HIGH COURT OF JUDICATURE AT BOMBAY

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

COMMERCIAL ARBITRATION PETITION NO. 220 OF 2022

Kalpesh Shantikumar Mehta & Ors .. Petitioners

Versus

NKGSB Co-op. Bank Ltd and Anr .. Respondents

WITH

COMMERCIAL ARBITRATION PETITION NO. 221 OF 2022

KSM Multitrade LLP and ors .. Petitioners

Versus

NKGSB Co-op. Bank Ltd and Anr .. Respondents

...

Mr.Anshul Anjarlekar i/b Raval Shah Associates for the petitioners.
Mr.Joel Carlos for the respondent no.1.
Mr.Manish Upadhye, AGP for the respondent no.3.

CORAM: BHARATI DANGRE, J.
DATED : 9th JANUARY, 2023

JUDGMENT:-

1 The two petitions, under Section 14 of the Arbitration and Conciliation Act, 1996 are filed against the respondent no.1, NKSGB Co-operative Bank Ltd, registered

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under the Multi State Co-operative Societies Act (for short 'MSCS Act'), which is carrying on business of Banking as per Section 5 of the Banking Regulation Act, 1949. The respondent no.2 to the Petition is the Central Registrar of Co-operative Societies, which is vested with powers under the MSCS Act, in terms of the order dated 8/6/2022, the Commissioner for Co-operation and Registrar of Co-operative Societies, Maharashtra State, acting as delegate of the respondent no.2 under the MSCS Act, 2002, is also impleaded as a respondent no.3.

2 The respondent no.1, NKGSB is party to the arbitral proceedings and is the contesting party.

Heard Mr.Anshul Anjarlekar for the petitioners, Mr.Joel Carlos for respondent no.1 Bank and Mr.Manish Upadhyay, the learned AGP for the State.

The petitioners in both the petitions are the individuals who had availed certain credit facilities from the respondent no.1 Bank and the other petitioners are the guarantors towards the credit facilities so availed.

3 The petitioners, are the parties to the arbitration proceedings, which according to them, were initiated by the respondent no.1 Bank on a reference being filed and they gained knowledge of their implication in the said proceedings, when ex-parte interim order was passed against them as regards certain immovable properties belonging to them. On the

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communication served upon the petitioners, they gained knowledge that an Arbitral Tribunal has been constituted on the request of the respondent no.1 and one M.H. Raval was appointed as a Sole Arbitrator by respondent no.3, to adjudicate upon the purported disputes that had arisen between the parties. On knowing, the scheduled date of hearing before the Tribunal, the petitioners put their appearance and contested their case by filing a written statement.

The petitioners allege that after filing of the written statement, the Tribunal directed listing of the matter for final hearing, but it failed to abide by the basic principles of natural justice and *inter alia* failed to even draft the points for determination, and did not even afford an opportunity to tender oral or documentary evidence, in support of their defence.

This constrained the petitioners in both the petitions to file applications before the Arbitral Tribunal, requesting it to frame points for determination and permitting the parties to file their evidence and also to permit them to cross-examine the witnesses of respondent. It is only upon such steps being taken, the Tribunal passed a common order on 1/9/2021, in both the applications, under which parties to the proceedings were permitted to file their respective evidence affidavits along with the compilation of original documents. Even the Tribunal formulated issues for its determination; the prime issue being whether the Bank had proved its claim of the amount due and

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payable by the petitioners along with the agreed interest and whether the opponents to the proceedings i.e. the petitioners had proved that the excessive rate was charged in the OD facility availed by them, and whether the NPA classification of their facility and funded interest on loan, is as per RBI guidelines.

4 The petition specifically plead that pursuant to these steps being taken by the Sole Arbitrator, it was envisioned by them that the Sole Arbitrator Mr.M.H. Rawal was hearing multiple matters, wherein the NKGSB Co-operative Bank was the disputant.

The petitioners, therefore, filed an Interim Application u/s.12(1)(a) and 12(3) of the Act read with Fifth Schedule of the Arbitration and Conciliation Act, 1996 on 26/10/2021 and thereafter, the matter was adjourned for one or the other reason. In the mean time, Mr.Rawal was substituted by another Sole Arbitrator Mr.Shyam Tinaikar, by the order of the Commissioner for Co-operation and Registrar of Co-operative Societies, Maharashtra. In the wake of the said order dated 17/11/2021, Mr.Tinaikar was appointed as Arbitrator in 9 different cases.

The petitioners were also provided with a disclosure by the Sole Arbitrator as mandated u/s. 12(1) of the Arbitration Act and the copy of the disclosure furnished by the learned Arbitrator in form of a self declaration of the prospective

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arbitrator, indicated that at presently, he was dealing with thirty(30) Arbitrations of the Urban Co-operative Banks and he was also acting as Arbitrator for several Co-operative Banks including the NKGSB Co-operative Bank, as he was designated Arbitrator from 2010 till March 2020.

