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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO. 847 OF 2010

Vaidyanath Sahakari Grahak Bhandar Ltd. … Petitioner

vs.

The Apex Urban Co-op Bank of Maharashtra and Goa Ltd. … Respondent (Org.Claimant)

WITH

ARBITRATION PETITION NO. 848 OF 2010

Sant Jagmitra Sahakari Soot Girini Maryadit and Ors. … Petitioner

vs.

The Apex Urban Co-op Bank of Maharashtra and Goa Ltd. … Respondent (Org.Claimant)

Mr. A. Y. Sakhare, Senior Advocate a/w. Mr. Sarang S. Aradhye for the Petitioner.
Mr. Rishabh Shah i/b. Mr. Vijay B. Chavan for the Respondent.

CORAM : A.K. MENON, J.
RESERVED ON : 27th JUNE, 2018
PRONOUNCED ON : 5th SEPTEMBER, 2018

JUDGMENT

1. These two petitions filed in the year 2010 were dismissed on 19th March, 2010 at the stage of admission. They were restored on 25th November. 2016 and vide order dated 16th March, 2017 were directed to be heard finally at the stage of admission. The petitions are taken up for final disposal today. The awards

challenged in these petitions arise from a similar set of facts inasmuch as the petitioners were constituents of the respondent bank and had availed of certain credit facilities. The dispute between the parties were referred to arbitration of the sole arbitrator who has passed separate awards in their references.

2. The challenge in these petitions is to two Awards dated 5th March, 2009 passed by the sole arbitrator appointed under section 84 of the Multi State Co-operative Society Act, 2002 ("MSCS Act"). Mr. Sakhare, learned Senior Advocate appearing in support of the petition submitted that the challenge in these petitions common although the facts may vary to some extent. The facts in Arbitration Petition No. 847 and 848 of 2010 being similar and the challenge being similar, Mr. Sakhare, Senior Counsel appearing on behalf of the petitioner in support submits that the decision in Arbitration Petition No. 847 of 2010 will apply equally to the facts in Petition no.848 of 2010. Accordingly for the purposes of this order the facts in the Arbitration Petition No. 847 of 2010 are being adverted to. The claimant in the arbitration is a co-operative bank under liquidation. The respondent is a co-operative society which had availed of Hypothecation Cash Credit facility on or about 25th August, 2001. The respondent bank sanctioned certain cash credit limits on 19th September, 2001. The petitioner's executed a demand notice for Rs.1,00,00,000/- along with the following documents all of which are dated 13th February, 2002

(a) Board Resolution accepting the terms and conditions of sanctioned letter

(b) Demand Promissory Note for Rs.1,00,00,000/-

(c) Letter of Continuing Security

(d) Letter of lien and

(e) Agreement of Hypothecation

On the strength of these documents the respondent bank released certain amounts. It is contended that the petitioner failed to repay balance in the hypothecation cash credit account being a sum of Rs.44,25,684/- as on 31st July, 2005.

3. It was the case of the bank that the petitioner had failed to repay the balance as a result of which the bank was forced to initiate proceedings under section 84 of the MSCS Act. The Central Registrar is stated to have appointed the arbitrator. The bank filed their claim statement on or about 29th November 2005. The petitioner raised certain preliminary objections and inter alia contended that the Tribunal had not being properly constituted, it had no authority to receive and adjudicate the dispute. The signatory to the statement of claim did not have valid authorisation and that the arbitration is in violation of directions of the Central Registrar and the Reserve Bank of India. This preliminary objection was decided vide order dated 22nd June, 2006 and the Arbitral Tribunal held that it had jurisdiction to entertain and try the dispute. The preliminary objection was decided after the respondent bank filed their written statement on the preliminary issue and the petitioner, a rejoinder.

