

Arun

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 638 OF 2023

**MAHINDRA AND MAHINDRA
FINANCIAL SERVICES LIMITED,**
A company registered under the Companies
Act, 1956 having its registered office at
Gateway Building Apollo Bunder, Mumbai
400 001 and Corporate Office at Sadhana
House, 2nd floor, 570, PB Marg, Behind
Mahindra Towers, Worli,
Mumbai 400 018
Represented by its Authorized Signatory,
Pabak Das

... PETITIONER

~ VERSUS ~

- 1. UNION OF INDIA,**
Through Ministry of Finance
- 2. NATIONAL CREDIT GUARANTEE
TRUSTEE COMPANY,**
a Private Limited Company
incorporated under the Companies Act
1956 having registered office at
Swavalamban Bhavan, C-11, G Block
BKC, Bandra Kurla Complex, Bandra
East, Mumbai, Maharashtra 400 051.

... RESPONDENTS

ARUN
RAMCHNDRA
SANKPAL

Digitally signed by
ARUN RAMCHNDRA
SANKPAL
Date: 2023.04.13
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APPEARANCES

FOR THE PETITIONER **Mrs Neeta Jain, i/b Priya Crasto.**

FOR RESPONDENT NO.1- UoI **Mr Ashutosh Mishra.**

FOR RESPONDENT NO.2 **Mr Zaman Ali, with Siddharth
Katekar, i/b Orbit Law
Services.**

**CORAM : G.S.Patel &
Neela Gokhale, JJ.**

DATED : 12th April 2023

ORAL JUDGMENT (Per GS Patel J):-

1. By our order of 3rd March 2023 we briefly set out the facts.
We reproduce that order to save time.

“ 1. Ms Jain for the Petitioners points out that the Writ
Petition seeks the following four reliefs:

“(a) that this Hon’ble Court be
pleased to issue a Writ of Certiorari or any
other Writ in the nature of Certiorari, order or
direction under Article 226 of the
Constitution of India, to the Respondent
Nos.2 calling for the records, papers and
proceedings pertaining to Emergency Credit
Line Guarantee Scheme and to direct the
Respondent No.2 to consider Arbitration
proceedings as legal proceedings for recovery
of dues;

(b) be pleased to issue a Writ of Mandamus or any other Writ in the nature of Mandamus, order or direction under Article 226 of the Constitution of India, (i) directing the Respondent No.2 to consider Arbitration proceedings as legal proceedings for recovery of dues and accordingly pay the Petitioners the claim amount, and (ii) directing the Respondent No.2 to forthwith remove the remark from its portal i.e. “*Arbitration proceedings are not considered as legal proceedings for recovery of dues.*”

(c) Pending the hearing and final disposal of the present writ petition, this Hon’ble Court be pleased to direct the Respondent No.2 to forthwith remove the remark from its portal i.e., “*Arbitration proceedings are not considered as legal proceedings for recovery of dues*”. Exhibit “G” is the screenshot of portal.

(d) accept the arbitration proceedings as recovery proceedings for the action initiated by the Petitioner.”

2. The facts arise in this fashion. In 2020 a Guaranteed Emergency Credit Line (“**GECL**”) scheme was announced principally on account of the disruption to commercial transactions by the onset of Covid 19 and the ensuing lockdown. The purpose was to provide relief to Micro, Small and Medium Enterprises (“**MSMEs**”). The Member Lending Institutions or MLIs were to be given an incentive to provide additional credit of an aggregate of Rs. 5 Lakh Crores but at a low carrying cost. This would, the scheme conceived, enable MSMEs to tide over their operational issues. Many businesses were facing a shutdown. An infusion of funds would enable them to continue or restart

their businesses. These MSMEs were typically constituted in a variety of forms including proprietorships, partnerships, registered companies, trusts, limited liability partnerships and so on. They also included borrowers under the Pradhan Mantri Mudra Yojana. Individuals too were covered by this, provided that the financing was for commercial/business purposes. The Petitioner is not only a Non-Banking Finance Company (“NBFC”) but is a MLI for the purposes of this scheme.

