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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision: 8th March, 2019

\+ **O.M.P. 729/2012**

RAJESH KONDIRA BHONSLE & ANR. ..... Petitioners

Through: Mr. Atul B. Dakh, Advocate. (M:9868602496)

versus

KOTAK MAHINDRA BANK LIMITED ..... Respondent

Through: Mr. Kaushik Mishra, Mr. Shivendra Singh and Mr. Anil Kumar Verma, Advocates. (M:8800149595)

CORAM:
JUSTICE PRATHIBA M. SINGH

<u>Prathiba M. Singh, J.</u> (Oral)

1. Present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (*hereinafter, 'Act'*) has been filed challenging the award dated 15th October, 2011 passed by the Ld. Sole Arbitrator against the Petitioners Mr. Rajesh Kondira Bhonsle (*hereinafter, 'Mr. Bhonsle'*) and Mr. Indrajeet Rajesh Bhonsle.

2. The background of the dispute is that Mr. Bhonsle had made a booking of Flat No.106 admeasuring 930 sq.ft. built-up area, on first floor, Bunch Berry-A, Yari Road, Versova, Andheri (West), Mumbai, through M/s. H. K. Builders (*hereinafter 'Builder'*). He applied for a home loan with Citi Financial Consumer Finance India Ltd (*hereinafter 'Citi Finance'*). He had entered into a loan agreement dated 28th August, 2007 under which the loan of Rs.26,10,000/- was sanctioned. The amount was to be released directly in the name of the Builder and 240 equal monthly instalments were

to be paid by Mr. Bhonsle. Each instalment was for a sum of Rs.32,456/-. The agreed rate of interest was 14% per annum with monthly reductions as and when the payments were made. Citi Finance, accordingly, had disbursed a sum of Rs.25,54,787/- directly in the ICICI Bank account of M/s. H. K. Builders. Unfortunately, however, the Builder did not hand over the possession of the flat to Mr. Bhonsle, which led to disputes. Mr. Rajesh Bhonsle filed a complaint under the Consumer Protection Act, 1986 before the State Consumer Redressal Forum, Mumbai against the Builder as also Citi Finance. In the said complaint, the case of Mr. Bhonsle was that M/s. H. K. Builders had not rendered its services and hence he was entitled to compensation/other relief. The said consumer complaint was decided vide order dated 28th August, 2017. The findings in the said complaint are as under:

i. The Builder is guilty for deficiency in service.
ii. The complainant, Mr. Bhonsle had availed of loan from Citi Finance.
iii. Citi Finance had sanctioned loan in favour of Mr. Bhonsle.
iv. The title of the Builder was cleared by Citi Finance.
v. The Builder developed the land, which was allotted to him by the Municipal Corporation of Greater Mumbai.
vi. The execution of agreement to sell between Mr. Bhonsle and the Builder was not denied. In fact, the Builder had given no objection to Mr. Bhonsle for mortgaging the property with Citi Finance.
vii. The Builder did not lead any evidence to show that the consideration received from Mr. Bhonsle was ever returned.

viii. The registered agreement to sell could not be terminated as some of the EMIs (seven) were paid by Mr. Bhonsle.

ix. The possession of the flat was to be given on or before December, 2006.

x. Since the Builder failed to prove termination, it was held that termination was illegal and thus, the Builder was guilty of deficiency of services.

3. Insofar as the allegation of deficiency in service by Citi Finance is concerned, the finding of the Consumer Forum was that Mr. Bhonsle had authorised one Mr. Nitin Padnekar to collect the cheque on his behalf to be paid to M/s. H. K. Builder. The authority having been given to the said person and payment having been made by Citi Finance, the Forum held that Citi Finance is not guilty of deficiency in service. The operative portion of the order passed by the said Consumer Forum is set out herein below:

> "*35. Consumer complaint deserves to be dismissed against opponent Nos.2, 3 & 4 in view of our findings. With this view, we pass the following order:-*
> *-:ORDER:-*
> *1. Consumer complaint is partly allowed as against opponent No.1 only.*
> *2. The opponent No.1 is hereby declared as guilty of deficiency in service.*
> *3. The opponent No.1 is hereby directed to give possession of flat No.106 admeasuring 930 sq.ft. built-up area, on first floor, Bunch Berry-A, Yari Road, Versova, Andheri (West), Mumbai as per agreement for sale to the complainant within two months from the date of this order.*
> ***ALTERNATIVELY AT THE OPTION OF COMPLAINANT***
> *The opponent No.1 is directed to hand over possession*

> *of any other flat of the same area in the same building to the complainant within two months from the date of this order.*
> *4. The opponent No.1 is directed to pay compensation of Rs.3,00,000/- (Rupees Three Lakhs only) to the complainant towards mental pain and agony within two months from the date of this order, otherwise amount will carry interest @ 9% p.a. from the date of filing of complaint i.e. 23/11/2009 till realisation of amount.*
> *5. Opponent No.1 is directed to pay amount of Rs.25,000/- (Rupees Twenty-five Thousand only) to the complainant towards costs of litigation within period of two months from the date of this order.*
> *6. Consumer complaint is dismissed as against opponent Nos.2, 3 & 4………………………………"*

4. The findings of the Consumer commission have acquired finality.

5. The present petition arises out of arbitral award dated 15th October, 2011. Citi Finance had invoked the arbitration clause in the loan agreement. Recovery of sum of Rs.28,26,420/- along with interest was sought. Ld. Arbitrator, after perusal of the loan agreement, held that the loan agreement is an admitted document between the parties. The loan was sanctioned after creating an equitable mortgage. Mr. Bhonsle defaulted in payments of the instalments. Accordingly, Citi Finance had filed the statement of account claiming that after giving adjustments of amounts paid, the principal amount of Rs.25,44,386/- was due.

