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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO. 918 OF 2012

Al Nakib Trading Co. & Ors. ... Petitioners
vs.
The Memon Co-operative Bank Ltd. & Anr. ... Respondents

Dr. Saikumar Pathrudu M. for the Petitioners.
Mr. N. N. Bhadrashete for respondent nos. 1 and 2.

CORAM : A.K. MENON, J.
DATE : 20th JUNE, 2018

P. C.

1. By this Arbitration petition the petitioners have sought to challenge an award dated 12th January, 2012 passed under Section 84(2)(a) of the Multi State Co-operative Societies Act,2002.

A few facts may be gone into before considering the submissions made at the bar.

2. The petitioner is a proprietary concern. Petitioner no. 2 is the sole proprietor of first petitioner. Petitioner nos. 3 and 4 are guarantors to the transactions. The petitioner bank invoked arbitration and made a claim for recovery of sum of Rs. 53,40,690.70 due to the bank. The statement of claim set outs particulars of various transactions including a cash-credit facility availed of. In paragraph 10 of the statement of claim, the respondent bank has set out the particulars of numerous

documents executed by the petitioners and contended that the petitioners have failed to pay the balance amounts due at the foot of the loan account.

3. The respondent bank also claimed security by way of mortgage created in its favour in respect of flat premises described in prayer clause (b) [See at page33]. A common written statement was filed on behalf of the respondents. All the petitioners were members of the respondent bank. In the written statement, copy of which appears at Annexure C to the petition, the petitioners have not disputed the execution of the documents. The only defence taken up is that cash credit facilities were granted in respect of stock-in-trade which was duly insured at all times but these stocks were destroyed in floods. Dr. Pathrudu, learned counsel for the petitioner submitted that in August, 2006 large scale flooding caused the stocks to be destroyed resulting in heavy losses. Flood waters are stated to have entered the store room where the goods had been stored. Security in terms of the stock was not recoverable. It is contended that the bank was a beneficiary of the insurance policy taken out in a sum of Rs.35 lakhs and that the claims were pending before the District Consumer Forum, Surat being C.R.D.F. No. 245/07..

4. There is no dispute of the fact that the credit facility had been availed of and that interest was being paid. There is also no dispute as to the rate of interest since in paragraph 11 of the written statement the petitioner has stated that they had paid a sum of Rs. 70 lakhs till April, 2009 including interest in the cash credit facility. The defence is thus only on the basis that on account of natural calamity their business suffered and loan could not be repaid. The impugned award came to

be passed after hearing both parties. The claimant bank in the meantime was ordered to be wound up and a liquidator came to be appointed. The Liquidator has now been joined as respondent no. 2 in this petition.

5. Mr. Bhadrashete learned counsel appearing on behalf of the respondents submitted that the liquidator appointed on 23rd May, 2011 was officer of the Bank of Baroda. Both parties were represented by their Advocates and that in the course of the arbitral proceedings the respondents examined their witness, a Deputy General Manager, who was duly cross examined by the Advocates for the petitioner.

6. The claimant bank relied on oral and documentary evidence which documents were proved. The fact that the loan was availed was proved as was the rate of interest. Execution of the documents was also proved. An opportunity of cross examining the witness was also granted and availed of. At some stage in the proceeding the Advocates for the petitioner sought to withdraw from the reference on account of some misunderstanding between the said Advocates and the petitioners. At that stage the learned Arbitrator is stated to have issued notice to the petitioners directing them to make alternate arrangements, but in the meantime the difference between petitioner and the Advocate were resolved, as a result of which the Advocates continued to represent the petitioner. The Arbitrator has recorded in paragraph 10 that he had not permitted the Advocates to withdraw from the matter. The Advocate had therefore fully participated in the proceedings and represented the petitioners.

7. The challenge to the award was basically on the ground that principles of natural justice had not been followed and that the arbitrator did not afford a proper opportunity to the petitioner to present their case. On a query from the Court the learned Counsel has fairly set out that the only grounds G, H, J, M and P are being urged. Thus I have heard him on these aspects of the grounds which are recorded below :

(G) It is submitted that the arbitral award contains decisions on matters beyond the scope of the submission to arbitration.

