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

Date of Decision: 14.05.2024

+ **ARB.P. 203/2023**

ADITYA BIRLA FINANCE LIMITED

..... Petitioner

Through: Mr. Aman Vasisth, Mr. Mahip Datta
Parashar, Mr. Nishant Srivastava,
Advs.

versus

M/S ANOOP OSWAL HOSIERY AND ORS

..... Respondents

Through: Mr. Abhinav Sharma, Mr. Ravi Singh
Chhikara, Mr. Shreesh Pathak, Advs.

CORAM:

HON'BLE MR. JUSTICE JASMEET SINGH

: **JASMEET SINGH, J (ORAL)**

1. This is a petition under section 11 of the Arbitration and Conciliation Act, 1996 seeking appointment of an Arbitrator to adjudicate the disputes between the parties.
2. The brief facts in the present case are that on 17.05.2019, the petitioner granted a sanction of a loan of 423.12 lakhs. Thereafter, a revised sanction was issued on 29.10.2019 as under:

Facility	Amount Revised
Term Loan	3.15
LOC	1.15
Funded Interest Term Loan (FITL)	0.20
Total	4.50



3. For securing the amount, the respondent issued three loan documents which were Term Loan Facility Agreement, Line of Credit Facility Agreement and a Deed of Guarantee dated 30.10.2019
4. The arbitration clause is Clause 25.17 in the three Term Loan Facility Agreement and Clause 25 in the Deed of Guarantee.
5. Since the respondent defaulted in making payments, the petitioner sent legal notice invoking arbitration on 24.11.2022.
6. In addition, the petitioner also issued demand notice dated 15.06.2021 under section 13(2) of SARFAESI Act, 2002.
7. Pursuant to the notice, the CMM passed a section 14 order and initiated SARFAESI proceedings.
8. Mr. Sharma, learned counsel for the respondent has raised objections, namely:- a) that the petition is not maintainable in view of the fact that the petitioner has initiated SARFAESI proceedings; (b) that the letter of authority in favour of the authorized representative had expired on the day when the petition was filed; c) there are four separate documents i.e. the three Term Loan Facility Agreements and the Deed of Guarantee, if at all, the petitioner should have initiated four separate arbitration proceedings.
9. As regards the first objection is concerned, Mr. Sharma, learned counsel for the respondent relies upon the judgment of ***Fermina Developers Private Limited and Ors. Vs. Indiabulls Housing Finance Limited and Ors.*** MANU/DE/5246/2022 and more particularly para 57 which reads as under:

“57. On an overall conspectus of the aforesaid discussion, this Court comes to conclude that once an action under Section 13 of the SARFAESI had been initiated by a secured creditor, the rights



and obligations of parties would have to necessarily be examined and decided in accordance with the procedure contemplated under Sections 13, 17 and 18 of the SARFAESI. Upon the issuance of such a notice, the dispute that may be raised by a debtor would fall outside the purview of a private adjudication which arbitration essentially represents. The limited window within which the issue of non-arbitrability would not come in the way would be where a party alleges and is able to establish that the action of the secured creditor is either fraudulent or that the claim is wholly absurd and untenable. This limited window stands duly recognised and conferred a judicial imprimatur by Mardia Chemicals itself and as would be evident from paragraph 51 of the report which has been extracted hereinbefore. For the purposes of evaluating the above, the question which would have to be posed would be whether the action sought to be initiated by the debtor is one which pertains to the enforcement measure adopted by the creditor under SARFAESI or is one which seeks to raise an independent claim and pertains to the enforcement of a right that may otherwise be claimed in civil law. It is only if it were to fall within the latter categories that the issue would become arbitrable.”

10. Mr. Vashisht, learned counsel for petitioner relies upon the judgment of the Hon’ble Supreme Court in ***M.D. Frozen Foods Exports Pvt. Ltd. and Ors. Vs. Hero Fincorp Limited*** in MANU/SC/1244/2017 and the judgment of this court in ***Aditya Birla Finance Limited vs. Shri Jagannath Memorial Educational Trust and Ors*** in ARB.P 251/2023 to state that the present petition is maintainable.

