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

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Date of Decision: 02.12.2021

% **W.P.(C) 2836/2018**

KAUSHALAYA DEVI AND ORS.

..... Petitioners

Through: Mr. Sanjeev Bhandari &
Mr. Shailendra Ojha, Advocates.

versus

DELHI NAGRIK SEHKARI BANK LTD.

..... Respondent

Through: Mr. Ravi Dutt Sharma, Advocate.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MR. JUSTICE JASMEET SINGH

VIPIN SANGHI, J. (ORAL)

1. We have heard learned counsel for the parties at length and proceed to dispose of the present writ petition.
2. The petitioners have preferred the present writ petition to seek the setting aside of the orders dated 15.05.2015 & 28.06.2017 passed by the Delhi Cooperative Tribunal (DCT), Delhi. The petitioners also seek remand of the case back to the learned DCT, Delhi, or before the Sole Arbitrator, who has passed the award dated 24.02.2014 for deciding the amount outstanding/ rate of interest for the delayed period, afresh. The petitioners also seek refund of excess amount of Rs.1,11,23,272/- deposited by the petitioners "under protest", for release of their title documents.

3. The background facts are that the respondent/ Delhi Nagrik Sehkari Bank Ltd. sanctioned an amount of Rs.3.20 Crores as loan to the petitioners in early October 2009 @ 12.5% per annum. The term of the loan was extended by one year on 28.10.2010. On 31.03.2012, the account was declared as a Non-Performing Asset (NPA) showing an outstanding balance of Rs.3,19,78,753/-. On 18.10.2012, the respondent bank issued a notice under Section 13(2) of the SARFAESI Act for an amount of Rs.3,41,97,368/- along with interest @ 17% per annum (15% + 2% penal interest) from 01.10.2012 till the date of full & final payment.

4. We may note that the interest was claimed only as simple interest and not as compound interest, much less, compounded on monthly rests. We have noted this fact since this has a bearing – as would be evident from further narration.

5. The endeavour of the petitioners to stall further proceedings initiated by the respondent Bank under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, 2002 before the Debts Recovery Tribunal (DRT) failed. Court Receiver was appointed to take over possession of the property. Petitioners' S.A. No. 92/2013 was then pending before the DRT. On 23.03.2013, a settlement was arrived at between the parties, whereunder the petitioners agreed to pay Rs.3.70 Crores, which included the amount of Rs.20 Lakhs deposited by the petitioners before the DRT. The petitioners were required to deposit the settlement amount by 31.08.2013. Consequently, on 30.05.2013, S.A. No.92/2013 filed by the petitioners before the DRT was disposed of on the

ground of settlement and on deposit of Rs. 1 Crore in terms of the settlement. However, the petitioners defaulted and did not comply with the aforesaid settlement.

6. The respondent bank – being the cooperative bank, invoked arbitration under Section 70 of the Delhi Cooperative Societies Act to recover its dues. During its pendency, the petitioners entered into another settlement with the respondent Bank, undertaking to pay a sum of Rs.1.6 Crores on or before 31.03.2014. This settlement took into account the amounts already paid & deposited by the petitioners.

7. The Arbitral Tribunal passed the award dated 24.02.2014 on the basis of the settlement arrived at between the parties. The relevant extract from the said award reads as follows:

“

AWARD

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*On 20.02.14, Sh Gulshan Kumar, authorised representative of Delhi Nagrik Sehkari Bank Ltd. and Sh. Shailender Ojha, authorised representative for the respondents informed this Court that **the two parties have reached an understanding and signed an agreement to that effect on 17.02.14 and following the agreement, the matter may be considered as settled for the purpose of arbitration.** The agreement was examined according to which :*

The First Party(respondents) has agreed to clear all outstanding dues of the Second Party(Claimant Bank) in the O.D account No.22000000002(01d No. 220000000026) on or before 31.03.14 in the following manner:

1) First Party will hand over a cheque dated 28.2.14 amounting to Rs.60 Lacs and another cheque dated 22.3.14 amounting to Rs.One Crore to the Second Party at the time of signing of Agreement

2) The First Party has gone through their account with the bank, and are fully satisfied with the accounts and figures as well as the interest charged by the Bank and undertake not to challenge the same before any forum.

3) The First Party has assured the Second Party that all the above cheques will be cleared by the First Party, failing which the Second Party will be at liberty to proceed with the sale of any or all of their properties mortgaged with the Second Party, besides taking legal action against them.

