

IN THE HIGH COURT OF JUDICATURE AT BOMBAY***ORDINARY ORIGINAL CIVIL JURISDICTION*****ARBITRATION PETITION NO. 207 OF 2012**

Smt.Prema Amarlal Gera)
 Age : 56 Yrs., Occ : Housewife)
 Residing at B-244, Clover Garden,)
 Naylor Road, Off. Mangaldas Road,)
 Pune – 411 001) Petitioner

Versus

1. The Memon Co-operative Bank Ltd.,)
 A Co-operative Bank, registered under)
 The Multi-State Cooperative Societies Act,))
 2002 having their registered office and)
 Central Administrative office at)
 Patel & Soni Arcade, 1st Floor, 234, Belasis))
 Road, Nagpada Junction, Mumbai – 400 008))
 Through the Liquidator)

2. Rajan Ramchand Gera,)
 Aged 60 years, Occ : Retired residing at)
 5, Radha Niwas, Khar Pali Road,)
 Near Khar Telephone Exchange,)
 Khar (West), Mumbai – 400 052) Respondents

ALONGWITH**ARBITRATION PETITION NO. 1345 OF 2012**

Rajan Ramchand Gera,)
 Aged 60 years, Occ : Retired residing at)
 5, Radha Niwas, Khar Pali Road,)
 Near Khar Telephone Exchange,)
 Khar (West), Mumbai – 400 052) Petitioner

Versus

1. The Memon Co-operative Bank Ltd.,)
 A Co-operative Bank, registered under)

**The Multi-State Cooperative Societies Act,))
2002 having their registered office and)
Central Administrative office at)
Patel & Soni Arcade, 1st Floor, 234, Belasis)
Road, Nagpada Junction, Mumbai – 400 008)
Through the Liquidator)**

**2. Mr.Amar Ramchand Gera)
Since deceased through his heir and legal)
Representative Mrs.Prema Amarlal Gera)
presently residing at B-244, Clover Garden,)
Naylor Road, Off. Mangaldas Road,)
Pune – 411 001)**

..... Respondents

Mr.Suresh Firodiya, i/b. Mr.Harshad Sathe for the Petitioner in Arbitration Petition No.207 of 2012 and for the Respondent no.2 in Arbitration Petition No.1345 of 2012.

Mr.Jayesh Patel, a/w. Mr.Dewang Khira for the Respondent no.1 in both the petitions.

Mr.Rumi Mirza for the Petitioner in Arbitration Petition No.1345 of 2012 and for the Respondent no.2 in Arbitration Petition No.207 of 2012.

CORAM : R.D. DHANUKA, J.

RESERVED ON : 16th DECEMBER, 2016

PRONOUNCED ON : 27th JANUARY, 2017

JUDGMENT :

By these two arbitration petitions filed under section 34 of the Arbitration and Conciliation Act, 1996 (for short 'the Arbitration Act') the petitioner in both the aforesaid two petitions have impugned the arbitral award declared on 15th October, 2011 by the learned arbitrator under section 84 of the Multi State Co-operative Societies Act, 2002 (for short 'the said Act of 2002'). By consent of parties, both the arbitration petitions were heard together and are being disposed of by a common judgment.

2. The petitioner in Arbitration Petition No.207 of 2012 was impleaded as party on demise of original respondent no.1 in the arbitral proceedings i.e. Mr.Amarlal Ramchand Gera who was her husband who expired during the pendency of the arbitral proceedings. The respondent no.1 herein was the original claimant in the arbitral proceedings. The petitioner in Arbitration Petition No.1345 of 2012 had applied for intervention in the arbitral proceedings before the learned arbitrator and was allowed to intervene by the learned arbitrator though he was not a party to the arbitration agreement. For the sake of brevity the petitioner in Arbitration Petition No.1345 of 2012 is referred to hereinafter as the intervenor. The intervenor had filed Arbitration Petition No.207 of 2012 for impugning some of the directions issued and the findings rendered by the learned arbitrator in the impugned award against the intervenor.

3. Some of the relevant facts for the purpose of deciding these two petitions are as under :-

The respondent no.1 was the original claimant and is a co-operative bank registered under the provisions of the said Act of 2002 and operates in the city of Mumbai and in some of the cities of Gujarat.

4. The husband of the petitioner in Arbitration Petition No.207 of 2012 Mr.Amarlal Ramchand Gera had applied to the respondent no.1 bank a loan facility for the purpose of expansion of his business on 9th September, 1991. Pursuant to the said request made by the said Mr.Amarlal Gera, the respondent no.1 bank granted him loan facility of Rs. 4 lacs repayable in 50 monthly installments. It was the case of the respondent no.1 bank that the said Mr.Amarlal Ramchand Gera had executed various security documents in favour of the

respondent no.1 bank and had also created equitable mortgage by deposit of title deed dated 17th January, 1994 in respect of his immovable property i.e. flat no.5 on 5th floor, situated in Radha Niwas Co-Operative Housing Society Ltd., Pali Road, Near Khar Telephone Exchange, Khar (West), Mumbai 400 052 alongwith share certificate containing 5 shares bearing nos. 21 to 25 issued by the said society. The respondent no.1 bank sanctioned the said enhanced facilities and converted the said existing loan facility into a overdraft facility.

5. On 15th January 1994, the said Mr.Amarlal Ramchand Gera executed various security documents and declaration deed in respect of equitable mortgage by deposit of title deed dated 17th January, 1994. It was the case of the respondent no.1 bank that Mr.Manoharlal Laxmichand and Mrs.Nasreen Amin Kapadia who were impleaded as respondent nos. 2 and 3 in the arbitral proceedings stood as guarantors for the said loan facilities granted by the respondent no.1 in favour of the said Mr.Amarlal Ramchand Gera. It was the case of the respondent no.1 bank that the said facility granted in favour of the husband of the petitioner was further renewed from time to time. The said over draft facility was enhanced to Rs.25,00,000/- vide a sanctioned letter dated 5th June, 1995 and was renewed upto 31st May, 2001.

6. On 14th October, 2005 the said Mr.Amarlal Ramchand Gera expired. The respondent no.1 bank went in liquidation. The liquidator came to be appointed in respect of the respondent no.1 bank. It was the case of the respondent no.1 that since the husband of the petitioner committed default in repayment of the loan granted by the respondent no.1 in his favour, the respondent no.1 bank invoked the provisions of arbitration under the provisions of the said Act of 2002. The Registrar of Co-Operative Societies, Maharashtra State, Pune was delegated

powers to appoint an arbitrator under the provisions of section 84 of the said Act of 2002.

7. On 24th June, 2009, the Registrar of Co-Operative Societies, Maharashtra State, Pune appointed a former Judge of this court as the sole arbitrator to adjudicate upon the dispute between the respondent no.1 bank and the husband of the petitioner and the two guarantors.

8. On 7th December, 2009 the respondent no.1 bank issued a legal notice calling upon the husband of the petitioner and the two guarantors to make payment of Rs.1,84,10,447/- as on 30th November, 2009. Since there was no repayment made by the husband of the petitioner and the two guarantors, the respondent no.1 bank filed a claim petition on 9th January, 2010 before the learned arbitrator against the husband of the petitioner and the two guarantors inter alia praying for recovery of various amounts. The learned arbitrator passed an interim order against the husband of the petitioner on 9th January, 2010.

9. During the pendency of the arbitral proceedings, the husband of the petitioner who was respondent no.1 in the arbitral proceedings expired leaving behind the petitioner as his legal heir and the representative. On 4th June, 2010, the learned arbitrator allowed the respondent no.1 bank to bring the petitioner on record of the arbitral proceedings as a legal heir and representative of the original respondent no.1, Mr.Amarlal Ramchand Gera. The petitioner thereafter appeared before the learned arbitrator and proceeded with the said proceedings as a legal heir and representative of the original borrower Mr.Amarlal Ramchand Gera.

