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

COMMERCIAL ARBITRATION PETITION (L) NO. 21174 OF 2025
WITH
INTERIM APPLICATION (L) NO.21534 OF 2024

Mohammed Sharif Hanif Khan ... Applicant

Versus

Apna Sahakari Bank Limited ... Respondent

Mr. Bhavik Lalan a/w Ms. Seema Pandey, Advocates for the Applicant.
Mr. Sanjiv Punalekar a/w Mr. Sachin Kanse a/w Ms. Ekta Rajpurohit, Advocates for the Respondent.

CORAM: AARTI SATHE, J.

Judgment Reserved on : 19th August 2026
Judgment Pronounced on : 16th September 2026

JUDGMENT :-

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act) challenges the arbitral award dated 6th March 2024 (hereinafter referred to as the impugned arbitral award) passed by the Arbitrator appointed under Section 84 of the Multi-State Co-operative Societies Act, 2002 (hereinafter referred to as the MCS Act) in respect of the proceedings regarding the dispute as raised by Respondent No.1-Bank invoking the aforesaid provisions. By way of the impugned arbitral award the Arbitrator has allowed the application filed by Respondent No. 1-Bank and directed the Petitioner along

with the other opponents in the said arbitration proceedings, i.e., Respondent Nos. 2 to 4 to jointly and severally pay to Respondent No. 1- Bank an amount of Rs. 18,16,562.64/- as on 31st December 2023 along with further interest thereon at the contractual rate of interest at 14% p.a. w.e.f 1st January 2024 till final payment/closure of the account, along with a sum of Rs. 16,995/- towards arbitration fees and Rs. 5510/- towards administrative costs and stamp fees. Further, other directions were also passed by which the Petitioner along with the other opponents, i.e., Respondent Nos. 2 to 4 were restrained from transferring and/or parting with possession of and/or creating any third-party interest in the hypothecation of stock-in-trade and book debts, collateral securities, mortgaged properties, and personal properties of the Petitioner till full realization of the awarded amount.

2. Briefly the facts are as follows:-

i. On 4th September 2006, the Petitioner obtained a housing loan of Rs. 7,70,000/- from Respondent No. 1-Bank under Loan Account No. SCHLN/44. On 29th March 2023 the Petitioner cleared the loan under Loan Account No. SCHLN/44, and it is the Petitioner's contention that he did not receive the original title deeds of his mortgaged flat from Respondent No. 1-Bank. The Petitioner had availed of the aforesaid loan on the basis of mortgage of title deeds of his flat, i.e., Flat No. 102 on 1st floor in B-Wing, admeasuring about 1010 sq.ft. built-up area in Sunrise Tower Co-operative Housing Society Ltd., Near Bharat Gears Co., Near Village Shil, District Thane (hereinafter referred to as the "mortgaged flat").

ii. It is the Petitioner's contention that after repayment of the loan in Loan Account No. SCHLN/44, the Petitioner approached Respondent No. 1-Bank for taking back the original title deeds of the mortgaged flat. However, the said title deeds were not returned back to the Petitioner, as the Manager of Respondent No. 1-Bank informed the Petitioner that there was some encumbrance in respect of the mortgaged flat.

iii. It is the Petitioner's contention that on 12th April 2024, the Petitioner for the first time received a letter of earlier date dated 12th March 2024 issued by the Senior Manager (Recovery) of Respondent No. 1-Bank enclosing the impugned arbitral award dated 6th March 2024. It is further the Petitioner's contention that in the said letter, for the first time, it was disclosed that the Petitioner had been shown as a co-borrower and/or surety in respect of Loan Account No. CC/111 (Kurla Branch). It is also the Petitioner's contention that by way of the impugned arbitral award, the mortgaged flat under Loan Account No. SCHLN/44 was now declared as a mortgaged property in Loan Account No. CC/111 (Kurla Branch), which pertained to the loan/cash-credit facility availed by Respondent No. 2, who is the sole proprietor of M/s. Paper Box.

iv. On 9th May 2024, the Petitioner through his authorized representative issued a letter to the Senior Manager (Recovery) of Respondent No. 1-Bank, requesting them to provide the entire papers and proceedings as well as documents relied upon by Respondent No. 1-Bank in the arbitration proceedings invoked under Section 84 of the MCS Act. An e-mail of even date was also sent to Respondent No. 1-Bank seeking the aforesaid documents.

v. On 13th May 2024, the Petitioner through his authorized representative applied to the Arbitrator for a certified copy of the impugned arbitral award along with records of the entire arbitration proceedings. It is the Petitioner's contention that in spite of repeated requests to Respondent No. 1-Bank to provide documents relating to the arbitration proceedings, Respondent No. 1-Bank did not supply the aforesaid documents and informed the Petitioner that he has to re-apply for the said documents. The Petitioner therefore submitted a hand-written application dated 30th May 2024 to the legal department of Respondent No. 1-Bank seeking the aforesaid documents.

vi. On 7th June 2024, Respondent No. 1-Bank addressed an email of even date to the Petitioner, stating that the Petitioner was liable as a co-borrower for the defaults of Respondent No. 2, and also did not supply the documents sought by the Petitioner by the earlier emails and correspondence.

vii. On 13th June 2024, the Arbitrator accepted the application of the Petitioner for issuance of a certified copy of the impugned arbitral award and arbitration proceedings and issued the certified copies of the same to the Petitioner in Case No. ARB/ASBL/14 of 2024.