4) It has also been agreed between the First and the Second Party that the Second Party(the Bank) will withdraw the Criminal Complaint for dishonour of the Cheque earlier issued by the First Party presently ongoing in the Court, provided the First Party honours the terms of Settlement, in the event of failure to do so, the Bank will have the right to pursue the complaint.

5)In case the First Party infringes the terms of this current Settlement Deed, the Second Party shall have the right to sell out any or all of the properties mortgaged with them (Second Party), and the First Party will not raise any objection or dispute before any Forum.

6) Both the Parties agree to the terms and conditions of the Settlement Deed with their free will, without any pressure, fully understanding the terms and conditions.

Having considered the submission of the authorized representatives of the claimant Bank and the respondents, it emerged that in the light of the recent Agreement on 17th Feb '14 further arbitration was not

required between the parties. In view of the facts thus brought out, I conclude that there is no further scope of arbitration in the matter. Accordingly, the Award is passed, under Rule 85 of the Delhi Cooperative Societies Rules 2007, on the basis of the statement of claim, filed by the Bank(as on 31.10.13) as under:-

The respondents shall pay jointly and severally to the Delhi Nagrik Sehkari Bank Ltd., the amount as follows:-

- | | | |
|-------|--|-------------------------|
| (i) | Principal | : Rs.2,16,49,282/- |
| (ii) | Interest + Penal Interest up to 31.10.2013 | : Rs.9,39,396/- |
| (iii) | Arbitration Cost | : Rs.16,99,151/- |
| | | Total : Rs.24,287,829/- |

Plus further Interest and Penal Interest @ 15%+2% p.a. w.e.f. 01.11.2013 till realization of the entire loan in full with up to date interest as agreed, shall also be paid by the Respondents.” (emphasis supplied)

8. The petitioners state that they learnt that the Arbitrator issued a corrigendum to the award on 19.05.2014. The said corrigendum reads as follows:

“ Reg : Corrigendum of Award dated 24/02/2014.

The undersigned passed an Award on 24/02/2014 under Rule 85 of the Delhi Cooperative Societies Rules 2007 regarding a dispute between the above mentioned parties. In this Award inadvertently some typographical mistake has been occurred in the Award. Now the Award may be read as:

1. The Arb. Case No. 3616/AR/Arb./12-13 instead of 1573/AR/Arb./13-14.
2. In the last para Interest and Penal Interest @ 15% +

2% per annum compounded with monthly rest w.e.f. 01.11.2013 instead of interest and Penal Interest @ 15%+2% p.a. w.e.f. 01.11.2013.

3. *Name of Husband/ Father of all Respondents are as follows :*

Smt. Kaushlaya Devi W/o Shri Devender Kumar (Prop. M/s R.R. Trading Co.)

Shri Satya Parkash S/o Shri Balbir Singh

Shri Naresh Kumar S/o Shri Kartar Singh

Shri Devender Kumar S/o Shri Prithvi Singh

4. *Address of Defendant No.3 Shri Naresh Kumar is WZ-406/24 instead of WZ-406/402.*

Other contents of the Award shall remain the same.

Given under my hand and seal this 05th day of March, 2014.

Sd/-

(Promila Mitra)

ARBITRATOR"

(emphasis supplied)

9. The petitioners assailed the aforesaid award, "as corrected" before the DCT. On 15.05.2015, the Tribunal dismissed the appeal *in limine* observing that the petitioners should have approached the learned Arbitrator by preferring a review application.

10. At this stage itself, we may observe that this approach of the learned Tribunal was completely wrong inasmuch, as, the Arbitrator became *functus*

officio after making the award, and there is no power of review vested in an Arbitrator.

11. Abiding by the order passed by the Tribunal, the petitioners moved an application before the Registrar of Cooperative Societies (RCS) under Sections 115 & 116 of the Delhi Cooperative Societies Act, 2003, read with Section 152 CPC, on 14.07.2015. However, on 11.09.2015 the learned RCS declined to send the petitioners' application to the Arbitrator stating that the same was time barred.

12. Consequently, the petitioners again approached the DCT in November 2015 by way of an appeal, which has been dismissed by the Tribunal on 28.06.2017. The Tribunal held that an appeal under Section 112(k) of the Delhi Cooperative Societies Act is maintainable before it only against decision or award made under Section 71 of the said Act. The order dated 11.09.2015 passed by the Registrar has not been passed under Section 71 of the Act, and therefore, the appeal is not maintainable. In the aforesaid background, the present petition has been preferred.

