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

Date of Decision: 1st December, 2023.

+ ARB.P. 251/2023

ADITYA BIRLA FINANCE LIMITED

..... Petitioner

Through: Ms. Mahip Datta Parashar and
Mr. Aman Vasisth, Advocates.

versus

SHRI JAGANNATH MEMORIAL EDUCATIONAL TRUST AND
ORS

..... Respondents

Through: Mr. Kirti Uppal, Senior Advocate
with Ms. Nishi Chaudhary and
Mr. Yashartha Gupta, Advocates.

CORAM:
HON'BLE MR. JUSTICE SANJEEV NARULA

JUDGMENT

SANJEEV NARULA, J. (Oral):

1. The Petitioner, Aditya Birla Finance Limited, a Non-Banking Finance Company registered with the Reserve Bank of India (RBI), has extended financial facilities to Respondent No. 1 under certain agreements containing an arbitration clause. In light of disputes having arisen between the parties in connection with the said agreements, the instant petition is filed under Section 11 of the Arbitration and Conciliation Act, 1996 ("***Arbitration Act***"), seeking appointment of an Arbitrator. The Respondent vehemently opposes the present petition, contending that arbitration is no longer a viable remedy as



the disputes in question are already under adjudication before a Civil Court in CS SCJ 1534/2022. This judgment aims to address these contentions, specifically focusing on the implications of ongoing civil proceedings on the arbitration process.

THE FACTUAL MATRIX

2. The factual backdrop leading to the filing of the instant application under Section 11 of the Arbitration Act, is set out in the petition as follows:

2.1. Respondent No. 1 is an educational trust, having its registered office at 309, Sector-06, Urban Estate, Karnal, and its operational office at Stanford International School, Meerut-Sonepat Road, Near Glaxo Company, Palri, Sonepat, Delhi (NCR). Respondents No. 2 and 3 are designated as its authorized signatories. Respondent No. 3 holds an office-bearer position within the trust, while Respondents No. 4 and 5 serve as the Chairman and Vice Chairman, respectively.

2.2. The Petitioner extended financial facilities, in the nature of a term of term loan and line of credit facilities, by way of certain loan agreements to the Respondents. Notably, the Facility Agreement dated 4th August, 2020, which governs these credit facilities, stipulates arbitration as the agreed mechanism for dispute resolution at Clause 32.17 thereof, which is worded as follows:

“Clause 32.17

All claims or disputes arising out of or in relation to this Agreement shall be settled by Arbitration. That Arbitration tribunal shall consist of a sole arbitrator to be appointed by the Lender. All Parties to this Agreement hereby expressly consent to Lender being the sole appointing authority. Any vacancy created in the arbitration tribunal, for any reason whatsoever, shall also be filled only by Lender acting as the sole appointing authority. The place of arbitration shall be Delhi. Parties agree that the courts of Delhi shall have the exclusive jurisdiction to exercise all powers under the Arbitration and



Conciliation Act, 1996.”

2.3. In July 2021, the Respondent sought to restructure the existing financial facilities. This request was considered and subsequently approved by the Petitioner, resulting in the restructuring of the facilities as detailed in the sanction letter dated 28th July, 2021, and loan agreement dated 29th July, 2021. This restructured arrangement included a Line of Credit for INR 1,33,00,000/- as well as two Term Loans of INR 13,80,00,000/- and INR 50,00,000/- respectively. Thus, the total sanctioned amount stood at INR 15,63,00,000/-, secured by Deeds of Guarantee dated 29th July, 2021, executed by Respondents No. 2 to 5. Another term loan of INR 1,45,85,300/- was issued in favour of the Respondent Trust in terms of Government of India's Emergency Credit Line Guarantee Scheme (ECLGS=II), *vide* another sanction letter dated 28th July, 2021.

