IN THE HIGH COURT OF JUDICATURE AT BOMBAY,

BENCH AT AURANGABAD

WRIT PETITION NO.5528 OF 2010 WITH CIVIL APPLICATION NO.4032 OF 2017

M/s. J. Square Steels Pvt. Ltd.,
A Private Limited Company,
having its factory at Gut No.850,
24 Km. Stone, Paithan Road, Bidkin,
Tq. Paithan, District Aurangabad,
through its Director,
Shri Rajendra Namdeorao Ekambe,
Age 38 years, Occ. Business,
R/o At and Post Krishnapur, Bidkin,
Tq. Paithan, District Aurangabad ... **PETITIONER**

VERSUS

1) The Union of India,
through its Secretary, Department of
Agricultural and Co-operation,
Ministry of Agriculture,
Govt. of India, Room No.398-A,
Krishi Bhawan, New Delhi – 1

2) The Central Registrar,
Multi-State Co-operative Societies,
Department of Agricultural and
Co-operation, Room No.398-A,
Krishi Bhawan, New Delhi – 1

(Copies to be served for respondent
No.1 and 2 on the Standing Counsel of
Union of India for Bombay High Court,
Bench at Aurangabad)

3) Abhyudaya Co-operative Bank Ltd.,
K.K. Tower, G.D. Ambekar Marg,
Parel Village, Mumbai PIN 400 012 … **RESPONDENTS**

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Shri N.B. Suryawanshi, Advocate holding for
Shri S.W. Munde, Advocate for petitioner

Shri S.B. Deshpande, Assistant Solicitor General
for respondents No.1 and 2
Shri S.S. Deve, Advocate for respondent no.3

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W I T H

FIRST APPEAL NO.2749 OF 2009 WITH
CIVIL APPLICATION NO.10993 OF 2017

Mrs. Sanyogita N. Jadhav,
Age 36 years, Occ. Business,
R/o CIDCO, Aurangabad … **APPELLANT**

VERSUS

1. M/s J. Square Steels Pvt. Ltd.
A Private Limited Company,
Registered under the Companies Act,
1956, and having its factory at
Gut No.850, Village Bidkin,
Tq. Paithan, District Aurangabad
through its Director

2. Abhyudaya Co-operative Bank Ltd.,
A Multistate Scheduled Bank,
having its Administrative Office at
K.K. Tower, Abhyudaya Bank Lane,
Off. G.D. Ambekar Marg,
Parel Village, Mumbai – 400 012
through its Authorised Signatory … **RESPONDENTS**

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Shri V.M.Thorat, Advocate holding for
Shri N.B. Suryawanshi, Advocate for appellant
Shri S.S. Deve, Advocate for respondent No.2.

…..

WITH

CIVIL APPLICATION NO.13313 OF 2011 IN
FIRST APPEAL NO.2749 OF 2009

Abhyudaya Co-operative Bank Ltd.,

having its Administrative Office at
K.K. Tower, Abhyudaya Bank Lane,
Off. G.D. Ambekar Marg,
Parel Village, Mumbai – 400 012 … **APPLICANT**

VERSUS

1. Mrs. Sanyogita N. Jadhav,
   Age 36 years, Occ. Business/ Housewife,
   R/o CIDCO, Aurangabad.

2. M/s J. Square Steels Pvt. Ltd.
   A Private Limited Company,
   Registered under the Companies Act,
   1956, and having its factory at
   Gut No.850, Village Bidkin,
   Tq. Paithan, District Aurangabad
   through its Director … **RESPONDENTS**

…..

Shri S.S. Deve, Advocate for applicant
Shri S.V. Adwant, Advocate for respondent No.1
Shri N.B. Suryawanshi, Advocate holding for
Shri S.W. Munde, Advocate for respondent No.2

…..

WITH

ARBITRATION APPEAL NO.1 OF 2015 WITH CIVIL APPLICATION NO.1449 OF 2015

Abhyudaya Co-operative Bank Ltd.,
A Multi-state Scheduled Bank
having its Administrative Office at
K.K.Tower, Abhyudaya Bank Lane,
Off. G.D. Ambekar Marg,
Parel Village, Mumbai – 400 012 … **APPELLANT**

VERSUS

1. Mr. Shripatrao M. Jadhav,
   (Deceased, through Legal Heirs)

a) Mrs. Nalini w/o Shripatrao Jadhav,
   Age 70 years, Occ. Household,
   R/o Plot No.18 & 34, CIDCO, N-3,

Aurangabad – 431 003

b) Mrs. Shaila w/o Atmaram Mapari,
Age 47 years, Occ. Service,
R/o Row House No.13,
Dharti Dhan Plaza, CIDCO, N-4,
Aurangabad.

c) Niranjan s/o Shripatrao Jadhav,
Age 43 years, Occ. Business,
R/o Plot No.18 & 34, CIDCO, N-3,
Aurangabad – 431 003

2. Mrs. Sanyogita N. Jadhav,
Age 36 years, Occ. Business,
R/o Plot No.18 & 34, CIDCO, N-3,
Aurangabad – 431 003

3. Mrs. Rajmati V. Ekambe,
PL SB/10/7, Sector 9, Khanda Colony,
New Panvel, District Raigadh
PIN CODE – 410 206 … **RESPONDENTS**

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Shri S.S. Deve, Advocate for appellant
Shri N.B. Suryawanshi, Advocate for respondents No.1-a to 1-c & 2

…..

<u>WITH</u>

<u>ARBITRATION APPEAL NO.2 OF 2015 WITH CIVIL APPLICATION NO.1451 OF 2015</u>

Abhyudaya Co-operative Bank Ltd.,
A Multi-state Scheduled Bank
having its Administrative Office at
K.K.Tower, Abhyudaya Bank Lane,
Off. G.D. Ambekar Marg,
Parel Village, Mumbai – 400 012 … **APPELLANT**

<u>VERSUS</u>

1. M/s J. Square Steels Pvt. Ltd.,
A company incorporated under the
Companies Act, 1956 and having
its registered office and factory

at Gut No.850, 24 Km. Stone,
Aurangabad-Paithan Road,
Bidkin, Tq. Paithan,
District Aurangabad

2. Mr. Vishram N. Ekambe,
R/o PL 5B/10/7, Sector 9,
Khanda Colony,
New Panvel – 410 201
District Raigadh

3. Mr. Rajendra N. Ekambe,
R/o At & Post Krishnapur,
Bidkin, Tq. Paithan,
District Aurangabad.

4. Mr. Balu B. Suryavanshi
R/o At & Post Krishnapur,
Bidkin, Tq. Paithan,
District Aurangabad.

5. Mr. Niranjan Shripatrao Jadhav,
R/o Plot No.18 & 34, CIDCO, N-3,
Aurangabad – 431 003 … **RESPONDENTS**

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Shri S.S. Deve, Advocate for appellant
Shri V.M. Thorat, Advocate holding for
Shri S.W. Munde, Advocate for respondent No.1.
Shri G.N. Kulkarni, Advocate for respondents No.3 & 4

…..

WITH

ARBITRATION APPEAL NO.3 OF 2015

Mrs. Sanyogita w/o Niranjan Jadhav,
Age 41 years, Occ. Housewife,
R/o Plot No.18 & 34, N-3, CIDCO,
Aurangabad, PIN CODE – 431 003 … **APPELLANT**

VERSUS

Abhyudaya Co-operative Bank Ltd.,
K.K. Tower, Abhyudaya Bank Lane,
Off, G.D. Ambekar Marg,

Parel Village, Mumbai – 400 012
through its Branch Office,
Abhyudaya Co-operative Bank Ltd.,
Samdani Chamber, New Gulmandi,
Dalalwadi, Aurangabad – 431 001 … **RESPONDENTS**

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Shri V.M. Thorat, Advocate holding for
Shri A.V. Patil, Advocate for appellant
Shri S.S. Deve, Advocate for respondent No.1

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CORAM: R.D. DHANUKA AND SUNIL K. KOTWAL, JJ.

Date of reserving judgment : 25th September, 2017

Date of pronouncing judgment :13th October, 2017

JUDGMENT (PER R.D. DHANUKA, J.):

1. By consent of parties, the aforesaid matters were clubbed and were heard together and are being disposed of by this common judgment.