viii. It is the Petitioner's contention that after perusing the impugned arbitral award he was surprised and shocked to see that the application for a business loan submitted by Respondent No. 2 on behalf of his sole proprietary firm was accompanied by forms enumerating details and particulars of sureties, wherein on numerous occasions, Respondent No. 2 had sought extension of credit facility on sureties of the Petitioner by forging his signature and endorsing seal of the Petitioner's separate proprietary firm, namely M/s. Shan Packaging, therefore compelling the Petitioner to file a police complaint on 28th June 2024 at Kurla Police Station, Mumbai. Since Respondent No. 1-Bank was unable to recover the outstanding loan amounts in Loan Account No. CC/111 (Kurla Branch), Respondent No. 1-Bank initiated arbitration proceedings under Section 84 of the MCS Act.

ix. It is in the backdrop of the aforesaid facts that the present Petition has been filed by the Petitioner under Section 34 of the Act, challenging the impugned arbitral award.

3. Learned counsel Mr. Bhavik Lalan, along with Ms. Seema Pandey appeared on behalf of the Petitioner, and Mr. Sanjiv Punalekar, along with Mr. Sachin Kanse and Ms. Ekta Rajpurohit appeared on behalf of Respondent No. 1-Bank.

4. The primary challenge to the impugned arbitral award as sought to be contended by the learned counsel on behalf of the Petitioner is that the entire award is vitiated on the following counts:-

i. The impugned arbitral award is an *ex parte* award, wherein the Petitioner did not get an opportunity to present his case, and hence the same would be in breach of the principles of natural justice and suffers from patent illegality and is hence liable to be quashed and set aside.

ii. Further, the equitable mortgage by deposit of title deeds of the mortgaged flat was in respect of Loan Account No. SCHLN/44, which commenced on 4th September 2006 as a housing loan availed by the Petitioner, and which was repaid on 20th March 2023, whereas Loan Account No. CC/111 (Kurla Branch) commenced from 26th April 2011, to which the Petitioner was not a party. Further, the mortgaged flat which belongs to the Petitioner was never given as collateral to secure the aforesaid loan/ cash-credit facility in Loan Account No. CC/111 (Kurla Branch) by the Petitioner.

iii. Learned counsel for the Petitioner also submitted that there is not a single document which goes to show how the mortgaged flat was secured against the loan/cash-credit facility disbursed by Respondent No. 1-Bank to Respondent No. 2 in Loan Account No.CC/111 (Kurla Branch).

iv. He further submitted that a perusal of the Roznama annexed to the impugned arbitral award would show that the entire arbitral proceedings commenced and concluded within a period of 28 days, and the Arbitrator acted hurriedly and did not give a chance to the Petitioner to present his case. It is therefore the Petitioner's submission that the entire impugned arbitral award is void *ab initio*, illegal, and not binding.

5. He also submitted that the entire arbitration proceedings themselves are invalid, inasmuch as the Petitioner is not a member of Respondent No. 1-Bank and hence, the provisions of Section 84 of the MCS Act, under which the present arbitration proceeding have been conducted, would not apply to the Petitioner. It is pertinent to note that though in paragraph No. 3 of the petition, the Petitioner has specifically averred that he was a member of Respondent No. 1-Bank, however, by an affidavit dated 19th August 2026 he has averred that he was not a member, and that the earlier averment was an inadvertent error on part of his

Advocate while drafting the Petition. Relevant paragraphs of the aforesaid affidavit are reproduced below:-

> 2. I say that I am filing the present Additional Affidavit for the purpose of placing certain material facts and clarifications on record which are necessary for the proper adjudication of the present Petition.
>
> 3. I say that I have studied only up to Standard 6th in Hindi medium and I have no higher educational qualifications. I further say that I am not well-versed with legal, banking or technical terminology and documentations.
>
> 4. I say that the statement made in the Paragraph No. 3 of the said Petition that I am a member of the Respondent No. 1 Bank/ Society, is incorrect. I categorially state that I am not a member of Respondent No. 1 - Bank Co-operative Society.
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> 5. I say that the same was made inadvertently mentioned while drafting of the Petition by my erstwhile Advocate. The said statement was neither intended nor made on the basis of any factual representation by me. I therefore, crave leave to correct and clarify the said statement accordingly. My attention to the said statement in Paragraph No.3 was drawn today at the time of hearing before this Hon'ble Court when I was present.
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> 6. I say that, save and except the aforesaid inadvertent statement, I reiterate and confirm the contents of the Petition to the extent that the same are true and correct. The inadvertent statement contained Paragraph No. 3 may kindly not be construed as an admission on my part of any membership, relationship, liabilities or associations with Respondent No. 1 Bank/ Co-operative Society.
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> 7. I further say that Respondent No. 1 Bank/ Co-operative Society has not produced before the Ld. Arbitral Tribunal any duly filled-in signed documents showing that I am a member of the Respondent No.1 Bank/ Society, The Respondent No. 1 has not produced before this Honble Court any duly filled Membership Application Form, Agreement or other instrument bearing my signature, where I had applied for, accepted or acknowledged membership of Respondent No. 1 Bank/ Co-operative Society.
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> 8. I therefore, respectfully submit that the inadvertent statement mentioned in paragraph no. 3 of the Petition ought to be corrected and the true factual position as stated hereinabove, ought to be taken on record.