4. The arbitrator then proceeded to hear the reference and by an award dated 5th March, 2009 directed payment of the amount due along with simple interest @ 9% p.a thereon, from the respective dates when the amount was received until the

date of realization of the total amount due. The claim was prepared and verified in the light of certain directions issued by the arbitrator and in keeping with the decision of the Supreme Court in *Central Bank of India vs. Ravindra & Ors. [AIR 2001 SC 3095].* The amount awarded was directed to be paid within a period of three months. If payment was made within three months no interest was to be charged from the date of the award till the payment. In addition the petitioner was granted a concession to the extent of 10% of the total amount of interest. Furthermore, all sums by way of deposits in the form of shares to the petitioner with the respondent bank including dividend and interest, if any, were to be adjusted at the time of final payment. Costs were to be borne equally. The petitioner is aggrieved by the said award. It is the case of the petitioner that the award is bad in law. The bank being under liquidation, there was no reason for the arbitrator to proceed.

5. Mr. Sakhare learned Senior Advocate appearing on behalf of the petitioner-society submitted that the bank had approached the Reserve Bank of India to obtain a licence on or about 28th August, 1993. The State of Maharashtra had thereafter issued a notification on 30th December, 1995 under section 2(u) of the NABARD Act declaring the respondent as a State Co-operative Bank. At that stage the Maharashtra State Co-operative Bank Ltd. had approached this Court and assailed the validity of the notification dated 30th December, 1995. In the matter of *Maharashtra State Co-operative Bank Ltd. vs. State of Maharashtra and Ors.*[1] in Writ Petition No. 2120 of 1996 the Division Bench of this Court on 19th December,

1 **1997 (3) Mh.L.J. 466**

1996 quashed and set aside the notification dated 30th December, 1995. The Court then directed the Reserve Bank of India to review the decision of granting licence to the respondent on 31st March, 1997. It transpires that the respondent bank approached the Supreme Court against order dated 19th December, 1996 in the Writ Petition. On 27th January, 1997 the Supreme Court granted an ad-interim stay of the judgment of this Court and in the intervening period this continued. On 25th August, 2001 the respondent bank sanctioned the said hypothecation facility. Meanwhile the bank sanctioned the loan on 19th September, 2001. On 29th October 2003, the Supreme Court dismissed the Special Leave Petition observing that the bank could not be allowed to operate as a State Co-operative Bank. Following the decision, on 30th October 2003, Reserve Bank of India canceled the banking licence of the respondent bank. Thus from 30th October, 2003 the respondent bank ceased to carry out banking activities.

6. Mr. Sakhare submitted that on 31st August, 2005 the Central Registrar issued a declaration that the respondent bank had ceased to operate as a Co-operative Society. Thereafter on 15th September, 2005 the Central Registrar issued a notice to the society to show cause as to why it should not be taken into liquidation. Pursuant to that, on 2nd December, 2005, the liquidator came to be appointed under section 84 of the MSCS Act. Meanwhile the arbitration proceedings were filed by the respondent on 29th November, 2005. Mr. Sakhare submitted that as on 19th December, 1996 the respondent bank ceased to be entitled to carry on banking business and as such all activities taken up from inception were rendered illegal and therefore the dispute was not maintainable and the arbitral award bad in law.

7. It is submitted that the validity of the reference is questionable. Only if there existed a dispute touching the business of the Multi State Co-operative Society could the reference be made under the Act. Mr. Sakhare submitted that in view of the cancellation of the banking licence, the respondent bank had no authority to enter into the loan transaction and equally the bank could not initiate any legal proceedings. Mr. Sakhare relied upon provisions of section 117(2) of the MSCS Act and submitted that attempt of the bank to recover these amounts was without authority of law. Mr Sakhare submitted that the decision of the Division Bench of this Court though rendered on 19th December, 1996 related back to 30th December, 1995. Mr. Sakhare invited my attention to paragraph 13 of the order and submitted that the words "carrying on business" contemplated under Section 2(u) of the NABARD Act meant that the additional principal co-operative society must be carrying out business of banking. The basic requirement is that the principal co-operative society must carry on business of banking and its primary object must be to finance other Co-operative Societies in the State. The respondent banks Multi State Co-operative Society was not carrying out banking business as on the date of declaration and therefore had failed to satisfy requirement of law.