2. Writ Petition No.5528/2010 is filed by M/s J. Square Steel Pvt. Ltd., the principal borrower of Abhyudaya Co-operative Bank Ltd. has filed the said Writ Petition, interalia praying for a declaration that Section 84 of the Multi-state Co-operative Societies Act, 2002 (for short the said Multi-state Act) is unreasonable, arbitrary and is violative of Article 14 of the Constitution of India and deserves to be set aside. The petitioner

also seeks a declaration that the Arbitrator is required to be appointed only after dispute is forwarded by the Bank or anyone else before the Central Registrar under Section 84 of the Multi-state Co-operative Societies Act, 2002 and that the Arbitrator shall be appointed in case to case by applying mind and one person cannot be appointed as an Arbitrator for the existing and/or for future disputes. The petitioner also seeks declaration that the learned Arbitrator Shri S.M. Nadgauda appointed by the Central Registrar was not appointed in accordance with the provisions of Section 84 of the Multi-state Act and his appointed deserves to be quashed and set aside.

3. The petitioner had also amended the Writ Petition and applied for a declaration that the award dated 25.8.2010, passed by the learned Arbitrator is null and void in view of his alleged illegal appointment under Section 84 of the Multi-state Act being ultra vires to the constitution of India.

4. Civil Application No.4032/2017 is filed by the petitioner in the said Writ Petition, interalia praying for recall of the order dated 25.1.2017, passed by this Court to de-tag First Appeal No.2749/2009, Writ Petition No.5528/2010, Arbitration Appeal No.1/2015, Arbitration Appeal No.2/2015 and to place

before the appropriate Bench.

5. First Appeal No.2749/2009 is filed by Mrs. Sanyogita Niranjan Jadhav, the guarantor to the loan given to M/s J. Square Steel Pvt. Ltd. by the Bank, interalia impugning the order dated 4.9.2009, passed by the learned 3rd Jt. Civil Judge, Senior Division, Aurangabad, dismissing the plaint filed by the appellant and allowing the application filed by the Bank for rejection of plaint under Order VII Rule 11(d) of the Code of Civil Procedure, 1908.

6. Civil Application No.10993/2017 is filed by the appellant in First Appeal No.2749/2009, interalia praying for amendment to the First Appeal No.2749/2009 as mentioned in para No.4 of the Civil Application.

7. Arbitration Appeal No.1/2015 and Arbitration Appeal No.2/2015 are filed by the Abhyudaya Co-operative Bank Ltd. impugning the final judgment dated 24.11.2014, passed by the learned District Judge, allowing the Arbitration Petition filed by the principal borrower. Arbitration Appeal No.3/2015 is filed by the guarantor, impugning the part of the order passed by the learned District Judge under Section 34 of the Arbitration and

Conciliation Act, 1996 (for short the Arbitration Act).

FACTS, SUBMISSIONS AND CONCLUSIONS IN WRIT PETITION NO.5528/2010

8. Insofar as Writ Petition No.5528/2010 is concerned, the petitioner had availed of term loan and/or working capital and other credit facilities from the respondent No.3 Bank i.e. Abhyudaya Co-operative Bank Ltd. (for short the said Bank) in the year 2005 vide various agreements entered into between the parties. The petitioner committed various defaults in making repayment of the loan and other facilities availed of by the petitioner from the said bank. The Accounts of the petitioner became non-performing assets (N.P.A.) as on 15.12.2008. On 1.6.2009, the said Bank issued a notice under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2000 (for short the said SARFAESI Act, calling upon the petitioner to discharge its full liability to the bank within 60 days from the date of the said notice and threatened to take possession of the secured assets of the petitioner.

9. The petitioner filed Writ Petition No.3956/2010 before this Court and challenged the validity of the said notice issued under the said SARFAESI Act and prayed that the said Bank be

directed to restructure the Accounts of the petitioner in accordance with the guidelines framed by the Reserve Bank of India. The Division Bench of this Court passed an order in the said Writ Petition, directing the petitioner to deposit 50% of the total outstanding amount and directed that in the event of the petitioner failing to deposit the said amount, the Writ Petition would stand rejected. Admittedly, the said amount has not been deposited by the petitioner.

10. The said Bank thereafter invoked Section 84 of the said Multi-state Act and appointed an Arbitrator Shri S.M. Nadgauda under Section 84 of the said Multi-state Act on 24.8.2009 for adjudication of its claim. The learned Arbitrator passed an order on 7.9.2009 directing the petitioner and its guarantors not to create any third party interest on the property mortgaged with the said Bank and issued a notice to the principal borrower and also the guarantors. It is the case of the petitioner that the petitioner thereafter appeared before the learned Arbitrator by appointing an Advocate and made an application dated 10.11.2009 before the learned Arbitrator questioning his jurisdiction to decide the issue. The petitioner also applied for inspection of the documents by making an application dated 21.12.2009. The petitioner also filed an application on 5.1.2010

under Section 16(2) of the Arbitration Act, raising an issue of jurisdiction of the learned Arbitrator to try, entertain and decide the dispute filed by the said bank before the learned Arbitrator. An issue was raised in the said application that, under Section 84 of the Multi-state Act, there is no provision for filing counter claim and/or setting up claim against the Bank.

11. On 24.2.2003, the Central Government issued a notification, thereby delegating the powers of Central Registrar to the Registrar, Co-operative societies of State in respect of the appointment of Arbitrator for deciding the dispute between the said Bank and its members. The petitioner also made an application dated 9.2.2010 before the learned Arbitrator seeking various information from the learned Arbitrator. It is the case of the petitioner that, the said Arbitrator Shri S.M. Nadgauda had made an application to the respondent bank for being appointed as an Arbitrator under Section 84 of the Multi-state Act and based on the said application, the Central Registrar has approved his name as an Arbitrator in all the disputes which had already arisen between the respondent bank and its members and also in the disputes which would arise in future.

12. On 8.3.2010, the petitioner made an application

before the learned Arbitrator to terminate the proceedings. The petitioner once again made an application dated 15.6.2010 raising the issue of jurisdiction of the learned Arbitrator. It is the case of the petitioner that the learned Arbitrator did not decide various applications made by the petitioner before the learned Arbitrator.

13. Mr. N.B. Suryawanshi, learned counsel for the petitioner (principal borrower) placed reliance on Section 84(1) of the Multi-state Act and submits that, under the said provision, there is no remedy available to the member of the Multi-state Co-operative Societies to file a claim or counter claim before the learned Arbitrator appointed under Section 84 of the Multi-state Act. He relied upon Section 84(4) of the Multi-state Act of the said Multi-state Act and would submit that, the Arbitrator, if any, can be appointed only where a dispute has been referred to arbitration under sub-section (1) of Section 84 and not in anticipation of the dispute which may arise in future. He submits that, the Arbitrator has to be appointed in each and every matter separately and cannot be appointed in respect of all the disputes which had arisen or may arise between the Multi-state Co-operative Societies and its members in future. He submits that, the learned Registrar, in any event, ought to have heard the

petitioner before appointing the learned Arbitrator and could not have appointed the learned Arbitrator unilaterally. The appointment of the learned Arbitrator by the Central government in this case was thus not binding upon the petitioner.

14. Learned counsel also placed reliance on Rule 30 of the Multi-state Co-operative Societies Rules, 2002 (for short the said Rules) and would submit that, under the said provision, the Central Government has granted discretionary powers to appoint and fix the fees of the Arbitrators subject to the provisions of the Arbitration and Conciliation Act, 1996. He submits that, the powers granted to the Central Registrar registered under Section 84(4) of the said Multi-state Act to appoint an Arbitrator unilaterally is discriminatory and violates Article 14 of the Constitution of India. Since the said Multi-state Act does not provide for an equal remedy to the member whereas providing remedy only to the Multi-state Co-operative Societies Act to invoke arbitration, is discriminatory and thus, is ultra vires Article 14 of the Constitution of India.

15. Mr. S.B. Deshpande, learned Assistant Solicitor General appearing for Union of India and the Central Registrar, on the other hand, invited our attention to Section 84(1)(b) of

the said Multi-state Act and would submit that, under the said provision, the dispute arising between the member, past member and persons claiming through a member, past member or deceased member and the Multi-state Co-operative Societies Act, its board or any officer, agent or employee of the said Society or Liquidator touching the constitution, management or business of a Multi-state Co-operative Society shall be referred to arbitration. He submits that, it is thus not correct that the claim, if any, of the petitioner who was admittedly a member of the said bank or counter claim, if any, of the petitioner, could not have been referred to arbitration under Section 84 of the Multi-state Act.

16. It is submitted by the learned counsel that, under Section 84(2) of the Multi-state Act, the disputes which shall be deemed to be dispute touching the constitution, management or business of a Multi-state Co-operative Society, is specified in the said provision, which is only illustrative. The list mentioned therein is of existing of all the claims, which can be entertained by the learned Arbitrator appointed under Section 84 of the Multi-state Act. He submits that, there is no limitation on the powers of the Central Registrar to appoint an Arbitrator in general. He submits that, the Central Registrar is not required to appoint any Arbitrator case to case or only when the dispute

between a Multi-state Co-operative Society and the member would arise. It is submitted that, the Central Registrar is competent to appoint Arbitrator for a particular Multi-state Co-operative Society to deal with all its disputes and it is not necessary to appoint separate Arbitrator for each case of the same Multi-state Co-operative Society.

