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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
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+ **ARB.P. 425/2015**

HARISH CHANDRA (I) LTD ..... Petitioner
Through: Mr. Dharmendra Rautray with Ms. Tara Sahni, Advocates.

versus

CORPORATE DEBT RESTRUCTURING CELL & ORS ..... Respondents
Through: Mr. Ajant Kumar, Advocate for R-1 to R-4 & 9.
Mr. Suresh Dutt Dobhal with Ms. Sonaakshi Dhiman, Mr. Yugank Goel and Ms. Kanchan Raturi, Advocates for R-5,7 & 8.

**CORAM: JUSTICE S.MURALIDHAR**

**O R D E R**
% **04.10.2016**

1. This is a petition filed by the Petitioner, Harish Chandra (I) Limited, ('HCIL') under Section 11 of the Arbitration and Conciliation Act, 1996 ('Act') seeking the appointment of an Arbitrator to adjudicate the disputes between it and the Corporate Debt Restructuring Cell ('CDRC') (Respondent No. 1), Consortium of Banks (Respondent Nos. 2, 3, 4, 6, 9 to 11) and the Asset Restructuring Company, Pheonix Arc Private Limited (Respondent Nos. 5, 7, 8) arising out of the Debtor Creditor Agreement (DCA) dated 24th July, 2010 and the Master Restructuring Agreement (MRA) dated 28th September, 2011.

2. The brief facts are that the Consortium of Banks sanctioned Working Capital Limits to the Petitioner in 2010 amounting to Rs. 110 crores. According to the Petitioner, they disbursed only Rs. 66 crores. It is then stated that on 11th December 2009 Consortium of Banks agreed to provide the *adhoc* limit of Rs. 15 crores to the Petitioner to complete the RVNL project in Orissa but only Rs. 3.35 crores was released.

3. On 23rd July 2010 the Consortium authorized Corporation Bank, Respondent No. 2, to refer the case to the Corporate Debt Restructuring (CDR) Cell for restructuring. The CDR Scheme was finally approved by Respondent No. 1 on 30th May, 2011 and 3rd June, 2011. However, according to the Petitioner no steps were taken to implement the project even after a lapse of two months from the date of its approval. On 28th September, 2011 the Consortium of Banks as well as the Petitioner executed the MRA for implementing the CDR Scheme.

4. At this stage it requires to be noticed that the DCA executed on 24th July, 2010 contains an arbitration clause which reads thus:

> "**10 <u>Dispute Resolution</u>**
>
> 10.1 If any dispute, controversy, disagreement or difference shall arise between the Eligible Borrower and the Lenders under this Agreement, such dispute shall be resolved amicably by negotiation under the aegis of the CDR Core Group (the member of the CDR Core Group, if party to the dispute, not participating in the negotiation but allowed to be heard).
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> 10.2 In case the dispute is not resolved by amicable settlement, the CDR Core Group shall within thirty (30) days from the date of conclusion of negotiation refer the dispute for arbitration. If the

> parties to the dispute agree, the arbitration shall be by sole arbitrator approved by the CDR Core Group. In the absence of an agreement for appointment of a sole arbitrator, the dispute shall be resolved by an arbitral tribunal consisting of three arbitrators; one each to be appointed by the parties to the dispute and the two arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator. The place of arbitration shall be at Mumbai. Unless otherwise determined, one-half of the expenses shall be borne by the Eligible Borrower and the other half in proportion to the Principal Outstanding Financial Assistance by the Lenders against whom the dispute is made out.
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> 10.3 The award given by the arbitrator shall be final and binding on it and it shall not challenge or prefer any appeal against the award.
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> 10.4 The arbitration shall be governed by the Arbitration and Conciliation Act, ·1996 as amended from time-to-time.
>
> 10.5 The Eligible Borrower agrees that it shall not have recourse to courts of law in respect of any matter arising under this Agreement and that disputes, if any, will be resolved through the mechanism provided in this Agreement."

5. As far as the MRA is concerned, it incorporated by reference the CDR Package. Clause 10.10 of the MRA states that "This Agreement together with the other Restructuring Documents, shall constitute the entire understanding of the Parties with respect to the matters which are subject hereof".

6. It also requires to be noticed at this stage that the grievance of the Petitioner commences with the decision of Respondent No. 1 on 15th December, 2012 to revoke the CDR Package. This was informed by Respondent No. 2 to the Petitioner by its letter dated 18th January 2013.

According to the Petitioner, this was done behind the Petitioner's back, and therefore, it is in violation of the principles of natural justice. It requested by its letter dated 24th January, 2013 that an opportunity should be provided to make its submissions for revival of the CDR Package. The Petitioner filed Writ Petition (Civil) No. 5031 of 2012 challenging the decision of Respondent No. 1 to withdraw the CDR Package and for an amendment to that to implement it. In the meanwhile, the Petitioner invoked the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) and initiated proceedings against the Petitioner before the Debt Recovery Tribunal (DRT). The Petitioner then filed an application, IA No. 416 of 2014 in OA No. 8 of 2014 stating that the petition, OA No. 8 of 2014, filed by the Consortium of Banks against the Petitioner should be dismissed as not maintainable in view of the arbitration agreement. By an order dated 21st July, 2014, the Presiding Officer, DRT-II, New Delhi dismissed the said application holding that the dispute as regards the loan amounts due to the bank was outside the purview of the arbitration clause. The Petitioner then filed a review petition, IA No. 619 of 2014, seeking recall of the above order. This was dismissed by the DRT-II on 21st August, 2014. In its order, it was noticed that the arbitration clause was never intended to mean that when there is a dispute with regard to the claim under the loan, then it shall be referred to arbitration.