6. The Petitioner also submitted that the Petitioner's signature has been forged on the surety form, and on the basis of fabricated documents Respondent No. 2 has availed of the loan/cash-credit facility in Loan Account No. CC/111 (Kurla Branch), wherein he has falsely shown the Petitioner's mortgaged flat as surety/collateral. It is also contended that the agreement which was entered into

between Respondent No. 1-Bank and Respondent No. 2 was in respect of hypothecation of movable property and shows the Petitioner's immovable property, i.e., the mortgaged flat, which has been attached by way of impugned arbitral award. This illegal methodology adopted to attach the Petitioner's mortgaged flat without the Petitioner ever standing as a surety to the loan/cash-credit facility received by Respondent No. 2 vitiates the entire arbitral proceedings. The Petitioner has submitted that the impugned arbitral award does not take into consideration any of the aforesaid issues, as the Petitioner was not represented during the arbitral proceedings and an *ex parte* award was passed.

7. It is also the Petitioner's contention that although the loan/cash-credit amount availed of by Respondent No. 2 was in the year 2011, Respondent No. 1-Bank has categorically made a statement in their Statement of Claim that by an application dated 5th May 2014, Respondent No. 2 requested the Petitioner to be a co-borrower of the aforesaid loan, which fact the Petitioner vehemently disputes. It is further the Petitioner's contention that the loan which he had availed of under Loan Account No. SCHLN/44 was a housing loan, and the present loan/cash-credit which is availed by Respondent No. 2 is primarily a cash-credit facility. The two cannot be interpolated to attach the mortgaged flat of the Petitioner for Loan Account No. CC/111 (Kurla Branch), for which the Petitioner never stood as a surety or even a co-borrower.

8. Lastly, the Petitioner has also contended that the entire documentation on which the loan/cash-credit facility was availed by Respondent No. 2 are false and fabricated documents, to which the Petitioner was never a signatory.

9. On the basis of the above submissions, learned counsel on behalf of Petitioner, Mr. Lalan has vehemently submitted that the impugned arbitral award is liable to be set aside and cannot be acted upon. He submitted that for the provisions of the MCS Act to apply, the Petitioner needs to be a member of Respondent No. 1-Bank, which the Petitioner is not, and further, there was no application which was ever made by the Petitioner to become a member of Respondent No. 1-Bank, as envisaged under the provisions of Section 25 of the MCS Act. He has therefore submitted that once there was no membership which the Petitioner held in Respondent No. 1-Bank, the question of the applicability of the provisions of the MCS Act does not arise at all. It was therefore his submission that the impugned arbitral award is not binding on the Petitioner. Insofar as the attachment of the mortgaged flat of the Petitioner is concerned, he submitted that this was a gross case where the Arbitrator had failed to appreciate that the Petitioner had never stood as a surety, and neither was a co-borrower in respect of the loan/cash-credit facility availed by Respondent No. 2. In such circumstances, attaching the mortgaged flat of the Petitioner to secure the loan/cash-credit facility to Respondent No. 2 was an arbitrary and highly perverse approach adopted by the Arbitrator while passing the impugned arbitral award, which he contended is liable to be set aside. He also sought to draw the attention of this Court to the Roznama annexed to the impugned arbitral award to contend that the entire arbitration proceedings were done in a haphazard and hurried manner, without giving the Petitioner an opportunity to present his case.

10. In view of the aforesaid, it was his submission that the impugned arbitral award is perverse, and the same requires interference under Section 34 of the Act as being patently illegal.

11. *Per contra*, learned counsel on behalf of Respondent No. 1-Bank submitted that the impugned arbitral award did not suffer from any infirmity and was passed on an appreciation of the entire factual conspectus. It was his submission that in fact, there were inconsistencies in the approach of the Petitioner, inasmuch as though the Petitioner had contended that he was not a member of Respondent No. 1-Bank, yet the pleadings as reflected in the paragraph No. 3 of the Petition go to show that the Petitioner has specifically pleaded that he was a member of Respondent No. 1-Bank. He therefore submitted that in view of this the fact, the Petitioner was a member of Respondent No. 1-Bank, and he would be governed by the provisions of the MCS Act, and the impugned arbitral award passed under Section 84 of the MCS Act would be binding on him. He also submitted that only a member could avail of any loan, and in the facts of the present case the Petitioner had admittedly availed of a housing loan in Loan Account No. SCHLN/44.

12. He further submitted that the contention of learned counsel on behalf of the Petitioner that the impugned arbitral award is an *ex parte* award cannot be a ground to set aside the impugned arbitral award, inasmuch as prior to passing the impugned arbitral award sufficient notice was given to the Petitioner on at least four occasions, and it was the Petitioner who had failed to appear before the Arbitrator. It was therefore his submission that the impugned arbitral award has

been passed after giving due opportunity to the Petitioner, which the Petitioner chose not to avail of, and hence, the Petitioner cannot now seek to make a grievance of the same. He also submitted that if at all the Petitioner was contending that forgery was committed while availing the loan/cash-credit facility by Respondent No. 2 and making the Petitioner a co-borrower and also keeping his mortgaged flat as a surety, the Petitioner could have initiated appropriate criminal proceedings, which the Petitioner sought not to avail, and instead, has chosen to challenge impugned arbitral award under Section 34 of the Act. He therefore submitted that the impugned arbitral award ought to be upheld and that there is no patent illegality warranting interference under Section 34 of the Act. The submissions made by learned counsel on behalf of Respondent No. 1-Bank are summarized as below:-

i. It was submitted that the Petitioner has specifically admitted that he is a member and he not only availed a housing loan but also created a mortgage. The mortgage documents specifically state that the mortgage extended to other accounts also.

ii. It was further submitted that a completely dishonest argument is sought to be put belatedly by the Petitioner that he is not a member of Respondent No. 1-Bank, which was never canvased either before the Arbitrator or in the present pleadings. It is only for the first time by the affidavit dated 19th August 2026 that the Petitioner has sought to raise this plea. It was further contended that only a member of Respondent No. 1-Bank could avail of a loan.

iii. It was further submitted that the Petitioner joined as a co-obligant/co-borrower of Respondent No. 2 in 2014. It is their case that his brother, i.e., Respondent No. 2 later applied for the said loan/cash-credit facility making the Petitioner as the co-obligant/co-borrower.