The petitioners submit that since 2004 petitioners have regularly paid the interest on the credit facilities obtained by them and even after being hit by the floods and business coming to standstill the petitioners continued paying interest to the respondent bank regularly in hope that maximum amount would be claimed from the insurance company and the same would be adjusted against cash credit account of the petitioners. It is pertinent to note that petitioners have paid an amount of Rs.70,00,000/- till April, 2009 as an by way of interest towards the cash credit facility. However as the Respondent Bank has not succeeded in claiming the insurance amount, the Petitioners have been put to loss and therefore the Respondent Bank has no right whatsoever to claim any amount from the petitioners.

Petitioners have lost their stock and they have suffered heavy losses to the tune of Rs.60,00,000/- in the heavy deluging flood in Tapi River in Surat in August, 2006. 90% of the City was under the flood water. The Petitioners whole business came to a standstill due to the natural calamities. Claimant immediately requested the respondent herein above to proceed with the claim against insurance company so that the amount against the insurance could be adjusted against the credit. However respondent herein above were failed to claim the insurance money from the insurance company and therefore the petitioners had file proceeding before the District Consumer Forum, Surat and the same is pending. Petitioner crave leave to refer to and rely upon copy of the said proceedings. The respondent would receive damages from the insurance company if the respondent herein above seriously pursues this case before the Forum. Though the entire stock worth Rs.60,00,000/- was destroyed the respondent herein above had certified the loss to the tune of Rs.34,00,000/- only. There was negligence on the part of the respondent herein above. In spite of this Petitioners have paid Rs.70,00,000/- till April 2009 as and by way of interest to the Respondent herein above.

(H) It is submitted that the composition of the Arbitral tribunal or the Arbitral procedure was not in accordance with the agreement of the parties. Order dated the 24th June, 2009 appointing the Learned Arbitrator is in conflict with the Notification dated 24th February, 2003. It is also not in consonance with the provisions of Section 84 of the Multi State Co-operative Societies Act, 2002. The composition of the Arbitral Tribunal was not in accordance with the provisions contained in above Section 84 order and Notification. It is further submitted that the Award has been improperly

procured or is otherwise invalid.

The petitioners respectfully submit that in view of the above Order and Notification and in view of provisions contained in Section 84 of the Multi State Co-operative Societies Act, the appointment of the learned Arbitrator is not valid and legal.

(J) It is submitted that the arbitral award is in conflict with the public policy of India.

The petitioners submit that the Mortgage Deed dated 29th July, 2003 is not valid and legal document. It is not sufficiently stamped and not Registered with the Sub-Registrar. Hence the same is not binding upon the Petitioners. As per Clause 29 of the Agreement for Sale dated the 1st March, 2001, the right, title, interest and ownership in Flat do not confirm on the Petitioner No. 2 till the Registration of the Society.

(M) The Petitioners submit that there is no proof of claim from excise department on the Daman property. There is no letter of demand from the said department. The learned Arbitrator's finding in that behalf having no base or evidence on record.

(P) The learned arbitrator has not given sufficient opportunity to the petitioners after receipt of copies of evidence on 16th December, 2011. The petitioners were not given sufficient time to take decision on the production of evidence by stepping into the witness box and to cross examine the witness of the respondent bank. Suddenly the case was closed on 2nd January, 2012. It is respectfully submitted that no principle of natural justice was observed by the learned Arbitrator. The petitioners crave leave to refer to and rely upon the minutes of the meetings before the learned Arbitrator.

8. As far as ground "G" is concerned nothing in the award shows that the decision is on matters beyond to scope of the reference. The ground seeks to elaborate that the petitioners had paid interest despite their business being affected by the flood. These payments were made in anticipation of the insurance claim being received. That they had lost stocks due to the deluge and they relied heavily on the insurance claim which is yet to be paid. It is contended that the respondent bank was negligent since they had certified the loss at a lower amount. I do not see how these contentions can be urged in a challenge under Section 34. In my view there is nothing that has been awarded which was beyond the scope of the reference.

9. The next ground "H" urged pertains to the procedure adopted by the Tribunal which according to the learned counsel was not in accordance with the provisions of Section 84 of the Maharashtra State Co-operative Societies Act and notification dated 24th February, 2013. No attempt has been made to demonstrate how there has been any violation of this provision since reference to the disputes has been made only after due notice was given to the petitioners and after they were called upon to repay the balance amount in the account. It is pertinent to mention that the claim before the insurance company is in fact the claim made jointly by the petitioner and the respondent. The responded bank is party to that as well. In the circumstances, I do not see how there has been any violation of Section 84. The petitioners have participated in the arbitration. Para 10 records that all the petitioners (Respondent in arbitration) had filed a common written statement upon receipt of notice of the proceeding. The grounds now sought to be raised were not raised in the arbitration as evident from the written statement. Thus in my view, there is no substance in the challenge based on ground "H" that the arbitration was conducted in violation of procedure.

