

IN THE HIGH COURT OF JUDICATURE AT BOMBAY***ORDINARY ORIGINAL CIVIL JURISDICTION*****ARBITRATION PETITION NO. 125 OF 2014**

1. Fancy Builders Private Limited)
 A Private Limited Company, registered)
 under the provisions of The Companies)
 Act, 1956, and having its registered)
 Address at 335, Shalimar House, Grant)
 Road, Mumbai – 400 007)

2. Mohammed Zuber Hasham Sorathia)
 Aged : 54 years, Occupation : Business)
 Director of Fancy Builders Private Limited)
 335, Shalimar House, Grant Road,)
 Mumbai – 400 007)

..... Petitioners/
 (Petitioner No.1 is
 Org.Claimant)

Versus

The Memon Co-operative Bank Ltd.)
 a Co-operative Bank, registered under)
 The Multi-State Cooperative Societies Act)
 2002, having their registered office and)
 Central Administrative Office at)
 Patel & Sony Arcade, 1st Floor, 234,)
 Belasis Road, Nagpada Junction,)
 Mumbai – 400 008, represented by)
 Liquidator)

..... Respondents
 (Org.Respondents)

ALONGWITH**ARBITRATION PETITION NO. 129 OF 2014**

1. Fancy Builders Private Limited)
 A Private Limited Company, registered)
 under the provisions of The Companies)
 Act, 1956, and having its registered)
 Address at 335, Shalimar House, Grant)

Road, Mumbai – 400 007)

2. Tohid Ashraf Furniturewala,)
 Aged : 46 years, Occupation : Business)
 Director of Fancy Builders Private Limited)
 and Partner of M/s.Huma Exhibitors,)
 335, Shalimar House, Grant Road,)
 Mumbai – 400 007)

3. Salim Yusuf Ingaria,)
 Aged : 55 years, Occupation : Business)
 335, Shalimar House, Grant Road,)
 Mumbai – 400 007)

4. Sunehra Tohid Furniturewala,)
 Aged : 46 years, Occupation : Business)
 Partner of M/s.Huma Exhibitors,)
 335, Shalimar House, Grant Road,)
 Mumbai – 400 007)

5. Mohammed Zuber Hasham Sorathia)
 Aged : 54 years, Occupation : Business)
 Director of Fancy Builders Private Limited)
 335, Shalimar House, Grant Road,)
 Mumbai – 400 007)

6. M/s.Huma Exhibitors,)
 A registered partnership firm, registered)
 under the provisions of the Partnership Act,))
 1932, having its registered office at)
 New L.B.S.Road, Kanjurmarg,)
 Mumbai – 400 078.)

..... Petitioners/
 (Org. Respondent
 Nos.1, 2, 4, 5, 6 & 7)

Versus

The Memon Co-operative Bank Ltd.)
 a Co-operative Bank, registered under)
 The Multi-State Cooperative Societies Act)

2002, having their registered office and)
 Central Administrative Office at)
 Patel & Sony Arcade, 1st Floor, 234,)
 Belasis Road, Nagpada Junction,)
 Mumbai – 400 008, represented by)
 Liquidator) Respondents
 (Org.Claimants)

ALONGWITH
ARBITRATION PETITION NO. 176 OF 2013

1. Divya Jyot Entertainment Private Limited)

A Private Limited Company, registered)
 under the provisions of The Companies)
 Act, 1956, and having its registered)
 Address at 1st Floor, Huma Mall,)
 L.B.S.Marg, Kanjur Marg (West),)
 Mumbai – 400 078)

2. Tohid Ashraf Furniturewala,)
 Aged : 46 years, Occupation : Business)
 Director of Divya Jyot Entertainment)
 Private Limited, 1st Floor, Huma Mall,)
 L.B.S.Marg, Kanjur Marg (West),)
 Mumbai – 400 078)

3. Sunehra Tohid Furniturewala,)
 Aged : 46 years, Occupation : Business)
 Director of 1st Floor, Huma Mall,)
 L.B.S.Marg, Kanjur Marg (West),)
 Mumbai – 400 078)

..... Petitioners/
 (Org.Respondents)

Versus

The Memon Co-operative Bank Ltd.)
 a Co-operative Bank, registered under)
 The Multi-State Cooperative Societies Act))
 2002, having their registered office and)
 Central Administrative Office at)
 Patel & Sony Arcade, 1st Floor, 234,)

Belasis Road, Nagpada Junction,)
Mumbai – 400 008, represented by)
Liquidator) **..... Respondents**
(Org.Claimants)