ANALYSIS AND FINDINGS

13. I have heard learned counsel for the parties for some length of time and have perused the papers and proceedings and the impugned arbitral award with their assistance. At the outset, I am of the view that the provisions of Section 34 of the Act, which are now well-settled by various decisions of the Supreme Court and this Court, allow interference in an arbitral award only in exceptional circumstances as set out in Section 34 of the Act. The primary ground on which learned counsel for the Petitioner seeks to assail the impugned arbitral award is that the same is patently illegal, and being an *ex parte* award, has not considered the submissions of the Petitioner, making the impugned arbitral award liable to be set aside. To advance this proposition, learned counsel for the Petitioner has taken me through various documents to show that the Petitioner was never a co-borrower/surety for the loan/cash-credit facility availed by the Respondent No. 2.

14. I am of the view that the impugned arbitral award is an award which suffers from infirmity, and I am aware of the fact that the contours of Section 34 of the Act allow interference in an arbitral award only in exceptional circumstances, which are listed in the provision itself. However, on a perusal of the impugned arbitral award, it is pertinent to note that it has been passed as an *ex parte* award. Though the impugned arbitral award has returned the finding that notices were

served on the Petitioner and the other opponents, yet the Arbitrator has, without giving an opportunity to the Petitioner and the other opponents to submit their case, gone ahead with passing the impugned arbitral award. The impugned arbitral award therefore suffers from a breach of the principles of natural justice, inasmuch as though a notice was issued to the Petitioner, however, the Petitioner was not heard, which by itself makes the impugned arbitral award an award which is in breach of the principles of natural justice. The impugned arbitral award also has not taken into consideration the fact that the Petitioner was not the person who had availed the loan/cash-credit facility in 2011, and in fact, it is only on the assertion of one of the Respondents in the loan application form that the Petitioner was made a co-borrower/surety in 2014 that the Arbitrator in the impugned arbitral award has held that the Petitioner was a co-borrower/surety and hence liable for the defaults on the loan/ cash-credit facility availed.

15. Though this Court is conscious of the fact that re-appreciation of evidence is not the mandate which is postulated under Section 34 of the Act, however, if an award on the face of it suffers from patent illegality, the said award can be set aside by this Court. I am also of the view that the impugned arbitral award has not taken into consideration the fact that the documents which have been submitted or which have been relied upon by Respondent No. 1-Bank include documents like agreement for hypothecation of movable property, which includes the immovable property of the Petitioner, i.e., the mortgaged flat, which to my mind cannot be the correct approach to hold that the Petitioner is liable for the defaults in repayment of the loan/cash-credit facility in Loan Account No.

CC/111 (Kurla Branch). Further, the impugned arbitral award is silent on the issue as to whether the housing loan in Loan Account No. SCHLN/44, which the Petitioner had availed of, was actually repaid by the Petitioner, and whether the mortgaged flat was in respect of the said housing loan and not in respect of the loan/cash-credit facility in Loan Account No. CC/111 (Kurla Branch), which was availed in the year 2011. The impugned arbitral award also does not set out as to whether any steps were taken or any communication was issued to the Petitioner in respect of default in repayment of the loan/cash-credit facility with regard to Loan Account No. CC/111 (Kurla Branch). Neither has the impugned arbitral award discussed whether any demand notice was issued to the Petitioner as surety for repayment. The impugned arbitral award has also not taken into consideration the Petitioner's contention that the signature of the Petitioner on the surety form, as per the Petitioner, was a forged document, and a fabricated seal of the Petitioner's sole proprietary firm, namely M/s. Shan Packaging has been affixed on the said surety form.

16. The impugned arbitral award further has not given a finding as to how the mortgaged flat of the Petitioner was secured against the loan/cash-credit facility given to Respondent No. 2 by the Respondent No. 1-Bank. The equitable mortgage by deposit of title deed of the mortgaged flat was in respect of Loan Account No. SCHLN/44, which commenced from 4th September 2006 and was a housing loan of the Petitioner, whereas Loan Account No. CC/111 (Kurla branch) had commenced from 26th April 2011. The impugned arbitral award has not given any finding to demonstrate that the mortgaged flat of the Petitioner was secured

against the loan/cash-credit facility which was in respect of Loan Account No. CC/111 (Kurla branch). It is therefore my view that the impugned arbitral award suffers from various infirmities and has not been passed before appreciating the entire factual conspectus, and is an award which is patently illegal and arbitrary. It has not been passed taking into consideration all the rival contentions, and merely by issuing notices to the Petitioner without giving him an opportunity of being heard has been passed as an *ex parte* award, which to my mind was an incorrect approach which has been adopted by the Arbitrator in the arbitral proceedings.