2.4. Upon Respondent No. 1 allegedly defaulting in repaying the necessary amounts in terms of the financial facilities, their account was classified as a 'Non-Performing Asset' (NPA) on 15th July, 2022. Subsequent thereto, on 20th July, 2022, the Petitioner issued a demand notice under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("**SARFAESI Act**") to the Respondents. This notice, which was also published in newspapers, demanded payment of INR 20,57,08,283/-, which was claimed to be due as of 19th July, 2022, along with subsequent interest and other charges thereon till date of payment.

2.5. Thereafter, Respondent No. 1 raised objections to this notice on 16th September, 2022. Petitioner reviewed and adjudicated the same in terms of Section 13(3A) of the SARFAESI Act and communicated their decision to



the Respondent through letter dated 3rd October, 2022. Upon the Respondents' failure to make the payment, the Petitioner's Authorized Officer took possession of the mortgaged property of the Respondents on 29th October, 2022, in accordance with Section 13(4) of the SARFAESI Act.

2.6. In response, the Respondents Trust instituted a Civil Suit bearing Case No. CS SCJ 1534/2022, titled ***Jagannath Memorial Education Trust & Ors. v. Aditya Birla Finance Limited***, which is pending adjudication before the Civil Judge at the Patiala House Court, New Delhi.

2.7. In the said civil suit, the Petitioner filed an application under Order VII Rule 11 of the Code of Civil Procedure, 1908 ("**CPC**"), read with Section 34 of the SARFAESI Act, seeking the suit's dismissal. This application was heard and subsequently dismissed *vide* order dated 19th December, 2022, which has been challenged this decision in a Civil Revision Petition (C.R.P. No. 3/2023), which is pending adjudication.

3. At this juncture, the Petitioner issued a notice under Section 21 of the Arbitration Act on 29th December, 2022, indicating an intention to resolve disputes through arbitration in terms of the arbitration clause contained at Clause 32.17 of the Facility Agreements dated 4th August, 2020 and 29th July, 2021, as well as at Clause 25 of the Deeds of Guarantee dated 29th July, 2021. According to the Petitioner, as on 15th February, 2023, the alleged outstanding amount is INR 22,18,88,768.100/-. On 27th January, 2023, the Respondents denied the request for arbitration. In these circumstances, the Petitioner has filed the instant petition seeking appointment of an arbitrator.

CONTENTIONS OF THE RESPONDENT

4. On 28th November, 2023, Mr. Kirti Uppal, Senior Counsel for the



Respondent, presented comprehensive arguments. Additionally, Ms. Nishi Chaudhary, counsel representing the Respondent, advanced further submissions today. The contentions put forth by the Respondent are summarised as follows:

4.1. The disputes proposed to be referred to arbitration are non-arbitrable as they are covered within the scope of the Recovery of Debts and Bankruptcy Act, 1993 (“**RDB Act**”). As held by the Supreme Court in **Vidya Drolia and Others v. Durga Trading Corporation**¹, this legislation overwrites the contractual right of parties to arbitration, as it implicitly prohibits waiver of the jurisdiction of the Debt Recovery Tribunal (DRT). Consequently, the statutory framework of the RDB Act supersedes the contractual agreement to arbitrate, and the Petitioner would be constrained to raise its claims before the DRT.

4.2. The Respondent has filed a civil suit before Patiala House Court (CS No. 1534/2022), wherein the following reliefs have been sought:

- “a) declaration that the defendant has fraudulently, illegally and wrongfully committed breach and violation of sanction letters dated 28.07.2021 issued by defendant for Term Loan and for Guaranteed Emergency Line of Credit (GECL);*
- b) declaration that the act of the defendant has fraudulently and illegally declared the loan account of the plaintiff as a Non-Performing Asset (NPA) with effect from 15-07- 2022 and in violation of the Reserve Bank of India Guidelines/circulars;*
- c) declaration that the defendant has fraudulently and illegally diverted the payments made by the plaintiff in one loan account to the other lean account and has violated the guidelines and circulars issued by the RBI;*
- d) declaration that the defendant has played a fraud on the plaintiff as well as on NCGTC & RBI by manipulating the release and adjustment/diversion of funds in gross violation of the conditions/guidelines/circulars of the RBI;*
- e) mandatory injunction. directing the defendant to classify the loan accounts of the plaintiff as ‘Standard Account’ in terms of the*

¹ (2021) 2 SCC 1.



