

Vidya Amin

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

ARBITRATION APPEAL NO. 54 OF 2013

The TJSB Sahakari Bank Ltd. (earlier known as The Thane Janta Sahakari Bank Ltd.)
having its registered office at
Madhukar Bhavan, Road No. 16,
Wagle Estate, Thane (W) – 4000 604.
Having its Regional office at -
1264, Ranglar Paranjpe Road,
Deccan Gymkhana, Pune-411 004.
through its officer-

Shri Priyadarshan D. Dabir

... Appellant

V/s.

1. Sandeep Sudhakar Rajeshirke
Age : Adult, Occupation – Business
Having address at -
13C, Bhakti Paradise, Chinchwad,
Link Road, Opposite Eagle Hotel,
Pune – 411 019.
2. Mrs. Sheetal Sandeep Rajeshirke
Age : Adult, Occupation : Business
Having address at -
13C, Bhakti Paradise, Chinchwad,
Link Road, Opposite Eagle Hotel,
Pune – 411 019.
3. Shri Dayanand Bhagawan Gaikwad
Age : Adult, Occupation : Service
Having address at -
736, Near Ganesh Mandir,
Shitle Nagar, Sangavi, Pune – 411 027.
4. Shri Nand Narayan Mathurai
Age : Adult, Occupation : Service
Having address at -
A-252, H.A. Colony Pimpri,
Pune – 411 018.

5. Shri J.S. Patil
The Arbitrator appointed by the
Central Registrar u/s. 84 of Multi-State
Cooperative Societies Act, 2002
Having address at -
9, Prasad, Gururaj Cooperative Hsg.
Society, Kothrud, Pune – 411 037.
6. M/s. Parth Associates
A Partnership Firm registered under
Indian Partnership Act 1932 having
its office at Sai Sagar, Plot No. 43,
Sector No. 16, Opp. Tata Indica Gate,
Raje Shivaji Nagar, Chinchwad,
Pune – 411 019.

... Respondents

Mr. Bhupesh V. Samant for the appellant.
None present for the respondents.

CORAM : G.S.KULKARNI, J.
DATE : 15th July, 2019

JUDGMENT:

This is an appeal filed by the appellant under section 37 of the Arbitration and Conciliation Act, 1996 (for short “the Act”) being aggrieved by the judgment and order dated 28th November, 2013 passed by the learned District Judge-9, Pune whereby Miscellaneous Civil Application no. 326 of 2011 filed by the appellant under section 34 of the Act challenging the award dated 7th February, 2011 passed the learned Arbitrator is rejected.

2. Respondents though served are not appearing.

3. In brief, the facts are -

The appellant is a bank registered under the Multi-State Cooperative Societies Act, 2002. Respondent nos. 1 and 2 had approached the appellant-bank for financial assistance in the nature of housing loan for purchasing Flat No. 42 situated at Sagar Apartments, Village Chikhali, Taluka Haveli as described in detail in paragraph 3 of the Dispute raised by the appellant before an arbitral tribunal. The flat was being sold to respondent nos. 1 and 2 by respondent no. 6 M/s. Parth Associates – a partnership firm.

4. An Agreement of Sale dated 16th November, 2009 was executed by respondent no. 6-Parth Associates with respondent no. 1. A receipt was issued by respondent no. 6-Parth Associates in favour of respondent no. 1 for initial payment. The appellant had granted loan of Rs.16,26,192/- by sanction letter dated 27th January, 2010 issued in favour of respondent nos. 1 and 2. Respondent nos. 3 and 4 stood as guarantors for the said loan. The loan was to be repaid within 180 equal monthly instalment of Rs.17,475/- with interest @10% p.a.