17. The impugned arbitral award further does not consider that the agreement of hypothecation of movable property against the loan/cash-credit facility in respect of Loan Account No. CC/111 (Kurla Branch) specifically refers to movable property, however, in Schedule B of Collateral Securities for the Loan, the immovable property (mortgaged flat) of the Petitioner has been mentioned as the collateral security. Further, the loan application forms wherein loan/cash-credit facility has been availed by Respondent No. 2 from the year 2011 does not mention the name of the Petitioner as the co-borrower, and only in 2014 when the aforesaid loan facility/cash-credit facility was sought to be renewed, the addition of the name of the Petitioner stands reflected. The contention of the Petitioner that the said document is a forged document and the Petitioner's signature is a forged signature is another aspect which has not been considered in the impugned arbitral award. The impugned arbitral award has also not recorded a finding on the issue whether the Petitioner is a member or not a member of Respondent No. 1-Bank, making him either bound or not bound to the impugned arbitral award under the

provisions of the MCS Act. Though in paragraph No. 3 of the petition the Petitioner has averred that he is a member of Respondent No. 1-Bank, however, by way of an affidavit dated 19th August 2026 he has averred that he was not a member of Respondent No. 1-Bank. The contents of the aforesaid affidavit are reproduced in paragraph No. 5 above.

18. I am therefore of the view that all these facts and contentions have to be examined, and no finding on the same would render the impugned arbitral award perverse and patently illegal, making it liable to be set aside. This Court is conscious of the fact that under Section 34 of the Act a reappreciation of evidence and facts cannot be made by this Court, and another view on the same set of facts cannot be substituted by this Court under the provisions of Section 34 of the Act. However, in the facts of the present case, this is not the position, and there is no reappreciation of facts or evidence which the Court seeks to do to come to another view, inasmuch as the impugned arbitral award being an *ex parte* award has had not got the benefit of appreciating the entirety of facts and rendering a finding thereon or forming of view, which vitiates the impugned arbitral award as being passed as a non-speaking award. Considering that in arbitral proceedings the arbitral tribunal is the master of evidence and facts, the non-consideration of the facts and evidence goes to the root of the matter, and this Court is of the view that the impugned arbitral award deserves to be set aside, being patently illegal and arbitrary. The relevant paragraphs of the impugned arbitral award make the same clear, and are reproduced below:-

> 18. It is further stated that the Disputants claim is within time and is not barred by law of limitation and the claim of the bank is legal, valid and subsisting.

19. During the course of the proceedings of Wis Arbitral Tribunal, speed post envelopes Containing Summons/Notice issued to Opponent No. 1 & 4 returned back with endorsement 'Unclaimed" are at Exh-4 & 7. Unclaimed Notice is a good service in the eyes of law. Opponent No. 2 is duly served. Postal Acknowledgement is at Exh- 5. Speed post envelope Containing Summons/Notice issued to Opponent No. 3 returned back with endorsement "Not Known" at Exh-6. The Disputant Bank filed application U/s 3 of the Arbitration and Conciliation Act, 2016 (as amended) to hold that the Opponent No. 3 is deemed to be served at Exh.-8. The said application is allowed. The Opponent No. 1 to 4 did 1 not appear though duly deemed to be served. Therefore, they, were proceeded Ex-parte vide proceedings dated-28/02/2024

20. The evidence was directed to be led by claim affidavit and documents. In order to prove the claim, the Disputant Bank through its Authorized Officer Mr. Hemant H. Shinde filed a claim affidavit at Exh-9 along with the Loan security documents list at Exh-10 including copy of the ledger tract of statement of Loan Account No. CC-111-KURLA Exhibit-“D”. Since the Opponent No. 1 to 4 remained absent and have not objected 'claim Affidavit and loan security documents including ledger extract Statement of Loan Account filed by the Disputant Bank, the Affidavit of Clam and documents listed with, remains unchallenged and unrefuted.

21. Therefore I have no hesitation but to hold that the Disputant Bank has proved its outstanding claim amount due and payable by the Opponents and all Opponents are liable jointly and severally to pay the said outstanding amount along with further interest thereon @ 14.00% p.a. W.e.f. 01/01/2024 subject to change in the rate interest as per RBI directives till final payment/realization of the entire dues.

22. Since it is proved as concluded herein above, that Opponent No. I to 4 have availed the Cash Credit facilities time to time from the disputant bank against the security of Hypothecation of Stock-in-Trade and collateral securities and Mortgage property, therefore to protect. the interest of recovery of outstanding dues payable by the Opponents, the Declaration and injunction as prayed for in the dispute application is required to be granted.

23. The question as to whether this Tribunal can enforce the Mortgage is no more re Integra after the Judgment of Hon'ble Bombay High Court in the matter between Saba Chemical Vs. Siddharth Bhattacharya (MAMU/MAH/0821/2015). The court has put gloss on the Supreme Court Judgment in Booz Allen's case and held that this Tribunal has exclusive jurisdiction to enforce the mortgage. Therefore, accordingly declaration of the mortgage will have to be given.

In the result thereof, I pass the following Award.

AWARD

I) Dispute is allowed.

II) Opponent No. 1 to 4 are hereby ordered to pay jointly and severally to the Disputant Bank Rs. 18,16,562.64 as on 31/12/2023, along with further interest thereon at the contractual rate of interest @ 14.00% p.a. w.e.f. 01/01/2024 till final payment/closure of the A/c and also a sum of Rs. 16,995/-towards the Arbitration fees and Rs.5,510/-towards administrative cost, stamp fees which the opponents are hereby directed to pay the Disputant Bank.