*guidelines/circulars issued by the RBI
f) cost and litigation expenses incurred by the Plaintiff for the present
suit;”*

4.3. The Petitioner’s application under Order VII Rule 11 of the CPC with Section 34 of the SARFAESI Act has been dismissed, allowing the suit to proceed. Although a revision petition has been preferred by the Petitioner assailing the dismissal order of the Civil Court, it is pertinent to note that they have not filed any application under Section 8 of the Arbitration Act, and their right to do so is foreclosed since the statutory timeframe for filing a written statement has lapsed. This proposition is supported by this Court's ruling in ***SPML Infra Limited vs M/s Trisquare Switchgears Pvt Ltd.***². Thus, by not pursuing arbitration by filing an application under Section 8 of the Arbitration Act, the Petitioner has effectively forfeited their right to arbitration and has conceded to the jurisdiction of the Civil Court. Consequently, the Petitioner cannot be permitted to invoke Section 11 of the Arbitration Act to seek the appointment of an arbitrator.

4.4. The Court’s jurisdiction under Section 11 of the Arbitration Act is comparable to the powers wielded by a civil court while considering an application under Section 8 of the Arbitration Act. This parallel in jurisdiction underscores the Court's role in assessing the appropriateness of referring disputes to arbitration. Since the crux of the civil suit initiated by the Respondent revolves around the arbitration agreement, which is also the focal point of the current proceedings, the Petitioner is precluded from seeking arbitration for disputes stemming from the same arbitration agreement. This is premised on the principle that simultaneous litigation and arbitration

² Neutral Citation No. 2022:DHC:2438.



proceedings concerning the same subject matter contravene the essence of arbitration as an alternative dispute resolution mechanism. Thus, the Petitioner's attempt to invoke arbitration in the face of ongoing civil proceedings is merely an attempt to circumvent the established judicial process.

4.5. In case the aforementioned revision petition preferred by the Petitioner results in dismissal, the proceedings before the Civil Court would be permitted to continue. In such a scenario, if an arbitral tribunal were to already have been appointed, it would lead to parallel proceedings addressing the same claims. This situation would not only create a duplication of judicial efforts, but also potentially result in conflicting judgments on identical issues. Such a circumstance is undesirable and contrary to the principles of efficient and effective judicial administration.

4.6. While deciding the Petitioner's application under Order VII Rule 11, the Civil Court has directed that the parties shall maintain *status quo* and the Petitioner has been restrained from taking any coercive action.

CONTENTIONS OF THE PETITIONER

5. *Per contra*, Mr. Aman Vasisht, counsel representing the Petitioner, has presented the following submissions:

5.1. The Petitioner has been notified as a 'financial institution' by the Ministry of Finance (Department of Financial Services) through a notification dated 5th August, 2016, under Sub-Clause (iv) of Clause M of Sub-Section (1) of Section 2 read with Section 31A of the SARFAESI Act. However, it is crucial to note that no similar notification has been issued under Section 2(h) of the RDB Act. This distinction is significant, as it implies that the Petitioner



is not covered under the definitions of ‘Bank’ under Section 2(d) or ‘Financial Institution’ under Section 2(h) of the RDB Act. Consequently, while the Petitioner is authorized to enforce security interests under the SARFAESI Act, however, it cannot take recourse to the provisions of the RDB Act for matters concerning the adjudication of disputes. Therefore, the Petitioner’s rights and remedies, in the context of dispute resolution and enforcement of security interests, are governed by specific statutory provisions, distinguishing its position from that of entities notified under the RDB Act.

5.2. Given the aforementioned distinctions in statutory provisions, the Petitioner is not in a position to file an application under Section 19 of the RDB Act for debt recovery purposes. Consequently, the bar against arbitrability delineated by the Supreme Court in *Vidya Drolia (supra)* does not extend to the Petitioner. Therefore, the arguments and legal precedents pertaining to entities under the RDB Act’s ambit are not directly applicable to the present context.