5. Respondent nos. 1 to 4 executed necessary documents in favour of the appellant including registered mortgage Deed dated 3rd February, 2010 in respect of the said flat whereby security interest was created in

favour of the appellant for repayment of said loan. Respondent nos. 1 and 2 defaulted in repayment of loan for the month of May, 2010. Consequently, officers of the appellant visited the mortgaged flat and noticed that the flat is in danger as respondent nos. 1 and 2 have also raised loan from other financial institution and the representatives of the financial institutions were also visiting the said flat. The appellant apprehended that respondent nos. 1 and 2 in collusion with Parth Associates may create third party interest and that respondent nos. 1 and 2 were not in actual and physical possession of the said flat. Aggrieved by the conduct on the part of respondent nos. 1 and 2, appellant raised a dispute as per the provisions of Section 84 of the Multi-State Cooperative Societies Act, 2002. on the basis of extract of the accounts and the loan documents as well as mortgage deed, the appellant sought recovery of the loan amount as defaulted and also prayed for attachment of mortgaged property and till then for appointment of receiver under Order 40 Rule 1 of the Code of Civil Procedure for reliefs of injunction etc. An Application was also filed for attachment of the said flat and appointment of receiver pending the adjudication of the dispute. A sole arbitrator came to be appointed to adjudicate the disputes between the parties.

6. On 1st June, 2010 the learned arbitrator passed the following order :

“Mr. P.L. Sonawane, Officer of the disputant bank is appointed as a receiver for suit flat, i.e., Flat No. 16, 3rd floor, admeasuring 992.00 sq.ft. At “Sai Sagar Apartment Condominium on Plot no. 42 sector 16, Chikhali, Tal. Haveli”. He is ordered to take physical possession of the flat by putting lock and report accordingly. He is also ordered to keep possession of the flat with him till disposal of the dispute or till any contrary order which is earlier, issue show cause notice returnable on 21/06/2010.”

7. Respondent nos. 1 to 3 failed to appear before the arbitral tribunal and the matter proceeded exparte against them. However, M/s. Parth Associates-respondent no. 6 although was not a party to the arbitration, appeared and filed an application to intervene, contending that the agreement produced by the appellant was the basis of which it was contended that a mortgage was created in respect of said flat, was a forged document as respondent no. 1 had paid only Rs.50,000/- to M/s. Parth Associates and other cheques which were issued by respondent no. 1 in its favour were dishonoured. M/s. Parth Associates contended that it had not handed over the possession of suit flat to respondent no. 1 and so the said flat was wrongly attached. M/s. Parth Associates requested to vacate the attachment of the flat and order of appointment of Court Receiver.

8. Learned arbitrator rendered an award dated 7th February, 2011 in

which the following issues were framed:

- “1. Whether disputant had proved claim for Rs.16,02,507/- with 10% interest from 30.04.2010 against all opponents?
2. Whether opponent no. 4 had signed loan documents as a formality?
3. Whether order for setting mortgaged flat be passed?
4. What order?”

9. In deciding point nos. 1 and 2, learned arbitrator held that respondent no. 1 to 3 were granted loan and that they have defaulted in repayment of loan was proved on documents. However, in deciding point no. 3 learned arbitrator has in fact decided a dispute which is possibly between respondent no. 1 and respondent no. 6-Parth Associates who was not a party to the arbitral proceedings. It would be appropriate to note discussion on the above points rendered by the arbitrator, which reads thus:

“Point no. 1

Evidence lead on affidavit by disputant gone unchallenged is supported by loan documents mentioned in para 1 of the judgment, copies of which are produced and proved. All necessary loan documents were executed by opponent no. 1 to 4 and incurred liability joint and several towards claim of the bank. Opponent nos. 1 and 2 are liable as a principal and opponent nos. 3 and 4 are liable as a surety. In view of finding to point no. 2, opponent no. 4 had not proved that he had signed loan documents as a formality. But fact emerges that opponent no. 4 had signed loan documents with full knowledge and free will as opponent no. 4 is matured and educated person. Statement of account is kept in regular course by bank, of which certified copy

is produced according to which Rs.16,02,507/- are due as on 30.04.2010 interest claimed at agreed rate requires to be allowed. Opponents have not paid amount is undoubted fact emerges. Hence my finding to this point for determination is proved.