11. I have heard learned counsel for the parties in this regard.

12. The judgment of *Fermina Developers (supra)* relies upon the judgment of the Hon’ble Supreme Court in ***Vidya Drolia vs. Durga Trading Corporation and Ors.***, MANU/SC/0939/2020. The Hon’ble Supreme Court



in the said judgment categorically held that the claims of a financial institution/banks which are covered under the Recovery of Debts and Bankruptcy Act, 1993 would not be arbitrable. The operative portion reads as under:-

“58. Consistent with the above, observations in Transcore on the power of the DRT conferred by the DRT Act and the principle enunciated in the present judgment, we must overrule the judgment of the Full Bench of the Delhi High Court in HDFC Bank Ltd. v. Satpal Singh Bakshi MANU/DE/5308/2012 2013 (134) DRJ 566 (FB), which holds that matters covered under the DRT Act are arbitrable. It is necessary to overrule this decision and clarify the legal position as the decision in HDFC Bank Ltd. has been referred to in M.D. Frozen Foods Exports Private Limited, but not examined in light of the legal principles relating to non-arbitrability. Decision in HDFC Bank Ltd. holds that only actions in rem are non-arbitrable, which as elucidated above is the correct legal position. However, non-arbitrability may arise in case the implicit prohibition in the statute, conferring and creating special rights to be adjudicated by the courts/public fora, which right including enforcement of order/provisions cannot be enforced and applied in case of arbitration. To hold that the claims of banks and financial institutions covered under the DRT Act are arbitrable would deprive and deny these institutions of the specific rights including the modes of recovery specified in the DRT Act. Therefore, the claims covered by the DRT Act are non-arbitrable as there is a prohibition against waiver of jurisdiction of the DRT by necessary implication. The legislation has overwritten the contractual right to arbitration.”

13. Para 49 of *Fermina Developers (supra)* relying on *Vidya Drolia (supra)* is relevant and reads as under:

“49. The Court further finds that even in Vidya Drolia, the Supreme



Court while recognising the window within which the jurisdiction of a civil court may be countenanced to exist, had while enunciating the principles of "implicit non- arbitrability" categorically held that the same would apply when by a mandatory law, parties stand restrained and barred from contracting out or waiving the adjudication by a designated court or a forum specially created by statute. It was also aptly stated that while arbitrability is a matter of national policy, a statute could on grounds of supervening public policy expressly or by implication, both restrict or prohibit arbitration being resorted to. Vidya Drolia goes on to expound the proposition that where a statute creates a right or liability and creates a special forum for the determination of the above, the jurisdiction of the civil court which otherwise exists would be proscribed. In such a situation, it was held that the dispute would not be arbitrable.”

14. The abovesaid judgment is based on the presumption that the issues which are covered under the Recovery of Debts and Bankruptcy Act, 1993 (‘RDB Act’) would be outside the purview of the arbitration proceedings.

15. This court in ***Aditya Birla Finance Limited vs. Shri Jagannath Memorial Educational Trust and Ors***, passed in **ARB.P. 251/2023** in this regard has held as under:-

*“8. At this stage, it would be apt to first tackle the objection raised by Mr. Uppal concerning the non-arbitrability of the present disputes in light of the observations of the Supreme Court in **Vidya Drolia** (supra). Although Ms. Chaudhary has subsequently retracted this objection in the course of her submissions, thus rendering its consideration by this Court to be ostensibly redundant, addressing this objection is crucial to acknowledge a key aspect of this case. In **Vidya Drolia**, the Supreme Court has indeed held that claims covered by the RDB Act are non-arbitrable. However, the Petitioner is not notified as a ‘financial institution’ in*



terms of Section 2(h) of the RDB Act, nor is it a 'Bank' or 'Banking Company' within the meaning of Sections 2(d) and 2(e) of the RDB Act. Thus, Petitioner is ineligible to institute proceedings and avail the resolution mechanisms stipulated under the RDB Act. Consequently, this contention of the Respondent, which hinges on the applicability of the RDB Act to the Petitioner, is foundationally flawed.”

16. The same has been reiterated in ***Aditya Birla Finance Ltd. vs. Anjali Nag and Ors. in ARB.P. 771/2023*** decided on 19.03.2024.

17. In the present case, the petitioner is not notified as a financial institution in terms of Section 2(h) of the RDB Act nor is a bank or a banking company within the meaning of Sections 2(d) and 2(e) of the RDB Act. Thus, the petitioner is ineligible to constitute proceedings and avail the resolution mechanisms stipulated under the RDB Act with respect to approaching the Debt Recovery Tribunal ('DRT') for adjudication of its claim *vis-a-vis* the respondent. The petitioner, by initiation of SARFAESI proceedings, has only sought to secure the equitable mortgage of the immovable property made in its favour. The judgment of Hon'ble Supreme Court in ***M.D. Frozen Foods Exports Pvt. Ltd. and Ors. (supra)*** in this regard held as under:

“33. SARFAESI proceedings are in the nature of enforcement proceedings, while arbitration is an adjudicatory process. In the event that the secured assets are insufficient to satisfy the debts, the secured creditor can proceed against other assets in execution against the debtor, after determination of the pending outstanding amount by a competent forum.

