

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

COMMERCIAL ARBITRATION PETITION NO.179 OF 2016

The Liquidator
Madhavpura Mercantile Co-op
Bank Ltd.

... Petitioner

Versus
Rasiklal D. Thakkar
And Others

... Respondents

.....

Mr. Harinder Toor a/w Mr. Nirav Shah and Mr. Aditya Singh I/b Little & Co. for the Petitioner.

Mr. Gaurav Joshi, Senior Advocate a/w Ms. Priya Ranade and Mr. Ankur Kalal I/b Markand Gandhi & Co. for Respondent Nos.1 to 5.

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CORAM : S.C. GUPTE, J.

DATE : 25 MARCH 2019

(Oral Judgement)

. This arbitration petition challenges an award passed by a sole arbitrator in a reference agreed to between the parties in a writ petition before Gujarat High Court.

2 The Petitioner is the liquidator of Madhavpura Mercantile Co-op Bank Ltd ("Bank"). The Respondents are constituents of the Bank, having availed of various loan facilities from it from time to time. The terms and conditions of the loan finance were contained in the respective sanction letters read with the security and other documents executed by the Respondents in favour of the Bank. The Respondents committed default in repayment of the loans and their accounts were declared as non-performing assets (NPAs). In view of the defaults, the Bank commenced

proceedings before an arbitrator appointed under the Multi State Co-operative Societies Act, 2002 ("Act"). The awards passed by the arbitrator were challenged by the Respondents in various civil miscellaneous applications. During the pendency of these applications, sometime in the year 2012, the Bank went into liquidation and the Petitioner came to be appointed as its liquidator. Its banking licence was cancelled on 4 June 2012 by the Reserve Bank of India. With a view to expedite the process of recoveries, the Petitioner proposed a compromise, known as Compromise Scheme of Settlement ("CSS-2013"). The scheme was "non-discretionary and non-discriminatory" and offered to all debtors of the Bank. The scheme expressly stipulated that no conditional proposal for settlement or proposal disputing the NPA date of the account would be accepted and in case any clarification was required, the decision of the Petitioner would be final. By its separate communication to the Respondents, the Petitioner gave an opportunity to the Respondents to avail of CSS-2013. The NPA date in the case of the Respondents was expressly stated to be "31 March 2001". The Respondents, vide their separate responses, all dated 13 April 2015, unconditionally accepted the offer and undertook to abide by all terms and conditions of CSS-2013. The Respondents paid a sum of Rs.34,25,000/- towards 5 % of the total sanctioned amount for five group companies being Respondent Nos. 3 to 7 herein. It is the case of the Petitioner that under CSS-2013, the Respondents were required to pay the balance sum of Rs.30.26 crores (as against the decretal amount of Rs.212.54 crores) to the Bank and having committed default in such payment, were guilty of various breaches and offences. The Petitioner accordingly adopted legal proceedings, including criminal complaints, against the Respondents. The Respondents approached Gujarat High Court for quashing these

complaints. At the hearing of their quashing petition before the Court, the parties agreed to appear before the Settlement Advisory Committee constituted to consider offers submitted by borrowers under CSS-2013. The committee determined the amount payable by the Respondents under the scheme and submitted its report dated 10 October 2015, confirming the amount claimed by the Petitioner. As per the calculations made by the Petitioner under CSS-2013, which were *inter alia* confirmed by the Settlement Advisory Committee, the Respondents were required to pay Rs.30.19 crores thereunder (i.e. a net amount of Rs.27.19 crores after deducting Rs.3 crores already paid by the Respondents). The Respondents, however, admitted their liability only to the extent of Rs.16.19 crores under CSS-2013 *inter alia* by raising a dispute about the NPA date. When the matter came up before Gujarat High Court for further orders, the parties arrived at consent terms. Under these terms, the Court directed the Respondents to file an undertaking accepting the payment of Rs.16.19 crores as an undisputed sum (i.e the One Time Settlement (OTS) amount calculated by the Respondents on the basis of the relevant RBI Master Circular and CSS-2013 Scheme issued by the Petitioner) as against the sum of Rs.30.19 crores. The Court directed the Respondents to pay this undisputed sum in full. As regards the disputed sum of Rs.14 crores, the Court directed the parties to agitate their dispute before the arbitrator to be appointed by the Central Registrar of Co-operative Societies for adjudication of disputed sums payable under CSS-2013. Under final orders in this behalf passed by Gujarat High Court on 9 May 2016, read with order dated 4 February 2016, the Court, accordingly, referred the parties to arbitration. The arbitral tribunal, by its impugned award dated 3 September 2016, accepted the Respondents' case on the applicable NPA

date and concluded that there was no liability on their part to pay the disputed sum of Rs.14 crores. Being aggrieved, the Petitioner has filed the present petition challenging the impugned award.

