



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

WRIT PETITION NO. 3139 OF 2002

1. Navsari Peoples Co-operative Bank Ltd.
A Co-operative Bank incorporated under the Gujrat State Co-operative Societies Act, 1961 (in liquidation) through the District Registrar, Co-operative Societies Navsari as Official Liquidator and having its registered and administrative office at Dindayal Bhavan, Din Dayal Chowk, Opp. Gayan Shala, Near Tower, Navsari 386 445.
2. Arvindbhai Soni,
The Asstt. Manager,
Navsari Peoples' Co-operative Bank Ltd.
having its office at "Din Dayal Bhavan",
Din Dayal Chowk, Opp. Gayan Shala,
Near Tower, Navasari- 396 445.
- 3 District Registrar, Co-operative Societies,
Navasari, as Official Liquidator of The
Navasari People's Co-operative Bank Ltd.
having its address at the Registrar,
Co-op. Societies, Gujarat State,
Block No.10, Juna Sachivalaya,
Gandhinagar, Gujarat.

..Petitioners

versus

1. The National Stock Exchange of India Ltd.
A Company incorporated under The provisions of Companies Act, 1956 with the main object of acting as a recognized Stock Exchange having its registered office at Exchange Plaza, Plot No. 5, 5th floor, Bandra-Kurla Complex, Bandra (E), Mumbai-400 051

2 Framroz Pochara,
Assistant Vice President of Arbitration
Deptt, National Stock Exchange,
Exchange Plaza, Plot No.5, 5th Floor,
Bandra-Kurla Complex, Bandra (East),
Mumbai 400 051.

3 Security & Exchange Board of India,
A Statutory body constituted under the
Securities & Exchange Board of India
Act, 1992, having its office at Mittal
Court, 1st floor, C Wing, Nariman Point
Mumbai-400 021.

4 M/s Home Trade Ltd,
A company incorporated under the
provisions of Companies Act, 1956,
having their registered office at Tower
4, 5th Floor, International Infotech Park,
Navi Mumbai 400 203.

..Respondents

Mr. Rajiv Narulla i/by Jhangiani Narulla & Associates for Petitioners.
Mr. E.P. Bharucha, Sr. Counsel with Ms Pranita M. Dhane i/by Shaunak
Satpute & Co. for Respondent No.1
Mr. S.R. Srivastava i/b Mr. Daya Gupta for Respondent No.3

**CORAM : F.I. REBELLO &
A. A. SAYED , JJ.**

DATED : 25TH MARCH, 2010.

JUDGMENT (PER F.I. REBELLO, J.)

1 The petitioner No.1, now in liquidation, had moved respondent No.1
for reference of the Arbitral Disputes they had with respondent No.4. It is
the case of the petitioner that respondent No.4 is a trading member of

respondent No.1. According to the petitioners, respondent No.1 for the purpose of conducting the business as a recognized stock exchange has made Rules, Bye-laws and Regulations duly approved by the Central Government so that the operation of the Exchange can be conducted strictly in compliance with the said Rules, Bye-laws and Regulations of the Exchange. The petitioners, being a Cooperative Society they were required under the provisions of the Banking Regulations Act, 1949 to invest upto 25% of the Net Time and Demand Liability into Government Securities to fulfill requirements of Statutory liquidity amount. The petitioners for that purpose required the services of a broker of Stock Exchange and that is how the petitioners came in touch with respondent No.4. Petitioners from February, 2000 started placing orders for purchase of Government Securities as well as sale of Government Securities with respondent No.4. Respondent No.4 according to the petitioners, in compliance with provisions of Clause 8 of Chapter IX of the Bylaws of respondent No.1 in conformity with provisions of SEBI (Stock Brokers and Sub Brokers) Regulations, 1992 issued various contract notes between the period from February, 2000 to March 2002 confirming the transaction for purchase and sale of government securities.

2 The respondent No.4 issued the contract notes in the form and in the manner provided by respondent No.1 with the following footnotes:-

(a) This contract is made subject to the Rules, Bylaws and Regulations and usage of the National Stock Exchange of India Ltd. Bombay and other government/regulatory bodies as applicable.

(b) in the event of any claim (whether admitted or not) difference or dispute arising between you and me /us out of these transactions the matter shall be referred to arbitration in Bombay as provided in the Rules, Bylaws and Regulations of the National Stock Exchange of India Ltd., Bombay.

(c) This contract constitutes and shall be deemed to constitute as provided overleaf an agreement between you and me / us that all claims (whether admitted or not) difference and disputes in respect of any dealings, transactions and contracts of a date prior or subsequent to the date of this contract (including any question whether such dealings, transactions and contract of a date have been entered into or not) shall be submitted to and decided by an arbitration, in Bombay as provided in the Rules, Bylaws and Regulations of the National Stock Exchange of India Ltd.

