered on 6th March 2010 was only an eye wash. The learned arbitrator has thus committed a breach of

the principles of natural justice and rendered the impugned award without giving any appropriate hearing to the petitioner.

11. The next submission of the learned counsel for the petitioner is that since the learned arbitrator had taken the assistance of the respondent no.1-bank for getting the said award franked on 5th March 2010 which is admitted by the respondent no.1 in its affidavit-in-reply which assistance was provided on the basis of the alleged practice which was not known to the petitioner, it would show that there was a collusion between learned arbitrator and the officer of the respondent no.1-bank. He submits that this would also amount to a fraud committed upon the petitioner. He submits that since the copy of the award was not served upon the petitioner, the petitioner applied for a copy of the award and after obtaining a copy of the said award and after perusing the award, it was noticed that the award was franked on 5th March 2010 whereas the hearing of the petitioner was on 6th March 2010. Thus, on this ground, the award be set aside.

12. In support of this submission, learned counsel placed reliance on Section 2 (k) (iii) and Section 13 of the Maharashtra Stamp Act, 1958 and submits that the award could not have been franked unless the same was ready. He submits that since the award was franked on 5th March 2010, it appears that the award was already kept ready on the date of franking.

13. The next submission of the learned counsel is that various issues raised by the petitioner in the written submission have not been dealt with in the impugned award. He submits that though in the

statement of claim, the respondent no.1 did not refer to any particular rate of interest, the learned arbitrator has awarded interest @17.5 % p.a. which is illegal.

14. Learned counsel invited my attention to the operative part of the impugned award and submits that the learned arbitrator has directed the respondents to the proceedings to pay to the bank the awarded sum. He submits that though there were in all four respondents in the said proceedings, the learned arbitrator had not made it clear as to which respondent was liable to pay the awarded sum. The award as such is totally vague and cannot be enforced under any provisions of the law and thus, the award be set aside on that ground also.

15. Learned counsel for the petitioner then submits that though the respondent no.1-Bank had not produced any original documents on record before the learned arbitrator, the learned arbitrator had directed in the impugned award to return those original documents to the bank which indicates that there was a collusion between the learned arbitrator and the officer of the respondent no.1-bank.

16. In support of the aforesaid submission, the learned counsel invited my attention to the judgment of the Supreme Court in the case of ***Venture Global Engineering Vs. Satyam Computer Services Ltd.***, reported in ***AIR 2010 SC 3371*** and in particular paragraphs 51 and 52 thereof and would submit that since the franking of the award made by the respondent no.1, which was the duty of the learned arbitrator which he failed, was noticed by the petitioner only after publication of the award

by the learned arbitrator, the petitioner is entitled to bring such fraud to the notice of the Court in the arbitration petition under Section 34 of the Arbitration Act. Paragraphs 51 and 52 of the said judgment of the Supreme Court in the case of *Venture Global Engineering (supra)* read thus :

“51. Therefore, this Court is unable to accept the contention of the learned counsel for the respondent that the expression 'fraud in the making of the award' has to be narrowly construed. This Court cannot do so primarily because fraud being of 'infinite variety' may take many forms, and secondly, the expression 'the making of the award' will have to be read in conjunction with whether the award 'was induced or affected by fraud'.

52. On such conjoint reading, this Court is unable to accept the contentions of the learned counsel for the respondents that facts which surfaced subsequent to the making of the award, but have a nexus with the facts constituting the award, are not relevant to demonstrate that there has been fraud in the making of the award. Concealment of relevant and material facts, which should have been disclosed before the arbitrator, is an act of fraud. If the argument advanced by the learned counsel for the respondents is accepted, then a party, who has suffered an award against another party who has concealed facts and obtained an award, cannot rely on facts which have surfaced subsequently even if those facts have a bearing on the facts constituting the award. Concealed facts in the very nature of things surface subsequently. Such a construction would defeat the principle of due process and would be opposed to the concept of public policy incorporated in the explanation.”

17. Mr. Khandeparkar, learned counsel appearing for the respondent no.1, on the other hand, submits that it is not in dispute that the arbitral award rendered by the learned arbitrator would attract payment of stamp duty of Rs.100/- under the provisions of the Maharashtra Stamp Act, 1958.