10. On 27th April, 2010, the intervenor who was a brother of Mr.Amarlal

Ramchand Gera and brother-in-law of the petitioner in Arbitration Petition No.207 of 2012 appeared before the learned arbitrator as an intervenor alleged that he was the owner of the said flat no.5 which was alleged to have been mortgaged by his brother in favour of the respondent no.1 and that was in actual possession of the said flat. The learned arbitrator heard the said application filed by the intervenor and allowed him to intervene in the matter.

11. On 1st June, 2010, the said intervenor filed an affidavit before the learned arbitrator and produced two alleged agreements on record. On 4th June 2010, in view of the information given by the intervenor that the petitioner in Arbitration Petition No.207 of 2012 was the legal heir and representative of the said Mr.Amarlal Ramchand Gera, the petitioner in Arbitration Petition No.207 of 2012 was brought on record in place of the said Mr.Amarlal Ramchand Gera in the arbitral proceedings.

12. On 25th October,2010, the petitioner in Arbitration Petition No.207 of 2012 filed a written statement in the arbitral proceedings. The petitioner and the bank led oral and documentary evidence before the learned arbitrator. Intervenor did not enter the witness box. Each of the witness examined by the parties were cross examined by the other parties extensively including the intervenor.

13. After arguments were heard by the learned arbitrator, the respondent no.1 made an application before the learned arbitrator placing on record that the respondent no.1 was under liquidation and the liquidator was appointed by the Central Registrar of the Co-Operative Societies. The learned arbitrator accordingly allowed the respondent no.1 to amend the cause title of the statement of claim to the effect that the respondent no.1 bank was represented by the

liquidator.

14. Sometimes in the month of October 2011, the learned arbitrator made an undated award directing the petitioner in Arbitration Petition No.207 of 2012 to pay a sum of Rs.88,87,838.04 and interest from 14th October, 2005 till 14th October, 2007 at the rate of 17% per annum. The learned arbitrator also held that the respondent no.1 bank would be entitled to enforce the said award against her and the property inherited by her from the deceased Mr.Amarlal Ramchand Gera and also from the mortgaged flat no.5 after a decision of the competent court in favour of the respondent no.1 bank that the said flat was owned by the deceased Mr.Amarlal Ramchand Gera and was the mortgaged property in favour of the bank to secure the loan and the over draft facility given by the bank to the said deceased Mr.Amarlal Ramchand Gera.

15. Learned arbitrator took a prima facie view that as on the date of the said award, the petitioner in Arbitration Petition No.207 of 2012 was the sole owner of the said flat i.e. 50% ownership of her own rights and the remaining 50% as legal heir of her husband Mr.Amarlal Ramchand Gera. The learned arbitrator held that he had limited power and jurisdiction to decide the dispute between two parties and he could not decide the complicated question of ownership of the property and could not probe any further to examine the legality and validity of the number of agreements produced before him by the parties and was not able to decide their lawful admissibility before the proper court of law, the said loan given by the respondent no.1 to the husband of the petitioner was to be treated as unsecured loan till the competent court decides the question of ownership of flat in accordance with law.

16. The learned arbitrator directed the intervenor to maintain status quo as on the date of the award till such decision was rendered by the civil court and shall not transfer or create any third party interest in the said flat no.5. He directed that if the bank succeeds in getting the decision from the competent court that the said flat was mortgaged property and it belonged to the principal borrower, in that case the bank would be entitled to recover its dues in accordance with law by selling the mortgaged property in accordance with law. This arbitral award is impugned by the widow of the original borrower and the brother of the original borrower by filing two separate arbitration petitions.

17. Mr.Firodiya, learned counsel appearing for the petitioner in Arbitration Petition No.207 of 2012 invited my attention to some of the correspondence exchanged between the parties and the documents on record of the arbitral proceedings. It is submitted by the learned counsel that though the bank had raised an objection to the intervention application filed by the intervenor, the learned arbitrator allowed the said petitioner to intervene in the arbitral proceedings though he was not a party to the transaction between the parties and could not have been impleaded as a party under the provisions of the said Act of 2002.

18. Learned counsel for the petitioner invited my attention to the list of documents filed by the respondent no.1 bank before the learned arbitrator and would submit that the respondent no.1 had never produced any such documents in evidence before the learned arbitrator. He also invited my attention to some portion of oral evidence led by the respondent no.1 bank. He submits that though in paragraph (28) of the statement of claim, the respondent no.1 bank had relied upon the books of account in support of their claim, it did not produce any such

books of account before the learned arbitrator though had examined a witness.

19. It is submitted that the findings of the learned arbitrator that there was no reason to disbelieve the books of account of the respondent no.1 bank which are maintained in its regular course of business is ex-facie perverse and contrary to the facts on record that no such books of account or statements of account were produced by the respondent no.1 on record nor any evidence was led by the bank before the learned arbitrator to prove such books of account or statement of account. Learned counsel for the petitioner placed reliance on the judgment of Supreme Court in case of ***Central Bank of India vs. Ravindra and others, AIR 2001 SC 3095*** and also placed reliance on the judgment of this court in case of ***M/s.Jayant Industrial Packaging Ltd. & Ors. vs. The Saraswat Co-operative Bank Ltd. & Anr. 2011(7) ALL MR 247.***

20. It is submitted that since the respondent no.1 bank had not produced any document in support of its claim, the entire award which proceeded on the premise that the original documents were produced in evidence is ex-facie perverse and shows patent illegality. He submits that the entire claim is allowed based on the particulars of claim annexed to the statement of claim and not based on any evidence.

21. It is submitted by the learned counsel that though the learned arbitrator had directed the respondent no.1 to send all the documents to the petitioner with calculation of interest, the respondent no.1 bank did not send such documents nor gave inspection of the accounts statements or the books of account. My attention is also invited to the cross examination of the witness examined by the bank deposing that all the original documents were in possession of the bank

and the same could be filed if required. He submits that it was thus clear beyond reasonable doubt that the original documents were never produced by the witness examined by the respondent no.1 bank. The witness had deposed that the loan was given to the husband of the petitioner by respondent no.1 bank from Bandra Branch. It is submitted that as a matter of fact, no such loan was advanced by the respondent no.1 bank to the husband of the petitioner at all.

22. It is submitted that the statement of account in respect of the alleged loan given to the husband of the petitioner was never furnished by the respondent no.1 bank to the petitioner. He submits that a suit was filed by the society against the petitioner, the intervenor and one Neeta Bhatija. He submits that the intervenor had transferred the flat in favour of the husband of the petitioner. The said suit filed by the society was subsequently withdrawn. He submits that the power of attorney was given by the petitioner in favour of the intervenor in respect of the said flat. The said power of attorney was accepted by the said intervenor which was duly notarized. The original power of attorney executed by the petitioner was with the intervenor.

23. Learned counsel appearing for the petitioner invited my attention to the notice dated 12th June, 1992 issued by the intervenor through his advocate to the respondent no.1 bank. He submits that in the said notice it was falsely contended by the intervenor that the flat in question was registered in the name of the husband of the petitioner in the record of the society for the sake of convenience. The learned counsel invited my attention to the cross-examination of the witness examined by the bank and more particularly of page 456 of the compilation in which the said witness had deposed that the statement of account was not produced on record. The statements of account were not furnished to the

petitioner for the period 1991-1993. He submits that the witness examined by the bank had no personal knowledge about such statement of account and the said witness could not explain the said statement of account. He submits that the witness examined by the bank has admitted that the husband of the petitioner was the owner of the said flat.

24. Learned counsel for the petitioner also invited my attention to the evidence led by the petitioner and her cross-examination by the learned advocate representing the intervenor. He submits that the respondent no.1 bank did not file any suit against the intervenor for recovery of the amount if any, since 1985. It is submitted by the learned counsel that the bank had only produced the photocopies as recorded in the arbitral award. The respondent no.1 had only filed a summary and not the statement of account. The claims made by the respondent no.1 bank were not proved. He submits that even in the affidavit in lieu of examination in chief in the witness examined by the bank, it was not mentioned that the books of account were maintained by the bank in ordinary course of business and in accordance with the provisions of Bankers' Evidence Act.