Point no. 2

Opponent no. 4 is complaining first time that he had signed loan documents as a formality and without free will at the instance of disputed bank and opponent no. 1 and friend of opponent no. 1 Madhukar Chavan. Opponent no. 4 seems to be matured and educated person. This behaviour alleged by opponent no. 4 is not probable human conduct of prudent man. Hence, cannot be accepted as a true. Opponent no. 4 should not have given pancard, salary slip to Bank if he would have not signed as a surety. Hence, contention of the opponent to 4 cannot be accepted as a true. Hence, my finding to this point for determination is no.

Point No. 3

Disputant had produced & proved mortgage deed executed by opponent no. 1 & 2. However, at the time of mortgaging flat, remaining amount of the price was required to be paid by creditor bank to builder seller. According to builder he has received only Rs.50,000/- and had not received remaining amount of Rs.19,05,000/- as a price of flat. According to builder, three cheques drawn by Opponent no. 1 on Ashok Sahakari Bank as part payment were dishonoured. According to builder, pay order issued by disputant bank is not received by him nor amount of said pay order is credited to his account. Amount is credited in some bogus account. Receipt for receiving pay order is bogus. According to builder, he had complained with police about forgery of document and cheating by opponent no. 1. In these circumstances, point is whether disputant had proved that it has paid loan amount of Rs.16 lacs to builder and whether Disputant has not produced any documentary evidence that amount of Rs.16 lacs in favour of Parth Associates (Builder) does not mean that builder had received said amount. As a prudent Banker disputant should have delivered pay order to builder personally and disputant should have put account number of the builder on said pay order but that is not done by disputant bank. As builder

is coming with the case that alleged pay order is not received by him or is not credited in his account. In these circumstances, fact emerges that opponent no. 1 should have credited said pay order by opening bogus account in the name of builder Parth Associates & absconded. Contention of the builder seems probable as he had given public notice in newspaper, alerting public about opponent no. 1 & his acts and behaviour, as builder had complained to police. Fact emerges that opponent no. 1 have by fabricating documents, by opening bogus account, by misrepresenting builder & bank cheated both builder & bank.

However, fact emerges before me undoubtedly that opponent no. 1 had paid Rs.50,000/- to the builder and got executed agreement for sale of flat. Fact emerges before me that opponent no. 1 had right to suit flat only to the extent of Rs.50,000/-. Opponent no. 1 cannot mortgage which he do not have. On the date of mortgage of flat in favour of the bank opponent no. 1 had only interest in suit flat to the extent of Rs.50,000/-. Hence, conclusion required to be drawn that opponent no. 1 had created only right in favour of disputant bank by executing mortgage deed with respect to suit flat to the extent of Rs.50,000/-. Hence, disputant bank has proved only claim of Rs.50,000/- against suit flat and not more. As I have asked builder to pay Rs.50,000/- to disputant bank with 10% interest from date of mortgage by opponent no. 1 in favour of disputant while, vacating order of receiver, disputant be ordered wait for one month for receipt of money from builder. If money is not received from builder, then, bank should be asked to sell mortgaged flat get satisfied its claim to the extent of Rs.50,000/- with interest against mortgaged flat and pay excess amount to builder. As discussed above I finding to this point of determination accordingly.”

10. The result of the above discussion, the sole arbitrator made following award:

“As discussed in finding to point no. 1 disputant had proved claim of Rs.16,02,507/- with 10% interest from 01/05/2010 against all opponents jointly & Severally. Order & Award for said amount be passed. As discussed in point no. 3, disputant be asked to wait for one month for receiving amount

from builder. If amount is not received then disputant be asked to sale mortgaged flat and get satisfied its claim to the extent of Rs.50,000/- plus 10% interest from 05/02/2010 as discussed in point no. 1 and pay remaining amount to builder. Rule costs follows cause be observed. Accordingly, award be passed.”