5 This disclosure was found to be appalling, as the petitioners realized that the Arbitrator, had acted as Sole Arbitrator in various disputes and he was also appointed to adjudicate the disputes in which the petitioners were impleaded as parties before the Tribunal along with 9 other disputes. Taking note of the multiple arbitrations which were entrusted to sole arbitrator, a reasonable doubt arose in the mind of the petitioners about his impartiality and independence and his capability to handle multiple arbitration proceedings in the same time line. Formulating it's doubt in the backdrop of Fifth Schedule of the Arbitration and Conciliation Act, which according to the petitioners, provide guidelines in determining whether the circumstances exist, which gave rise to a justifiable doubt about the independence or impartiality of the arbitrator, the petitioners contend that as per entry 22 of the Fifth Schedule of the Act of 1996, the appointment of the Arbitrator is bad in law.

The said entry is invoked by the petitioner by submitting that as per the said entry, if the Arbitrator has within past three years, been appointed as Arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties,

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it would be sufficient ground to challenge his mandate, as it would directly affect his independence and impartiality.

6 As the circumstances gave rise to justifiable doubts as to the independence and impartiality of the sole arbitrator, the petitioners raised a challenge to the Constitution of the Arbitral Tribunal by filing an Application before the Tribunal itself within the limitation prescribed u/s.13(2) of the Act. In accordance with Section 13(2) of the Act, the petitioners filed Interim Application u/s.12(1)(a) and 12(5) of the Fifth Schedule, inter alia, challenging the appointment of the Arbitrator and praying for his recusal from the Tribunal.

This application was strongly opposed by the Bank by filing written submissions, the end result of the application, being its rejection on 24/2/2022 by the Arbitrator, who was competent to rule upon his competency, by dismissing the application filed by the petitioners.

7 It is this order which resulted in the petitioners invoking Section 14 of the Arbitration Act, by making a specific submission that the mandate of the Arbitrator stood terminated as he became *de jure* or *de facto* unable to perform his functions or for other reasons, failed to act without undue delay. Contending that in terms of Section 14 (2), since a controversy has arisen in respect of the ground referred to in Section 14(1)(a), which can be only resolved through Court, which would decide upon the

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termination of the mandate of the Arbitral Tribunal, they approached this Court by filing the present petition.

8 I have heard the counsel for the petitioners, who are the opponents before the learned Arbitral Tribunal, in support of the prayers in the petition which read thus :

> (a) That this Hon'ble Court be pleased to pass an order directing that the Learned Arbitrator comprising of the Learned Sole Arbitrator, Mr.Shyam V. Tinaikar be terminated under the provisions of Section 14(2) of the Arbitration Act.
>
> (b) That this Hon'ble Court be pleased to direct the respondent No.2 to appoint a substituted Arbitrator in place of the learned Sole Arbitrator Mr.Shyam V. Tinaikar.
>
> (c) That pending the hearing and final disposal of the present Application this Hon'ble Court be pleased to stay the proceedings and further hearing of the Arbitration Case No. ARB/NKGSB/007 of 2021 before the Ld. Arbitral Tribunal.

9 The learned counsel for the petitioners would vehemently urge that there are certain minimum levels of independence and impartiality that should be required of the Arbitral process, regardless of the parties apparent arrangement for sanction of loan, in each case, but this shall not permit, Appointment of an arbitrator, who is himself a party to the dispute or who has a commonality with the parties, or has any

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interest in the subject matter. The learned counsel would submit that with this precise reason in the background, the Arbitration Act 1996 was extensively amended by Amendment Act of 2015, which contemplate a disclosure by the Arbitrator, in writing of any circumstances, which would affect his ability to be independent or impartial and also his ability to devote sufficient time to the arbitration process and in particular, to complete the arbitration within a period of 12 months. He would submit that the Fifth Schedule inserted by the said Amendment comprises of several circumstances, which would give rise to a justifiable doubt about the independence or impartiality of an Arbitrator. The disclosure in form of Sixth Schedule, according to the learned counsel, necessiates his disqualification, if at all, he fall within any of the clauses enumerated in Fifth Schedule, in which each of the situation give rise to a doubt about the independence or impartiality of an Arbitrator.

By specifically inviting my attention to clause 22 of Schedule V, the learned counsel for the petitioners would vehemently submit that since the Arbitrator, who has been appointed by the Central Registrar/his delegate i.e. respondent no.3, his appointment would fall within the teeth of Section 12 and he incurs a disqualification, bestowing upon him a *de facto/de jure* disqualification to continue with the arbitration proceedings. He would submit that Section 12 of the Act of 1996 contemplate the grounds for challenge to the appointment of

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Arbitrator, if the existing circumstances give rise to a justifiable doubt about his independence or impartiality and sub-section (4) of Section 12 permit such a challenge when the party became aware, after the appointment has been made. According to the learned counsel, the challenge procedure is prescribed in Section 13 and Section 14 of the Act as amended by Act no.3/2016, the mandate of an Arbitrator shall terminate and he shall be substituted by another arbitrator, if he is *de jure* or *de facto* unable to perform his functions. On terminating the mandate of the erstwhile arbitrator as having incurred disqualification, the learned counsel would submit that the arbitration process can continue by substituting the Arbitrator who is a qualified one.