10. The next ground of challenge is ground "J" in which it is urged that the arbitral award is in conflict with the public policy of India. Nothing has been shown to me as to how the award is in violation of the fundamental policy of law of India. There is no reason to entertain that challenge merely because the defence is based on the inability to pay as a result of business loss. There is no manner in which loss in business and the effect of natural calamity can be relied upon to contend that the award is in conflict with public policy of India.

11. Ground M pertain to certain property at Daman which could have formed security for the banks had not been taken into consideration by the Tribunal when the Arbitral Reference was being heard. It is the case of the respondent bank that it had no claim against said property and therefore no reference was made to it in the claim and no relief was sought in respect of that property. This can hardly be a ground of challenge to the award since bank had no claim against the said property. Existence or otherwise of any claim by the excise department of the Daman property is not relevant to the present challenge. In the circumstances that ground also cannot succeed.

12. The last ground of challenge is ground "P". It is vehemently submitted by the learned counsel for the petitioner that the Arbitrator had not given sufficient opportunity to present their case after receipt of copies of the evidence on 16th December, 2011. It is contended that they were not given sufficient time to produce evidence by stepping into the witness box and cross examining the witness of the bank and the reference was closed on 2nd January, 2012 abruptly. This ground essentially pertains to the first ground urged in violation of the principles of natural justice. It is submitted by the learned Advocate on behalf of the petitioner that final arguments were not heard and the reference was closed abruptly.

13. In the course of submissions attention of the learned counsel for the petitioner was invited to the award and specifically to the observation in paragraph 18 wherein the learned Arbitrator records as follows :

"The pleadings of the Claimant Bank are given in minute details

> *with all the necessary particulars in respect of the loan transactions. The pleadings are wholly supported by the documentary and oral evidence adduced by the claimant bank and nothing much could be elicited in the cross examination of the witness. The testimony of the witness was not shaken. As against this evidence there is nothing on record by way of evidence on behalf of the respondents. They have admitted the relationship with the claimant bank and the loan transaction of Rs.50,00,000/- by way of Cash Credit facility. There is no dispute about the loan documents. There is no dispute about the renewal of the Cash Credit Facility from time to time. Apart from bear denial there is absolutely nothing in the defense which stands unsubstantiated by any evidence, oral or documentary. The Respondents have taken this matter very lightly and casually, to say the least. The Respondents have not stepped in the witness box to prove their allegations made in their statement of defence. It was their bounden duty to have proved their case by entering into the witness box and by offering for cross examination of the other side. The claimant bank has fully feeded and wholly proved their case and claim against the respondents to recover the claim amount of Rs.53,40,690.70 with interest as prayed for by them.*

As can be seen from the above, the documents executed were not in dispute and the witness of the bank who was Deputy General Manager who had filed his affidavit of evidence had stepped into the box and was duly cross examined. Nothing could be elicited in the cross examination. The testimony of the witness was therefore accepted by the Arbitrator. On behalf of the petitioner however apart from a bare denial no steps were taken to substantiate their defence. The petitioner did not examine any witness and did not establish their case as pleaded.

14. In view of the submissions made today I inquired of the learned counsel for

the petitioner whether at the material time the petitioner had protested allegedly abrupt closure of the arbitral proceedings and that they were not allowed to argue their case. The learned Advocate for the petitioner was called upon to produce copies of the minutes of the meeting which were not forthcoming. The Minutes would have revealed whether the petitioner was denied a fair opportunity of presenting their case. However, the learned counsel was unable to produce any such correspondence. One more argument was that the unfortunate incidents of August, 2006 resulted in large scale floods and which inundated the store room has not been considered by the Arbitrator. There is no substance in this contention since the claim was in effect not disputed and the only defence is that the insurance claim is still pending and that is no reason to set aside the Award. If the claim is paid by the insurance company the liquidator is bound to give credit for the same.

15. In the circumstances, I am of the view that none of the grounds urged have been established and the challenge therefore cannot succeed. In view of the above, I pass the following order :

(i) Arbitration petition is dismissed.

(ii) No order as to costs.

(A.K. MENON, J.)