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

COMMERCIAL ARBITRATION PETITION NO.230 OF 2017

Ayub Basha Shaikh ..Petitioner
Versus
Abhyudaya Co-op. Bank Ltd. and others ..Respondents

Mr. Nilesh Gala i/by Mr. M. N. Gala for the Petitioner.
Mr. V. C. Ghosalkar for the Respondent No.1.

CORAM : R. M. SAVANT, J.
DATE : 18th APRIL, 2017

P.C.

1 The Award dated 27.12.2016 passed by the Sole Arbitrator under Section 84 of the Multi-State Co-operative Societies Act, 2002 (For short "the Multi-State Act") is taken exception to by way of the above Arbitration Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 (For short "the 1996 Act"). By the impugned Award the Opponent Nos.1 to 7 to the said Arbitral proceedings amongst whom was the Petitioner was made liable to pay the Respondent Bank i.e. the Disputant an amount of Rs.23,79,72,413/- with interest at 15.50% per annum from 01.09.2014 till payment/ recovery.

2 The Award vide clause (C) directs the Opponent Nos.1 to 3 to pay the amount within three months for avoiding sale of the mortgaged properties which are mentioned in the said clause (C) of the

operative part of the impugned Award. The Petitioner herein was the borrower from the Respondent Bank. The said loan was taken for business purposes as the Petitioner is proprietor of one M/s. Asian Build Tech carrying on business at the address mentioned in the cause title. The Petitioner as a member of the Respondent Bank enjoyed credit facilities against the security of the properties which were mortgaged to it. It seems that the Petitioner also applied for working capital term loan of Rs.25,00,00,000/- which was also sanctioned against the security of the properties which were mortgaged to it. It seems that pursuant to the sanctioned working capital term loan, the following documents were executed by the Petitioner in favour of the Respondent Bank :-

> "1) Demand Promissory Notes executed by the Opponent Nos.1 to 7.
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> 2) Agreement for Term Loan executed by the Opponent No.1.
>
> 3) Guarantee executed by Opponent Nos.2 to 7."

3 It was the case of the Respondent Bank i.e. the Disputant that after availing the entire term loan amount of Rs.25,00,00,000/- the Petitioner failed to pay the regular loan installments and also committed default in payment of dues and thereby committed breach of the agreed terms of sanction. This resulted in the loan account of the Petitioner

being classified as "Non-Performing Asset" on 30.09.2014. The other Respondents i.e. the Opponents to the Arbitral proceedings also failed to fulfill their obligations in the matter of repayment of the loan in terms of their guarantee and thereby committed default. The Respondent Bank issued demand notices upon the Petitioner and finally a loan recall notice came to be issued on 23.07.2015. It seems that the Respondent Bank also invoked the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (For short "the SARFAESI Act") through its Authorized Officer for enforcement of the security interest in the mortgaged properties. The Respondent Bank also filed an application for ad-interim injunction, which injunction was granted on 22.09.2016 in terms of prayer clause (a) of the said application. It is thereafter that the Respondent Bank filed the present dispute for recovery of the amount of Rs.23,79,72,413/- together with interest at 15.50% per annum with effect from 01.09.2015 till payment of the entire dues and closure of the said loan amount. The Petitioner herein filed his written statement and did not deny the factum of he banking with the Respondent No.1 Bank. He admitted the grant of the term loan in the sum of Rs.25,00,00,000/- and the execution of the security documents as also the extension of the mortgage as averred by the Respondent No.1. It seems that the Petitioner took up a defence that his signature was obtained on blank documents. A further defence taken was that the Respondent No.1 Bank could not invoke the jurisdiction under Section 84 of the Multi-State Act in view of the fact that the provisions of the SARFAESI Act were already invoked by the Respondent Bank. The other Opponents in the said dispute also admitted the availment of the financial assistance by the Petitioner as also the execution of the documents by them in favour of the Respondent Bank. On the basis of the pleadings of the parties, the Learned Arbitrator framed as many as eight issues, amongst which were the issues, whether the Respondent Bank proves that it had sanctioned the term loan of Rs.25,00,00,000/- to the Petitioner, whether the Respondent Bank proves that the Opponent did not pay the amounts sought for in this dispute despite demands and whether the Respondent Bank is entitled to the amount claimed and the interest at the claimed rate.

4 It seems that on 17.11.2015 before the Learned Arbitrator, the parties agreed that the evidence would be led by affidavits and documents. In terms thereof, the Respondent Bank filed an affidavit of one V. B. Patil in support of its claim as also the copies of the documents which were executed as security for the loan taken. The said documents were inter-alia the membership application filed by the Petitioner, the application for credit facility, sanctioned letter, demand promissory note,

agreement for loan, guarantee agreements executed by the guarantors, registered mortgage (extension) deed dated 11.11.2013. It seems that the Opponent No.1 i.e. the Petitioner herein filed his affidavit of evidence. The Opponent No.2 also filed his affidavit of evidence whereas the Opponent No.5 filed affidavit of evidence for himself and for Opponent Nos.4, 6 and 7 before the Learned Arbitrator. It seems that the Petitioner herein alongwith the Opponent No.2 had filed separate applications seeking cross-examination of the affiant who had filed the affidavit in support of the claim however the said application came to be withdrawn and was accordingly disposed of on the said ground on 20.09.2016. Thereafter application Exh.48 came to be filed by the Opponent Nos.4 to 7 seeking cross-examination of the affiant who had filed the affidavit in support of the claim which came to be dismissed on merits by the Learned Arbitrator by order passed on 06.12.2016.