III) The above amount is declared to be Hypothecation of Stock in Trade as per Agreement of Hypothecation dated-02/05/2011, 30/05/2014, 30/03/2019 respectively and collateral securities till full realization of the awarded amount and the said Hypothecation of Stock-in-Trade and Book Debts and collateral securities are valid and subsisting till clearance of entire dues.

IV) The above amount is declared to be Mortgage Property viz. "All that part and parcels of Flat No.102 self-contained flat admeasuring area of the said Flat is 1010 Sq. Ft. (build up area), including terrace on the 1st Floor, in the Building No. B-Wing, known as "Sunrise Tower Co-operative Housing Society Limited" Situated on the piece or parcel of land hereditaments and premises situate lying and being at Near Bharat Gear Co., Village - Sheel, Taluka & Dist.-Thane in the Registration District and Sub District of Thane bearing Survey No. 137, Hissa No. 1, and Survey No. 137 Hissa No.2, Village - Sheel, Taluka & Dist.-Thane" and the same is valid and subsisting till clearance of the awarded amount.

V) The Opponents either by himself/themselves and/or by his/their agents, servants or through any other person/s are hereby restrained from transferring and/or parting with possession of and/or creating any third party interest in the said Hypothecation of Stock in Trade and Book Debts, Collateral securities, Mortgage properties and personal properties of the Opponents till full realization of the awarded amount.

VI) The Disputant Bank is directed to serve this Order upon the Employer of the Opponents to recover its dues, failing which the same be recovered as arrears of land revenue from the employers personally.

VII) During the pendency of the dispute if Opponents paid any amount the same be adjusted towards the awarded amount.

19. My view is fortified by the decisions of the Supreme Court in **Ssangyong Engg. & Construction Co. Ltd. v. NHAI**[1] and **Associate Builders v. DDA**[2], wherein it has been held that an arbitral award is liable to be set aside on the ground of patent illegality under Section 34(2A) of the Act, if the Court *prima facie* ascertains that the arbitral award is perverse, and such perversity goes to the root of the matter. It would be relevant to reproduce the relevant paragraphs of the aforesaid decisions in this regard:-

Ssangyong Engg. & Construction Co. Ltd. v. NHAI

1 (2019) 15 SCC 131
2 (2015) 3 SCC 49

37. Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2-A), added by the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law. In short, what is not subsumed within "the fundamental policy of Indian law", namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.

38. Secondly, it is also made clear that reappreciation of evidence, which is what an appellate court is permitted to do, cannot be permitted under the ground of patent illegality appearing on the face of the award.

39. To elucidate, para 42.1 of Associate Builders, namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to-set aside an arbitral award. Para 42.2 of Associate Builders however, would remain, for if an arbitrator gives no reasons for an award and contravenes Section 31(3) of the 1996 Act, that would certainly amount to a patent illegality on the face of the award.

40. The change made in Section 28(3) by the Amendment Act really follows what is stated in paras 42.3 to 45 in Associate Builders, namely, that the construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take. Also, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under Section 34(2-A).

41. What is important to note is that a decision which is perverse, as understood in paras 31 and 32 of Associate Builders, while no longer being a ground for challenge under "public policy of India", would certainly amount to a patent illegality appearing on the face of the award. Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse.

(Emphasis supplied)

<u>Associate Builders v. DDA</u>

31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation.It is settled law that where:

(i) a finding is based on no evidence, or

(ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or

(iii) ignores vital evidence in arriving at its decision,

such decision would necessarily be perverse.

32. A good working test of perversity is contained in two judgments. In Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons, it was held : (SCC p. 317, para 7)

> "7.... It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law."

In Kuldeep Singh v. Commr. of Police, it was held : (SCC p. 14, para 10)

> "10. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with."

…

42.2. (b) A contravention of the Arbitration Act itself would be regarded as a patent illegality — for example it an arbitrator gives no reasons for an award in contravention of Section 31(3) of the Act, such award will be liable to be set aside.

42.3. (c) Equally, the third subhead of patent illegality is really a contravention of Section 28(3) of the Arbitration Act, which reads as under:

> "28. Rules applicable to substance of dispute.—(1)-(2)
>
> (3) In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."

This last contravention must be understood with a caveat. An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do.

43. In McDermott International Inc. v. Burn Standard Co. Ltd., this Court held as under : (SCC pp. 225-26, paras 112-13)

> "112. It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine,

even if it gives rise to determination of a question of law. [See Pure Helium India (P) Ltd. v. Oil and Natural Gas Commission and D.D. Sharma v. Union of India.]

113. Once, thus, it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless it is found that there exists any bar on the face of the award."

(Emphasis supplied)

20. The decision of the Supreme Court in the case of **DMRC Ltd. v. Delhi Airport Metro Express (P) Ltd.**[3] has reiterated that instances where an arbitral tribunal fails to take into consideration vital evidence to pass an arbitral award warrant interference by the Court under Section 34 of the Act and render such an arbitral award liable to be set aside on the ground of patent illegality. Relevant paragraphs of the aforesaid decision are reproduced below:-

34. The contours of the power of the competent court to set aside an award under Section 34 has been explored in several decisions of this Court. In addition to the grounds on which an arbitral award can be assailed laid down in Section 34(2), there is another ground for challenge against domestic awards, such as the award in the present case. Under Section 34(2-A) of the Arbitration Act, a domestic award may be set aside if the Court finds that it is vitiated by "patent illegality" appearing on the face of the award.

