IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

Arbitration Appeal NO. 6 OF 2013

Nashik Merchants' Co-op.Bank Ltd. ...Appellant
Versus
1.M/s.Mehta Trading Company & Ors. ...Respondents

Mr.N.M.Pujari I/b. Mr.P.N.Joshi, for the Appellant.

Mr.Sunil Surana, for Respondent nos.1 and 5.

CORAM : G.S. KULKARNI, J.

DATE : 10 July 2019

P.C.

1. Heard learned Counsel for the appellant and learned Counsel for the respondents.

2. This is an appeal filed under Section 37 of the Arbitration and Conciliation Act,1996 (for short 'the Act'), by the appellant being aggrieved by the judgment and order dated 30 October 2012 passed by the learned Principal District Judge, Nashik, whereby Arbitration Case no.65 of 2007 filed by the appellant under Section 34 of the Act was rejected.

3. Briefly the facts are: The appellant had advanced a loan of Rs.50

lakhs to respondent no.1 on hypothecation of the goods which are part of the loan report. Respondent nos.2, 3 and 4 are the guarantors. The contesting respondents in the present proceedings are respondent nos.1 and 5. There was a default on the part of respondent no.1 in repayment of the loan advanced.

4. The appellant being a co-operative bank falling under the Multi-State Co-operative Societies Act,2002 (for short 'the said Act'), had invoked the provisions of Section 84 of the said Act. A sole arbitrator was accordingly appointed to adjudicate the disputes and differences between the parties arising out of the default in repayment of the loan by respondent no.1 as also against the guarantors.

5. Respondent no.1 also raised a counter-claim, claiming an amount of Rs.61 lakhs against the appellant-bank on various grounds, relevant being loss of business and loss of material, namely the hypothecated goods being lost when the premises were sealed by the respondent.

6. The Arbitral Tribunal considering the evidence on record has partly allowed the claim of the appellant as also partly allowed the counter-claim of respondent no.1. The following are the relevant contents of the arbitral award:-

> "34. In the result the opponent no.1 has successfully proved his counter claim to the extent of Rs.10,00,000/- and it is liable to be

awarded.

35. In sum and substance the applicant has established that on 17/09/2003 it sanctioned and released loan of Rs.50,00,000/- to the opponent no.1. The then prevailing rate of interest on that amount was Rs.13.15% p.a. till 31/03/2007. Thereafter from 01/04/2007 the interest rate has been increased to 15% p.a. as per directions of the Reserve Bank of India. Admittedly, the opponent no.1 has not repaid that loan. The applicant has further established that the opponent nos.2 to 4 were the guarantors for the said loan. The opponent no.5 has been impleaded as a party as consenter for hypothecation of immovable property. However, no such document of hypothecation which she has executed as consenter has been produced before me. In all considerations no decree was to be passed against her for recovery of loan. She was a formal party to the extent that she should not take any objection at the time of sell of property in execution. Moreover, this Tribunal has no concern with execution and sale of hypothecated property. So far as the guarantors are concerned, I have already held that they are liable to be discharged as due to the negligence of applicant the hypothecated goods are lost. Lastly as observed supra the applicant is claiming compound interest and interest at the rate of 15% p.a. from 01/04/2007. However, in view of the special circumstances of this case, I am not inclined to grant compound interest. The applicant has deposited costs of about Rs.15380/-. On the other hand the opponent no.1 has also deposited costs of about RS.13870/-. The counter claim has been also partly awarded. In the circumstances, I am of the view that the parties should bear their costs. Hence, I record following award.

AWARD

a) The application is partly allowed.

b) The applicant do recover from opponent no.1 the amount of Rs.53,48,242-98ps along with the future simple interest on that amount at the rate of 13.15% p.a. from 21/12/04 till 31/03/2007 and at the rate of 15% p.a. from 01/04/2007 till the recovery of the amount.

c) The application against opponent nos.2 to 4 stands dismissed without any costs.

d) The counter claim of opponent no.1 is partly allowed.

e) The opponent no.1 is entitled to recover amount of Rs.10,00,000/- from the applicant towards the counter claim. The said amount be adjusted in the claim amount.

Parties to bear their costs.”

7. The appellant being aggrieved by the arbitral award, whereby the

arbitral tribunal had allowed the counter-claim of Rs.10 lakhs in favour of respondent no.1, approached the Court of learned Principal District Judge by filing Arbitration Case no.65 of 2007 under Section 34 of the Act praying that the amount of counter claim in favour of respondent no.1 be set aside. The learned District Judge considering the contention as urged on behalf of the appellant and the contesting respondent, did not find any favour in any of the contentions raised on behalf of the appellant and has observed that none of these contentions can be any ground for the Court to interfere in the award in the limited parameters of Section 34 of the Act. Accordingly, the application was rejected. It is on this premise the appellant is before this Court in the present appeal as filed under Section 37 of the Act.

8. Learned Counsel for the appellant in assailing the impugned Judgment and order passed by the learned District Judge would make the following submissions:-

(i) It is submitted that the inspection report which was relied by the learned arbitrator was not a correct report. In so contending, learned Counsel for the appellant however is not in a position to point out as to on what basis such submission is made and as to whose behest the said report was brought on record before the arbitral tribunal.

