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

Date of Decision: 13th March, 2019

\+ **O.M.P. 1124/2013**

ASHOK KUMAR TOHANI & ANR. ..... Petitioners

Through: Mr. Rajeev Saxena and Mr. Manish Khurana, Advocates. (M:9466593775)

versus

M/S CAPITAL FIRST LTD & ANR. ..... Respondents

Through: Mr. Arun Aggarwal, Advocate. (M:9811087995)

CORAM:
JUSTICE PRATHIBA M. SINGH

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

1. The present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (*hereinafter, 'Act'*) has been preferred against the impugned order dated 25th June, 2013 passed by the Ld. Sole Arbitrator. The Petitioners were borrowers of a loan of Rs.89,50,000/- from M/s. CitiFinancial Consumer Finance India Limited. The loan was secured by offering immovable property bearing No.B-94, Sector-14, Noida, Uttar Pradesh, as security. The loan was then disbursed to the Petitioners-borrowers. There was a default in payment of various EMIs and despite repeated reminders, the payments were not made. Accordingly, Respondent/its predecessor-in-interest invoked the clause relating to the event of default contained in the loan agreement dated 4th September, 2008. The notice of demand dated 23rd June, 2012 was issued to the borrowers, as seven instalments remained overdue as on 3rd April, 2012. Despite the

notice of demand, the outstandings were not cleared. In view of the default, the loan agreement was terminated and the borrowers were called upon to pay the entire outstanding amount. Since the payments were not made, the matter was referred to the Ld. Arbitrator. The Ld. Arbitrator, upon satisfying himself that the loan was, in fact, availed by the borrowers, passed the impugned award in favour of the Respondent in the following terms.

> "*(A) THAT, the Borrowers/Respondents shall pay jointly and severally to the Lenders/ Claimants a sum Rs.96, 76, 773/- (Rupees Ninety Six Lakh Seventy Six Thousand Seven Hundred Seventy Three Only) with further interest @24% per annum from 04.04.2012 till the payment is received or recovered subject to deduction of amount paid by the respondents, if any, during pendency of arbitration proceedings.*
> *(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 B-94, Sector 14, NOIDA (U. P.) in any manner whatsoever directly or indirectly;*
> *(C) THAT initially the Arbitration cost and the fees shall be paid by the Claimant and the Lenders/Claimants may recover the same from the Borrowers/ Respondents*"

2. The present objection petition challenges the above award. One of the main objections of the Petitioners in the objection petition is that the award was an *ex-parte* award and the borrowers were not served by the Ld. Arbitrator. However, Ld. counsel for the Respondent submits that the arbitral record would reveal that repeated notices were sent to the borrowers by the Ld. Arbitrator. It is further submitted that the Respondent has also commenced proceedings under the SARFAESI Act, 2002. The property,

which was given as security, has now been taken over by the Respondent, vide possession notice dated 13th December, 2018. A copy of the possession notice, as also notice issued by Kotak Mahindra Bank to the borrowers dated 13th December, 2018 has been placed on record. In view of this development, Mr. Rajeev Saxena, Ld. counsel appearing for the Petitioners submits that the property is being put to auction shortly on 25th March, 2019 and in case the value of the property, which is realised, is higher than the amount due and payable by the borrowers, the said amount ought to be paid to the borrowers.

3. Ld. counsel for the Respondent submits that once the auction takes place, the Respondent would only be entitled to retain that portion of the amount, which was awarded to it and which is due and payable by the borrowers, after defraying the expenses, which may occur. He submits that the Respondent would pay to the borrowers, the difference if the amount recovered is over and above the amount liable to be paid to the Respondent, along with the expenses thereof. In case, the realised amount is lesser than the amount due and payable, the Respondent's remedies are left open. Letter dated 13th December, 2018 and the possession notice are taken on record.

4. OMP is disposed of in the above terms.

PRATHIBA M. SINGH
JUDGE

MARCH 13, 2019/*dk*