

Sudhir Rane

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.**

**APPEAL NO.475 OF 2009
IN
ARBITRATION PETITION NO.275 OF 2006**

John Peter Fernandes
Aged about 36 years, Indian Inhabitant
St. Paulin No. 175/D, Near Doulers
Colony, Wadala (East),
Mumbai – 400 037

**...APPELLANT/
Orig. Respondent No. 1**

VERSUS

1. Saraswati Ramchandra Ghante
aged about 40 years, Indian Inhabitant
Occupation – business, residing at
12 Bhupal House, Naigaon Society
S.M. Jadhav Marg, Dadar
Mumbai – 400 014.
2. Ramakant Ramchandra Ghanate
aged about 40 years, Indian Inhabitant
Occupation – Business also constituted
attorney of Respondent No.1, residing
at 12 Bhupal House, Naigaon Society,
S.M. Jadhav Marg, Dadar,
Mumbai – 400 014.

**...RESPONDENTS/
Orig. Petitioners**

3. Deepak L. Thakkar
aged about 28 years, Indian Inhabitant,
Occupation – Business, residing at
Gour "B" Nirmala Niwas, Ground floor,
Aaimai, Merwagadi Street, Parel,
Mumbai – 400 012.

**...RESPONDENT/
Orig. Respondent No.2**

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Mr. Rushabh Shah i/b. Bptist D'Souza for Appellant.

Mr. Rohaan Cama i/b. Shriram S. Redij for Respondent Nos. 1 & 2.

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**CORAM: ANOOP V. MOHTA AND
P.R. BORA, JJ.**

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DATE OF RESERVING THE JUDGMENT : 01.02.2017

DATE OF PRONOUNCING THE JUDGMENT : 30.03.2017

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JUDGMENT: (*Per P.R.Bora, J.*)

1. The appellant has preferred the present appeal against the judgment and order dated 03.11.2006 passed by the learned Single Judge in Arbitration Petition No.275 of 2006. The learned Single Judge has allowed the Arbitration Petition and has thereby set aside the arbitral award impugned in the said petition.

2. The facts which are relevant for decision of the present appeal in brief are thus:

Respondent Nos. 1 and 2 had agreed to sell to the appellant the premises belonging to them along with the business being run therein, for the consideration of Rs.35 Lakh. Accordingly, an agreement dated 06.10.2003

was executed between the appellant and the respondent Nos. 1 and 2. The said agreement was duly registered and duly stamped. It is the case of the appellant that, he had paid a sum of Rs. 11.5 Lakh to the respondents by way of advance amount towards the consideration of the said property before entering into an agreement of sale dated 06.10.2003. It is the further case of the appellant that since the respondents failed to perform their part of the agreement though he was ready and willing to perform his part. He filed a Suit No.2410/2004 against the respondent Nos. 1 and 2 in the High Court for specific performance of the agreement dated 06.10.2003. In the aforesaid suit, notice of motion was taken out by the appellant seeking interim relief, however same was rejected. Against the said order, the appellant preferred an Appeal No.322 of 2005 before the Division Bench of this Court. In the aforesaid appeal, the appellant and respondent Nos. 1 & 2 filed consent terms, whereby they both consented to refer the dispute between them to the Arbitrator. By consent the dispute was referred to the arbitration of the learned Arbitrator Shri D.D. Madan. Both the parties filed their respective statements before the arbitrator with the

supporting evidence. The learned arbitrator passed the award on 03.02.2006 and thereby partly allowed the claim of the appellant. The learned Arbitrator though refused the relief of specific performance, directed respondent Nos. 1 and 2 to refund the sum of Rs.11.5 Lakh to the appellant with interest thereon. Being aggrieved by the award so passed, respondents filed Arbitration Petition No.275/2006 challenging the said award. The learned Single Judge after hearing the parties allowed the said petition and set aside the said award. The appellant has challenged the said order by filing the present appeal.

