

(2013) 01 BOM CK 0146

Bombay High Court

Case No: Arbitration Appeal No. 13 of 2012

The Nashik Merchant's Co-Op.
Bank Ltd.

APPELLANT

Vs

Dhananjay Shriram Daga, Sau.
Rajashri dhananjay Daga and
Laxmichand M. Lilame

RESPONDENT

Date of Decision: Jan. 4, 2013

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 33, 34, 37
- Multi-State Cooperative Societies Act, 1984 - Section 84(4)

Citation: (2013) 2 ABR 199 : (2014) 1 ALLMR 343 : (2013) 1 BomCR 721 : (2013) 2 MhLj 143

Hon'ble Judges: R.D. Dhanuka, J

Bench: Single Bench

Advocate: R.M. Haridas and instructed by P.N. Joshi, for the Appellant;

Final Decision: Allowed

Judgement

R.D. Dhanuka, J.

By this appeal filed u/s 37 of the Arbitration and Conciliation Act, 1996, appellant seeks to challenge an order dated 1st December, 2011 passed by the Principal District Judge, Nashik rejecting application filed by the appellant u/s 34 of the Arbitration and Conciliation Act, 1996 (Arbitration Case No. 28 of 2007). None appeared for the respondents though served.

2. On 20th January, 2001, the appellant bank had granted cash credit loan of Rs. 50,000/- to the 1st respondent. The 1st respondent committed default in making payment. The appellant therefore filed proceedings u/s 84(4) of the Multi State Co-operative Societies Act, 2002. The learned arbitrator made an award on 31st March, 2005. The learned arbitrator recorded the findings that the 1st respondent had admitted the claim made by the appellant. After recording the finding that the

appellant was entitled to recover an amount of Rs. 63,002/- jointly from respondent nos. 1 to 3 alongwith future interest at the rate of 14% per annum, at the request of the respondent, the learned arbitrator allowed the respondent to make payment in installments. It was made clear that in case the respondent fails to pay any two installments, the appellant shall be at liberty to recover the entire amount at once. It was also provided in the award that if the respondent fail to pay any two installments, they shall be liable to pay penal interest at the rate of 2% per annum over and above the rate of interest granted in the said award from the date of default.

3. It is not in dispute that the respondent has not challenged the said award. It is the case of the appellants that though the respondent made some payment in implementation of the said award, however committed default in making payment as directed in the said award. The appellants have therefore already filed execution application for execution of the said award dated 31st March, 2005 in the appropriate court.

4. After filing of the execution application by the appellants, the respondent invoked arbitration clause again and the respondent applied for appointment of arbitrator on the basis that the respondents were not liable to make payment as demanded by the appellant and there was computation error in the amount claimed by the appellant. Based on those allegations, the learned arbitrator was appointed. The appellant bank raised objection in respect of the maintainability of the claim before the learned arbitrator on the ground that the earlier award was not implemented by the respondent fully and execution application for execution of the same was already filed by the appellant is pending. The appellant raised objection that for interpretation of an award, a separate reference is not permissible. In spite of such objection raised by the appellant and without considering the same in proper direction, the learned arbitrator delivered another award on 10th February, 2007 allowing the application filed by the respondent and declared that respondent was liable to pay amount of Rs. 66,972/- to the appellant bank as on 31st January 2007 as against the claim amount of the appellant at Rs. 92,962/- at the relevant time.

5. The said award dated 10th February, 2007 was challenged by the appellant u/s 34 of the Arbitration Act before the Principal District Judge, Nashik who dismissed the said application u/s 34 by passing an order dated 1st December, 2011.

6. The learned counsel appearing for the appellant submits that the second reference initiated by the respondent for arbitration was not permissible and was barred by principles of res-judicata. The appellant has filed execution application which is pending before the appropriate court. The District Judge, however, did not consider this aspect in proper direction and has rendered a perverse finding that the second reference was not barred by res judicata.

7. From perusal of the award dated 31st March, 2005 (first award), it is clear that the said award was declared on merits. The learned arbitrator has recorded the finding that the respondents were jointly and severally liable to pay the amount of Rs. 63,002/- with interest to the appellants from 1st June, 2002 till the recovery of the said award. The said award also provided for future interest in the event of respondent committing default. It is not in dispute that the said award has not been challenged by the respondent. Part of the awarded amount has been paid by the respondent in implementation of the said award dated 31st March, 2005. In my view, even if there was any calculation error according to the respondent, the second reference for determining such dispute was not permissible. The respondent not having challenged the award dated 31st March, 2005 could not file successive reference for interpretation of the said award dated 31st March, 2005. If the respondent wanted to seek interpretation of the award or correction thereof, the respondent could have invoked provisions u/s 33 of the Arbitration and Conciliation Act, 1996 within the time prescribed therein and could not have filed successive reference for the same. In my view, the award dated 31st March, 2005 was in force and was binding upon the respondent and thus second reference was barred by principles of res-judicata. In my view, the finding recorded by the Learned District Judge that by the second award, the learned arbitrator has only corrected the mathematical calculation and is not barred by principles of res-judicata is perverse and deserves to be set aside. I, therefore, pass the following order :-

(a) Appeal is allowed.

(b) Impugned order dated 1st December, 2011 passed by the Learned Principal District Judge is set aside.

(c) Arbitration Case No. 28 of 2007 filed by the appellant is allowed. The impugned award is set aside.

(d) It is made clear that if the respondent seeks to raise any issue about calculation in respect of the amount awarded or what is already paid, he would be free to agitate the said issue before the executing court in the application filed by the appellant. If any such objection is raised, the same shall be decided by the executing court in accordance with law.

(e) No order as to costs.