17. Learned Assistant Solicitor General placed reliance on Section 4(2) of the said Multi-state Act and submits that, under the said provision, the Central Government is empowered to issue notification to direct that any power exercisable under the Central Registrar under the said Multi-state Act are in relation to such society and such matters as may be specified in the notification, be exercisable by other officer of the Central Government or of a State Government as may be authorised by the Central Government subject to such conditions as may be specified therein. He submits that, by exercising the said powers under Section 84 of the Multi-state Act, the Central Government issued a notification dated 24.2.2003 directing that the powers exercisable by the Central Registrar under Section 84 of the Multi-state Act shall also be exercisable by the Registrar of Cooperative Societies and the State/ Union Territories in respect of the Societies located in their respective Societies subject to

certain guidelines and conditions as specified in the said notification. It is submitted by the learned Assistant Solicitor General that, Shri S.M. Nadgauda alone has not been appointed as the sole Arbitrator for the petitioner Bank, but Shri A.G. Pandit and Mrs. Anita Sanjiv Pawar had also been appointed as Arbitrators for the said Bank. He submitted that, the Central Registrar is not required to hear any parties before referring the dispute to Arbitrator under Section 84 of the Multi-state Act.

18. Learned Assistant Solicitor General for the respondent No.1 and 2 invited our attention to the letter dated 24.9.2010 addressed by the Director (Cooperation) & C.P.T.O. for Cooperation Division, addressed to Shri Rajendra Ekambe in response to a request for information under the provisions of Right to Information Act, 2005. In the said information, it was provided that the said office complies with all the required legal formalities and provisions. It is not necessary for the Central Registrar to appoint separate person as an Arbitrator for different cases. Arbitrator may either be appointed for a specific case or for the society to whom they can assign their cases for arbitration. It was further mentioned that the Managing Director of the said Abhyudaya Co-operative Bank Ltd. had recommended the name of 3 persons namely Shri S.M. Nadgauda, A.G. Pandit

and Mrs. Anita Sanjiv Pawar for consideration for appointment as Arbitrator and of the said Bank. The procedure under Section 84 of the Multi-state Act was followed while appointing the Arbitrator for the said Bank. It was clarified in the said letter that Shri S.M. Nadgauda had not been appointed as a sole Arbitrator for the said Abhyudaya Co-operative Bank Ltd. Shri Pandit and Mrs. Anita Pawar had also been appointed as Arbitrators for the said Bank. The said Shri S.M. Nadgauda was appointed by an office order dated 26.3.2007.

19. Our attention is invited to the order dated 26.3.2007, thereby appointing Shri S.M. Nadgauda, Advocate as Arbitrator by the Central Registrar of Cooperative Societies to settle any dispute other than a dispute regarding disciplinary action taken by Abhyudaya Co-operative Bank Ltd. against its paid employee or an industrial dispute touching the constitution, management of business in the Mumbai region of the said Abhyudaya Co-operative Bank Ltd. as per provisions of Section 84 of the Multi-state Act. It was mentioned in the said order that the said Abhyudaya Co-operative Bank Ltd. had stated that it had a wide area of operation through 53 Branches in the State of Maharashtra and thus, the said bank was in need of the Arbitrator to decide the recovery cases. The Bank had proposed

names of three Advocates for appointment as Arbitrators of the Bank. By the said order, the Arbitrators came to be appointed.

20. Mr. S.S. Deve, learned counsel for the Bank also opposed this petition on the ground that the provisions of Section 84 of the Multi-state Act clearly provides remedy of arbitration not only to Multi-state Co-operative Societies Act but also to its members. He submits that, the petitioner is admittedly a member of the said Bank and thus, was entitled to file a separate claim and/or a counter claim before the same learned Arbitrator under Section 84(1)(b) of the Multi-state Act. He submits that, the entire petition is thoroughly misconceived and is filed with ulterior motive.

21. With the assistance of learned counsel appearing for the parties, we have perused Section 84 of the Multi-state Act and various other provisions of the said Act including Section 4(2) of the said Act and also Rule 30 of the said Rules. Under section 84(1)(a), it is clearly provided that, any dispute between a member, past member and persons claiming through a member, past member or deceased member and the Multi-state Co-operative Society, its board or any officer, agent or employer of the Multi-state Co-operative Societies Act or liquidator,

touching constitution, management or business of a Multi-state Co-operative Societies Act, shall be referred to arbitration in addition to the dispute between various other categories of persons mentioned in Section 84.

22. It is not in dispute that the petitioner was and is a member of the said Abhyudaya Co-operative Bank Ltd., which is a Multi-state Co-operative Societies Act within the meaning of Section 3(p) of the said Multi-state Act. In our view, the petitioner being a member of the said Multi-state Act, was not precluded from filing any claim or counter claim arising out of dispute touching the business of a Multi-state Co-operative Societies Act under Section 84(3). If any question arises whether a dispute referred to arbitration under the provisions of Section 84 is or is not a dispute touching the constitution, management or business of a Multi-state Co-operative Societies Act, the decision thereon of the Arbitrator shall be final and cannot be called in question in any Court. It is thus clear beyond reasonable doubt that the petitioner was entitled to make a claim or counter claim arising out of any such dispute touching the business of a Multi-state Co-operative Societies Act including the dispute in respect of a loan transaction availed of by the petitioner before the learned Arbitrator appointed by the Central

Registrar. We are, thus, not inclined to accept the submission of the learned counsel for the petitioner that there is no remedy provided Section 84 of the Multi-state Act or under any other provision of the said Multi-state Act to the petitioner- member i.e. borrower under the provisions of the Multi-state Co-operative Societies Act.

23. A perusal of the record clearly indicates that the learned Arbitrator, while rejecting various applications filed by the petitioner, by order dated 6.7.2010, had declared that all the opponents to the said arbitration claim filed by the said Bank including the petitioners herein and the guarantors were at liberty to file their counter claims. In spite of this order passed by the learned Arbitrator, allowing the petitioner also to file a counter claim, the petitioner did not file any counter claim.

24. Insofar as the submission of the learned counsel for the petitioner that the Central Registrar could not have appointed the learned Arbitrator unilaterally or in anticipation of any dispute, or ought to have appointed an Arbitrator in each case separately or could not have appointed an Arbitrator without giving any opportunity to the petitioner of being heard is concerned, in our view, there is no merit in this submission of the

learned counsel for the petitioner. Under Section 4(2) of the Arbitration Act, the Central Government is empowered to issue notification authorizing any officer of the Central Government or of a State Government in relation to a Multi-state Co-operative Societies Act subject to such conditions as may be specified therein. It is not in dispute that, by exercising such powers under Section 4(2) of the said Multi-state Act, the Central Government had issued a notification on 24.2.2003, thereby directing that the powers exercisable by the Central Registrar Section 84 of the Multi-state Act shall also be exercisable by Registrar of Cooperative Societies of the State/ Union Territories in respect of the Societies located in their respective jurisdiction subject to certain guidelines and conditions as specified in the notification.

25. Based on the said notification, the said Bank i.e. Abhyudaya Co-operative Bank Ltd. had suggested three names of the Advocates for their appointment as Arbitrators in respect of the disputes which may arise between the said bank and its members to the Central Registrar. The Central Registrar accordingly had appointed those three persons as Arbitrators for different regions. The said Bank had 53 Branches in the State having wide area of operation. In our view, the Central Registrar

was thus not required to appoint an Arbitrator in respect of each dispute separately and that also only after such dispute would have arisen. The Central Registrar is empowered to appoint an Arbitrator Section 84(4) of the Multi-state Act in respect of each Multi-state Cooperative Society separately, whether in respect of the existing disputes on the date of such appointment or the disputes which may arise in future on various terms and conditions. These appointments made by the Central Registrar are for a specified period. Such Arbitrators who are appointed by the Central Registrar Section 84(4) of the Multi-state Act in respect of a particular Multi-state Co-operative Society is empowered to deal with all such disputes contemplated Section 84 of the Multi-state Act as and when the dispute arises. Such disputes are mandatorily required to be referred to such Arbitrators who are appointed by the Central Registrar whenever such dispute arises.

26. There is, thus, no merit in this submission of the learned counsel for the petitioner that the Central Registrar was under an obligation to grant personal hearing to the petitioner before appointing any Arbitrator Section 84(4) of the Multi-state Act or that, the Arbitrator could be appointed only case to case or only after a dispute would actually arise and an application for

appointment or Arbitrator is made by the Multi-state Co-operative Society after effecting service of said application upon the member.