It is the case of the petitioners, therefore, that there is an agreement for Arbitration between the petitioners and Respondent No.4 wherein both have agreed to refer any dispute or difference arising between both of them in respect of the transactions covered in the contract notes, to arbitration in the manner and as per the procedure prescribed under the Rules, Bylaws and Regulations of respondent No.1.

3 Respondent No.1, under Clause 16 of Chapter XI of the Bylaws of respondent No.1, through its Arbitration Department have agreed to provide administrative assistance in the arbitral proceedings. The petitioners during the said period of transaction had issued a number of cheques in favour of

respondent No.4 to fulfill their part of the contractual obligations arising from the contract notes issued by respondent No.4 for purchase of government securities. Respondent No.4 had also delivered the securities purchased under the contract notes and had also issued cheques against sale of government securities till March 2002. Respondent No.4, however, failed to deliver the government securities purchased under the contract notes and therefore failed to fulfill their contractual obligations as provided in contract notes issued by them as a member of respondent No.1. As respondent No.4 failed to deliver government securities, for which a consideration has been paid, the petitioners retained the services of M/s Deer Investor's Grievance Services Ltd., to represent their case with respondent No.1 and also to take other issues as the petitioners realized that respondent No.4 had failed to fulfill their contractual obligations to a number of other banks and investors. The petitioners decided to invoke arbitration clause of the agreement between the petitioners and respondent No.4 so as to adjudicate the claim against respondent No.4. Though they had followed the requirements of byelaws, the office in charge of respondent No.1 for the period between 29-5-2002 to 16-7-2002 refused to accept the documents including arbitration application on the ground that they have no power under the Rules, Bylaws and Regulations of respondent No.1. It is not necessary to set out the reasons for the order to be passed.

The petitioner received a letter dated 16-8-2002 from respondent No. 1 returning the arbitration application and pay order without registration by giving reasons that respondent No.4 was not enabled to trade on the Wholesale Debt Market segment of the Exchange and as such no transactions could have executed by Respondent No.4 on the Wholesale Debt Market segment. As the claim dispute does not arise out of transactions executed on the Exchange, the petitioners were informed by respondent No. 1 that they are unable to process the arbitration application. It is not necessary to refer to the various other averments in the petition. Suffice it to say that respondent No.1 declined to refer the matters to arbitration.

4 The petitioners have filed the present petition asking respondent No.1 to accept and register the petitioners' arbitration application against respondent No.4 and commence the arbitral proceedings in the matter as per the procedure prescribed under Rules, Byelaws and Regulation of respondent No.1.

It is also the case of the petitioners that the action of respondent No.1 and his officers was contrary to the provisions of the Act, Rules and Byelaws and therefore an Inquiry Officer should be appointed to find out the reasons under which circumstances the respondent No.2 and other officers of the Arbitration Department of Respondent No.1 have willfully violated

the Rules, Bylaws and Regulations of respondent No.1 and assisted and supported respondent No.4 in avoiding the legally enforceable liability, so necessary disciplinary proceedings and any other proceedings, as may be required could be initiated against the guilty officers. In so far as this relief is concerned, in our opinion, nothing further survives on account of subsequent events and hence it will not be possible for this Court, at this juncture, to grant such a relief.

5 On behalf of respondent No.1 a reply has been filed by Shri T.R. Biju, Assistant Manager. It is the case of this deponent that respondent No.1 provides a redressal mechanism in the form of arbitration to settle the disputes between the Trading Members and their Constituents including the disputes arising out of or in relation to dealings, contract and transactions executed or reported on the Wholesale Debt Market Trading Segment of the Exchange and made subject to the Byelaws, Rules and Regulations of the Exchange of any of its member. The petitioners had filed arbitration application which was received by respondent No.1 on August 8, 2002. The petitioners were informed by letter of 16th August, 2002 that Home Trade Ltd. was not enabled on the WDM segment of the respondent No.1 and as such no transactions could have been executed by Home Trade Ltd. on the WDM segment and since the claim /dispute do not arise out of the transaction executed on the NSEIL i.e. respondent No.1, it was not possible

to process the Arbitration Application and hence the arbitration application received was returned to the petitioner as it could not be entertained. It is not necessary to refer to the other aspects of the application.

6 The petitioners have filed Additional rejoinder, to which the additional reply affidavit has been filed on behalf of respondent No.1. It may also be pointed out that a reply has also been filed on behalf of respondent No.2.