ALONGWITH
ARBITRATION PETITION NO. 127 OF 2014

1. Hanjer Builders Private Limited)
A Private Limited Company, registered)
under the provisions of The Companies)
Act, 1956, and having its registered)
Address at 335, Shalimar House,)
Grant Road, Mumbai – 400 007)

2. Salim Yusuf Ingaria,)
Aged : 55 years, Occupation : Business)
Director of Hanjer Builders Private Limited,) 335, Shalimar House, Grant Road,)
Mumbai – 400 007)

3. Sunehra Tohid Furniturewala,)
Aged : 46 years, Occupation : Business)
Director of Hanjer Builders Private Limited,) 335, Shalimar House, Grant Road,)
Mumbai – 400 007)

4. Tohid Ashraf Furniturewala,)
Aged : 46 years, Occupation : Business)
Director of Hanjer Builders Private Limited,) 335, Shalimar House, Grant Road,)
Mumbai – 400 007)

..... Petitioners
(Org. Respondent nos. 1 to 4)

Versus

The Memon Co-operative Bank Ltd.)
a Co-operative Bank, registered under)
The Multi-State Cooperative Societies Act) 2002, having their registered office and)
Central Administrative Office at)

Patel & Sony Arcade, 1st Floor, 234,)
 Belasis Road, Nagpada Junction,)
 Mumbai – 400 008, represented by)
 Liquidator) Respondents
 (Org.Claimants)

**ALONGWITH
 ARBITRATION PETITION NO. 242 OF 2014**

1. Divya Jyot Entertainment Private Limited)
 A Private Limited Company, registered)
 under the provisions of The Companies)
 Act, 1956, and having its registered)
 Address at 1st Floor, Huma Mall,)
 L.B.S.Marg, Kanjur Marg (West),)
 Mumbai – 400 078)

2. Tohid Ashraf Furniturewala,)
 Aged : 46 years, Occupation : Business)
 Director of Divya Jyot Entertainment)
 Private Limited, 1st Floor, Huma Mall,)
 L.B.S.Marg, Kanjur Marg (West),)
 Mumbai – 400 078) Petitioners
 (Petitioner no.1 is
 Org.Claimant)

Versus

The Memon Co-operative Bank Ltd.)
 a Co-operative Bank, registered under)
 The Multi-State Cooperative Societies Act))
 2002, having their registered office and)
 Central Administrative Office at)
 Patel & Sony Arcade, 1st Floor, 234,)
 Belasis Road, Nagpada Junction,)
 Mumbai – 400 008, represented by)
 Liquidator) Respondents/
 (Org.Respondents)

**ALONGWITH
 ARBITRATION PETITION NO. 246 OF 2014**

1. Hanjer Builders Private Limited)
 A Private Limited Company, registered)
 under the provisions of The Companies)
 Act, 1956, and having its registered)
 Address at 335, Shalimar House,)
 Grant Road, Mumbai – 400 007)

2. Salim Yusuf Ingaria,)
 Aged : 55 years, Occupation : Business)
 Director of Hanjer Builders Private Limited,))
 335, Shalimar House, Grant Road,)
 Mumbai – 400 007)

..... Petitioners/
 (Petitioner no.1 is Org.Claimant)

Versus

The Memon Co-operative Bank Ltd.)
 a Co-operative Bank, registered under)
 The Multi-State Cooperative Societies Act))
 2002, having their registered office and)
 Central Administrative Office at)
 Patel & Sony Arcade, 1st Floor, 234,)
 Belasis Road, Nagpada Junction,)
 Mumbai – 400 008, represented by)
 Liquidator)

..... Respondents/
 (Org.Respondents)

Mr.Shoaib Memon for the Petitioners.

Mr.Prathamesh Kamat, i/b.Mr.Yashodhan Gavankar for the Respondents.

CORAM : R.D. DHANUKA, J.

DATED : 27th APRIL, 2015

JUDGMENT :

By these petitions filed under section 34 of the Arbitration and Conciliation Act, 1996 (in short the said Arbitration Act) the petitioners have impugned the arbitral awards passed by the learned arbitrator allowing the claims made by the

respondents and dismissing the claim filed by the petitioners. Some of the relevant facts for the purpose of deciding these petitions are as under :-

2. Both the parties had filed their respective claims before the learned arbitrator which were heard by the same arbitrator and were disposed off by separate awards. The respondents are the co-operative bank registered under the provisions of Multi State Co-operative Societies Act, 2002 and the area of the operation of the respondents was in the City of Mumbai and other cities of Gujarat.

