

(2012) 02 BOM CK 0225

Bombay High Court

Case No: Arbitration Petition No. 195 of 2009

The Shamrao Vithal Co-op. Bank
Ltd.

APPELLANT

Vs

Inland Printers Ltd.

RESPONDENT

Date of Decision: Feb. 6, 2012

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 34

Citation: (2013) 1 ARBLR 155 : (2012) 3 BomCR 99 : (2012) 3 MhLj 589

Hon'ble Judges: Anoop V. Mohta, J

Bench: Single Bench

Advocate: N.N. Bhadrashete, for the Appellant; Firoz Bharucha instructed by y Mr. Vinay Menon and Ms. Suvarna Joshi for Respondent Nos. 1 and 3., for the Respondent

Judgement

Anoop V. Mohta, J.

The Petitioner is a Multi State Co-operative Society having a business of banking, has challenged u/s 34 of the Arbitration and Conciliation Act, 1996 (for short, the Arbitration Act), the award dated 21 October 2008 passed by the sole Arbitrator appointed under the provisions of the Multi State Co-operative Societies Act, 1984 (for short, MCS Act-1984), thereby rejected the Petitioner's claim against Respondent Nos. 1 to 3 by holding that it is barred by res-judicata.

2. The relevant facts are -Respondent No.1 is a company duly registered under the provisions of Companies Act, 1956, Respondent Nos. 2 and 3 are the Directors of Respondent No.1-Company and also the guarantors. Respondent Nos. 1 to 3 are the members of the Petitioner Bank. Respondent No.4-Bank had a first charge on the property in respect of loan facility granted to Respondent No.1.

3. The Petitioner states that on the application made by Respondent No.1 for a loan facility, the Petitioner granted and sanctioned in April, 1996 a Cash Credit loan facility in the sum of Rs. 250 lakhs to enable Respondent No.1 to use the said loan

amount for its business purposes and accordingly by a letter of sanction dated 6 June 1996 informed Respondent No.1 containing terms and conditions. The Petitioner states that Respondent No.1, with a view to secure repayment of loan amount executed various documents and gave securities.

4. Respondent Nos. 2 and 3 executed a deed of guarantee dated 26 December 1996, guaranteeing repayment of loan amount.

5. The Petitioner states that under agreement dated 30 January 1997, Respondent No.1 hypothecated plant and machinery by creating a charge thereon and same has duly been registered with the Registrar of Companies. The Petitioner states that Respondent No.1 has created a second charge on it's immovable property namely Raman Centre C-18 to 21 Oshiwara Industrial Area of Link Road, Andheri (W), Mumbai-53 and premises at 317, Raheja Chambers, Free Press Journal Road, Nariman Point, Mumbai-21 in favour of the Petitioner whereas Respondent No.4 had first charge on the said properties in respect of it's loan facility granted to Respondent No.1.

6. On 30 June 1999, the Petitioner filed Dispute No. 299 of 1999 u/s 91 of MCS Act, 1960 in the Co-operative Court for recovery of it's dues of Rs. 2,78,29,144.68 paise with further interest w.e.f. 1 June 1999.

7. The Debts Recovery Tribunal is established in Mumbai on or about 16 July 1999 under the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (for short, RDDBFI Act).

8. Respondent No.4 in August, 2001 filed original application bearing O.A. No. 878 of 2001 in the Mumbai Debts Recovery Tribunal (MDRT) for recovery of its dues from Respondent Nos. 1 to 3. Since the Petitioner had second charge on the immovable properties the Petitioner was joined as Respondent No.4. No reliefs were claimed against Respondent No.4.

9. The Full Bench of this Court has held that Co-operative Banks are entitled to file proceeding before the Debts Recovery Tribunal (DRT) under the RDDBFI Act. The Apex Court has set aside the said judgment.

10. In the meantime the Multi State Co-operative Societies Act -2002 (The MCS Act, 2002) came into force on or about 19 August 2002. Section 84 of the said Act provides referring of the disputes and differences by the Multi State Co-operative Society for recovery of it's debt from it's member, to the sole Arbitrator, to be appointed by the learned Central Registrar, as provided in the said Act.