25. It is submitted that though the respondent no.1 bank did not produce any original documents before the learned arbitrator, the learned arbitrator has alleged to have compared the signature of the husband of the petitioner with the signature on the alleged original documents. He submits that several admissions made by the witness examined by the bank have not been considered by the learned arbitrator at all. He submits that the entire award was in violation of principles of natural justice and contrary to the principles of evidence of Act. Learned counsel for the petitioner also placed reliance on the judgment of this court in case of ***Bank of Baroda, Bombay vs. Shree Moti Industries, Bombay and***

others, 2009(1) Mh.L.J. 282 and in particular paragraphs 10 to 15, 19 to 24, 28 to 31 and 37 to 45.

26. It is submitted by the learned counsel that the last sanction letter was dated 23rd March, 1998. The continuing security form was allegedly signed by the husband of the petitioner on 9th January, 1998. Another sanctioned letter was dated 8th May, 2000. The notice of demand was itself made by the respondent no.1 thereby invoking the arbitration agreement only on 7th December, 2009. The claim thus made after a period of 12 years by the respondent no.1 bank was ex-facie barred by law of limitation.

27. Learned counsel appearing for the petitioner invited my attention to the minutes of the meeting on page 437 of the compilation showing that the matter was adjourned by the learned arbitrator for passing an order on plea of limitation. He submits that though the learned arbitrator had allowed the respondent no.1 bank to file an application for condonation of delay, the respondent no.1 bank did not file any application for condonation. Learned counsel invited my attention to the ruling given by the learned arbitrator on the plea of limitation on page 441 of the compilation of documents. Learned counsel placed reliance on section 85(A) of the said Act of 2002 and would submit that in this case the provisions of Limitation Act, 1963 would be applicable. He submits that the principal borrower died on 14th October, 2005 whereas the statement of claim was filed on 9th January, 2010. He submits that though delay could be condoned in view of section 85(3) of the said Act of 2002, on application of claimant and on satisfaction of the learned arbitrator, admittedly no application for condonation of delay was made by the respondent no.1 before the learned arbitrator. He submits that only on the application of bank on 23rd October, 2010, the petitioner was added as a party to

the arbitral proceedings in place of the husband of the petitioner.

28. Learned counsel for the petitioner invited my attention to the findings on the issue of limitation rendered by the learned arbitrator who placed reliance also on section 37 of the Limitation Act, 1963 holding that the petitioner was liable to pay to the bank towards liability of the husband only for a period of two years.

29. It is submitted by the learned counsel that since the intervenor was not party to an arbitration agreement and would not fall under any category under section 84 of the said Act of 2002, the learned arbitrator could not have allowed any such intervention and could not have given an opportunity to the said intervenor to cross examine the petitioner and also the witness examined by the bank. In support of this submission, learned counsel placed reliance on the definition of 'Party' as defined under section 2(1) (h) of the Arbitration Act. It is submitted by the learned counsel that the directions of the learned arbitrator to the respondent no.1 bank to file a separate suit for declaration of the title in respect of the said flat is ex-facie perverse. He invited my attention to the letter addressed by the society confirming that the said flat was in the name of the husband of the petitioner at the time of creation of mortgage in favour of the respondent no.1 bank. It is submitted by the learned counsel that the original agreement in respect of the suit flat is not traceable. The original power of attorney executed by the petitioner however is with the intervenor. He submits that the share certificate in respect of the said flat was in the name of the husband of the petitioner alone.

30. Learned counsel for the petitioner also invited my attention to the cross-examination of his client by the learned advocate representing the intervenor. He submits that the intervenor did not enter the witness box though cross

examined the petitioner and had alleged that the agreement relied upon by the petitioner was fabricated. It is submitted by the learned counsel that though the learned arbitrator has held that the intervenor was not the owner of the said flat, the learned arbitrator has directed the bank to file a suit for declaration of the title in respect of the said flat. He submits that though the finding is rendered by the learned arbitrator that the husband of the petitioner and the petitioner were the owners of the suit flat, the suit is directed to be filed by the bank. He submits that the learned arbitrator could not have held that the ownership of flat could be decided only by the competent court. He submits that since the intervenor did not enter the witness box, the learned arbitrator ought to have drawn adverse inference against the intervenor. The petitioner placed reliance on the judgment of Supreme Court in case of **Vidyadhar vs. Manikrao AIR 1999 SC 1441** and in particular paragraphs 15, 16, 34, 36 and 37.

31. Learned counsel appearing for the petitioner placed reliance on the judgment of this court in case of **Poise Securities and Exchange Ltd. vs. Mansu Investment Pvt. Ltd. and others, 2000(3) Mh.L.J.84** and in particular paragraph (2) in support of his submission that the claim made by the respondent bank was barred by law of limitation. He submits that without application for condonation of delay filed by the respondent, the learned arbitrator could not have condoned the delay. In support of this submission, learned counsel placed reliance on the judgment of this court in case of **Abhyudaya Co-operative Bank Ltd. vs. State of Maharashtra and others, 2009(4) Mh.L.J. 929** and in particular paragraph 22.

32. It is submitted by the learned counsel for the petitioner that the impugned award holding the petitioner personally liable in respect of the alleged dues of the bank against the husband of the petitioner is contrary to law. He

submits that even if the learned arbitrator was right in making the petitioner liable for alleged dues of her husband, the same could be only to the extent of 50% and that also only subject to proof and provided the claim was made within the period of limitation.

33. Mr.Mirza, learned counsel appearing for the intervenor invited my attention to the application for intervention made by the intervenor and would submit that the said affidavit/application filed by the intervenor was treated as pleadings on his behalf before the learned arbitrator. Learned counsel appearing for the intervenor submits that the learned arbitrator had allowed the said application made by the intervenor and was also served with the copy of the arbitral award under section 31(5) of the Arbitration Act and thereafter within the period of three months, the intervenor has filed an arbitration petition challenging the said arbitral award. He submits that since the intervenor was allowed to intervene in the arbitral proceedings, the intervenor is entitled to file a petition under section 34(3) of the Arbitration Act for impugning such arbitral award. In support of this submission, learned counsel placed reliance on the judgment of this court in case of **Mukesh Gala and ors. vs. Heritage Enterprises and another, (2015) 2 Bom.C.R.123** and in particular paragraphs 31 and 32.

34. Learned counsel for the intervenor submits that the loan facilities was renewed by the respondent no.1 in favour of the husband of the petitioner Smt.Prema Amarlal Gera upto 31st May, 2001. He submits that the arbitration agreement was invoked only on 7th December, 2009. He submits that under section 37 of the said Act of 2002, the liabilities of past member and estate of deceased member is for two years from the date of the death of the deceased member and not from the date of the knowledge. He submits that the arbitration

proceedings were filed by the bank against the petitioner in Arbitration Petition No.207 of 2012 admittedly on 10th January, 2010. He submits that the principal borrower admittedly expired on 14th October, 2005 and thus time to make any application against the wife of the principal borrower expired on 31st October, 2007. He submits that the provisions of section 85(2) of the said Act of 2002 would apply except to those cases mentioned in section 85(1). He submits that though the arbitrator is empowered to condone delay under section 85(3) of the said Act of 2002 provided a sufficient cause is made out and the application for condonation of delay is made, the learned arbitrator in this case without any such application for condonation of delay and without the respondent no.1 making out sufficient case has allowed the entire time barred claim.

35. It is submitted by the learned counsel for the intervenor that the learned arbitrator has rejected the plea of limitation raised by the intervenor on the ground that the claims made by the bank could not be rejected on the technical ground of limitation. He submits that this finding of the learned arbitrator is ex-facie perverse and contrary to the provisions of the Limitation Act, 1963 and contrary to the Section 84 of the said Act of 2002. He submits that the alleged principal borrower had become defaulter long back and ceased to be a member much prior to six years of the date of filing arbitration proceedings by the bank.