10 The learned counsel would further assertively submit that the Multi-State Co-operative Societies Act, 2002 which contain a scheme for Resolution of the disputes, in the manner prescribed in Chapter IX of the Act, through Section 84, which contemplate resolution of disputes through Arbitration process which shall be carried out as if the arbitration process is being undertaken under the provisions of Arbitration and Conciliation Act, 1996. Sub-section (4) of Section 84 provide that all the provisions of the Arbitration and Conciliation Act, with it's amended form would govern the proceedings u/s.84 of the MSCS Act. By applying the aforesaid principle, the submission advanced is, when the Arbitration and Conciliation Act came to be amended by the Amending Act, 2015 and Section 12 was

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amended with a specific provision being inserted to strengthen the sanctity of the arbitral proceedings, by having a neutral Arbitrator, the provisions to that effect must be read into the Multi-State Co-operative Societies Act, 2002.

11 Per contra, the learned counsel for the Bank and the learned AGP for the Registrar, Co-operative Societies, would submit that the Multi State Co-operative Societies Act is a special enactment, which contemplate a procedure for resolving the disputes arising thereunder, contemplated in the mode prescribed under section 84, through an Arbitrator who would work in a distinct situation and merely because the sole Arbitrator has also been appointed in 9 other cases, do not warrant his termination on having incurred disqualification. The maintainability of the petition is also doubted by submitting that the Arbitration Act, 1996 do not permit any kind of interference, as being prayed in the petition filed u/s.14 and therefore, invocation of Section 14(2) and Section 15(2) is entirely misplaced. It is submitted that the Tribunal has rightly assessed the prevailing position of law and has rejected the application.

The counsel for the respondents would place reliance upon the decision of this Court in case of *TJSB Sahakari Bank Ltd Vs. M.S. Laxmi Industries and ors.* (CARBP 1/2022) and another decision of Division Bench in case of *Niwas Dattatraya Lad and ors vs. Punjab and Maharashtra Co-operative Bank Ltd,* holding that MSCS Act is a special statute and complete code for

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the purposes of settlement of dispute between the members and/or the Society, and the aspect of appointment of Arbitral Tribunal and/or illegality and/or the power of jurisdiction shall be tested before the Arbitral Tribunal as contemplated u/s.16 of the Arbitration Act, 1996 and once such application is rejected and the issue of jurisdiction and the power to arbitrate is upheld, the remedy available to a party is to challenge the main award by invoking appropriate proceedings u/s.34(6) of the Arbitration Act.

Reliance is also placed on a decision of this Court in companion Arbitration Appeals decided by the Division Bench on 13/10/2017 in case of *M/s.J. Square Steels Pvt.Ltd, Aurangabad Vs. Union of India,(WP NO.5528/2010 with CIVIL APPLICATION NO.4032/2017)* and the connected First Appeal as well as Arbitration Appeals.

12 On hearing the learned counsel for the petitioner and respondents, I have perused the copy of the petition as well as the affidavit in reply placed on record. Before appreciating the rival arguments advanced before me by the respective counsel, I must inevitably turn myself to the provisions of the Multi State Co-operative Societies Act, 2002, since the disputes that have arisen between the parties are referred to arbitration under the scheme contemplated u/s.84 of the said Act.

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The MSCS Act is a law enacted by the Parliament to facilitate the organization/administration and functioning of co-operative societies, with objects not confined to one State and serving the interest of members of Societies in more than one State. Since the provisions of the Co-operative laws in different States governing these multi-state co-operative societies are at variance from one to another, and there was lack of uniformity in the existing arrangement, the Parliament deemed it expedient to have a comprehensive central legislation to provide for a central authority, to be responsible for their registration, promotion and supervision. The Act intended to provide functional autonomy and democratic management of the Multi-State Co-operative Society. The new legislation also ensured financial management by the Co-operative Society themselves by formation of subsidiary institutions by the Co-operatives, by receipt of deposits, raising of loans and grants from external sources in accordance with their bye-laws and to invest in shares, securities or assets of any other institutions, with previous approval of the Central Registrar.

13 In the scheme of enactment, a special chapter is introduced for settlement of disputes, which contemplate, that if any dispute touching the constitution, management or business of a multi-state co-operative Society arises, amongst members or between a member, past member and a person claiming through a Member and a Multi State Co-operative Society, its Board or any

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Officer, agent or employee or liquidator past or present, or between the Multi-State Co-operative Society or it's Board or between one multi-state co-operative Society and other, such dispute shall be resolved through Arbitration. What disputes shall amount to touching the Constitution, Management or business of a multi state co-operative society, is also stipulated in sub-section (2) of Section 84. Sub-section (3), (4) and (5) of Section 84 read thus :-

> (3) If any question arises whether a dispute referred to arbitration under this section is or is not a dispute touching the constitution, management or business of a multi-State co-operative society, the decision thereon of the arbitrator shall be final and shall not be called in question in any court.
> (4) Where a dispute has been referred to arbitration under sub-section (1), the same shall be settled or decided by the arbitrator to be appointed by the Central Registrar.
> (5) Save as otherwise provided under this Act, the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply to all arbitration under this Act as if the proceedings for arbitration were referred for settlement or decision under the provisions of the Arbitration and Conciliation Act, 1996.

Section 85 of the MSCS Act prescribe the period of limitation in the case of a dispute being referred for arbitration.