3. Since the learned counsel for the parties have placed their arguments in the Arbitration Petition Nos.125 of 2014 and 129 of 2014, the facts in the aforesaid two matters are summarized and dealt with in detail. It is stated by the learned counsel for the parties that other four matters are also identical and parties have no objection if no reasons are rendered in respect of the other four matters and outcome of these two petitions would apply to other four petitions. By consent of parties thus all the six arbitration petitions were heard together and are disposed off by a common order.

4. On 2nd May, 2002 the petitioner no.1 made an application for secured overdraft facility of Rs.2,50,00,000/- for the purpose of availing working capital for their business on execution of various documents. The said facility was from time to time renewed at the request of the petitioner no.1 on execution of various documents. The last renewal of the said secured overdraft facility was granted till 5th July, 2008. In the month of July, 2008 the account of the petitioner no.1 had been declared as Non Performing Asset (NPA). On 23rd January, 2009 Reserve Bank of India declared a moratorium on the respondents bank.

5. On 16th March, 2009, the respondents through their advocates issued a notice to the petitioners and the guarantors in respect of the said secured overdraft facility and called upon them to pay the amount of Rs.16,09,57,660/- within a period of seven days from the date of receipt of the said notice. In response to the said notice dated 16th March, 2009 the petitioner no.1 addressed a letter on 21st May, 2009 alleging that the petitioners had deposited with the respondents fixed deposits of Rs.9,25,00,000/- duly endorsed and discharged which the petitioners had proposed to set off against the standing loan. The petitioners called upon the respondents to immediately adjust the said fixed deposits against the outstanding loan and showed their readiness and willingness to pay the balance outstanding including principle which if communicated to the petitioners by the respondents. The petitioners called upon the respondents to communicate the complete balance outstanding after adjusting the fixed deposits to enable the petitioners to issue a cheque for the same and to close the account with the respondents.

6. The respondents by their letter dated 10th September, 2009 to the petitioner no.1 informed that the said loan amount could not be set off against the fixed deposits as suggested by the petitioners for the reason that a moratorium had been laid down on the respondents by Reserve Bank of India and informed that in any event the respondents had suggested a proposal of the petitioners to the Reserve Bank of India, however they were not permitting the respondents to adjust the said loan against the security of those fixed deposits.

7. In the said letter, the respondents placed on record that the petitioners had willfully exceeded their overdraft limit and withdrew an aggregate amount of Rs.15,90,66,296.74 whereas the overdraft limit of the petitioners was only

Rs.2,50,00,000/-. The respondents informed that the interest applicable on the said outstanding was Rs.1,61,87,218/- till 31st August, 2009 and thereby the total outstanding of Rs.17,52,53,514.74 was payable by the petitioners to the respondents. The respondents called upon the petitioners to pay the said amount with interest at the rate of 17% per annum from 1st September, 2009 till payment within seven days from the date of the receipt of the said notice. The petitioners neither replied to the said notice nor paid any amount in response to the said notice.

8. On 20th November, 2009 the petitioner no.1 herein filed their claim petition under section 84 of the Multi State Co-operative Societies Act, 2002 (Claim No.54 of 2009) against the respondents inter alia praying for a direction against the respondents to set off the fixed deposit receipts aggregating to Rs.9,25,00,000/- against the claims of the respondent bank against the petitioners. The claim was referred to Shri P. L.Joshi, who was appointed as the sole arbitrator by the Central Registrar under section 84 of the Multi State Co-operative Societies Act, 2002. The respondents opposed the said claim by filing written statement on 19th January, 2010. The respondents contended that those fixed deposits relied upon by the petitioners were not supported with the fixed deposits discharge agreement i.e. the consent agreement duly signed on the stamp paper by the fixed deposit holder thereby authorising the respondents to appropriate and/or adjust the fixed deposits against the dues of the petitioners in case of default by the petitioners. The respondents also placed reliance on the moratorium issued by the Reserve Bank of India in the month of January 2009 and subsequent restriction imposed by the Reserve Bank of India on the respondents which were binding on the respondents. The respondents prayed for dismissal of the said claim filed by the petitioners.