27. In our view, the constitutional validity of Section 84, challenged by the petitioner is thoroughly misconceived and is obviously filed with a view to delay the other proceedings pending between the parties. The petitioner not having availed of the opportunity granted by the learned Arbitrator to file counter claim, cannot be allowed to contend that there was no remedy available to the petitioner/ member to file a claim or counter claim Section 84 of the Multi-state Co-operative Societies Act. In our view, thee is no merit in this Writ Petition No.5528/2010. This Writ Petition deserves to be dismissed.

28. Insofar as Civil Application No.4032/2017 filed by the applicant (original petitioner) interalia praying for recall of the order dated 25.1.2017 passed by this Court is concerned, since all the proceedings were clubbed together in view of the administrative order passed by the learned seniormost Judge stationed at Aurangabad, and pursuant to the said administrative order, all the proceedings were heard together, this Civil Application does not survive and is accordingly dismissed.

FACTS, SUBMISSIONS AND CONCLUSIONS IN FIRST APPEAL NO.2749/2009

The parties described in this order insofar as this First Appeal is concerned, are described as per their original status in Special Civil Suit No.337/2009.

29. This First Appeal is filed by the guarantor, who is wife of the Chief Executive Officer of M/s J. Square Steels Pvt. Ltd., who was the principal borrower, who had obtained various loans and other facilities from the Abhyudaya Co-operative Bank Ltd. The appellant was the original plaintiff in Special Civil Suit No.337/2009 whereas the principal borrower M/s J. Square Steels Pvt. Ltd. was defendant No.1 and Abhyudaya Co-operative Bank Ltd. was the defendant No.2. The plaintiff is the owner and possessor of property bearing Flat No.401, admeasuring 950 sq.ft. of Godawari Building, situated at Worli Sagar Co-operative Housing Society, Worli, Mumbai and was a guarantor and co-mortgagor. It was the case of the plaintiff that, the defendant No.2 Bank had changed, substituted, altered and modified the terms of the original contract entered into with defendant No.1 and as a result thereof, the plaintiff was exonerated from the so called liability arising out of the said transaction.

30. It was the case of the plaintiff that defendant No.2 Bank had not informed the plaintiff about the changes in the terms of the contract and had seriously violated the statutory and contractual rights of the plaintiff. It was alleged that, the defendant No.2 Bank had made the defendant No.1 to divert the funds granted to it without the consent and concurrence of the plaintiff. The undue allowance and accommodation granted to the defendant No.1 was against the interest of the plaintiff and the spirit of the contracts of loan. The diversion was illegal and resulted in substitution of the main contracts of loan. According to the plaintiff, the said act on the part of the Bank amounted to complete substitution of a new contract in place of the old contract.

31. On 5.8.2009, the plaintiff accordingly filed the suit against the principal borrower of the Bank being Special Civil Suit No.337/2009 before the learned Civil Judge, Senior Division, Aurangabad interalia praying for a declaration that the guarantee documents shown to have been executed by the plaintiff in favour of defendant No.2 for securing the loan advanced to defendant No.1 are void for want of observance and fulfillment of the statutory and contractual duties on the part of the Bank. The

plaintiff also sought declaration that the plaintiff stood exonerated from the so called liability due to alleged change, substitution, alterations and modification of the terms of the loan contracts and the Bank having advanced the loan facilities to the defendant No.1 without the consent and concurrence of the plaintiff. The plaintiff applied for a declaration that the contract or mortgage alleged to have been executed by the plaintiff in favour of the Bank was void and unenforceable.

32. On 14.8.2009, the defendant No.2 filed an application under Order VII Rule 11(d) of the Code of Civil Procedure, 1908 in the said Special Civil Suit No.337/2009 filed by the plaintiff, interalia praying for rejection of the plaint and dismissal of the suit on various grounds. It was contended in the said application that, the plaintiff had not given mandatory notice as per Section 115 of the Multi-state Co-operative Societies Act, 2002 though defendant No.2 is a Multi-state Co-operative Society under the provisions of the said Multi-state Act. The said application was also filed on the ground that the action initiated by the Bank under the provisions of SARFAESI Act could not be subject matter of the said suit in view of the specific bar of Civil Court to entertain any suit and more particularly under Section 34 of the SARFAESI Act.

33. The defendant No.2 also contended in the said application that the remedy of the plaintiff was under Section 84 of the Multi-state Co-operative Societies Act and thus, the said suit was clearly barred. The plaintiff filed a reply to the said application filed by the Bank under Order VII Rule 11(d) of the Code of Civil Procedure, 1908. The plaintiff denied the contentions raised by the defendant No.2 in the said application. The plaintiff did not dispute that no notice under Section 115 of the Multi-state Co-operative Societies Act was issued by the plaintiff to the defendant No.2 Bank before filing the said suit.

34. By an order dated 4.9.2009, passed by the learned 3rd Jt. Civil Judge, Senior Division, Aurangabad, the said application (Exh.14) filed by the defendant No.2 under Order VII Rule 11(d) of the Code of Civil Procedure, 1908 came to be allowed. The learned trial Judge held that the plaintiff had not issued a notice under Section 115 of the Multi-state Co-operative Societies Act, 2002. the plaint was thus expressly barred by the provisions of the Multi-state Co-operative Societies Act, 2002. It is held that, the dispute between the plaintiff and defendant No.2 was touching the business of the society and has to be referred to the arbitration and thus, the said suit could not be entertained

before a Civil Court. The learned trial Judge made various observations against the plaintiff. Being aggrieved by the said order dated 4.9.2009, the plaintiff filed this First Appeal.

35. Mr. Thorat, learned counsel for the plaintiff submits that, the defendant No.2 Bank had made various changes in the conditions of contract entered into between the Bank and the defendant No.1 without prior consent of the plaintiff. There was no efficacious remedy available under the provisions of the Multi-state Co-operative Societies Act, 2002 and more particularly under Section 84, to the plaintiff to file a claim or counter claim for seeking the reliefs which were claimed by the plaintiff in the said Special Civil Suit No.337/2009. He submits that, the suit thus filed by the plaintiff was maintainable before the learned trial Judge and could not have been rejected by the learned trial Judge. He submits that, under Section 84 of the Multi-state Act, the guarantor could not have filed any claim or counter claim before the learned Arbitrator. He submits that, civil proceedings are not barred if remedy under the specific Act such as Multi-state Co-operative Societies Act, 2002 is not efficacious. He submits that, even otherwise, the plaintiff could not have filed any proceedings before the learned Arbitrator in view of their being split of causes of action.

36. It is submitted that, the defendant No.2 had issued a notice under Section 13(2) of the SARFAESI Act on 1.6.2009. The plaintiff had filed the said civil suit bearing Special Civil Suit No.337/2009 on 5.8.2009. The defendant No.2 Bank had filed its claim before the learned Arbitrator on 21.8.2009. He invited our attention to some of the averments made by the plaintiff to the application filed by the defendant No.2 under Order VII Rule 11(d) of the Code of Civil Procedure, 1908. He submits that, the subject matter of the suit filed by the plaintiff was not covered by any of the provisions under Section 84 of the Multi-state Act. He submits that, since the plaintiff has challenged the illegal acts of the defendant No.2, the civil suit was maintainable.

37. It is submitted that, no modalities under the Multi-state Act are provided to implement the remedies provided therein. He submits that, the subject matter of the suit does not touch the business of the society and thus, was maintainable and not barred. He submits that, no part of Section 84 applies to the plaintiff and thus, plaintiff was not required to invoke Section 84 of the Multi-state Act. Reliance is placed on Section 85 of the Multi-state Act. It is submitted that, there are different periods of limitations provided under Section 85 to the Multi-state Co-

operative Societies Act and to the members. The member has to wait for filing a counter claim till the Multi-state Co-operative Societies Act would have filed its claim before the learned Arbitrator. Both the parties are not granted equal rights Section 85 of the Multi-state Act.

38. Insofar as the issue as to whether notice under Section 115 of the Multi-state Act was required to be issued to the defendant No.2 Bank before filing such suit or not is concerned, it is submitted that, since the dispute raised by the plaintiff did not touch the business of the defendant No.2 Bank, the plaintiff could not have filed any claim or counter claim under Section 84 of the Multi-state Act before the learned Arbitrator. The learned trial Court, however, did not deal with this issue at all in the impugned order.

39. Learned counsel for the plaintiff placed reliance on the judgment of Supreme Court in case of **Shiv Kumar Chadha & ors. Vs. Municipal Corporation of Delhi & ors. [(1993) 3 SCC 161]** and in particular para No.23, the judgment of Supreme Court in case of **Rajasthan State Road Transport Corporation & anr. Vs. Bal Mukund Bairwa [(2009) 4 SCC 299]** and in particular para No.24, judgment of Supreme Court

in case of **Dhulabhai & ors. Vs. The State of Madhya Pradesh & anr. [AIR 1978 SC 78**] and on the judgment of Supreme Court in case of **Sukanya Holdings Pvt. Ltd. Vs. Jayesh H. Pandya & anr. [AIR 2003 SC 2252]** in support of his aforesaid submissions.

