IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION PETITION NO.65 OF 2015

Shamin Banu Modak .. Petitioner
Vs.
Konkan Mercantile Co-op. Bank Ltd. .. Respondent

Mr.Anand Mishra i/b Ashok M. Saraogi for petitioner.

Mr.Jaydeep Mitra i/b S.R. Waghmare for respondent.

CORAM : K.R.SHRIRAM, J.
DATE : 16TH JUNE, 2015

P.C.

1 This petition is filed challenging an Award dated 1.10.2014 issued under Section 84 of the Multi-State Co-operative Society's Act 2002 passed by the Arbitrator appointed by the Central Registrar, Co-operative Societies, Government of India, New Delhi. The grounds for challenge primarily are that (a) that the Arbitrator has given the Award based on an offer made by the petitioner holding it as admission of liability when the offer was on without prejudice basis, (b) the respondent having commenced action under the provisions of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFACIE Act, 2002), simultaneous action could not be taken by the respondent under the Multi-State Co-operative Society's Act; and (c) as the offer made was on without prejudice basis, the Arbitrator should have insisted upon the respondent proving its claim by leading evidence.

2 The facts that lead to the respondent commencing arbitration proceedings against the petitioner are as under :

The petitioner had approached the respondent for sanction of cash credit facility of Rs.50 lakhs by way of an application dated 21.04.2011. The respondent on the basis of representation of the petitioner sanctioned the cash credit facility of Rs.50 lakhs by a letter dated 16.06.2011. The petitioner executed required documents including security documents in favour of the respondent to repay the amount of Rs.50 lakhs together with interest. The petitioner utilised the amount of Rs.50 lakhs but failed and neglected to make repayment of any amount, i.e., principal or the interest.

3 The respondent, therefore, commenced arbitration proceedings. The petitioner filed their defence and denied the claim. In the meanwhile, the respondent had also commenced actions under the provisions of the SARFACIE Act, 2002 in respect of certain properties of the petitioner. There have been several allegations made by the respondent against the petitioner but we need not go into those for the purpose of dealing with the present petition which is under Section 34 of the Arbitration and Conciliation Act, 1996 (The Arbitration Act, 1996).

4 During the course of the proceedings, the petitioner filed an

application for adjournment before the Arbitrator on the ground that by a letter dated 27.08.2014, the petitioner has made to the respondent one time settlement offer whereby the petitioner agreed to pay to the respondent a sum of Rs.66 lakhs in full and final settlement.

5 On the next date of hearing which the counsel for the respondent states was on 1.10.2014, which is also the date of the Award, the representative of the respondent-bank submitted that the respondent has agreed to accept the amount of Rs.66 lakhs in full and final settlement but the respondent shall charge interest at the rate of 15.5% per annum (cash credit facility was given at interest of 17.5% per annum) until the payment is made. The bank's representative further submitted that in case the petitioner failed to pay the amount of Rs.66 lakhs within the time limit as granted to the petitioner, the respondent shall be entitled to execute Award for an amount of Rs.63,91,969.92 which was the amount outstanding as on 30.08.2014 also interest at the rate of 15.5 % per annum till full realisation with monthly rest.

The submission of the bank's representative was accepted by the petitioner. Therefore, the Arbitrator proceeded to pass the Award on basis of admission of liability. The operative part of the Award read as under :

1. Dispute is allowed.

> 2. Opponents are ordered to pay jointly and severally to the claimant bank Rs.66.00 lakh within three months from the date of this order with future interest at the rate of Rs.15.5% p.a. on Rs.66.00 lakhs from 1/09/2014 till 30/11/2014.
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> 3. If the Opponents failed to fulfill the order clause 2 above, the opponents are ordered to pay jointly and severally to the claimant bank Rs.63,91,969.92 as on 30/08/2013 with further interest at the rate of 15.5% p.a. from 01/09/2013 at monthly rest on the principal amount of Rs.63,13,409.43 till final payment and also a sum of Rs.18,000/- towards the Arbitration Fee, Rs.5,000/- towards administrative Cost, stamp fees and public notice charges Rs.Nil which the opponents are hereby directed to pay to the Claimant Bank.
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> 4. The Attachment order dated 20/05/2014 passed by this Authority is hereby confirmed till full repayment of Awarded amount.
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> 5. During the pendency of the dispute, if any amount is paid by the opponents the same be adjusted towards the Awarded amount.

6 The first ground of the petitioner that the offer made by the petitioner to pay one time settlement of Rs.66 lakhs was without prejudice, is not acceptable. I have perused a copy of the letter of offer dated 27.08.2014, copy whereof was tendered across the bar by the advocate for the petitioner. It is not a without prejudice offer. In the said letter, the petitioner had admitted the liability. The petitioner in fact had made an offer to pay Rs.52 lakhs earlier and later enhanced it by this letter to pay Rs.66 lakhs. The last paragraph of this letter reads as under :

> 8.............
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> As our loan Account was in CC facility we sincerely requested you to settle the matter. We request you to kindly settle the matter for a lump-sum amount of Rs.66,00,000/- (Rupees Sixty Six lakhs only) for which we shall make entire repayment of the said amount within a period of 04 weeks from acceptance of my one time settlement proposal.