8. Pursuant to quashing of the notification dated 30th December, 1995 the Reserve Bank of India which had granted licence was directed to review the decision and complete such review by 31st March, 1997. However, it must be noticed till such review the licence was to remain operative. Thus although the notification was struck down the licence granted by Reserve Bank of India was to

remain operative. The Supreme Court later stayed the order of the Division Bench on 27th January, 1997. Thus even at that stage, the banking licence was operative. Likewise when the hypothecation facility was sanctioned on 19th September, 2001, the licence continued to be operate. It was only on 29th October, 2003 that the Supreme Court dismissed the Special leave Petition filed by the respondent bank thereby disallowing further business to be continued. It is only on 30th October, 2003 that the Reserve Bank of India has canceled the banking licence and from 30th October, 2003 the banking activity ceased. Later in 2005, the Central Registrar issued a notification that the society ceased to exists and the board of directors were rendered inoperative. Thus for all practical purposes the licence of the bank was in force at the material time the loan was sanctioned.

9. In the course of submissions Mr. Sakhare invited my attention to the order on preliminary objections dated 22nd June, 2006. In paragraph 4 of the said order the Arbitral Tribunal recorded the fact that under section 16 of the Arbitration and Conciliation Act, 1996 ("The Arbitration Act, 1996") the Tribunal could decide on its own jurisdiction and ultimately conclude that it had the jurisdiction to try the dispute. In doing so the Tribunal observed that the provisions of section 84 are such that it would empower appointment of an arbitrator for settling many disputes and rejected contention on behalf of the petitioner that it is mandatory to have a separate arbitrator for each dispute. In the instant case the Tribunal was appointed in number of matters and all the respondents in the arbitration had taken up a preliminary point. The order dated 22nd June, 2006 was passed in common. The

Tribunal also considered the submission on behalf of the petitioners that the society was then not existing and the reference was void in law. In this behalf it was contended that although liquidator had been appointed, mere cancellation of the banking licence did not mean that the arbitration proceeding could not continue.

10. Mr. Sakhare submitted that effect of the winding up order is to put an end to all management of the business but especially to the management of the affairs of the bank. The Tribunal however held that the effect of the order of winding up would result in vesting of the management in the liquidator and the process of winding up does not end till the company is wound up. It is only after cancellation of the registration of the society that the process of dissolution would continue and that was yet to take place. It was further held that the cancellation of the banking licence would not entail that the loan transaction entered into during the validity of the licence would render the transaction void. The amounts due to the bank could still be recovered since the process of liquidation would also entail that amounts lent and advanced and due and owing to the bank in dissolution were to be recovered. Mr. Sakhare was at pains to submit that it was not the business of the respondent society to do banking business under the Banking Regulations Act or Maharashtra Co-operative Societies Act. The Society may have some activity to perform but could not have any banking activities under section 84 of the MSCS Act. He stressed upon the preliminary objections that has been raised in the matter to contend that the arbitrator could not have proceeded.

11. Mr. Sakhare relied upon provisions of section 86 of the MSCS Act and contended that it was not attracted in the instant case and that section 89 and 90 (2) was also relevant. He submitted that no leave was granted under section 117(2) of the MSCS Act. He submitted that section 86 of the MSCS Act related to winding up of Multi State Co-operative Society would not be applicable since the licnece of the bank had been cancelled. He submitted that even under section 89 the liquidator appointed would not be empowered to act. He submitted that under section 117(2) even while the society is being wound up, legal proceedings could not be proceeded with except with leave of the Central Registrar and in the instant case no such leave has been granted. He submitted that pending proceedings may be continued or fresh proceedings may be instituted only with prior permission of the Central Registrar and therefore in the instant case a reference could not have been made. The present dispute is arising out of financing and banking activity and it therefore could not have been carried out.