(ii) The second contention as urged on behalf of the appellant is that respondent no.1 had not produced any stock report whereby the arbitral tribunal can record a finding that there is in fact loss of stock after the shop premises are sealed by the appellant. It is thus contended that the award is required to be set aside only on this principal ground. There are no other submissions urged on behalf of the appellant.

9. I am not persuaded to accept any of these submissions as urged on behalf of the appellant. As clear from the reading of the award, the arbitral tribunal in paragraph 30 of the Award, has clearly observed that there was an inspection report of Stock at Exhibit 20 to show that goods worth Rs.40,00,000/- existed in the shop when inspection was undertaken. It is observed that although the said report did not bear any date, however at the foot of that report a loan of Rs.50,00,000/- was renewed by the appellant on 17 September 2003, accepting the security of the goods as mentioned in the inspection report which completely belies the contention of the appellant that there was no stock whatsoever. On the very basis that the stock was existing, the appellant had granted renewal of the loan on 17 September 2003. The observations in that

regard are required to be noted which reads thus:-

> "30. Now I will take those claims in to consideration one after the other. The first claim is of the loss of goods and furniture. Admittedly the applicant has not recorded the panchanama of the shop along with good and furniture there in. In the rejoinder Ex.99 there is a mention that the opponent no.1 did not co-operate in taking inventory of goods in the shop and recording of panchanama. The officers of applicant should have recorded the panchanama of the fact that the opponent no.1 did not co-operate in taking inventory and recording of panchanama. No witness of that fact has been examined. The witness examined did not say anything about it. Shri.Shinde himself was not the member of the party which carried out that action. The inspection report of stock Ex.20 shows that there were goods worth Rs.40,00,000/- in the shop when inspection was done. Unfortunately the inspection report did not bear any date. However at the foot of that report the loan of Rs.50,00,000/- was renewed on 17/09/2003. Therefore, it is possible that on 20/11/2004 there may be goods and furniture worth Rs.20,00,000/- in the shop. The status of those goods is not known. Under the circumstances it is really difficult to determine the quantum of loss on account of loss of goods and furniture. The opponent no.1 was running a business of oils and grocery articles. They are certainly perishable. Therefore, I am inclined to grant Rs.5,00,000/- to the opponent no.1 towards loss of goods and furniture."

10. Although it is argued on behalf of the appellant that there is an illegality in the award granting the counterclaim of respondent No.1 to the extent of Rs.10 lakhs, it can be seen that the learned Arbitrator has made serious observations in respect of the conduct of the appellant in keeping respondent no.1 deprived of the premises when merely the right of the appellant was to the hypothecated goods and not to the premises. It is also observed, on the basis of the material on the record before the arbitral tribunal, that the goods were not safeguarded and in fact there was

pilferage and loss of goods, of which the appellant had clear knowledge and on the basis of which the appellant had renewed the claim. There was no contrary material as placed on record of the arbitral tribunal on behalf of the appellant. These observations are clearly seen in paragraph 33 and 34 of the Award which reads thus:-

> "33. The fourth claim is towards loss of income due to the closing of shop. The opponent no.1 claims that his monthly earning from the shop was Rs.40,000/-. In all he is claiming Rs.6,00,000/- on that count. The opponent no.1 states in his affidavit Ex.129 that his monthly income from the shop was Rs.40,000/-. No questions denying that fact were put to him in the cross examination. The opponent no.1 has produced his Income Tax Return Form for the year 2004-05 at Ex.138. It shows that his taxable income for that year was Rs.97,560/-. It is unbelievable. The opponent no.1 was sanctioned a loan of Rs.50,00,000/- having interest at the rate of 13.15% p.a. The monthly interest on that amount is about Rs.50,000/-. If viewed from that angle his monthly income should be more than Rs.50,000/-. I think that the income shown in the income tax return is a net income. Considering all that evidence I am laid to derive that the monthly income of the opponent was more than Rs.40,000/- per month. Hence, for the loss of income for 25 months I am inclined to grant Rs.5,00,000/-. The opponent no.1 is entitled to that much amount on that count.
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> 34. In the result the opponent no.1 has successfully proved his counter claim to the extent of Rs.10,00,000/- and it is liable to be awarded."

11. On perusal of the findings and the observations as made by the learned Principal District Judge, it is quite clear that the learned Principal District Judge has taken into consideration all the issues as urged on behalf of the appellant and considering the material in terms of the

observations as made in paragraph 13 of the impugned judgment has thought it appropriate to reject Section 34 arbitration petition as filed by the appellant. The scope of Section 34 proceedings is certainly not to re-appreciate evidence and reach to a finding different from the one recorded by the arbitral tribunal.

12. I do not find any illegality or perversity in the findings as recorded by the arbitral tribunal or in the orders passed by the learned District Judge. There is no ground as made out by the appellant to interfere in the award within the limited jurisdiction available to the Court under Section 34 of the Act. There is no merit in the appeal. It is rejected. No costs.

(G.S.Kulkarni, J.)