*34. We are, thus, unequivocally of the view that the judgments of the Full Bench of the Orissa High Court in *Sarthak Builders Pvt. Ltd. v. Orissa Rural Development Corporation Limited MANU/OR/0110/2014*, the Full Bench of the Delhi High Court in*



HDFC Bank Limited v. Satpal Singh Bakshi (supra) and the Division Bench of the Allahabad High Court in Pradeep Kumar Gupta v. State of U.P. MANU/UP/0209/2009 : AIR 2010 All 3 lay down the correct proposition of law and the view expressed by the Andhra Pradesh High Court in M/s. Deccan Chronicles Holdings Limited v. Union of India MANU/AP/0060/2014: AIR 2014 Andhra Pradesh 78 following the overruled decision of the Orissa High Court in Subash Chandra Panda v. State of Orissa MANU/OR/0069/2008: AIR 2008 Ori 88 does not set forth the correct position in law. SARFAESI proceedings and arbitration proceedings, thus, can go hand in hand.”

18. In addition, the Coordinate Bench of this court in the matter of **Aditya Birla Finance Limited in ARB.P. 251/2023** has held as under:

“11. Moreover, the Supreme Court's decision in M.D. Frozen Foods Exports (supra) has held that recourse to SARFAESI Act and Arbitration Act can co-exist. Although the SARFAESI Act is a special legislation pertaining to enforcement of securities, this view taken by the Supreme Court supports the contention that parallel proceedings do not inherently nullify the arbitral process. Thus, even if the Petitioner is said to have acquiesced to the jurisdiction of the Civil Court, this in itself does not preclude the possibility of pursuing arbitration, as there can be different sets of claims in the two proceedings, notwithstanding the overlap.”

19. For the said reasons and relying on the above observation, I am of the view that despite having initiated proceedings under SARFAESI, the present petition for adjudication of claims before the Arbitral Tribunal is maintainable.

20. As regards the second objection of Mr. Jahirul Laskar not being competent to sign the petition on the date it was filed is concerned, my attention has been drawn to board resolution dated 23.06.2022 wherein Mr. Jahirul Laskar has been shown as a person competent to sign pleadings on behalf of the petitioner and all actions taken by him earlier are approved and



confirmed.

21. For the said reasons, I am satisfied that the petition is properly signed and verified.

22. The third objection is with regard with four separate arbitration proceedings for three loan agreement as well as the Deed of Guarantee.

23. All the loan facility agreements as well as the Deed of Guarantee arise out of loan document dated 29.10.2019. All the loan agreements are to secure the loan extended vide the said loan sanction letter and the revised sanction letter. The arbitration clause is between the same parties and is identical except for the deed of guarantee.

24. For the said reasons, I am of the view that a common arbitration proceedings arising out of the alleged non-payment of the loan secured from loan sanction letter is maintainable.

25. Mr. Vashisht, learned counsel for the petitioner states that he is dropping respondent No. 6 from the arbitration proceedings with liberty to initiate any/all legal proceedings available in law. The statement is taken on record.

26. For the said reasons, disputes between the petitioner and respondent Nos. 1 to 5 are referred to arbitration with the following directions:

- i) Ms. Nandita Rao, Adv. (Mob. No. 9999031918) is appointed as a Sole Arbitrator to adjudicate the disputes between the parties.
- ii) The arbitration will be held under the aegis of the Delhi International Arbitration Centre, Delhi High Court, Sher Shah Road, New Delhi hereinafter, referred to as the 'DIAC'). The remuneration of the learned Arbitrator shall be in terms of the Fourth Schedule of the Arbitration & Conciliation Act, 1996.



- iii) The learned Arbitrator is requested to furnish a declaration in terms of Section 12 of the Act prior to entering into the reference.
 - iv) It is made clear that all the rights and contentions of the parties, including as to the arbitrability of any of the claim, any other preliminary objection, as well as claims on merits of the dispute of either of the parties, are left open for adjudication by the learned arbitrator.
 - v) The parties shall approach the learned Arbitrator within two weeks from today.
27. The petitioner is at liberty to initiate any/all legal proceedings available in law against respondent No. 6.

JASMEET SINGH, J

MAY 14, 2024/DM

Click here to check corrigendum, if any