12. My attention was invited to Rule 28 of the Multi State Co-operative Society Rules 2002 which provides for the procedure to be adopted by the liquidator when he has been appointed subsequent to Section 9. Mr. Sakhare submitted that the powers of the liquidator are confined by the said rule and nothing in the rule provides for recovery of amounts such as the ones claimed in the present arbitration. I may mention here that Rule 28(d) of the said Rules obliges the liquidator to recover all sums and other property to which the Society is entitled for which he may institute proceedings incidental to liquidation proceedings as he may

deem appropriate. In that background, it was Mr. Sakhare's contention, since the existence of the bank was in question the liquidator of such bank could not carry out banking business or continue to pursue the claim in arbitration. Furthermore he assailed the appointment of the arbitrator on the ground that it was without consent of the Central Registrar which was a pre-requisite, the basis of his contention being that the society was not existing and therefore the appointment could not have been made.

13. The Arbitration proceedings in the instant cases have also been conducted under the instructions of the liquidator and in discharge of the duties of the liquidator appointed and the present petition has similarly been contested under the instructions of the liquidator. The affidavit in reply is filed by one Mr. B. Prabhakar Rao as representative of the respondent duly appointed by the Official Liquidator, Central Registrar, New Delhi in which it is stated that the arbitrator has passed 16 awards and out of these 16 awards only two awards have been challenged 8 awards have already resulted in settlements and some are under execution. The affidavit, apart from dealing with various contentions, also highlights the fact that the proceedings in arbitration had commenced prior to appointment of the liquidator and that the loan transaction was admitted. There is no dispute of the fact that loan was availed of and furthermore it is contended that the respondent continues to be a Multi State Co-operative Society. Consequent upon appointment of liquidator, the society was still in the process of being wound up. Registration of the Society is valid subject to its winding up and the liquidator is obliged to recover the debts as

part of his duties. Furthermore it is contended that the petitioner at all times was a member of the society and membership has not been disputed and once a member, provisions of section 84 can always be resorted to which has been done in this.

14. According to Mr. Sakhare submissions made before the arbitrator including those in the written arguments on the aspect of the absence of a valid reference under section 84 of the MSCS Act appointment of a liquidator there was no question of making a reference. It was for the liquidator to proceed according to law and not for the arbitrator to proceed with the reference. It was urged that the dispute before the arbitrator was not one before a legally constituted tribunal. Besides the co-operative society and its members could not seek recovery of a legally advanced loan since the bank was conducting without legal sanction and therefore it was prohibited from lending money and for the same reasons from recovering it. Conduct of illegal banking business would not entitle the Society or liquidator to recover the amount lent and advanced.

15. Mr. Sakhare placed reliance on his submission that the Society was illegally engaging in banking business. Therefore the loan advanced in September, 2001 cannot be termed as part of its valid banking business and therefore proceeding to recover its dues would not be justifiable. These contentions, he submitted, were not taken into consideration by the Arbitral Tribunal while passing the award. For these reasons Mr. Sakhare submitted that the award is liable to be set aside and is not sustainable.

16. On behalf of the respondent bank Mr. Shah opposed the petition on the ground that the respondent was registered as a Multi State Co-operative Society and it continued at all material times to be one. He submitted that under section 84(2) a valid reference had been made which was touching upon the business, the management and business of the Society and that a claim of the society for any debt or demand due to it from member or nominee is deemed to be a dispute touching the management constitution or business of such society and as such the claim that is definitely maintainable. He submitted that the society had registered on 10th October, 1994 under section 7 of the MSCS 1984 Act. A loan application was made on 25th August, 2001 and it was sanctioned on 19th September, 2001. Reference to arbitration was made on or about 29th November 2005 as claim no. 2 of 2005 and the liquidator was appointed only on 2nd December, 2005. He therefore submitted that the reference was pending when the liquidator was appointed.