11. Peculiarly on the same day (7th February 2011), learned arbitrator passed another order on the application No. ARB/ACB/107 of 2011, which is an application filed by the said third party M/s. Parth Associates, who by the said application prayed for vacating of the interim order for appointment of receiver in respect of flat in question. Learned arbitrator passed an order directing that the order dated 1st June, 2010 appointing receiver is vacated subject to said third party M/s. Parth Associates paying amount of Rs.50,000/- with 10% interest from 5th February, 2010 within one month to the appellant and on this condition, receiver was directed to handover possession of the flat to third party after getting confirmation of the receipt of money. The order reads thus :

“This is an application filed by third party & by same third party had prayed for vacating interim order appointing receiver for suit flat dated 01.06.2010. It is contended by third party applicant that order appointing receiver is wrongly passed. Third party was required to be heard before passing said order. He contended that he had never given possession of suit flat to opponent no. 1. He had received only Rs.50,000/- out of price Rs.19,55,000/-. He contended that he was required to be made consenting party to mortgage deed between opponent no. 1 & 2 and bank. It is alleged that documents produced by opponent no. 1 to bank are fabricated and forged. He also contended that he had not received pay order of loan amount. It is alleged in written argument that it was understanding that opponent no. 1 was to pay remaining consideration (price) after getting loan by opponent no. 1. It is alleged that on the date of mortgage, opponent no. 1 & 2 had no right to mortgage flat. In view of these contentions, third party

prayed for vacating order of receiver for suit flat and for compensatory costs. Disputant Bank opposed this application by reply and oral arguments. Third party filed written arguments.

Disputant Bank had failed to show that on the date of mortgage, opponent no. 1 and 2 had valid right to mortgaged suit flat and builder has received amount of loan sanctioned by disputant bank. Documentary evidence came before me show that opponent no. 1 had produced forged documents to disputant bank, except agreement for sale between him and builder. Cheques issued by opponent no. 1 to builder were dishonoured, pay order of loan amount is realized by opponent no. 1 by opening bogus account, proceeds of pay order are not received by builder. In view of above circumstances, I find that opponent no. 1 had acquired only right to the extent of Rs.50,000/- on the basis of agreement between builder and him. Said agreement is admitted document between the parties. I also find builder that is third party applicant is guilty of negligence that is he should have canceled the agreement as soon as cheques given by opponent no. 1 drawn on Ashok Sahakari Bank are dishonoured and should have given public notice but third party and builder had kept mum for considerable time.

Disputant Bank was not deligent. As discussed in Judgment that disputant had acquired interest only, what was opponent no. 1 had in suit flat on the date of mortgage that is to the extent of Rs.50,000/- only. Third party had received this amount hence third party be asked to pay said amount to disputant bank with 10% interest, that is interest claimed by disputant from opponents. Builder third party is also not entitled to this amount of Rs.50,000/- in law, hence I find builder has to pay Rs.50,000/- with interest before claiming any right to suit flat that is before vacating order of receiver.

Advocate for disputant had submitted that builder had to get declaration from civil court that mortgage deed between disputant bank and opponents is void and he cannot approach to this authority. This submission I am reluctant to accept, as everyone is entitled to show me that some wrong order is passed by me which affects his right. I cannot say that I will pass wrong order against person who is not party and ask said person to get declaration from civil court.

Considering all above discussion, I find order of receiver be vacated subject to third party paying to Rs.50,000/- with interest hence following order:

ORDER

Order dated 01.06.2010 appointing receiver is vacated subject to third party paying Rs.50,000/- with 10% interest from 05.02.2010 within one month to disputant. Receiver is ordered to hand over possession to third party after getting confirmation as to payment of money. Otherwise disputant is as liberty to sale suit flat get above amount from sale proceeds any pay remaining amount to third party.”

12. Learned sole arbitrator passed another order on the same day, i.e., dated 7th February, 2010, which is titled as award, without any reasoning, which reads thus:

“AWARD

1. Opponent No. 1 to 4 are jointly & severally ordered to pay Rs.16,02,507/- to disputant with 10% interest from 01/05/2010.
2. Opponent no. 1 to 4 are jointly & severally ordered to pay Rs.5,650/- as a arbitration fees and Rs.5,000/- as a administrative costs.
3. If Rs.50,000/- with 10% interest from 05.02.2010 date of mortgage, are not received (as per order to builder dated 07.02.2011) within one month from builder disputant bank is ordered to attach & sale mortgaged flat that is flat no. 16 on 3rd floor, admeasuring 992 sq.ft. (92.19 sq. mtr.) in building “Sai Sagar Apartment Condominium” on plot no. 42, Sector No. 16, Village Chikhali within limits of Pimpri Chinchwad New Town Development Authority, in Pimpri Chinchwad Municipal Corporation and get satisfied it's claim for Rs.50,000/- with 10% interest from 05.02.2010 and pay to excess amount to builder promoter.”