14 Section 84 of the MSCS Act open with a non obstante clause, would clearly indicate the special nature of the mechanism chalked out for reference of disputes, and it is evident that the legislature intended to create a forum for resolution of

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disputes involving a multi-state co-operative Society through arbitration. In what manner the proceedings shall then be carried out, is also provided by the legislature, by virtue of sub-section (5), which by reference make the provisions of the Arbitration and Conciliation Act, 1996, applicable to all arbitrations under the Act, as if the proceedings for arbitration were referred to for settlement or decision, under the provisions of Arbitration and Conciliation Act, 1996.

15 In the scheme of the above enactment, it is not disputed between the parties that the dispute that has been referred to the Arbitrator, is the one which is falling within the purview of Section 84 and hence, capable of being arbitrated.

The bone of contention between the parties is the competency of the Arbitrator to adjudicate upon the said dispute. Pertinent to note that the Arbitrator came to be appointed by the Commissioner of Co-operation and Registrar, Co-operative Society Maharashtra State, Pune i.e. respondent no.3, who is conferred with the powers by the Central Government vide notification No.S.O. 216/E dated 24/02/2003, under Multi State Co-operative Societies Act, 2002.

By exercising the said power u/s.84(4), the Arbitrator came to be appointed for the NKGSB Co-operative Bank. The order of appointment reads thus :-

> "In exercise of the powers conferred by the Central Government vide Notification No.S.O. 216(E) dated

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24/02/2003, I, Anil Kawade, Commissioner for Cooperation and Registrar of Cooperative Societies Act, 2002 (hereinafter referred as "the MSCS Act") hereby appoint Shri Shyam V. Tinaikar as Arbitrator for NKGSB Co-op Bank Ltd, Mumbai (Multistate Scheduled Bank), (hereinafter referred as "the multi state society") in respect of its offices located within the State of Maharashtra.

The Arbitrator is to settle any disputes (other than a dispute regarding disciplinary action taken by the multistate society against its paid employees or an industrial dispute as defined in clause k of Sec.2 of the Industrial Dispute Act, 1947) touching the constitution, management or business of the multistate society in respect of its offices located within the Maharashtra State as per provisions of the Arbitration and Conciliation Act, 1996 (hereinafter referred as "the Arbitration Act") read with section 84 of the MSCS Act.

The Arbitrator is appointed for the 10 disputes mentioned in the annexure A, is annexed herewith.

It is also pointed out that as per section 84 of the MSCS Act save as otherwise provided under the said Act, the provisions of the Arbitration Act shall apply to all arbitration under the said Act as if the proceedings for arbitration were referred for settlement of decision under the provisions of the Arbitration Act. The fee and the other expenses of Arbitrator shall be governed by the provisions of the Arbitration Act.

The Arbitrator shall submit immediately a brief report regarding any adverse remarks, strictures or orders passed by the competent court against the Arbitrator, if any.

The appointment of Shri Shyam V. Tinaikar as the Arbitrator for the multistate society is valid for one year from the date of this order or date of expiry of his empanelment to the panel of arbitrators whichever is earlier".

16 Upon his appointment, the Arbitrator gave his declaration, as a presiding arbitrator and he made the following disclosure;

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Prior experience (including experience with arbitration	(i) Practicing as Advocate since 1986 (ii) Discharging duties as Arbitrator for PMCB Ltd, since 2005. (iii) Was Arbitrator for TJSB Ltd from 2009 till March 2020 (iv) Was Arbitrator for SVC Bank Ltd from 2012 till 2018 (v) Was Arbitrator for NKGSB Co-op Bank Ltd from 2010 till March 2020.
Number of ongoing arbitration cases details	
1. Urban Co-operative Banks	30
2. Co-operative Credit Societies	N.A.
3. Other Societies	N.A.
Name of Cases pending more than one year	NKGSB Co-op Bank Ltd
Circumstances disclosing any past or present relationship with or interest in any of the parties or in relation to the subject matter in dispute, whether financial, business, professional or other kind which is likely to give rise to justifiable doubts as to your independence or impartiality (list out)	NO ADVERSE REMARKS IN ANY DISPUTES
Circumstances which are likely to affect your ability to devote sufficient time to the Arbitration and in particular your ability to furnish the entire arbitration within twelve months (list out)	NOTHING

The recusal of the Arbitrator who gave the above disclosure, is sought on the ground that he is appointed by the order of respondent no.3 to adjudicate upon 10 different disputes,

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to which the disputant is a party and he is acting as an Arbitrator for the disputant since the year 2010 and by Entry no.22 of Fifth Schedule, since he has been appointed as Arbitrator within past three years, on one or two occasions by one of the parties, the said circumstance give rise to a justifiable doubt as to his independence and impartiality and the respondents apprehend the possibility of bias and prejudice.

17 The MSCS Act, a special statute for encouraging the movement of Multi State Co-operative Societies operating in more than one State has provided for mechanism of dispute resolution through Arbitration. This statute by reference has incorporated the provisions of Arbitration and Conciliation Act in sub-section (5) of Section 84 of the Act.

Lord Isher M.R, dealing with legislation by incorporation in Re: Wood's Estate 1886(31) ChD 607, has held thus :-

> "If a subsequent Act brings into itself by reference, some of the clauses of a former Act, the legal effect of that, as has often been held, is to write those sections into the new Act as if they had been actually written in it with the pen, or printed in it and the the moment you have those clauses in the later Act, you have no occasion to refer to the former Act at all".