9. On or about 5th March, 2010, the respondents herein filed their claim (Claim No.04 of 2010) against the petitioners and the guarantors before a former judge of this court who was appointed as an arbitrator under section 84(4) of the said Multi State Co-operative Societies Act, 2002 inter alia praying for recovery of the amount of Rs.19,00,89,561.74. The said claim filed by the respondents was resisted by the petitioner no.1 by filing written statement. The respondents examined the witness who filed affidavit in lieu of examination in chief. The petitioners did not examine any witness and also did not cross examine the witness examined by the respondents before the learned arbitrator.

10. On 7th April, 2010, the petitioner no.1 made an application before Shri P.L.Joshi who was appointed as an arbitrator in Claim No.54 of 2010 which was filed by the petitioner no.1 inter alia praying for transfer of the dispute bearing No.4 of 2010 which was filed before the learned arbitrator, the former judge of this court and for clubbing of the said matter with Claim No.54 of 2010 filed by the petitioner no.1 to avoid multiplicity of the proceedings. On 16th July, 2010, the learned arbitrator hearing Claim No.4 of 2010 which was filed by the respondents against the petitioner no.1 passed an order directing both the parties to go before the learned arbitrator Shri P.L.Joshi who was hearing the arbitration claim filed by the petitioner no.1 to avoid any multiplicity of the proceedings. Pursuant to the said order passed by the learned arbitrator in Claim No.4 of 2010, both the proceedings were clubbed and were heard and were referred to Shri P.L.Joshi.

11. On 7th February, 2011, the learned arbitrator Shri P.L. Joshi directed the respondents to furnish the details as to the fixed deposits i.e. the date of maturity and the maturity amount so that if the same was allowed to be adjusted, the petitioner no.1 would know what was due to them. The matter was adjourned to

3rd March, 2011. On 3rd March, 2011 the learned arbitrator granted time to the respondents to file statement of account in respect of the fixed deposits which shall contain casewise fixed deposits, date of maturity and the amount due on maturity. The learned arbitrator directed the petitioner no.1 to show their bonafides to deposit the amount that according to them was due to the respondents bank or part of it. The petitioners did not deposit any amount with the respondents. Similarly the respondent bank also did not file any statement as directed by the learned arbitrator.

12. It is the case of the respondents that the said Mr.P.L.Joshi thereafter resigned and in his place the Central Registrar appointed Dr.Pratibha D.Upasani, former judge of this court as the sole arbitrator for hearing the said dispute between the parties by issuing a notification.

13. On 12th January, 2011 the moratorium issued by the Reserve Bank of India on the respondent came to be lifted. It is the case of the petitioners that thereafter all the assets of the respondents bank were transferred to the Bank of Baroda. On 20th September,2011 the learned arbitrator observed that since there was no moratorium, it was possible to deduct fixed deposits amount from the claim amount in each matters. Both the parties informed the learned arbitrator that there was possibility of exploring settlement. The learned arbitrator directed that in each matters the fixed deposits were directed to be deducted from the claim amount. The learned arbitrator noticed that there were three accounts and three different sets of fixed deposits. She directed that the respective amount may be adjusted to their respective accounts. It was made clear that if the settlement talks failed for any reason, both the sides shall be prepared for advancing their final arguments on 4th October, 2011.

14. It is the case of the respondents that three of the fixed depositors approached the respondents and disputed the authority if any alleged to have been given to the petitioners for applying for adjustment of the loan amount of the petitioners against their fixed deposits. One of the parties also filed affidavit in that respect and made a complaint against the petitioner no.1 with the bank. The respondents therefore applied for modification of the order dated 20th September, 2011 before the learned arbitrator.

15. On 11th September, 2012, the learned arbitrator made an award and rendered a finding that the stand of the respondents in refusing to adjust the fixed deposits appeared to be correct. The learned arbitrator in the impugned award also noticed that the petitioner no.1 had filed an application on 8th April, 2010 but failed to swear to the fact that they had been duly authorised by the fixed deposit holders to adjust the proceeds of the same towards the loan amount and claim and pay difference amount. The petitioners had sought time to comply with the proposal for submitting affidavit of deposit holders and pay the difference amount, but did not comply with the same. The learned arbitrator also considered the fact that the respondents were receiving letters from the fixed deposit holders claiming that they had lost the original fixed deposit receipts. It was noticed by the learned arbitrator that there were three such claim applications filed by the petitioner no.1 and in one such claim petition, one of the joint fixed deposit holders Mr.Ratan N. Motwani for self and on behalf of others had addressed one undated letter to the bank stating that he had not given any fixed deposits to any third party but had applied to the bank for converting the same in long term deposit. By the said award dated 11th September, 2012 the learned arbitrator

rejected the claim filed by the petitioners inter alia praying for adjusting the loan amount of the fixed deposits.