3 Learned Counsel for the Petitioner makes three submissions at the hearing of the petition. Learned Counsel, firstly, submits that the Petitioner's original proposal contained in CSS-2013 did not admit of any NPA date save and except the date communicated by the Petitioner. Learned Counsel submits that the Petitioner having communicated such date to the Respondents and the latter having unconditionally accepted the same as the correct NPA date, with reference to which, the outstandings would have to be worked out, a concluded contract was reached between the parties. Learned Counsel submits that it is not permissible to any court, or arbitrator, for that matter, to rewrite this contract. Learned Counsel relying on the provisions of Section 62 of the Contract Act, submits that the original contract need not be performed only if the parties to the contract agree to a new contract or rescind or alter the original contract. Learned Counsel submits that in the present case, there is no such agreement. It is submitted that even assuming that the correct NPA date had to be in accordance with RBI guidelines, the date considered by the liquidator, namely, 31 March 2001, satisfies the mandate.

4 It is pertinent to note that CSS-2013 was not a statutory scheme of compromise or settlement or a scheme issued under RBI guidelines for One Time Settlement (OTS). The stipulation of NPA date in RBI guideline was, accordingly, not applicable in the present case. CSS-2013, though a scheme floated by the Petitioner as a liquidator of a bank in pursuance of

his statutory powers, and though approved by Central Registrar of Co-operative Societies, is not a statutory instrument; it is not subject to the guidelines and circulars of RBI concerning the NPA status of bank accounts. Nothing prevented the Petitioner from naming any particular date as a date with respect to which, the assets would be treated as NPA and interest dues calculated accordingly. It was perfectly legitimate for the liquidator to have declared '31 March 2001' as the date on which the Respondents' loan account should be treated as having become NPA. In the present case, the date of 31 March 2001 was determined by the liquidator as the NPA date with respect to the Respondents' debt on the basis of the statutory auditor's report dated 31 October 2001. The auditor's report was uniformly made the basis for all borrowers of the Bank including the Respondents herein. Treating this date as the date when assets became NPA, the Petitioner announced a scheme which was non-discretionary and non-discriminatory for all debtors. The scheme made it clear that the NPA date declared by the liquidator could not be questioned; the scheme could not be accepted conditionally. In a communication, particularly addressed to the Respondents by the liquidator, the NPA date reckoned by the liquidator was duly conveyed to the Respondents. The Respondents' acceptance of the scheme was sought particularly on that basis. Having accepted the scheme unconditionally (the Respondents' acceptance letter does not indicate any condition as to the NPA date), dues owed by the Respondents to the Bank ought to be computed according to that date. Any forum, be it a court or an arbitral tribunal, which adjudicates upon the rights and liabilities of parties based on a contract, must determine those rights and liabilities in accordance with the contract; it is impermissible to the court or tribunal, as the case may be, to modify or rewrite the contract. This is an

elementary and fundamental principle of our law and if the arbitrator were to disregard it and rewrite the contract, as the learned arbitrator has done in the present case, his view can only be termed as an impossible view or a view which no fair and judiciously minded person would take.

5 The learned arbitrator, in the present case, has noted the root cause for the difference in perception of the parties concerning the NPA date, the Respondents' date having been claimed under the RBI guidelines, whilst the Petitioner's calculation was based on CSS-2013. Though he noticed that CSS-2013 has not disclosed how this NPA date had been arrived at, yet at the same time, the arbitrator noted that the scheme already had a fixed NPA date. Having thus noted the date, the learned arbitrator appears to have gone off at a complete tangent and posed impertinent questions in this behalf, namely, whether the liquidator could bind the borrower by an NPA date determined on his own or whether it was violative of the legitimate claim of the borrower (to have his dues reckoned like other creditors under RBI guidelines for OTS Schemes ?) or whether the scheme such as the present (namely, CSS-2013) could provide for a dictatorial setup to force the borrower to part with payment. CSS-2013, which has a fixed date as the NPA date offered to all borrowers based on statutory auditor's report, was a matter of volition. It was for the individual debtor to accept or reject the scheme. The scheme was offered, in the present case, to the Respondents with a specific stipulation that no change in the NPA date would be permissible and the acceptance of the scheme had to be unconditional. Any acceptance thereafter of the scheme brings about a concluded contract substituting the original contract of loan between the parties. The arbitrator, who was to adjudicate the rights and