11. The Co-operative Court by order dated 22 December 2004 returned the original proceeding to the Petitioner to enable the Petitioner to present the same before the sole Arbitrator appointed u/s 84 of the MCS Act-2002. Accordingly, the Petitioner filed the Arbitration proceedings before the sole Arbitrator.

12. Before the Arbitrator, Opponent Nos. 2 and 4 (Respondent Nos. 2 and 4) were absent. Opponent Nos. 1 and 3 (Respondent Nos. 1 and 3) contested the matter. The Arbitrator framed six issues though decided that the proceedings are within the period of limitation; not bad for non-joinder of necessary parties; necessary to transfer the proceedings before the Debts Recovery Tribunal, Mumbai; in view of the decision in the matter initiated by the IDBI subsequent negotiations by the bank with IDBI come in the way of the present proceedings. The Arbitrator, however, not considered the basic issue whether the bank has entitled to recover a sum of Rs. 2,67,82,792/- as on 31 May 1999 together with interest @ 19.5% till realization, by holding that the issue raised in the present proceedings are substantially and directly dealt with previously in DRT matter in which the Bank and the present Opponent-Respondent Nos. 1 to 3 were also parties. It is further observed that as MDRT was competent to decide the said issue and as the bank has not preferred any Appeal against the Judgment and Order of the MDRT and it stands finally decided and therefore concluded that the doctrine of res-judicata applies in the present proceedings. It is also observed that the bank received Rs. 150 lakhs as its share in the sale proceeds and preferred not to insist for any action in DRT matter for recovery of balance due of OTS for Rs. 221 lakhs arrived in the said matter and therefore, the present proceedings initiated by the bank held to be barred by res-judicata.

13. It is relevant to note the principles of res-judicata, observed by the Hon"ble Supreme Court in [Raj Lakshmi Dasi and Others Vs. Banamali Sen and Others](#), as under:-

The condition regarding the competency of the former Court to try the subsequent suit is one of the limitations engrafted on the general rule of res judicata by S. 11 of the Code and has application to suits alone. When a plea of res judicata is founded on general principles of law, all that is necessary to establish is that the Court that heard and decided the former case was a Court of competent jurisdiction. It does not seem necessary in such cases to further prove that it has jurisdiction to hear the latter suit.

The Apex Court recently again reiterated the same in [M. Nagabhushana Vs. State of Karnataka and Others](#), . Therefore, for the purpose of present case, as adjudication of Competent Court is the basic requirement which in the present case is missing, hence principle of res judicata wrongly extended.

14. Admittedly, the Petitioner being Multi State Co-operative Society deemed to have been registered under the MCS Act 2002, therefore could not have filed proceedings to recover its dues from its members, under the provisions of RDDBFI Act 1993. The Apex Court has held that the Multi State Co-operative Bank cannot file the Suit for recovery of it's dues from it's members under the MCS Act-2002 before the Tribunal constituted thereunder. There was no question of filing or initiating any proceedings for recovery of its dues before the DRT. Therefore, the observations and findings

that the Co-operative Court No.I at Mumbai was under obligation to transfer the record of case No. CC/I/229 of 1999 to MDRT is apparently contrary to the provisions of the MCS Act-2002 and the judgment of the Apex Court [Greater Bombay Co-op. Bank Ltd. Vs. United Yarn Tex. Pvt. Ltd. and Others,](#)

15. Merely because the Petitioner was joined as Respondent No.4 in the DRT proceedings and contested the matter and not preferred any counter claim, that itself cannot be the reason to hold that the claim of the Petitioner is barred by res-judicata specifically in view of the fact that the Petitioner is under obligation to invoke Section 84 of the MCS Act-2002 to recover it's dues. The DRT and/or the Tribunal under the Debts Recovery Tribunal Recovery Act if not competent Court and as no jurisdiction to adjudicate the claim of the Petitioner, then it was necessary for the Arbitrator to decide the matter on merits by considering the events and/or reasonings, and/or the conduct of the parties and not to dismiss the whole claim on the ground of res- judicata is totally unjust and illegal.