16. The said award dated 11th September, 2012 is impugned by the petitioners in Arbitration Petition No.125 of 2014. By a separate award dated 8th August, 2012 passed by the learned arbitrator in Claim No. 04 of 2010 filed by the respondents herein against the petitioners, the learned arbitrator allowed the said claim and directed the petitioners to pay a sum of Rs.19,00,89,561.74 with further interest thereon at the rate of 17% per annum from the date of claim till payment and/or realization and granted various other reliefs. The said award dated 8th August, 2012 in favour of the respondents had been impugned by the petitioners in Arbitration Petition No.129 of 2014.

17. Insofar as other four petitions are concerned, the same are filed by the two of the creditors who were granted similar facilities by the respondents. Those creditors had also filed similar statement of claim inter alia praying for adjustment of loan amount against fixed deposits whereas respondents bank had filed statement of claim for recovery of various amounts under facilities granted to those petitioners. None of the petitioners in those petitions had filed any written statement in the proceedings for recovery filed by the respondents bank against them before the learned arbitrator.

18. It is submitted by the learned counsel for the petitioners that all the aforesaid arbitral proceedings were referred to the sole arbitrator Mr.P.L.Joshi till the month of July 2011. The mandate of the said Mr.P.L.Joshi was terminated by the respondents. The arbitral proceedings were heard by Smt.Justice P.D.Upasani, former judge of this court which appointment was illegal and without jurisdiction.

Reliance is placed on section 15 of the Arbitration and Conciliation Act, 1996 in support of this submission.

19. Learned counsel for the petitioners placed reliance on the award rendered by the learned arbitrator Mr.P.L.Joshi on 18th May 2011 in case of Memon Co-operative Bank Ltd. vs.Damodar Mudaliar in which the learned arbitrator Mr.P.L.Joshi had given benefit of one time settlement scheme to the said borrower and had reduced the amount substantially. He submits that in another matter between the same bank and Web Hills Resort Pvt. Ltd., in Arbitration Petition No.902 of 2011, the parties settled the matter amicably. He submits that even in the said matter, the said borrowers were granted benefit of one time settlement. Learned counsel submits that since the said Mr.P.L.Joshi would have passed the similar award and would have given benefit of one time settlement also to the petitioners, the respondents deliberately terminated his mandate and illegally appointed Mrs.Justice P.D.Upasani, former judge of this court as an arbitrator. He submits that the said arbitrator could not have decided the proceedings between the petitioners and the respondents.

20. It is submitted by the learned counsel for the petitioners that though by an order dated 20th September, 2011, the learned arbitrator had directed the respondents to deduct the amounts of the fixed deposits from the claim amount, the respondents did not give any deduction of the said amount and did not adjust the loan amount as against the said fixed deposits. He submits that though the said order dated 20th September, 2011 was not complied with by the respondents, the learned arbitrator did not consider the non-compliance of the said order dated 20th September, 2011 and refused to appropriate the proceedings of the said fixed deposits against the loan amount payable by the petitioners if any, to the

respondents. He submits that the learned arbitrator has wrongly rejected the claim for adjustment in the said impugned award dated 11th September, 2012.

21. Learned counsel for the petitioners submits that though the principle amount of the secured overdraft facility was only Rs.2,50,00,000/-, the learned arbitrator has awarded the claim to Rs.19,00,89,561.74 in favour of the respondents.

22. Mr.Kamat, learned counsel appearing for the respondents on the other hand supported the findings of fact rendered by the learned arbitrator in all the awards and submits that such finding of fact rendered by the learned arbitrator after considering the pleadings, documentary as well as oral evidence and are not perverse and thus this court cannot interfere with such findings of fact under section 34 of the said Arbitration Act. Learned counsel invited my attention to various paragraphs of the pleadings, documents and also the findings rendered by the learned arbitrator in the impugned award. Learned counsel also invited my attention to the Roznama of the arbitral proceedings and would submit that the petitioners had taken large number of adjournments before the learned arbitrator and did not cross examine the witness examined by the respondents. Insofar as issue of jurisdiction raised by the petitioners in the arbitration petition is concerned, learned counsel for the respondents submits that on the application for transfer of the statement of claim filed by the petitioners of the disputes bearing No.4 of 2010, the learned arbitrator who was hearing claim no.4 of 2010 after hearing both the parties had passed an order directing the parties to go before the learned arbitrator Mr.P.L.Joshi who was hearing the arbitration claim filed by the petitioner no.1 to avoid any multiplicity of the proceedings.