liabilities of the parties, was expected to determine such rights and liabilities under such contract, namely, CSS-2013. It was not open to him to question CSS-2013 or relieve any debtor from his obligations under it on some notion of equity or sympathy.

6 Learned Counsel for the Respondents submits that the parties had, after all, agreed to an arbitration reference, acknowledging thereby the arbitrator's authority to determine the correct NPA date. Learned Counsel submits that the only dispute between the parties, when the matter was pending before Gujarat High Court, concerned the identity of the NPA date and it was this dispute which was referred to the arbitrator by consent of the parties; it was, therefore, open to the arbitral forum to determine the correct NPA date or, in other words, choose from the alternative dates proposed by the parties. There is nothing on record to suggest that the Petitioner, who was a party to this agreement, had given a go-by to the contract formulated between the parties through acceptance of CSS-2013. It would certainly be open to the liquidator to contend before the arbitral forum that the scheme fixed a particular date as the NPA date and that the dues payable by the borrowers ought to be computed on the basis of that particular date and no other date. The consensus between the parties to refer their dispute to arbitration merely implies that the parties are agreeable to have the dispute adjudicated by an arbitral forum as opposed to a court of law. The rights and liabilities, which are to be thereby determined, are the rights and liabilities arising under the contract. Such consensus does not in any way impinge upon these rights and liabilities.

7 Learned Counsel for the Respondents relies on the judgments in **KSS KSSIPL Consortium Through Its Constituted Attorney Devendra Kumar Vs. GAIL (India) Limited**¹ and **Dr. Renuka Datla (Mrs) Vs. Solvay Pharmaceuticals B.V.**² and submits that merely because the scheme (CSS-2013) makes the decision of the liquidator final in the matter of issues arising under it, it cannot be said that the present subject matter is out of bounds for a court or an arbitral tribunal. Learned Counsel submits that the Supreme Court decisions in these cases make it clear that any finality attached to a decision of a party under a contract is not a unilateral act beyond the pale of scrutiny of a court or an arbitrator; justifiability of such a decision, though stated to be final, is always subject to a process of enquiry/adjudication, which the parties may agree to by way of an arbitration. Any clarification sought from the liquidator by the Respondents apart, the question in the present case was what was the contract between the parties. The contract was to accept the date of 31 March 2001 as the date on which the assets could be treated as NPA and dues owed by the debtors worked out on that basis. If that was the contract, the respective rights and liabilities of the parties would have to be worked out with reference to that contract. There is no question of the contract itself being scrutinized by any court or arbitral forum from the standpoint of equity or commercial propriety or wisdom. As I have noted above, any forum, which adjudicates upon the rights and liabilities of the parties based on a contract, is enjoined upon to determine those rights and liabilities in accordance with the contractual terms, be it a court or an arbitral forum.

1 (2015) 4 Supreme Court Cases 210

2 (2004) 1 Supreme Court Cases 149

8 The learned arbitrator, in fact, has clearly exceeded his jurisdiction by reformulating the contract between the parties contained in CSS-2013. Just as the arbitrator could not have done so, if CSS-2013 were to be the underlying contract containing the arbitration agreement, the arbitrator being a creature of it, merely because the arbitral reference was outside the purview of CSS-2013 or a result of a separate court proceeding, the arbitrator appointed to adjudicate upon the disputes between the parties arising under CSS-2013, could not travel beyond the contract contained in it.

9 The impugned award, thus, deserves to be interfered with, both on the grounds of patent illegality, since the declaration in it is in the face of a contract as well as for the reason of the arbitrator having taken an impossible view, or a view which no fair or judiciously minded person would take.

10 Accordingly, the arbitration petition succeeds. The impugned award dated 3 September 2016 is quashed and set aside. In the circumstances of the case, there shall, however, be no order as to costs.

(S.C. GUPTE, J.)