16. It is settled that pending any recovery proceedings, if any amount is received by the Claimant/Plaintiff that amount needs to be adjudicated even in any other proceedings. The subsequent proceedings and/or any other proceedings even if filed by the same Plaintiff or Claimant, it is always subject to the adjustment of the amount received from the other side. It also applies even in any subsequent negotiations by the parties, but in no way it can be stated bound by the principle of res-judicata. No Appeal against the DRT order and/or no further challenge in my view that itself cannot be the reason to dismiss the claim of the Petitioner on merits by holding it to be bound on the ground of res-judicata, merely because the Petitioner participated in the proceedings before the DRT and contested the same. The participation in any other form, whether jurisdiction or no, in any way is not sufficient to hold that the said Court is competent to decide the dispute of the Multi State Societies, which admittedly governed by the provisions of MCS Act.

17. If the proceedings itself was not maintainable before the DRT, there was no question of transfer of the proceedings, apart from the law and the decision of the Supreme Court on the issue of jurisdiction and competency of the Court referring to the Multi State Co-operative Societies. Its entitlement to invoke the appropriate proceedings for recovery of their dues ought not to have been overlooked by the Arbitrator.

18. The proceedings, therefore, so initiated by the Petitioner-Multi State Co-operative Bank for recovery of its dues for enforcement of securities if maintainable, there was no question of dismissing the same on the ground of res-judicata, merely because the participation of the Petitioner bank in the DRT proceedings.

19. The sole Arbitrator completely overlooked the fact that the Petitioner could not have filed a recovery proceedings before the DRT against Respondent No.1 and one

M/s. Dream Entertainment Co. Ltd in view of the Memorandum of Understanding executed between them. There was no option for the Petitioner but to invoke the proceedings as initiated.

20. Admittedly, Respondent Nos. 2 and 4 were absent before the Arbitrator. Therefore, there was no question of considering of any plea of Respondent Nos. 2 and 4 including their entitlement to claim discharge on the ground that Respondent No.4 had sold the plant and machinery and in respect thereof the Petitioner bank did not claim any amount from Respondent No.4. Therefore, any observation with regard to the discharge of Respondent Nos. 2 and 4 from their liability could not have been decided in such fashion. It is also relevant to note that the Petitioner, admittedly, did not make any claim for recovery or enforcement of it's charge on the property of Respondent No.1 before MDRT but such claim was raised for recovery of it's dues before the sole Arbitrator.

21. The Arbitrator failed to consider that the one time settlement was not fully materialized, there fore the Petitioner was entitled for it's balance claim after giving credit for Rs. 150 lakhs. The Arbitrator, however, wrong in holding that the Petitioner bank has avoided to recover from Respondent No. 4, 1/3 share of sale proceeds of plant and machinery. The observation that the Petitioner bank was negligent in realizing it's securities also cannot be the reason and/or any material elements to dismiss the claim on the ground of res- judicata.

22. The Arbitrator is wrong in holding that the proceeding before the DRT and before the learned Arbitrator are one and the same, by overlooking the provisions of both the Acts. The Tribunals constituted under these Acts are empowered to deal with the subjects within its jurisdiction as provided under the Acts and not otherwise or vice- versa. The proceedings filed by Respondent No.4 and as initiated by the Petitioner before the Arbitrator under the respective Acts, cannot be stated to be identical and/or similar, though it was for the recovery of the dues, specifically when the Petitioner's claim against its borrowers is not maintainable before the DRT, in view of the specific provisions of both the Acts.

23. In view of the above reasonings itself, it is clear that the award/ reasoning so made by the sole Arbitrator is contrary to the provisions of law. This Court u/s 34 has jurisdiction and has no choice but to declare the award null and void and therefore, there is no option but to quash and set aside it.

24. Resultantly, the impugned award dated 21 October 2008 is quashed and set aside. The matter is remanded back for de novo consideration on every aspects including merits after giving full opportunity to both the parties and be disposed of as early as possible in any case within a period of four months from today.

25. There shall be no order as to costs.