35. In Associate Builders v. DDA, a two-Judge Bench of this Court held that although the interpretation of a contract is exclusively within the domain of the arbitrator, construction of a contract in a manner that no fair-minded or reasonable person would take, is impermissible. A patent illegality arises where the arbitrator adopts a view which is not a possible view. A view can be regarded as not even a possible view where no reasonable body of persons could possibly have taken it, This Court held with reference to Sections 28(1)(a) and 28(3), that the arbitrator must take into account the terms of the contract and the usages of trade applicable to the transaction. The decision or award should not be perverse or irrational. An award is rendered perverse or irrational where the findings are:

(i) based on no evidence;

(ii) based on irrelevant material; or

(iii) ignores vital evidence.

39. In essence, the ground of patent illegality is available for setting aside a domestic award, if the decision of the arbitrator is found to be perverse, or so irrational that no reasonable person would have arrived at it; or the construction of the contract is

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such that no fair or reasonable person would take; or, that the view of the arbitrator is not even a possible view. A "finding" based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside under the head of "patent illegality". An award without reasons would suffer from patent illegality. The arbitrator commits a patent illegality by deciding a matter not within his jurisdiction or violating a fundamental principle of natural justice.

...

43. In the case at hand, the Division Bench found the award to be perverse, irrational and patently illegal since it ignored the vital evidence of CMRS certification in deciding the validity of termination. This, the Division Bench held, overlooked the statutory certification deeming it irrelevant without reasons and thus the award was patently illegal according to the test in Associate Builders.

44. This Court in appeal against the judgment- of the Division Bench of the High Court held that the award was not perverse. Factual findings such as the finding that the cure period was 90 days and that DAMEPL was entitled to terminate the contract, could not, it was held, be interfered with. On CMRS Certificate, this Court held that the Arbitral Tribunal was deciding whether there was a breach of the agreement and whether the defects were cured within the cure period; hence the safety of the line was not an issue before the Tribunal. This Court held that the Commissioner may be the competent authority to determine the safety of the project but the certificate itself did not show that the defects were cured within 90 days. This Court disagreed with the Division Bench and held that CMRS certificate had no bearing on the validity of the termination.

45. There is a fundamental error in the manner in which this Court dealt with the challenge to the decision of the High Court. This jurisdiction of this Court was invoked under Article 136 of the Constitution. The Court was exercising its jurisdiction over a decision rendered by the Division Bench of the High Court in appeal under Section 37. The Division Bench had held that the award overlooked crucial facts and evidence on record that were crucial to the determination of the issues before the Arbitral Tribunal. This led to the award being perverse and patently illegal within the parameters of Section 34 as explained in the judgments of this Court in Associate Builders and Ssangyong. The award overlooked the express terms of Clause 29.5.1 (i) which stipulated that if "effective steps" were taken during the cure period by DMRC, the contractual power to terminate could not be exercised. This Court incorrectly considered CMRS certificate to be irrelevant to the validity of the termination.

47. Clause 29.5.1 (i) entitles the concessionaire to terminate the agreement if DMRC "failed to cure such breach or take effective steps for curing such breach" within the cure period. Pertinently, the clause uses two separate phrases, "cure" and "effective steps to cure". The clause reads as follows.

> "29.5.1. The concessionaire may after giving 90 (ninety) days notice in writing to DMRC terminate this agreement upon the occurrence and continuation of any of the following events (each a "DMRC event of default"), unless any such DMRC event of default has occurred as a result of concessionaire event of default or due to a force majeure event.
>
> (i) DMRC is in breach of this agreement and such breach has a material adverse effect on the concessionaire and DMRC has failed to cure such breach or take effective steps for curing such breach Within 90 (ninety) days of receipt of notice in this behalf from the concessionaire;"

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(emphasis supplied)

48. The Tribunal found that since certain defects remained after the cure period, this was indicative of the fact that the defects were not cured and that no effective steps were taken. However, logically, the fact that defects existed at the end of the cure period relates to one aspect of the termination clause that the defects were not completely cured. Itdoes not explain whether effective steps were taken within the cure period. Effectively, the Tribunal considered that in-progress steps that had not yet culminated into completely cured defects were not "effective steps" to offset termination. This places the two components i.e. "curing of defects" and "taking effective steps to cure defects" at par, to mean that only the completed curing of defects is relevant. The Tribunal fails to explain what amounts to an "effoctive step" and how the steps taken by DMRC were not effective, within the meaning of the phrase.

49. Evidently, this could hot have been the intention of the parties, because they have clearly agreed to include the phrase effective steps". They clearly intended that one a cure notice was served on a party, it would be open to them to either cure defects or to initiate effective steps, even if they could not culminate into the complete curing of defects within the cure period. Incremental progress, even if it does not lead to complete cure, is an acceptable course of action to prevent termination according to the 2008 Agreement.

50. The Tribunal did not appreciate the individual import of the two phrases separately from each other. This was not a matter of mere "alternate interpretation" of the clause, but an unreasonable and uncalled for interpretation of the clause, which frustrated the very provision, and which no reasonable person would have accepted considering the terms of the clause. We must clarify that the Tribunal could have still arrived at the conclusion that the steps taken during the cure period were not effective within the meaning of the clause for certain reasons. However, such discussion and reasoning is conspicuously absent.