18. Learned counsel for the respondent no.1-bank invited my attention to the roznama of the arbitral proceedings. He submits that the cross-examination of the witness examined by the respondent no.1 was already over on 14th November 2009. Learned arbitrator had thereafter heard the arguments of the bank on 26th December 2009. The matter was thereafter adjourned for arguments of the petitioner to 16th January 2010. On 16th January 2010, the petitioner and his advocate were absent. The matter was accordingly adjourned for arguments of the petitioner on 6th February 2010. He submits that again on 6th February 2010, the petitioner and his advocate were absent. Thus, the matter was adjourned to 6th March 2010. Only on 6th March 2010, the advocate for the petitioner was present, who was heard by the learned arbitrator on that day itself. The matter was adjourned for award to 27th March 2010. The learned arbitrator thereafter rendered an award on 24th April 2010. He invited my attention to the averments of the respondent no.1 in affidavit-in-reply on this issue and more particularly on paragraph 10. He submits that after filing of the claim and after completion of the pleadings of both the parties, as per the practice followed by the learned arbitrator, he required the bank to submit full title of each arbitration case with franking of Rs.100/- on it. The said title with franking of Rs.100/- was used for preparing the award. In these circumstances, the respondent no.1 had franked the first page of the award on which, the learned arbitrator was required to render the award. The allegation made by the petitioner is denied in paragraph 10 of the affidavit-in-reply.

19. Learned counsel for the respondent no.1-bank also invited my attention to Section 14A of the Maharashtra Stamp Act, 1958 and

would submit that the purpose of franking of document is necessary only if any alternations or changes are required to be made in an instrument. A fresh stamp paper is required to be used for incorporating such changes in the entire document. He submits that in this case, there is no dispute that the stamp duty payable on the arbitration award was Rs.100/- only. The petitioner was absent on numbers of hearings before the learned arbitrator, though the matter was kept for arguments. He submits that it is not in dispute that the award has been franked by the respondent no.1 bank who was one of the authorised dealers. He submits that merely because the award was franked on 5th March 2010, it would not indicate that the award was already ready on 5th March 2010 itself.

20. The learned counsel also invited my attention to the entire award and would submit that the learned arbitrator has dealt with the submissions made by the petitioner on 6th March 2010. It is submitted that thus it is clear that though the first page of the award was franked on 5th March 2010, the award was prepared by the learned arbitrator only after the hearing was concluded on 6th March 2010.

21. Learned counsel for the respondent no.1 Bank invited my attention to the averments made by the petitioner in its written statement and submits that the petitioner has admitted loan transactions between the petitioner and the respondent no.1-bank. The allegation in the written statement of the petitioner was that the entire loan was repaid by the petitioner. The petitioner had also alleged fraud against the officers of the bank alleging that 60 cheques of the petitioner were credited to the various accounts including her mother's account. The petitioner had disputed the statement of account and the rate of interest in

the written statement. Learned counsel submits that in view of the pleadings filed by the parties, the learned arbitrator had rightly framed four points for determination.

22. He submits that in so far as the allegation of fraud raised by the petitioner is concerned, admittedly the petitioner did not lead any evidence in support of its allegation. Learned arbitrator had rightly rendered the finding while dealing with issue no.1 which cannot be interfered with under Section 34 of the Arbitration Act. In so far as the issue no.2 as to whether the petitioner/ original respondent no.1 had proved that the claim of the respondent no.1 – bank/original petitioner was barred by the principle of res judicata is concerned, the learned counsel for the petitioner fairly did not press this issue.

23. Learned counsel for the respondent no.1 submits that in so far as issue no.3 as to whether the respondent no.1 bank had proved that the claim amount was outstanding against the petitioner is concerned, the petitioner did not lead any evidence. Learned counsel invited my attention to the affidavit of evidence in lieu of examination-in-chief of Vahidali Kazi, officer of the respondent no.1-bank and submits that in the said affidavit of evidence, the witness has not only proved the existence of the documents signed by the petitioner and the respondent nos.2 to 4 but also proved the contents thereof. In the said affidavit of evidence, the witness also proved the contents of the accounts. Learned counsel invited my attention to the cross-examination of the witness and would submit that the deposition of the witness examined by the respondent no.1 on the execution of the documents, the contents thereof

and the correctness of the accounts produced by the witness are not controverted in the cross-examination. Learned counsel submits that the learned arbitrator has dealt with the written statement in the impugned award in support of this submission. Learned counsel invited my attention to the findings rendered by the learned arbitrator while dealing with the issue no.1 and issue nos.3 and 4 in which, the learned arbitrator had referred to the submissions of the petitioner herein made in its statement and has rejected the same on merits.

24. In so far as the submission of the petitioner that the original documents were not filed by the respondent no.1 before the learned arbitrator and thus the learned arbitrator could not have given direction to return the original documents is concerned, learned counsel invited my attention to various roznamas of the arbitral proceedings and submits that the original documents were forming part of the record and inspection thereof was given by the respondent no.1 to the petitioner in the arbitration proceedings itself. Learned arbitrator thus has rightly issued a direction to return the original documents to the respondent no1-bank. He submits that in any event, the said direction does not have any bearing on the merits of the case.