6. The Ld. Arbitrator held that Citi Finance is entitled to a decree for the award of Rs.28,26,420/-. The operative portion of the award is set out herein below:

"IN THE RESULT, I HEREBY AWARD AND ORDER AS UNDER:
(A) THAT, the Borrowers/Respondents shall pay jointly and severally to the Lenders/ Claimants a sum Rs.28,26,420/- (Rupees twenty eight lakh twenty six thousand four hundred twenty only) with further interest @2% per month from 23.11.2010 the payment is received or recovered subject to deduction of amount, if any, paid by the respondent after 22.11.2010.
(B) THAT the respondents, their agents, assignees, and legal heirs are hereby restrained from selling disposing off, transferring alienating or creating any third party interest in the mortgaged property at Sourt Part of A/106, Bunch Berry Verosva Yari Road Versova Andheri West Mumbai -400053, in any manner whatsoever directly or indirectly:
(C) THAT the Lenders/Claimants are also entitled to recover from the Borrowers/ Respondents all costs and expenses which may be borne or incurred for recovering the awarded amount as also the costs/expenses of Arbitral Proceedings borne/incurred by them

AND

(D) THAT the Claimants are further allowed to attach the mortgaged property and recover the awarded amount/s from the sale proceeds of mortgaged property, if required."

7. The challenge in the present petition by Ld. Counsel for the Petitioners is that Citi Finance, in fact, never disbursed the amount to the Builder on behalf of Mr. Bhonsle. He submits that there was no proof on record to show that the money was actually received by the Builder. It is further submitted by Ld. Counsel for the Petitioners that only seven

instalments were paid by Mr. Bhonsle, under the impression that the money was, in fact, disbursed to the Builder.

8. Such a submission is clearly not liable to be entertained as the Consumer complaint had proceeded on the basis that the loan was in fact disbursed and the Builder was deficient in its services. However, merely to ensure that there is no injustice caused, as Citi Financial was no longer in the picture and the liability was now taken over by Kotak Mahinder, on the last date, when the matter was heard, Respondent was directed to produce any documents to show that the money was actually disbursed to M/s. H. K. Builder. Today, Ld. counsel for Respondent has placed on record copies of the cheques as also the loan application form. The said documents are taken on record. The same show that the form was signed by Mr. Bhosle authorising Citi Financial to disburse the amount to the Builders. The copies of cheques issued to the Builder have also been placed on record.

9. Insofar as the said documents are concerned, Ld. counsel for the Petitioners submits that mere copies of the cheques are not sufficient and actual accounts statement ought to be called for to show that the amount was credited to the account of M/s. H. K. Builder.

10. This Court has heard Ld. counsels for the parties. The stand of the Petitioners that the Respondent should be directed to prove on record that the money was actually disbursed, is completely misplaced. A perusal of the order of the State Forum, which has attained finality, clearly shows that the finding has been rendered by the State Forum against the Builder on the ground that the Builder had, in fact, received the consideration amount from the Respondent. Further, the State Consumer Forum in Mumbai, had come to the conclusion that the individual, which had accepted the cheque with

due authority by Mr. Bhonsle, was an agent of M/s. H. K. Builders. Further perusal of the loan application form, which is duly signed by Mr. Bhonsle, shows that the instructions were given by Mr. Bhonsle to Citi Finance for crediting money in favour of M/s. H. K. Builders through ICICI Bank account no.001105003911.

11. A perusal of the cheques, clearly, shows that the same account number is being mentioned along with the name M/s. H. K. Builder in the following manner.

> "*PAY ICICI BANK A/C M/S H. K. BUILDER A/C 001105003911*"

12. Moreover, the Petitioners themselves having repaid seven instalments of the EMIs, cannot, today, be found to be arguing that the initial disbursement by the bank itself, did not take place. This is contrary to the case pleaded before the State Forum as also by the conduct of the Petitioners itself.

13. The submission that further proof requires to be adduced to show that the money was credited to M/s. H. K. Builders is without any basis. There was never any doubt that the money was actually disbursed on behalf of the Petitioners to the Builder. Property had been mortgaged with the bank on the basis of the loan agreement, which authorised the bank to disburse the amount in favour of the Builder. The conclusion of Ld. Arbitrator is, thus, liable to be upheld.

14. In the facts and circumstances however, interest is modified to 6% simple interest per annum. If the amount is paid within three months, no further interest would be liable to be paid. Further, if the amount is not paid, on the entire awarded amount as modified today, 8% simple interest per

annum would be liable to be paid.

15. OMP is disposed of in the above terms.

PRATHIBA M. SINGH
JUDGE

MARCH 08, 2019/*dk*
(corrected and released on 14th March, 2019)