36. Insofar as issue as to whether the flat was mortgaged by the husband of the petitioner or not and as to whether the intervenor himself was the owner of the said flat or the husband of the petitioner was the owner of the said flat or not, it is submitted by the learned counsel that the said flat belongs to the intervenor exclusively. He also invited my attention to the copy of the alleged agreement annexed by his client in support of the plea of ownership. He submits that the

intervenor had informed the respondent no.1 bank about the title of the intervenor in respect of the said flat much before the loan was sanctioned by the respondent no.1 bank in favour of the husband of the petitioner. He submits that by a letter dated 19th January, 2010, the intervenor had informed the bank about the demise of his brother. He also invited my attention to the copies of the four letters addressed by the advocate of the intervenor to the respondent no.1 bank questioning the bank about sanction of any loan against such flat. The respondent no.1 had received all the letters but did not reply to any of those four letters. Learned counsel also placed reliance on some of the documents in support of his submission that the intervenor was in continuous possession and occupation of the said flat.

37. Learned counsel appearing for the intervenor placed reliance on the NOC letter addressed by the society to the bank on 25th May, 1992 in response to the letter of the bank addressed on 17th September, 1991 wherein the society had stated that the bank must have granted the loan after ascertaining the facts regarding the ownership and possession of the said flat. He submits that the said letter dated 25th May, 1992 was signed by Mr.Prakash Gangwani as chairman. He submits that an undated letter from the society which referred to the letter dated 17th September, 1991 from the bank was signed by the principal borrower himself as the chairman.

38. Learned counsel invited my attention to some portion of the cross-examination of the witness examined by the bank and more particularly on pages 382 to 387 of the compilation of documents. He submits that even the documents produced by the respondent no.1 bank clearly showed that the address of the principal borrower was always that of flat no.3 and not flat no.5 which was allegedly mortgaged. He submits that the respondent no.1 did not produce any

proof of service of the letter dated 6th August, 1992. He submits that admittedly no action was taken by the principal borrower or the wife of the principal borrower for recovery of possession of the said flat or for declaration of ownership rights in respect thereof against the intervenor though had threatened vide letter dated 6th August, 1992. He submits that admittedly the intervenor was the owner of the said flat.

39. It is submitted that the petitioner i.e. the widow of the original borrower had not produced any original of the alleged agreement dated 15th June, 1985 before the learned arbitrator. He submits that the receipt clause of the alleged agreement is also incomplete. He submits that the petitioner in Arbitration Petition No.207 of 2012 has admitted in her cross-examination that the intervenor had not given possession of the flat no.5 and was not aware whether the intervenor was paid the sale consideration mentioned in the alleged agreement dated 15th June, 1985 or not. She had also admitted that the principal borrower and the intervenor were the joint owners of flat no.6 which was sold by them on 9th July, 1984 to one Mr.Prakash Gangwani. The principal borrower and his wife had permanently shifted to Pune since 1992-93. During the period between 1984 to 1992-93, the principal borrower and his wife were residing in flat no.3 since flat no.5 was never in their possession.

40. It is submitted by the learned counsel for the intervenor that though the intervenor had not entered the witness box, no adverse inference can be drawn against him. He submits that the respondent no.1 bank and the petitioner were to prove their own case and they would stand or fall on their own legs. He submits that in any event, since the witness examined by the bank and the petitioner in Arbitration Petition No.207 of 2012 had made various admissions in their oral

evidence in favour of the intervenor, the case of the intervenor stood proved. In support of this submission, learned counsel placed reliance on the judgment of this court in case of ***Kunda vs. Haribhau Bhagdri (2014) 5 Mah.L.J. 726***. It is submitted by the learned counsel that the respondent no.1 bank had not produced any documents in support of their claims and none of the documents were proved. He submits that the entire award is based on no evidence. He submits that the learned arbitrator could not have directed the bank to file a suit for determining the ownership rights of the wife of the principal borrower which suit came to be filed pursuant to the impugned award and is now pending.

41. Learned counsel for the intervenor submits that the order of the learned arbitrator directing the intervenor not to create any third party rights and to maintain status quo in respect of the flat which is owned by the intervenor is beyond his jurisdiction and ex-facie perverse. He submits that all such observations and directions which are made against the intervenor by the learned arbitrator thus deserves to be set aside in the Arbitration Petition No.1345 of 2012 filed by the intervenor. Learned counsel for the intervenor distinguished the judgments relied upon by the learned counsel for the petitioner.

42. In the hearing held on 16th December, 2016, learned counsel for the bank tendered synopsis of the arguments on behalf of his client and submits that the same be considered by this court as part of the oral arguments in addition to the arguments already advanced earlier. Learned counsel for the intervenor also submitted the brief written submissions and agreed not to make any further arguments in rejoinder.

43. It is submitted by the respondent no.1 bank that there is no ground raised in the arbitration petition filed by the widow of the principal borrower or by

the intervenor that the original documents were not produced by the bank before the learned arbitrator and thus the statement made by the learned arbitrator in the impugned award that the original documents were produced has to be accepted and cannot be doubted. In support of this submission, learned counsel for the bank placed reliance on the judgment of Supreme Court in case of Union of India vs. T.R.Verma, AIR 1957 SC 882 and in particular paragraph 8. He also placed reliance on the judgment of this court in case of **M/s. Technica International Engineering Pvt. Ltd. and others vs. Kokan Mercantile Co-op. Bank Ltd., Mr. Masood Mahmood Rakhe and Mrs. Sofiya Masood Rakhe, (2013) 5 Bom.C.R.274.**

44. It is submitted that the learned arbitrator has categorically rendered a finding that the original documents were produced by the bank. He submits that the original documents were shown to the witness examined by the bank and after he had identified the original documents and the signatures thereof, those documents were taken on record by the learned arbitrator. The witness examined by the bank had identified the signatures on most of the documents. He submits that the officer who was examined as a witness by the bank was in the employment of the bank since 1980 and was having knowledge about the subject matter of the dispute. It is submitted that the learned arbitrator had compared the signatures of the deceased principal borrower on the original documents with the other documents on record. Learned counsel for the bank produced a file containing the original documents for perusal of this court. Upon raising a query whether the documents produced before this court by the learned counsel were forming part of the record of the arbitral proceedings or not, learned counsel for the bank stated that the original documents were separately produced and were not kept alongwith the record of the arbitral proceedings.

45. It is submitted by the learned counsel that the husband of the petitioner in Arbitration Petition No.207 of 2012 was the original borrower. Two persons had given guarantee on his behalf to secure the said loan given to him on 19th September, 1991 and subsequently against the equitable mortgage of the flat bearing no.5 in Radha Niwas. He submits that pursuant to the said loan granted to the husband of the petitioner, he had signed various agreements and documents. The guarantors also had signed separate agreement of guarantee. The principal borrower had produced the share certificate dated 24th September, 1991, document confirming deposit of title deed, indemnity, irrevocable power of attorney, affidavit duly executed by him etc. It is submitted that the said loan facility was thereafter enhanced from Rs.4 lacs to Rs.25 lacs and was converted into overdraft facility subsequently. He submits that the overdraft facility of Rs.25 lacs was renewed upto 31st May, 2001.

46. It is submitted that in the affidavit of examination in chief filed by the witness examined by the bank had clearly deposed that the contents of the affidavit were true and correct and he also confirmed that the copies of the original documents were forming part of the statement of claim. It is submitted that the said witness had deposed that some of the documents had signed in her presence and some may not have been signed in his presence. He however could identify the signature from the record. The said witness deposed that the original documents were in possession of the bank and she could file the same at any time if required.