In case of legislation by incorporation the former Act becomes an integral part and parcel of the latter Act, as if it was written with ink and printed in it. Its validity, including the

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provisions incorporated thereunder, would be judged with reference to the power of the legislature enacting the latter Act. It is not by reference, logically when the provisions in the former Act were repealed or amended, they do not, unless expressly made applicable to the subsequent Act, be deemed to be incorporated in it. The latter Act is totally unaffected by any amendment or repeal. It would however, be subject to certain exceptions, the statute being distinct and different, each to be judged with reference to it's own source that emerges from it's scheme, the language employed and the purpose it seeks to achieve. If a latter Act merely make a reference to the earlier Act or existing law, it is only by way of reference and all amendments, repeals, new law subsequently made, will have effect unless its operation is saved by Section 8(1) of the General Clauses Act or void under Article 254 of the Constitution.

18 By any statutory interpretation, the Court has no power to add the word or interpret the words in a statute. In case of *Gauri Shankar Gaur Vs. State of U.P, (1994) 1 SCC 92*, the Apex Court held as under :-

> "42 Adopting or applying an earlier or existing Act by a competent Legislature to a later Act is an accepted device of legislation. If the adopting act refers to certain provisions in an earlier existing act it is known as Legislation by reference. Whereas if the provisions of another Act are bodily lifted and incorporated in the act then it is known as legislation by incorporation. Legal meaning of these expressions, therefore, is no different

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than the literal meaning. But the consequences of their application are far reaching. When an earlier Act is referred in a later act then any subsequent amendment, addition or alteration in the earlier act automatically , becomes a part of it even for purpose of the later act. But in a legislation by incorporation since the entire provision either wholly or partly stands bodily engrafted, therefore, it stands frozen on the date of incorporation and remains unaffected by any subsequent or future amendment. Why it is so? What is the rationale for it? When an act is wholly or partly referred in another act it has to be applied or acted upon in the form it exists. For instance if a statute provides that the proceedings under the act shall he conducted in accordance with the procedure provided in the CPC then on the date the proceedings commence it is the CPC as existing, on that date which shall apply. The natural consequence that flows from it is that any amendment or alteration in the adopted act becomes operative even in the statute in which it is referred.

Sutherland in his book 'Statutory Construction' has explained it thus,

> A statute which refers to the law of a subject generally adopts the law on the subject as of the time the law is invoked. This will include all the amendments and modifications of the law subsequent to the time the reference statute was enacted.

Same principle is discussed in Corpus Juris Secundum as under :

……Where the reference in the adopting statute is to the law generally which governs the particular subject, and not to any specific statute or part thereof,… the reference will be held to include the law as it stands at the time it is sought to be applied, with all the changes made from time to time, at least as far as the changes are consistent with the purpose of the adopting statute.

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19 In case of *Nagpur Improvement Trust Vs. Vasantrao and Ors, (2002) 7 SCC 657*, distinction was drawn between the category of referential legislation and legislation by incorporation and it was held that the distinction would depend upon language used in the Statute, in which the reference is made to the earlier decision of earlier relevant circumstances. In paragraph no.30, it was held as under :-

> "30 We shall now proceed to consider whether the provisions of the Land Acquisition Act, 1894 as modified by the State Acts stand incorporated in the State Acts or whether there is a mere reference or citation of the land Acquisition Act in the State Acts. The law on the subject is well settled. When an earlier Act or certain of its provisions are incorporated by reference into a later Act, the provisions so incorporated become part and parcel of the later Act as if they had been bodily transposed into it. The incorporation of an earlier Act into a later Act is a legislative device adopted for the sake of convenience in order to avoid verbatim reproduction of the provisions of the earlier Act into the later. But this must be distinguished from a referential legislation which merely contains a reference or the citation of the provisions of an earlier statute. In a case where a statute is incorporated by reference into a second statute the repeal of the first statute by a third does not affect the second. The later Act alongwith the incorporated provisions of the earlier Act constitute an independent legislation which is not modified or repealed by a modification or repeal of the earlier Act. However, where in later Act there is a mere reference to an earlier Act, the modification repeal or amendment of the statute that is referred, will also have an effect on the statute in which it is referred. It is equally well settled that the question whether a former statute is merely referred to or cited in a later statute or whether it is wholly or partially incorporated therein is a question of construction.

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33. In U.P. Avas Evam Vikas Parishad v. Jainul Islam and Anr.(supra) this Court observed:-

> "17. A subsequent legislation often makes a reference to the earlier legislation so as to make the provisions of the earlier legislation applicable to matters covered by the later legislation. Such a legislation may either be (i) a referential legislation which merely contains a reference to or the citation of the provisions of the earlier statute; or (ii) a legislation by incorporation whereunder the provisions of the earlier legislation to which reference is made are incorporated into the later legislation by reference. If it is a referential legislation the provisions of the earlier legislation to which reference is made in the subsequent legislation would be applicable as it stands on the date of application of such earlier legislation to matters referred to in the subsequent legislation. In other words, any amendment made in the earlier legislation after the date of enactment of the subsequent legislation would also be applicable. But if it is a legislation by incorporation the rule of construction is that repeal of the earlier statute which is incorporated does not affect operation of the subsequent statute in which it has been incorporated. So also any amendment in the statute which has been so incorporated that is made after the date of incorporation of such statute does not affect the subsequent statute in which it is incorporated and the provisions of the statute which have been incorporated would remain the same as they were at the time of incorporation and the subsequent amendments are not to be read in the subsequent legislation."

