

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.3288 OF 2022

**PRAJWAL KANTILAL MITHAWALA
VERSUS
BULDANA URBAN CO-OPERATIVE CREDIT SOCIETY LIMITED AND
OTHERS**

...

Advocate for Petitioner : Mr. S. G. Dodya
Advocate for Respondent No.1 : Mr. A. M. Gholap and
Mr. G. C. Navandar

...

CORAM : NITIN B. SURYAWANSHI, J.

DATE : 19th SEPTEMBER, 2022

PER COURT :

1. At the outset, learned advocate for petitioner seeks permission to delete respondent Nos. 3 and 4 stating that they are formal parties and therefore, are not necessary to be heard. Permission granted. Deletion to be carried out during course of the day.

2. Challenge in this petition is to order dated 06/11/2021, passed by the Arbitral Tribunal, below Exhibit-48 in Arbitration Case No.ARB/BUCCS/93/43/2020, thereby holding that petitioner/opponent No.3 is deemed to be a member of society as his liability is governed under Section 128 of the Indian Contract Act, 1872 as he stood surety for principal debtor who is a member and therefore, guarantor is also deemed to be a member.

3. Respondent No.1 has filed arbitration proceeding under Section 84 of the Multi State Cooperative Societies Act, 2002, before respondent No.2 seeking recovery of Rs.2,38,19,777/- advanced to respondent No.3, to which petitioner and respondent No.4 were guarantors. Upon receiving notice, petitioner appeared before learned arbitrator and filed application Exhibit-31 for framing preliminary issue contending that he being not a member of respondent No.1 Society, cannot be proceeded with in arbitration proceeding and therefore, preliminary issue be framed as to whether petitioner is a member of disputant society. Order was passed on Exhibit-31 that it shall be considered at the time of final decision. This order was challenged by petitioner by filing Writ Petition No.3689/2021. In the said petition, this Court directed learned arbitrator to frame issue and decide it as a preliminary one, in case No.ARB/BUCCS/93/59/2019. Accordingly, preliminary issue "whether opponents in the dispute are members of disputant society" is framed vide Exhibit-48.

4. Tribunal after hearing the parties has recorded a finding that Section 84 contemplates even the person claiming through members and wide meaning of the same is that other person who is claiming through member is also liable and therefore, guarantor is deemed to be a member of society and liability is co-extensive with principal debtor. Tribunal has also placed reliance on Section 126 of

the Indian Contract Act, 1872 and has held that contract of guarantor is a contract to perform promise or discharge liability of a third person in case of his default. It is also held that, as per Section 128 of the Indian Contract Act, liability of surety is co-extensive with that of principal debtor unless it is otherwise provided by contract. Therefore, learned arbitrator has held that liability of guarantor is co-extensive with principal debtor. This order is impugned in present petition.

5. Heard learned advocate for petitioner and learned advocate for respondent No.1. None for respondent No.2.

6. Learned advocate for petitioner by placing reliance on provisions of Section 84 and decision in Writ Petition No.3689/2021 has submitted that respondent No.1 has failed to bring on record any material to show that petitioner is its member and it cannot be said that petitioner is a person claiming through member merely because he stood as a guarantor. In that view of the matter, learned arbitrator has erred in coming to conclusion that liability of guarantor is co-extensive with principal debtor. According to him, reliance placed by learned arbitrator on Sections 126 and 128 is misplaced. Further submission is that as per Section 84(3), decision of arbitrator is final and cannot be called in question in any Court. Therefore, challenge of petitioner in present petition is maintainable

and writ petition deserves to be allowed.

7. Learned advocate for respondent No.1, on the other hand, strenuously opposed petition contending that petitioner has a remedy under Section 34 of the Arbitration And Conciliation Act, 1996 to challenge arbitration award if it goes against him. By relying on Section 84(5) of the Multi-State Co-operative Societies Act, 2002 he submits that since proceedings under Arbitration And Conciliation Act are applicable to all arbitration under this Act, petitioner should challenge the said decision in proceeding under Section 34 of the Arbitration and Conciliation Act. He submits that petitioner being guarantor is a person claiming through borrower and therefore, order passed by learned arbitrator is proper and is not liable to be interfered with. He, therefore, submits that writ petition filed by petitioner is premature and it should be dismissed as such.