47. It is submitted that during the course of the cross-examination of the petitioner, it was noted by the learned arbitrator that the said witness had carefully

gone through each and every page of the original documents shown to her and the original loan agreements were taken on record by the learned arbitrator. He submits that in the statement of claim, the bank had referred to and relied upon the books of account in support of its claim maintained in ordinary course of business. It is submitted that the true copies of the statement of accounts were furnished to the learned advocate representing the petitioner pursuant to the directions given by the learned arbitrator at the hearing held on 3rd June, 2010. The learned arbitrator has recorded this fact during the cross-examination of the witness of the bank. He submits that the inspection of the original statement of account was also given to the petitioner as recorded by the learned arbitrator during the cross-examination of the witness of the bank.

48. It is submitted that the original statement of account was produced before the learned arbitrator. Several questions were asked to the witness examined by the bank before the learned arbitrator as recorded at pages 456 to 458 of the compilation of the documents. The witness examined by the bank did not agree to the suggestion put to him in the cross-examination that he had not produced the statement of account. He submits that the loan documents produced by the bank alongwith the affidavit of evidence of the witness examined by the bank clearly proved the claims made by the respondent no.1 bank against the principal borrower and the guarantors. He submits that the findings recorded by the learned arbitrator that the books of the accounts were maintained in its regular course of business being not perverse and thus cannot be interfered with by this court.

49. Insofar as issue of limitation raised by the petitioner and the intervenor is concerned, it is submitted by the respondent no.1 bank that the bank

was originally a co-operative bank governed by the provisions of the Maharashtra Co-operative Society Act, 1960. With effect from 1984, the bank was converted as Multi State Co-operative Bank and since then was governed by the provisions of the Multi State Co-operative Society Act, 1984. It is submitted that the bank had filed a claim petition under section 85(2) (a) of the said Act of 2002 on 9th January, 2010. It is submitted that on the date of filing of claim by the respondent no.1 bank, the original borrower and the guarantors continued to be the members of the bank. It is submitted that under section 85 of the said Act of 2002, the limitation relating to the recovery of any sum including any interest thereon to the bank by the member has to be computed from the date on which a member dies or ceased to be the member of the society. It is submitted that in view of section 29(2) of the Limitation Act, 1963, the Multi State Co-operative Society Act being the special statute providing special period of limitation, the provisions of Limitation Act, 1963 are not applicable.

50. It is the case of the bank that the original borrower died on 14th October, 2005. Neither the legal heirs and the representatives of the original borrower nor anybody else informed the bank about the death of the original borrower. The witness examined by the bank in his cross-examination has deposed that nobody informed about the death of the original borrower to the bank. The respondent no.1 bank came to know about the death of the original borrower when the application for intervention was filed by the intervenor before the learned arbitrator. The learned arbitrator has recorded a finding that the bank had no knowledge about the death of the original borrower. He submits that the respondent no.1 came to know about the demise of the original borrower only on 19th January, 2010 when the copy of the death certificate was annexed to the letter dated 19th January, 2010 followed by his advocate's letter dated 8th January, 2010.

It is the case of the bank that it was not the case of the petitioner or the intervenor that the bank had knowledge of the death of the original borrower. The bank placed reliance on the unreported judgment of Delhi High Court in case of **Arun Kumar Aggarwal & Anr. vs. Sudarshan Wadia & Ors. in I.A.No.4440 of 2009 in CS(OS) No.908 of 2008** in support of this submission. It is submitted that the claims thus made by the bank were not barred by law of limitation.

51. It is submitted that since the original borrower was alive on the date of the filing claim petition by the respondent no.1 bank and since no period of limitation is prescribed under the provisions of the said Act of 2002 and more particularly section 85(1) for recovery of dues against the member who is alive, the claims filed by the bank against the original borrower was within time.

52. It is submitted that in any event, the learned arbitrator has ample power to admit and entertain the claims even after expiry of period of limitation in view of section 85(3) of the said Act of 2002 if the applicant shows sufficient cause for not referring the dispute within the period of limitation. It is submitted that in the event of inconsistency between the special statute on the Limitation Act, the provisions of special statute will apply. Reliance is placed on the judgment of **L.S.Synthetics Limited vs. Fairgrowth Financial Services Limited 2005 AIR (SC) 1209** and more particularly paragraphs 38 and 39.

53. It is submitted that since the original borrower continued to be a member of the respondent no.1 bank till he died which was during the pendency of the proceedings before the learned arbitrator, the claims made by the respondent no.1 bank cannot be held as time barred in view of specific provisions of section 85(1)(a) of the said Act of 2002.

54. Insofar as the issue as to whether the petitioner was part owner of the flat or not is concerned, it is submitted by the bank that the share certificate produced before the bank by the husband of the petitioner did not bear the name of the petitioner. These facts were admitted by the petitioner during her cross-examination by the learned advocate for the intervenor. The letter dated 15th July, 1991 addressed to the original borrower by the society also confirmed that the share certificate was issued in the name of the original borrower in respect of flat no.5. The notice given to the intervenor by the original borrower through his advocate on 6th August, 1992 also affirmed that the original borrower was the sole owner of the flat. The petitioner who entered the witness box did not produce the original agreement dated 15th June, 1985 claiming the title in respect of the said flat alleging that the same was misplaced. The petitioner did not make any application for leading secondary evidence in respect of the said agreement before the learned arbitrator.

55. It is submitted by the bank that the petitioner did not file any proceedings for claiming full ownership in respect of the said flat till date though the original borrower expired on 14th October, 2005 nor she filed any proceedings for a declaration of her right and/or for recovery of the vacant possession from the intervenor. It is the case of the bank that the petitioner and the intervenor had colluded with each other to deprive the bank of its security. It is submitted that the original borrower in his letter dated 21st September, 1991 while confirming the deposit of title deed with the bank had represented that the said flat no.5 was self acquired and was owned by him and none else had any claim to the said flat. Similar, representation was also made subsequently vide letter dated 17th January 1994, 20th May 1995 and 7th February 1997.

56. It is submitted that the original borrower had duly mortgaged the said flat in favour of the bank to secure the repayment of the dues and thus the bank was entitled to make a claim for realizing the said security for recovery of the huge amount. It is submitted that if the title deed was deposited bonafide which relates to the property with an intention of creating a security, it is not necessary that whole or even the material documents of the title to the property should be deposited. In support of this submission, reliance is placed on the judgment of Calcutta High Court in case of ***Amulya Gopal Majumdar vs. United Industrial Bank Limited and others, AIR 1981 Cal.404.***

57. Insofar as intervention of the intervenor before the learned arbitrator is concerned, it is submitted that the said intervenor was not impleaded as a party to the statement of claim. The intervenor had himself appeared before the learned arbitrator and had applied for intervention. He is neither a member of the bank nor was a party to the arbitration agreement. He is not even the owner of the suit flat. It is submitted that the intervenor thus had no locus standi in the matter and could not have been permitted to intervene in the matter.

58. It is lastly submitted that the arbitral tribunal has rendered a findings of fact which are not perverse and thus cannot be interfered with by this court in these petitions filed under section 34 of the Arbitration Act.

REASONS AND CONCLUSIONS :

59. There is no dispute that insofar as the intervenor i.e. Rajan Ramchand Gera is concerned, he was neither a borrower nor guarantor in respect of the loan transaction between the respondent no.1 bank and the principal borrower. He was

also admittedly not a member of the respondent no.1 bank. The said intervenor was also not claiming through the principal borrower Amarlal Gera or any other persons described in section 84(1) of the said Act of 2002. The respondent no.1 bank had filed the arbitral proceedings against the principal borrower i.e. Amarlal Gera and two guarantors. The intervenor was not impleaded admittedly by the respondent no.1 bank in the statement of claim when the same was filed before the learned arbitrator.

60. During the pendency of the arbitral proceedings however, the said intervenor made an application for intervention in the said arbitral proceedings on the ground that he was the owner of the flat alleged to have been mortgaged by the principal borrower in favour of the respondent no.1 bank. The intervenor was also not a party to the arbitration agreement. Though the dispute between the persons who are described in section 84(1) of the said Act, 2002 only could be referred to arbitration and though the intervenor did not fall under any of those categories described in section 84(1) of the said Act, 2002, the learned arbitrator without application of mind and contrary to section 84 allowed the intervention application to intervene in the arbitral proceedings.