23. Learned counsel for the respondents submits that the said Mr.P.L.Joshi who

was hearing all the six proceedings resigned. My attention is invited to the order passed by the Commissioner for Co-operation and Registrar of Co-operative Societies, Maharashtra State, Pune who exercised the powers delegated to him by the Central Registrar and appointed Mrs. Justice P.D. Upasani as the sole arbitrator of the Memon Co-operative Bank, Mumbai for the Maharashtra State. The said appointment of the said arbitrator was valid for one year from the date of the said order. On 10th July, 2012 the appointing authority issued another order thereby appointing Mrs. Justice P.D. Upasani (retired) as arbitrator of the Memon Co-operative Bank w.e.f. 30th June, 2011 for the period of one year. My attention is also invited to the similar order dated 11th July, 2013 issued by the appointing authority appointing Mrs. Justice P.D. Upasani (retired) w.e.f. 11th July, 2013 for a period of one year from the date of the said order as the arbitrator of the said Memon Co-operative Bank for the Maharashtra State. The appointment of the learned arbitrator was again extended by another order passed in the month of 14th August, 2014 for a period of one year as the arbitrator of Memon Co-operative Bank w.e.f. 14th August, 2014. It is submitted by the learned counsel for the petitioners that the learned arbitrator was thus validly appointed by the Central Registrar by delegating his powers who had issued orders of appointment from time to time.

24. He submits that since Mr. P.L. Joshi resigned, the only arbitrator who could hear the matter and adjudicate upon the dispute was Mrs. Justice P.D. Upasani (retired) and none else. Learned counsel for the respondents submits that though several meetings were held by the learned arbitrator and some of such meetings were attended by the petitioners or their advocates, no objection about the validity of the appointment or about jurisdiction of the learned arbitrator to act as an arbitrator was raised by the petitioners by filing any application under section 16

of the Arbitration and Conciliation Act, 1996. He submits that the petitioners thus cannot be allowed to raise such issue of jurisdiction for the first time in these petitions under section 34 of the said Act.

25. Insofar as submission of the learned counsel for the respondents that the petitioners were not given benefit of one time settlement scheme is concerned, he submits that the petitioners never applied for benefit of such scheme. It was also not pleaded by the petitioners before the learned arbitrator that the petitioners were eligible to get the benefit of such schemes if any, and ought to have given such benefit. The learned arbitrator therefore rightly did not consider any such benefit of the one time settlement scheme in favour of the petitioners.

26. Insofar as submission of the learned counsel for the petitioners that though the learned arbitrator herself had issued directions to the respondents to deduct the amount under various fixed deposits and to appropriate the same against the loan amount, the learned arbitrator refused to give credit of such amount in the impugned award is concerned, learned counsel appearing for the respondents submits that the petitioners wanted the credit and appropriation of the amount under 677 fixed deposits in the name of third parties which were without supporting of any affidavit of such third parties and indemnity in favour of the bank. He submits that the secured overdraft facility granted in favour of the petitioner no.1 was not against those fixed deposits. He submits that initially the respondents even otherwise could not have deducted any amount under those fixed deposits in view of the moratorium issued by the Reserve Bank of India which was in force for quiet sometime. The respondents had informed the petitioners that the proposal of the petitioners was forwarded to the Reserve Bank of India but the Reserve Bank of India did not permit any such adjustment.

27. Learned counsel submits that several of such fixed deposit holders whose fixed deposits were sought to be adjusted by the petitioners had approached the respondents and had made complaints against the petitioners. Some of the fixed deposit holders also alleged that their fixed deposit receipts were lost and misplaced and they had not authorised the petitioners to apply for adjustment. In one of the proceedings three fixed deposit holders had also filed affidavit raising strong protest against the petitioners for seeking such adjustment of fixed deposits against the liability of the loan granted to the petitioner no.1. He submits that no sooner the respondents received such complaint from some of the fixed deposit holders, the respondents had applied for modification of the order passed by the learned arbitrator directing deduction of such fixed deposit amounts from the loan amount.

28. Learned counsel for the respondents submits that except in one matter out of three matters which were filed by the respondents for recovery of various amounts, the petitioners did not even file the written statement. Though an opportunity was rendered by the learned arbitrator to the petitioners to cross examine the witness examined by the respondents, the petitioners did not cross examine the said witness. My attention is also invited to the statement of claim filed by the petitioners in which the petitioners themselves had admitted the loan amount. He submits that the petitioners did not lead any oral evidence before the learned arbitrator.