3. The GECL was in fact a form of guarantee or insurance. It provided 100% guaranteed coverage by the National Credit Guarantee Trustee Company to all member lending institutions. This took the form of additional working capital, term loan facilities and non-fund-based facilities for scheduled banks and financial institutions and, for NBFCs, additional term loan facilities. The Petition sets out the details of the GECL credits. The scheme was applicable to all known sanctioned under the scheme from 23rd May 2020 (just a few weeks after the first lockdown) until 31st March 2023 or until guarantees for an amount of Rs. 5 Lakh Crores were issued by the 2nd Respondent.

4. This guarantee scheme is that once a lender enters the details of the loan sanctioned (the loan being to an eligible borrower under the guidelines), there is an automated approval of the guarantee. In other words, once the loan details are provided/uploaded, the guarantee begins to operate as soon as the details are entered into the delegated portal. Appropriate reference numbers are then provided. No documents are required except for individual loans where there is a management certificate demanded. There is a stipulated procedure for filing and settling claims. Then there is a system by which for interim claims a MLI can furnish details of the account. This would include the date when the account became a Non-Performing Asset (“NPA”), the amount in default, etc.

5. For our present purposes today, it is enough to note that the scheme itself clarified what legal action could be considered as being initiated if a borrower's account turned NPA. Clause 83 of the online FAQ (page 66) *prima facie* suggests that the *commencement* of arbitration proceedings would be one of the methods of "legal actions" in contemplation.

6. The Petitioner had facility agreements with various borrowers. Once such sample is at page 89. This has an arbitration Clause 24.11 at page 125

7. In that case, the Petitioner obtained an arbitration award (page 167). But what happened thereafter was curious. When the Petitioner attempted to file an application for an interim return at the online portal, and specified that this was as per the arbitration award, the system auto-generated a remark that

"Arbitration proceedings are not considered as legal action for recovery of dues".

8. To our question as to what this is supposed to mean, Ms Jain's response was that neither she nor her clients could answer. That is understandable. We do not understand how any portal for recovery can wholly refuse to acknowledge an arbitration proceeding, especially where there is an award, as a legal action for recovery of dues.

9. The 2nd Respondent has been served but is not present. It has been served the second time yesterday. We direct notice through Court. Fresh private service including by courier is also required. All notices are to include a copy of this order. An Affidavit in Reply is required by 17th March 2023. There is to be no Rejoinder until further orders of the Court.

10. We do not think that it is possible to grant the kind of interim relief that Ms Jain seeks today without hearing the

2nd Respondent. However, the 2nd Respondent is put to notice that if he does not appear and has not entered an Affidavit by the dates specified above, we may consider granting interim relief

11. List the matter high on board on 23rd March 2023.”

2. Mr Ali on behalf of the National Credit Guarantee Corporation (“NCGC”) raises a limited point which is that in cases where a financial institution has an available remedy under the Recovery of Debts Due to Banks And Financial Institutions Act, 1993 (“**RDDBFI Act**”) or Securitization and Reconstruction of Financial Assets And Enforcement of Security Interest Act, 2002 (“**SARFAESI Act**”), following the Supreme Court decision in *Vidya Drolia & Ors v Durga Trading Corporation*,¹ arbitration cannot be accepted as a legitimate or legal mode of recovery.

3. Ms Jain points out that on the basis of this argument, what is sought to be done is that National Credit Guarantee Trustee Company (“**NCGTC**”) is refusing to accept or register cases where there are already awards obtained. She further submits that it is not for the NCGTC to assume the jurisdiction of a Civil Court, a Writ Court or an Arbitration Court in deciding matters of jurisdiction. She points out that there are cases where there are already awards obtained. There are also cases where arbitration has been invoked or initiated and is pending a final award. Whether or not arbitration can be invoked by a financial institution depends on many factors. For instance, a claim may be of an amount that does not lend itself to the application of the **RDDBFI Act** or the jurisdiction of the Debt

1 (2021) 2 SCC 1.