35. It is also well settled that the question as to whether a particular legislation falls in the category of referential legislation or legislation by incorporation depends upon the language used in the statute in which reference is made to the earlier decision and other relevant circumstances.

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20 With this aforesaid legal position emerging through the authoritative pronouncements of the Apex Court, I show now turn to the provision before me, in form of Section 84 of MSCS Act. Since sub-section (5) of Section 84 of the Multi State Co-operative Societies Act, has referred to Arbitration and Conciliation Act, 1996 by way of reference, as a necessary consequence, all the amendments in the Arbitration and Conciliation Act would apply to the arbitration to be carried u/s.84 of the MSCS Act, 2002 and the amended provisions of Arbitration and Conciliation Act, automatically become applicable to the mechanism of arbitration prescribed u/s.84.

In the wake of the aforesaid scenario emerging, when the Arbitration and Conciliation Act, 1996 with its amendment is applicable to the arbitration process, to be followed u/s.84 of the Multi State Co-operative Societies Act, 2002 all the amendments inserted in the Act of 1996, including the one in Section 12, along with Schedule V, VI and VII, is also applicable to the proceedings undertaken by the Arbitrator under the MSCS Act. This would necessarily convey that the disclosure by the Arbitrator as contemplated u/s.12 of the Arbitration and Conciliation Act, 1996, would also become part of the Arbitration process as postulated u/s.84 of the MSCS Act.

21 The insertion of Section 12, by the amended Act, intended to achieve the impartiality and independence of the

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Arbitrator and hence it contemplated a disclosure in writing by the proposed arbitrator, of the following circumstances :

> (a) Existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and
>
> (b) which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months.

The explanation (1) and (2) appended to Section 12 is of utmost significance, which reads thus :-

> "Explanation 1 –The grounds stated in the Fifth Schedule shall guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator.
>
> Explanation 2 – The disclosure shall be made by such person in the form specified in the Sixth Schedule".

Sub-section (2) of Section 12 prescribe that an arbitrator from the time of his appointment and throughout the arbitral proceedings, shall without delay, disclose to the parties in writing any circumstances referred to in sub-section (1) unless they have already been informed by him, and an appointment of the Arbitrator may be challenged, if the circumstances exist which give rise to justifiable doubts as to his independence or

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impartiality, or he does not possess the qualifications agreed to, by the parties.

22 Undisputedly, the intent in enacting Section 12, being made manifestly clear, i.e. to make the procedure of arbitration, more neutral and impartial, before any party expresses any doubt about the independence or impartiality, by pointing out any relevant circumstances, the legislature deemed it fit for the Arbitrator himself to make a disclosure of any such circumstance, which would be amounting to any conflict of interest between the parties and himself, so as to give rise to a reasonable suspicion that the arbitration proceedings are not conducted in a fair and impartial manner.

23 When the Vth Schedule to the Arbitration Act, 1996 is read along with Section 12 of the Act, one finds the circumstances being compartmentalized under six distinct heads, being:

(i) Arbitrator's Relationship with the parties or counsel.

(ii) Relationship of the Arbitrator to the Dispute.

(iii) Arbitrator's Direct or Indirect Interest in the Dispute.

(iv) Previous Services for one of the parties or other involvement in the case.

(v) Relationship between an Arbitrator and another Arbitrator or counsel.

(vi) Relationship between Arbitrator and Party and others involved in the Arbitration.

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The first category of circumstances, which may give rise to a doubt about the independence and impartiality of an Arbitrator, is the Arbitrator's relationship with the parties or their counsel. This necessarily contemplate the Arbitrator being an employee, consultant, advisor, in present or in past, or sharing any business relationship with a party. It also envisage a situation where the Arbitrator represents the lawyer or a law firm acting as a counsel for one of the parties or where the Arbitrator is a Manager, Director or part of the management. It also contemplate an Arbitrator having close family relationship with one of the parties or having significant financial interest in one of them or an affiliate of one of the parties.

The other two categories are indicative of the interest of the arbitrator in the dispute, either directly or indirectly.

The fourth category, enlist the circumstances which exclusively refer to another facet of interconnect between the Arbitrator and the Party, and what is emphasized upon, in the present case, is entry no.22 which reads thus :-

> Entry No.22 : "The arbitrator has within past three years been appointed as arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties".

24 The above circumstance necessarily intend to cover an Arbitrator, who has been appointed, on more than two

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occasions in the last three years by one of the parties or an affiliate of one of the parties.

A careful reading of the above clause, when *juxtaposed* against the appointment of a Sole Arbitrator in the present scenario, by respondent no.3, Commissioner of Co-operation, Registrar of Co-operative Societies, acting as a delegate of the Central Registrar, empowered under sub-section (4) of Section 84 to appoint an arbitrator to adjudicate the disputes, covered under sub-section (1) of Section 84, would clearly fall outside the purview of the said alleged embargo.

The reason being simple; that the embargo created under clause 22, comes into picture when the Arbitrator is appointed by one of the parties or an affiliate of one the parties.