29. Learned counsel for the respondents placed reliance on the judgment of Division Bench of this court in case of ***Ganesh Benzoplast Ltd. vs.SAF Yeast Co. Ltd. reported in 2007 B.C.I. 109*** and in particular paragraph (16) and would

submit that if objection under section 16 is not raised before the learned arbitrator, it would amount to waiver on the part of such party to raise such objection. Objection cannot be allowed to be raised for the first time in the petition filed under section 34 of the Arbitration Act. Paragraph (16) of the said judgment reads thus :-

16. The appellants had not shown any objection or reluctance for participating in the adjudication process before the learned arbitrator in relation to the disputes arising out the second shipment. On the contrary, the appellants volunteered to place on record the necessary materials in support of their allegations in answer to the claim made in that regard by the respondents, and there being no objection raised as regards the absence of any issue being framed by the arbitrator on the aspect of exclusion of the dispute in relation to the second shipment, it is to be held that the scope of arbitration included the disputes arising out of the second shipment. In view of Section 16 of the said Act, it cannot be disputed that the arbitral Tribunal is fully competent to rule on its own jurisdiction including on the objections which could be raised about the absence or validity of the arbitration agreement as also about the exclusion of any part of dispute from the arbitration proceedings. Obviously therefore, in case any party to the proceedings want to contend that the dispute or any part thereof falls beyond the scope of arbitration in the proceedings before the learned arbitrator, it is necessary for such party to raise specific objection in that regard and invite the learned arbitrator to rule on such objection. Failure in that regard by such a party will have to be construed as waiver on the part of such a party to raise such objection.

REASONS AND CONCLUSION

30. A perusal of the record indicates that the petitioner no.1 was granted overdraft facility of Rs.2,50,00,000/-. Petitioner nos. 2 to 5 stood as guarantors for the petitioner no.1. It is not in dispute that the said overdraft facility was secured against the equitable mortgage of various properties. The said overdraft facility was renewed from time to time upon the petitioners executing various documents in favour of the respondents.

31. A perusal of the correspondence entered into between the parties further indicate that the petitioner no.1 had exceeded their overdraft limit of Rs.2,50,00,000/- going upto Rs.15,90,66,296.74. The respondents had given such bifurcation in their letter dated 10th September, 2009 which was not denied by the petitioners. The learned arbitrator has considered the documents produced by the respondents at the time of hearing as well as produced in the witness examined by the respondents who was not cross examined. In my view there is thus no merit in the submission of the learned counsel for the petitioners that the petitioners were not liable to pay amount of Rs.19,00,89,561.74 with further interest thereon.

32. Insofar as submission of the learned counsel for the petitioners that the respondents could not have terminated the mandate of Mr.P.L.Joshi and could not have appointed Smt.Justice P.D.Upasani (retired) as the sole arbitrator unilaterally is concerned, the reference to the affidavit of evidence filed by the respondents of Mr.Mohammad Adam Shaikh on this issue would be relevant. In paragraph (8) of the said affidavit, the witness had deposed that the matter was taken before Mr.P.L.Joshi who was also on the panel of the arbitrators who withdrew from the matter and thus the matter was placed before Smt.Justice P.D.Upasani(retired). Reference was also placed on the said affidavit and the orders issued by the

Commissioner of Co-operation and Registrar of Co-operative Societies, Maharashtra State dated 30th June, 2003 and 30th June, 2011. There was no cross examination of the said witness on any part of the deposition made in the said affidavit of evidence which was admittedly served upon the petitioners.

33. Be that as it may, it is not in dispute that several meetings were held by the learned arbitrator after her appointment and before rendering the impugned award which were sometimes attended by the petitioners themselves or through their advocates. The petitioners however did not raise any objection about the jurisdiction of the learned arbitrator to act as an arbitrator or about her appointment at any point of time by filing application under section 16 of the Arbitration Act or otherwise. In my view, the petitioners have thus waived their right to raise such objection of jurisdiction and cannot be allowed to raise such issue of jurisdiction and for the first time in these proceedings filed under section 34 of the Arbitration Act. The Judgment of Division Bench of this court in case of **Ganesh Benzoplast Ltd. (supra)** squarely applies to the facts of this case. I am respectfully bound by the said judgment. In my view in view of the provisions under section 84 empowering Central Registrar to appoint arbitrator, respondents were not required to take consent of the petitioners for appointment of the arbitrator. Section 15 of the Arbitration Act thus would not be applicable to such statutory arbitration.