7 The first question before us is whether a writ petition at the instance of petitioners against respondent No.1 to invoke the arbitration clause in the written agreement between the petitioners and respondent No.4, which is a Constituent of respondent no.1, is maintainable.

8 The Arbitration and Conciliation Act, 1996 is an Act to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards. Section 11(6)(c), is relevant and is reproduced as under :-

"11(6) Where, under an appointment procedure agreed upon by the parties,-

- (a)
- (b).....

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request the Chief Justice of any person or institution designated by him to take necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment."

Section 5 of the Arbitration and Conciliation Act, 1996 which reads as under:-

"5. Extent of Judicial intervention.-Notwithstanding anything contained in any other law for the time being in force, in matters governed by this part, no judicial authority shall intervene except where so provided in this Part."

9 On behalf of petitioners learned Counsel submits that the Rule as to exclusion of extra ordinary jurisdiction is a Rule of Procedure. Apart from that the matter is pending in this Court since 2002. A learned Bench of this Court by an order dated 11th March, 2003 had directed the parties to Arbitration by appointing Arbitrator. Relief was granted in terms of prayer clause (d) which reads as under:-

"(d) Pending the hearing and final disposal of the said petition this Hon'ble Court be pleased to direct the Respondent No.1 to accept and register Petitioners' Arbitration Application against Respondent No.4 and to appoint the Panel of Arbitrators and give notice to Respondent No.4, Member of the Respondent No.1. "

The respondent No.1 aggrieved by that order, moved the Hon'ble Supreme Court which by its order dated July 14, 2006 in Civil Appeal No. 2969 of

2006 took the view that such a relief, could not have been granted at the ad interim stage and it could have been granted only at the time of final decision of the writ petition and accordingly set aside the order passed by interim directions. The matter has come before the present Bench today for hearing and we have taken it for hearing forthwith.

Reliance is placed on the Judgment in **Durga Enterprises (P) Ltd. And another Vs. Principal Secretary, Government of U.P. and Others.** (2004) 13 SCC 665 wherein it is observed that "High Court having entertained the writ petition in which pleadings were also complete ought to have decided the case on merits instead of relegating the parties to a civil suit." Reliance is also placed on the Judgment in **Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Ors.** (1998) 8 SCC 1, the Court was pleased to observe that the High Court can entertain a writ petition under Article 226 of Constitution of India in spite of the alternative statutory remedies and it is not affected, specially in a case where the authority against whom the writ is filed is shown to have had no jurisdiction over and has purported to usurp jurisdiction without any legal foundation.

In **State of UP. Vs. Mohd. Nooh** AIR 1958 SC 86 the Court has observed as under:-

This rule requiring the exhaustion of statutory remedies

before the Writ will be granted is a rule of policy convenience and discretion rather than a rule of law and instances are numerous where a writ of certiorari has been issued in spite of the fact that the aggrieved party had other adequate legal remedies. "

In **Harbanslal Sahnia and another VS.**

Indian Oil Corporation Ltd. and others, (2003) 2 SCC 197, the Supreme Court once again reiterated the Rule of exclusion of writ jurisdiction on account of availability of an alternative remedy by holding that it a rule of discretion and not one of compulsion. The High Court may still exercise its writ jurisdiction in at least three contingencies :- (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is failure of principles of natural justice, or (iii) where the orders or proceedings are wholly without jurisdiction or vires of an Act is challenged under Article 226 of the Constitution of India.

In **ABL International Ltd. Vs. Export Credit Guarantee Corporation of India Ltd.,** 2004 DGLS 1502, while Considering Sections 8 and 11 of the Arbitration and Conciliation act. 1996, the Court was pleased to observe that " the Courts will not allow recourse to other remedy without exhausting the remedy of arbitration, unless both the parties to the dispute agree on another mode of dispute resolution."

10 We may point out that because there is agreement in writing to

arbitration, under the Arbitral Clause, that by itself would not oust the jurisdiction of a Civil Court, in absence of the parties invoking the arbitral clause. In any judicial proceedings, it will be open to the Court exercising jurisdiction to refer the parties as long as section 8 is invoked and the procedure is followed and the dispute is the subject matter of arbitral clause. In other words, if there is arbitration agreement in writing and if there be a difference and that dispute is the subject matter of arbitral agreement and the parties do not invoke section 8, the forum where the proceedings are pending will continue to exercise jurisdiction.

