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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgement reserved on: 09.05.2023

% *Judgement pronounced on: 24.05.2023*

\+ **FAO (COMM) 4/2022 & CM APPL. 1408/2022**

NAJMUS SEHAR ..... Appellant

Through: Mr Kshitiz Mahipal and Mr Khairun Nisa, Advocates.

versus

M/S BOMBAY MARCANTILE COOP BANK & ORS.

..... Respondent

Through: Mr Mirza Amir Baig, Advocate for R-1.

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER
HON'BLE MR. JUSTICE GIRISH KATHPALIA

GIRISH KATHPALIA, J.:

1. This appeal, brought under Section 37(1)(c) of the Arbitration and Conciliation Act 1996 assails order dated 30.10.2021 passed by the learned District Judge (Commercial)-05, Central, Tis Hazari Courts, Delhi, whereby objection petition filed under Section 34 of the Act by the appellant were dismissed. Upon service of notice, the respondent no. 1 bank (*claimant before the arbitral tribunal*) entered appearance through counsel to oppose this appeal. But respondents no. 2 and 3 (*the principal borrower and the successor of the now deceased co-guarantor before the arbitral tribunal*) opted not to contest the appeal despite service of notice.

1.1 We heard learned counsel for the appellant and for the respondent no. 1 bank.

2. Briefly stated, circumstances leading to this appeal are as follows. On 14.10.1998, the present respondent no. 2 availed loan of Rs. 2,90,000/- from the present respondent no. 1 co-operative bank for purchase of a new Ambassador car against hypothecation, for which the appellant and the now deceased father of the present respondent no. 3 stood guarantor. The present respondent no. 2 having turned defaulter, liability to repay the loan with interest rose across the period to a sum of Rs. 10,11,640/-. Consequently, the present respondent no. 1 bank invoked arbitration proceedings against the principal borrower (*respondent no. 2 herein*) as well as the guarantors (*the appellant and the now deceased father of respondent no. 3 herein*), which culminated into an ex-parte award dated 08.05.2018. During pendency of execution proceedings, the appellant filed objection petition under Section 34 of the Arbitration and Conciliation Act, which was dismissed by way of the impugned order. Hence, the present appeal.

3. During final arguments, learned counsel for appellant contended that the impugned order is not sustainable in the eyes of law, and assailed the impugned order as well as the arbitral award, mainly on three grounds. Firstly, it was contended that the arbitral award was wrongly passed ex-parte insofar as the appellant despite being a respondent to the claim was not served with notice of the arbitral proceedings. Secondly, it was argued that the loan having been advanced on 14.01.1998, the reference to the arbitral

tribunal on 23.05.2014 was clearly barred by limitation. Thirdly, it was contended that role of the appellant being merely a guarantor and the respondent no. 2 being principal borrower and alive, the dispute ought to have been raised only against respondent no. 2.

4. On the other hand, learned counsel for respondent no. 1 supported the impugned order and contended that the appeal is devoid of merit. Learned counsel for respondent no. 1 contended that notice of the arbitral proceedings was duly served on the appellant by way of publication since the appellant kept avoiding service of the same. On the issue of limitation, learned counsel for respondent no. 1 referred to the provision under Section 85(1)(a) of the Multi State Co-operative Societies Act, 2002 and claimed that there was no breach of limitation period.

5. In rebuttal arguments, learned counsel for appellant claimed that vide Section 85(2) of the Act, the limitation period for reference was only three years from 14.01.1998, so the arbitral proceedings were time-barred. It was also claimed by learned counsel for appellant that the appellant was fraudulently made to sign the guarantee papers, so cannot be held liable. However, learned counsel for appellant did not dispute that notice of the execution proceedings was received by the appellant at the same address from where notice of the initiation of arbitral proceedings kept returning unserved, which lead to directions to serve the notice by publication.

6. To begin with, argument advanced on behalf of the appellant that respondent no. 2 being the principal borrower, in the absence of any action

against respondent no. 2, there can be no action against the appellant who was "merely" a guarantor, is contrary to the fundamental legal position that liability of guarantor is co-extensive with that of the principal borrower and both of them are jointly and severally liable to the lender. Besides, the learned counsel for appellant appears to have ignored that the arbitral proceedings in the present case were conducted against not just the appellant but against the principal borrower respondent no. 2 as well as co-guarantor, respondent no. 3 and the same culminated into the arbitral award.

7. So far as the issue of service of notice of arbitral proceedings, as mentioned above, admittedly notice of the arbitral proceedings was sent at the same address where notice of the execution proceedings was received by the appellant. Notice of the arbitral proceedings was sent to the appellant at his residential address, 1802 Ahmad Manzil, Kalan Mahal, Dariya Ganj, Delhi, which is admittedly the correct address of the appellant and also mentioned in memo of parties to this appeal. But the notice issued by the arbitral tribunal returned unserved as many as three times through courier, so the arbitral tribunal had to take resort to the substituted service by way of the publication of the notice in the newspaper "Rashtriya Sahara". Since despite substituted service, none appeared for the principal borrower and both the guarantors, there was no option before the arbitral tribunal but to proceed ex-parte on 11.05.2015 against them. The appellant himself having not joined the arbitral proceedings, cannot now claim that he was fraudulently made to sign the guarantee papers.