40. Learned counsel for the Bank, on the other hand, submits that under Section 84(1)(b) of the Multi-state Act, the dispute between the member of the Multi-state Co-operative Society touching the business of society has to be referred to arbitration. There is no other remedy available to the member. He submits that, the plaintiff was admittedly a member of the defendant No.2 Bank. Learned Arbitrator had already allowed all the respondents therein including the plaintiff herein, to file counter claim by an order dated 6.7.2010. However, the plaintiff had filed the suit on 5.8.2009. He submits that, even before the Bank could have invoked provisions of Section 84 of the Multi-state Act, the plaintiff could have independently invoked Section 84 of the Multi-state Act. He submits that, the prayers sought in the plaint were governed by Section 84 of the Multi-state Act and could be entertained only by an Arbitrator. There were no split of cause of action as sought to be canvassed by the learned counsel for the plaintiff.

41. It is submitted by the learned counsel that, the learned trial Judge has passed a reasoned order and has rightly accepted the contentions raised by the defendant No.2 in the application filed under Order VII Rule 11(d) of the Code of Civil Procedure, 1908. The defendant No.2 being a Multi-state Co-operative Society, notice under Section 115 of the Multi-state Act was mandatory before filing such suit.

42. It is submitted by the learned counsel that, the plaintiff has efficacious and proper remedy under Section 84 of the Multi-state Act and thus, the suit filed by the plaintiff was barred under the provisions of the Multi-state Act. The learned counsel appearing for defendant No.2 distinguished the judgments relied upon by Mr. Thorat, learned counsel for the plaintiff. It is submitted by the learned counsel that, the husband of the plaintiff who was Chief Executive Officer of the principal borrower, has been giving instructions to the learned counsel for the plaintiff. He submits that, the collusion is between the plaintiff and her husband, who represents the principal borrower and not between the principal borrower and the Bank, as sought to be canvassed by the learned counsel for the plaintiff.

43. Learned counsel for the Bank submits that, the plaintiff was fully aware of the transactions between the defendant No.1 and defendant No.2 and had filed a false suit before the Civil Court which was not maintainable. Learned counsel invited our attention to various findings rendered and observations made in the impugned order passed by the learned trial Judge rejecting the plaint filed by the plaintiff about the conduct of the plaintiff. It is held that, the remedy of the defendant No.1 to challenge the notice under Section 13(2) of the Securitisation Act was only before the Debts Recovery Tribunal under Section 17 of the said Act. The plaintiff herself was a member of the defendant Bank. The learned trial Judge also held that the dispute raised by the plaintiff in the present suit is the dispute touching the business of the defendant No.2 Bank. All the guarantors were residing together and hail from one and the same family.

44. Insofar as submissions of the learned counsel for the plaintiff that remedy under Section 84 of the Multi-state Act is not an efficacious remedy available to the plaintiff – guarantor or there is no remedy under Section 84 of the said Act at all is concerned, in our view, this submission of the learned counsel is

contrary to Section 84(1)(b) of the Multi-state Act. It is not in dispute that the plaintiff was and is a member of the defendant No.2 Bank and was a member on the date of filing the suit. Under Section 84(1)(b), any dispute between the member of the Multi-state Co-operative Societies Act touching the business of the society has to be referred to arbitration under Section 84. The reliance sought by the plaintiff in the plaint was touching the business of the defendant No.2 Bank. The guarantee given by the plaintiff and the mortgage created in respect of the flat in question in favour of the defendant No.2 Bank was in respect of the loan transaction between the defendant No.2 and the defendant No.1, which was a business of the defendant No.2 Bank.

45. In our view, all the reliefs thus claimed by the plaintiff in the suit were touching the business of the society and could be only resolved by the learned Arbitrator under Section 84 of the Multi-state Act. There is, thus, no merit in the submission of the learned counsel for the plaintiff that the reliefs as prayed in the plaint could be granted only by the Civil Court and not by the Arbitrator. There was no split of cause of action as sought to be canvassed by learned counsel for the plaintiff.

46. Under Section 115 of the Multi-state Co-operative Societies Act, the notice to the Multi-state Co-operative Society is mandatory before filing the suit. Admittedly, no such notice was issued by the plaintiff as contemplated under Section 115 of the said Act. In our view, no acts of the defendant No.2 Bank were outside the business of the defendant No.2 Society which were impugned by the plaintiff in the said Special Civil Suit. The Division bench of this Court, in the order dated 26.2.2010 in Writ Petition filed by Mrs. Smita Vaibhav Muley, Mr. Arif Shaikh Mahboob Shaikh & anr. filed by the principal borrower against the Union of India and the defendant No.2 Bank and other Banks, in which those parties had challenged the proposed coercive action of the Bank under the provisions of SARFAESI Act, had imposed condition against the petitioners therein to pay at least 50% of the outstanding dues as on the date of said order to the Bank within four weeks from the date of the said order.

47. It was made clear that if the amount was not paid as directed, the interim protection would stand vacated and those Writ Petitions would stand dismissed for non prosecution. In the said order, it was made clear that the Banks were fully empowered to pursue their claim against the petitioner by invoking remedy under Section 84 of the Multi-state Co-operative

Societies Act which remedy by no standard was less efficacious. The Banks were permitted to take recourse to that remedy in spite of pendency of those Writ Petitions. Admittedly, none of the petitioners in the said Writ Petitions paid any amount to the Bank as directed by the division Bench of this Court and thus, all those petitions were dismissed due to non-compliance of the conditional order passed by this Court.

48. In our view, the learned trial Judge rightly rejected the plaint on the ground that notice under Section 115 of the Multi-state Act was mandatory before filing the suit against the defendant No.2 Bank in respect of the dispute touching the business of the Multi-state Co-operative Societies Act also on the ground that the only remedy of the plaintiff was to file claim under Section 84 of the Multi-state Act. The learned trial Judge also rightly held that the action on the part of the Bank under Section 13(2) of the Securitisation Act could not have been challenged before the Civil Court and was clearly barred under Section 34 of the SARFAESI Act.

49. Insofar as judgment of the Supreme Court in case of Shiv Kumar Chadha & ors. (supra) relied upon by the learned counsel for the plaintiff is concerned, the Supreme Court has held

that, the ouster of the jurisdiction of the Court is upheld on the finding that the rights and liabilities in question had been created by the Act in question and the remedy provided therein was adequate. In our view, this judgment of the Supreme Court would assist the case of the Bank and not the plaintiff. In view of the specific remedy available under Section 84 of the Multi-state Act to the Multi-state Co-operative Societies Act and also to all its members in respect of the dispute touching the business of the society, civil suit in respect of such dispute was not maintainable. The defendant No.2 had thus rightly filed an application for rejection of plaint under Order VII Rule 11(d) on that ground and various other grounds.

50. Insofar as judgment of Supreme Court in case of Rajasthan State Road Transport Corporation & anr. (supra) relied upon by the learned counsel for the plaintiff is concerned, it is held by the Supreme Court that, when there is a doubt as to whether Civil Court has jurisdiction to try a suit or not, the Court shall raise a presumption that it has such jurisdiction. In our view, the provisions under Section 84 of the Multi-state Act are very clear which provide that the dispute between a member and the Multi-state Co-operative Society touching the business of society has to be referred to arbitration to be appointed by the

Central Registrar. The claim includes counter claim. The plaintiff thus ought to have filed her claim or counter claim before the learned Arbitrator by invoking Section 84 of the Multi-state Act.

51. We are not inclined to accept the submission of the learned counsel for the plaintiff that the plaintiff could not have filed a claim or counter claim till such time the defendant No.2 Bank would have filed its claim under Section 84 of the Multi-state Act. In our view, the plaintiff being a member of the defendant No.2 Bank and if according to the plaintiff the dispute had arisen in respect of the loan transaction, pursuant to which she had executed a guarantee and had mortgaged her flat to secure the said loan, could have filed her claim even before the Bank would have filed its claim by invoking Section 84 of the Multi-state Act. In our view, the plaintiff thus could not have filed the said Special Civil Suit No.337/2009 for the reliefs covered for the disputes which were covered by the disputes contemplated under Section 84.

52. There is no merit in the submission of the learned counsel for the plaintiff that there is any discrimination under Section 85 insofar as period of limitation in filing proceedings by a member or by a Multi-state Co-operative Society is concerned.

Be that as it may, the defendant No.2 had not raised any plea of limitation in the said suit filed by the plaintiff. The plaintiff has not even raised this issue in this appeal.