REASONS AND CONCLUSIONS:

25. In so far as the first submission of the learned counsel that the arbitration award was franked on 5th March 2010 whereas the hearing was rendered on 6th March 2010 which would indicate that the hearing of the petitioner rendered by the learned arbitrator was an eye

wash is concerned, a perusal of the first page of the award undoubtedly indicates that the said page was franked on 5th March 2010 by the respondent no.1-bank. A perusal of the roznama of the arbitral proceedings, however, indicates that the cross-examination of the witness examined by the respondent no.1 was over on 14th November 2009. The matter was thereafter argued by the bank on 26th December 2009. On the request of the learned advocate representing the petitioner, the matter was adjourned for his arguments to 16th January 2010. On 16th January 2010, the petitioner and its advocate were absent. The matter was adjourned to 6th February 2010. On 6th February 2010 again the petitioner and its advocate were absent. The matter was, therefore, adjourned to 6th March 2010. On 6th March 2010, the learned advocate for the petitioner was present and completed his arguments before the learned arbitrator. A perusal of the award indicates that the learned arbitrator rendered his award on 24th April 2010.

26. To appreciate the submissions made by the learned counsel for the petitioner on both these issues whether the learned arbitrator had rendered his award already on 5th March 2010, i.e. prior to the date of hearing of the petitioner or only the first page was franked in the circumstances set out aforesaid or not, it would be appropriate to deal with the provisions of the Maharashtra Stamp Act, 1958. Section 13 of the Maharashtra Stamp Act, 1958 provides that every instrument for which sheet of paper stamped with impressed stamp is used shall be written in such manner that the writing may appear on the face and, if required, on the reverse of such sheet so that it cannot be used for or applied to any other instrument. Section 14A of the Maharashtra Stamp Act, 1958 provides that if due to any material alternations made in an instrument by a party,

with or without the consent of other parties, the character of the instrument is materially or substantially altered, then such instrument shall require a fresh stamp paper according to its altered character. Section 17 of the Maharashtra Stamp Act, 1958 provides that all instruments chargeable with duty and executed by any person in this State shall be stamped before or at the time of execution or immediately thereafter or on the next working day following the day of execution.

27. Article 12 of Schedule I of the Maharashtra Stamp Act, 1958 provides for payment of stamp duty of Rs.100/- for an arbitration award and in any other case other than Article 12 (a). It is not in dispute that in this case, the learned arbitrator has rendered a monetary award and would attract payment of stamp duty of Rs.100/- only under Article 12 (b).

28. It is also not in dispute that the respondent no.1 was also a dealer of stamps appointed by the government and had authority to frank the documents. In my view, the explanation rendered by the respondent no.1 bank in its affidavit-in-reply and in particular paragraph 10 thereof that as to why the first page of the document was franked by the bank, as per prevailing practice followed by the learned arbitrator deserves to be accepted. In my view, merely because the learned arbitrator who had rendered the award, which was required to be stamped, was franked by the respondent no.1 which was also one of the dealers appointed by the government for franking the documents, it would not mean that there would be any collusion or fraud upon the petitioner by the learned arbitrator or by the respondent no.1 bank. In my view, the franking made on the award dated 24th April 2010 on 5th March

2010 in the circumstances aforesaid would atmost amount to an irregularity which would not vitiate the validity of the award. I am not inclined to accept the submission of the leaned counsel for the petitioner that the officer of the respondent no.1 colluded with the learned arbitrator and the learned arbitrator was biased against the petitioner.

29. In so far as the submission of the learned counsel for the petitioner that the learned arbitrator has not dealt with the plea raised by the petitioner in the written statement in the impugned award is concerned, a perusal of the award indicates that the the learned arbitrator has dealt with the plea raised by the petitioner and held that the petitioner had obtained the loans and failed to pay the same. It is the case of the petitioner that the petitioner had already repaid the entire loan amount to the bank. The petitioner had disputed the statement of account of the bank and the rate of interest claimed therein. Learned arbitrator accordingly rightly framed the issue no.3 i.e. "Does the Applicant Bank prove that the claim amount is outstanding against the respondents".

30. A perusal of the award indicates that while dealing with issue nos.1, 3 and 4, the learned arbitrator has referred to the written statement filed by the petitioner before the learned arbitrator. Learned arbitrator on issue no.1 has rendered a finding that the allegation of the petitioner herein was not sufficient to hold the officer of the bank guilty. Similarly while dealing with issue nos. 3 and 4, learned arbitrator has not only referred to the written statement and submissions made by the petitioner but also has rejected the same having found no merit. It is held by the learned arbitrator that the evidence of the petitioner in its