64. Rather than considering the vital evidence of CMRS certificate towards safety and effective steps, the Arbitral Tribunal focussed on the conditions imposed by the Commissioner on speed and regarding inspections. While the Division Bench correctly noted'that the certificate was relevant for the issue of the validity of termination, this Court held that safety was not in issue, even though DAMEPL insisted on discontinuing operations citing safety concerns. We respectfully disagree with this Court's re-assessment of the Division Bench's interpretation. The cure notice was relevant for the reasons stated above Moreover, the fact that DAMEPL premised it on safety could not have been overlooked by the Tribunal. In doing so, it overlooked vital evidence pertaining to an issue that goes to the root of the matter. The cure notice was obviously on the record and merited consideration for its contents bearing on vital elements of safety.

65. The cure notice, which contains statements bearing on the safety of the line and other material indicating that the line was running uninterrupted are matters of record. While the cure notice contains allegations about the line not being operational, there is evidence on the record indicating that the line was in fact running. Even if we were to accept that the finding of the Arbitral Tribunal that the defects were not completely cured during the cure period is a factual finding incapable of interference, it is clear from the record that DMRC took steps towards curing defects which led to the eventual resumption of operations. The award contains no explanation as to why the steps which were taken by DMRC were not "effective steps" within the meaning of the termination clause.

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> 66. In essence, therefore the award is unreasoned on the above important aspects. It overlooks vital evidence in the form of the joint application of the contesting parties to CMRS and CMRS certificate. The Arbitral Tribunal ignored the specific terms of the termination clause. It reached a conclusion which is not possible for any reasonable body of persons to arrive at. The Arbitral Tribunal erroneously rejected CMRS sanction as irrelevant. The award bypassed the material on record and failed to reconcile inconsistencies between the factual averments made in the cure notice, which formed the basis of termination on the one hand and the evidence of the successful running of the line on the other. The Division Bench correctly held! that the Arbitral Tribunal ignored vital evidence on the record, resulting in perversity and patent illegality, warranting interference. The conclusions of the Division Bench are, thus, in line with the settled precedent including the decisions in Associate Builders and Ssangyong.
>
> (Emphasis supplied)

21. Further, the Supreme Court, in the case of **I-Pay Clearing Services (P) Ltd. v. ICICI Bank Ltd.**[4] had refused to remand the matter back to the arbitral tribunal and set aside the arbitral award and held that an arbitral award that does not render findings on contentious issues is perverse and is liable to be set aside on the ground of patent illegality under Section 34 of the Act. The relevant paragraphs of the decision in the aforesaid case are reproduced below:-

> 38. In absence of any finding on Point 1, as pleaded by the respondent and further, it is their case that relevant material produced before the arbitrator to prove "accord and satisfaction" between the parties, is not considered, and the same amounts to patent illegality, such aspects are to be considered by the Court itself. It cannot be said that it is a case where additional reasons are to be given or gaps in the reasoning, in absence of a finding on Point 1 viz. "whether the contract was illegally and abruptly terminated by the respondent?".
>
> ...
>
> 41. Under the guise of additional reasons and filling up the gaps in the reasoning, no award can be remitted to the arbitrator, where there are no findings on the contentious issues in the award. If there are no findings on the contentious issues in the award or if any findings are recorded ignoring the material evidence on record, the same are acceptable grounds for setting aside the award itself. Under the guise of either additional reasons or filling up the gaps in the reasoning, the power conferred on the Court cannot be relegated to the arbitrator. In absence of any finding on contentious issue, no amount of reasons can cure the defect in the award.

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> **42. A harmonious reading of Sections 31, 34(1), 34(2-A) and 34(4) of the Arbitration and Conciliation Act, 1996, make it clear that in appropriate cases, on the request made by a party, Court can give an opportunity to the arbitrator to resume the arbitral proceedings for giving reasons or to fill up the gaps in the reasoning in support of a finding, which is already rendered in the award. But at the same time, when it prima facie appears that there is a patent illegality in the award itself, by not recording a finding on a contentious issue, in such cases, Court may not accede to the request of a party for giving an opportunity to the Arbitral Tribunal to resume the arbitral proceedings.**
>
> **(Emphasis supplied)**

22. Considering the aforesaid settled principles of law and the facts of the present case, since the impugned arbitral award has not rendered any finding on *inter-alia* the following important issues, the same suffers from the vice of patent illegality and is liable to be set aside. The following are the issues on which no finding has been rendered:-

i. No finding on whether the Petitioner is a member of Respondent No. 1-Bank.

ii. No finding on whether the dispute is an arbitrable dispute under the MCS Act.

iii. No finding on whether an application was made by the Petitioner to become a member of Respondent No. 1-Bank

iv. No finding on whether the loan/cash-credit facility was availed by the Petitioner as a co-borrower along with Respondent No. 2 in Loan Account No. CC/111 (Kurla Branch), and further whether the mortgaged flat of the Petitioner was actually mortgaged by the Petitioner

v. No finding on whether the documents on which the loan/cash-credit facility was availed by Respondent No. 2 actually bore the Petitioner's signature, and whether the Petitioner's signature was forged.

23. Therefore, as there are no findings on the aforesaid contentious issues, interference under Section 34 of the Act is warranted. The impugned arbitral award is set aside. Any amount deposited in Court shall be released within the expiry of **one month** from the date on which this judgement is uploaded on this Court's website. The Petition is allowed, and interim application(s), if any, do not survive and are accordingly disposed of. No costs. The parties are at liberty to initiate fresh arbitration proceedings in respect of the present dispute in accordance with law.

(AARTI SATHE, J.)