8. In reply, learned advocate for petitioner relied on *Deep Industries Limited Vs. Oil and Natural Gas Corporation Limited and Another*, (2020) 15 SCC 706 and *Rohtas Industries Ltd. and Another Vs. Rohtas Industries Staff Union and Others*, (1976) 2 SCC 82, to submit that award of learned arbitrator can be challenged under Articles 226 and 227 of the Constitution India, in a given case and if the proceedings are without jurisdiction those can be challenged in a petition under Article 227.

9. I have given thoughtful consideration to submissions advanced by both the learned advocates, perused the grounds raised in writ petition memo and citations relied upon.

10. It is not in dispute that petitioner is a guarantor and not a member. It is not even the case of respondent No.1 that petitioner is its member. In that view of the matter, what is required to be considered is, whether learned arbitrator was justified in coming to conclusion that petitioner is a person claiming through member and therefore is liable to be proceeded with and hence, guarantor is deemed to be a member of society and his liability is co-extensive with principal debtor.

11. This Court had an occasion to consider similar facts in ***Kiran D. Parmar Vs. Punjab and Maharashtra Co-op. Bank Ltd., 2018 SCC Online Bom 19745***, wherein award was passed in arbitration proceeding initiated before Arbitral forum under Section 84(1)(a) of the Multi State Co-operative Societies Act, 2002, as against a surety of member, though surety was not a member of Multi State Cooperative Bank. Same argument was advanced in that case that surety claimed through a member and therefore, award is rightly passed against surety. This Court held:-

"3. There is absolutely no basis in law for such a conclusion. The surety, by no stretch of imagination, can be said to be a person claiming through the principal debtor as against the creditor. The arbitrator's finding is wholly arbitrary and capricious. It has absolutely no support either

in law or authority and cannot be sustained.

4. *Learned Counsel for the respondent submits that liability of a surety is co-extence with that of the principal debtor. That is quite so. But because it is so, the surety cannot be termed as a person claiming through the principal debtor. Learned counsel alternatively relies on the judgment of this court in the case of Shetkari Sahakari Sangh Ltd. V. Shahuwadi Taluka Shetkari Sahakari Kharedi Vikri Sangh, 1998 (3) Mh.L.J. 648, to support his case on maintainability of the reference. That case was under Section 91 of the Maharashtra Co-operative Societies Act, which provides for disputes referable to a Cooperative Court. Apart from the nature of the disputes, the section requires fulfillment of one or other of the capacities or categories mentioned under clauses (a) to (e) of sub-section (1) on the part of the parties. One of the categories (clause-(b)) is a surety of a member or a past member or a deceased member or of a person other than a member with whom the society has had any transaction in respect of which any restriction has been prescribed under Section 45, whether or not such surety or person is a member of the society. In Shetkari Sahakari Sangh Ltd's case, the surety was arraigned as a surety of a member. The observations made in that judgment are to be read in that light. They have absolutely no application to the facts of our case. Our case is under the Multi-State Cooperative Societies Act, 2002 and Section 84 thereof does not refer to any such category. Learned counsel relies on Section 84(b). This clause makes a deeming provision in respect of a claim by a surety against the principal debtor, where a Multi-State Cooperative Society recovers from the surety any amount of debt due from its principal debtor. This provision has no applicable to a claim by a Multi-State Cooperative Society against the surety."*

This Court, therefore, set aside award against surety.

12. In ***Suresh Prabhu Vs. Bombay Mercantile Co-op. Bank Ltd. and Others, 2008 (1) All.M.R. 232***, in similar facts learned Single Judge of this Court has held that, in absence of any proof of petitioner's membership, award passed against him is required to be set aside. In that case also, guarantor raised same contention that he is not a member of respondent No.1 Bank and therefore,

learned arbitrator had no jurisdiction. In that case also, arbitrator had taken into consideration documents filed by Bank i.e. membership/shareholder application and all loan documents alongwith his affidavit to prove the fact that respondent No.2 executed guarantee deed and accepted liability of repayment of loan. In these facts, it is held :-