17. Mr Shah further submitted that although Mr. Sakhare had pressed into service section 117 of MSCS Act, no such plea had been raised at the appropriate time before the Arbitral tribunal. In fact the petitioners had only contended that the reference was invalidated as seen from the preliminary objection. He further submitted that contrary to the contention now being taken up every reference was now decided separately. References were not decided together it was only the preliminary point that was decided in a group of matters. To that extent it was submitted that there was no merit in the submission raised by the learned counsel for the petitioners. Furthermore Mr. Shah submitted that the cancellation of the

banking licence did not deprive the society from recovering dues when advances were made during validity of the licence. This he submitted had to be read in conjunction with paragraph 16 of the order of the division Bench. This clearly holds that the licence would be operative when the Reserve Bank of India took a decision in this view of the matter and since the cancellation of the banking licence itself had taken place only on 29th October, 2003 there was no question of the respondent being deprived of its just dues and the ability to recover the amounts. The recovery of the loans were certainly a matter that touches upon the business of the society and the powers of the liquidator. Section 89(2) and 89(3) would come to the assistance of the respondent. In that behalf section 89 of the Act clearly provides for the liquidator to continue to have custody and control of the property, effects and actionable claims mentioned. Section 89(2) provide that the liquidator when appointed, he shall take into custody all the property effects and actionable claims to which a Multi State Co-operative Society appears to be entitled. He is required to take steps to prevent loss and to make claims. He is permitted to carry out business of Multi State Co-operative Society so far as necessary with the previous approval of the Central Registrar.

18. It was the case of the respondent and as canvassed by Mr. Shah that the objection now sought to be taken to the effect that reference was bad on the ground of Section 117(2) was not taken earlier during the course of the arbitration proceedings. He further submitted that the Rule 28(d) requires the liquidator to recover all sums that may be due and institute suits and proceedings for the purpose

which are incidental to the liquidation proceedings. In this behalf provisions under section 117 did not prevent the liquidator from proceeding to effect recovery. Mr Shah submitted that there was no substance in the challenge.

19. Mr. Sakhare persisted with the petitioners contention that section 84(1) and (2) contemplated that the dispute in question should be touching the constitution, management or business and by virtue of referring to business of the society what was intended is the banking business of the Society and as set out by the judgment of the High Court whereby section 2(u) of the NABARD Act was struck down. He therefore supported the petitioners case.

20. In Arbitration Petition No.848 of 2010 the only difference in facts is that it is filed on behalf of 15 petitioners, 14 of whom are who are directors of the 1st petitioner borrower. The respondent society was attempting to recover a sum of Rs. 8,87,97,261/- due from them to the bank in liquidation. Save and except the grounds urged in Arbitration Petition no. 847 of 2010, no other grounds were urged in support of the petition.

21. I have heard the learned counsel at length and with their assistance I have gone through the award. In my view the the petitioner has not been unable to make out any ground for interference within the scope of section 34 of the Arbitration Act, 1996. The grounds in the petition are premised on the contention that there was no valid reference to arbitration. Thus the provisions of Multi State Co-

operative Society Rules 2002 and Rules are not applicable to the petitioner. However in the course of submissions, this aspect has not been urged at all. It is contended that for want of valid reference the arbitrator had no jurisdiction. All the other grounds as set out in the petition arise out of this basic contention of the alleged invalidity of the reference. The petitioner has urged there cannot be a blanket order of appointing a sole arbitrator under section 84 of the MSCS Act and that a valid reference is a must in order for the provision of the Act to apply. By that reason this very petition would be rendered infructuous since Rule 30 of MSCS Rules, 2002 states in no uncertain terms that the provisions of section 84 would be subject to provision of the Arbitration Act, 1996.