53. Insofar as judgment of Supreme Court in case of Dhulabhai & ors. (supra) relied upon by the learned counsel for the plaintiff is concerned, the Supreme Court has held that challenge to provisions of the Act as ultra vires cannot be brought before the Tribunals. Admittedly, the plaintiff has not challenged the constitutional validity of any of the provisions of the Multi-state Co-operative Societies Act, 2002 in the plaint. The husband of the plaintiff has filed a separate Writ Petition challenging the vires of Section 84 of the Multi-state Act, 2002. The judgment of Supreme Court in case of Dhulabhai & ors. (supra) relied upon by the plaintiff would not even remotely assist the case of the plaintiff.

54. Insofar as judgment of the Supreme Court in case of Sukanya Holdings (supra) relied upon by the learned counsel for the plaintiff is concerned, in our view, since the reliefs which were subject matter of the plaint arising out of the dispute in respect of the loan transaction including the execution of guarantee and mortgage deed, was touching the business of the

defendant No.2 Society and also the disputes covered by the disputes contemplated under Section 84, the same could be decided only by invoking Section 84 of the Multi-state Act, which is a statutory arbitration contemplated under the provisions of the said Act. There was no split of any cause of action as sought to be canvassed by learned counsel for the plaintiff. No relief was claimed by the plaintiff against the defendant No.1 in the said suit. The judgment of the Supreme Court in case of Sukanya Holdings (supra) relied upon by the plaintiff, thus, is clearly distinguishable in the facts of the present case and would not advance the case of the plaintiff.

55. A perusal of the record indicates that, there is a clear case of collusion between the plaintiff and the defendant No.1. The learned counsel who appeared for the plaintiff in this First Appeal, and appeared for the defendant No.1 (principal borrower), whose Chief Executive Officer is husband of the plaintiff in Writ Petition No.5528/2010, which was filed by the principal borrower. During the course of hearing of these matters, the husband of the plaintiff was present all throughout and was giving instructions to the learned counsel Shri V.M. Thorat, who appeared for the plaintiff in this First Appeal. The collusion between plaintiff and the defendant No.1 through the

Chief Executive Officer is apparent. It is clear that, the plaintiff has been put up by the defendant No.1 who had not even challenged the arbitral award rendered by the learned Arbitrator against defendant No.1.

56. In our view, there is no infirmity with the order passed by the learned trial Judge rejecting the plaint in its detailed reasoned order. The First Appeal, thus, deserves to be dismissed.

57. Learned counsel for the Bank invited our attention to the order dated 11.8.2017, passed by the Division Bench of this Court in Civil Application No.9664/2017 with Civil Application No.8584/2017 in First Appeal Nos.2749/2009 rejecting Civil Application Nos.9664/2017 and 8584/2017 and observing that the applicant (i.e. Mr. Sanyogita Niranjan Jadhav had suppressed the conditions imposed by the Government while granting lease in respect of the said plot on which the mortgaged Flat was constructed and had obtained loan and had created mortgage and thus, relief of injunction sought by the applicant could not be granted.

58. Insofar as Civil Application No.10993/2017 in First

Appeal No.2749/2009 filed by the guarantor Mrs. Sanyogita Niranjan Jadhav, interalia praying for amendment of the First Appeal No.2749/2009 is concerned, the learned counsel for the Bank submits that, the applicant in the Civil Application has sought to bring the additional allegations in the appeal proceedings which is not permissible in law. He submits that, the applicant had also filed an application under Section 9 of the Arbitration and Conciliation Act, 1996 seeking relief against SARFAESI action taken by the Bank in respect of the mortgaged flat of the applicant.

59. By a detailed order dated 26.7.2010, the said application filed by the application under Section 9 of the Arbitration and Conciliation Act, 1996 came to be rejected. The said order was not challenged by the applicant. The applicant, thus, cannot seek any amendment in the First Appeal at this stage to introduce new and additional facts which were not germane to the issue in question and more particularly after eight years of filing the First Appeal. He submits that, the Principal District Judge, Aurangabad, in the said order dated 26.7.2010, while dismissing the application filed under Section 9 of the Arbitration and Conciliation Act, 1996 by the applicant, has already rendered various findings about the execution of the

deed of mortgage and also about the conduct of the applicant.

FACTS, SUBMISSIONS AND CONCLUSIONS IN ARBITRATION APPEAL NOS.1/2015, 2/2015 AND 3/2015

60. All the aforesaid three appeals are arising out of the order and judgment delivered by the learned Principal District Judge, Aurangabad, thereby setting aside the impugned award dated 25.8.2010 and remanding back the Arbitration Case No.ARB/ACB/392/2009 for fresh hearing on all points. In the Arbitration Appeal Nos.1/2015 and 2/2015, the Bank has impugned the entire order and judgment dated 24.11.2014. In Arbitration Appeal No.3/2015, the guarantor Mrs. Sanyogita Niranjan Jadhav, has impugned the order and judgment insofar as the arbitration proceedings are remanded by the learned Principal District Judge to the learned Arbitrator for fresh consideration is concerned. It is thus clear that, insofar as order of remand of the arbitration proceedings by the learned Principal District Judge for fresh consideration is concerned, that part of the order is impugned by the Bank as well as by the guarantor.

61. Some time in the year 2006, the principal borrower M/s J. Square Steel Pvt. Ltd. was granted various credit facilities by the Abhyudaya Co-operative Bank Ltd. on execution of various

documents. Mrs. Sanyogita Niranjan Jadhav, the guarantor herein, along with other guarantors, had executed a deed of guarantee. The said Mrs. Sanyogita Niranjan Jadhav had also executed a deed of mortgage, thereby mortgaging her Flat, situated at Worli in favour of the Bank. The said M/s J. Square Steel Pvt. Ltd. committed default in making repayments of duties of the Bank in the month of September 2008. The said principal borrower admitted its liability of the Bank. Some time in the month of June 2009, the Bank issued a statutory notice under Section 13(2) of the SARFAESI Act to the principal borrower and also the guarantors. The said statutory notice was challenged by the principal borrower on 23.6.2009 before this Court by filing a Writ Petition.

62. In the month of August 2009, the Bank filed a dispute under Section 84 of the Multi-state Act against the principal borrower as well as its guarantors before the learned Arbitrator appointed by the Central Registrar. The principal borrower as well as the guarantors were served with the summons issued by the learned Arbitrator. In the month of August 2009, the guarantor Mrs. Sanyogita Niranjan Jadhav filed a civil suit for various reliefs including a declaration that she had stood exonerated in view of the alleged violation in the terms and

conditions in the loan agreement. On 4.9.2009, the learned District Judge rejected the plaint on an application filed by the Bank under Order VII Rule 11(d) of the Code of Civil Procedure, 1908. In the said order, it was observed that the respondent No.2 i.e. Mrs. Sanyogita Niranjan Jadhav is wife of Chief Executive Officer of the principal borrower. The Company's registered address of the principal borrower as well as the residential address of respondent No.1 and 2 as well as residential address of the Chief Executive Officer at Mumbai are same.

63. On 20.3.2010, the Chief Metropolitan Magistrate passed an order under Section 14 of SARFAESI Act against the mortgaged property of respondent No.2. By an order dated 5.5.2010, the respondent No.2 guarantor approached this Court for seeking various reliefs against the Bank. By an order dated 5.5.2010, this Court granted liberty to the guarantor to approach the learned Arbitrator and also granted liberty to seek appropriate interim relief under Section 9 of the Arbitration and Conciliation Act, 1996.

64. The Central Registrar appointed the learned Arbitrator under Section 84(4) of the Multi-state Act. Summons

were served on the principal borrower as well as on the guarantors. Mrs. Kanchan Kambli, Advocate filed Vakalatnama for opponent Nos.1 to 3, 6 and 8 before the learned Arbitrator. The other opponents remained absent though served. None of the opponents filed their written statement and chose to remain absent.

65. Insofar as the respondent No.2 guarantor is concerned, she filed several applications before the learned Arbitrator, raising various issues including issue of jurisdiction and various other issues. She also applied for inspection of documents. Though various applications were filed by the respondent No.2 through her Advocate, the respondent No.2, her Advocate as well as other respondents did not appear before the learned Arbitrator. By an order dated 6.7.2010, the learned Arbitrator rejected various applications filed by the respondent No.2 for inspection and raising issue of jurisdiction of the learned Arbitrator and for other reliefs.

66. The respondent No.2 thereafter made some more applications before the learned Arbitrator. On 25.8.2010, the learned Arbitrator made an exparte award against all the opponents including the respondent No.2 herein i.e. Mrs.