3. Mr. Rushabh Shah, learned Counsel appearing for the appellant, assailed the impugned order on various grounds. Learned Counsel submitted that, the learned Single Judge manifestly erred in coming to the conclusion that the arbitrator has excluded from consideration the relevant material and further that the finding recorded by the arbitrator is contrary to the material on record. Learned Counsel further submitted that, the learned Single Judge has failed in appreciating that the forfeiture clause

in the agreement dated 06.10.2003 is inconsequential. Learned Counsel further submitted that the learned Single Judge has kept out of consideration the receipts at Exhibit 11 to 13 evidencing the payment of Rs.5 Lakh to the respondent by the appellant and by considering only receipt at Exhibit 14, has recorded the conclusion that the arbitrator has excluded certain material from consideration while passing the award. Learned Counsel further submitted that, the learned Single Judge has also not considered the observation made by the learned arbitrator to the effect that the evidence of the appellant was found by the arbitrator to be more dependable and reliable, whereas the evidence adduced by the respondents did not inspire any confidence. Learned Counsel further submitted that, the learned arbitrator has duly appreciated the evidence brought before him and has passed well reasoned order. Learned Counsel therefore prayed for setting aside the order passed by the learned Single Judge and to confirm the award passed by the learned arbitrator.

4. Mr. Rohaan Cama, the learned Counsel appearing for the respondents supported the order passed

by the learned Single Judge. Learned Counsel submitted that, the arbitrator has passed an award in favour of the appellant thereby directing the respondents to refund the amount of Rs.11.5 Lakh to the appellant with interest @ 18% p.a. thereon, presuming firstly that the aforesaid amount was in fact received to the respondents and secondly that there was no such clause in the agreement dated 06.10.2003 permitting forfeiture of the said amount by the respondents. Learned Counsel invited our attention to the agreement dated 06.10.2003 and more particularly to the clause therein to the effect that, on willful default on the part of the purchaser, the vendor shall be entitled to forfeit the earnest money. The learned Counsel submitted that in spite of the aforesaid specific clause in the agreement, the learned arbitrator has observed that there is no forfeiture clause in the said agreement. Learned Counsel submitted that, no more evidence is required to arrive at the conclusion that the award passed by the learned arbitrator is contrary to the evidence on record.

5. Learned Counsel further submitted that the

learned Single Judge has rightly set aside the finding recorded by the Arbitrator to the effect that the receipts at Exhs. 11 to 14 establish that Rs. 10 lakhs were received by respondent nos. 1 and 2. Learned Counsel submitted that, according to appellant himself, the amount of Rs. 5 lakhs was not paid by him by cheque as is mentioned in the receipt at Exh.14 and the said amount was, according to him, he has paid in cash. However, there was no receipt executed by respondent nos. 1 and 2 for having received the said sum of Rs. 5 lakhs by cash. Learned Counsel submitted that in the circumstances, the finding arrived at by the learned Arbitrator was not sustainable.

6. Learned Counsel submitted that, the aforesaid were the two main grounds which made the learned Single Judge to arrive at a conclusion that the learned Arbitrator had excluded from the consideration the relevant material and the findings recorded by him are contrary to the material on record. In the circumstances, according to the learned Counsel, no error has been committed by the learned Single Judge in setting aside the award passed by the learned Arbitrator. Relying on the Judgment of the

Hon'ble Apex Court in the case of **Wander Ltd. And anr. Vs. Antox India P. Ltd 1990 (Supp) SCC 727** and more particularly the observations made by the Hon'ble Apex Court in Para No.13 and 14 of the said judgment, the learned Counsel submitted that, the Appellate Court would normally not be justified in interfering with the exercise of the discretion by the learned Single Judge, in an appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. The Hon'ble Apex Court, in the aforesaid judgment has observed that if the discretion has been exercised by the Trial Court reasonably and in a judicial manner the fact that the Appellate Court would have taken a different view may not justify interference with the Trial Court's exercise of discretion. Learned counsel submitted that, the learned Single Judge has exercised its discretion reasonably and in a judicial manner and therefore no interference is required in the impugned order.

7. We have carefully considered the submissions advanced by the learned Counsel appearing for the respective parties. We have also perused the impugned

order, the award passed by the Arbitrator and the other material on record. The learned Single Judge has set aside the Arbitral Award mainly on the ground that though there is a specific clause in the agreement of sale dated 6.10.2003, to the effect that, " in the event of any wilful default on the part of the purchaser, the vendor shall be entitled to forfeit the earnest money or deposit", the learned Arbitrator has directed the refund of the said amount observing that there is no forfeiture clause in the said agreement. We have carefully perused the agreement dated 6.10.2003. No doubt, there is a forfeiture clause in the said agreement but the question arises as to which amount was to be forfeited on the strength of the forfeiture clause in the said agreement.