22. Section 84(4) provides that where a dispute has been referred to arbitration under sub-section (1), the same would be settled by arbitration of an arbitrator appointed by the Central Registrar. Rule 30 provides that provisions of the Arbitration Act,1996 would apply to all Arbitration under the MSCS Act as if proceedings in arbitration were referred for settlement or decision under the provision of the Arbitration Act,1996

23. Apropos submissions of Mr. Sakhare as to the alleged non compliance with section 117, I find that the bar under section 117(2) only applies to proceedings instituted and being continued <u>against</u> the liquidator *(emphasis supplied)*. It certainly cannot apply to matters which the liquidator acts in discharge of his duties as liquidator of the bank. In my view it is not possible to accept the contention of Mr. Sakhare that leave of the Central Registrar was a pre-condition to continue the

claim against the petitioner. In this behalf it was submitted that even on the factual aspect, the Central Registrar of the Co-operative Society had vide order dated 21st December, 2004 passed in section 84(4) appointed the Arbitrator to settle disputes other then dispute relating to disciplinary action taken by the respondent bank so far which were touching upon management and business of the bank in accordance with the Arbitration Act, 1996 read with section 84 of the MSCS Act. This aspect has been clearly overlooked by the petitioner.

24. The order of liquidation came much later viz. on 2nd December 2005 and the Show Cause Notice issued by the Central Registrar to the respondent seeking an explanation as to show cause why society should not be wound up was issued on 15th September, 2005. Thus prior to the show cause notice, the Central Registrar had appointed the Arbitrator. The statement of claim was since filed on 9th March, 2006 inter alia the bank was ordered to be wound up. Furthermore save and except for the alleged invalidity of the reference no other ground has been pressed into service.

25. The submissions on behalf of the petitioners can at best be considered as a challenge under section 34(2)(b)(ii) and I find nothing in the award that is perverse or illegal. In my view, it cannot be held that the award is against substantial law of India or Arbitration Act, 1996 or the Multi State Co-operative Society Act, 2002. The petitioner in my view has not made out a case that award contravenes the terms of the contract and nothing has been shown to me that the challenge falls within the 4th head of public policy that is of patent illegality. The making of the award is not

induced by fraud. In order to establish a case for interference, the petitioner would inter alia have to establish that the award was in contravention of the substantive law of India and or against the fundamental policy of Indian law including that of the Arbitration and Conciliation Act, 1996 and in contravention of the terms of agreement between the parties.

26. In the instant case the award is one that is made on a claim for recovery of the respondents dues by virtue of the provisions of Section 84 of the MSCS Act which by statutory force requires the parties to settle the specified disputes in the arbitration by reference to arbitration. Sub-Section 5 of section 84 expressly provides that provisions of the Arbitration Act, 1996 will apply to all arbitrations under the MSCS Act as if the proceedings were referred for a decision under provisions of the Arbitration Act, 1996. Thus all challenges to the award passed under section 84 would also necessary have to meet the requirements of section 34. Having considered the challenge in this petition, I am unable to find any patent illegality whether by way of contravention of substantive law of India or provisions of Arbitration and Conciliation Act, 1996. Nor is there anything in the award contravening terms of the bargain between the parties. The fact that the bank is in liquidation does not operate as a bar for recovery proceedings and indeed the liquidator is obliged to pursue recovery of all amounts due to the respondent. The decision of the arbitrator is neither perverse nor irrational. For these reasons the challenge cannot succeed. There is nothing that has been shown to me that is an illegality going to the root of the matter.

27. Applying these tests I am of the view that the award does not fall foul of the law. The contention canvassed on behalf of the petitioners have been dealt with. The conduct of proceeding was with the consent of the Central Registrar and its directions under Sub Section (4) of Section 84 of the MSCS Act. This is evident from the order dated 21st December, 2004 copy of which has been placed before me in the course of the hearing. In the circumstances, the challenge fails and the award is sustained. I therefore pass the following order :

(i) Arbitration petitions are dismissed.

(ii) Petitioners shall pay costs in each of these petitions quantified at Rs.25,000/- to the respondents.

(A.K. MENON, J.)

Rajeshwari Ramesh Pillai

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