Recovery Tribunal (“**DRT**”). This is a distinction that the NCGTC completely fails to make when it advocates a broad general principle without taking into account the various possibilities that might arise in a given case. The size of the claim and the recovery is not the only distinguishing factor. It is entirely possible, for instance, that although a financing company has lent amounts which are due for recovery, it is not one of the entities, covered by the **RDDDBFI** Act or **SARFAESI** Act. There are, therefore, she submits, a number of cases where although the entity is a financial institution, proceedings before the DRT are not available to that financial institution.

4. The more fundamental point she makes is that it is not for the 2nd Respondent to decide whether or not a proceeding lies or to determine questions of jurisdiction. The 2nd Respondent is by no means a Civil Court. It is an insurer and is not vested with the authority to decide questions of law.

5. In the present case, despite the fact that the Petitioner had an award in its favour, the portal purported to say at that time that arbitration proceedings were not legal modes of recovery. This was an even broader and an even more untenable position.

6. In fairness, Mr Ali states on instructions that the remark that arbitration proceedings are not considered as legal action for recovery of dues has been removed from its portal. He however maintains that where there is an arbitration clause in a lending agreement and the provisions of The Recovery Of Debts And

Bankruptcy Act, 1993 (“DRT Act”) are attracted, and any arbitration proceedings are commenced or initiated, these will not be considered as recovery proceedings because of the Supreme Court decision in *Vidya Drolia*.

7. The first clarification that Mr Ali makes is of course correctly positioned. There cannot be such an endorsement and we note that it has been removed. It is acceptable for the insurer to put in a disclaimer instead that where there is an arbitration claim and this is sought to be entered on the portal, this will necessarily be subject to the outcome of any legal proceedings in that regard. But it is not open to the 2nd Respondent to decide in advance that all proceedings by financial institutions relating to arbitration are inapplicable because some provisions of the DRT Act may be attracted.

8. Apart from anything else the 2nd Respondent is never a party to the lis in the arbitration. It is the Respondent to the claim by the financial institution who is entitled to take all these defences and to oppose not only the passing of an award but its enforcement on all available grounds as contemplated by law and before a Court of competent jurisdiction. The 2nd Respondent is not a Court, let alone a Court of a competent jurisdiction.

9. In the result, we issue Rule, make it returnable forthwith. Prayer clauses (a) and (b) of the Petition at page 18 reads thus:

“ (a) that this Hon’ble Court be pleased to issue a Writ of Certiorari or any other Writ in the nature of Certiorari, order or direction under Article 226 of the Constitution of

India, to the Respondent No.2 calling for the records, papers and proceedings pertaining to Emergency Credit Line Guarantee Scheme and to direct the Respondent No.2 to consider Arbitration proceedings as legal proceedings for recovery of dues;

(b) be pleased to issue a Writ of Mandamus or any other Writ in the nature of Mandamus, order or direction under Article 226 of the Constitution of India, (i) directing the Respondent No.2 to consider Arbitration proceedings as legal proceedings for recovery of dues and accordingly pay the Petitioners the claim amount; and (ii) directing the Respondent No.2 to forthwith remove the remark from its portal i.e. “*Arbitration proceedings are not considered as legal proceedings for recovery of dues.*”

10. Prayer clause (b) is worked out because of the statement made by Mr Ali and which we have noted and accepted.

11. Even prayer clause (a) is strictly speaking no longer necessary and we mould the relief for the purposes of the present order by directing the 2nd Respondent to accept the award in the present case as a legal proceeding for recovery of dues if not already done. At this stage both sides inform us that the arbitration award in this present case has already been accepted on the portal.

12. The Petition is disposed of in these term with no order as to costs.

(Neela Gokhale, J)

(G. S. Patel, J)