13. The Appellant being aggrieved by the award passed by the learned arbitrator approached the Court of learned District Judge challenging the award passed by the learned arbitrator. The appellant interalia contended that the arbitrator had no jurisdiction to make any award against a third party, namely, M/s. Parth Associates, as it was not a party to the arbitration.

14. The learned District Judge in the proceedings filed under section 34 of the Act, considering the merits of the dispute, has observed that

the “pay order” issued by the appellant was not received by the third party and that the amount was credited in some bogus account and the appellant had not produced any documentary evidence showing that the amount of Rs.16 lakhs being received by Parth Associates. The contention as urged on behalf of the appellant was that the appellant can claim full rights in respect of the said flat under the mortgage created in favour of the bank was not accepted. It was held that the appellant could not have enforced its rights qua the full amount of claim to be recovered from the sale of said flat. It was held that the learned arbitrator was justified in passing the orders and the award recognizing the rights of the appellant only in respect of amount of Rs.50,000/- in respect of said flat and accordingly dismissed Section 34 Application as filed on behalf of the appellants by the impugned judgment and order.

15. Learned counsel for the appellant, in assailing the impugned order passed by the learned District Judge would principally urge that the fundamental error on the part of the arbitral tribunal is to adjudicate the rights of Parth Associates-respondent no. 6. This for the reason that M/s. Parth Associates was a third party to the arbitral proceedings. M/s. Parth Associates was not a member of the bank as also the arbitration mechanism created by virtue of Section 84 of the Multi-State

Cooperative Societies Act, was not applicable to respondent no. 6-Parth Associates and it could not have been a party to the arbitral proceedings. It is submitted that the findings recorded by the arbitral tribunal to this extent clearly demonstrate adjudication of rights of a third party in the claim asserted by the bank on the mortgaged property. It is submitted that if M/s. Parth Associates had any rights in respect of said flat/mortgage property, it was open to M/s. Parth Associates to adopt appropriate proceedings and establish its rights against the bank or even in that regard against respondent nos. 1 to 4. According to him, this aspect was completely overlooked by the arbitral tribunal and the learned District Judge. The sole arbitrator ought to have accepted this contention. It is submitted that in these circumstances, the adjudication of the disputes by the arbitral tribunal itself is contrary to the provisions of Section 84 of Multi-State Cooperative Societies Act, 2002 and the award needs to be quashed and set aside to that extent as also the impugned judgment order confirming the said award, being clearly hit by the provisions of Section 34(2)(a)(iv) read with section 34(2)(b)(ii) being in contravention with the fundamental policy of Indian law.

16. Having heard learned counsel for the appellant and having perused the record, there appears to be much substance in the

contentions as urged on behalf of the appellant. Perusal of Section 84 of the Multi-State Cooperative Societies Act clearly indicate that the jurisdiction of the arbitral tribunal would be to adjudicate disputes which would arise between the Multi-State Cooperative Society and its members and in the manner as provided in Section 84(1), which reads thus:

“84. Reference of disputes – (1) Notwithstanding anything contained in any other law for the time being in force, if any dispute (other than a dispute regarding disciplinary action taken by a multi-State cooperative society against its paid employee or an industrial dispute as defined in clause (k) of section 2 of the Industrial Disputes Act, 1947 touching the constitution, management or business of a multi-State cooperative society arises-

(a) among members, past members and persons claiming through members, past members and deceased members, or

(b) between a member, past member and persons claiming through a member, past member or deceased member and the multi-State co-operative society, its board or any officer, agent or employee of the multi-State co-operative society or liquidator, past or present, or

(c) between the multi-State co-operative society or its board and any past board, any officer, agent or employee, or any past officer, past agent or past employee, heirs or legal representatives of any deceased officer, deceased agent or deceased employee of the multi-State co-operative society, or

(d) between the multi-State co-operative society and any other multi-State co-operative society, between a multi-State co-operative society and liquidator of another multi-State co-operative society or between the liquidator of one multi-State co-operative society and the liquidator of another multi-State co-operative society, such dispute shall be referred to arbitration.”