11 In **S.B. P. & Co. Vs. Patel Engineer, 2006 (1) Bom.C.R. (SC) 585 (C.B.)**, Section 11 of the Arbitration and Conciliation Act come up for consideration. The Court was considering the Judgment of the Constitution Bench of the Supreme Court in **Konkan Railway Corporation Ltd. Vs. Rani Construction Pvt. Ltd., (2002) 2 SCC 388** which had taken a view that an order under section 11 is administrative. On a consideration of various provisions, a Bench of 7 learned Judge of Supreme Court was pleased to hold that the order passed under section 11 (6) by the Chief Justice or his designate is a quasi judicial order and was further pleased to hold that in a case when section 11 is invoked it is open to the Chief Justice or his designate to decide on the issues as in existence of an arbitral agreement and further as to whether the dispute falls within the arbitration clause. In other words section 11 is a complete mechanism by itself when

there be an arbitration agreement.

12 In the instant case, we find that it is the case of the petitioners themselves that they invoked the arbitration clause and respondent No.2 failed to refer the parties to arbitration. In such an event section 11(6)(c), which we have reproduced earlier, would clearly give the jurisdiction to the Chief Justice or delegate under section 11, to decide the issue. Bearing in mind the provision of section 5 of the Arbitration and Conciliation Act, 1996 no other Court should interfere in the arbitral procedure. In our opinion that would not exclude the jurisdiction of the High Court to exercise the jurisdiction under Article 226 of the Constitution of India, if respondent No.1 falls within Article 12 of the Constitution of India. Without going into the issue as to whether the writ Court should go into the matter considering that the petition is pending in this Court since the year 2002, in our opinion in the facts of the case we cannot direct the parties to arbitration, more so considering the contention raised by the respondent No. 1 that the subject matter of the dispute cannot be the subject matter of arbitration as respondent No.4 was not authorized to carry on the relevant transactions. A decision under section 11 can be the subject matter of the appeal to the Supreme Court. In these circumstances, in our opinion, it will not be possible for this Court, considering the subject matter and section 5 of the Act and as the petitioner can invoke the jurisdiction under section

11, to invoke the extra ordinary jurisdiction.

13 Under Section 21, arbitral proceedings commences unless otherwise provided, on the date a request was made to refer the dispute to arbitration under section 11(6), if the other party to the arbitral clause refuses to refer the matter to arbitration and in that case, Respondent No.1 had to constitute the Tribunal on a request being made by the petitioner, which request was made. On failure the requirement of the party is to invoke the provisions of section 11 of the Act. Though under section 34 of the Act there is no provision for extension of time to challenge an award beyond the time prescribed in Section 34, (See Union of India Vs. Popular Construction Co. (2001, 8 SCC 470), nonetheless the provisions of section 14 of the Limitation Act is applicable to arbitral proceedings (see State of Goa Vs. Western Builders (2006) 6 SCC 239). As such if required the time taken before the court in bonafidely prosecuting the writ petition before this Court can be excluded. Section 11 does not provide for any limitation as long as arbitral proceedings are commenced within the period of limitation as it is only to constitute an Arbitral Tribunal.

14 Respondent No.1 has sought to raise a contention that arbitration under their byelaws is statutory, considering section 2(4) of the Act and as such it is byelaws and rules which would be applicable and as such the

procedure under the Arbitration and Conciliation Act 1996 would not be applicable. Reliance for that purpose is placed on the judgment of Supreme Court in **Bombay Stock Exchange Vs. Jaya I. Shah and another**, 2004 (1) SCC 160, wherein considering the judgment a Division Bench of this Court in **Dowell Leasing & Finance Ltd. Vs. Radheshyam B. Khandelwal and others**, 2008(1) Bom. C.R. 768, to which one of us was a party (F.I. Rebello, J), held that considering the judgment of Jaya I. Shah (Supra) where the Supreme Court has observed that the Byelaws are not made under a statute but having regard to the scheme as also the purported object of the Act they have only a statutory flavour. The provisions of section 11 which provides for reference to arbitration would prevail as nothing has been pointed out that the procedure under section 11 is inconsistent with the Byelaws and rules. However, we do not propose to pronounce finally on that issue for the view to be taken. It is always open for respondent No.1, on the petitioner invoking the jurisdiction under section 11 (6) to raise that contention wherein that issue can be decided.

16 For the aforesaid reasons, in our opinion, as the petitioners have an efficacious legal remedy under the Arbitration and Conciliation Act, 1996 bearing in mind section 5 of the of the Act and the issue sought to be raised can be considered under section 11 of the Act and a remedy available thereunder, we decline to exercise our extra ordinary jurisdiction. Rule

discharged. In the circumstances of the case there shall be no order as to costs.

Sd/-

(F.I. REBELLO J.)

Sd/-

(A. A. SAYED, J.)