34. Insofar as submission of the learned counsel for the petitioners that the learned arbitrator did not give any opportunity to the petitioners to cross examine the witness is concerned, a perusal of the record indicates that the petitioners never asked for any opportunity to cross examine the witness examined by the respondents. Learned counsel for the petitioners could not produce any application or any letter forming part of the record seeking such opportunity. The petitioners

have taken several adjournments before the learned arbitrator on one or the other pretext. I am thus not inclined to accept the submission of the learned counsel appearing for the petitioners that the learned arbitrator refused to give an opportunity to the petitioners to cross examine the witness examined by the respondents.

35. Insofar as submission of the petitioners that inspite of the order passed by the learned arbitrator herself on 20th September, 2011 directing the respondents to give deduction of the amount under the fixed deposits and though such order was not complied with by the respondents, the learned arbitrator did not give credit of such amount to the petitioners is concerned, a perusal of the said order dated 20th September, 2011 does not indicates that on the date of passing the said order by the learned arbitrator, the petitioners had produced any letter of authority or indemnity on behalf of the fixed deposit holders in favour of the respondents to appropriate the amount under those fixed deposits against the loan amount. It is not in dispute that the secured advance or facility granted in favour of the petitioner no.1 by the respondents was not against any of those fixed deposits.

36. A perusal of the record produced before the learned arbitrator and also for perusal of this court clearly indicates that some of the fixed deposit holders had made complaints to the respondents to the effect that their fixed deposits were lost and they had not authorised any person to apply for appropriation of those fixed deposits against the loan amount payable by the petitioners to the respondents. In view of such claims raised by the respondents from some of the fixed deposit holders, the respondents brought this fact to the notice of the learned arbitrator by producing such documents and applied for modification of the said order dated 20th September, 2011. A perusal of the award indicates that the learned arbitrator has

considered this issue at length and has held that those fixed deposits were not supported with the fixed deposit discharge agreement i.e. consent letter duly signed on stamp paper by the fixed deposit holders thereby authorizing the respondents to appropriate and/or adjust the fixed deposits of the holders against the dues of the petitioners in case of any default by them.

37. The learned arbitrator has also taken cognizance of the fact that initially Reserve Bank of India had issued moratorium which was binding upon the respondents not to allow any such adjustment of the liability of the borrowers against such fixed deposits. A perusal of the award also indicates that the learned arbitrator has taken into consideration that as per the directions issued by the erstwhile arbitrator on 25th March, 2010 directing the petitioners to file affidavit showing that they had been duly authorised by the fixed deposit holders to adjust their fixed deposits against the loan amount, the petitioners though filed affidavit dated 8th April, 2010 but failed to swear to the fact that they had been duly authorised by the fixed deposit holders to adjust to the proceeds of the same towards the loan amount and claim or pay the difference amount. Though the petitioners had sought time to comply with the proposal for submitting affidavit of deposit holders and pay the difference amount, the petitioners had failed to do so. In these circumstances, the learned arbitrator in my view has rightly rendered a finding of fact that the respondents were justified in refusing to adjust the said fixed deposits against the loan amount.

38. A perusal of the record indicates that the learned arbitrator has considered all the pleadings, documents and also the evidence led by the respondents on which there was no cross examination by the petitioners and has rendered a finding of fact that the respondents were entitled to recover various amounts from the

petitioners and has rightly allowed the said claim. The petitioners in other four petitions had not even filed any written statement disputing the claims made by the respondent bank. The learned arbitrator was thus right in allowing all the claims made by the respondents and rejecting the claims made by the petitioners. Such findings of fact rendered by the learned arbitrator are not perverse and thus cannot be interfered with under section 34 of the Arbitration Act.

39. In my view there is no merit in any of the aforesaid petitions filed by the petitioners. The facts in the other four matters are identical to the facts in Arbitration Petition No.125 of 2014 and Arbitration Petition No.129 of 2014 and the reasoning rendered by this court in Arbitration Petition No.125 of 2014 and Arbitration Petition No.129 of 2014 would apply to the other four arbitration petitions also. I, therefore, pass the following order :-

- (a) Arbitration Petition Nos.125 of 2014, 129 of 2014, 176 of 2013, 127 of 2014, 242 of 2014 and 246 of 2014 are dismissed.
- (b) There shall be no order as to costs.

(R.D. DHANUKA,J.)