8. Clause 1A of the said agreement, in fact, carries an averment that the total consideration of Rs.35 lakhs was already paid by the purchaser to the vendor and that the vendor has admitted and acknowledged the receipt of the said payment. If one goes by the recitals as aforesaid in the said agreement, there was no question of any default since the entire consideration was shown to

have been paid before signing of the said agreement. Consequently, when there was no possibility of any default on the part of the purchaser in payment of consideration amount, forfeiture clause was inconsequential. It is, however, also the matter of record that though the aforesaid clause connotes that the entire consideration of Rs. 35 lakhs was paid by the present appellant and was received by present respondent nos. 1 and 2, the appellant himself has clarified that he had paid only a sum of Rs. 11,50,000/- to respondent nos. 1 and 2 before signing the said agreement. It has also to be stated that respondent nos. 1 and 2 have denied to have received any such amount. The fact, however, remains that the aforesaid agreement does not contain any information that a sum of Rs.11,50,000/- was paid by the purchaser to the vendor. The said agreement also does not contain any information as to how much amount had remained to be paid by the purchaser to the vendor out of the total consideration fixed or no amount was paid by the purchaser as contended by respondent nos. 1 and 2. It is also not mentioned in the said agreement as to what was the time schedule for making such payment by the purchaser. The said

agreement does not prescribe any outer limit within which the purchaser was required to pay the entire amount of consideration. Unless a period is prescribed for making the payment and unless the amount is specified, the default clause cannot be pressed into service. The agreement dated 6.10.2003 lacks both the particulars. Most importantly, there is nothing in the said agreement to indicate that the time was the essence of the said contract. In absence of the vital particulars as aforesaid, there was no meaning to the forfeiture clause; in fact, it was inconsequential.

9. Material on record reveals that the amount of Rs.11,50,000/- which has been directed to be refunded by respondent nos. 1 and 2 to the appellant in the award passed by the Arbitrator, was, according to the appellant, paid by him to respondent nos. 1 and 2 before the date of the aforesaid agreement. The aforesaid contention is, of course, disputed by respondent nos. 1 and 2. After the date of execution of the aforesaid agreement, even according to appellant, no amount was paid by him to respondent nos. 1 and 2. As noted by us earlier, the

agreement does not contain any information whether any amount was paid by appellant to respondent nos. 1 and 2 towards consideration before execution of the said agreement and, if yes, how much amount was paid. Thus, whether forfeiture clause in the said agreement would apply to the amount allegedly paid by the appellant before execution of the said agreement is a matter of scrutiny. The learned Single Judge has not considered this aspect.

10. Considering the contentions raised by respondent nos. 1 and 2, that the appellant had not paid a single pie to them towards consideration, much less the amount of Rs.11,50,000/- as alleged by him, it was immaterial for them whether the agreement dated 6.10.2003 contains any forfeiture clause or not. These respondents, in their written statement filed before the Arbitrator, had also taken the same stand that since no payment was received, there was no question of any refund or forfeiture. In view of the above, it appears to us that merely relying on the forfeiture clause contained in the agreement, the learned Single Judge could not have

set aside the award passed by the learned Arbitrator on the said ground excluding from his consideration the other material on record.

11. Setting aside the award passed by the arbitrator, directing refund of Rs.11,50,000/- by observing that there is no forfeiture clause in the agreement, merely on the ground that there is a forfeiture clause in the said agreement, and without considering the said agreement as a whole and without considering other evidence on record, impliedly leads to an inference that the appellant had paid at least some amount. Considering the stand taken by respondent nos. 1 and 2, though the order passed by the learned Arbitrator was liable to be set aside, it ought to have been set aside by holding that the appellant has not paid any amount to respondent nos. 1 and 2 and not on the ground that the agreement contains a forfeiture clause.