7 In fact, it is for the first time in this petition, the petitioner has alleged that it was a without prejudice offer. It is also to be noted that the petitioner had in fact filed a petition earlier challenging the same Award which the petitioner withdrew with liberty to file the present petition. A copy of the earlier petition is annexed to the reply filed by the respondent in which prayer (b) reads as under :

> *"(b) that after perusal of the records, be pleased to extend the time for repayment for a total sum of Rs.66 lacs to the respondents on or before 30th May, 2015 and be pleased to permit the petitioner to dispose of the said flat being flat No.502 situated at Sayba Palace, Flat No.502, A-Wing, Near Post Office, New Mill Road, Kurla (W), Mumbai 400 070 subject to the petitioner making payment of Rs.66 Lacs first in time out of the recovery by way of sale of the said flat on such terms as this Hon'ble Court may deem fit and proper."*

Therefore, the Arbitrator was correct in proceeding on the basis that there has been an admission of liability by the petitioner.

8 The second ground of the petitioner that two simultaneous actions

cannot be taken by the petitioner, i.e., one under the SARFACIE Act, 2002 and the other under the Multi-State Co-operative Society's Act, 2002 is also not sustainable.

9 The Apex Court in the matter of ***M/s. Transcore Vs. Union of India & Anr.***[1] has held that the actions under the SARFACIE Act, 2002 and Debt Recovery Tribunal Act, 1993 (DRT Act) for recovery can be maintained simultaneously as both are arms of the same body for achieving the same ends. Paragraph nos.26 and 46 of the said judgment read as under :

> *"26 In our view, Section 17(4) shows that the secured creditor is free to take recourse to any of the measures under Section 13(4) notwithstanding anything contained in any other law for the time being in force, e.g., for the sake of argument, if in the given case the measures undertaken by the secured creditor under Section 13(4) comes in conflict with, let us say the provision under the State land revenue law, then notwithstanding such conflict, the provision of Section 13(4) shall override the local law. This position also stands clarified by Section 35 of the NPA Act which states that the provisions of NPA Act shall override all other laws which are inconsistent with the NPA Act. Section 35 is also important from another angle. As stated above, the NPA Act is not inherently or impliedly inconsistent with the DRT Act in terms of remedies for enforcement of securities. Section 35 gives an overriding effect to the NPA Act with all other laws if such other laws are inconsistent with the NPA Act. As far as the present case is concerned, the remedies are complimentary to each other and, therefore, the doctrine of election has no application to the present case.*

1 A.I.R.2007 SC 712

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46 In the light of the above discussion, we now examine the doctrine of election. There are three elements of election, namely, existence of two or more remedies; inconsistencies between such remedies and a choice of one of them. If any one of the three elements is not there, the doctrine will not apply. According to American Jurisprudence, 2d, Vol. 25, page 652, if in truth there is only one remedy, then the doctrine of election does not apply. In the present case, as stated above, the NPA Act is an additional remedy to the DRT Act. Together they constitute one remedy and, therefore, the doctrine of election does not apply. Even according to Snell's Equity (Thirty-first Edition, page 119), the doctrine of election of remedies is applicable only when there are two or more co-existent remedies available to the litigants at the time of election which are repugnant and inconsistent. In any event, there is no repugnancy nor inconsistency between the two remedies, therefore, the doctrine of election has no application."

The actions by the respondent under the Multi-State Co-operative Housing Society's Act is akin to the actions taken by banks under DRT Act. The recovery proceedings are commenced under the Multi-State Co-operative Housing Societies Act. Moreover, there is no conflict between the SARFACIE Act, 2002 and the Multi-State Co-operative Housing Societies Act, 2002. The SARFACIE Act is an additional remedy to the Multi-State Co-operative Housing Societies Act. Together they constitute one remedy. Therefore, the ratio laid down by the Apex Court in Transcore (supra) will also be squarely applicable to the present petition.

10 As could be seen from the Award, the same is based on an admission of liability relying upon the settlement offer made by the petitioner which was accepted by the bank. Under Section 30 of the Arbitration Act, 1996 the tribunal is empowered to record the settlement in the form of an Award on agreed terms. Under Section 30(3), an arbitral Award on agreed terms shall be made in accordance with Section 31 and shall state that it is an arbitral Award. An arbitral Award on agreed terms under Section 30, need not give any reasons. Section 31(3) of the Arbitration Act reads as under :

> ***31. Form and contents of arbitral award :***
> ***…......***
> *3. The arbitral award shall state the reasons upon which it is based, unless :-*
> > *(a) the parties have agreed that no reasons are to be given, or*
> > *(b) the award is an arbitral award on agreed terms under section 30.*

11 Since the petitioner had made one time settlement offer which was accepted by the respondent and the offer was not on without prejudice basis, question of the respondent having to prove the claim by leading evidence etc. also does not and did not arise.

12 In the circumstances, the grounds of challenging the award are not accepted. In my view, the arbitral Award is not in conflict with the public policy of India and does not require to be set aside under Section 34 of the

The Arbitration Act, 1996.

13 The petition is, therefore, dismissed with costs in the sum of Rs.25,000/-.

(K.R. SHRIRAM, J.)