7. In the meanwhile, for some reason neither the order dated 21st July, 2014 nor the order dated 21st August, 2014 was further challenged by the Petitioner. In the meanwhile, Writ Petition (Civil) No. 5031 of 2012 came to

be heard by this Court on 19th January, 2016 and the following order was passed:

> "1. The Senior counsel for the Petitioner states, (i) that this petition was filed seeking mandamus to the Respondent No. 1 CDR Cell and the Respondents No. 2 to 11 Banks to implement the Debt Restructuring Scheme approved by the Respondent No. 1 CDR Cell vide letters of approval dated 30th May 2011 and 3rd June 2011; (ii) however during the pendency of the petition, the Debt Restructuring Scheme approved vide letters aforesaid was withdrawn, purportedly for the reason of non-compliance by the Petitioner of the terms thereof and necessitating the Petitioner to file CM No. 16106 of 2013 for amendment of the petition *inter alia* challenging the said withdrawal.
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> 2. The senior counsel for the Petitioner has fairly also disclosed that the Respondent Banks have since initiated proceedings against the Petitioner before the Debt Recovery Tribunal (DRT) and which are pending consideration. He states that either a direction be issued to the Respondent No. 1 CDR Cell to reconsider the matter, after hearing the Petitioner or the petition be disposed of leaving all the pleas including those taken in the petition and the application for amendment, open to be raised before the DRT.
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> 3. The counsels for the Respondents inform that several of the Banks have already assigned the debts by invoking the procedure under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) and the Petitioner has already preferred proceedings before the DRT under Section 17 of the SARFAESI Act.
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> 4. In this view of the matter, the petition is disposed of with liberty to the Petitioner to raise all pleas in accordance with law before the DRT.
> No costs"

8. After passing of the above order, it appears that yet another application was filed by the Petitioner under Section 17 of the SARFAESI Act seeking the setting aside of the possession notices dated 26th, 29th and 30th July, 2013 issued by the Consortium of Banks. The said application was dismissed by the DRT a detailed order dated 18th July, 2016. The issue considered by the DRT-II as is set out in para 28, which reads as under:

> "(i) Whether declaration of the account of the Applicant No. 1 Company as NPA by Respondents No. 1 to 7 is valid or not?
>
> (ii) Whether withdrawal of CDR Package by the Respondent banks are bad in law?
>
> (iii) Whether notice under Sections 13 (2) of the SARFAESI Act, 2002 is valid and binding on the security applicants and consequently whether the possession taken under Section 13 (4) of the SARFAESI Act, 2002 is valid?
>
> (iv) Relief.

9. As regards (i) and (ii) above, the DRT was of the view that the Applicants have failed to make out any case. It was held that no fault can be found with regard to the declaration by the Consortium of Banks of the Petitioner's account as NPA. In fact the DRT-II came to the conclusion that withdrawal of the CDR Package was not bad in law.

10. As far as the present petition is concerned, it was filed in July 2015, after the dismissal of the applications filed by the Petitioner before the DRT, objecting to those proceedings and citing the existence of the arbitration clause. A preliminary objection has been raised by learned counsel for the

Respondents that on the ground of estoppels, the Petitioner would be precluded from maintaining the present petition having allowed the orders of the DRT as mentioned hereinabove, to attain finality. There are other objections as regarding maintainability of the present petition including lack of jurisdiction. A reference has been made to the decision of the Supreme Court of India in ***Anil v. Rajendra 1 (2015) SLT 64.***

11. Learned counsel for the Petitioner sought to explain away the pendency of the other proceedings before the DRT by stating that the scope of the claim made in the present petition includes the claim for damages on account of the wrongful withdrawal of the CDR package and that such claim did not form part of the proceedings before the DRT.

12. The Court is unable to agree with the above submissions. The Petitioner appears to have taken a chance by repeatedly going before the DRT to dissuade it from proceeding with the matter since there was an arbitration clause in the contract between the parties. Without opining on the correctness of the orders, the Court is of the view that the Petitioner cannot maintain the present petition after allowing the orders of the DRT dated 21st July, 2014 and 21st August, 2014 to attain finality. Having pleaded the existence of the arbitration clause and having sought reliefs before the DRT by way of stoppage of those proceedings and having not succeeded in those applications, the Petitioner ought to have carried the matter to its logical end.

13. Further, the Petitioner again went before the DRT by filing another

application under Section 17 of the Act which also got rejected after declining to recognize the arbitration clause as precluding the exercise of jurisdiction by the DRT on the issue whether the CDR Package was rightly withdrawn. Consequently, the claim for damages cannot said to be a separate issue unconnected with the said relief for which a separate arbitration can be initiated. It must be recalled that apart from the above, the Petitioner filed Writ Petition (Civil) 5031 of 2012 which was disposed of by this Court by its order dated 19th January, 2016 recording the submission of learned Senior counsel for the Petitioner that the petition can be disposed of leaving all the pleas including those taken in the petition and in the application for amendment, open to be raised before the DRT. In other words, the Petitioner having elected to go before the DRT time and again to adjudicate the issue regarding the illegality of the withdrawal of the CDR Package, it is no longer open to the Petitioner to maintain the present petition seeking reference of that very dispute to the arbitration.

14. For the aforesaid reasons, the Court is not prepared to entertain the present petition. The petition is dismissed leaving it open to the Petitioner to pursue other remedies in accordance with law.

**S.MURALIDHAR, J**

**OCTOBER 04, 2016**
*Rm*