13. The above narration would show that the petitioner was left remediless qua the "corrected" award, and was shuttled between the DCT and the RCS. The petitioners' grievances against the "corrected" award – which was appealable before the DCT, were not heard on merits and decided in accordance with law. Considering the aforesaid position, and the fact that the matter has been hanging fire since 2012, and the petitioner has been out of pocket for nearly seven years now, rather than remanding back the matter to the DCT, we have heard learned counsels on the merit of their

submissions, as they are legal in character, and no dispute on facts arises for our consideration.

14. The submission of Mr. Bhandari – learned counsel for the petitioners is that, firstly, the award having been rendered by the Arbitrator on 24.02.2014, she was powerless to issue a corrigendum and amend the same in a substantive way, much less, without notice to and hearing the petitioners. The Arbitrator had become *functus officio* after making her award.

15. Mr. Bhandari submits that so far as the award dated 24.02.2014 is concerned, the petitioners have no grievance with regard to the determination of the principal liability. As far as the rate of interest + penal interest up to 31.10.2013 are concerned, the Arbitrator while issuing the aforesaid corrigendum proceeded to alter the rate of interest from 15% + 2% simple interest, to 15% + 2% compounded with monthly rests with effect from 01.11.2013, which tantamounted to a substantial change in the liability of the petitioner under the award. He submits that the nature of interest was altered from simple interest to compound interest – which could not have been done by the Arbitrator, much less at the petitioners' back.

16. On the other hand, Mr. Sharma, who appears for the respondent Bank, submits that the application to seek corrigendum/ correction of the award was filed, premised on the bonds executed by the petitioners, agreeing to pay compound interest, compounded monthly.

17. Whatever be the case, the fact of the matter is that the award was

premised on a settlement. Even if under the terms of the loan agreement, the respondent was entitled to compound interest – compounded with monthly rests, nothing prevented the respondent from, under the settlement, agreeing to receive simple interest. In any event, the Arbitrator having rendered the award on 24.02.2014 became *functus officio*, and could not have made a material & substantial change in the award which had an adverse effect on the financial liability of the petitioner. By not issuing notice to the petitioners, the entire exercise of issuing a corrigendum was rendered null & void. Had the petitioner been put to notice, the petitioner would have pointed out the lack of jurisdiction in the Arbitrator to change the Award. The only remedy that the respondent had against the non-grant of compound interest was to challenge that part of the Award before the DCT.

18. We are, therefore, of the view that the respondent bank could not have recovered compound interest with monthly rests; and the excess amount recovered by it – on the aforesaid basis, is liable to be refunded to the petitioners.

19. The next aspect urged by Mr. Bhandari is with regard to the levy of arbitration costs of Rs.16,99,151/- by the Arbitrator. Mr. Bhandari has submitted that this is exorbitant, excessive and completely unjustified considering the fact that the arbitral award was rendered on a settlement at the initial stage of the arbitration itself.

20. Our attention has been drawn to Rule 88 of the Delhi Cooperative Societies Rules in this regard. The said rule provides for arbitration fee and reads as follows:

“88. Arbitration Fee.

The Registrar shall have power to require the person referring a dispute under sub-section (1) of section 70 of the Act, to deposit in advance with the office of Registrar in "Settlement and Executive Expenses Fund" a fee at the rate specified in the schedule, below, that may be revised by the Registrar from time to time.

Schedule

(Schedule of Fee for Arbitrator)

- (A) *In respect of disputes relating to claims of money referred to under section 70 of the Act:-*
- (i) *in case of claim below rupees one thousand rupees twenty five;*
 - (ii) *in case of claim for rupees one thousand or above..... three percent of the claim subject to a maximum of rupees five thousand.*
- (B) *In respect of dispute of non-monetary nature..... a fee of not less than rupees seven hundred fifty and not more than rupees two thousand in each case, as may be considered reasonable by the Registrar.*
- (C) *No fee shall be payable to an arbitrator till the dispute referred to him is finally disposed.*
- (D) *The Registrar may, in his discretion, remit the whole or any part of the fees collected under clause (A) of this schedule.*
- (E) *All fees for services rendered in respect of arbitration or execution proceedings payable by a party shall be deposited in the Office of the Registrar in the "Settlement and Execution Services Expenses Fund" which shall be administered by the Registrar in accordance with the*

Regulations contained in Schedule III.”

(emphasis supplied)

21. The above would show that the Arbitrator appointed under Section 70 of the said Act is entitled to a maximum fee of Rs.5,000/-.