61. A perusal of section 84(1) of the said Act, 2002 clearly indicates that only if the dispute touching the constitution, management or business of a Multi State Co-operative Societies arises between the persons mentioned therein, such disputes shall be referred to arbitration and not otherwise. The learned counsel for the intervenor could not indicate before this Court as to how the intervenor fell under any of the category of persons described in section 84(1) of the said Act, 2002. The only submission made by the learned counsel for the intervenor was that flat no.5 which was alleged to have been mortgaged by the principal borrower in

favour of the respondent no.1 bank did not belong to him but was owned by the intervenor and thus any order that would have been passed by the learned arbitrator would have affected the intervenor.

62. It is common ground that the widow of the principal borrower as well as the respondent no.1 bank did not agree before the learned arbitrator for impleadment of the intervenor on any grounds and have agitated the said issue in these two petitions, which are being disposed of by this judgment.

63. A perusal of the impugned award indicates that the learned arbitrator has not only allowed the intervenor to intervene in the arbitral proceedings but has also framed the point for determination as to whether the said intervenor had proved that the said flat no.5 was owned by him and was not owned by the principal borrower and whether the intervenor had not authorized the principal borrower to mortgage his flat by way of security against the loan from the respondent no.1 bank (original claimant). The learned arbitrator also framed a point for determination as to whether the widow of the principal borrower had proved that the intervenor had sold and transferred flat no.5 to her and her deceased husband by an agreement dated 15th June, 1985.

64. A perusal of the record further indicates that the learned arbitrator allowed the said intervenor to cross-examine the witnesses examined by the respondent no.1 bank and also by the widow of the principal borrower, who was impleaded as a party respondent in place of the principal borrower, who expired. The learned arbitrator in the impugned award has made an observation that he wondered while the intervenor had tried to enter into the merits of the case when his whole emphasis to get his flat no.5 freed from the clutches of the bank. The

learned arbitrator also rendered a finding that the respondent no.1 bank had proved that the deceased respondent no.1 (principal borrower) had mortgaged by way of security flat no.5 in the building Radha Niwas while obtaining the loan and over draft facility from the respondent no.1 bank and had executed the required documents.

65. In spite of such finding rendered by the learned arbitrator, the learned arbitrator also observed that after carefully perusing the documents, he was of the view that those documents definitely support the case of the intervenor at least in respect of his occupation and possession of flat no.5. This document however, did not certainly go to prove his title and ownership of the said flat. The learned arbitrator ultimately held that the intervenor was not the owner of the said flat but the principal borrower and his widow were lawful owners of the said flat. The intervenor had not rebutted all these crucial evidence which was placed on record against him. The learned arbitrator at the same time held that he could not have decided complicated question of ownership of the property and could not probe any further to examine the legality and validity of the number of documents produced before him.

66. Though the learned arbitrator rendered a finding that the principal borrower and his widow were the lawful owners of the said flat which was mortgaged in favour of the respondent no.1 bank, the learned arbitrator in the subsequent paragraphs rendered a finding that he could not decide and held the fact of ownership of the mortgaged property i.e. flat no.5 in Radha Niwas and thus the present loan was to be treated as simply unsecured loan till a competent Court decides the question of the ownership of the said flat in accordance with law. The learned arbitrator accordingly held that the respondent no.1 bank will have to get

the said issue resolved by initiating proper proceedings in the competent Court of law. He held that till the said decision is rendered, the intervenor will have to maintain *status-quo* as on the date of the said order and shall not transfer or create third party interest in the said flat. It is directed that in case the respondent no.1 bank succeeds in getting a decision from the competent Court that the said mortgaged property belonged to the principal borrower, the respondent no.1 bank would be entitled to recover its dues in accordance with law by selling the mortgaged property in accordance with law.

67. Insofar as the ownership in respect of the said flat is concerned, the learned arbitrator has rendered a finding that *prima-facie* on the date of the order, the widow of the principal borrower was the sole owner of the said flat i.e. half share of her own and half as a legal heir of her husband Amarlal Gera, who was the principal borrower and was liable to pay the dues of the respondent no.1 bank on behalf of her husband from his estate inherited by her. It is held that her liability to pay the dues of the respondent no.1 bank as on 14th October, 2005 was Rs.88,87,838.04 ps. and she being legal heir of the principal borrower was liable to pay interest from 14th October, 2005 to 14th October, 2007 at the rate of 17% p.a. The learned arbitrator directed the widow of the principal borrower to pay an amount of Rs.1,25,54,201.57 ps within eight weeks from the date of the receipt of the arbitral proceedings. The learned arbitrator held that the respondent no.1 bank would be entitled to enforce the said award against her and the property inherited by her from the deceased Amarlal Gera and also from the flat no.5 after a decision of the competent Court in favour of the respondent no.1 bank that the said flat was owned by the deceased Amarlal Gera and was a mortgaged property to secure the loan and over draft facility given by the respondent no.1 bank to the said deceased.

68. In my view, it was within the jurisdiction of the learned arbitrator to decide whether the said flat no.5 was mortgaged by the principal borrower in favour of the respondent no.1 bank and whether he was entitled to create mortgage having right, title or interest in the said property or not. Though on one hand the learned arbitrator has rendered a finding that the principal borrower as well as his widow were lawful owners of the said flat, the learned arbitrator directed the respondent no.1 bank to file a civil suit for a declaration of title in respect of the said flat. The impugned award in this situation is incapable of execution. The learned arbitrator has given three separate and inconsistent findings in respect of the title in respect of the said flat. The award shows total perversity on the face of it and total non-application of mind.

69. In my view at the first instance the learned arbitrator could not have allowed a third party, who did not fall under any of the categories of the persons described in section 84(1) of the said Act, 2002 to intervene in the arbitral proceedings. Admittedly the intervenor was not even a party to any arbitration agreement as defined under section 2(1)(h) of the Arbitration & Conciliation Act, 1996 nor was claiming through the deceased principal borrower who was admittedly a member of the respondent no.1 bank till his death.

70. The learned arbitrator followed a very unique method in this case which is unheard in law, i.e. (i) by allowing a third party who was neither claiming through the existing member or past member nor was himself the member of the respondent no.1 bank to first intervene, (ii) framing points for determination in respect of the alleged title of the intervenor in the said flat and allowing him to participate in the arbitral proceedings by permitting him to cross-examine the witnesses examined by the respondent no.1 bank (original claimant)

and also the widow of the principal borrower, who was impleaded as party respondent in view of his demise, (iii) permitting him to raise all the submissions on merits of the loan amount on various issues including the issue of limitation and (iv) rendered a *prima-facie* finding that the said intervenor was not the owner of the said flat in question and then passed an order of *status-quo* against the intervenor against whom no relief of any nature could have been granted by the learned arbitrator.

71. In my view, the learned arbitrator had no jurisdiction to allow the intervention application of an outsider and who did not fall under any of the categories of persons described under section 84 of the said Act, 2002 nor was claiming through any of those persons mentioned therein. Be that as it may, the learned arbitrator could not have determined the rights and liabilities of a third party, including the issue of his ownership in respect of the flat which was mortgaged by the principal borrower in favour of the respondent no.1 bank. Similarly the learned arbitrator also could not have granted any relief in favour of or against such third party under section 84(1) of the said Act, 2002 or under any other provisions of the Arbitration & Conciliation Act, 1996.