Sanyogita Niranjan Jadhav and directed all the opponents including the respondent No.2 to pay sum of Rs.31,88,23,876=49 to the Bank. It was, however, made clear that, the individual liability of Mr. Niranjan S. Jadhav i.e. husband of guarantor and Mr. Malu B. Suryawanshi shall be limited to Rs.30,02,99,649=49 and Rs.49,81,134 respectively. The respondents were also directed to pay interest and arbitration fees. The learned Arbitrator declared that those liabilities were secured by mortgage of various properties. Insofar as respondent No.2 is concerned, the Flat No.401, admeasuring 950 sq.ft., situated at Godawari Building, Worli Sagar Co-operative Housing Society Ltd. was mentioned. The learned Arbitrator declared that, the bank was entitled to realize the dues by selling the mortgaged and hypothecated assets.

67. Being aggrieved by the said award, the opponents filed two separate applications under Section 34 of the Arbitration and Conciliation Act, 1996 before the learned Principal District Judge at Aurangabad. By an order and judgment dated 24.11.2014 passed by the learned Principal District Judge, the petitions filed by the opponents were allowed. The impugned award dated 25.8.2010 came to be set aside. However, while setting aside the impugned award, the learned Principal District

Judge remanded the matter back to the learned Arbitrator for fresh hearing on all points and directed to dispose of the proceedings within six months from the date of receipt of the order. Being aggrieved by the said order and judgment dated 24.11.2010, the Bank filed two separate arbitration appeals under Section 37 of the Arbitration and Conciliation Act, 1996 whereas the respondent No.2 filed a separate arbitration appeal i.e. Arbitration Appeal No.3/2015. The principal borrower did not file any separate arbitration appeal.

68. Mr. Thorat, learned counsel for the appellant in Arbitration Appeal No.3/2015 and for respondent No.2 in Arbitration Appeal Nos.1/2015 and 2/2015 invited our attention to various applications filed by the respondent No.2 before the learned Arbitrator for seeking inspection of various documents and also challenging the jurisdiction of the learned Arbitrator under Section 16 of the Arbitration and Conciliation Act, 1996, copy of the order passed by the learned Arbitrator rejecting most of those applications and also the order passed by the learned Principal District Judge. It is submitted by the learned counsel that, though the suit filed by the respondent No.2 before the Civil Court for a declaration that the deed of guarantee and other documents executed by her were not binding upon her in view of

the alleged novation of the contract and she was exonerated from making any payment to the Bank under those documents, the learned Arbitrator proceeded with the arbitral proceedings and passed an exparte award.

69. It is submitted by the learned counsel that, the learned Arbitrator could not have been appointed by the Central Registrar without hearing his client and in any event in anticipation of the dispute having arisen. He submits that, the appointment of the Arbitrator was totally illegal. The remedy of the respondent No.2 was not under Section 84 of the Multi-state Act or in any event the said remedy was not efficacious and thus, the entire arbitral proceedings were without jurisdiction. The Bank was under an obligation to disclose the details of claim, the names of parties before the Central Registrar while making a request for appointment of Arbitrator. The Central Registrar was under an obligation to give notice to the parties, hear objections, if any, from the parties and only thereafter could have appointed an Arbitrator. Only convenience of the Bank could not be considered. The powers of the Central Registrar ought to have been exercised by him in spirit of Section 84 of the Multi-state Act. The impugned order passed by the learned Central Registrar was in violation of principles of natural justice.

70. It is submitted by the learned counsel that, even the application for seeking inspection of the documents sought by his client from the Bank also came to be rejected. He submits that, the learned Arbitrator proceeded with the proceedings exparte and without hearing his client, has passed an exparte award in violation of principles of natural justice. He submits that, the learned Principal District Judge ought to have simplicitor set aside the arbitral award and could not have remanded the matter back to the learned Arbitrator for fresh disposal.

71. It is submitted by the learned counsel that, even if the respondent No.2 could be governed by the provisions of Section 84 of the Multi-state Act, the learned Arbitrator did not give opportunity to file written statement and counter claim to his client. It is submitted that, the learned Arbitrator has not decided number of applications filed by his client. He tenders a copy of the list showing such applications which were alleged to have been made by the respondent No.2 and were not decided by the learned Arbitrator before passing an award. It is submitted by the learned counsel that the loan was not granted by the Bank to the husband of the respondent No.2 but was granted to the Company, of which her husband was Chief

Executive Officer.

72. It is submitted by the learned counsel that, appointment of the Arbitrator could be challenged by his client at any stage. In support of his submission that the appointment of the learned Arbitrator was illegal, the learned counsel placed reliance on the judgment delivered by learned Single Judge of this Court on 26.9.2011 in Writ Petition No.7408/2011 in case of Deshbhakta Ratnappanna Kumbhar Panchganga Sahakari Sakhar Karkhana Maryadit Vs. Shri Ramesh Bhupal Chowgule & ors., and would submit that, the appointment of the Arbitrator by the Central Registrar without hearing the respondent No.2 was illegal and without jurisdiction and thus, the entire arbitration proceedings were vitiated.

73. Learned counsel appearing for the respondent No.2 placed reliance on the judgment of this Court in case of **Indian Overseas Bank Shreekrishna Woollen Mills Pvt. Ltd. [AIR 1988 Bom. 343**] in support of his submission that the Bank was under an obligation to give inspection of the documents referred and relied upon by the Bank to the respondent No.2 before filing of any written statement, without which the respondent No.2 could not have filed the written statement. The learned

Arbitrator thus ought to have directed the Bank to permit inspection of all the documents to the respondent No.2 and thereafter ought to have given an opportunity to the respondent No.2 to file a written statement. He submits that, since the suit for declaration that the respondent No.2 was exonerated from any liability was based on the documents referred to and relied upon by the Bank was pending when the arbitration proceedings were going on, the learned Arbitrator could not have proceeded with the proceedings and could not have rendered an arbitral award.

74. Learned counsel for the Bank, on the other hand, submits that, admittedly all the opponents in the arbitration proceedings were served with the summons by the learned Arbitrator and were granted several opportunities to remain present before him and to file written statement and counter claim. He submits that, while rejecting the false and frivolous applications filed by the respondent No.2, the learned Arbitrator, though at initial stage, had passed an order of "No Written Statement", recalled the said order and had granted one more opportunity in spite of gross delay on the part of respondent No.2 and other opponents and had also granted the liberty to file counter claim. The respondent No.2, however, did not appear

before the learned Arbitrator though had engaged an Advocate and did not file written statement or counter claim in spite of several opportunities granted by the learned Arbitrator.

75. It is submitted by the learned counsel that the learned Arbitrator, after considering the material on record, had rightly allowed the claims made by the Bank against all the opponents including the respondent No.2. He submits that, the impugned order passed by the learned Principal District Judge is totally erroneous. The findings rendered by the learned Principal District Judge are totally perverse. It is submitted that, the order passed by the learned Arbitrator rejecting various applications filed by the respondent No.2 have not been challenged by the respondent No.2 in her petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 before the learned Principal District Judge and thus, the same cannot be challenged for the first time across the bar in Arbitration Appeal No.3/2015 filed by her under Section 37.

76. It is submitted by the learned counsel that, the impugned order passed by the learned Principal District Judge setting aside the impugned award and thereafter remanding the matter back to the learned Arbitrator is not only perverse but

totally illegal and contrary to law. In support of the submission that the learned Principal District Judge could not have remanded the matter back to the learned Arbitrator, learned counsel for the Bank placed reliance on the judgment of the Division Bench of this Court in the case of Geojit Financial Services Limited Vs. Kritika Nagpal in Appeal No.35/2013 in Arbitration Petition No.47/2009 and other companion appeals, delivered on 25.6.2013 and unreported order delivered by Division Bench of this Court, dated 21.9.2013 in the case of Reliance Capital Ltd. Vs. The Loot (India) Pvt. Ltd. & ors. in APPEAL (L) No.304/2013. He submits that, the learned Principal District Judge had relied upon the judgment of the learned Single Judge in case of The Loot (India) Pvt. Ltd. & ors. Vs. Reliance Capital Ltd., which judgment was subsequently reversed by the Division Bench of this Court and it is held that the Court has no power to remand the proceedings back to the sole Arbitrator.

77. It is submitted by the learned counsel that the arbitral proceedings as well as the action under the provisions of Section 13(2) of the SARFAESI Act both could be initiated and pursued together against the borrowers and guarantors. There was no bar from proceeding with both the remedies available to the lenders - Bank.