5 The Learned Arbitrator thereafter proceeded to adjudicate upon the dispute. The Learned Arbitrator having regard to the documents on record and the admitted position of the Petitioner availing the financial assistance by way of term loan as well as cash credit facility, did not give credence to the defence taken by the Petitioner and the Opponents. The Learned Arbitrator also did not find any substance in the contention raised on behalf of the Petitioner that since recourse to the

SARFAESI Act was taken, the Petitioner could not invoke provisions of Section 84 of the Multi-State Act by holding that it is well settled that a creditor can simultaneously avail of both the remedies. The Learned Arbitrator therefore came to a conclusion that the Respondent Bank i.e. the Disputant had proved its case and accordingly ruled in favour of the Respondent Bank and directed the Opponent Nos.1 to 7 to pay to the Disputant an amount of Rs.23,79,72,413/- with interest at 15.50% per annum from 01.09.2014 till full payment/recovery.

6 Whilst assailing the Award, the Learned Counsel for the Petitioner would contend that the Arbitrator had erred in directing the sale of the mortgaged properties, which issue was not falling within his domain under Section 84 of the Multi-State Act. In support of the said contention, reliance is sought to be placed on the judgment of the Apex Court reported in ***2011(5) SCC 532*** in the matter of ***Booz Allen & Hamilton Inc Vs. SBI Home Finance Ltd. & others***. It was also the submission of the Learned Counsel that the Arbitrator has also gone beyond the loan agreement whilst Awarding interest at 15.50% per annum on the Awarded amount. It was further submitted by the Learned Counsel that the Arbitrator had erred in Awarding interest from 01.09.2014 when the claim of the Respondent Bank was for interest from 01.09.2015. The Learned Counsel would submit that the Arbitrator has

erred in holding in favour of the Respondent Bank only on the basis of the admissions of the Petitioner. It was therefore the contention of the Learned Counsel that the impugned Award is required to be interfered with under Section 34 of the 1996 Act.

7 Per contra, the Learned Counsel for the Respondent No.1 Mr. V. C. Ghosalkar would support the impugned Award. It was the submission of Mr. V. C. Ghosalkar that the Petitioner has not been able to make out any case for interference with the impugned Award having regard to the well settled principles that are applicable to a Petition under Section 34 of the 1996 Act. The Learned Counsel would contend that in so far as the interest is concerned, once the Petitioner had defaulted in payment then the floating rate of interest would be applicable and it is in the said circumstance that the interest at 15.50% per annum was sought in the claim Petition. The Learned Counsel would submit that in so far as the grant of interest from 01.09.2014, the same is an obvious mistake which can be corrected by this Court and interest can be granted from 01.09.2015, from which date it has been sought in the claim Petition. It was the submission of the Learned Counsel that however the said fact would not vitiate the Award so as to merit interference under Section 34 of the 1996 Act.

8 Having heard the Learned Counsel for the parties, I have considered the rival contentions. In so far as the parameters laid down for exercising jurisdiction under Section 34 of the 1996 Act are concerned, they have been well settled by the judgments of the Apex Court. The said law can be said to have been crystallized in the latest judgment of Apex Court reported in ***(2015) 3 SCC 49*** in the matter of ***Associate Builders Vs. Delhi Dev. Authority***. The said judgment can be said to be an exposition of the Apex Court as regards the jurisdiction under Section 34 of the 1996 Act. The principles that can be culled out are that the interference under Section 34 of the 1996 Act is warranted if the Award is perverse, it is against the terms of the agreement, the findings are such that no reasonable person could have arrived at, and the Award shocks the conscience of the Court. In the instant case, there can be no dispute about the basic fact of the loan facilities or the financial assistance taken by the Petitioner from the Respondent Bank. There can also be no dispute about the default committed by the Petitioner, the factum of the documents being executed in favour of the Respondent Bank by the Petitioner has also been admitted by the Petitioner and the other Opponents in the Arbitral proceedings. The fact that security was executed by the Petitioner in favour of the Respondent Bank also cannot be disputed. It is in the context of the aforesaid background that the

Learned Arbitrator proceeded to adjudicate upon the dispute between the Respondent Bank and the Petitioner. As indicated above, in the meeting held on 15.09.2016, the parties had agreed that evidence would be led by affidavits. Pursuant to which, affidavits were filed on behalf of the Respondent Bank being the claimant and the affidavits were filed on behalf of the Opponents in denial. The application filed by the Petitioner for cross-examination of the affiant who had filed the affidavit in support of the claim was not pressed and therefore was allowed to be withdrawn. In so far as the other Opponents are concerned, their application was rejected by the Learned Arbitrator. Once that be so, there is no question of the Petitioner being not given a proper opportunity in the Arbitral proceedings, in any event what defences the Petitioner can have in the teeth of the admitted documents begs an answer. Be that as it may, the Award in the instant case cannot be said to be such as to merit any interference in the above Petition applying the well settled principles for interference under Section 34 of the 1996 Act which have been adverted to hereinabove.

9 In so far as the claim for interest is concerned, though undoubtedly the interest as per the loan agreement was to be at the rate of 14.50% per annum, once default in payment was committed by the Petitioner, then the Bank was entitled to claim interest at the floating rate

which is interest at 15.50% per annum. In so far as the date from which interest is granted i.e. from 01.09.2014 is concerned, the same is obviously a mistake of the Learned Arbitrator, as the claim Petition itself mentions that interest is claimed from 01.09.2015. Hence in so far as the interest is concerned, the Learned Counsel appearing on behalf of the Respondent Bank has no objection to the date being altered from 01.09.2014 to 01.09.2015. The Respondent Bank would therefore be entitled for interest from 01.09.2015. In the light of what has been stated hereinabove, the impugned Award does not merit any interference in the exercise of jurisdiction under Section 34 of the 1996 Act. The Arbitration Petition is accordingly dismissed.

[R.M.SAVANT, J]