25 The MSCS Act contemplate appointment of an arbitrator by the Central Registrar/Commissioner of Co-operative Societies, who is empowered to exercise his power and there is no appointment by any party or an affiliate i.e. either by the disputant bank/borrowers/guarantors. The right of appointment vest only in the statutory authority i.e. Central Registrar and the Arbitration contemplated under the MSCS Act is distinct from the contractual arbitration, where the parties to the *lis* are at liberty to choose an Arbitrator amongst themselves, it being a chosen forum or if they fail to make the appointment in certain circumstances, they can seek an appointment of Arbitrator from

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the Court.

In contrast, under the MSCS Act, what is necessarily contemplated is a statutory arbitration, with the power of appointment of Arbitrator being reposed in an authority created under the statute itself i.e. 'Central Registrar' appointed under sub-section (1) of Section (4) of the Act, which would include any Officer empowered to exercise the power of Central Registrar. Hence, there is no appointment of Arbitrator by any party and the petitioners are under the misconception, that the appointment is made by the Bank, who is the disputant, aggrieved by non-payment of the dues.

When the procedure for appointment adopted by the Central Registrar, is minutely looked into, it is evident that it maintain a panel of Arbitrators, which is constituted every three years and since the powers are delegated to the respondent no.3, the Commissioner, the panel is maintained by him and this Panel is re-constituted every three years. The empanellment is undertaken, by following a specific procedure of empanelling qualified persons to act as Arbitrators. The Commissioner for Co-operation and Registrar of Co-operative Societies has no interest in the subject matter, but he choose an Arbitrator from the panel prepared by him and assign to a particular arbitrator, distinct number of cases filed by a particular disputant and as it could be seen from the appointment order in the present case, the Arbitrator is appointed for 10 disputes, which are mentioned in

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the order of appointment issued, with a clear understanding that the provisions of the Arbitration Act shall apply to the arbitration proceedings and even the fees and other expenses of the Arbitrator shall be governed by Act of 1996.

The order of appointment also contemplate that immediately after his appointment, the Arbitrator shall submit a brief report regarding any adverse remarks, strictures or orders passed by the competent Court against him, if any.

The reason for such a disclosure is obvious, being to ascertain whether the Arbitrator has faced any adverse action at the hands of a competent court, in which circumstances he may be considered to be incompetent to act as an Arbitrator, if his appointing authority feel so.

Not only this, the Arbitrator has also made a disclosure statement in form of 'self declaration of the prospective Arbitrator' as required to be done u/s.12(1)(a) and (b) and Sixth Schedule of Arbitration and Conciliation Act, 1996. In this statement, he has disclosed the number of arbitrations which he has undertaken as well as his prior experience in arbitration proceedings. This include his various arbitration assignments from 2005 onwards. There is also a disclosure that the prospective Arbitrator was an arbitrator for the Disputant Bank from 2010 till March 2020.

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26 The object in introducing the provision for disclosure by the proposed arbitrator in Section 12 of 1996 being apparent, to have transparency in the process of Arbitration and this could be achieved by assuring the independence and impartiality of the Arbitrator to carry out the process and from the disclosure given by the proposed arbitrator, it could be discerned whether the Arbitrator has any direct or indirect relationship with, or has any interest in any of the parties, or in relation to the subject matter in dispute, which may be financial, business, professional or any other kind.

Another factor which could be inferred from the disclosure is whether the Arbitrator would be able to devote sufficient time to the Arbitration process, and in particular, his ability to complete the Arbitration within the period of 12 months. Having more than three arbitrations in hand at the same time, would not per-se disqualify an Arbitrator and that certainly, is not the intention of the Statute to disqualify him, but a disclosure would only give a clarity, on whether he has sufficient time on his hands to devote to the arbitration proceedings, in which he is proposed to be appointed.

27 In the present case, in my considered opinion, I need not go that far to ascertain whether the Arbitrator would be in a position to complete the proceedings with the number of arbitrations assigned to him, since the disclosure contemplated under clause no.22 of Schedule V is for inference of a

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circumstance of impartiality of an arbitrator who was appointed, by one of the parties or an affiliate of one of the parties on more than two occasions in past three years.

28 The axe of impediment or the embargo would not fall upon an Arbitrator appointed by the respondent no.3, i.e. Commissioner of Co-operation and Registrar, Co-operative Society, M.S. as he is not appointed by any of the parties to the dispute or by an affiliate of the disputant and therefore, he having more than two arbitrations assigned to him, would not create any legal impediment on his part. The Arbitrators from the Panel prepared by respondent no.3 have experience in dealing with the disputes being referred to them, which has arisen on the default attributed to the borrowers and guarantors, as against the facility extended to them by the Bank, and in the wake of the expertise possessed by them, the dispute can be conveniently adjudicated and which may not consume considerable length of time and since the Arbitrator is exclusively devoted to the similar nature of work, who shall take up the proceedings of similar nature, it would definitely not create a disqualification in him, to act as an Arbitrator.

Hence, I am not persuaded to accept the argument advanced by the counsel for the petitioners that the Arbitrator has incurred a disqualification, and therefore has become *de jure,* unable to perform his functions as an arbitrator, requiring his mandate to be terminated and the prayer for substituting him by

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a new Arbitrator, which is the relief prayed in the Petition, deserve to be granted.