78. Insofar as the submission of the learned counsel for the respondent No.2 that various applications were not decided by the learned Arbitrator is concerned, it is submitted that, all such applications were totally false and frivolous and were only made with a view to delay the arbitral proceedings with ulterior motives. The learned Arbitrator thus rightly rejected all the applications filed by the respondent No.2. In support of this submission, the learned counsel invited our attention to various reasons recorded by the learned Arbitrator rejecting all such applications filed by the respondent No.2 and also various reasons recorded in the impugned award about such applications and the conduct of the respondent No.2 and her husband. He submits that, since the respondent No.2 did not appear before the learned Arbitrator, the jurisdiction of the learned Arbitrator could not be challenged.

79. A perusal of the record clearly indicates that, there were no disputes that all the parties including the respondent No.2 herein were served with the summons by the learned Arbitrator. Various meetings were held by the learned Arbitrator. The meetings were, however, not attended by the respondent No.2 and other opponents. Though several applications were

filed by the respondent No.2 with a view to delay the arbitral proceedings, the respondent No.2, in person or through her Advocate did not even remain present to argue those applications. Under Section 16 of the Arbitration and Conciliation Act, 1996, if the plea of jurisdiction is not accepted by the learned Arbitrator, such an order can be challenged by the aggrieved party along with arbitral award under Section 34 of the Arbitration and Conciliation Act, 1996. The prayers of the Arbitration Petition filed by the respondent No.2 and others clearly indicate that the respondent No.2 and others did not apply for setting aside the order passed by the learned Arbitrator rejecting all the applications. Though Mr. Thorat, learned counsel for respondent No.2 made an attempt to show that the ground were raised by the respondent No.2 in the Arbitration Petition in respect of the said order passed by the learned Arbitrator rejecting various applications, the fact remains that, no such order was challenged by the respondent No.2 in the Arbitration Petition.

80. A perusal of the said order passed by the learned Arbitrator indicates that, each and every application made by the respondent No.2 was totally frivolous and was repeatedly made on the same ground. This Court has already held in detail in

earlier paragraphs of this judgment that the dispute, if any, between the member of the Co-operative Society touching the business of the Society could be raised only under Section 84 of the Multi-state Co-operative Societies Act. The learned Arbitrator rightly rejected those applications. The respondent No.2 has not challenged that order in the Arbitration Petition. Upon considering the submissions of the learned counsel for 2, at this stage also we are of the view that various applications filed by the respondent No.2 for inspection as well as raising issue of jurisdiction and other issues has been rightly rejected by the learned Arbitrator. The learned Principal District Judge, therefore, did not decide this issue in the impugned order. In our view, there is, thus, no merit in the submission made by the learned counsel for respondent No.2. Learned counsel for respondent No.2 could not demonstrate before this Court, the prejudice alleged to have been caused to the respondent No.2, guarantor for allegedly not deciding the application filed by the guarantor.

81. A perusal of the impugned award rendered by the learned Arbitrator clearly indicates that, the learned Arbitrator has considered the entire evidence on record produced by the Bank. Though various opportunities were rendered by the

learned Arbitrator to the respondent No.2 to file written statement and counter claim, the respondent No.2 chose to remain absent and did not file written statement and counter claim. The learned Arbitrator, thus, in these circumstances, was right in proceeding with the proceedings exparte. In our view, since the respondent No.2 has chosen to remain absent in spite of service of the notices and in spite of opportunities granted by the learned Arbitrator and has not even bothered to file written statement and counter claim, the learned Arbitrator was right in proceeding with the proceedings exparte in such circumstances. In our view, the respondent No.2 thus cannot be allowed to arise a plea of violation of principles of natural justice. A party who chooses to remain absent in spite of service of notice and opportunities granted by the learned Arbitrator cannot allege violation of principles of natural justice or cannot be allowed to contend that the learned Arbitrator could not have proceeded with the proceedings exparte.

82. A perusal of the impugned order passed by the learned Principal District Judge indicates that the learned Arbitrator has not dealt with various documents, affidavits filed by the Bank and totally overlooked the fact that the learned Arbitrator had rendered various opportunities to file written

statement and counter claim and was kind enough to give various opportunities to the respondent No.2 to remain present. Though the respondent No.2 having bent upon to remain absent before the learned Arbitrator on one or the other ground, the learned Principal District Judge, has set aside the impugned award which was passed by the learned Arbitrator correctly and legally.

83. Insofar as the submission of the learned counsel for respondent No.2 that the Bank could not have proceeded with the arbitration proceedings as well as an action under the Securitisation Act is concerned, the Supreme Court, in the case of M.D. Frozen Foods Exports Pvt. Ltd. & ors. Vs. Hero Fincorp Ltd., delivered on 21.9.2017 in Civil Appeal No.15147/2017, has held that the SARFAESI proceedings are in the nature of enforcement proceedings while arbitration is an adjudicatory process. In the event that the secured assets are insufficient to satisfy the debts, the secured creditors can proceed against other assets in execution against the debtor after determination of the pending outstanding amount by a competent forum.

84. Insofar as the part of the order passed by the learned Principal District Judge, thereby remanding the arbitration

proceedings back before the learned Arbitrator while setting aside the impugned award is concerned, it is not in dispute that both the parties are aggrieved by that part of the directions issued by the learned Principal District Judge. Be that as it may, the judgment of the learned Single Judge in case of The Loot (India) Pvt. Ltd. & ors. Vs. Reliance Capital Ltd. relied upon by the learned Principal District Judge has been reversed by the Division Bench of this Court by an order and judgment dated 21.9.2013 in case of Reliance Capital Ltd. Vs. The Loot (India) Pvt. Ltd. & ors. (supra). The Division Bench of this Court, in the said judgment dated 21.9.2013, had overruled its earlier judgment dated 25.6.2013 in case of Geojit Financial Services Limited Vs. Kritika Nagpal & ors. in Appeal No.35/2013 in Arbitration Petition No.47/2009 and other companion matters, holding that there was no provision for remand under Section 34 of the Arbitration and Conciliation Act, 1996. In our view, the said judgment of the Division bench squarely applies to the facts of this case.

85. The Supreme Court, in **Kinnari Mullick & ors. Vs. Ghanshyam Das Damam [AIR 2017 SC 2785]**, has held that, the Court cannot remand the proceedings back to the learned Arbitrator for deciding the proceedings de novo. The Court can

remand the matter back to the learned Arbitrator under Section 34(4) of the Arbitration and Conciliation Act, 1996 on application if made by the respondent in the proceedings under Section 34. It is held that, the limited discretion available to the Court under Section 34(4) can be exercised only upon written application made in that behalf by a party to the arbitration proceedings. The Court cannot exercise this limited power of discretion in the proceedings before it suo moto. The Supreme Court held that, no power has been invested by the Parliament in the Court to remand the matter to the arbitral Tribunal except to adjourn the proceedings for the limited purpose mentioned in sub-section (4) of Section 34. The Supreme Court adverted to its earlier judgment in case of **M.C. Dermott International Vs. Burn Standard Ltd. [(2006) 11 SCC 181]**.

86. In our view, the learned Principal District Judge thus had no jurisdiction to remand the matter back to the learned Arbitrator under any of the provisions of the Arbitration and Conciliation Act, 1996. Admittedly, there was no application made by the respondents before the learned Principal District Judge under Section 34(4). The learned Principal District Judge has not remanded the matter back for limited purpose for elimination of grounds of challenge under section 34 of the

Arbitration and Conciliation Act, 1996, and has set aside the impugned award but has directed the learned Arbitrator to decide the matter afresh keeping all contentions open. In our view, this part of the impugned order is totally perverse and contrary to law laid down by the Supreme Court in case of Geojit Financial Services Limited (supra), Reliance Capital Ltd. (supra), and contrary to the judgment of the Supreme Court in case of Kinnari Mullick & ors. (supra). In our view, the impugned judgment delivered by the learned Principal District Judge, setting aside the entire award in the facts and circumstances of this case is also totally perverse and contrary to the principles laid down by the Supreme Court. Thus, the entire order deserves to be quashed and set aside.

87. We, therefore, pass the following order :

1. Writ Petition No.5528/2010 is dismissed. Rule is discharged.
2. First Appeal No. 2749/2009 is dismissed.
3. Arbitration Appeal No.3/2015 is dismissed.
4. Arbitration Appeal nos.1/2015 and 2/2015 are allowed. The impugned order dated 25/8/2010, passed by the learned Principal District Judge,

Aurangabad allowing M.A.R.J.I. No.89/2011 and M.A.R.J.I. No.90/2011 is set aside. Arbitration Petition No.89/2011 and Arbitration Petition No.90/2011 are dismissed. The impugned award dated 25/8/2010, rendered by the learned Arbitrator is upheld.

5. Civil Application No.10993/2017 in First Appeal No.2749/2009 filed for amendment is dismissed.

6. All Civil Applications are disposed of.

7. No order as to costs.

(SUNIL K. KOTWAL)
JUDGE

(R.D. DHANUKA)
JUDGE

fmp/-