17. Sub-section 5 of Section 84 would also recognize the applicability of the provisions of Arbitration and Conciliation Act, 1996 in arbitration proceedings. It would be appropriate to note the relevant provisions in

Section 84 (5) which reads thus:

“5. Save as otherwise provided under this Act, the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply to all arbitration under this Act as if the proceedings for arbitration were referred for settlement or decision under the provisions of the Arbitration and Conciliation Act, 1996.”

18. Perusal of the award rendered by the arbitral tribunal reveals that in deciding point no. 3 the learned arbitrator has in fact adjudicated the rights of M/s. Parth Associates. This is also clear from the adjudication of an application filed by M/s. Parth Associates whereby the learned arbitrator by an order dated 7th February, 2011 (supra) has vacated the appointment of Receiver, however, conditionally. The arbitral award in deciding point no. 3 adjudicates the third party's rights vis-a-vis that of the appellant. Thus, adjudication of rights of the third party in respect of said flat has become part of the impugned award. This possibly for the reason that it was only Parth Associate was before the arbitral tribunal and arbitral proceedings has proceeded ex-parte against principal borrowers and guarantors, i.e., respondent nos. 1 to 4. The learned arbitrator totally missed the issue that M/s. Parth Associate cannot be impleaded as a party to the arbitral proceedings.

19. Having perused the reasons as set out in the impugned order passed by the learned District Judge as also the reasons as set out in the arbitral award as noted above as contained in operative paragraph (3)

of the award, the same, cannot be sustained. The contention as urged on behalf of the appellant that respondent no. 6-Parth Associates not being a party to the dispute and therefore, an application as made by M/s. Parth Associates could not have been entertained ought to have been accepted by the learned District Judge. In my opinion, there is clear error of law. The finding as recorded by the arbitral tribunal on the possession of the flat, by undertaking an enquiry on the rights on the said flat and the learned District Judge rejecting a contention on the arbitration exceeding his jurisdiction is a clear illegality and a sufficient reason for the award to be set aside to that extent considering the proviso below sub-section (2) of Section 34 so as to separate a decision which cannot be subject matter of arbitration. Such decision also amounts to a legal perversity. The appellant was thus correct in its contention that Parth Associates if had any right in respect of said flat or vice-versa if respondent no. 1, did not have any right, title and interest in respect of flat in question or that respondent no. 1 had no right to create any mortgage in respect of said flat, it was open to M/s. Parth Associates to resort to appropriate remedy.

20. In above circumstances, the arbitral award cannot be sustained to the extent it has decided disputes which was not subject matter of

arbitration and/or alien to arbitral proceedings amounting to adjudication of the rights of respondent no. 6-Parth Associates/a third party qua the appellant-bank.

21. The arbitral award is accordingly required to be set aside, to the extent of clause 3 of the impugned award which reads thus:

“3. If Rs.50,000/- with 10% interest from 05.02.2010 date of mortgage, are not received (as per order to builder dated 07.02.2011) within one month from builder disputant bank is ordered to attach & sale mortgaged flat that is flat no. 16 on 3rd floor, admeasuring 992 sq.ft. (92.19 sq. mtr.) in building “Sai Sagar Apartment Condominium” on plot no. 42, Sector No. 16, Village Chikhali within limits of Pimpri Chinchwad New Town Development Authority, in Pimpri Chinchwad Municipal Corporation and get satisfied it's claim for Rs.50,000/- with 10% interest from 05.02.2010 and pay to excess amount to builder promoter.”

22. Consequently the judgment and order passed by the learned District Judge upholding the award to the above extent also cannot be sustained and accordingly it is set aside.

23. The appeal accordingly succeeds in the above terms. No costs.

24. All the contentions of the parties on the rights in respect of the flat in question are expressly kept open.

(G.S.KULKARNI, J.)