72. The intervenor is thus being aggrieved by the observations made by the learned arbitrator insofar as his claim of ownership and an order of *status-quo* in respect of the said flat is concerned. In my view at the first instance the intervenor himself could not to have applied for intervention in the arbitral proceedings knowing well that he did not fall under the category of persons described under section 84(1) of the said Act, 2002 and the issue of his alleged claim of ownership in respect of the said flat could not have been determined by

the learned arbitrator under the said statutory arbitration provided under section 84 of the said Act, 2002. The intervenor himself is responsible for seeking intervention in the arbitral proceedings illegally. Be that as it may, it was the duty of the learned arbitrator to apply his mind and ought to have rejected the said application for intervention.

73. Be that as it may, since the learned arbitrator had permitted such intervention illegally and has passed an order of *status-quo* and has made an observation on the title of the intervenor in respect of the said flat, the intervenor is entitled to challenge such award by filing an arbitration petition under section 34 of the Arbitration & Conciliation Act, 1996. This Court in case of **Mukesh Gala & Ors.** (supra) has held that a third party who is not a party to an arbitration agreement cannot be allowed to be impleaded as a party to the arbitral proceedings. However, if a person is wrongly impleaded as a party to the arbitration proceedings and is aggrieved by an arbitral award, he can invoke section 34 of the Arbitration Act. The judgment of this Court in case of **Mukesh Gala & Ors.** (supra) squarely applies to the facts of this case. I am respectfully bound by the said judgment. In my view, Mr. Mirza, learned counsel appearing for the intervenor is thus right in his submission that since the learned arbitrator has granted certain reliefs against the intervenor, the arbitration petition filed by him is maintainable.

74. In my view the order of the learned arbitrator at the first instance allowing the intervenor to intervene in the arbitration proceedings though he was not a party to the arbitration agreement and did not fall under the category of persons described in section 84(1) of the said Act, 2002 itself is totally illegal and

shows patent illegality on the face of award. The impugned order passed by the learned arbitrator granting status-quo order against the intervenor is also totally illegal, perverse, without jurisdiction and is without application of mind. The impugned award insofar as the interim reliefs granted against the intervenor by the learned arbitrator thus deserves to be set aside.

75. Insofar as the issue on limitation raised by the intervenor as well as by the widow of the principal borrower before the learned arbitrator is concerned, it is not in dispute that the respondent no.1 bank had filed the arbitral proceedings against the principal borrower as well as against the guarantors on 9th January, 2010. It is also brought on record that the principal borrower Amarlal Gera, who was also a member of the respondent no.1 bank expired on 14th October, 2005, much prior to the date of the respondent no.1 bank filing the arbitral proceedings before the learned arbitrator. It was the case of the respondent no.1 bank that the legal heirs of the said original principal borrower however, did not inform the respondent no.1 bank about the demise of the principal borrower till the arbitral proceedings were filed by the respondent no.1 bank against the said principal borrower and the guarantors. It was the case of the respondent no.1 bank that the brother of the said principal borrower, who applied for intervention before the learned arbitrator informed about the death of the principal borrower for the first time on 1st June, 2010. The respondent no.1 bank thereafter impleaded the widow of the said principal borrower Smt.Prema Gera in place of the principal borrower on 4th June, 2010.

76. It is not in dispute that the widow of the principal borrower had herself raised an issue of limitation before the learned arbitrator by filing a

written statement. The issue of limitation was also vehemently raised by the intervenor before the learned arbitrator. The learned counsel for the respondent no.1 bank has urged before this Court that the principal borrower continued to be the member of the respondent no.1 bank and was member on the date of the respondent no.1 bank filing the arbitral proceedings before the learned arbitrator. It was the case of the respondent no.1 bank that the cause of action for filing the arbitral proceedings against the principal borrower did not commence till he continued to be the member of the respondent no.1 bank.

77. In the alternate, the plea of the respondent no.1 bank was that since the respondent no.1 bank was not informed about the death of the principal borrower and about the names of legal heirs till 1st June, 2010 and that also by the brother of the principal borrower, the cause of action for impleading the legal heirs of the principal borrower commenced only from the date of the knowledge of the death of the principal borrower. On the other hand, it was the case of the widow of the principal borrower as well as of the intervenor that the last sanctioned letter was 23rd March, 1998 issued by the respondent no.1 bank. Continued security form was allegedly signed by the principal borrower on 9th January, 1998. Another sanctioned letter was issued on 8th May, 2000. The notice of demand itself was issued on 7th December, 2009. It was urged by the petitioner that i.e. widow of the principal borrower that the claim made after the period of 12 years by the respondent no.1 bank was thus *ex-facie* barred by law of limitation.

78. A perusal of the record indicates that admittedly the principal borrower had already expired on 14th October, 2005, whereas the statement of claim was filed on 9th January, 2010. In my view, the respondent no.1 bank thus cannot be allowed to urge that the principal borrower continued to be the member

of the respondent no.1 bank till the date of filing of the statement of claim by the respondent no.1 bank on 9th January, 2010.

79. There is no dispute between the parties that the delay, if any, in filing the statement of claim can be condoned by the learned arbitrator by exercising his powers under section 85(3) of the said Act, 2002, on application of the claimant and on satisfaction of the learned arbitrator that the case for condonation of delay was made out by the claimant.

80. A perusal of the minutes of the meeting of the learned arbitrator which are annexed at page 437 of compilation indicates that the matter was adjourned by the learned arbitrator for passing an order on the plea of limitation raised by the intervenor as well as by the widow of the principal borrower. The learned arbitrator had allowed the respondent no.1 bank to file an application for condonation of delay. It is common ground that the respondent no.1 bank however, did not file any application for condonation of delay before the learned arbitrator though permission was granted by the learned arbitrator to the respondent no.1 bank to file such an application for condonation of delay and to explain the delay in filing the statement of claim.

81. A perusal of the record indicates that though there was no application for condonation of delay and no reasons were furnished by the respondent no.1 bank before the learned arbitrator for seeking condonation of delay, the learned arbitrator has in the impugned award recorded a finding that there was sufficient cause to admit the dispute for final decision in the arbitration proceedings and rejected the argument of the petitioner that the claim was barred by limitation. The learned arbitrator at the first instance observed that there was no specific period of

limitation provided on par with the disputes relating to any act or omission on the part of the parties as referred in section 84 of the Companies Act, 1956 and thus it could not be held that the proceeding filed by the respondent no.1 bank on 9th January, 2010 was beyond any period of limitation. It is observed by the learned arbitrator that he could not simply dismiss the case only on the technical ground of limitation when there was no specific provision under section 84(1) of the said Act, 2002 for filing of the case for recover of the dues of the bank.

82. A perusal of the award indicates that the learned arbitrator has condoned the delay without there being any application in writing for seeking condonation of delay though the learned arbitrator himself had directed the respondent no.1 bank to file an application for seeking condonation of delay under section 85(3) of the said Act, 2002. If the respondent no.1 bank would have filed an application for seeking condonation of delay to explain sufficient cause, the petitioner could have opposed the said application for condonation of delay by pointing out that no sufficient cause was shown by the respondent no.1 bank for filing the statement of claim after several years from the date of death of the principal borrower. The learned arbitrator on one hand has held that it was not to the knowledge of the respondent no.1 bank that the principal borrower had expired on 14th October, 2005 and on the other hand has held that insofar as the widow of the principal borrower is concerned, in view of section 37 of the said Act, 2002, her liability will be restricted for a period of two years from the date of death of the principal borrower, she being legal heir of the said principal borrower. The learned arbitrator did not consider various submissions made by the petitioner on the issue of limitation while rejecting the said plea of limitation.

83. A perusal of the award indicates that the learned arbitrator has rejected

the plea of limitation raised by the petitioner and also the intervenor on the ground that the said plea was hyper technical plea. In my view, this observation of the learned arbitrator is totally perverse and contrary to the well settled principles of law laid down by the Supreme Court and this Court. The plea of limitation is based on the principles of the public policy and cannot be rejected on the ground that the same was hyper technical.