22. Mr. Sharma submits that under Rule 85(5), *“In addition to the arbitration fee, the arbitrator may order the expenses of determining a dispute or the cost of either party, to be paid by such party or parties to the dispute as the arbitrator may think fit: Provided that the expenses or the cost so awarded shall not exceed seven and half per cent of the awarded amount”*. Mr. Sharma submits that the amount of Rs.16,99,151/-, apart from including the Arbitrator’s fee of Rs.5,000/- includes the expenses or costs awarded to the claimant bank. The same have been computed @ 7.5% of the awarded amount.

23. This action of the Arbitrator appears to be a complete illegality. What can be recovered under Section 85(5) are the expenses of determining a dispute, or the costs of either party. As noticed above, the arbitral award was rendered on a settlement arrived at the initial stage of the arbitration itself. Therefore, there was hardly any expense incurred in determining the dispute. It is not the case of the respondent that the respondent incurred costs to the tune of Rs.16,94,151/- (after excluding the fee of the Arbitrator of Rs.5,000/-). No such claim was apparently made by the respondent before the Arbitrator. There is no discussion found in the award as to on what basis, the arbitration costs of Rs.16,99,151/- have been assessed.

24. Mr. Sharma next submits that the costs have gone into the coffers of the RCS, and not been pocketed by the respondent bank.

25. In our view, that is wholly irrelevant. The issue is whether the petitioners could be charged such exorbitant costs for an arbitration which hardly proceeded, since the award came to be rendered on the basis of a settlement agreement arrived at between the parties soon after initiation of the arbitration. Merely because the expenses or costs, up to 7.5% of the awarded amount may be imposed, it does not follow that the Arbitrator can impose, or should impose, the maximum permissible 7.5% of the awarded amount as expenses, or costs even when the same have not been incurred. A reading of Rule 85(5) shows that the expenses, or costs have to be levied on actuals. The rule only provides that if the actuals are more than 7.5% of the awarded amount, the expenses & costs recoverable are capped at 7.5%.

26. We are, therefore, of the view that the arbitration costs to the tune of Rs.16,50,000/- are refundable to the petitioners. While assessing the amount – as aforesaid, we have taken into account the expenses and fee that may have been incurred in arbitration to the tune of nearly Rs.44,000/- which, in our view, would be more than sufficient to cover the expenses/costs actually incurred, as the award was rendered on a settlement soon after its initiation.

27. Mr. Bhandari has, lastly, submitted that the respondent has charged recovery fee to the tune of Rs.8,28,937/-, as is evident from the statement of account furnished by the respondent bank on 10.03.2017. The justification for levy of the said recovery fee is found in the counter-affidavit of the respondent bank in paragraph 3.17, which reads as follows:

“3.17. That the respondent bank also wants to submit here that the respondent bank also filed an execution for the Award dated 24.02.2014 and during the execution proceedings the Ld. Asstt. Collector charges the recovery fees of five percent of the gross amount recovered as per the provisions of Rule 125(1) of the DCS Rules, 2007 which reads as under :

"125. Accounting Procedure :

(1)All amounts recovered from the judgment debtors by the Recovery Officer shall first be deposited in the current account to be kept in his official designation in the State Bank of India, which shall be operated by the Recovery Officer. The payment to decree holder, of all amount recovered on his behalf during the course of execution proceedings, shall be made by the Recovery Officer by crossed cheque drawn on the above current account against the deposits relating to the decree holder, after deducting the recovery fees of five percent of the gross amount recovered, with in seven days of the receipt of amount."”

28. The respondent Bank seeks to justify recovery of the aforesaid amount by placing reliance on Rules 125 and 126 of the Delhi Cooperative Societies Rules, relevant extracts of which read as follows:

“125. Accounting Procedure

(1.) All amounts recovered from the judgment debtors by the Recovery Officer shall first be deposited in the current account to be kept in his official designation in the State Bank of India, which shall be operated by the Recovery Officer. The payment to decree holder, of all amounts recovered on his behalf during the course of execution proceedings, shall be made by the Recovery Officer by

*crossed cheque drawn on the above current account against the deposits relating to the decree holder **after deducting the recovery fee of five per cent of the gross amount recovered, with in seven days of the receipt of amount.***

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126. Mode of payment of decretal amount:-1. All money payable under the certified award shall be paid as follows:

- (a) To the Recovery Officer or to any person authorised by him against official receipt and such payment shall be remitted to the decree holder with in thirty days from the date of receipt thereof, for recording the same in the personal ledger of judgment debtor;**
- (b) Out of the court payment to the decree holder and in such cases the recovery charges shall be payable to Recovery Officer.**
- (2.) In case any money payable under the award under execution by the Recovery Officer, is paid by the Judgment debtor out of court to the decree-holder or the award, is, otherwise, adjusted in whole or in part to the satisfaction of the decree-holder the decree-holder shall certify payment or adjustment to the Recovery Officer and the Recovery officer shall record such payment or adjustment in the personal ledger account maintained by him.**
- (3) The judgment debtor may also inform to the Recovery Officer of such payments or adjustment and apply to him to issue notice in Form no. 30 to the decree-holder to show cause on a day to be fixed by the Recovery Officer, why such payment or adjustment should not be recorded in the personal ledger account of the decree-holder as**

having been paid or adjusted in the execution proceedings, and if after service of such notice, the decree holder fails to show cause, the Recovery Officer may record the payment and/or adjustment in the above manner. A payment or adjustment which has not so been recorded as aforesaid, shall not be recognised by the Recovery Officer executing the award.” (emphasis supplied)

29. A perusal of Rule 125(1) shows that, firstly, the deduction of 5% on account of recovery fee may be made from the amount recovered from the judgment debtor **by the Recovery Officer** and deposited in the State Bank of India **in the account operated by the Recovery Officer**. This recovery fee is leviable in cases where the Recovery Officer is called upon to render his services to effect recovery. The recovery fee is the consideration for such recovery services rendered by the Recovery Officer. In the present case, it is not the case of the respondent that recovery was effected from the petitioner through the Recovery Officer. No recovery proceedings were required to be undertaken as the petitioner, on its own, deposited the amount under the Award with the respondent Bank. Thus, there was no question of levying any recovery fee by the RCS, and none could have been collected by the respondent Bank from the petitioner. Secondly, a perusal of Rule 125 shows that the recovery charges are liable to be recovered from the decree holder, and not the judgment debtor. It is a deduction to be made from the “gross amount recovered”. There is no question of any further amount being recovered from the judgment debtor, once the gross amount – which is the entire decretal amount, has been received.

30. This is also clear from a reading of Rule 126, which provides the

manner in which the money payable under the certified award is to be paid. Rule 126(1)(b) states that all money payable under the certified award shall be paid such that, out of the Court payment to the decree holder, the recovery charges shall be payable to the Recovery Officer. The aforesaid rule clearly places the said liability toward recovery charges on the decree holder. So far as the judgment debtor is concerned, his liability is restricted to the amount reflected in the decree and the costs of execution.

31. Pertinently, Rule 126 also envisages the situation where the judgment debtor makes payment directly to the decree holder. (See Rule 126(3)). The said Rule does not contemplate deposit of any recovery fee or charges by – either the judgment debtor, or the decree holder. Thus, the deposit of the recovery fee by the respondent Bank, after recovering the same from the petitioner was without any basis, and the petitioner cannot be saddled with the said liability. Since it is the respondent Bank which has made the recovery of the recovery fee from the petitioner, the respondent Bank should refund the said amount to the petitioner along with interest. The respondent Bank may, in turn, recover the amount from the RCS.

32. Rule 127 provides that the Recovery Officer executing the award may recover, in addition to the decretal amount from the judgment debtor, the costs of execution as arrears of land revenue and pay such amount to the decree holder. Therefore, the Legislature was conscious of the distinction between the amount recoverable from the judgment debtor – which is the decretal amount plus the cost of execution, on the one hand, and the recovery fee payable to the RCS – which is to be borne by the decree holder

in case the services of the recovery officer are availed of, on the other hand. In our view, the aforesaid amount of recovery fee, i.e. of Rs.8,28,937/- could not have been recovered from the petitioners, and the respondent is bound to refund the same to the petitioners. To the extent that the amounts recovered by the respondents have been transferred to the account of the RCS, it shall be open to the respondent bank to pursue its claim for recovery from the RCS.

33. We, therefore, dispose of this petition with a direction to the RCS to have the amounts computed – as recoverable by the petitioners from the respondent Bank, by a competent officer having accounting knowledge. The amounts shall be determined after hearing both the parties keeping in view our findings, and the same shall be communicated to the parties in a reasoned order. The respondent bank shall make payment of the amount so determined to the petitioners within four weeks of such determination. The excess amount found to be refundable to the petitioners shall also bear interest @ 10% per annum from the date of recovery, till payment.

34. The petition stands disposed of in the aforesaid terms.

VIPIN SANGHI, J.

JASMEET SINGH, J.

DECEMBER 02, 2021

B.S. Rohella