5.3. The proceedings under the SARFAESI Act and the Arbitration Act can proceed concurrently, as established by the Supreme Court in the case of *M.D. Frozen Foods Exports Pvt. Ltd. v. Hero Fincorp Ltd.*³ This precedent supports the viewpoint that actions taken under the SARFAESI Act for the enforcement of security interests do not preclude or hinder parallel arbitration proceedings concerning the same dispute. This legal interpretation allows for simultaneous recourse to both these mechanisms, thus enabling the Petitioner to pursue arbitration while also taking action under the SARFAESI Act.

5.4. Contrary to the averments of the Respondent, the Petitioner did, in fact,

³ (2017) 16 SCC 741.



exercise their rights under Section 8 of the Arbitration Act, as evidenced by the specific objection raised to the jurisdiction of the Civil Court in their written submissions accompanying their application under Order VII Rule 11 of CPC. In these submissions, the Petitioner explicitly asserted the following:

“Even otherwise, as per the Loan Facility Agreement dated 03.07.2019, Facility Agreement dated 04.08.2020 executed by Plaintiff and Facility Agreement dated 29.07.2021 (Clause 32.17) it was mutually agreed that any dispute arising out of the said loan transaction shall be settled by arbitration, and hence, this Hon'ble Court does not have the jurisdiction to entertain the present suit.”

5.5. To this effect, along with their application under Order VII Rule 11 of CPC, the Petitioner attached copies of the Facility Agreement which included the arbitration clause agreed upon by both parties. Further, during the course of submissions before the Civil Court, specific references were made to this arbitration clause. It was therefore incumbent upon the Civil Court to consider this jurisdictional objection and accordingly refer the parties to arbitration. In this regard, reliance is placed on the precedent set by this Court in ***Madhu Sudan Sharma & Ors v. Omaxe Ltd.***⁴, which dictates that in order to seek reference of disputes to arbitration, a party is only required to raise an objection to the Civil Court's jurisdiction by bringing the said Court's notice to the existence of an arbitration agreement. Thus, a formal request for referring the dispute to arbitration is not necessary to trigger the Court's obligation to consider such an objection.

5.6. The ongoing Civil Suit does not negate the Petitioner's right to seek lawful remedies for the recovery of its dues. Given that the Petitioner is precluded from utilizing the provisions of the RDB Act, arbitration remains a

⁴ Neutral Citation No. 2023:DHC:8044



viable legal recourse, being the contractually agreed mode of dispute resolution. Consequently, the Petitioner's entitlement to arbitration should not be denied, especially considering that it is the only remedy available under the contractual agreement between the parties

ANALYSIS AND FINDINGS

6. Under Section 11 of the Arbitration Act, the Court's mandate is predominantly confined to assessing the existence of an arbitration agreement and verifying the fulfilment of pre-requisites for the appointment of an arbitrator. At this juncture, it is not incumbent upon the Court to engage in an in-depth analysis of the nature of potential claims, or make determinations as to their arbitrability. Such assessments are generally reserved for the consideration of the Arbitral Tribunal, as they fall within the ambit of the *kompetenz-kompetenz* principle whereby an Arbitral Tribunal is empowered to determine its own jurisdiction. Consequently, once an arbitration agreement is established and the criteria outlined in Section 11 of the Arbitration Act are met, the Court's primary role is to facilitate the appointment of an arbitrator, leaving detailed examination of the dispute(s) and their arbitrability to the expertise of the Arbitral Tribunal.

7. In light of the fact that there exists an arbitration clause within the facility documents executed between the parties, which the parties have mutually acknowledged, and disputes have emerged pertaining thereto, the fundamental criteria for appointing an arbitrator under Section 11 of the Arbitration Act are satisfied. Nevertheless, the facts of the present case raise a crucial issue for this Court to address prior to appointing an arbitrator — whether the pendency of the civil proceedings instituted by the Respondent



precludes the Petitioner from initiating arbitral proceedings.