84. Insofar as the submission of the learned counsel for the intervenor and the petitioner (widow of the principal borrower) that the original documents relied upon by the respondent no.1 bank were not produced before the learned arbitrator and were not proved though the same were disputed by the intervenor and the widow of the principal borrower is concerned, a perusal of the arbitration petition filed by the widow of the principal borrower indicates that no such ground is raised in the arbitration petition. Learned counsel for the respondent no.1 bank however, produced some of the original documents for perusal of this Court. He however, fairly submitted that those documents were not produced by him from the original record of the arbitral proceedings, but were separately kept by the respondent no.1 bank. A perusal of the oral evidence led by the respondent no.1 bank however, indicates that in the cross-examination of the witness, he admitted that the original documents including the statement of accounts were not produced by him before the learned arbitrator. A perusal of the award however, indicates that the learned arbitrator proceeded on the premise that the original documents were produced by the respondent no.1 bank before the learned arbitrator and were shown to the petitioner when she entered the witness box.

85. A perusal of the record indicates that the petitioner who was brought on record in place of the principal borrower had disputed the document relied upon

by the bank. In view of such dispute raised by the petitioner, the documents as well as the statement of account on which the respondent bank had relied upon before the learned arbitrator were required to be proved. Though the learned arbitrator is not bound to follow the provisions of the Code of Civil Procedure, 1908 and also the Evidence Act, the learned arbitrator is bound to follow the principles of the Code of Civil Procedure, 1908 and also the Evidence Act in respect of proof of documents which provisions are in consonance with principles of natural justice.

86. The findings of the learned arbitrator that the books of account were maintained in the ordinary course of business is also not proved by the witness examined by the respondent no.1 bank. The learned arbitrator thus could not have rendered such finding without any appropriate evidence led by the witness examined by the respondent no.1 bank. The learned arbitrator in my view has totally overlooked the cross-examination of the witness examined by the respondent no.1 bank in the impugned award and shows perversity. The findings of the learned arbitrator that there was no reason to disbelieve the books of account of the bank which were alleged to have been maintained in its regular course of business and the periodical and final statement of account is without any evidence.

87. A perusal of the record indicates that though the intervenor had brought to the notice of the bank at the relevant time when the loan was being sanctioned in favour of the principal borrower by the respondent no.1 that he was claiming right, title and interest in the said flat and had warned the respondent no.1 bank before sanctioning the loan, the respondent no.1 bank did not consider the said correspondence seriously and overlooked the said objection and still granted loan in favour of the principal borrower and accepted the equitable mortgage in

respect thereof from the principal borrower. Though the learned arbitrator made very strong observation about the conduct of the respondent no.1 bank in ignoring those correspondence and granting loan in favour of the principal borrower, the learned arbitrator still allowed the claims made by the bank. The award shows total inconsistency and contradictions in the impugned award.

88. A perusal of the record indicates that on one hand the learned arbitrator has held that the issue of title in respect of the said flat will have to be adjudicated upon in the appropriate civil proceedings and had directed the respondent no.1 bank to file a suit and declared that till then the said loan was to be considered as an unsecured loan and on the other hand passed an award against the widow of the principal borrower on the premise that she was entitled to 50% share on her own rights and 50% on the basis of inheritance in the said flat through her husband. The award shows total perversity and patent illegality and thus deserves to be set aside.

89. Insofar as submission of the learned counsel for the intervenor that though the intervenor had not entered the witness box, no adverse inference could be drawn against him by the learned arbitrator is concerned, in my view at the first instance the learned arbitrator could not have allowed the intervenor to intervene in the arbitral proceedings since he was neither party to any arbitration agreement nor he fell in any of the category of the persons provided under section 84(1) of the said Act of 2002, the learned arbitrator could not have permitted the intervenor to lead any evidence even if he would have entered the box as an intervenor or to cross examine the witness examined by the bank as well as by the widow of the principal borrower. The learned arbitrator thus even otherwise could not have drawn any adverse inference against the intervenor.

90. In my view the issue as to whether the mortgage was properly created or not by the principal borrower or by the guarantor in favour of the bank covered under the provisions of the said Act of 2002, or not has to be decided by the learned arbitrator himself under the provisions of the said Act, 2002. The directions of the learned arbitrator to the bank to file a separate suit for determination of title of the principal borrower in respect of the suit flat or the title of the widow of the principal borrower claiming independently to the extent of 50% therein is totally perverse and/or contrary to the law laid down by this court in case of *M/s. Technica International Engineering Pvt. Ltd. and others (supra)*.

91. Insofar as submission of the learned counsel for the respondent no.1 bank that the witness examined by the bank had identified the original documents and the signatures thereon and those documents were taken on record by the learned arbitrator is concerned, a perusal of the record does not indicate that any such original documents were produced on record by the said witness nor the same were produced by the learned counsel for the bank when called upon before this court from the custody of the learned arbitrator. Though the learned arbitrator had made an observation that the original documents were produced by the bank before the learned arbitrator, a perusal of the record indicates the contrary position.

92. Insofar as judgment of Calcutta High Court in case of *Amulya Gopal Majumdar* (supra) relied upon by the learned counsel for the bank is concerned, it is held that it is not necessary that the whole or even the material of the documents of the title to the property should be deposited nor that the document deposited should show a complete or good title and it is sufficient if the deeds deposited bonafide relate to the property or are material evidence of title or are shown to

have been deposited with the intention of creating a security thereof. A perusal of the record indicates that the principal debtor had deposited sufficient documents with an intention to create a mortgage in favour of the respondent no.1 bank to secure the loan and other facilities obtained by him.

93. Insofar as judgment of Delhi High Court in case of ***Arun Kumar Aggarwal & Anr.*** (supra) relied upon by the learned counsel for the bank is concerned, there is no dispute about the proposition that upon the demise of the party to the proceedings, his legal representatives are to be brought on record. In this case the principal borrower had expired much prior to the date of the respondent no.1 bank filing statement of claim before the learned arbitrator. The judgment of Delhi High Court in case of ***Arun Kumar Aggarwal & Anr.*** (supra) does not assist the case of the respondent no.1 bank.

94. Insofar as judgment of Supreme Court in case of ***Central Bank of India vs. Ravindra and others*** (supra) is concerned, there is no dispute about the proposition of law laid down by the Supreme Court in the said judgment. The witness examined by the bank in this case did not depose that the books of account maintained by the bank were maintained in ordinary course of business and did not produce the original thereof before the learned arbitrator. Learned arbitrator therefore could not have rendered any such finding.

95. Insofar as judgment of this court in case of ***M/s. Jayant Industrial Packaging Ltd. & Ors.*** (supra) is concerned, this court has held that the learned arbitrator is bound to follow the principles of natural justice and fairplay. It is held that even though the statement of account as produced by the bank as per the bankers book of evidence and certified by its authorized officer, it is still necessary

for the arbitrator to provide a copy of the documents and opportunity to the petitioner and ought not to have taken on record without their consent and/or knowledge. The principles laid down by this court in case of ***M/s.Jayant Industrial Packaging Ltd. & Ors. (supra)*** applies to the facts of this case. I am respectfully bound by the said judgment. Similarly in case of ***Bank of Baroda, Bombay vs. Shree Moti Industries, Bombay and others*** (supra) also on the same proposition applies to the facts of this case. I am respectfully bound by the said judgment.

96. For the reasons recorded aforesaid, I am of the view that the petitioners have made out a case for setting aside the impugned award dated 15th October, 2011. I, therefore, pass the following order :-

- (a) Impugned award dated 15th October, 2011 is set aside.
- (b) Arbitration Petition No.207 of 2012 and Arbitration Petition No.1345 of 2012 are allowed in the aforesaid terms.
- (c) No order as to costs.

(R.D.DHANUKA, J.)

The impugned award insofar as it directs the intervenor to maintain *status-quo* in respect of flat no.5 on 5th floor, situated in Radha Niwas Co-Operative Housing Society Ltd., Pali Road, Near Khar Telephone Exchange, Khar (West), Mumbai 400 052 is concerned to continue for a period of four weeks from today.

(R.D.DHANUKA, J.)