"8. In my view, the said statement is a stray statement and is not a finding that the petitioner is or was a member of the respondent No. 1 bank. Arbitrator only has recorded that the manager of the respondent No. 1 had filed on record the membership/shareholder application and all loan documents. The arbitrator has not recorded whether the application was signed by the petitioner and whether the said application was accepted by the respondent No. 1 bank and whether on acceptance the application the petitioner subscribed to any share capital of the respondent No. 1. Therefore, the stray statement on which a reliance has been placed by the counsel for the respondent cannot be held to mean that the arbitrator has recorded any finding on the contention of the petitioner that he was not a member of the petitioner bank. If at all it is to be regarded as a finding of fact, no reasons are given in the award for it and clearly the award is a non-speaking award in that respect.

9. In my view, the very jurisdiction of the Arbitral Tribunal depends upon the petitioner being a member or a past member of the respondent No.1 bank. In the absence of any proof of petitioner's membership the award would have to be set aside. However, learned Counsel for the respondent submits that instead of setting aside the award on that count, an opportunity may be given to the Arbitral Tribunal under Sub-section (4) of Section 34 of the Arbitration Act and further proceedings may be adjourned to enable the Arbitral Tribunal to take such action as in the opinion of the Arbitral Tribunal, would eliminate the grounds for setting aside the award. Counsel submits that if the further proceedings are stayed, to give an opportunity to the Arbitral Tribunal to record a finding on the issue whether the petitioner is or was the member of the respondent No. 1 bank and consequently whether the Arbitral Tribunal had no jurisdiction to entertain the arbitral dispute, the Arbitral Tribunal would record its finding to eliminate the defect. In my view, request can be granted as it would enable the

Arbitral Tribunal to eliminate the defect. Accordingly, further proceedings are stayed under Sub-section (4) of Section 34 for three months to enable the Arbitral Tribunal to take such steps as it thinks proper."

13. In the case in hand also, loan documents executed by petitioner whereby he stood as guarantor are taken into consideration by learned arbitrator to come to conclusion that petitioner is claiming through original borrower and his liability is co-extensive with principal debtor.

14. Similar is the view taken by learned Single Judge of this Court in ***Indian Bank Vs. Kapol Co-op. Bank Ltd. and Others, 2009 (5) Mh.L.J. 318***, wherein it is held that since award is passed by arbitrator against non-members, it is not sustainable. Reference of dispute between respondent No.1 and non-members by Central Registrar was without jurisdiction and arbitrator could not have passed award against respondent No.3 (non-member).

15. Learned advocate for respondent No.1 has vehemently submitted that in all the three decisions relied upon by learned advocate for petitioner, award was passed, then it was challenged and the same was set aside. Petitioner also should avail the same remedy. This argument cannot be accepted in view of the fact that petitioner being non-member of respondent No.1, arbitration proceeding against him is itself not maintainable and respondent No.2 learned arbitrator has no jurisdiction to entertain arbitration

proceedings against petitioner since he lacks inherent jurisdiction.

16. In ***Deep Industries Limited***, the Hon'ble Apex Court has considered jurisdiction under Articles 226 and 227 of the Constitution of India in the context of provisions of Sections 16, 5 and 34 of the Arbitration and Conciliation Act, 1996. It is held :-

"In these circumstances, what is important to note is that though petitions can be filed under Article 227 against judgments allowing or dismissing first appeals under Section 37 of the Act, yet the High Court would be extremely circumspect in interfering with the same, taking into account the statutory policy as adumbrated by us herein above so that interference is restricted to orders that are passed which are patently lacking in inherent jurisdiction."

17. Similar view is taken by the Hon'ble Apex Court in ***Rohtas Industries Ltd.*** (supra). Since in present case learned arbitrator lacks inherent jurisdiction, the impugned order passed by learned arbitrator cannot be sustained.

18. For the aforesaid reasons, impugned order passed by respondent No.2 learned arbitrator is unsustainable in law and facts of the present case and is hereby quashed and set aside.

19. In the result, writ petition is allowed in terms of prayer clauses 'B' and 'C' to the extent of petitioner.

(NITIN B. SURYAWANSHI, J.)