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.

9. Having established that the Petitioner’s contractual right to arbitration has not been overwritten by the applicability of the RDB Act, we now turn to the contentions regarding the impact of the ongoing civil suit on the initiation of arbitration proceedings. Determining this issue would require the Court to first assess whether the Petitioner has waived their right to arbitration by participating in the civil proceedings, and whether the issues raised in the said civil suit are related to the disputes sought to be referred to arbitration in the present petition.

10. In the ongoing civil suit, the Petitioner has preferred an application seeking rejection of the plaint under Section 34 of the SARFAESI Act along with Order VII Rule 11 of CPC. This conduct of the Petitioner indicates that



the Petitioner has not submitted to the jurisdiction of the Civil Court. Furthermore, while it is not within this Court's purview to render a definitive opinion on this specific issue, it can be *prima facie* observed that although no formal application has been filed under Section 8 of the Arbitration Act, the Petitioner has nonetheless drawn the attention of the Civil Court to the existence of the arbitration agreement between the parties, contained in the Facility Agreement. This objection is specifically raised in the written submissions filed along with the afore-noted application. It is imperative to note that a coordinate Bench of this Court in ***Madhu Sudan Sharma (supra)*** has taken the view that the subsistence of a valid arbitration agreement between the parties would *ipso facto* denude a Civil Court of its jurisdiction to entertain a suit the instant that the arbitration agreement is brought to the notice of the Court. Thus, although the issue as to whether the Civil Court has considered the arbitration agreement is a matter for the Petitioner to argue before the Revisional Court, it would be inappropriate to deny the Petitioner their request to be referred to arbitration solely on the assumption that by participating in the civil proceedings they have allegedly waived their right to arbitration.

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.

12. Having noted the aforesaid, this Court opines that an extensive scrutiny of the nature of claims of the parties presented before the Civil Court would exceed the limited purview of this Court under Section 11 of the Arbitration Act. Nonetheless, the substantive disputes presented by the Petitioner, and their potential monetary claims, arise out of the agreements between the parties and clearly fall within the scope of the arbitration clause. It would thus be apposite that the question of arbitrability of the disputes be determined by the Arbitral Tribunal in exercise of its power under the principle of *kompetenz-kompetenz*, which includes the mandate to entertain jurisdictional objections as well.

13. The principle of party autonomy, a cornerstone of arbitration law, also bolsters the Petitioner's prayer for initiating arbitral proceedings. The parties should be able to resolve their disputes in the forum they have contractually agreed upon, provided that the nature of the disputes falls within the scope of the arbitration agreement. The fact that the Respondent has initiated a civil suit with seemingly distinct claims should not negate the Petitioner's contractual right to arbitrate its own claims and denying the Petitioner this avenue of redressal would undermine the essence of the contractual agreement between the parties. It is also worth noting the fact that the potential claims brought forth by the Petitioner appear to be predominantly grounded in financial transactions, for which arbitration is an efficient forum for dispute resolution.

14. In view of the foregoing, we proceed with the appointment of a Sole Arbitrator. Accordingly, Hon'ble Mr. Justice Vipin Sanghi, former Chief Justice of the High Court of Uttarakhand [Contact No.: +91 9871300037] is



appointed as the Sole Arbitrator to adjudicate the disputes that are stated to have arisen between the parties in relation to the arbitration agreements mentioned above.

15. The parties are directed to appear before the Sole Arbitrator as and when notified. This is subject to the Arbitrator making necessary disclosure(s) under Section 12(1) of the Act and not being ineligible under Section 12(5) of the Act.

16. The Arbitrator will be entitled to charge their fee in terms of the provisions of the Fourth Schedule appended to the Act.

17. It is clarified that the Court has not examined any of the claims of the parties and all rights and contentions on merits are left open. Both the parties shall be free to raise their claims/counter claims before the Arbitrator in accordance with law.

18. Disposed of.

SANJEEV NARULA, J

DECEMBER 1, 2023

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(Corrected and released on 15th December, 2023)