12. From the pleadings of the parties, it is evident that the real dispute is in respect of payment of Rs.11,50,000/-. It is the assertion of appellant that he

had paid that amount to respondent nos. 1 and 2 whereas respondent nos. 1 and 2 had candidly denied to have received any such amount. The learned Arbitrator, in the latter part of the order, has dealt with the issue of payment. The learned Single Judge has held the finding recorded by the learned Arbitrator, that, "the receipts at Exhs. 11 to 14 establish that an amount of Rs. 10 lakhs was received by the vendor" to be unsustainable on the ground that the appellant has failed to prove the payment made under receipt at Exh.14. According to the learned Counsel for the appellant, the finding so recorded by the learned Single Judge is against the evidence on record. For a moment, even if it is accepted that the payment allegedly made vide Exh.14 is not proved, the fact remains that the learned Single Judge has not recorded any adverse finding in regard to payment of Rs. 5 lakhs allegedly made by the appellant vide receipts at Exhs. 11, 12 and 13. The learned Single Judge in paragraph no.3 of the impugned order has observed that the purchaser had relied on several receipts to prove that he had paid various sums to the vendor on various dates. Needless to state that Exh.11 to Exh.14 are the said receipts. As

noted earlier, the discussion made by the learned Single Judge is restricted to the alleged payment of Rs. 5 lakhs under receipt at Exh.14. It is observed by the learned Single Judge that perusal of the receipt at Exh.14 though shows that by that receipt the vendors have acknowledged receipt of Rs.5 lakhs by cheque even according to the purchaser, the said amount of Rs. 5 lakhs was not paid by cheque but was paid in cash. Since the purchaser did not produce on record the receipt executed by vendors for having received the amount of Rs. 5 lakhs in cash, the learned Single Judge proceeded to hold that the said payment has not been proved by the appellant. Learned Single Judge has not recorded any such finding as about payment allegedly made by the appellant under receipts at Exhs. 11, 12, and 13, which may lead to an inference that the amount of Rs. 5 lakhs under the said receipts was received to the respondent nos.1 and 2 and which may also have an effect of rejecting the contention of present respondent nos./ 1 and 2 that they have not received a single pie from the appellant. It appears to us that the learned Single Judge instead of recording such a vague finding, must have recorded an unambiguous and clear

conclusion whether the evidence on record supports the contention of the appellant that he has paid Rs.11,50,000/- to respondent nos. 1 and 2 or the contention raised by respondent nos. 1 and 2 has to be sustained that the appellant did not pay them a single pie.

13. It, thus, appears to us that after legality and correctness of the finding recorded by the learned Arbitrator, to the effect that the appellant has paid an amount of Rs.11,50,000/- to respondent nos. 1 and 2, is decided; either confirming, partly confirming or rejecting it, then only the next question will fall for consideration, whether the order passed by the learned Arbitrator directing refund is to be sustained, or is to be set aside. If it is held that there is no evidence showing that any payment was made by the appellant to respondent nos. 1 and 2, the question of refund or forfeiture both would not arise. However, if it is held that payment of Rs. 11,50,000/- or payment of any sum, was made by the appellant to respondent nos. 1 and 2 by way of earnest money / part payment, the further question will have to be answered whether the order passed by the Arbitrator, directing refund of the said

amount was correct or was liable to be set aside. In such a contingency, it would be further required to examine whether the default committed by the appellant in completing the transaction which was the subject matter of the agreement dated 6.10.2003, was willful or otherwise, because unless the said fact is established, the grant of forfeiture of the earnest money amount may not be permissible. We need not to elaborate evidence on this aspect, suffice it to say that, there is ample evidence on record which will have to be scrutinized before recording any such finding whether the default committed by the appellant was willful or otherwise. The learned Single Judge in his impugned order has not even touched to this aspect.

14. It has to be further mentioned that according to respondent nos. 1 and 2, the appellant had executed a deed of cancellation on 19th of December, 2003, contending therein that since he failed in making arrangement of finance in time, though sufficient time was given to him by respondent nos. 1 and 2, he is inclined to declare the agreement dated 6.10.2003 to have been

cancelled from 1st of January, 2004. The appellant has candidly denied to have executed any such document. It appears to us that while deciding the issue of willful default in complying with the agreement dated 6.10.2003, the said cancellation deed may also have a material bearing. The learned Single Judge has not even referred to the said document and its impact on the transaction in dispute.

15. In the foregoing circumstances, we feel that it would be in the interest of both the parties to remit back the matter for its fresh decision. Hence, the following order:

ORDER

1. The order passed by the learned Single Judge in Arbitration Petition No.275/2006 dated 8th of November, 2006, is set aside.

2. The matter is remitted back to the learned Single Judge to decide it afresh by giving due consideration to the observations made in the body of the present judgment and of course by giving due hearing to the parties.

3. The Appeal stands allowed in the aforesaid terms.

(P.R.BORA)
JUDGE

(ANOOP V.MOHTA)
JUDGE

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