written statement and submissions is not sufficient to discard and disbelieve the claim of the bank. In the impugned award, the learned arbitrator has also rendered a finding that the claim of the respondent no.1 bank and the affidavit of its officer disclosed that the record was maintained legally and properly and there was no such act which would amount to a fraud or forgery played by the bank officer. It is also held by the learned arbitrator that the petitioner as well as the respondent nos.2 and 4 had executed security documents in favour of the bank such as i) Demand Promissory Note, ii) Letter of Continuity, iii) Agreement for Loan and iv) Letter of Guarantee which were on record of the arbitral proceedings. The officer of the respondent no.1 who was examined has proved the contents of the documents in her affidavit. Learned arbitrator has further rendered a finding that the petitioner and the respondent nos.2 to 4 had also executed the security documents such as i) Demand Promissory Note, ii) Letter of Continuity, iii) Letter of Waiver, iv) Agreement for Overdraft and v) Hypothecation Agreement etc. It is held that it was clear from the record that as per the terms and conditions of the sanction, the petitioner and the other three respondents were liable to pay the dues. Learned arbitrator has also come to the conclusion that the bank had proved that the claim amount was due and recoverable from the petitioner and the other three respondents.

31. A perusal of the affidavit-in-lieu of the examination-in-chief filed by the witness examined by the bank clearly indicates that the witness has referred to both the loan transactions and had relied upon the documents executed between the petitioner and the respondent nos. 2 and 4 in the deposition. The interest chargeable on the term loan was @

17.5 % p.a. The witness produced all these documents and had deposed that the contents thereof were true and correct. It is deposed that the record of the bank is maintained in its ordinary course of business. Similarly the deposition was made and the documents were produced for overdraft facility. It was deposed that the interest chargeable on the said facility was @16.5% p.a. In paragraph 7 of the said affidavit of evidence, the witness referred to and relied upon a copy of the statement of account and tendered the same before the learned arbitrator. The witness deposed that the contents of such statement of account were true and correct.

32. A perusal of the cross-examination of the witness, however, indicates that the witness deposed that the bank has charged interest on the claim amount @16.5 % p.a. for both the accounts. A perusal of the cross-examination further indicates that the said witness was asked whether the bank had mentioned about any fixed deposits in the statement of account. The witness denied the suggestion that the bank had not mentioned anywhere in the statement of account regarding the fixed deposit. The witness also denied the suggestion that the claim amount shown in the account was false and except this bare cross-examination of the witness, the petitioner did not challenge the deposition of the witness on the correctness of the contents of the documents as well as the contents of the statement of the account.

33. A perusal of the award clearly indicates that the learned arbitrator has rightly rendered a finding of fact that the officer of the bank had proved the contents of the documents by way of affidavit and the bank had proved its claim. In my view, there is no substance in the

submission of the learned counsel for the petitioner that the learned arbitrator has not dealt with the submission made by the petitioner in the written statement. The submission is contrary to the documents and pleadings on record and is accordingly rejected.

34. In so far as the submission of the learned counsel for the petitioner that in the impugned award, the learned arbitrator has awarded the interest @17.5% p.a. which was not claimed in the statement of claim is concerned, the respondent no.1 had claimed interest on the sum of Rs.1,08,70,443.82/- in overdraft account and Rs.17,13,349/- in term loan account. The witness examined by the respondent no.1 bank has deposed that the bank was entitled to recover the interest @17.5% p.a. on the term loan and @16.5% p.a. on the overdraft facility. It is not in dispute that the said rate was provided in the agreement entered into between the parties. There is no substance in the submission of the petitioner that no particular rate of interest was claimed by the respondent no.1-bank. The learned arbitrator, in my view, has awarded the rate of interest in terms of the agreement entered into between the parties. There is, thus, no merit in the submission of the learned counsel for the petitioner.

35. In so far as the last submission of the learned counsel for the petitioner that since the respondent no.1 bank had not produced any original documents before the learned arbitrator and thus no direction in that regard could have been given is concerned, a perusal of the original documents indicates that the documents were produced before the learned arbitrator by the bank at least for the purpose of giving

inspection, which inspection was offered as is clear from the roznama on record. Learned arbitrator has, thus, rightly directed to return the original documents to the respondent no.1. Be that as it may, a direction to return the original documents would not affect the validity of the award. The submission of the learned counsel for the petitioner is thus without any merit and is accordingly rejected.

36. In so far as the judgment of the Supreme Court in the case of *Venture Global Engineering (supra)* relied upon by the learned counsel for the petitioner is concerned, in my view, since there is no fraud committed by the learned arbitrator or by the respondent no.1, question of the petitioner noticing any such alleged fraud after rendering of the award and after publishing the award did not arise. The judgment of the Supreme Court in the case of *Venture Global Engineering (supra)* thus would not assist the case of the petitioner. In my view, the petition is totally devoid of any merits and is accordingly dismissed. There shall be no order as to costs.

37. Mr. Samant, learned counsel for the petitioner prays that the respondent no.1 shall not take any step to execute the impugned award which prayer is vehemently opposed by Mr.Khandeparkar, learned counsel for the bank. I am not inclined to accept this prayer of the learned counsel for the petitioner. Prayer for stay is accordingly rejected.

R.D. DHANUKA, J.