8. Then comes the limitation challenge insofar as, according to the appellant the loan having been advanced on 14.01.1998, reference to the arbitral tribunal on 23.05.2014 was time-barred. The rebuttal argument advanced on behalf of appellant that vide Section 85(2) of the Multi State Co-operative Societies Act, the dispute required to be referred to arbitration shall be regulated by the provisions of the Limitation Act as if the dispute were a suit, completely ignores that the said provision operates in disputes other than those mentioned in sub section (1) of Section 85 of the Act. The provision under Section 85(1) of the Act stipulates thus :

> *"85. Limitation.—*
> *(1) Notwithstanding anything contained in the Limitation Act, 1963 (36 of 1963), but subject to the specific provisions made in this Act, the period of limitation in the case of a dispute referred to arbitration shall,—*
> *(a) when the dispute relates to the recovery of any sum including interest thereon due to a multi-State co-operative society by a member thereof, be computed from the date on which such member dies or ceases to be a member of the society;*
> *(b) save as otherwise provided in clause (c), when the dispute relates to any act or omission on the part of any of the parties referred to in clause (b) or clause (c) or clause (d) of sub-section (1) of section 84, be six years from the date on which the act or omission, with reference to which the dispute arose, took place;*
> *(c) when the dispute is in respect of an election of an officer of a multi-State co-operative society, be one month from the date of the declaration of the result of the election".*

9. It is clear from the above quoted provision that where a dispute relates to recovery of money including interest payable to a co-operative society by its member, the period of limitation for referral to arbitration would be computed from the date on which the member dies or ceases to be a member of the society. And that is notwithstanding anything contained in the

Limitation Act. On the face of it, the provision under Section 85(1)(a) of the Act would appear to be an extraordinary provision of law. But on a brief traverse through the concept, it appears to have been created in order to ensure nurturing of the bond between the co-operative society and its member till death of the member or cessation of his membership, coupled with the upkeep of fiduciary interest of the co-operative scoeity.

10. In the month of March 2002, Government of India framed a detailed National Policy on Co-operatives, embodying the origin and growth of co-operative movement in India and the existing constraints as well as the policy and plan of action to overcome the same. As observed *inter alia* in the said policy document, the ideology of co-operatives is based on the principles of self-help, self-responsibility, democracy, equality, equity and solidarity. The policy decision enunciated by the Government of India in consultation and collaboration with the State governments included recognizing the need for incorporating special provisions in the Co-operative Societies Acts with regard to banking, housing, real estate development, processing, manufacturers' co-operatives and infrastructure development etc. The policy decision also recognized the need to provide preferential treatment, as far as possible to the co-operatives engaged in areas such as credit, labour, consumer, services, housing, development of SC/ST and women and development of emerging areas as well as sectors requiring people's participation especially in rural areas. The policy concluded with the belief that it would ensure enduring autonomy and lasting viability to the co-operatives as democratically owned self-reliant enterprises, responsible and accountable to their members and to a larger public interest.

11. As laid down in its preamble, the Multi State Co-operative Societies Act, 2002 was enacted to consolidate and amend the law relating to co-operative societies with objects not confined to one State and serving the interests of members in more than one State, to facilitate the voluntary formation and democratic functioning of co-operatives as people's institutions based on self-help and mutual aid and to enable them to promote their economic and social betterment and to provide functional autonomy and for matters connected therewith or incidental thereto.

12. Thence, the provision under Section 85(1)(a) of the Act, while dealing with the limitation period for reference of money dispute between the co-operative society and its defaulting member to arbitration, carves an extraordinary niche out of the general law of limitation. And that is in absolute consonance with the basic purpose of creation of this statute.

13. Falling back to the present case, admittedly, the appellant was not only a member but also a shareholder of the respondent no.1 bank, as established vide Ex. CW1/5 whereby the appellant had purchased shares of the respondent no. 1. That being so, for the purposes of recovery of money with interest payable by the appellant to the respondent no. 1, the limitation period for referral of dispute to arbitration would be governed by Section 85(1)(a) of the Act and not by the provisions of the Limitation Act. Since the appellant is alive and has not ceased to be a member of the respondent no. 1 bank, as on 23.05.2014, limitation period for referral of dispute did not even commence and therefore, the referral to arbitration was not bad in law.

14. As also correctly observed in the impugned order by the learned District Judge (Commercial), the scope of objections under Section 34 of the Act is quite limited and is not similar to the scope of appellate jurisdiction.

15. We are unable to find any infirmity in the impugned order, so the same is upheld and the appeal is dismissed. All pending applications stand accordingly disposed of.

16. Copy of this order be sent to the concerned court and file be consigned to records.

(GIRISH KATHPALIA)
JUDGE

(RAJIV SHAKDHER)
JUDGE

MAY 24, 2023