29 A Division Bench of this Court in *M/s.J. Square Steels Pvt.Ltd, Aurangabad Vs. Union of India,*(supra), speaking through Justice R.D. Dhanuka, had an opportunity to deal with the interface between the two enactments, i.e. Arbitration and Conciliation Act, 1996 and Multi-state Co-operatives Societies Act, 2002, in a petition filed by the Principal Borrower of Abhyudaya Co-operative Bank, seeking a declaration that Section 84 of the Multi-state Co-operative Societies Act, 2002 is unreasonable, arbitrary and violative of Article 14 of the Constitution and hence, deserve to be set aside. The petitioner also sought a declaration that the Arbitrator is required to be appointed only after the dispute is forwarded by the Bank or any one else before the Central Registrar and the Arbitrator shall be appointed in case to case based by applying his mind and one person cannot be appointed as an Arbitrator for the existing and/ or for future disputes. The appointment of the arbitrator was prayed to be quashed and set aside.

The Division Bench was confronted with a somehow similar argument, which is advanced before me that an Arbitrator cannot be appointed for resolving multiple disputes, but there has to be a separate arbitrator and the Bench dealing with the said submission, made the following pertinent observation:-

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"24. Insofar as the submission of the learned counsel for the petitioner that the Central Registrar could not have appointed the learned Arbitrator unilaterally or in anticipation of any dispute, or ought to have appointed an Arbitrator in each case separately or could not have appointed an Arbitrator without giving any opportunity to the petitioner of being heard is concerned, in our view, there is no merit in this submission of the Writ Petition No.5528/2010 with connected matters learned counsel for the petitioner. Under Section 4(2) of the Arbitration Act, the Central Government is empowered to issue notification authorizing any officer of the Central Government or of a State Government in relation to a Multi-state Co-operative Societies Act subject to such conditions as may be specified therein. It is not in dispute that, by exercising such powers under Section 4(2) of the said Multi-state Act, the Central Government had issued a notification on 24.2.2003, thereby directing that the powers exercisable by the Central Registrar Section 84 of the Multi-state Act shall also be exercisable by Registrar of Cooperative Societies of the State/ Union Territories in respect of the Societies located in their respective jurisdiction subject to certain guidelines and conditions as specified in the notification.

25. Based on the said notification, the said Bank i.e. Abhyudaya Co-operative Bank Ltd. had suggested three names of the Advocates for their appointment as Arbitrators in respect of the disputes which may arise between the said bank and its members to the Central Registrar. The Central Registrar accordingly had appointed those three persons as Arbitrators for different regions. The said Bank had 53 Branches in the State having wide area of operation. In our view, the Central Registrar Writ Petition No.5528/2010 with connected matters was thus not required to appoint an Arbitrator in respect of each dispute separately and that also only after such dispute would have arisen. The Central Registrar is empowered to appoint an Arbitrator Section 84(4) of the Multi-state Act in respect of each Multi-state Cooperative Society separately, whether in respect of the existing disputes on the date of such appointment or the disputes which may arise in future on various terms and

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> conditions. These appointments made by the Central Registrar are for a specified period. Such Arbitrators who are appointed by the Central Registrar Section 84(4) of the Multi-state Act in respect of a particular Multi-state Co-operative Society is empowered to deal with all such disputes contemplated Section 84 of the Multi-state Act as and when the dispute arises. Such disputes are mandatorily required to be referred to such Arbitrators who are appointed by the Central Registrar whenever such dispute arises.
>
> 27. In our view, the constitutional validity of Section 84, challenged by the petitioner is thoroughly misconceived and is obviously filed with a view to delay the other proceedings pending between the parties. The petitioner not having availed of the opportunity granted by the learned Arbitrator to file counter claim, cannot be allowed to contend that there was no remedy available to the petitioner/ member to file a claim or counter claim Section 84 of the Multi-state Co-operative Societies Act. In our view, thee is no merit in this Writ Petition No.5528/2010. This Writ Petition deserves to be dismissed".

30 The challenge to the validity of Section 84 of the MSCS Act having failed, on the contention that there has to be a separate Arbitrator for every dispute having been declined by the Division Bench, I must necessarily follow a similar course of action by dismissing the present Arbitration Petitions, holding it to be without any merit, as the contention of the petitioners that the Arbitrator appointed to arbitrate the dispute with the disputant has incurred a disqualification, does not hold to be a meritorious contention. Though I must pertinently observe that a proposed Arbitrator to be appointed u/s.84 of the Multi-state Co-operative Societies Act, must imperatively follow the mandate

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of Section 12, sub-section (1) and (2) of the Arbitration and Conciliation Act, which necessarily include a declaration as contemplated under the VI Schedule of the Arbitration and Conciliation Act. In case if it is revealed that the appointment of the proposed Arbitrator would affect his independence or impartiality, his appointment can always be called in question if it attract any of the circumstance contemplated in Schedule V and Schedule VII of the Arbitration and Conciliation Act.

This not being the case before me, in the two petitions, the Arbitration Petitions deserve a dismissal and they are accordingly dismissed.

Easy on costs.

(SMT. BHARATI DANGRE, J.)

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