

HON'BLE THE ACTING CHIEF JUSTICE RAMESH RANGANATHAN

ARBITRATION APPLICATION NO.51 OF 2017

ORDER:

This application is filed by Kotak Mahindra Bank Limited, under Section 11(5)&(6) of the Arbitration and Conciliation Act, 1996 (the "Act" for short) seeking appointment of an arbitrator. The first respondent herein is the builder and the second respondent is the borrower who sought to purchase two flats from the first respondent builder. A tripartite agreement dated 19.09.2011 was entered into between the applicant and respondents 1 and 2 whereby the applicant extended a loan to the second respondent but made payment thereof to the first respondent towards part sale consideration of the two flats. The agreement envisaged that, if the borrower (the second respondent) withdrew from buying the premises or failed to pay the balance amount representing the difference between the housing loan allowed by the bank and the actual cost of the flats, the entire amount to the credit of the borrower would be repaid by the builder/promoter to the bank. The fact that the second respondent had defaulted in payment of instalments to the applicant is not in dispute. Clause 18 of the tripartite agreement reads thus:

"In the event of any dispute arising out of or in connection with the Agreement or its performance shall be settled by Arbitration by a single arbitrator to be appointed jointly THE BUILDER/PROMOTER and the Bank. The venue of Arbitration shall be in Mumbai/Hyderabad. The arbitration shall be conducted under the provisions of the Indian Arbitration and Conciliation Act, 1996 or any statutory modification or re-enactment thereof for the time being in force and the award of such Arbitrator shall be final and binding upon the parties thereto."

The applicant invoked the arbitration Clause by their legal notice dated 27.03.2017, and appointed a retired Judge of this

Court as the arbitrator. On the ground that the respondents had failed to give their consent to such appointment, the jurisdiction of this Court, under Section 11(5) and (6) of the Act, has been invoked. Sri T. Surya Satish, Learned Counsel for the second respondent-borrower, would fairly state that the second respondent has no objection to an arbitrator being appointed by this Court to resolve the dispute between the parties.

Sri A. Venkatesh, Learned Counsel for the first respondent, would, however, submit that Clause 8 of the agreement makes the first respondent liable for repayment of the amount, borrowed by the second respondent from the applicant, only if the borrower withdrew from buying the premises or failed to pay the balance amount or dies or the allotment of the house is otherwise cancelled; while 90% of the entire sale consideration (including the entire amount advanced by the applicant bank) has been received, the balance 10% of the sale consideration is still due and payable by the second respondent to the first respondent; the second respondent has not withdrawn from buying the premises, and the first respondent has also not allotted the house or cancelled the allotment; consequently, the first respondent is not liable to pay any amount to the applicant bank; and since no amount is due and payable by the first respondent to the applicant, the arbitration clause in the agreement cannot be invoked.

Section 11(6-A) was inserted into the Act by Act 3 of 2016 with retrospective effect from 23.10.2015, and thereunder the High Court, while considering any application under Section 11(5) and (6), is required to confine its examination only to the existence of an arbitration agreement, notwithstanding any judgment, decree, or

order of any Court. The fact that there is an arbitration agreement is not in dispute. The question whether the applicant is entitled to claim repayment of the amounts, it had advanced on behalf of the second respondent to the first respondent, and whether the conditions in Clause 8 of the agreement have been fulfilled justifying the applicant's claim, are all matters which the arbitrator is required to examine. In view of Section 11(6-A) of the Act, examination by this Court is confined only to the existence of an arbitration agreement and, in as much as it is not in dispute that an arbitration agreement exists (Clause 18 of the tripartite agreement), all other questions can only be examined by the arbitrator appointed by this Court.

Sri N. Harinath, Learned Counsel for the applicant, Sri A. Venkatesh, Learned Counsel for the first respondent and Sri T. Surya Satish, Learned Counsel for the second respondent, agree that the seat of arbitrator would only be at Hyderabad in the State of Telangana. In such circumstances, I consider it appropriate to appoint Hon'ble Sri Justice D. Appa Rao, Flat No.201, Sunrise Apartment, Beach Road, Pandurangapuram, Visakhapatnam – 530 003 (Retired Judge of this High Court), as the presiding arbitrator. The Learned Arbitrator shall fix his remuneration, and incidental charges for the arbitration proceedings, in consultation with the parties. The arbitration proceedings shall be completed and an award passed at the earliest, preferably within a period of six months from the date of commencement of the arbitral proceedings.

The Arbitration Application is, accordingly, disposed of. The miscellaneous petitions pending, if any, shall stand closed. No costs.

RAMESH RANGANATHAN, ACJ

Date: 19.01.2018.

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